IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

IN IT COMMERCIAL DIVISION

COMMERCIAL ARBITRATION PETITION NO. 416 OF 2019

NEILAN INTERNATIONAL CO LIMITED
being a body corporate registered under the law of Sudan, having its office at 8 Nogomi Street, Khartoum, Sudan

…Petitioner

~ versus ~

POWERICA LIMITED
being a company registered under the Companies Act 1956, having its registered office at 74-A Wing, Mittal Court, Nariman Point, Mumbai 400 021

...Respondent

APPEARANCES

For the Petitioner	**Mr Javed Gaya**, *with Hursh Meghani & Vidya Chaudhari, i/b Chambers of Javed Gaya.*
For the Respondent	**Mr Rishab Gupta**, *with Shivani Sanghavi, i/b Shardul Amarchand Mangaldas.*

CORAM : ARIF S DOCTOR, J.

RESERVED ON : 19th September 2024.
PRONOUNCED ON : 27th November 2024.

JUDGMENT:

1. The present Commercial Arbitration Petition is filed under the provisions of Part II of the Arbitration and Conciliation Act, 1996 ("Arbitration Act") and seeks enforcement of an Arbitral Award dated 27th September 2018 ("the Final Award") passed by International Court of Arbitration, London under the provisions of ICC Arbitration Rules 2012. By the Final Award the Petitioner has been awarded a sum of Euro 2.45 million and costs.

2. Before adverting to the rival contentions, it is useful, for context to set out the following facts, viz.

i. On 30th January 2006 a Consortium Agreement was entered into between the Petitioner and the Respondent, *inter alia* for distribution of work and responsibilities between the Petitioner and the Respondent in respect of construction of

power plants for the National Electricity Corporation of Sudan (NEC). The Respondent was the lead member of the consortium..

ii. Thereafter, on 9th May 2006, NEC and the Respondent entered into two contracts, *inter alia* for the design, construction, and commissioning of two thermal power plants, one located in El-Fasher, Sudan and the other in El-Genena, Sudan ("the said Contracts"). Admittedly, the applicable law[1] under the said Contracts was Sudanese Law. The said Contracts also provided for arbitration[2] which was to be held in London. Clause 1.1.16[3]

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1 *1.11.17.- Applicable Law.*

The Contract Shall be governed by the Laws of Sudan applicable at the of the Contract Signature

2 *1.16.1. Arbitration of Disputes.*

Any dispute arising out of or in connection with this contract, including Change order, the Total Contract Price or the Construction Schedule, shall be settled through friendly consultation or conciliation between the parties promptly upon the written request of one party to the other party. If the parties do not reach an amicable resolution within thirty (30) days from the notice of such dispute, either party may, with notice to the other party, submit the dispute to the ICA of the ICC, as the exclusive forum, for binding arbitration of the ICC shall govern the proceedings. Any settlement and award rendered through such an arbitration proceeding shall be final and binding upon the parties

3 *EMPLOYER means THE NATIONAL ELCECTRICITY CORPORATION) (NEC), Sudan, its successors and assignees*

of the said contracts defined *Employer* to mean NEC, its successors and assignees.

iii. On 5th December 2007, NEC and the Petitioner executed an addendum by and under which NEC *inter alia* assigned to the Petitioner all matters concerning the advance payment made by NEC to the Respondent. Thereafter on 4th March 2008, NEC authorized the Petitioner to recoup the down payments made by NEC to the Respondent under the said Contracts. NEC was subsequently dissolved, and the Sudanese State Thermal Power Generation Company (STGP) was established.

iv. On 24th December 2012 STGP and the Petitioner executed a Deed of Assignment whereby STGP assigned in favour of the Petitioner the debt of Euro 2.7 million i.e. the down payment made by NEC to the Respondent and STGP's right against the Respondent arising out of the breaches and/or wrongful repudiation of the said contracts.

v. Thereafter arbitration proceedings commenced between the Petitioner and Respondent wherein, the Respondent raised the following preliminary issue, viz.

> "*Whether there exists a binding arbitration agreement between the Parties conferring jurisdiction on the ICC over the claims, summarized in the Terms of Reference*"

vi. The Tribunal after a detailed hearing, and on the basis of evidence led by both parties, passed a Partial Award dated 21st April 2015 ("Partial Award") *inter alia* holding that a binding arbitration agreement existed between the Parties which conferred jurisdiction on the ICC over the claims summarized in the terms of reference made by the Petitioner. The Tribunal thereafter passed the Final Award on 27th September 2018.

vii. The Respondent did not challenge either the Partial Award or the Final Award before the Courts in London. The Respondent had however challenged the Final Award under the provisions of Section 34 before the Court in Karnataka which Petition, the Respondent had withdrawn during the pendency of the present Petition.

3. Mr Gaya Learned Counsel appearing on behalf of the Petitioner submitted that the Petitioner was the Assignee of the said Contracts and

thus stood in the shoes of NEC. He pointed out that vide the Partial Award, the Tribunal had specifically upheld the validity of the said assignment as per the applicable law i.e. Sudanese Law. He also pointed out that the Respondent had admittedly not challenged the Partial Award which he substituted was final in all respects. In support of his contention that the Partial Award was final in all respects, he placed reliance upon the judgement of the Hon'ble Supreme Court in the case of ***McDermott International Inc. vs. Burn Standard Company Ltd. And Others.***[4]

4. Mr Gaya then submitted that it was well settled that the enforcement of a Foreign Award could be resisted on very limited grounds. He submitted that it was well settled that when opposing the enforcement of a Foreign Award it was impermissible for the Court to go into the merits of the Foreign Award . In support of his contention, he placed reliance upon the judgements of the Hon'ble Supreme Court in the case of ***Renusagar Power Co. Ltd. vs General Electric Co.***[5] and ***Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India (NHAI).***[6] Mr Gaya then pointed out that the

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4 (2006) 11 SCC 181

5 AIR 1994 SC 860

6 2019 SCC OnLine SC 677

arbitration proceedings were conducted in London under the ICC Rules and reiterated that the Respondent had neither challenged the Partial Award nor the Final Award in London. He submitted that both India and the United Kingdom were signatories to the New York Convention and therefore the Final Award could not be challenged on merits. It was basis this, Mr. Gaya submitted that the present Petition must be allowed as prayed for.

5. Mr. Gupta, Learned Counsel appearing on behalf of the Respondent at the outset submitted that the Respondent was opposing the enforcement of the Partial Award on the ground that the same was contrary to the public policy of India. He submitted that the fact that the Petitioner had not challenged the Partial Award, would be of no relevance and would have no bearing to the Respondent's opposition to the enforcement of Final Award. He submitted that the Respondent was opposing the enforcement of the Final Award on the ground that the Final Award was contrary to the Public Policy of India. In support of his contention, that the absence of challenge to the Partial Award or the Final Award would not make any difference to the Respondent's opposition to the enforcement of the Final Award, he placed reliance upon to the judgment of the Delhi High Court in the case of ***Cruz City 1***

Mauritius Holdings vs Unitech Limited.[7] He also placed reliance upon the judgement of Hon'ble Supreme Court in the case of ***Vijay Karia vs Prysmian Cavi E. Sistemi SRL and others***[8] to submit that when the enforcement of a Foreign Award was opposed on the ground of violation of public policy, the Court would have no discretion but to refuse enforcement of such Award, if it was found that the said Award was infact in violation of the public policy of India. He thus submitted that since the Respondent's opposition to the enforcement of the Award was on the ground of violation of the public policy of India, the present opposition would lie and the fact that the Partial Award had not been challenged on merits would be of little or no consequence.

6. Mr. Gupta then submitted that the Partial Award, *inter alia* held that as per Sudanese Law, the Deed of Assignment was valid and did not require the consent of the Respondent. He submitted that in arriving at this conclusion, the Tribunal had not considered Indian Law but had only considered Sudanese Law. Mr. Gupta submitted that it was well settled that in ascertaining whether the Tribunal had jurisdiction to decide a dispute, the enforcing Court would not be bound by the findings of the Tribunal but would have to independently consider

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7 2017 SCC OnLine Del 7810

8 (2020) 11 SCC 1

whether the Tribunal would have the jurisdiction to determine the underlying disputes. In support of his contention, in addition to the judgement of the Delhi High Court in ***Cruz City 1 Mauritius Holdings*** he also placed reliance upon the judgement of ***Daiichi Sankyo Co. Ltd. vs Malvinder Mohan Singh***[9] and the judgment of the Supreme Court of United Kingdom in ***Dallah Real Estate and Tourism Holding Co. vs Ministry of Religious Affairs of the Govt. of Pakistan***[10] and the judgment of the High Court of Singapore in the case of ***AQZ vs ARA.***[11]

7. Mr. Gupta then submitted that the Petitioner's reliance upon the judgement of the Hon'ble Supreme Court in the case of ***McDermott International Inc.*** to submit that Partial Award was final in all respects and thus could not be challenged under Section 48 of the Arbitration Act was entirely misconceived and was contrary to the provisions of Section 48(2)(b)(ii) and (iii) of the Arbitration Act. He pointed out that Section 48(2)(b) of the Arbitration Act made it clear that the Court may refuse enforcement of a Foreign Award if the Court finds that the enforcement of the Foreign Award would be contrary to the Public Policy of India. He placed reliance upon the judgement of the Hon'ble

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9 2018 SCC OnLine Del 6869

10 (2011) 1 AC 763

11 (2015) SGHC 49

Supreme Court in the case of ***Government of India vs Vedanta Ltd. and Ors.***[12]and pointed out that the Hon'ble Supreme Court had held that *"if an award is found to be violative of the public policy of India, it would not be enforced by Indian Courts*". He submitted that it was on this very basis that the Respondent was opposing the enforcement of Partial Award, since the same was in contravention of the public policy of India i.e. the fundamental policy of Indian Law and the most basic notions of morality and justice.

8. Mr. Gupta then submitted that the Partial Award was in contravention with the fundamental policy of Indian Law and the most basic notions of justice, since the assignment by NEC in favour of the Petitioner was unilateral. He submitted that it was well settled that the fundamental policy of Indian Law meant the basic and core values of India. He also submitted that it was well settled that consent was the bedrock of Arbitration, and that Section 7 of the Arbitration Act required an Arbitration Agreement to be in writing. He pointed out that in the facts of the present case, both these aspects were absent. It was thus that he submitted that the assignment by NEC of the said contracts in favour of the Petitioner was contrary to the public policy of India.

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12 Order of Hon'ble Supreme Court dated 16th September 2020 in Civil Appeal No. 3185 of 2020

9. Mr. Gupta submitted that though ordinarily, arbitration cannot be invoked against non-parties/non-signatories the Hon'ble Supreme Court had in the case of ***Chloro Controls India (P) Ltd. vs Severn Trent Water Purification Inc.***[13] set out the exceptions when an arbitration agreement would bind non-parties/non-signatories. He, however, pointed out that an assignment of a contract would fall outside the exceptions carved out by the Hon'ble Supreme Court. He submitted that the law laid down in ***Chloro Controls*** was reiterated by the Hon'ble Supreme Court in the case of ***Cox & Kings Ltd. vs SAP India (P) Ltd.***[14]

10. Mr. Gupta then placed reliance upon the following judgments, in the case of ***Kobelco Construction Equipment India Pvt. Ltd. vs Lara Mining & Anr.,***[15] ***MM Aqua Technologies Ltd. vs. Wig Brothers and Engineers Ltd.***[16]***, Delhi Iron and Steel Company Limited vs UP Electricity Board and Ors.***[17] and ***Govt. of NCT of Delhi vs YasiKan Enterprises Pvt. Ltd.***[18] and pointed out that all these cases pertained to assignment of a contract containing an arbitration clause, where the Courts had refused

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13 (2013) 1 SCC 641

14 (2024) 4 SCC 1

15 2023 SCC OnLine Cal 2327

16 2000 SCC OnLine Del 868

17 2002 (61) DRJ 280

18 2018 SCC OnLine Del 11918

to extended the arbitration agreement to include an assignee, since the consent to the assignment was lacking.

11. Mr. Gupta then sought to draw support from the judgement of the Hon'ble Supreme Court in the case of ***Ssangyong Engineering & Co. Ltd. vs National Highways Authority of India (NHAI)***[19] to point out that the Hon'ble Supreme Court had in the said judgement held that an Arbitral Award can be set aside if the same contravenes the most basic notions of morality and justice. He pointed out that to foist a contract upon an unwilling party would therefore be contrary to the fundamental principles of justice and morality in India. It was thus his submission that the unilateral assignment by NEC which resulted in the Respondent being forced to arbitrate with a non-party was thus contrary to the public policy of India.

12. Mr Gupta, then submit that even as per Sudanese Law, the Deed of Assignment was invalid and, alternatively, even assuming the Deed of Assignment was valid, it did not result in an automatic assignment of the arbitration clause in the said contracts. In support of his contention, he pointed out that the Respondent's expert witness, Dr. Medani had deposed that in cases of an assignment of a debt Sudanese Law would

19 2019 SCC OnLine SC 677

require the express consent of the debtor which he submitted was plainly absent in the present case. He then submitted that Sudanese law, also recognised that an arbitration agreement was severable from the main contract, therefore, even assuming that only a part of the contracts were assigned, the arbitration clause under the said contracts would necessarily have to be separately assigned, which he submitted was not done.

13. Mr Gupta, then submitted that the Final Award to the extent that it awarded the Petitioner a sum of Euro 2.45 million amounted to unjust enrichment which he submitted was also contrary to Indian Public Policy. He additionally submitted that the right to bring a claim for unjust enrichment was beyond scope of the Arbitration Agreement. Mr Gupta pointed out that the said contracts had not been terminated and were still in force and thus a claim for unjust enrichment could not lie in the facts of the preset case. He then without prejudice to this contention, pointed out that the grant of such a claim was an equitable remedy and was therefore plainly beyond the scope of the Deed of Assignment. He pointed out that the Deed of Assignment made it clear that what had been assigned to the Petitioner were only in the nature of "a legal chose in action" and nothing more.

14. Mr. Gupta submitted that the Tribunal's reliance on the testimony of the Petitioner's witness was also in contravention of the most basis notions of justice. He pointed out that the said contracts had not been terminated and that under Sudanese Law, a claim for unjust enrichment would not lie when the underlining contract was valid. He pointed out that the Respondent's witness had furnished a report confirming this position and though the Petitioner's witness initially confirmed this position in the first report, he had filed a second and totally contradictory report making opposite claim. He thus submitted that the Tribunal's finding on the inconsistent testimony of the Petitioner's witness was contrary to the public policy as set out by the Hon'ble Supreme Court in the case of ***Ssangyong***.

15. Mr Gupta then pointed out that the Tribunal held that the contracts never became effective and permitted NEC to take advantage of its own wrong because the only reason that the effective date of the contracts did not occur was because NEC had failed to furnish a bank guarantee in terms of the said contracts. He pointed out that the Tribunal had ignored the evidence and relied on unjust enrichment quantification made by the Petitioner to quantify the Respondent's

efforts at Euro 2.45 million. Basis this, he submitted that the Final Award even on merits fell foul of the public policy in India.

16. Mr Gaya in rejoinder submitted that the entire basis of the Respondent's opposition to the enforcement of the Final Award was on the merits of the Partial Award. He pointed out that this was in the teeth of Explanation 2[20] to Section 48(2)(b) of the Arbitration Act. He then invited my attention to the Explanation to Section 48(2)(b) of the Arbitration Act and pointed out that the same specifically precluded the Court from entailing a review on the merits of the award when considering the as to whether a the Arbitral Award was in contravention of the fundamental policy of Indian Law.

17. Mr. Gaya submitted that what the Respondent was now attempting to do was to resurrect the expert evidence on Sudanese Law and use the same to impeach the merits of the Partial Award. Mr. Gaya then without prejudice to his contention that the merits of the Partial Award could not be gone into much less, reviewed by this Court, submitted that proof of foreign law was a matter of fact and as such, even assuming there was an error in the application of such law, such

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20 *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.*

error of fact cannot be reviewed by this Court. In support of his contention that proof of Foreign Law was matter of fact and the same could not be reopened in proceedings under Section 48, placed reliance upon the judgement of the Hon'ble Supreme Court in the case of ***Gemini Bay Transcription Pvt Ltd vs Integrated Sales Services Ltd & Anr.***[21]

18. Mr Gaya then without prejudice pointed out that Clause 1.1.16 the said contracts defined "Employer" which he pointed out specifically included '*successors*' and '*assignees*'. He thus submitted that the entire premise of the Respondent's contention that the assignment by NEC was bad in law for want of the Respondent's consent was plainly misconceived and contrary to the specific terms of the said contracts. He also placed reliance upon the judgments of this Court in the case of ***DLF Power Limited vs Mangalore Refinery & Petrochemicals Ltd***[22] and the judgment in the case of ***Shayler vs Woolf***[23] and ***Kotak Mahindra Bank vs Nagabhushan***[24] to submit that in cases where the contract itself is assignable and the contract was not of a personal nature, then the arbitration clause under such contract would also be assignable. He

21 (2022) 1 SCC 753.

22 Order of this Court dated 20th July 2016 in Arbitration Petition 509 of 2011

23 (1946) 2 All England Law Reports, 54

24 2018 (2) Arb LR 488 (Delhi).

thus submitted that it could not therefore, in any manner be suggested that the assignment by NEC to the Petitioner was in violation of Public Policy of India.

19. Mr. Gaya also placed reliance upon Section 44[25] of the Arbitration Act and pointed out that the definition of a Foreign Award for the purpose of Part II of the Arbitration Act, would include an Arbitral Award on *differences between persons arising out of legal relationships, whether contractual or not.* He pointed out that Section 48(1)(a) of the Arbitration Act specifically provided that the parties to the Agreement referred to in Section 44 "*were under the law applicable to them under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or failing any indication thereon under the law of the country where the award was made*". He pointed out that the Hon'ble Supreme Court had in the case of ***Gemini Bay Transportation*** held that the allegation that a non-party to the

25 ***44. Definition.—***

In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

agreement falls within the literal construction of Section 48 (1) (a) was fallacious, as it was contrary to Section 44 as adopted in Section 48(1) (a) of the Arbitration Act. He pointed out that Section 44 (a) did not require the persons who were enforcing a foreign award to be parties to the contract, but merely persons who could be assignees, if found so, under the applicable law. He thus submitted that being a non-signatory *per se* was not a ground of challenge to the enforcement of a foreign award.

Reasons and Conclusions:

20. The Respondent has essentially opposed the enforcement of the Final Award on the ground that the Partial Award was in violation of Section 48(1)(a)[26] and Section 48(2) (ii) & (iii)[27] of the Arbitration Act. However, after having heard Learned Counsel at

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26 *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) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

27 *(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.

length and having considered their rival contentions as also the case law cited by them, I find that the Respondent has failed to make out any case to resist the enforcement of the Final Award. I say so for the following reasons, viz.

A. *First*, the Respondent's contention that the Final Award was in violation of Section 48(1)(a) is entirely untenable in the facts of the present case. It is not in dispute that the law which the Parties were subjected to was Sudanese Law. The preliminary objection taken by the Respondent i.e. that there was no arbitration agreement between the Petitioner and the Respondent was heard and disposed of by the Tribunal by way of the Partial Award. The Tribunal has infact passed the Partial Award after considering the evidence led by both sides and has thereafter declared that there exists a binding arbitration agreement between the Parties. The Respondent has since accepted the findings of fact as rendered in the Partial Award since the Respondent has admittedly not challenged the same. The findings in the Partial Award are therefore final in all respects as held by the Hon'ble

Supreme Court in the case of ***McDermott International Inc***. The Respondent thus, not having challenged the Partial Award and having accepted the findings rendered therein, cannot now be heard to resist the enforcement of the Final Award on the basis of a challenge raised entirely on the merits of the Partial Award.

B. *Second,* the Respondent's entire challenge to the enforcement of the Final Award was on the basis that the assignment by NEC to the Petitioner was unilateral and absent the consent of the Respondent. It was for this reason contended that the Partial Award was in violation of Section 48(2) (ii) & (iii) of the Arbitration Act. This contention also in my view is untenable and one which must be rejected. In view of Explanation 2 to Section 48 (1) of the Arbitration Act which expressly provides that the test as to whether there is a contravention of the fundamental policy of Indian Law shall not entail a review on the merits of the dispute Thus, simply put, it is not open for the Respondent to now, in the guise of an objection raised under Section 48(1)(a) of

the Arbitration Act, seek a revision of the Partial Award on merits. Insofar as a challenge based on Section 48 (2)(iii) of the Arbitration Act, the Hon'ble Supreme Court has in the case of ***Ssangyong*** held that it is only in exceptional cases, which shocks the conscience of the Court, that such plea can be entertained. In the facts of the present case, there is nothing which even remotely shock the conscience of the Court.

C. *Third*, the Respondent's reliance upon the judgement of the Hon'ble Supreme Court in the case of ***Chloro Controls*** and ***Cox and Kings*** in support of the contention that the assignment of the said contracts by NEC to the Petitioner would be in violation of Indian public policy and the fundamental law of India as contemplated in Section 48(2)(ii), this contention is also plainly untenable. In neither of the two judgements has the Hon'ble Supreme Court laid down that in all cases of an assignment of a Contract containing an arbitration clause, the assignment or any arbitration commenced pursuant to such assignment would

be invalid. On the contrary, the Hon'ble Supreme Court has as in ***Chloro Controls*** noted as follows, viz.

> "*65. Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlining that agreement. But, it does occasionally happen that the claim is made against or by someone who is not originally named as a party. These may create some difficult situations, but certainly, they are not absolute obstructions to law/the arbitration agreement. Arbitration, thus, could be possible between a signatory to an arbitration agreement and a third party. Of course, heavy onus lies on that party to show that, in fact and in law, it is claiming 'through' or 'under' the signatory party as contemplated under Section 45 of the 1996 Act. Just to deal with such situations illustratively, reference can be made to the following examples in Law and Practice of Commercial Arbitration in England (Second Edn.) by Sir Michael J. Mustill:*
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> "*1. The claimant was in reality always a party to the contract, although not named in it.*
>
> *2. The claimant has succeeded by operation of law to the rights of the named party.*
>
> *3. The claimant has become a part to the contract in substitution for the named party by virtue of a statutory or consensual novation.*
>
> *4. The original party has assigned to the claimant either the underlying contract, together with the agreement to arbitrate which it incorporates, or the*

benefit of a claim which has already come into existence"

(Emphasis Supplied)

Further in the said Judgment, the Hon'ble Supreme Court has expressly held as follows:

> *"104. If one analyses the above cases and the authors' views, it becomes abundantly clear that reference of even non-signatory parties to arbitration agreement can be made. It may be the result of implied or specific consent or judicial determination. Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those to the an action. But this general concept is subject to exceptions which are that when a third party, i.e. non-signatory party, is claiming or is sued as being directly affected through a party to the arbitration agreement and there are principal and subsidiary agreements, and such third party is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be referred to arbitration."*
>
> ***(Emphasis Supplied)***

D. *Fourth*, the arbitration clause in the said Contracts contain the words '*in connection with*' which were interpreted by

the Hon'ble Supreme Court in the case of ***Chloro Controls*** *inter alia* to be wide enough to mean and include mother/principal agreement and all other agreements entered into even by non-signatories, which were entered under or in connection with mother/principal agreement. *Crucially*, the, Hon'ble Supreme Court has in ***Cox and Kings*** (supra) had explained the judgment of ***Chloro Controls*** and has in paragraph 108 of the said judgement, *inter alia* held that what is to be seen is the mutual intention of the Parties to join non signatory Parties to the Arbitration Agreement.

E. *Fifth*, thus, what has to be seen in present case is whether the Parties intended to assign the Contracts to a third party i.e. a non signatory. In this regard, clause 1.1.16 of the said Contracts which defines NEC as the "*Employer*" and specifically includes "*Its assignees*" makes it clear that the Parties had agreed that NEC would unreservedly have the right to assign the said Contracts. Clause 1.16.1 i.e. the Dispute Resolution clause also clearly provides for arbitration in respect of *"any dispute arising out of or in*

connection with" the said contracts. Thus, in my view, the intention of the Parties to join and bind non-signatories as parties to the said Contact is manifestly clear. Hence, the contention of the Respondent that the assignment was unilateral etc. is plainly untenable. Thus in the facts of the present case, the assignment was clearly as per the agreed terms of the said contracts and cannot be said to in any manner be against the fundamental policy of Indian Law and/or the most basic motions of morality or justice which much less shock the conscious of the Court.

F. *Sixth,* in my view, in the facts of the present case, the judgement of this High Court in the case of ***DLF Power Limited*** which holds as follows, would squarely apply and hold the field viz.

> "*66. It is not the case of the respondent that the contract between the respondent and the DLF Industries Limited was not assignable. Clause 19.1 of the General Conditions of Contract appended to the said contract dated 16th April, 1997 provided for assignment of the obligation or any benefit or interest in the said contract or any part thereof, however explicit prior approval in writing of the other party. A*

> *perusal of the said contract dated 16th April, 1997 clearly indicates that the DLF Industries Limited which was a party to the said contract as a contractor included its legal successor and permitted assigns. The intention of the party to the said contract dated 16th April, 1997 is clear from the provisions of the said contracts that the said contracts were assignable in toto. In my view the judgment of the Court of Appeal in case of Shayler vs. Woolf (supra) would assist the case of the petitioner."*

Hence, in my view the Respondent's reliance upon the judgement in the case of ***Chloro Controls*** and ***Cox and Kings*** to submit that the assignment of the said Contracts by NEC to the Petitioner, would be contrary to the public policy of India or the fundamental policy of Indian Law is plainly untenable and would have no application to the facts of the present case.

G. *Seventh*, in the present case, it is also crucial to note that the opposition to the arbitration was not at the instance of a non – party to the agreement but the same is by the Respondent who is a signatory to said contracts. As already noted above, the said Contracts expressly provide that (i) the definition of Employer would mean and include an assignee and (ii) the

arbitration clause, was very wide and included "*disputes arising out of or in connection with*" as in the case of ***Chloro Controls***. Thus, clearly the Respondent had consented to submit any disputes and differences to arbitration not only arising out of said contracts but also in connection with said contracts. Also, it is to be noted that the Petitioner was admittedly part of the consortium established with the Respondent and hence was not a stranger to the said project. Also, the Respondent admittedly being a signatory to the said Contracts, no prejudice could be caused to the Respondent by invocation of Arbitration. Also, as already noted above, the Respondent has infact appeared and contested the Arbitration on merits and has not challenged either of the Awards passed.

H. *Eight*, the Respondent had also assailed the Final Award on merits by contenting that the same amounted to a claim of unjust enrichment having been allowed despite the fact that said contracts were not terminated and were valid. It was also submitted that the Arbitral Tribunal did not consider

the fact that there was an inconsistency in the Petitioner's expert witness testimony as also that contracts never came into force. However, in my view given that this challenge was on the merits of the Final Award, this Court is precluded from going into the same (i) in view of the *Explanation 2* of Section 48 of Arbitration Act and (ii) since the Respondent has accepted both the Partial and Final Award by consciously not challenging either of them.

21. Therefore, no case to oppose the enforcement of the Final Award under Section 48 of the Arbitration Act has been made out. The Arbitration Petition is thus allowed in terms of prayer clause (a) which reads as follows:

> *"a) For an order and/or declaration that the said Foreign Award dated 27th September 2018 is enforceable under the provisions of Chapter-II of Arbitration and Conciliation Act,2015 and; directions to be issued to enforce and execute the said award as decree in favour of the Petitioner and against the Respondent"*

(ARIF S. DOCTOR, J)