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

\+ EX.P.278/2015

Reserved on: 14th May, 2018
Date of decision : 4th July, 2018

LDK SOLAR HI-TECH(SUZUHOU) CO. LTD.
..... Decree Holder

Through: Mr.Promod Nair & Ms.Manini Brar, Advs.

versus

HINDUSTAN CLEANENERGY LIMITED (FORMERLY MOSER BEAR CLEAN ENERGY LIMITED)
..... Judgment Debtor

Through: Mr.P.V. Kapur, Sr. Adv. with Ms.Maneesha Dhir, Ms.Varsh Banerjee, Mr.Karan Kamal, Mr.Kunal Godhwani, Mr.V.K. Nagrath, Mr.Sidhant Kapur & Ms.Kaveri Gupta, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

EX.APPL.(OS) 192/2017

1. The above Execution Petition has been filed by the Decree Holder seeking enforcement of the Foreign Arbitral Award dated 25.02.2015 passed by the (China International Economic and Trade Arbitration Commission (CIETAC), Shanghai in Arbitration Case No.SHR 20130112 between the parties (hereinafter referred to as the 'Impugned

Award'). In terms of the Impugned Award the following amounts have been awarded in favour of the Decree Holder and against the Judgment Debtor:-

"X.AWARD

Based on the Tribunal's opinions set forth in the preceding paragraphs, the Tribunal renders its final award as follows:

(1) The Respondent shall pay to the Claimant under the Bond the balance of purchase price in the amount of USD 14,687,867.00;

(2) The Respondent shall pay to the Claimant under the Bond liquidated damages in the amount of USD 734,393.35;

(3) The Respondent shall pay to the Claimant legal fees in the amount of RMB 1,323,000;

(4) The costs of this arbitration filed by the Claimant are in the amount of RMB 900,786.00, ten percent (10%) of which shall be assumed by the Claimant and ninety percent (90%) thereof assumed by the Respondent. The Claimant has prepaid such a sum in the amount of RMB 900,786.00 and the Respondent shall be liable to reimburse to the Claimant a sum in the amount of RMB 810,707.40.

The amounts which the Respondent shall be liable to the Claimant shall, as awarded above, be paid within thirty (30) days from the date of this award."

2. The present application has been filed by the Judgment Debtor/applicant under Section 48 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') praying that the enforcement of the Arbitral Award be refused by this Court.

3. Though not very relevant for the purpose of the present application but only as a brief background, it is noted that the disputes between the parties have their genesis in the Framework Contract setting forth General Conditions for Supplying Modules (GTAC) executed between the Decree Holder and M/s Enertec Trading FZE (Enertec) on 21.11.2011 for supply of solar panels by the Decree Holder to Enertec to be used in various solar energy generating projects in India.

4. The Judgment Debtor issued a Parent Company Bond (PCB) on 14.11.2011 in favor of the Decree Holder wherein it stood as a guarantor for the due discharge of obligations by Enertec under the GTAC and the Purchase Orders. Enertec having failed to discharge its liability under GTAC and Purchase Orders, the Decree Holder invoked arbitration for seeking such recovery. During the course of arbitration proceedings, the Decree Holder sought deletion of Enertec as a party and the arbitration proceedings continued only against the Judgment Debtor leading to the Impugned Award.

5. Before adverting to the submissions made by the learned senior counsel for the applicant / Judgment Debtor in support of the above application, it would be useful to quote sub-Sections 1 and 2 of Section 48 of the Act as it is only within the four corners of the said provisions that the enforcement of a foreign award can be refused by this Court:-

> *"**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

(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) 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 ; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(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."

6. The first contention of the applicant/Judgment Debtor is that CIETAC had no jurisdiction to entertain the claims filed by the Decree Holder as in terms of the Arbitration Agreement, the parties were to refer

the disputes between them for adjudication to the CIETAC, Shanghai Sub-Commission. Till 01.05.2012, CIETAC Shanghai Sub-Commission, though an integral part of CIETAC, had its Secretariat which handled its day to day work under the direction of the Secretary-General of the Sub-Commission. Article 2(8) of the CIETAC Arbitration Rules 2005 provided that the parties may agree to have their disputes arbitrated by either CIETAC in Beijing or by the Shanghai Sub-Commission in Shanghai. In the submissions of the learned senior counsel for the applicant, the parties had agreed to have their disputes arbitrated through Shanghai Sub-Commission and not through CIETAC in Beijing. It is further asserted that CIETAC issued revised CIETAC Arbitration Rules on 01.05.2012 whereunder, CIETAC Shanghai Sub-Commission, which was renamed as Shanghai International Economic and Trade Arbitration Commission and is also referred to as Shanghai International Arbitration Centre, became independent of CIETAC and implemented its own Arbitration Rules. It is submitted that as the Arbitration Agreement between the parties was to refer disputes to CIETAC Shanghai Sub-Commission, the disputes could only have been referred to Shanghai International Economic and Trade Arbitration Commission / Shanghai International Arbitration Centre and not to CIETAC, Beijing, as was done by the Decree Holder.

7. The learned senior counsel for the applicant further submits that upon receipt of notice of arbitration from CIETAC, the applicant immediately challenged its jurisdiction, however, CIETAC wrongly rejected the challenge vide its order dated 08.04.2014. Relying upon the "Official Reply of the Supreme People's Court on the request of the

Shanghai High People's Court and others for Instructions on the cases involving the Judicial Review of Arbitration Awards made by the China International Economic and Trade Arbitration Commission, its former Sub-Commissions and other Arbitral Institutions" dated 15.07.2015 it is submitted that the Supreme People's Court at China has also held that where the Arbitration Agreement provides for reference of the disputes to CIETAC Shanghai Sub-Commission, the Shanghai International Economic and Trade Arbitration Commission alone shall have jurisdiction to arbitrate such disputes.

8. I have considered the submissions made by the learned senior counsel for the applicant, however, I am unable to agree with the same. The Arbitration Agreement is contained in Article 13 of the Agreement between the parties and is reproduced herein below:-

> *"Clause 13*
>
> *Any and all claims, disputes, controversies or differences arising between the Parties out of or in relation to or in connection with this Bond shall be submitted for arbitration before China International Economic and trade Arbitration Commission (CIETAC) in Shanghai by three Arbitrators appointed in accordance with the corresponding rules of arbitration.*
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> *The arbitration shall be conducted in English.*
>
> *The award though arbitration shall become final and binding on the Parties, and the Parties agree to waive any right of appeal against the arbitration award. "*

9. The Agreement therefore, provides that arbitration shall be conducted by CIETAC and the place of arbitration shall be Shanghai. It does not state that it would be CIETAC Shanghai Sub-Commission that

would conduct the arbitration proceedings. Admittedly till 01.05.2012, CIETAC Shanghai Sub-Commission was an integral part of CIETAC. Under the CIETAC Rules it was clearly known that there is a Shanghai Sub Commission which has a separate Secretariat for handling its day to day work. If the parties wanted their disputes to be arbitrated only by Shanghai Sub Commission they would have mentioned it in their Agreement. On the contrary, as is evident from Article 13 of the Agreement, they had agreed for arbitration by CIETAC.

10. Article 2(7) and Article 2(8) of CIETAC Rules, 2005, on which reliance has been placed by the learned senior counsel for the applicant are reproduced herein below:-

> *"**Article 2** Name and Structure*
>
> *xxxxx*
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> *7. The CIETAC is based in Beijing, and has a South China Sub-Commission (formerly known as Shenzhen Sub-Commission) in Shenzhep Special Economic Zone and a Shanghai Sub-Commission in Shanghai. These Sub-Commissions are integral parts of the CIETAC. The Sub-Commissions have their respective secretariats, which handle their day-to-day work under the direction of the Secretaries-General of the respective Sub-Commissions.*
>
> *8. The parties may agree to have their disputes arbitrated by the CIETAC in Beijing, the South China Sub-Commission in Shenzhen or the Shanghai Sub-Commission in Shanghai. In the absence of such an agreement, the Claimant shall have the option to submit the case for arbitration by the CIETAC in Beijing, the South China Sub-Commission in Shenzhen or the Shanghai Sub-Commission in Shanghai. When such option is exercised, the first choice by the party shall prevail. In case of any dispute, the final decision shall be made by the CIETAC."*

11. A reading of the above provisions would show that the parties have an option to have their disputes arbitrated through CIETAC in Beijing or South China Sub-Commission in Shenzhen China or Shanghai Sub-Commission in Shanghai. In any case, the final decision was to be made by CIETAC. Article 31 of the CIETAC Rules, 2005 talks about the place of arbitration and is reproduced herein below:-

> ***"Article 31** Place of Arbitration*
> *1. Where the parties have agreed on the place of arbitration in writing, the parties agreement shall prevail.*
> *2. Where the parties have not agreed on the place of arbitration, the place of arbitration shall be the domicile of the CIETAC or its Sub-Commission.*
> *3. The arbitral award shall be deemed as being made at the place of arbitration."*

12. A reading of the sub-Clauses 7 and 8 of Article 2 read with Article 31 makes it clear that the place of arbitration is different from the agreement on whether CIETAC Beijing, South China Sub-Commission or Shanghai Sub Commission shall have jurisdiction to conduct arbitration. A reading of Article 13 of the Agreement makes it clear that the parties have agreed for arbitration to be conducted under the aegis of CIETAC, while the place of arbitration under Article 31 of the Rules shall be Shanghai.

13. The opinion of the Supreme People's Court at China relied upon by the senior counsel for the applicant is also not of any assistance to the plea of the applicant. It deals with a situation where parties have expressly agreed to have their disputes arbitrated through "China International Economic and Trade Arbitration Commission South China Sub-Commission" or "China International Economic and Trade

Arbitration Commission Shanghai Sub-Commission". In the Agreement between the parties to the present petition, the Arbitration Agreement does not provide that the disputes have to be referred to the China International Economic and Trade Commission Shanghai Sub-Commission. On the other hand, it clearly provides that the disputes will be arbitrated through "China International Economic and Trade Arbitration Commission (CIETAC)".

14. The second contention raised by the learned senior counsel for the applicant relying upon Section 48(1)(b) of the Act, is alleging violation of Principles of Natural Justice. For appreciating this submission, few facts are to be noted. Article 25 of the CIETAC Rules 2012 provides for the procedure for appointment of the three members of the Arbitral Tribunal. It is quoted herein below:-

> *"Article 25 Three-Arbitrator Tribunal*
> *1. Within fifteen (15) days from the date of receipt of the Notice of Arbitration, the Claimant and the Respondent shall each nominate, or entrust the Chairman of CIETAC to appoint, an arbitrator, failing which the arbitrator shall be appointed by the Chairman of CIETAC.*
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> *2. Within fifteen (15) days from the date of the Respondent's receipt of the Notice of Arbitration, the parties shall jointly nominate, or entrust the Chairman of CIETAC to appoint, the third arbitrator, who shall act as the presiding arbitrator.*
>
> *3. The parties may each recommend one to five arbitrators as candidates for presiding arbitrator and shall each submit a list of recommended candidates within the time period specified in the preceding Paragraph 2. Where there is only one common candidate on the lists, such candidate shall be the presiding arbitrator jointly nominated by the parties. Where there is more than one common candidate on the lists, the Chairman of CIETAC*

shall choose a presiding arbitrator from among the common candidates having regard to the circumstances of the case, and he/she shall act as the presiding arbitrator jointly nominated by the parties. Where there is no common candidate on the lists, the presiding arbitrator shall be appointed by the Chairman of CIETAC.

4. Where the parties have failed to jointly nominate the presiding arbitrator according to the above provisions, the presiding arbitrator shall be appointed by the Chairman of CIETAC".

15. A reading of the above sub-Clauses 2, 3 and 4 of Article 25 of the Rules would show that the parties within 15 days of respondent's receipt of notice of arbitration, jointly nominate or entrust the Chairman of CIETAC to appoint the Presiding Arbitrator. In the case of entrusting the appointment of the Presiding Arbitrator to the Chairman of CIETAC, the parties are given a choice to "recommend" one to five Arbitrators as candidates for Presiding Arbitrators. If there is a common candidate on the list submitted by the parties, such candidate shall be appointed as a Presiding Arbitrator. Incase there is more than one common candidate, the Chairman of CIETAC shall choose a Presiding Arbitrator. If there is no common candidate, the Presiding Arbitrator shall be appointed by the Chairman of CIETAC. Where the parties fail to jointly nominate the Presiding Arbitrator, Clause 4 of Article 25 of the Rules provides that the Presiding Arbitrator shall be appointed by the Chairman of CIETAC. Therefore, it is the Chairman of CIETAC who has to appoint the Presiding Arbitrator in case, where parties do not jointly nominate such Presiding Arbitrator.

16. Article 31 of the Rules further provides for replacement of an Arbitrator. The said Article is reproduced herein below:-

"Article 31 Replacement of Arbitrator

1. In the event that an arbitrator is prevented de jure or de facto from fulfilling his/her functions, or fails to fulfill his/her functions in accordance with the requirements of these Rules or within the time period specified in these Rules, the Chairman of CIETAC shall have the power to decide to replace the arbitrator. Such arbitrator may also voluntarily withdraw from his/her office.

2. The Chairman of CIETAC shall make a final decision on whether or not an arbitrator should be replaced with or without stating the reasons.

3. In the event that an arbitrator is unable to fulfill his/her functions due to being challenged or replaced, a substitute arbitrator shall be nominated according to the same procedure and time period that applied to the nomination of the arbitrator being challenged or replaced. If a party fails to nominate a substitute arbitrator accordingly, the substitute arbitrator shall be appointed by the Chairman of CIETAC.

4. After the replacement of an arbitrator, the arbitral tribunal shall decide whether and to what extent the previous proceedings in the case shall be repeated.

17. Clause 3 of the Article 31 provides that a substitute Arbitrator shall be nominated "according to the same procedure and time period" that is applied to the nomination of the Arbitrator being replaced.

18. In the present case, the parties failed to jointly nominate or jointly entrust the Chairman of CIETAC the power to appoint a Presiding Arbitrator within the specified time. The Chairman of CIETAC, therefore, exercising his power under Article 25(4) of the Rules, appointed Mr. Xing Xiusong as the Presiding Arbitrator. Mr. Xing Xiusong voluntarily withdrew on 13.10.2014. On 15.10.2014 the Chairman of CIETAC informed the parties of the appointment of Mr. Gu

Yaoliang as the substitute Arbitrator and also informed the parties that the Arbitral Tribunal has decided to hold an oral hearing on 24.11.2014.

19. The applicant objected to such appointment of the substitute Presiding Arbitrator and sought 15 days' time to consult with the Decree Holder herein regarding a joint nomination as provided in Clause 2 to Article 25 of the Rules. The applicant further sought postponement of the date of hearing. The said request was considered by CIETAC and by its communication dated 31.10.2014 answered as under:-

> *"11.* ***15 days for consultation****. CIETAC has noted that the Respondent wished to have 15 days to consult with the Claimant on a joint nomination or whether to entrust the Chairman of CIETAC to appoint the replacement presiding arbitrator, as so stated in its Objection to Appointment of Mr. Gu Yaoliang as the presiding arbitrator. The Parties may have this period to consult with each other from the date of receipt of this Notice (i.e. the Notice of the Procedure of Arbitration Case No. SHR20130112) to jointly appoint or jointly entrust the Chairman of CIETAC to appoint a presiding arbitrator to replace Mr. Gu Yaoliang as the presiding arbitrator. If however the parties fail to jointly appoint, or jointly entrust the Chairman of CIETAC to appoint, a presiding arbitrator to replace Mr. Gu Yaoliang as the presiding arbitrator in the case within the aforesaid specified time, Mr. Gu Yaoliang, appointed by the Chairman of CIETAC as the presiding arbitrator in accordance with Article 31.3, shall remain unchanged.*
>
> *12.* ***Time for presentation of its case****. The Respondent's objection to the oral hearing fixed on 24 November 2014 was said for such reason that it lack of reasonable opportunity to present its case. It is respectfully disagreed, bearing in mind that: (a) it has been more than one year since the Notice of Arbitration was sent to and received by the Parties; and (b) more than three months have elapsed since the constitution of the Tribunal. During such time periods elapsed, the Respondent should have been able to prepare for and has actually had ample time for preparation of its case."*

20. The learned senior counsel for the applicant submits that the appointment of the substitute Arbitrator by the CIETAC is in violation of Article 31(3) of the CIETAC Rules. He submits that Article 31(3) of the CIETAC Rules clearly provides that a substitute Arbitrator has to be appointed according to the same procedure and time period that applies to the nomination of the Arbitrator being replaced. He submits that the procedure which would therefore, be applicable in the present case would be the one prescribed in Clauses 2, 3 and 4 of Article 25 of the CIETAC Rules whereunder 15 days' time period is given to the parties to jointly nominate the Presiding Arbitrator. In this regard he places reliance on the Judgments of the Supreme Court in ***Yashwith Constructions (P) Ltd. Vs. Simplex Concrete Piles India Ltd. & Anr***., (2006) 6 SCC 204; ***Huawei Technologies Company Limited Vs. Sterlite Technologies Limited***, (2016) 1 SCC 721;, ***ACC Limited Vs. Global Cements Limited,*** (2012) 7 SCC 71***; National Highways Authority of India and Another Vs. Bumihiway DDB Ltd. (JV) and Others.***, (2006) 10 SCC 763.

21. The real relevance of the above submissions of the learned senior counsel for the applicant is that, under Article 35 of the CIETAC Rules, the parties are to be given an advance notice of atleast 20 days for an oral hearing. The learned senior counsel for the applicant submits that as the Arbitral Tribunal itself was wrongly constituted, the notice dated 15.10.2014 issued by the Secretariat of CIETAC informing the parties of the date of hearing as 24.11.2014 cannot be considered as a valid notice. He further submits that on the objection being raised by the applicant, CIETAC by its Procedural Order dated 31.10.2014 had granted 15 days'

time to the parties to jointly nominate the Presiding Arbitrator. Therefore, at best, the Arbitral Tribunal would be deemed to have been properly constituted only on 15.11.2014 and the oral hearing notice should have been fixed only thereafter. As the date of hearing was fixed as 24.11.2014, there was no proper notice as contemplated under Article 35(1) of the CIETAC Rules, 2012.

22. The learned senior counsel for the applicant further submits that due to such insufficient notice, the appellant could not produce the witnesses in support of its case and sought postponement of the hearing. This was, again rejected by the CIETAC vide its Procedural Order dated 20.11.2014 thereby leading to denial of fair opportunity to the applicant to defend its case in violation of Principles of Natural justice.

23. I have considered the submissions made by the learned senior counsel for the applicant, however, I find no merit in the same. Admittedly, in the first instance also, the Presiding Arbitrator had been appointed by the Chairman of CIETAC as the parties had failed to arrive at a consensus on the Presiding Arbitrator as provided under Clause 2 and 3 of Article 25 of the CIETAC Rules. It is not the case of the applicant that even after the Procedural Order dated 31.10.2014 passed by CIETAC granting another opportunity to the parties to jointly nominate a Presiding Arbitrator, the applicant took steps in this regard. Clearly therefore, the applicant is merely trying to take advantage of an inconsequential issue to challenge the Arbitral Award. In the judgments cited by the learned senior counsel for the applicant, the initial Arbitrator, who was being substituted or replaced had been appointed in accordance with the appointment procedure provided in the Agreement and therefore, the

Court held that the same appointment procedure must be followed while appointing a substitute Arbitrator. At the same time, the counsel for the Decree Holder has placed reliance on the following judgments; ***Mithlesh Kumar Aggarwal Vs. Athena Infrastructure Ltd***, 2017 SCC OnLine Del 7875; ***GMR Ambala Chandigarh Expressways Pvt. Ltd. Vs. National Highway Authority of India,*** 2018 SCC OnLine Del 7588; ***Ramjee Power Construction Ltd. Vs. Damodar Valley Corporation***, 2009 SCC OnLine Cal 321, to contend that where the initial Arbitrator is appointed by the High Court in exercise of its power under Section 11(6) of the Act, the substitute Arbitrator has to be appointed by the High Court itself and the original appointment procedure contained in the Arbitration Agreement will not revive. In my view, this issue need not be answered in the facts of the present case as it is not the case of the applicant that it made any endeavour to seek the consent of the Decree Holder on the appointment of the Presiding Arbitrator even after opportunity had been granted by CIETAC in its communication dated 31.10.2014.

24. As far as inadequacy of notice is concerned, the applicant had been duly informed of the next date of hearing by the Secretariat of CIETAC by its communication dated 15.10.2014. Even in its communication dated 31.10.2014, while granting time to the parties to jointly agree on a Presiding Arbitrator, the Secretariat of CIETAC had expressly and equivocally clarified that this would not have any effect on the next date of hearing which is fixed for 24.11.2014. On a subsequent request made by the applicant, CIETAC reiterated its stand and communicated the same to the applicant in its order dated 20.11.2014 reproduced as under:-

"1. ***The Tribunal has been legally formed and the relevant arbitrator replaced therefore valid and remains unchanged and qualified to continuously examine the case and render an award***

The replacement of the presiding arbitrator Mr. Xing Xiusong by Mr. Gu Yaoliang which has been done in accordance with Article 31 of Rules 2012, is correct and valid.

In view of the fact that the Parties did not jointly appoint or entrust the Chairman of CIETAC to appoint a presiding arbitrator, nor did the Parties recommend one candidate to be the presiding arbitrator within the time limit, therefore, the Chairman of CIETAC appointed Mr. Xing Xiusong as the presiding arbitrator. This is the way to form the Tribunal in the case in accordance with Article 25 of Rules 2012.

As Mr. Xing Xiusong resigned voluntarily from his appointment, the replacement of Mr.Xing Xiusong as the presiding arbitrator, of cause, shall be appointed in the same way by the Chairman of CIETAC in accordance with Article 31 of Rules 2012. Therefore, the appointment of Mr. Gu Yaoliang as the presiding arbitrator to replace Mr. Xing Xiusong is correct and valid which is in compliance with Article 31 of Rules 2012.

CIETAC felt it would be more beneficial to the Parties if the Parties are given another opportunity to jointly appoint or jointly trust the Chairman of CIETAC to appoint or recommend the presiding arbitrator. Bearing that in mind we give another 15 days for the Parties to consult with each other, not the cure of any procedural defect, as so alleged, on the appointment of the presiding arbitrator, however in the premise that if "the parties fail to jointly appoint, or jointly entrust the Chairman of CIETAC to appoint, a presiding arbitrator to replace Mr. Gu Yaoliang as the presiding arbitrator in the case within the aforesaid specified time, Mr. Gu Yaoliang, appointed by the Chairman of CIETAC as the presiding arbitrator in accordance with Article 31.3, shall remain unchanged."

Just because the Parties failed again to jointly appoint or jointly entrust to appoint or respectively recommend any candidate as the presiding arbitrator within the time limit given by the Notice ***of Decision on Some Procedure Matters of Arbitration Case No. SHR20130112*** *sent to the Parties on 31 October 2014,* ***Mr. Gu***

Yaoliang, as the presiding arbitrator in the case, shall remain unchanged.*"*

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3. The hearing dated on 24 November remains unchanged

After having reviewed the correspondences and submissions by the Parties and taking into account of the second letter of the Respondent dated 14 November, 2014, the Tribunal determines that the reasons set forth in the aforesaid second letter of the Respondent do not constitute justified reasons for postponement of the hearing and therefore the hearing scheduled on 24 November 2014 will not be changed and will be held as previously notified to the parties.

The hearing will commence on 9:30 am, 24 November, 2014 and last until the above procedures are completed on that day.

However the Respondent may produce the written Witness Statement of Mr Sandeep Bhateja and such statement together with attachments which shall be received by the Tribunal and the Claimant no later than 22 November 2014 in such form and in such number of copies in full compliance with Rules 2012. Furthermore, Mr Sandeep Bhateja shall be permitted to attend the hearing so as to give his witness evidence."

25. The above order would show that the applicant had sufficient notice of the date of oral hearing as provided under Article 35 of the CIETAC Rules and also of the fact that merely because it has been given time to explore the possibility of jointly nominating the Presiding Arbitrator to be appointed, the date of oral hearing so fixed will not be changed.

26. The only prejudice sought to be urged by the learned senior counsel for the applicant due to denial of change of date of hearing is that the applicant could not produce its witnesses due to inadequacy of notice period. However, the learned senior counsel has made no submission

with regard to the relevance of this witness and in what manner non production of this witness has caused any prejudice to the applicant in its defence or has affected the Impugned Award.

27. It has been repeatedly held that natural justice is no unruly horse. It cannot be put in a straightjacket formula. It cannot be put into rigid rules and there is no such thing as mere technical infringement of natural justice. The requirement of natural justice must depend upon the facts and circumstances of the case and some real prejudice must be shown to have been suffered by the party complaining of the violation of Principles of Natural Justice. In ***Chairman, Board of Mining Examination and Chief Inspector of Mines & Anr. v. Ramjee, (***1977) SCC 2 256, the Supreme Court held:-

> *"Natural justice is no unruly horse, no lurking land mine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. We can neither be finical nor fanatical but should be flexible yet firm in this jurisdiction. No man shall be hit below the belt-that is the conscience of the matter."*

28. In ***Aligarh Muslim University v. Mansoor Ali Khan*** (2000) 7 SCC 529, the Supreme Court further held as under:-

> *"24. The principle that in addition to breach of natural justice, prejudice must also be proved has been developed in several cases. In K.L. Tripathi Vs. State Bank of India 1984(1) SCC 43, Sabyasachi Mukherji, J. (as he then was) also laid down the principle that not mere violation of natural justice but de facto*

prejudice (other than non-issue of notice) had to be proved. It was observed: quoting Wade Administrative Law, (5th Edn.PP.472-75) as follows: (SCC p. 58, para 31)

> *"....it is not possible to lay down rigid rules as to when principles of natural justice are to apply, nor as to their scope and extent ....There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with and so forth".*

Since then, this Court has consistently applied the principle of prejudice in several cases. The above ruling and various other rulings taking the same view have been exhaustively referred to in State Bank of Patiala Vs. S.K. Sharma (1996) 3 SCC 364. In that case, the principle of 'prejudice' has been further elaborated. The same principle has been reiterated again in Rajendra Singh Vs. State of M.P. (1996) 5 SCC 460."

29. In relation to the arbitration proceedings, the Supreme Court in ***Sohan Lal Gupta and Others v. Asha Devi Gupta and Others,*** (2003) 7 SCC 492, held as under:-

> *"23. For constituting a reasonable opportunity, the following conditions are required to be observed :*
> *1. Each party must have notice that the hearing is to take place.*
> *2. Each party must have a reasonable opportunity to be present at the hearing, together with his advisers and witnesses.*
> *3. Each party must have the opportunity to be present throughout the hearing*
> *4. Each party must have a reasonable opportunity to present evidence and argument in support of his own case.*
> *5. Each party must have a reasonable opportunity to test his opponent's case by cross-examining his witnesses, presenting rebutting evidence and addressing oral argument.*

6. The hearing must, unless the contrary is expressly agreed, be the occasion on which the parties present the whole of their evidence and argument.

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25. The minutes of the meeting referred to hereinbefore clearly show that not only he had notice of arbitration proceedings but also took active part therein day after day. The circular letter dated 24.5.1976 was issued by the arbitrator so as to give a notice of caution that the arbitration proceedings shall be held and continued at Kolkata."

30. In ***D.L. Miller and Co. Ltd. v. Daluram Goganmull***, AIR 1956 Cal 361, the law is stated in the following terms:-

"13. The doctrine of arbitrators' legal misconduct has been so overworked in recent years that across the whole branch of case-law on this point one finds the blazing trial of principles of natural justice. They are discussed and agitated in an atmosphere of complete unreality and divorced from the facts of each case.

Somehow the obvious point is missed in most of such cases that when the parties agree to go to arbitration they stipulate not so much for vague principles of natural justice as for concrete principles of contractual justice according to the contracts of the parties and their specific stipulations. Where the contract of arbitration itself prescribes a private procedure of its own, then so long as such agreed private procedure is not against the laws and the statutes of the land, then such agreed procedure must prevail over the notions and principles of natural justice."

31. In ***Hari Om Maheshwari v. Vinitkumar Parikh,*** (2005) 1 SCC 379, the Supreme Court has held as under:

"13. In the above circumstances, the question for our consideration is: was the High Court justified in interfering with the discretionary jurisdiction of the arbitrators while entertaining a petition under Section 30 to set aside an award.

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14. A bare reading of the said section shows that the civil court has very limited jurisdiction to interfere with an award made by the arbitrators and it certainly does not permit the civil court including the High Court to interfere with the discretionary order of granting or refusing an adjournment.

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16. From the above it is seen that the jurisdiction of the court entertaining a petition or application for setting aside an award under Section 30 of the Act is extremely limited to the grounds mentioned therein and we do not think that grant or refusal of an adjournment by an arbitrator comes within the parameters of Section 30 of the Act. At any rate the arbitrator's refusal of an adjournment sought in 1999 in an arbitration proceeding pending since 1995 cannot at all be said to be perverse keeping in mind the object of the Act as an alternate dispute resolution system aimed at speedy resolution of disputes."

32. In ***National Ability S.A. vs. Tinna Oil & Chemicals Ltd. & Ors.***, 2008 (105) DRJ 446, this Court has also considered and rejected the plea of violation of Principles of Natural Justice in arbitration proceedings with the following observation:-

"One cannot be oblivious of the nature of such international arbitration proceedings. The schedule fixed by the arbitral tribunals is strictly adhered to and only in exceptional circumstances adjournments are given. There is a rational and justification for the same. In respect of disputes relating to international commercial dealings, such arbitral tribunals ensure that they are decided with utmost alacrity and promptness. Such proceedings are not allowed to be dragged on unnecessarily causing delays. In fact, this is the culture which needs to be set-in in all kinds of arbitration proceedings, whether international or domestic.

It is stated by the petitioner that proceedings were conducted in accordance with the established practice in England and procedure followed there. This is an important fact which cannot

be lost sight off. If such procedure is followed as prevalent in the country where the arbitration took place, it cannot be said that the same would be in violation of principles of natural justice when considered on the touchstone of law prevailing in India. Way back in the year 1963, the Supreme Court in the case of ***R. Vishwanathan & Ors. v. R. Gajambal Ammal & Ors., AIR 1963 SC 1****, made following pertinent observations relating to enforcement of foreign judgments in India :-*

> *"40. Before we deal with the contentions it may be necessary to dispose of the contention advanced by the executors that it is not open in this suit to the plaintiffs to raise a contention about bias, prejudice, vindictiveness or interest of the Judges constituting the Bench. They submitted that according to recent trends in the development of Private International law a plea that a foreign judgment is contrary to natural justice is admissible only if the party setting up the plea is not duly served, or has not been given an opportunity of being heard. In support of that contention counsel for the executors relied upon the statement made by the Editors of Dicey"s "Conflict of Laws", 7th Edition Rule 186 at pp. 1010-1011 and submitted that a foreign judgment is open to challenge only on the ground of want of competence and not on the ground that it is vitiated because the proceeding culminating in the judgment was conducted in a manner opposed to natural justice. The following statement made in "Private International Law" by Cheshire, 6th Edition pp. 675 to 677 was relied upon:*
>
> > *"The expression contrary to natural justice' has, however, figured so prominently in judicial statements that it is essential to fix, if possible, its exact scope. The only statement that can be made with any approach to accuracy is that in the present context the expression is confined to something glaringly defective in the procedural rules of the foreign law. As Denman, C.J. said in an early case :*
> >
> > *"That injustice has been done is never presumed, unless we see in the clearest light that the foreign law, or at least some part of the proceedings of the foreign*

court, are repugnant to natural justice : and this has often been made the subject of inquiry in our Courts"

In other words, what the Courts are vigilant to watch is that the defendant has not been deprived of an opportunity to present his side of the case. The wholesome maxim audi alteram partem is deemed to be of universal, not merely of domestic application. The problem, in fact, has been narrowed down to two cases.

The first is that of assumed jurisdiction over absent defendants.... Secondly, it is a violation of natural justice if a litigant, though present at the proceedings, was unfairly prejudiced in the presentation of his case to the Court.

xxxx

I do not find the objection of the respondent No.2 getting covered by any of the principles on which such an award could be challenged, namely, the respondent No.2 could not establish that the Tribunal did not consist of impartial persons or it did not act fairly, without bias, or in good faith. Reasonable notice was given to the parties to the dispute by fixing the schedule much in advance and if that schedule was followed rigorously and even if adjournment was refused, that would not amount to denial of principles of natural justice. The Apex Court in Hariom Maheshwari v. Vinit Kumar Parikh, JT 2004 (10) SC 360, clearly laid down that where a party is refused an adjournment and where it is not prevented from presenting its case, it cannot, normally, claim violation of natural justice and denial of a fair hearing."

33. Applying the above principles to the facts of the present case, it cannot be said that the applicant was denied a proper notice of the appointment of the Arbitral Tribunal or of the arbitration proceedings or was otherwise unable to present its case before the Arbitral Tribunal due to which the enforcement of the Impugned Award can be refused.

34. Another important factor in the present case is that the applicant had also challenged the Impugned Award before Beijing Fourth Intermediate People's Court in China on similar grounds. The Court vide

its Judgment dated 16.12.2015 rejected the contention of the applicant and held as under:-

> *"In respect of the jurisdiction of CIETAC, the Bond at issue was written in English, and its original provision is: Any and all claims, disputes, controversies or differences arising between the Parties out of or in relation to or in connection with this Bond shall be submitted for arbitration before China International Economic and Trade Arbitration Commission ("CIETAC") in Shanghai by three Arbitrators appointed in accordance with the corresponding rules of arbitrations. When this court examined the provision, the parties stated differently as for the interpretation of such English provision. Cleanenergy claimed that the core meaning of the above provision was that when any dispute arose, it should be submitted to the CIETAC branch in Shanghai for arbitration, and further interpreted the CIETAC branch in Shanghai Branch. LDK claimed that the core meaning of the above provision was that when any dispute arose, it should be decided by CIETAC in Shanghai. This court believes that the arbitration institution specified in the above provision expressly refers to CIETAC, that is, China International Economic and Trade Arbitration Commission, and the English phrase is obviously different from that of CIETAC Shanghai Branch. To say the least, even though the arbitration institution agreed by both parties is CIETAC Shanghai Branch, according to Article 3 of Reply of the Supreme People's Court to the Requests of Shanghai High People's Court etc. regarding Cases of Judicial Review on the Arbitration Awards of China International Economic and Trade Arbitration Commission, Its Former Branches and other Arbitration Institutions, the claim of Cleanenergy for setting aside No.016 Award based on the above reason should not be supported. In addition, there are no obvious procedural defects for CIETAC to apply CIETAC Rules 2012 to this case or to re-appoint the chief arbitrator after the original one resigned, etc. Therefore, this court will not adopt the opinion of Cleanenergy for setting aside No.016 Award based on that reasons. In respect of the claim of Cleanenergy that the arbitral tribunal decided to hear the case hurriedly and thus caused its key witness unable to attend the*

hearing, we believe that the absence of the witness is irrelevant to the opportunity for stating opinions by the parties. Thus, this reason is not a legal basis based on which the award may be set aside, and this court will not examine that."

35. Though this Court would not be bound by the above judgment, I have no reason to disagree with the same.

36. The last contention raised by the learned senior counsel for the applicant is that the present Execution Petition has not been filed by a duly authorized representative of the Decree Holder and therefore, is liable to be dismissed. It is submitted that the Execution Petition has been filed by one Ms.Shivani Singhal who claims herself to have been authorized by one Mr.Tong Xing Xue vide authorization dated 13.05.2015, however, no authorization in favour of Mr. Tong Xing Xue has been placed on record. This is countered by the learned counsel for the Decree Holder who places reliance on a paper published by Daisy XU, Attorney (Beijing) and Mathew Mckee, Foreign Legal Counsel (Beijing), titled "Legal Representatives: Understanding the Risks and Responsibilities", which states that a legal representative is appointed to act on the behalf of a company and is authorized to perform all acts regarding general administration of the company in accordance with the corporate purpose. The legal representative can take actions which are legal and necessary for the conservation or exploitation of the Company's assets, execute the Power of Attorney on the Company's behalf; and authorize legal representation of litigation by the Company. He therefore, submits that Mr.Tong Xing Xue was not only authorized to file the present Execution Petition but was also authorized to delegate the said

authority in favour of Mrs.Shivani Singhal. I agree with the submission made by the counsel for the Decree Holder. It is not the case of the applicant/Judgment Debtor that the Decree Holder has in any proceedings disowned the present petition or disputed the authority of Mr.Tong Xing Xue.

37. The learned senior counsel for the applicant further submits that Ms.Shivani Singal is an advocate working with a Law Firm representing the Decree Holder in the present Execution Petition. Relying upon the judgment of this Court in ***Baker Oil Tools (India) Pvt. Ltd. v. Baker Hughes Ltd. & Anr***., 2011 SCC OnLine Del 2567, the learned senior counsel for the applicant submits that such practice is not only being deprecated by this Court, but it has also been held that law does not permit an advocate to act in two capacities, that is, as a lawyer and as a Power of Attorney holder in the same case.

38. In the present case, though Ms.Shivani Singal is one of the Associates working with the Law Firm representing the Decree Holder, I find that the vakalatnama has been executed by the Decree Holder, represented through Ms. Shivani Singal, in favour of Mr. Pramod Nayyar and Mr.Rajhnenth Basant, advocates in their individual capacity. In my view, therefore, the above judgment would not be of any assistance to the applicant.

39. In any case, the above challenge does not lie within the ambit of Section 48 of the Act and cannot be put in service to refuse enforcement of a foreign award.

40. In view of the above, I find no merit in the objections raised by the applicant to the enforcement of the Impugned Award and the present application is accordingly dismissed with no order as to cost.

EX.P.278/2015

As the objections raised against the enforcement of the Impugned Award have been rejected, the Judgment Debtor shall make payment of the awarded amount to the Decree Holder within a period of four weeks from today failing which, the Judgment Debtor shall file an affidavit disclosing its assets in Form 16A Appendix E of the Code of Civil Procedure, 1908 within the same period.

List on 8th August, 2018.

NAVIN CHAWLA, J

JULY 04, 2018/*rv*