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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 03.07.2024
Judgment pronounced on: 29.10.2024

\+ **O.M.P.(EFA)(COMM.) 1/2023 & EX.APPL.(OS) 537/2023**

INTERNATIONAL AIR TRANSPORT ASSOCIATION
THROUGH ITS HEAD IATA INDIA BRANCH
MR RODNEY AUGUSTINE D CRUZ ..... Decree Holder

Through: Mr Vijay Chawla, Mr Prashant Mehta, Mr Dhruv Chawla, Mr Vipul Saini and Ms Yuganshi Singh, Advs.

versus

SPRING TRAVELS PVT LTD THROUGH ITS
MANAGING DIRECTOR MR MANDEEP SINGH ANAND
..... Respondent

Through: Mr Anand Mishra, Mr C P Tomar and Mr ShammuBaghel, Advs.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: **JASMEET SINGH, (J)**

1. This is a petition seeking enforcement and execution of a foreign award dated 21.04.2022 passed by the learned Sole Arbitrator in the arbitration between International Air Transport Association ("**IATA**") and Spring Travels Pvt. Ltd. ("**STPL**"). The arbitration was held under the aegis of ICC International Court of Arbitration and the seat of arbitration was in Singapore.

Factual Matrix

Brief Background

2. The petitioner-IATA is a trade association for member airlines worldwide, comprising approximately 280 airlines, which represent 83% of total air traffic. IATA, *inter alia*, promotes safe and reliable air travel and manages the billing and settlement system for its member airlines (or "**Carriers**") and accredited travel agents.

3. STPL was appointed as an accredited travel agent by IATA under a Passenger Sales Agency Agreement ("**PSA Agreement**") dated 18.01.2005 entered between STPL and IATA members represented by IATA acting for and on behalf of its members. The PSA Agreement was signed by the Director General of IATA, acting as an agent for the Carriers mentioned in the preamble of the PSA Agreement, and by Mr. Mandeep Singh, Managing Director of STPL, for STPL.

4. Pursuant to the PSA Agreement, STPL was allowed to participate in IATA's passenger agency program. This program facilitated the accredited travel agent to sell air passenger transportation services of the member airlines.

5. The relationship between IATA and STPL is governed by: a) terms of the PSA Agreement; and b) pursuant to Clause 2 of the PSA Agreement, the terms and conditions set forth in the Resolutions (and other provisions derived therefrom) contained in the Travel Agent's Handbook ("**Handbook**") attached to the PSA Agreement. The Handbook incorporates, *inter alia*, the Sales Agency Rules (also referred to as the Passenger Sales Agency Rules).

6. Transactions between the member airlines and the accredited travel agents (such as STPL herein, also referred as "**Agent**" in the PSA Agreement) are carried out through the Billing & Settlement Plan ("**BSP**") in accordance with Resolution 850 of the Handbook.

7. Accredited travel agents are granted a short credit period during which they are permitted to hold the payments collected on behalf of the

member airlines in trust. The remittance frequencyfor the payments from tickets sold was as follows:

a. For domestic tickets sold from the 1st to the 15th of the month ("**Reporting Period**"), payment was due by the 25th of the same month.
b. For international tickets sold from the 1st to the 15th, payment was due by the 30th of the same month.
c. For domestic tickets sold from the 16th to the end of the month, payment was due by the 10th of the following month.
d. For international tickets sold from the 16th to the end of the month, payment was due by the 15th of the following month.

8. Since STPL breached the PSA Agreement by failing to remit the monies in terms of the remittance schedule, IATA claimed a sum of Rs. 1,24,31,69,623 (equivalent to USD 19,125,686 calculated at 1 USD = INR 65) received by STPLfrom the sale of ticketsplus interest. The claims were for unpaid dues in respect of bookings done in the period of 01.03.2013 to 15.03.2013 and 16.03.2013 to 31.03.2013.

Proceedings before Delhi High Court

9. IATA instituted a suit for recovery before this Court being CS(COMM) 119/2016, wherein STPL filed an interim application under Order VII Rule 11 CPC read with Section 8 of the Arbitration and Conciliation Act, 1996 ("**1996 Act**"), which was allowed *vide* order dated 05.02.2018 and the dispute was referred to arbitration.

10. On 04.05.2018, IATA filed a petition under Section 9 of the 1996 Act bearing O.M.P.(I)(COMM.) 209/2018 before this Court, which was disposed of on 15.03.2023 directing interim orders passed in the petition to continue till 04.05.2023 and thereafter be subject to O.M.P.(EFA)(COMM.) 1/2023.

Arbitral Proceedings

11. IATA submitted a request for arbitration dated 29.03.2018 to the Secretariat of the ICC International Court of Arbitration. STPL submitted an answer to the request for arbitration dated 05.06.2018, *inter alia*, challenging the jurisdiction of the Arbitral Tribunal ("**AT**") to hear the claims in the arbitration. On 29.06.2018, the AT was constituted.

12. On 16.05.2019, the learned AT passed the partial award, wherein the objections raised by STPL with respect to the jurisdiction and maintainability of the arbitration proceedings were rejected. The partial award ruled as follows:

> *"Upon considering the arguments and submissions of the Parties, the Tribunal FINDS, AWARDS, ORDERS AND DECLARES that:*
>
> *(1) The Tribunal has jurisdiction to hear the claims of IATA in these proceedings.*
>
> *(2) The Tribunal retains jurisdiction to hear the claims on the merits and to fix and allocate the costs of the issue of jurisdiction as well as any further costs of the arbitration, and all issues not dealt with in this Partial Award are reserved for determination to one or more future awards."*

13. STPL challenged the partial award before the Singapore International Commercial Court ("**SICC**") in appeal, which was dismissed *vide* judgment dated 25.03.2020.

14. Subsequent to the passing of the judgment dated 25.03.2020, the arbitral proceedings were resumed, and the learned AT passed the final award dated 21.04.2022, which ruled as follows:

> *"Upon considering the arguments and submissions of the Parties, the Tribunal FINDS, AWARDS, ORDERS AND DECLARES that:*
>
> *(1) Spring Travels Pvt. Limited shall pay the International Air Transport Association the sum of INR 124,31,67,193.*
>
> *(2) Spring Travels Pvt. Limited shall pay the International Air Transport Association simple interest at the rate of 14% per annum on the amount of INR 124,31,67,193 (i.e. INR 4,76,831.25 per day) from 1 May 2013 till the date of full payment.*

(3) Spring Travels Pvt. Limited shall pay the International Air Transport Association the fees and expenses of the arbitrator and the ICC administrative expenses in the sum of USD 200,000.

(4) Spring Travels Pvt. Limited shall pay the International Air Transport Association its legal and other costs in the sum of USD 87,353.00.

(5) Save as aforesaid, all other claims of the parties are dismissed."

15. Pursuant to this, the present petition for enforcement has been filed.

Respondent's Objections

16. The respondent-STPL has filed reply-cum-objections to the petition:

17. The primary objection raised by STPL is in terms of Section 48(1)(c) read with Section 48(2) of the 1996 Act. It is stated that there was no arbitral dispute in the absence of review by Travel Agency Commissioner ("**TAC**"). For this, reliance is placed upon, *inter alia*, Sections 12.1.1, 12.2.1 and 12.3.1 of the Handbook, which imply that review by TAC was a mandatory pre-requisite for invoking arbitration. It is stated that the learned AT travelled beyond the terms of the contract in holding that IATA was not obligated to seek review from TAC, which is in contravention to Rule 1.3 of Resolution 820e of the Handbook. Reliance is placed upon ***Indian Oil Corpn. Ltd. v. Shree Ganesh Petroleum***[1] and ***SAIL v. J.C. Budharaja, Govt. and Mining Contractor***[2] to state that the arbitrator, being a creature of the agreement, must operate within the four corners of the agreement.

18. As regards AT's finding that STPL had waived off this pre-condition, it is stated that the same is in contravention of Section 4 of the 1996 Act since STPL raised this objection at the threshold (as seen in the Terms of Reference). It is argued that in terms of principles of *kompetenz-kompetenz,* the AT was empowered to give a ruling on the objections with

[1] (2022) 4 SCC 463
[2] (1999) 8 SCC 122

respect to all aspects of non-arbitrability. Reliance is placed upon ***Sanjiv Prakash v. Seema Kukreja***[3]. Further, it is stated that seeking reference under Section 8 of the 1996 Act by STPL did not amount to STPL waiving off the objection towards the pre-condition, in the absence of anything to the contrary being recorded in the order. Although the parties were referred to arbitration, it did not amount to appointment of an arbitral tribunal (as under Section 11 of the 1996 Act) and commencement of arbitration in a manner contrary to the arbitration agreement between the parties. Reliance is placed upon ***Delhi Express Travels Pvt. Ltd. v. International Air Transport Association &Ors.***[4].

19. The second main contention raised by STPL is that the cost of arbitration was extremely high, which prevented STPL from effectively participating in the proceedings and denied it fair opportunity of being heard. It is stated that initial cost of approximately Rs. 1 Cr was charged. Additionally, the cost for arranging a virtual setup for five days for cross-examination was SGD 36,754 to be paid to a third party. When STPL was unable to cover these costs, it was denied the right of cross-examination, leading to its evidence being disregarded.

20. STPL has also raised certain other contentions in its reply. It is stated that the AT's finding that compliance of Section 65B of Indian Evidence Act, 1872 was not required, since STPL had seen all the hardcopies of evidence provided in Compact Disc was against the laws of India, making the award unenforceable.

21. It is argued that the foreign award is unenforceable because, under the PSA Agreement and the Handbook, the Carriers whose monies were involved were necessary parties to the proceedings, and IATA's claim could not be maintained in a representative capacity. For this, reliance is

[3] (2021) 9 SCC 732
[4] 2009 (3) Arb LR 303 (Delhi)

placed upon Clauses 7 and 1 of the PSA Agreement. Furthermore, it is asserted that according to the Sales Agency Rules in the Handbook, IATA served only as a billing platform and rule-making body for its accredited agents and Carriers. It is also submitted that the AT's finding that IATA's member airlines had authorized IATA to take legal action on their behalf was unsupported by any evidence.

22. Another objection raised is that under Section 47(1)(b) of the 1996 Act, IATA did not file the complete arbitration agreement with the petition and only provided the PSA Agreement as Document-2. It is stated that STPL filed the complete Handbook as Document R/2.

23. STPL submits that AT’s finding regarding limitation was perverse as there was no specific finding as to whether Indian limitation law would be applicable or that of Singapore. It is argued that Section 14 of The Limitation Act, 1963 was invoked without meeting its essential requirements. It is stated that in the present case, the termination notice was issued by IATA on 01.05.2013 and the arbitration request was submitted by IATA on 29.03.2018, which was barred by limitation.

Petitioner’s Submissions

24. It is submitted that the objections of STPL are not within the purview of Section 48 of the Act.

25. It is argued that the aspect of TAC review, being a pre-condition for institution of arbitral proceedings, has been considered and deliberated by the AT at great length. It is asserted that the AT had the requisite jurisdiction, which was not ousted by IATA’s failure to seek TAC's review before initiating arbitration. Additionally, it is argued that STPL cannot challenge the jurisdiction at this stage as this Court in enforcement proceedings does not act as an appellate court.

25.1 STPL agreed that the dispute between the parties should be referred to arbitration, which was duly noted in the consent order

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dated 05.02.2018 passed in CS (COMM) 119/2016. This consent order was not challenged by any of the parties in any forum.

25.2 STPL belatedly contacted the TAC via email on 23.05.2014, but the TAC rejected the request on 26.05.2014, citing it as time-barred.

25.3 The partial award dated 16.05.2019 addressed the TAC issue, concluding that IATA was under no obligation to seek a review by TAC regarding the outstanding fees. It further determined that STPL had waived the pre-arbitration requirement by failing to approach the TAC for review within the specified time limit of 30 days.

25.4 STPL appealed to the SICC to have the partial award set aside. In its judgment dated 25.03.2020, SICC upheld the AT's jurisdiction, stating that STPL had acknowledged that only it could initiate a review by TAC, which it failed to do. Additionally, SICC noted that when a creditor demands payment, it is up to the debtor to raise an objection, and IATA was not obligated to seek a third-party review of its payment demands from agents.

25.5 STPL filed I.A. No. 15689/2021 in the disposed of suit being CS(COMM) 119/2016, re-agitating the same arguments. However, after extensive arguments, STPL withdrew the application as per the order dated 30.11.2021.

25.6 Against the final award dated 21.04.2022, STPL filed objections under Section 34 of the 1996 Act, however, they were withdrawn by STPL as recorded in the order dated 15.03.2023. Consequently, the foreign award dated 21.04.2022 has attained finality.

26. As regards the issue of alleged financial hardship of STPL and violation of principles of natural justice, the same is denied and it is stated that STPL willfully absented itself from the proceedings and is now attempting to benefit from its own wrong. It is asserted that the statements of STPL are not valid for the following reasons:

26.1 STPL contends that the expenses associated with virtual proceedings in Singapore were excessive. However, on 16.07.2021, STPL emailed the AT requesting in-person hearings in Singapore, which would result in even greater procedural costs.

26.2 *Vide* email dated 14.09.2021 sent to the AT, the advocates representing STPL in the arbitral proceedings withdrew their representation. However, those same advocates appeared on behalf of STPL in CS(COMM) 119/2016, as is evident from the order dated 30.11.2021. Hence, STPL's argument that it could not engage counsel for the arbitration proceedings, despite having the funds to retain the same counsel for applications before the Court, was a mere delaying tactic.

26.3 Although STPL was not willing to bear any of the expenses associated with the arbitral proceedings, it was still granted access to the virtual proceedings.

27. As regards the alleged non-compliance of Section 65B of the Indian Evidence Act, 1872, it is submitted that IATA filed certification in compliance with Section 65B along with its Statement of Claim. Additionally, hard copies of emails sent after STPL's counsel requested discharge were also provided to STPL. It is also submitted that the Terms of Reference to the arbitration itself specified that communications sent via email will be valid.

Discussion and Findings

28. I have heard learned counsels for the parties and perused the documents on record.

29. At this stage, it is relevant to map out in brief the relevant statutory provisions as well as case laws regarding enforcement of foreign awards.

30. The enforcement of certain foreign arbitral awards is dealt with in Part II of the 1996 Act, wherein Chapter I deals with awards under the New York Convention. Section 46 states that a foreign award enforceable under this Chapter is binding for all purposes on the parties between whom it is made. Section 47 outlines the evidentiary requirements for enforcing a foreign award. Section 48 lists the grounds upon which a court may refuse to enforce a foreign award. Section 49 provides that once a court is satisfied with the enforceability of a foreign award under this Chapter, the award shall be deemed to be a decree of Court.

31. Relevant portion of Section 48 of the 1996 Act reads as under:

> *"48. Conditions for enforcement of foreign awards.—(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—*
>
> *(a) .....*
>
> *(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*
>
> *(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or*
>
> *(d) .....*
>
> *(e) .....*
>
> *(2) Enforcement of an arbitral award may also be refused if the Court finds that—*

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) the enforcement of the award would be contrary to the public policy of India.

[Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

(3) ……"

32. Powers of an enforcement court under Section 48 of the 1996 Act (relevant to the issues raised in this petition) have been interpreted as follows:

32.1 The power to set aside a foreign award lies only with the courts at the seat of the arbitration, which exercise primary/supervisory jurisdiction over the matter.[5] Even if grounds under Section 48 of the 1996 Act can be made out, this Court being the enforcement court and having only secondary jurisdiction over the foreign award cannot set aside the award but may only "refuse" its enforcement.[6] The enforcement court in its assessment under Section 48 is not bound by the findings of the seat court rejecting a challenge to the award, however, it also does not have the power to review the correctness of the seat court's judgment.[7] Though principles of *res judicata* do not strictly apply in proceedings before an enforcement court, enforcement courts generally do not allow re-litigation of issues which have been decided by courts

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[5] *Union of India v. Vedanta Ltd.*, (2020) 10 SCC 1, paragraph 83.11

[6] *Id* at paragraphs 83.11 and 91

[7] *Id* at paragraph 94

having competent jurisdiction on merits or where the parties had the opportunity to raise the issues but did not do so.[8]

32.2 The grounds under Section 48(1)(a) to (e) are to be narrowly construed, and grounds under Sections 48(1) and (2) must be clearly made out by the objecting party.[9] The expression "proof" in Section 48 only means *"established on the basis of the record of the arbitral tribunal"* and *"such other matters as are relevant to the grounds contained in Section 48."*[10] "Perversity of an award" under the head of public policy and "patent illegality on the face of the award" as an independent ground are not valid grounds under Section 48 and cannot be invoked against international commercial arbitrations.[11]

32.3 Grounds urged under Section 48 objecting to enforcement can be categorized in three groups: (a) grounds affecting the jurisdiction of the arbitration proceedings; (b) grounds affecting party interest alone; (c) grounds affecting the public policy of India. There is no scope for discretion for grounds made under groups (a) and (c) and the enforcement would have to be rejected if such grounds are made out. However, if grounds under group (b) are made out, for instance, if a party was unable to present its case before the arbitrator, or if a ground is capable of waiver, the Court may still enforce the award, despite such grounds, depending on the facts and circumstances of the case.[12]

32.4 In the assessment under Section 48(1)(b), it is to be seen whether factors beyond the party's control have denied it a fair hearing. If a party had no opportunity to address key arguments or respond to

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[8] *Cruz City 1 Mauritius Holdings v. Unitech Limited*, 2017 SCC OnLine Del 7810, paragraph 50
[9] *Gemini Bay Transcription (P) Ltd. v. Integrated Sales Service Ltd*., (2022) 1 SCC 753, paragraph 41
[10] *Id* at paragraph 40
[11] *Id* at paragraph 60, referring to *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131
[12] *Vijay Karia v. Prysmian Cavi E Sistemi SRL*, (2020) 11 SCC 1, paragraphs 58-59

evidence which forms basis of the award, it could render a foreign award unenforceable. However, such breaches must be clearly proven.[13] To assess if the foreign award violates the most basic notion of justice under Section 48(2)(b), it is to be seen whether the award *"fails to determine a material issue which goes to the root of the matter or fails to decide a claim/counter claim in its entirety"*. Poor reasoning adopted by the arbitral tribunal to reject a material claim is not a ground to refuse its enforcement.[14]

33. With this background, I will deal with the objections raised by the judgment-debtor.

Regarding Review by TAC

34. The primary ground urged by STPL is that in the absence of TAC review (which could have been sought by either of the parties), arbitration could not have been invoked. IATA in response stated that this argument was rejected by the AT in the partial award (also upheld by SICC) as STPL had waived off this requirement by not approaching the TAC within the time limit of 30 days. It contended that in light of the withdrawal of the Section 34 petition filed by STPL, withdrawal of the application bearing I.A. No. 15689/2021 filed by STPL in the disposed of suit, as well as lack of any challenge to the consent order *vide* which the parties were referred to arbitration, the issue has attained finality and cannot be challenged at this stage.

35. At the outset, it is relevant to address IATA's argument on the issue attaining finality and the bar to its challenge at this stage. The issue was discussed in the partial award dated 16.05.2019 and findings of the AT were upheld by the SICC. Thereafter, a Section 34 petition was filed by STPL before this Court, however, the same was withdrawn for lack of

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[13] *Id* at paragraph 81
[14] *Id* at paragraph 83

jurisdiction. STPL also filed I.A. No. 15689/2021 in CS(COMM) 119/2016 seeking clarification of the order dated 05.02.2018 *vide* which the suit was disposed of (referring the parties to arbitration). Clarification was sought on whether the order suggested that the parties have waived off the required pre-condition of a TAC review, however, the application was not pressed and accordingly dismissed on 30.11.2021. The foreign award has also not been challenged in the seat court.

36. As per the judgment of the Hon'ble Supreme Court in ***Union of India v. Vedanta Ltd.***[15], the enquiry by the enforcement court under Section 48 of the 1996 Act is not to be constrained by findings of the seat court:

> *"94. The enforcement court would, however, examine the challenge to the award in accordance with the grounds available under Section 48 of the Act, without being constrained by the findings of the Malaysian courts. Merely because the Malaysian courts have upheld the award, it would not be an impediment for the Indian courts to examine whether the award was opposed to the public policy of India under Section 48 of the Indian Arbitration Act, 1996. If the award is found to be violative of the public policy of India, it would not be enforced by the Indian courts. The enforcement court would however not second-guess or review the correctness of the judgment of the seat courts, while deciding the challenge to the award."*

37. Hence, although there is no dispute that the foreign award has attained finality, this Court has the power to assess and refuse enforcement as long as the same falls within the parameters of Section 48 of the 1996 Act.

38. In the partial award, which is entirely dedicated to the issue of AT's jurisdiction and has merged with the final award, the AT gave its detailed findings on the following sub-issues, *inter alia*: (1) whether TAC's decision was a mandatory pre-condition to arbitration, and hence required to be complied with (discussed in paragraphs 110-186 of the partial award); (2) whether IATA could and should have sought TAC's review (discussed in paragraphs 187-204); and (3) whether STPL's

[15] (2020) 10 SCC 1

actions/conduct constituted a waiver/estoppel (discussed in paragraphs 205-234).

39. The AT held that although TAC review was indeed a mandatory pre-condition, there was no sufficiently clear procedure in place obligating IATA to initiate a review by TAC of its claim for outstanding fees. It further held that: a) STPL waived off this pre-condition by not approaching the TAC within the prescribed time; and b) STPL is estopped from raising this objection in view of its Section 8 application in CS(COMM) 119/2016 whereby STPL prayed for IATA to bring its claim to arbitration.

40. As regards the objection that the AT has gone beyond the terms of the contract in holding that IATA was not obliged to initiate a review by TAC in this case, I find no merit in the same.

41. STPL has placed reliance upon certain clauses of the PSA Agreement and the Handbook to state that the AT has exceeded its jurisdiction and dealt with issues which were beyond the scope of arbitration, since the mandatory prerequisite of a TAC review was not fulfilled. For the sake of brevity, only operative portions of the relevant clauses are reproduced hereinbelow:

41.1 Clause 2 of the PSA Agreement:

> *"Rules, Resolutions and Provisions Incorporated in Agreement*
> *2.1(a) the terms and conditions governing the relationship between the Carrier and the Agent are set forth in the Resolutions (and other provisions derived therefrom) contained in the Travel Agent's handbook ("the Handbook") as published from time to time under the authority of the Agency Administrator and attached to this Agreement. The Handbook incorporates:*
> *....."*

41.2 Clause 14 of the PSA Agreement:

> *"If any matter is reviewed by arbitration pursuant to the Sales Agency Rules, the Agent hereby submits to arbitration in accordance with such Rules and agrees to observe the procedures*

therein provided and to abide by any arbitration award made thereunder."

41.3 Section 12 of the Handbook:

"12.1.1 Any party to a dispute settled in accordance with Resolution 820e shall have the right to submit the Travel Agency Commissioner's decision to de novo review by arbitration in accordance with this Section.

.....

12.2.1 All disputes arising out of or in connection with a decision rendered by a Travel Agency Commissioner (a "Decision") shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with said Rules and judgment upon the award may be entered in any Court having jurisdiction thereof.

......

12.3.1 Arbitration proceedings pursuant to this Section 12 shall be commenced no later than thirty (30) calendar days from the date of the Travel Agency Commissioner's award."

41.4 Section 1 of Resolution 820e in the Handbook:

"All disputes arising out of or in connection with matters enumerated in the present Section shall be finally settled, subject to review by arbitration pursuant to Section 4 herein, by the Commissioner, in accordance with this Resolution."

41.5 Section 1.1 of Resolution 820e in the Handbook is regarding review to be initiated by agent or applicant and Section 1.3 is regarding review to be initiated by agency administrator.

42. The learned AT has discussed this issue in paragraphs 187-204 of the partial award. I am of the view that the AT has given due consideration to the arguments put forth by both parties, the evidence on record, and dealt with the relevant clauses of the agreement to arrive at its findings. Relevant extract from the discussion by the AT in the partial award is reproduced hereinunder:

"201. The Tribunal finds that STPL has not established that IATA could have requested areview from the TAC in relation to a claim for outstanding dues under Section 1.8 or its subsections or had the obligation to do so. The onus was on STPL to establish its

assertions. The reference to Section 1.8 appeared to have been an afterthought.

202. Further, the kinds of decisions which the TAC may decide to take under Section 3.3 of Resolution 820e upon a review initiated by the Agency Administrator do not appear to involve, as IATA submitted, a review as to whether a mere payment of money was claimed for outstanding dues. The decisions required to be taken by the TAC appear to be decisions involving some form of positive actions to be taken against an Agent, such as removal or suspension (Section 3.3.1), requiring the Agent to meet certain specified requirements as a condition for retention on the Agency list (Section 3.3.2), ordering that traffic documents be removed from the Agent (Section 3.3.3), the Agent being reprimanded (Section 3.3.4), the Agent's access to reduced fares being suspended for a specific period (Section 3.3.5), the Agent being required to undergo at its own expense an audit by an independent certified public accountant (Section 3.3.6) and where it is found that the Agent has been improperly withholding money from a Member, suspension of the Agent until all outstanding monies have been paid (Section 3.3.7). It would be expected that if such careful thought had been given to the matters for which the TAC was empowered to make decisions, as evidenced by the list of matters in Section 3.3, and the intention was that a review request was required to be made by the Agency Administrator to the TAC to review an outstanding debt to establish whether the debt was due or not, Section 3.3 might have included a specific provision for such decisions to be taken or for specific orders for reliefs to be granted."

43. For reference, Section 3.3 of the Handbook reads as under:

"3.3 DECISIONS ON REVIEWS INITIATED BY THE AGENCY ADMINISTRATOR

Consequent on a review initiated by the Agency Administrator, the Commissioner may decide that one or more of the following actions be taken:

3.3.1 the Agent or Approved Location be removed or suspended for a stated period of time from the Agency List;

3.3.2 an Agent or Approved Location be required to meet specified requirements as a condition for retention on the Agency List;

3.3.3 order that Standard Traffic Documents, and ticketing authorities be removed from the Agent:

> *3.3.4 the Agent be reprimanded;*
>
> *3.3.5 the Agents access to reduced fare air passenger transportation be suspended for a specified period;*
>
> *3.3.6 the Agent, at its own expense, be required to undergo an audit by an independent certified public accountant;*
>
> *3.3.7 where it is found that at the time of the hearing, the Agent is improperly withholding money from a Member, the Commissioner shall suspend the Agent until all outstanding amounts have been paid to the Member(s) concerned."*

44. The challenge to above observations in the partial award has also failed before the SICC *vide* order dated 25.03.2020 and the partial award has attained finality. To my mind, the view taken by the AT that a) none of the provisions of the PSA Agreement or the Handbook stated that IATA is to approach the TAC for claiming unpaid dues; and b) STPL had waived off its objection by conduct (discussed in detail later) to arrive at the finding that it has the requisite jurisdiction is the correct view, and in the worst-case scenario, a plausible view. The AT has not travelled beyond the terms of the contract and has interpreted the terms of the contract in a reasonable way. The claim of IATA was based on unpaid dues for the tickets sold by STPL. Hence, no ground under Section 48 can be made out to refuse enforcement of the award.

45. It is also pertinent to understand the scope of Section 48(1)(c) in respect of this objection. The Hon'ble Supreme Court in ***Ssangyong Engg. & Construction Co. Ltd. v. NHAI***[16] has restricted the scope of challenge as contained in Section 34(2)(a)(iv), which is in *pari material* with Section 48(1)(c)[17]. Paragraph 69 of ***Ssangyong***[18] reads as under:

> *"69. We therefore hold, following the aforesaid authorities, that in the guise of misinterpretation of the contract, and consequent "errors of jurisdiction", it is not possible to state that the arbitral award would be beyond the scope of submission to arbitration if*

[16] (2019) 15 SCC 131
[17] *Supra* note 9 at paragraph 62
[18] *Supra* note 16 at paragraph 69

> *otherwise the aforesaid misinterpretation (which would include going beyond the terms of the contract), could be said to have been fairly comprehended as "disputes" within the arbitration agreement, or which were referred to the decision of the arbitrators as understood by the authorities above. If an arbitrator is alleged to have wandered outside the contract and dealt with matters not allotted to him, this would be a jurisdictional error which could be corrected on the ground of "patent illegality", which, as we have seen, would not apply to international commercial arbitrations that are decided under Part II of the 1996 Act. To bring in by the backdoor grounds relatable to Section 28(3) of the 1996 Act to be matters beyond the scope of submission to arbitration under Section 34(2)(a)(iv) would not be permissible as this ground must be construed narrowly and so construed, must refer only to matters which are beyond the arbitration agreement or beyond the reference to the Arbitral Tribunal."*

46. To my mind, the issue of whether TAC review was mandatory, of whether IATA could have/should have approached the TAC on its own accord, of whether STPL has waived off the objection – are all issues which can be comprehended as "disputes" within the arbitration agreement. It cannot be said that the issues raised were beyond the arbitration agreement or beyond the reference to the AT. STPL's arguments before this Court are in the nature of review of the merits of the case, which is impermissible at this stage.

47. As regards the objection that the enforcement needs to be rejected since the AT's finding on waiver is in contravention of Section 4 of the 1996 Act and against the principles of *kompetenz-kompetenz,* I am inclined to reject the same.

48. AT's findings on this issue are contained in paragraphs 205-234 of the partial award. Certain relevant portions are quoted hereinbelow:

> *"211. ....Accordingly, STPL could have, as a matter of contract, initiated a review by the TAC for a decision in respect of IATA's claim for outstanding dues or monies. It should also have done so in time, that is, within the 30-day period allowed by the contract, and if it did not do so, it would have only itself to blame if a TAC*

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decision was not given, as the court in the Delhi case, rightly observed, and the ultimate step of arbitration to resolve disputes involving claims such as for dues against STPL could not be achieved by reason thereof.

212. .... In these circumstances, the absence of a TAC decision was the result of STPL's own wrongdoing and the general principle that a party should not be permitted to benefit from or take advantage of its own wrong, as a principle of Indian law (and as the substantive law governing the contract) as held in the Delhi case, should apply.

.....

219. Accordingly, for the above reasons, the Tribunal finds that STPL by its conduct or actions waived the pre-condition to arbitration and/or should be estopped from objecting to IATA proceeding with the arbitration on its present claims.

.....

226. The Tribunal does not consider that the court order has any finality in relation to the Tribunal's jurisdiction to rule on its own jurisdiction, at any rate, under the laws of theseat of the arbitration, or in any way "denudes" the Tribunal from possessing orexercising such jurisdiction.....

227. Although the Tribunal does not need to make a definitive finding on whether the orderwas a consent order (and does not do so), it appears that there was some element ofconsent involved in the making of the Court order as STPL (the applicant seeking toinvoke Order VII Rule 11 which is, in essence, an application to strike out the claim) "agreed" as recorded by the Court order, that the application under Order VII Rule 11was "misconceived", and IATA also "agreed" as recorded by the Court order that theaction before the Court was "the subject matter of (the) arbitration agreement" and further, that on the basis of the matters recorded in the Court order, the application was allowed and disposed of without a full hearing on the merits.

.....

231. So far as STPL is concerned, the Tribunal has already found that STPL could have sought a review and decision by the TAC and by not seeking a review within the prescribed time, effectively prevented the TAC decision (which was a condition precedent to arbitration as found by the Tribunal and itself the position that STPLtook in this arbitration) from being issued, and waived the

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condition precedent orshould be estopped from relying on its non-fulfilment. STPL then had the right todefend the action brought by IATA against it in the court. STPL had that "right" solong as IATA did not proceed with arbitration itself. STPL had, however, by not seeking a review by the TAC within the time prescribed, lost the right and opportunity to obtain a decision from the TAC, and if it was unhappy with the decision, the right to commence arbitration itself (if only to seek negative declarations of liability). STPL's only remedy in these circumstances was to defend the claim in court when IATA commenced the suit against it. Defending the claim in court would also be consistent with its arguments that as there was no TAC decision, there would be nothing to arbitrate.

232. Instead of defending the claim in court however, STPL elected to require IATA to bring its claim to arbitration, by its application to the court to refer the Parties toarbitration. In the Tribunal's view, this would amount to an estoppel by conduct. The Tribunal finds that STPL should be estopped from objecting to IATA bringing its claims in this arbitration."

49. Hence, STPL's argument that the award violated principles of *kompetenz-kompetenz* is misconceived as paragraph 226 of the partial award shows that the AT has adhered to the same. In this regard, the reliance placed by STPL upon ***Sanjiv Prakash***[19] becomes irrelevant.

50. As regards the alleged misapplication/misinterpretation/ignorance of contours of Section 4, Section 16(2) or Section 8 of the 1996 Act is concerned, I am of the view that the same does not warrant refusal of enforcement. Pursuant to ***Vijay Karia v. Prysmian Cavi E Sistemi SRL***[20], this Court can exercise its discretion under Section 48:

"59. On the other hand, where the grounds taken to resist enforcement can be said to be linked to party interest alone, for example, that a party has been unable to present its case before the arbitrator, and which ground is capable of waiver or abandonment, or, the ground being made out, no prejudice has been caused to the party on such ground being made out, a court may well enforce a foreign award, even if such ground is made out. When it comes to the "public policy of India" ground, again, there

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[19] *Supra* note 3

[20] (2020) 11 SCC 1

would be no discretion in enforcing an award which is induced by fraud or corruption, or which violates the fundamental policy of Indian law, or is in conflict with the most basic notions of morality or justice. It can thus be seen that the expression "may" in Section 48 can, depending upon the context, mean "shall" or as connoting that a residual discretion remains in the court to enforce a foreign award, despite grounds for its resistance having been made out. What is clear is that the width of this discretion is limited to the circumstances pointed out hereinabove, in which case a balancing act may be performed by the court enforcing a foreign award."

51. AT has considered that STPL belatedly approached the TAC and hence was barred from seeking a review. Thereafter, IATA approached the court to realise its claims against STPL. STPL, instead of defending the claims in court, filed an application under Order VII Rule 11 CPC read with Section 8 of the 1996 Act in that suit, seeking reference of the disputes to arbitration and obtained a favorable order. IATA did not object to this and invoked arbitration. This conduct of STPL, the AT held, amounted to estoppel. To my mind, the view taken by the AT is the correct view, and in the worst-case scenario, a plausible view. STPL cannot approbate and reprobate as per its convenience. If STPL's objection was to be accepted, IATA would be left remediless. The conduct of STPL suggests that it is trying to defeat the arbitral process. Hence, this objection cannot be sustained under Section 48.

52. STPL has placed reliance upon ***Delhi Express Travels***[21] to state that an application by a party under Section 8 of the 1996 Act does not equate to its readiness and willingness to proceed with arbitration. It is stated that in the order dated 05.02.2018 in CS(COMM) 119/2016 *vide* which the matter was referred to arbitration, both parties had agreed to the application of ***Delhi Express Travels***[22]. Order dated 05.02.2018 in CS(COMM) 119/2016 reads as under:

[21] *Supra* note 4
[22] *Ibid*

"IA No. 9449/2016 (of defendants u/O VII R-11 r/w S-8 of Arbitration & Conciliation Act, 1996)

1. *The senior counsel for the defendants/applicants agreed that the invocation of Order VII Rule 11 of the Code of Civil Procedure, 1908 is misconceived.*
2. *The counsel for the plaintiff has fairy stated that the matter is covered by Delhi Express Travels Pvt. Ltd. Vs. International Air Transport Association MANU/DE/0739/2009 and against which, both counsels agree, no appeal was preferred and there is no contrary view.*
3. *The counsel for the plaintiff on further query agrees that the action brought before this Court by way of this suit is subject matter of arbitration agreement.*
4. *In this view of the matter, the application is allowed and disposed of.*

CS(COMM) 119/2016

5. *The parties are referred to arbitration under Section 8 of the Arbitration and Conciliation Act, 1996.*
6. *The suit is disposed of.*
7. *On request of the counsel for the plaintiff, a certification entitling the plaintiff to refund of court fees paid on the plaint, less Rs. 20,000/- be issued and handed over to the counsel for the plaintiff."*

53. I am of the view that the argument put forth by STPL placing reliance upon ***Delhi Express Travels***[23] is misconstrued. In that case, the Agent had filed the suit and IATA had filed a Section 8 application stating that the dispute was subject matter of arbitration. In the present case, AT has already given a finding that IATA was not obligated to seek a review from TAC, and the same has been upheld by SICC. It was STPL who was obligated to approach the TAC, however, it did not do so within the stipulated time. Hence, STPL cannot be permitted to take advantage of its own wrongs. This has also been observed by the AT in the partial award:

[23] *Ibid*

"208. The principle that a party should not be allowed to benefit from its own wrong was stated and recognized as applicable in the Delhi case discussed above where a party, the agent in that case, argued that disputes involving a claim for outstanding dues should not be allowed to go to arbitration as no decision of the TAC had been obtained. The court there held that the contention that the disputes were not the subject matter of the arbitration agreement in question (which was worded in similar terms as the contract in this case) was "misconceived" and that "merely because the agreement between the parties provides for a precursor to the arbitration, arbitration cannot be avoided on the ground of the pre requisite step having not been taken." The court further held that "it was open to the plaintiff [i.e. the Agent] to have applied to the Travel Agent Commissioner for review of the decision of the Agency Administrator with which the [Agent] was aggrieved. The [Agent] having not done has itself to blame for not adopting the course leading to arbitration." The court then referred the parties to arbitration.

.....

211. ....Accordingly, STPL could have, as a matter of contract, initiated a review by the TAC for a decision in respect of IATA's claim for outstanding dues or monies. It should also have done so in time, that is, within the 30-day period allowed by the contract, and if it did not do so, it would have only itself to blame if a TAC decision was not given, as the court in the Delhi case, rightly observed, and the ultimate step of arbitration to resolve disputes involving claims such as for dues against STPL could not be achieved by reason thereof.

212. The Tribunal has already found that IATA was not obligated to seek a review by the TAC of its claim for outstanding dues. In these circumstances, the absence of a TAC decision was the result of STPL's own wrongdoing and the general principle that a party should not be permitted to benefit from or take advantage of its own wrong, as a principle of Indian law (and as the substantive law governing the contract) as held in the Delhi case, should apply."

54. Further, STPL had filed an application seeking clarification of the order dated 05.02.2018 in CS(COMM) 119/2016 as regards whether the filing of the application bearing I.A. No. 9449/2016 (under Order VII Rule 11 CPC read with Section 8 of the 1996 Act) would be treated as a legal

estoppel for it to raise the plea of jurisdiction before the AT. The same was dismissed as not pressed *vide* order dated 30.11.2021:

> *"I.A. No. 15689/2021 (for clarification in the Order dated 05th February, 2018 passed in I.A. No. 9449/2016)*
>
> 1. *After some arguments, Mr. Sanjay Rathi, counsel for the Applicants/Defendants, states that he does not wish to press the present application.*
> 2. *Accordingly, the application is dismissed, as not pressed."*

Regarding Violation of PNJ

55. STPL has contended that pursuant to the exorbitant costs associated with the proceedings, it could not effectively participate and hence it was denied fair hearing and the right to cross-examination, and its evidence was disregarded. In response, IATA has rebutted this position by questioning STPL's claims of financial hardship, stating that STPL was using mere delaying tactics and willingly absented itself from the proceedings. IATA stated that regardless of STPL's unwillingness to bear the costs of the proceedings, STPL was granted access to the virtual proceedings.

56. STPL has urged this ground under Section 48(2)(b) read with Explanation 1(iii) of the 1996 Act, stating that the award is in violation of most basic notions of justice. At this stage, it is also relevant to discuss Section 48(1)(b) of the 1996 Act. The Hon'ble Supreme Court in ***Vijay Karia***[24] has interpreted the scope of these provisions.

57. Section 48(1)(b) provides grounds for rejection of enforcement if the party was "otherwise unable to present its case". In interpreting this provision, this Court has to see whether factors beyond the control of STPL denied it a fair opportunity of being heard, and to address key arguments/evidence which forms the basis of the award. It is pertinent to

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[24] *Supra* note 20

note that this provision concerns breaches at the hearing stage, and not after the award has been delivered. Operative portion of ***Vijay Karia***[25] reads as under:

> *"81. Given the fact that the object of Section 48 is to enforce foreign awards subject to certain well-defined narrow exceptions, the expression "was otherwise unable to present his case" occurring in Section 48(1)(b) cannot be given an expansive meaning and would have to be read in the context and colour of the words preceding the said phrase. In short, this expression would be a facet of natural justice, which would be breached only if a fair hearing was not given by the arbitrator to the parties. Read along with the first part of Section 48(1)(b), it is clear that this expression would apply at the hearing stage and not after the award has been delivered, as has been held in Ssangyong. A good working test for determining whether a party has been unable to present his case is to see whether factors outside the party's control have combined to deny the party a fair hearing. Thus, where no opportunity was given to deal with an argument which goes to the root of the case or findings based on evidence which go behind the back of the party and which results in a denial of justice to the prejudice of the party; or additional or new evidence is taken which forms the basis of the award on which a party has been given no opportunity of rebuttal, would, on the facts of a given case, render a foreign award unenforceable on the ground that a party has been unable to present his case. This must, of course, be with the caveat that such breach be clearly made out on the facts of a given case, and that awards must always be read supportively with an inclination to uphold rather than destroy, given the minimal interference possible with foreign awards under Section 48."*

58. Section 48(2)(b) read with Explanation 1(iii) of the 1996 Act has a wider ambit than that envisaged under Section 48(1)(b)[26]. The Court has to see that the arbitral tribunal has failed to determine a material issue or claim/counter-claim which goes to the root of the matter. Operative portion of ***Vijay Karia***[27] reads as under:

> *"83. Having said this, however, if a foreign award fails to determine a material issue which goes to the root of the matter or fails to decide*

[25] *Id* at paragraph 81
[26] *Id* at paragraph 77
[27] *Id* at paragraph 83

a claim or counterclaim in its entirety, the award may shock the conscience of the Court and may not be enforced, as was done by the Delhi High Court in Campos. It must always be remembered that poor reasoning, by which a material issue or claim is rejected, can never fall in this class of cases. Also, issues that the Tribunal considered essential and has addressed must be given their due weight — it often happens that the Tribunal considers a particular issue as essential and answers it, which by implication would mean that the other issue or issues raised have been implicitly rejected. For example, two parties may both allege that the other is in breach. A finding that one party is in breach, without expressly stating that the other party is not in breach, would amount to a decision on both a claim and a counterclaim, as to which party is in breach. Similarly, after hearing the parties, a certain sum may be awarded as damages and an issue as to interest may not be answered at all. This again may, on the facts of a given case, amount to an implied rejection of the claim for interest. The important point to be considered is that the foreign award must be read as a whole, fairly, and without nit-picking. If read as a whole, the said award has addressed the basic issues raised by the parties and has, in substance, decided the claims and counterclaims of the parties, enforcement must follow."

59. Although STPL has stated that it has urged this ground under Section 48(2)(b), I am of the view that the arguments put forth by STPL are pertaining to the pre-award stage and hence the parameters under Section 48(1)(b) are the relevant parameters.

60. The learned AT has addressed the issue of STPL's non-participation in paragraphs 155-157 of the final award, which read as under:

"155. Before discussing the issues on the merits, it is necessary to consider the effect of STPL's non-participation and attendance at the virtual hearing held over 3 days in October 2021 to hear oral evidence and arguments. STPL participated in the arbitration proceedings from the commencement thereof throughout as would be evident from the procedural history set out above. Even after its counsel withdrew from representing it in September 2021, it was represented by its Managing Director, Mr Mandeep Singh, to whom all correspondence was sent. It however chose not to participate in or attend the oral hearing to have its witness, Mr Mandeep Singh, give evidence or to be made available for cross-examination or to challenge the evidence of STPL's witnesses, or to make submissions to

refute or rebut those of STPL on the law and the facts. The Tribunal is satisfied that STPL had full notice of the hearing and/or the hearing dates and had reasonable, and indeed full, opportunity to present its case and call witnesses in accordance with the Tribunal's directions but chose not to avail itself of that opportunity without valid justification.

Effect of the failure of STPL and its witnesses to appear at the hearing

156. At the commencement of the hearing when it became apparent that STPL was not going to appear and participate in the hearing, the Tribunal asked counsel for IATA for its submissions on the effect of STPL's non-appearance at the hearing and how the evidence of its witness, Mr Mandeep Singh, who had filed witness statements should be treated. Counsel for IATA submitted, inter alia, that Mr Mandeep Singh's evidence should be disregarded as he had not submitted himself for cross-examination.

157. Having heard the submissions, the Tribunal considers that notwithstanding the non-appearance or participation of STPL at the hearing, the hearing should continue. While the Tribunal should satisfy itself that IATA's claims were well-founded, it should not however substitute itself for the defaulting party and attempt to argue that party's case for that party or attempt to improve upon it. As regards the evidence in witness statements by a witness who did not appear at the hearing to affirm the same and to allow his evidence to be tested and challenged by cross-examination, the Tribunal retains "...the power to determine the admissibility, relevance, materiality and weight of any evidence" in accordance with the Singapore International Arbitration Act and First Schedule the UNCITRAL Model Law, Article 19(2), which applies as the applicable law at the seat or place of arbitration, which is Singapore. While it will not reject outright the witness statements, it will give such weight to the evidence therein as it considers appropriate, drawing, if necessary, such inferences as it deems appropriate."

61. Further, a perusal of paragraphs 60-83 of the final award (pertaining to procedural history) shows that multiple extensions were granted to STPL for lack of finances. On 06.09.2021, STPL agreed to share the costs of virtual proceedings and sought yet another extension. Despite the same, STPL refused to bear the costs and sought a further extension. Owing to this, IATA made arrangements for virtual hearing at its own expense and

copied STPL on all correspondences with the service provider. Arrangements were also made to upload the documents submitted by STPL during the arbitration proceedings to the document repository system, despite STPL's non-cooperation. STPL did not confirm its presence in the virtual hearings, despite notice having been given.

62. Going further, STPL was provided withthe link for the test call, the log-in details and other requisite information, and even then, STPL did not join the test call. STPL was also supplied IATA's Written Opening Statement, which was uploaded to the online repository system, however, STPL did not submit its Written Opening Statement. For the virtual hearing held via Zoom video conference on 19.10.2021, 20.10.2021 and 22.10.2021, STPL was provided with the link, log-in details as well as access to the online repository system (which included IATA's and STPL's pleadings, memorials and written statements) for its participation. However, there was no representation on behalf of STPL on any of the dates. The AT was satisfied that due notice and ample opportunity was given to STPL to attend the hearing and present its defence and evidence. It is also clear that despite STPL's non-appearance, and in the absence of its witness submitting himself to cross-examination, the AT did not outrightly reject STPL's witness statements.

63. In the present case, the series of events makes it clear that a) multiple opportunities were given STPL to comply with its obligations in bearing the costs of the proceedings; b) in STPL's failure to do so, the entire cost for arrangement of virtual proceedings was undertaken by IATA and regardless of it, STPL was given access to them; c) at every step, STPL was included in the correspondences, given access to the document repository system, provided with the links and requisite log-in details to the proceedings; and d) despite the same, STPL refused to participate in the proceedings, refused to present its defence, and refused to submit its

witness to cross-examination.Hence, STPL had full opportunity to submit its case, but it willfully chose not to.

64. Even before me, STPL has failed to provide any valid justification for absenting itself from the proceedings which was ignored by the AT or make a clear case of the proceedings being unfair. It has levied mere bald allegations that STPL was denied right of cross-examination for not being able to deposit the costs of the proceedings. Hence, no ground can be made out under Section 48(1)(b) of the 1996 Act.

65. For the said reasons, I find no substance in the arguments of STPL. STPL has failed to prove that the enforcement of the foreign award should be rejected on the ground of its inability/denial of opportunity to present its case.

Regarding Ancillary Objections

66. As regards the objection on alleged non-adherence of Section 65B of the Indian Evidence Act, 1872 is concerned, the AT has dealt with this issue in paragraphs 224-228 of the final award and held that the provision of documents in electronic form in CD was in consonance with the Terms of Reference. It also observed that the AT was empowered to adjudicate on any issues of evidence as per the Singapore International Arbitration Act (Singapore being the seat/place of arbitration) and the ICC rules (being the applicable rules). The operative portion of the final award reads as under:

> *"225. In short, STPL had asked to be supplied with hard copies of the contents of a CD containing the BSP documents which showed and evidenced the transactions on which IATA's claim was based. The CD had been provided by IATA at the commencement of the arbitration to STPL.*
>
> *226. Although STPL had acknowledged receipt of the CD and evidently read the CD contents, as it had admitted, it nevertheless asked to be furnished with hard, printed copies of the pages in the CD, which amounted to some 17,000 pages of documents. The*

Tribunal after considering STPL's application and hearing submissions from the Parties decided not to order IATA to provide hard copies since STPL had access to them and was able if it wished, to print the copies itself. In any event, paragraph 8 of the Terms of Reference signed by the Parties and the Tribunal provided: "8. All written notifications or communications to or by the Parties (including pleadings, submissions, witness statements and exhibits) shall be valid if sent by email to the representatives of the Parties, the Tribunal and the Secretariat to the ICC International Court of Arbitration, to the email addresses specified below (with PDF or Word attachments, unless the attachments are too big to be attached to the email, in which case they should be provided on a memory stick or similar device and sent by courier to the postal addresses of the Parties and the Tribunal), unless otherwise directed by the Tribunal ... " IATA had complied with the Terms of Reference by supplying the documents in electronic form in a CD.

227. STPL's defence was not one dealing with the merits of the claim. Any reliance it places on the provisions of the Indian Evidence Act is misplaced as the question of evidence is to be determined by the Tribunal in accordance with its powers under the Singapore International Arbitration Act as the seat or place of the arbitration and the ICC Rules as the applicable rules of the arbitration."

67. Hence, it is clear that STPL was provided the documents in accordance with the Terms of Reference. Even otherwise, IATA in its rejoinder to the reply-cum-objections/written submissions hascategorically stated to have complied with the requirements of Section 65B of the Indian Evidence Act, 1872 by furnishing the certificate along with its Request for Arbitration/Statement of Claim. For the above reasons, this objection cannot be sustained at this stage.

68. As regards STPL's objection of non-joinder of necessary parties is concerned, the same does not find merit with this Court. The AT has already adjudicated on this issue and its findings regarding this is contained in paragraphs 181-193 of the final award, which is not reproduced herein for the sake of brevity.

69. The AT observed that STPL's stance on IATA having no *locus standi* was not clearly made out and it also chose not to participate in the hearing to explain its position. It further noted that although there was no evidence of a direct contract between IATA and STPL, the Member Airlines of IATA must have authorized IATA to commence arbitration proceedings against STPL to recover the monies that were not paid by STPL to IATA on behalf of the Member Airlines. It inferred this from the PSA Agreement which described each IATA member as represented by the Director General of IATA *"acting for and on behalf of such IATA Member"*. It also referred to the Articles of Association of IATA, which empowered the Corporate Secretary of IATA to grant powers of attorney for the conduct of the activities of IATA including the collection of money from agents on behalf of the Member Airlines. It also drew persuasive value from ***Delhi Express Travels***[28] wherein, on similar facts, the Court found that IATA was bound by the PSA Agreement and had the *locus standi* to refer the disputes to arbitration. Hence, in the absence of any substantive arguments/evidence to the contrary presented by STPL, the AT held that IATA had the *locus standi* to commence the arbitration to recover the monies on behalf of the Member Airlines.

70. The argument of STPL is that the finding is unsupported by evidence and lacks reasons. STPL has also relied upon certain clauses of the PSA Agreement in an attempt to argue the case on merits. This Court is satisfied that this ground cannot be taken under Section 48 of the 1996 Act. STPL had the opportunity to present its arguments before the AT, and as observed by the AT, it failed to do so by choosing not to participate in the proceedings. At this stage, this Court cannot go into the merits of the case and also cannot refuse to enforce the award on the alleged basis that the AT adopted poor reasoning to adjudicate upon an

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[28] *Supra* note 4

issue. Hence, given the limited purview of Section 48, this objection is rejected.

71. As regards the objection of limitation is concerned, the same also cannot be taken at this stage. The AT has already adjudicated on this issue and its findings regarding this is contained in paragraphs 194-213 of the final award. The AT observed that STPL's defence on limitation was convulated and inconsistent, since STPL did not plead material facts identifying the cause of action from which time would run for limitation, nor did it provide details of the statute it relied upon and how it was to be applied. It rejected the argument of a contractual time bar being wholly without merit. It also rejected the arguments of statutory time bar since STPL failed to reply upon any provisions of the Singapore or Indian limitation laws to make its case, failed to adduce any evidence as regards the material/relevant facts and failed to submit its witnesses to be cross-examined. The AT was inclined to accept IATA's arguments on this issue (which it made pre-emptively) but held that it was not required to make this determination since no defence was made out by STPL on the issue of limitation.

72. STPL has made some arguments on merits and also argued that the finding on limitation was perverse. This is not a court of appeal, or a court of primary/supervisory jurisdiction over the matter. Further, the ground of perversity is not envisaged under Section 48. Hence, this objection is rejected.

73. As regards the objection of non-compliance of Section 47(1)(b) of the 1996 Act is concerned, the same is misconceived. The Hon'ble Supreme Court in ***PEC Ltd. v. Austbulk Shipping Sdn. Bhd.***[29] has held that non-filing of documents under Section 47 is not a valid ground for rejection of enforcement under Section 48:

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[29] (2019) 11 SCC 620

> *"22. The object of the New York Convention is smooth and swift enforcement of foreign awards. Keeping in view the Object and Purpose of the New York Convention, we are of the view that the word "shall" in Section 47 of the Act has to be read as "may".* ***The opposite view that it is obligatory for a party to file the arbitration agreement or the original award or the evidence to prove that the award is a foreign award at the time of filing the application would have the effect of stultifying the enforcement proceedings. The object of the New York Convention will be defeated if the filing of the arbitration agreement at the time of filing the application is made compulsory. At the initial stage of filing of an application for enforcement, non-compliance of the production of the documents mentioned in Section 47 should not entail in dismissal of the application for enforcement of an award.*** *The party seeking enforcement can be asked to cure the defect of non-filing of the arbitration agreement. The validity of the agreement is decided only at a later stage of the enforcement proceedings.*
>
> *23. It is relevant to note that there would be no prejudice caused to the party objecting to the enforcement of the award by the non-filing of the arbitration agreement at the time of the application for enforcement. In addition, the requirement of filing a copy of the arbitration agreement under the Model Law which was categorised as a formal requirement was dispensed with.* ***Section 48 which refers to the grounds on which the enforcement of a foreign award may be refused does not include the non-filing of the documents mentioned in Section 47.*** *An application for enforcement of the foreign award can be rejected only on the grounds specified in Section 48. This would also lend support to the view that the requirement to produce documents mentioned in Section 47 at the time of application was not intended to be mandatory."*

(emphasis supplied)

74. The PSA Agreement has been annexed with the petition by IATA as Document-2. Relevant extracts of the Handbook have been annexed by STPL as Document-R/2. The entire arbitration agreement is available on the court file, and hence the mandate of the 1996 Act has duly been complied with. This ground does not warrant refusal of enforcement of the award. Hence, this objection is rejected.

Conclusion

75. For the reasons stated above, the objections raised by the respondent-STPL under Section 48 of the 1996 Act stand rejected. The enforcement petition is allowed. The judgment-debtor is directed to pay to the decree holder the entire awarded amount along with awarded interests, costs, fees and expenses of the arbitrator as well as administrative expenses in terms of the foreign award dated 21.04.2022 within 4 weeks from today.

76. List for compliance on 10.01.2025 before the Roster Bench.

77. Pending applications, if any, are disposed of.

JASMEET SINGH, J

OCTOBER 29th, 2024
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