

IN THE HIGH COURT FOR THE STATE OF TELANGANA, HYDERABAD

*** * ***

EXEP.No.4 of 2022

Between:

St Frosso Shipping Corporation

Petitioner

AND

M/s Eastern Multitrans Logistics Pvt Ltd

Respondent

JUDGMENT PRONOUNCED ON: 27.06.2025

THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA

EXEP.No.4 of 2022

1. Whether Reporters of Local newspapers
may be allowed to see the Judgments? : Yes
2. Whether the copies of judgment may be
Marked to Law Reporters/Journals? : Yes
3. Whether Her Ladyship wishes to
see the fair copy of the Judgment? : No

MOUSHUMI BHATTACHARYA, J

*** THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA
AND
THE HON'BLE JUSTICE B.R.MADHUSUDHAN RAO**

+ EXEP.No.4 of 2022

% Dated 27.06.2025

Between:

St Frosso Shipping Corporation

Petitioner

AND

M/s Eastern Multitrans Logistics Pvt Ltd

Respondent

! Counsel for the appellant: Sri Vikram Pooserla, learned Senior Counsel representing Sri M.Abhinay Reddy, learned counsel for the petitioner.

^ Counsel for the respondent No.1: Sri T.Bala Mohan Reddy, learned counsel appearing for the respondent.

< GIST :

> HEAD NOTE :

? Cases referred :

1. 2024 SCC OnLine SC 3219
2. 2017 8 SCC 377
3. 2020 20 SCC 760

HON'BLE JUSTICE MOUSHUMI BHATTACHARYA**EXEP.No.4 of 2022**

Sri Vikram Pooserla, learned Senior Counsel representing Sri M.Abhinay Reddy, learned counsel for the petitioner.

Sri T.Bala Mohan Reddy, learned counsel appearing for the respondent.

ORDER:

1. The petitioner/Award Holder seeks execution of a Foreign Award dated 03.05.2022 for a sum of USD 443,310.47 (equivalent to INR 35,329,716.57) and £ 7,000 (equivalent to INR 638,487.97) along with interest of USD 9,235.63 (equivalent to INR 736,035.38) at pro-rata compoundable rates of interest.

2. The particulars of the reliefs prayed for are tabulated as part of the Execution Petition filed under Form No.53 as per Rule 141 (2) of The Civil Rules of Practice and Order XXI Rule 11 of The Code of Civil Procedure, 1908.

3. The petitioner has also filed several Interlocutory Applications for directions pending adjudication of the main Execution Petition. The details of these applications will be discussed later in the judgment.

4. The petitioner is a Shipping Company registered in Liberia and owner of the Vessel M.V. FROSSO K. The respondent/Award Debtor is a Company registered in India and provides shipping services for construction material, metals, minerals and chemicals.

5. The brief facts of the case are narrated below:

6. On 29.09.2021, the parties entered into a Fixture Recap for chartering the petitioner's vessel to the respondent for a trip of 70 days via India and Madagascar or Mozambique. The vessel was delivered to the respondent on 30.09.2021 at Paradip Port, India. On 16.01.2022, the vessel was re-delivered to the petitioner at Passing Port Durban, South Africa. On 17.01.2022, the petitioner issued a Hire Statement until 16.01.2022 indicating that an amount of USD 443,384.53 was due. On 25.01.2022, the petitioner sent a letter to the respondent through their Lawyers requesting remittance of the amount due. On 27.01.2022, the respondent replied to the petitioner via an email confirming that the amount due to the petitioner was USD 443,310.47 and requested confirmation of the said amount. The petitioner confirmed the amount on the same day.

7. On 02.02.2022, the petitioner nominated Mr. Alan Oakley as the Arbitrator and invited the respondent to nominate its Arbitrator within 14 days. The invocation was made in accordance with the arbitration clause in the Charter Party. The respondent, however, failed to nominate its Arbitrator and proposed to settle the due amount which was rejected by the petitioner since the respondent's offer was considerably lower than the petitioner's claim. On 11.03.2022, the petitioner served their claim submission on the respondent.

8. On 13.04.2022, the Arbitrator sent an order via email directing the respondent to serve their defence submissions by 20.04.2022. The Arbitrator passed a final and peremptory order on 21.04.2022 directing the respondent to serve their defence submissions by 28.04.2022. The Arbitrator proceeded with the Arbitration on 02.05.2022 since the respondent failed to comply with the order and serve any defence submissions or correspond with the Arbitrator. None of the parties requested for an oral hearing. The Award was made on 03.05.2022 in favour of the petitioner directing the respondent to pay a sum of USD 443,310.47 along with interest and costs of arbitration and the

Arbitrator's costs of £ 7,000 along with interest. The petitioner sent an email to the respondent on 20.05.2022 seeking payment of the awarded amount. The respondent failed to respond or comply with the directions of the Award.

9. The present Execution Petition was filed on 02.12.2022.

10. The Fixture Recap dated 29.09.2021 and the *Pro forma* Charter are collectively referred to as the Charter Party dated 29.09.2021. Clause 36 of the Fixture Recap dated 29.09.2021 executed between the parties provides for "*Arbitration in London – Rest as per CP* " (CP stands for Charter Party). The proforma of Time Charter is annexed to the Fixture Recap. Clause 17 of the Charter Party provides for arbitration. The said clause is set out below:

Clause 17:

'That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three Persons at London, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men.'

11. Clause 30 provides for Arbitration. The relevant part of Clause 30 is set out below:

‘BIMCO Dispute Resolution Clause 2015 to apply (with small claims arbitration procedure to apply for claims up to US\$ 100,000.00 excluding Legal costs. Bills of lading to be governed by English law and English jurisdiction to apply. BIMCO Conwartime 2013 and BIMCO piracy clause 2008 to be incorporated into Charter Party & bills of lading.

The recap and the signed Charter Party, the recap will take precedence unless the parties have expressly agreed otherwise between the conclusion of the fixture as recorded in the recap and the signing of the Charter Party.’

12. Clause 22(a) of the BIMCO Terms, 2015 sets out the Dispute Resolution Clause.

‘(a) This Contract shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this his Contract shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.

The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced.

The reference shall be to three arbitrators. A Party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other Party requiring the other Party to appoint its own arbitrator within fourteen (14) calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other Party appoints its own arbitrator and gives notice that it has done so within the fourteen (14) days specified. If the other Party does not appoint its own arbitrator and give notice that it has done so within the fourteen (14) days specified, the Party referring a dispute to arbitration may, without the requirement of any further prior notice to the other Party, appoint its arbitrator as sole arbitrator and shall advise the other Party accordingly. The award of the sole arbitrator shall be binding on both Parties as if he had been appointed by agreement.

Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator'

13. Clause 10 of The London Maritime Arbitrators Association (LMAA) Terms 2021, referred to in the Clause 22(a) of BIMCO Terms, 2015, reiterates the same procedure as provided under BIMCO Terms, 2015. Clause 10 of the LMAA Terms, 2021, is set out below:

'A party wishing to refer a dispute to arbitration in accordance with paragraph 8(b)(i) or paragraph 9(a) above shall appoint its arbitrator and send notice of such appointment in writing to the other party, requiring the other

party to appoint its own arbitrator within 14 calendar days of the notice, and stating that the requesting party will appoint its own arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the 14 days specified. If the other party does not appoint its own arbitrator and give notice that it has done so within the 14 days specified in the notice, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator appointed in this manner shall be binding on both parties as if the sole arbitrator had been appointed by agreement.'

14. Learned Senior Counsel appearing for the petitioner contends that the petitioner nominated Mr. Alan Oakley as its Arbitrator in accordance with the procedure agreed by the parties in the Agreement and sent several communications to the respondent for appointing its Arbitrator within the time frame provided under Clause 22(a) of the BIMCO Terms 2015. The respondent, however, failed to appoint its Arbitrator within 14 calendar days of the petitioner's notice and the petitioner accordingly proceeded to appoint Mr. Alan Oakley as the Sole Arbitrator for deciding the dispute upon notice to the respondent.

15. Senior Counsel submits that the respondent was kept informed at all stages of the arbitration i.e., pre-arbitration, during the arbitration proceeding as well as in the post-Award stage. The respondent was also sent a Notice *vide* email requesting for compliance of the Award in terms of making payment to the petitioner. Senior Counsel submits that the grounds raised by the respondent for refusing enforcement of the Award are contrary to the admitted facts on record which would include the respondent's admission and acknowledgment of the amount outstanding to the petitioner. Counsel disputes that enforcement of the Award is contrary to the public policy of India in view of the unilateral appointment of the sole arbitrator. Counsel defends the Execution Petition as being properly executed and signed by the authorized representative of the petitioner.

16. Learned counsel appearing for the respondent/Award Debtor argues that the impugned Award is in contravention of the fundamental Policy of Indian Law and enforcement of the Award should be refused under section 48(2)(b) of The Arbitration and Conciliation Act, 1996 read with the Explanations 1 and 2 thereto. Counsel submits that the fundamental policy of India has been

violated since the petitioner unilaterally appointed the sole Arbitrator who consequently would be a Judge in the petitioner's cause. Counsel submits that the Arbitration Agreement in the Charter Party is invalid and offends the most basic notions of morality and justice. According to counsel, the petitioner should have approached a neutral forum for appointment of a sole Arbitrator under section 18 of The English Arbitration Act, 1996 which is the counterpart of section 11 of The Indian Arbitration and Conciliation Act, 1996.

17. The second ground urged on behalf of the respondent is that the respondent was not given proper notice of the appointment of the Arbitrator or of the arbitral proceedings and was not aware of the emails sent by the petitioner. Counsel further argues that the present Execution Petition suffers from defects since there is an inconsistency between the affidavits in support of the E.P. and the notarization document.

18. I have considered the competing submissions made on behalf of the petitioner/Award Holder and the respondent/Award Debtor in light of the documents filed along with the Execution Petition. The decision is being rendered on the three grounds taken

by the respondent/Award Debtor for refusing enforcement of the Award.

19. The Award dated 03.05.2022 is a 'Foreign Award' as defined in Part II, section 44, of The Arbitration and Conciliation Act, 1996. Under the said provision, a '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 11.10.1960 which fulfills both the conditions under section 44 as enumerated in clauses (a) and (b) thereunder. A Foreign Award under section 44 falls within the scope of the New York Convention Awards in the First Schedule to the Act and is an Award which is not a domestic award in the State where recognition and enforcement of the Award is sought. The Award in the present case is a New York Convention Award amenable to the First Schedule.

20. In the present case, Clause 36 of the Fixture Recap provides for 'Arbitration in London' which is reiterated in Clause 17 of the Charter Party. Clause 30 provides that the BIMCO Dispute Resolution Clause 2015 shall apply and the Bills of Lading are to

be governed by English Law. The present Execution Petition has therefore been filed under Part II of the 1996 Act for enforcement of a Foreign Award. Further, the registered office of the respondent is in Hyderabad and the respondent's related companies are also registered in Hyderabad with assets within the jurisdiction of the High Court. The particulars of properties of the respondent available in the public domain, as per the audited financial accounts of the respondent as on 31.01.2021, forms part of the Schedule to the Execution Petition.

21. Before dealing with the two primary objections taken by the respondent against enforcement of a Foreign Award, it is necessary to decide whether the present Execution Petition has been properly verified.

22. The Execution Petition has been signed by one Mr. Ioannis Kefalas, who is the Authorised Representative of the petitioner-company. The verification states that Mr. Ioannis Kefalas resides in Greece and the Notary and Apostille were therefore carried out in Greece, as evident from the Notary and Apostille attached to the Execution Petition. The Court does not find any reason to disbelieve the contention of Senior Counsel appearing for the

petitioner that the statement in the verification being done at Liberia was through inadvertence and should not be seen as an incurable or deliberate defect or mis-statement on the part of the Award-holder. The Notary and Apostille speak for themselves, specifically, that the Execution Petition is signed and verified in Greece and not in Liberia. The translations of both the Notary and Apostille have subsequently been brought on record by the petitioner.

23. The Court has considered the relevant documents and finds the same to be in order and is consequently of the view that there is no defect in the verification of the Execution Petition – much less any defect which would disentitle the petitioner from filing the Execution Petition. Mr.Ioannis Kefalas is therefore entitled to file the Execution Petition as the authorized representative of the petitioner – company.

24. I.A.No.9 of 2022 is thus allowed and Mr. Ioannis Kefalas is permitted to represent the petitioner.

25. The other Grounds of refusal raised by the Award-debtor are being dealt with below:

The respondent/Award Debtor was not given proper Notice of the Arbitrator's appointment or of the Arbitral Proceedings.

26. The admitted documents on record, forming part of the correspondence between the parties, contradict the objection/ground raised by the respondent for refusing enforcement of the Foreign Award.

27. The petitioner's lawyers sent an email to the respondent on 03.02.2022 along with a Notice dated 03.02.2022 of Commencement of Arbitration Proceedings and appointment of Arbitrator on behalf of the petitioner. A copy of the email dated 03.02.2022 was also sent by the ACF – Operations Department (brokers of the petitioner) to Lightship Chartering (brokers of the respondent) forwarding the Notice dated 03.02.2022 for commencement of the Arbitration. The petitioner's lawyers also sent an email dated 22.02.2022 to the respondent with regard to appointment of Mr. Alan Oakley as the sole Arbitrator. Lightship Chartering (brokers of the respondent) sent an email dated 23.02.2022 to ACF – Operations Department (brokers of the petitioner) informing that the email dated 22.02.2022 of the petitioner's lawyers with regard to the appointment of the sole

Arbitrator has been passed on to the respondent. Lightship also confirmed the respondent's email address as "*eastern@kascmarine.com*".

28. The Award records that the petitioner's lawyers served their submissions on the respondent on 11.03.2022 which was confirmed by the respondent's broker. The Award also records that the respondent/Charterer failed to serve its defence submissions within the timeframe as required by the LMAA Terms. On 11.04.2022, the petitioner requested the Arbitrator to pass a final and peremptory order giving the respondent a short deadline to serve its defence submissions. The Arbitrator, however, passed an ordinary order for the Defence to be served latest by 20.04.2022. The order is set out in paragraph 6 of the Final Arbitration Award.

29. The Award further records that the respondent failed to file any Defence to the petitioner's Claim or correspond with the Arbitrator. Therefore, on 21.04.2022, the Arbitrator passed a Final and Peremptory Order directing the respondent to submit its defence submissions latest by 28.04.2022. The order dated 21.04.2022 is extracted in paragraph 7 of the Award. Paragraph 8

of the Award records that the respondent again failed to comply with the order or correspond with the Arbitrator. On 02.05.2022, the Arbitrator took a decision to proceed with the Award.

30. The documents on record show that all the submissions and proceedings in the arbitration were sent by the lawyers of the petitioner as well as by the Arbitrator to the same email IDs of the respondent which were used for correspondence during the currency of the contract. Moreover, the preliminary counter affidavit filed by the respondent to the Execution Petition on 08.02.2023, contains a Board Resolution referencing the same e-mail ID i.e., 'cs@easterncargos.com'. The emails sent during course of the arbitration were also sent to the aforesaid email IDs of the respondent. As stated above, all the emails pertaining to the arbitration were sent to the respondent via its brokers, Lightship Chartering. The said broker confirmed that all the emails had been forwarded to the respondent.

31. The documents referred to above are part of the records.

32. Counsel appearing for the respondent has not been able to provide a credible defence to these documents. It is also relevant

that the respondent proposed a settlement even after the commencement of arbitration, which has specifically been pleaded in the Execution Petition.

33. Therefore, the respondent's ground/objection that the respondent was not given proper notice of the arbitration or of the Arbitrator's appointment is not only unsubstantiated but also contrary to the records.

34. Significantly, the respondent has not denied any of the email IDs to which the petitioner's and Arbitrator's emails were sent, but simply states that the respondent did not 'see' the emails. Surely, this is neither a credible defence nor one which would fall within section 48(1)(b) of the 1996 Act; namely that the party against who 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 its case. The stubborn refusal of the respondent to acknowledge the emails sent by the petitioner and the Arbitrator and to participate in the Arbitration or to file its defence submissions, demonstrates that the respondent deliberately chose to avoid the arbitration process and refused to participate in the same.

35. The respondent's first ground for refusal of enforcement is hence rejected as being wholly without merit.

II. The Award is in contravention of the Fundamental Policy of Indian law and is in conflict with the most basic notions of Morality or Justice as the Sole Arbitrator was unilaterally appointed by the petitioner.

36. The respondent/Award-debtor has objected to the enforcement of the Foreign Award on the ground of unilateral appointment of the Sole Arbitrator.

37. The relevant clause/Arbitration Agreement must be seen for testing the legality of the respondent's argument.

38. The parties agreed to the mode and the manner of selection of the Arbitrator which would be reflected from Clauses 17 and 30 of the Charter Party. Both these Clauses are being set out again for ease of reference.

Clause 17:

'That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three Persons at London, one to be appointed by each of the

parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men.'

Clause 30

'BIMCO Dispute Resolution Clause 2015 to apply (with small claims arbitration procedure to apply for claims up to US\$ 100,000.00 excluding Legal costs. Bills of lading to be governed by English law and English jurisdiction to apply. BIMCO Conwartime 2013 and BIMCO piracy clause 2008 to be incorporated into Charter Party & bills of lading.

The recap and the signed Charter Party, the recap will take precedence unless the parties have expressly agreed otherwise between the conclusion of the fixture as recorded in the recap and the signing of the Charter Party.'

39. Clause 30 makes the BIMCO Dispute Resolution Clause, 2015 applicable to the dispute resolution. Clause 22(a) of the BIMCO Terms, 2015 is set out below:

'(a) This Contract shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this his Contract shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof

save to the extent necessary to give effect to the provisions of this Clause.

The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced.

The reference shall be to three arbitrators. A Party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other Party requiring the other Party to appoint its own arbitrator within fourteen (14) calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other Party appoints its own arbitrator and gives notice that it has done so within the fourteen (14) days specified. If the other Party does not appoint its own arbitrator and give notice that it has done so within the fourteen (14) days specified, the Party referring a dispute to arbitration may, without the requirement of any further prior notice to the other Party, appoint its arbitrator as sole arbitrator and shall advise the other Party accordingly. The award of the sole arbitrator shall be binding on both Parties as if he had been appointed by agreement.'

40. Incidentally, Clause 22(a) of the BIMCO Terms, 2015 is equivalent to Clause 10 of the LMAA Terms, 2021, which also provides for a similar mechanism of appointment of Arbitrator/s. The LMAA Terms are relevant since Clause 22(a) of the BIMCO

Terms, 2015 specifically refers to the LMAA Terms with regard to the conduct of the Arbitration.

41. Admittedly, the petitioner appointed Mr. Alan Oakley as the Sole Arbitrator and the petitioner's lawyers, by an e-mail dated 03.02.2022, sent the notice of appointment to the respondent for commencement of arbitration. By the said notice, the respondent was also informed to appoint its Arbitrator within 14 days from the date of the Notice i.e., by 17.02.2022 and the respondent admittedly failed to appoint its arbitrator within 14 days from the date of the Notice of Commencement of Arbitration Proceedings i.e., from 03.02.2022. The petitioner's lawyers sent an email dated 22.02.2022 to the respondent informing the respondent that the petitioner's Arbitrator, Mr. Alan Oakley, will act as the Sole Arbitrator since the respondent did not appoint any Arbitrator within 14 days as per the BIMCO Dispute Resolution Clause, 2015.

42. The e-mails and 'Notice of Commencement of Arbitration Proceedings' are part of the Records and have not been disputed by the respondent. The respondent's only argument, through learned counsel, is that the petitioner should have approached a

neutral forum for appointment of the Sole Arbitrator on the respondent failing to nominate its Arbitrator.

43. This Court is not inclined to accept the respondent's argument on the unilateral appointment of the Sole Arbitrator for the following reasons:

44. The appointment mechanism as provided under Clause 22(a) of the BIMCO Terms, 2015 specifically provides that a party wishing to refer the dispute to Arbitration shall appoint its Arbitrator and send the notice of such appointment in writing to the other party. Clause 22(a) specifically mentions the content of the Notice, namely, that the first party shall require the second party to appoint its own Arbitrator within 14 calendar days of that Notice and further that the first party will appoint its arbitrator as the Sole Arbitrator if the second party fails to appoint its own Arbitrator and to give notice of such within 14 days.

45. The second part of Clause 22(a) provides for the consequences if the second party does not appoint its own Arbitrator or fails to give notice of the appointment to the first party within 14 days. The Clause provides that in the event of

such failure, the first party may appoint its Arbitrator as the Sole Arbitrator without requiring any further prior notice required to be given to the second party. The first party shall also inform the second party that the Arbitrator appointed by the first party shall act as the Sole Arbitrator.

46. Clause 22(a) of the BIMCO Terms, 2015, clearly provides for an equal say/right of both the parties to nominate its Arbitrator. The clause provides for a Sole Arbitrator only where the second party fails to appoint its Arbitrator or fails to give notice of such appointment to the first party within 14 calendar days of the first party's notice of appointment. Therefore, the provision of a Sole Arbitrator to carry the Arbitration forward is a mechanism of expediency and not of unilaterality. It is not a case where the first party's appointment of the Arbitrator is a final and peremptory act with the second party being denied of its right of participating in the appointment process. The Sole Arbitrator's appointment is only legitimised where the second party fails to act within the stipulated timeframe. The silence or inaction of the second party is presumed as acceptance of the first party's appointment of Arbitrator.

47. Unilateral appointments are appointments where the other/complaining party is denied its right to participate in the composition of the Arbitral Tribunal or is deprived of an opportunity to object to the appointment. It is essentially a question of natural justice where the deprived party loses the valuable right to a level-playing field in terms of having a say in the choice of Arbitrator. Unilateral appointments also carry with it the spectre of bias and conflict where the presumption is that the Arbitrator would act in the interest of the appointing party.

48. The protection against bias and conflict is weaved in several strands of The Arbitration and Conciliation Act, 1996. Impartiality and lack of independence can be used as a ground of challenge to the appointment under section 12(1) of the 1996 Act. A party may also have a recourse against an Arbitral Award on the ground of absence of knowledge of the appointment of an Arbitrator (section 34(2)(a)(iii)) or that the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties (section 34(2)(a)(v)). The provisions under section 34 are mirrored in section 48 in Part II of the 1996 Act as conditions for refusal of enforcement of a Foreign Award. Section 48(1)(d) reflects

of section 34(2)(a)(v) in a transformed avatar. In other words, the party seeking refusal of enforcement of a Foreign Award must furnish proof that the composition of the Arbitral Tribunal or the Arbitral procedure was not in accordance with the Arbitration Agreement.

49. Notably, the respondent has not objected to the enforcement of the Foreign Award under section 48(1)(d) of the 1996 Act which is set-out hereunder;

‘Section 48(1)(d): the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;’

Rather, the respondent has raised the objection under section 48(2)(b) – namely, that

‘The enforcement of the award would be contrary to the public policy of India.’

The respondent has also sought to rely on Clause (iii) of Explanation 1 to section 48(2)(b) i.e., the Award is in conflict with the public policy of India as it is in conflict with the most basic notions of morality or justice. In essence, the respondent has

mounted its entire argument on section 48(2)(b) on the alleged unilateral appointment of the Sole Arbitrator.

50. The Court has already expressed its view on the construction of Clause 22(a) of the BIMCO Terms, 2015, which provides for equal opportunity to both the parties for appointment of their respective Arbitrators and thereby negates the charge of unilateral appointments.

51. It may be said in this context that Arbitration Agreements may be differently-worded in terms of the mechanism of appointment of the Arbitrators, seat-venue selection and conduct of the arbitration, among other aspects. The intention of the parties must be gleaned from the express and implied undertakings of the clause. It would be an ill-advised exercise to make an argument of unilaterality solely based on a recent decision of the Supreme Court where the Arbitration Clause was entirely different to the one at hand. The respondent rests its entire case on *Central Organisation for Railway Electrification Vs. ECI SPIC SMO MCML (JV)*¹. This decision shall be dealt with in the next few paragraphs.

¹2024 SCC OnLine SC 3219

52. Counsel for the respondent has relied on *TRF Limited Vs. Energo Engineering Projects Limited*², *Perkins Eastman Architects DPC Vs. HSCC (India) Limited*³ and on *Central Organisation* (supra) to urge that unilateral appointments are fundamentally contrary to the public policy of India. A comparative perusal of the Arbitration Agreements in *TRF* and *Perkins* would however show that the element of potential impartiality was writ large in the wording of the Agreement itself. The relevant parts of the Arbitration Agreements are extracted below.

TRF Limited Vs. Energo Engineering Projects Limited (supra):

‘....this Agreement shall be referred to sole arbitration of the Managing Director of Buyer or his nominee.’

Perkins Eastman Architects DPC Vs. HSCC (India) Limited (supra):

‘...shall be referred for adjudication through arbitration by a sole arbitrator appointed by the CMD, HSCC within 30 days from the receipt of request from the Design Consultant. ... It is also a term of this contract that no person other than a person appointed by such CMD, HSCC as aforesaid should act as arbitrator.’

²2017 8 SCC 377

³2020 20 SCC 760

53. The above clauses would show that the appointment was starkly one-sided without giving any option to the other party to nominate its Arbitrator.

54. The relevant part of the Arbitration Agreement in relation to appointment of the Arbitrator in *Central Organisation* (supra) is set out below:

'The Arbitral Tribunal shall consist of a panel of three retired railway officers retired not below the rank of SAO officer, as the arbitrator. For this purpose, the Railways will send a panel of at least four names of retired railway officer(s) empanelled to work as railway arbitrator indicating their retirement date to the contractor within 60 days from the day when a written and valid demand for arbitrators is received by the GM.

Contractor will be asked to suggest to General Manager at least two names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by the Railways. The General Manager shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the "presiding arbitrator" from amongst the three arbitrators so appointed. The GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contract's nominees. While nominating the arbitrators, it will

be necessary to ensure that one of them has served in the Accounts Department.'

55. In *Central Organisation* (supra), the inequality of participation in the appointment process is not only embedded in the clause itself but occurs at several stages therein. The panel of Arbitrators was to be prepared only by one of the parties (Railways) with the other party (Contractor) not having a voice in the selection of names. The General Manager of the Railways was also given the sole power to appoint one name from the panel as the Contractor's nominee and to appoint the balance number of Arbitrators from the panel or from outside the panel. The General Manager further had the power to appoint the Presiding Arbitrator amongst the three arbitrators so appointed. A majority of the 5 - Judge Bench of the Supreme Court (speaking through Hon'ble Justice D.Y.Chandrachud) accordingly found the Clause to be unequal and in violation of Article 14 of the Constitution of India. Justice P.S. Narasimha opined that all Arbitration Agreements which provide for the unilateral appointment of the Arbitral Tribunal are not void *per se* and the Court must examine the text of the clause as well as the context of the Agreement.

56. There is little doubt that the Arbitration Agreement in the present case is wholly dissimilar to *TRF Limited, Perkins Eastman* and *Central Organisation* (supra) in text, context and spirit. The Arbitration Agreement in the present case is democratically-worded giving both parties the right to nominate its Arbitrator. The failure of the second party to nominate its Arbitrator or communicate such nomination to the first party within the stipulated timeframe of 14 calendar days is not an instance of unequal treatment but more a reflection of the need to proceed with the Arbitration without further delay. In fact, the mechanism provided under the Arbitration Agreement/BIMCO Dispute Resolution Clause can be traced to section 17 of The English Arbitration Act, 1996 – ‘*Power in case of default to appoint sole arbitrator*’. Section 17(2) is set out below:

‘17(2): If the party in default does not within 7 clear days of that notice being given –

- (a) make the required appointment, and*
- (b) notify the other party that he has done so,*

the other party may appoint his arbitrator as sole arbitrator whose award shall be binding on both parties as if he had been so appointed by agreement.’

57. The respondent's argument that the petitioner should have approached a neutral forum to appoint the Sole Arbitrator is undermined by the Arbitration Agreement itself as one which was agreed to and signed by the respondent. There is no statutory or legal infirmity in the said Arbitration Agreement.

58. As stated above, the respondent has chosen not to bring the objection with regard to unilateral appointment within section 48(1)(d) of the 1996 Act but has instead resorted to section 48(2)(b) of the 1996 Act on the enforcement being contrary to the public policy of India. Notably, section 48(1) puts the onus entirely on the party who objects to the enforcement of a Foreign Award to prove that any of the five grounds under section 48(1) or the two grounds under section 48(2) was present at the material point of time for refusal of enforcement. The burden of proof is thus squarely on the respondent to show by documentary evidence that the Sole Arbitrator was unilaterally-appointed. The Arbitration Agreement/ Clause, taken together with the admitted failure on the part of the respondent to appoint its Arbitrator, despite the petitioner's Notice to the respondent in that regard, demolishes the objection. This Court is hence of the considered view that the ground of unilateral

appointment of the Arbitrator for refusing enforcement of Foreign Award is totally without any substance. The respondent's argument is thus rejected.

Section 48 of The Arbitration and Conciliation Act, 1996.

59. Section 48(1) and (2) of the 1996 Act enumerates the grounds on which enforcement of a Foreign Award may be refused. The presence of one or more of the grounds must be brought to the Court's notice by the party against who the Foreign Award is being invoked and subject to the said party furnishing proof of the presence of one or more of such grounds. It is important to note that the words used in section 48(1) are as follows:

'Enforcement of a foreign award may be refused...'

60. This means that the enforcing Court retains a residual power to accept or reject the case made out by the Award-debtor on the absence/insufficiency of the proof furnished by the Award-debtor. Section 48(1) does not envisage the Court being under any obligation to accept the request of the party, against who the Foreign Award is invoked, for refusing enforcement of the Foreign

Award on any of the conditions under section 48(1) or (2) of the 1996 Act.

Conclusion

61. The three grounds taken by the respondent/Award-debtor for refusing enforcement of the Foreign Award have been separately dealt with in the foreground of decisions pronounced by the Supreme Court. The respondent has failed to furnish any evidence of the presence of any of the grounds under section 48(1) or (2) for refusing enforcement of a Foreign Award. It is crucial that the final Arbitration Award (Foreign Award) specifically records that the petitioner/owners are entitled to be paid the sum of USD 443,310.47 by the Charterer (the respondent/Award-debtor) together with interest payable at a commercial rate from 27.02.2022 when the Charterer/the respondent acknowledged that they owed the owners/petitioners this sum. The Award further records that the respondent's correspondence of 27.02.2022 together with a copy of its final accounting dated 17.01.2022 acknowledged that the respondent owes the petitioner a sum of USD 443,310.47 by way of the final accounting for the Charter.

The Arbitrator accordingly found this sum to be undisputably due and owing to the petitioner/owners as claimed.

62. Hence, even factually, the respondent has no defence to the claim amount since the respondent unequivocally acknowledged the same.

63. The petitioner/Award-holder has filed several IAs, inter alia, for payment of the decretal amount, attachment of the movable and immovable properties of the respondent, directing sale of those properties and restraining the respondent from alienating these properties.

64. Considering the clear view of this Court that none of the conditions under section 48(1) and (2) of the 1996 Act exist or are present for refusing enforcement of the Foreign Award and the fact that the respondent has failed to made out a case for refusal of enforcement, EXEP.No.4 of 2022 along with all I.As filed by the petitioner/Award-holder is allowed and disposed of.

MOUSHUMI BHATTACHARYA, J

June 27, 2025.
VA/BMS