Astonfield Renewables Pvt. Ltd. & Anr. vs Ravinder Raina on 15 January, 2018

Author: Navin Chawla

Bench: Navin Chawla

* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ OMP 388/2015

Reserved on: 5th December, 2017
Date of decision:15thJanuary, 2018

ASTONFIELD RENEWABLES PVT. LTD. & ANR..... Petitioner
Through: Mr.Atul Chitale, Sr. Adv. with
Ms. Raveena Rai, Mr. Akash
Jindal, Ms.Tanvi and Mr.Gurjyot
Sethi, Advs.
versus
RAVINDER RAINA ..... Respondent

Through: Mr. Samar Singh with Mr. Amit
Sharma, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the award dated 16.03.2015 passed by the Sole Arbitrator appointed by the Indian Council of Arbitration.

2. The disputes between the parties arise out of two agreements, the first one is Appointment & Employment Agreement (hereinafter referred to as the 'Appointment Agreement') dated 17.09.2008 and the second one being Stock Issuance Agreement (hereinafter referred to as the 'SIA') dated 01.12.2008.

3. The respondent was appointed as the President of Petitioner No.1 Company under Letter of Appointment & Employment dated 17.09.2008. The letter inter-alia provided as under:

OMP No.388/2015 Page 1 "The terms and conditions of the said employment are annexed hereto and also in the accompanying Stock Issuance Agreement to be entered between you and our parent company Astonfield Renewable Resources Limited."

It is important to note here that the so-called 'Appointment Agreement' was, in fact, an Annexure to this letter.

4. Clause 1.4 of the Appointment Agreement further provides that the respondent shall be eligible to participate in the Employee Stock Auction Plan/Scheme of the petitioner no.1 or its parent company i.e. petitioner no.2.

5. Clause 7 of the Agreement provides for termination of the employment and is reproduced herein below:

> "7. Termination of Employment 7.1 Either you or the Company may terminate your employment without cause, upon written notice to the other Party. The termination would be effective after 3 (three) months from the date of the receipt (by the other Party) of such notice (hereinafter referred to as the 'Notice Period'). Alternatively, the Company may terminate your employment with immediate effect, upon giving you three month's remuneration as per Clause 1 of this agreement in lieu of notice or pro-rated remuneration for the balance Notice Period in case you have been permitted to work during the Notice Period.

7.2 The Company may terminate this employment agreement for Cause (hereinafter defined) with immediate effect without any severance pay, provided that notice of Cause has been served by the Company and you do not rectify, where capable of rectification, the breach/problem within 30 (thirty) days from receipt of the notice: provided, however, that no notice or thirty day OMP No.388/2015 Page 2 cure period shall be required with respect to matters set forth in sub (ii) of the definition of Cause below. For the purposes of this clause "Cause"shall mean (i) the negligence or misconduct by you in complying with your duties, responsibilities, obligations and/or covenants or undertakings, which are either incapable of remedy or otherwise not remedied by you within 30 (thirty) days of a written notice being serviced on you by the Company stating the breach or (ii) your gross misconduct, theft from the Company, commission of any crime or breach of the Company's confidence."

6. Clause 11 of the Appointment Agreement restrained the respondent from engaging in any other employment or business activity during the term of the employment. The same is reproduced herein below:

> "11. Conflicting Employment You will devote your full time to the Company. During the term of your employment with the Company, you shall not engage in any other employment, occupation, consulting or other business activity, nor will you engage in any other activities that conflict with your obligations to the Company."

7. Clause 23 of the Appointment Agreement provides for dispute resolution through arbitration. The said clause specifically provided that if a dispute arose under the said Agreement, as well as under the Stock Issuance Agreement entered into between the respondent and the petitioner no.2, the same shall be referred to and be heard by the same Arbitral Tribunal. The said Clause is reproduced

herein below:

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"23. Dispute Resolution

23.1 You shall discharge all your obligations in utmost good faith. You will, at all times, act in good faith and make all attempts to resolve all differences howsoever arising out of or in connection with your employment by discussion. If within 21 days of the commencement of the discussions the dispute is not resolved the dispute shall be referred to arbitration, provided that:

(a) Arbitration shall be conducted in accordance with the provisions of the (Indian) Arbitration and Conciliation Act, 1996: In accordance with the Rules of Arbitration of the Indian council of Arbitration.

(b) There shall be one arbitrator.

(c) All hearings shall be held in Mumbai or Delhi and the language of the arbitration shall be in English.

(d) If a dispute arises under this Agreement as well as under the Stock Issuance Agreement entered into between you and Astonfield Renewable Resources Limited the same shall be referred to and heard by the same Arbitral Tribunal. In accordance with rules of Arbitration of the Indian Council of Arbitration.

23.2 Notwithstanding the aforesaid provisions, in the event of any breach or apprehened breach by you of the provisions hereof, we shall be entitled, in addition to all other remedies, to an injunction, whether interlocutory or preliminary and particularly relating to Confidential Information and Intellectual Property, restraining any such breach, without recourse to arbitration as aforesaid."

(emphasis supplied)

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8. Clause 24 of the Appointment Agreement provides that the Appointment & Employment Agreement shall be governed by the laws of India.

9. The Stock Issuance Agreement was executed between the respondent and petitioner no.2. Clause 1(f) of the Agreement defines "Discounted Fare Market Value" and is reproduced herein below:

"Clause 1(f) "Discounted Fair Market Value" of a share means the value of Common Stock on any day as shall be determined in good faith by the Board of Directors on the basis of such considerations as the Board of Directors deems appropriate from time to time, including, but not limited to, such factors as the last sale price, the

average of the high bid and low asked prices, the average of the high and low sales price or the average of the closing bid and asked prices for a share of Common Stock, on such day (or, if such day is not a trading day, on the next preceding trading day) as reported on NASDAQ or, if not reported on NASDAQ, as quoted by the National Quotation Bureau Incorporated, or if the Common Stock is listed on an exchange, on the principal exchange on which the Common Stock is listed, in any such event, discounted by twenty percent(20%)."

10. Clause 1(j) of the SIA defines the term "Termination Event" as under:

"1(j) "Termination Event" shall mean the termination of Raina's Employment Agreement, or termination of employment for any reason whatsoever. In case of any dispute concerning whether and/or when a "Termination Event" has occurred, the Board of Directors shall have discretion to determine the effective date of such Termination Event."

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11. Clause 2(a) of SIA provides for issuance of shares of petitioner no.2 in favour of the respondent, on the completion of two years, three years, four years and five years from the Employment Date. It further provides that in case the Employment Agreement is terminated for any reason whatsoever prior to the aforesaid periods, the respondent shall be entitled to fractional value of the shares on the basis of number of days of completed service. The said Clause is reproduced herein below:

"2. Issuance of Shares

(a) Anniversary Issuance. Subject to and in reliance upon the representations, warranties, terms and conditions of this Agreement and the Employment Agreement, the Company agrees to issue to you, on each of the dates which are two (2) years, (3) years, four (4) years and five (5) years respectively from your Employment Date one share of the Company's Common Stock, up to an aggregate total of four (4) such shares of the Company's Common Stock (each, a share, and together with any other shares issued pursuant to this Agreement, collectively, the "Shares"), if any and only if you are, and have been, continuously employed by the Company (or one of its affiliates) from the date of this Agreement through such date. Provided however if your Employment Agreement is terminated for any reason whatsoever prior to the aforesaid periods you shall be entitled to fractional value of the shares on the basis of number of days of completed service."

(emphasis supplied)

12. Clause 5 of the SIA prescribed for restriction on transfer of shares.

13. Clause 7 of the SIA provides for re-purchase of the shares by petitioner no.2 upon the happening of a 'Termination Event'. The said Clause is reproduced herein below:

OMP No.388/2015 Page 6 "7. Repurchase Option. Following a Termination Event the Company shall have the right and the obligation to purchase and Holder shall have the right and the obligation to sell the first and/or the second Share as vested in you at the time of sale pursuant to clause 2(a) The pre-agreed value of the first and second share is USD 275,000 per share. The value of subsequent shares shall depend upon the fair market value. If either the Company or the Holder elect to exercise this Section 7, it shall notify the other party in writing of such election within ninety (90) days after the Termination Event. The holder shall deliver the Shares to the Company within ten (10) days of such notice and payment shall be made by certified check or wire transfer within sixty (60) days of the election to purchase."

14. Clause 12(f) of SIA provides that the SIA will be interpreted, construed and governed by the laws of the Republic of Malta.

15. Clause 12(g) of SIA provides for dispute resolution through arbitration of a Sole Arbitrator in accordance with the Rules of Arbitration of Indian Council of Arbitration.

16. On 02.01.2013, the respondent tendered his resignation, which was immediately accepted by the petitioners by return email of the same date.

17. Vide email dated 05.01.2013, the Co-Chairman & Director of Astonfield Group of Companies informed the respondent that he had asked the legal counsel to review the terms of respondent's Employment Contract and Stock Agreement to ensure his preparedness to plan respondent's exit in a comfortable and smooth manner. This email is important as it shows that both Appointment Agreement and SIA were considered part of same transaction.

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18. The respondent, vide its letter dated 11.01.2013, called upon the petitioner to settle his accounts, inter-alia claiming that he is entitled to 3.08 shares of petitioner no. 2 valued at USD 275,000 per shares as part of his compensation.

19. On 25.01.2013 the petitioners sent an alleged full and final settlement which was payable to the respondent. The respondent, however, did not sign the same and called upon the petitioners to clear all his dues.

20. On 22.04.2013, the petitioners informed the respondent that they are under financial constraints and of their inability to clear the dues of the respondent forthwith.

21. It is only at this stage, that vide legal notice dated 01.08.2013, the petitioners alleged certain breaches of the Agreement against the respondent and raised a claim against the respondent.

22. The respondent vide its letter dated 08.08.2013 addressed to Indian Council of Arbitration invoked the Arbitration Agreement under the Appointment Agreement as also the SIA and requested the Indian Council of Arbitration to initiate the arbitration proceedings and appoint an arbitrator for adjudication of the disputes.

23. The respondent also filed a petition under Section 9 of the Act, being OMP No.777/2013 before this Court, which was disposed of vide order dated 10.12.2013 inter-alia directing that the petition be placed before the Arbitrator appointed by the Indian Council of Arbitration, who may treat the same as an application under Section 17 of the Act.

24. The arbitration resulted in the impugned award holding the respondent to be entitled to 2.43 shares of petitioner no.2 valued at USD OMP No.388/2015 Page 8 275,000 per share and the salary amount of Rs.27.20 lacs, which had been directed to be deposited with the Registrar of this Court in terms of the order dated 10.12.2013 passed by this Court in OMP 777/2013 and also interest @ 12% p.a. from the date of respondent's resignation till the date of award and further interest @ 18% till the date of payment.

25. The present petition has been filed challenging the said impugned award.

26. It is firstly contended by the learned senior counsel for the petitioners that the disputes raised by the respondent related to two different agreements; one being the payment under Employment Agreement, while the other being entitlement to share value under SIA; both having separate Arbitration Agreement(s) and one being governed by the laws of India while the other being governed by laws of Malta. The learned senior counsel submits that, therefore, a common arbitration was not maintainable. Reliance in this regard was placed on the judgment of Supreme Court in Duro Felguera S.A. v. Gangavaram Port Limited, (2017) 9 SCC 729.

27. On the other hand, learned counsel for the respondent submits that the two agreements form part of the same transaction. He further submits that Clause 23.1 (d) of the Appointment Agreement clearly provided that in case a dispute arises in relation to the said Agreement and the SIA, the said disputes were to be referred to and heard by the same Arbitral Tribunal. He submits that the objection of the petitioners on a common arbitration was therefore, rightly rejected by the Arbitral Tribunal vide its order dated 02.04.2014. He further placed reliance of the judgment of Supreme Court in P.R.Shah, Shares and Stock Brokers Private Limited OMP No.388/2015 Page 9 v. B.H.H. Securities Private Limited and Others,(2012) 1 SCC 594 to submit that in the circumstances like the present, a common and single arbitration was held to be maintainable and no fault can be found in the award on this count.

28. In my opinion, the objection raised by the petitioners has no merit.

29. Clause 23.1(d) of the Appointment Agreement expressly provides that in the case of disputes arising under the said Agreement as well as the SIA, the same shall be referred to and heard by the same Arbitral Tribunal. Further, the Employment Letter also provides that the terms and conditions of the employment are contained in the annexure (so called Appointment & Employment

Agreement) and also in the accompanying "Stock Issuance Agreement". The two Agreements therefore form part of one transaction and contain the terms and conditions of the employment of the respondent. The disputes having arisen in relation to the employment, were rightly referred to a common Arbitration by the Indian Council of Arbitration.

30. In P.R. Shah (supra) Supreme Court had explained the circumstances where there can be joint arbitration, even where there are separate agreements between the parties. The present is one of such a case. I may only quote paragraph 19 of the said judgment:

> "19. If A had a claim against B and C, and there was an arbitration agreement between A and B but there was no arbitration agreement between A and C, it might not be possible to have a joint arbitration against B and C. A cannot make a claim against C in an arbitration against B, on the ground that the claim was being made jointly against B and C, as C was not a party to the arbitration agreement.
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> OMP No.388/2015 Page 10 But if A had a claim against B and C and if A had an arbitration agreement with B and A also had a separate arbitration agreement with C, there is no reason why A cannot have a joint arbitration against B & C. Obviously, having an arbitration between A and B and another arbitration between A and C in regard to the same claim would lead to conflicting decisions. In such a case, to deny the benefit of a single arbitration against B and C on the ground that the arbitration agreements against B and C are different, would lead to multiplicity of proceedings, conflicting decisions and cause injustice. It would be proper and just to say that when A has a claim jointly against B and C, and when there are provisions for arbitration in respect of both B and C, there can be a single arbitration."

31. In Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc. (2013) 1 SCC 641, the Supreme Court held as under:-

> "70. 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 (sic underlying) 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(2nd Edn.) by Sir Michael J. Mustill:
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> OMP No.388/2015 Page 11 "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 party 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."

71. Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the courts under the English law have, in certain cases, also applied the "group of companies doctrine". This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non- signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non- signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement. [Russell on Arbitration (23rd Edn.)]

72. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, OMP No.388/2015 Page 12 "intention of the parties" is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non- signatory parties.

73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.

74. In a case like the present one, where origin and end of all is with the mother or the principal agreement, the fact that a party was non-signatory to one or other agreement may not be of much significance. The performance of any one of such agreements may be quite irrelevant without the performance and fulfilment of the principal or the mother agreement. Besides designing the corporate management to successfully complete the joint ventures, where the parties execute different agreements but all with one primary object in mind, the court would normally hold the OMP No.388/2015 Page 13 parties to the bargain of arbitration and not encourage its avoidance. In cases involving execution of such multiple agreements, two essential features exist; firstly, all

ancillary agreements are relatable to the mother agreement and secondly, performance of one is so intrinsically interlinked with the other agreements that they are incapable of being beneficially performed without performance of the others or severed from the rest. The intention of the parties to refer all the disputes between all the parties to the Arbitral Tribunal is one of the determinative factors.

75. We may notice that this doctrine does not have universal acceptance. Some jurisdictions, for example, Switzerland, have refused to recognise the doctrine, while others have been equivocal. The doctrine has found favourable consideration in the United States and French jurisdictions. The US Supreme Court in Ruhrgas AG v. Marathon Oil Co. [143 L Ed 2d 760 : 526 US 574 (1999)] discussed this doctrine at some length and relied on more traditional principles, such as, the non-signatory being an alter ego, estoppel, agency and third-party beneficiaries to find jurisdiction over the non-signatories.

76. The Court will have to examine such pleas with greater caution and by definite reference to the language of the contract and intention of the parties. In the case of composite transactions and multiple agreements, it may again be possible to invoke such principle in accepting the pleas of non-signatory parties for reference to arbitration. Where the agreements are consequential and in the nature of a follow-up to the principal or mother agreement, the latter containing the arbitration agreement and such agreements being so intrinsically intermingled or OMP No.388/2015 Page 14 interdependent that it is their composite performance which shall discharge the parties of their respective mutual obligations and performances, this would be a sufficient indicator of intent of the parties to refer signatory as well as non-signatory parties to arbitration. The principle of "composite performance" would have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand and the explicit intention of the parties and the attendant circumstances on the other.

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105. We have already discussed that under the group of companies doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties.

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108. In the present case, the corporate structure of the respondent companies as well as that of the appellant companies clearly demonstrates a legal relationship which not only is inter-legal relationship but also intra-legal relationship between the parties to the lis or persons claiming under them. They have contractual relationship which arises out of the various contracts that spell out the terms, obligations and roles of the respective parties which they were expected to perform for attaining the object of successful completion of the joint venture agreement. This joint venture project was not dependent on any single agreement but was capable of being achieved only upon fulfilment of all these agreements. If one floats a joint OMP No.388/2015 Page 15 venture company,

one must essentially know how to manage it and what shall be the methodology adopted for its management. If one manages it well, one must know what goods the said company is to produce and with what technical know-how. Even if these requisites are satisfied, then also one is required to know how to create market, distribute and export such goods. It is nothing but one single chain consisting of different components. The parties may choose to sign different agreements to effectively implement various aforementioned facets right from managing to making profits in a joint venture company. A party may not be signatory to an agreement but its execution may directly be relatable to the main contract even though he claims through or under one of the main parties to the agreement. In such situations, the parties would aim at achieving the object of making their bargain successful by execution of various agreements like in the present case.

The present case, in my opinion, is fully covered by the above judgment.

32. The judgment in Duro Felguera S.A.(supra) cannot be of much assistance to the petitioners as it was dealing with a case under Section 11 of the Act and was decided taking into account the amendment to the Act by way of incorporation of Section 11(6A) to the Act. Paragraph 22 of the judgment is important to note this distinction:

> "22. On behalf of GPL, it was repeatedly urged that the works are intrinsically connected, inseparable, integrated, interlinked and that they are one composite contract and that they were split up only on the request and representations given by Duro Felguera and FGI. As discussed earlier, as per amended provision Section 11 (6A), the power of the Supreme Court or the High Court is only to examine the OMP No.388/2015 Page 16 existence of an arbitration agreement. From the record, all that we could see are five separate Letters of Award; five separate Contracts; separate subject matters; separate and distinct work; each containing separate arbitration clause signed by the respective parties to the contract."

33. The Supreme Court had further distinguished the case of Chloro Controls India (P)Ltd. (supra) as under:

> "42. The learned Senior Counsel for GPL relied upon Chloro Controls India (P) Ltd. (supra), to contend that where various agreements constitute a composite transaction, court can refer disputes to arbitration if all ancillary agreements are relatable to principal agreement and performance of one agreement is so intrinsically interlinked with other agreements. Even though Chloro Controls has considered the doctrine of "composite reference", "composite performance" etc., ratio of Chloro Controls may not be applicable to the case in hand. In Chloro Controls, the arbitration clause in the principal agreement i.e. clause (30) required that any dispute or difference arising under or in connection with the principal (mother) agreement, which could not be settled by friendly negotiation and agreement between the parties, would be finally settled by arbitration conducted in accordance with Rules of ICC. The words thereon "under and in connection with" in the principal agreement was very wide to make it more comprehensive. In that background, the

> performance of all other agreements by respective parties including third parties/non-signatories had to fall in line with the principal agreement. In such factual background, it was held that all agreements pertaining to the entire disputes are to be settled by a "composite reference". The case in hand stands entirely on different footing. As discussed earlier, all five different Packages as well as the Corporate Guarantee have separate arbitration clauses OMP No.388/2015 Page 17 and they do not depend on the terms and conditions of the Original Package No.4 TD nor on the MoU, which is intended to have clarity in execution of the work."

34. In the present case, however, the judgment of Supreme Court in Chloro Controls India (P) Ltd (supra) will squarely apply.

35. It is also worth noting that even in Duro Felguera (supra), as far as the package 6,7,8 and 9 were concerned, Supreme Court appointed the Arbitral Tribunal consisting of same arbitrators, though, these were ordered to be separately constituted domestic Arbitral Tribunals. The present is a case where the parties have travelled beyond Section 11 of the Act. The Arbitrator has also considered the effect of the two different agreements and the two different Arbitration Agreements and has concluded that a common arbitration shall lie. It is not even the case of the petitioners that any prejudice was caused to them due to a common arbitration. I find no infirmity in the said finding of the Arbitrator and therefore, the objection against the Award on this issue is rejected.

36. As far as the application of laws of Malta in relation to the SIA is concerned, it is not shown by the petitioners how the application of the said laws of Malta would, in any manner, make the Impugned Award in conflict with the said laws. The objection in this regard is, therefore, fallacious and is rejected.

37. Learned senior counsel for the petitioners next contended that the arbitration proceedings themselves were not properly initiated/ invoked. He submitted that no notice invoking arbitration agreement had been received by the petitioners.

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38. I find no merit in the said objection. It is not disputed before me that before appointment of an Arbitrator, a notice was duly served by the Indian Council of Arbitration on the petitioners. The Arbitration clause, in either of the two above mentioned agreements, does not provide for any pre-condition of notice being served by the party claiming arbitration on the other before a reference for appointment of an arbitrator is made to the Indian Council of Arbitration. The existence of disputes between the parties is not denied by the petitioners. It is also rightly contended by the learned counsel for the respondent that before the Arbitrator the only objection of jurisdiction taken was with respect to the common arbitration in relation to the two agreements and not with respect to non receipt of notice of invocation of arbitration by the petitioners. Non-receipt of the notice is a question of fact and cannot be allowed to be raised for the first time in a petition under Section 34 of the Act. Though, there is no merit in the objection raised by the petitioners, even otherwise, Section 4 of the Act would operate as a waiver of said objection on the part of the petitioners. Section 4 of

the Act is reproduced herein below:

> Section 4 of the Act "4. Waiver of right to object.--A party who knows that--
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> (a) any provision of this Part from which the parties may derogate, or
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> (b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-

compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object."

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39. The next contention raised by learned senior counsel for the petitioners is that the arbitrator has erred in finding the respondent not guilty of breach of Clause 4 of the Appointment Agreement. Reliance in this regard was made to the emails dated 22.01.2010, 02.05.2012, 13.07.2012, 31.07.2012 and 31.10.2012.

40. Clause 4 of the Appointment Agreement is reproduced herein below:

> "Clause 4. Duties Subject to overall superintendence, control and directions of the Board of Director, you shall devote all your working time, attention and abilities to the business of the Company, confirm to and comply with the directions given by the Board of Directors, work faithfully and diligently in the best interests of the Company and use best endeavors to promote the interest of the Company. You shall have the duties, responsibilities and authority customarily accorded to the president of an organization, including running the day to day operations of the Company subject always to the authority of the Board of Directors. You shall be responsible for the following matters relating to the Company and shall report to Ameet Shah, Sourabh Sen and/or Aparna Doshi or other person(s) as per the Board of Directors of the Company; In addition you shall be responsible for such duties as may be assigned to you in or in relation to the Affiliates of the Company operating in India (namely, subsidiary/ SPV of the Company's parent company; (Astonfield Renewable. Resources Limited.) I. GENERAL ROLES AND RESPONSIBILITIES A. BE A LEADER OMP No.388/2015 Page 20 Develop Aston field Renewable Resources Limited into the leading Indian renewable energy company and establish a dominant market share in South Asia
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> -Advise the Board
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> -Advocate and promote the Company's mission to develop renewable energy projects · Support and motivate employees to build a world class organization B. BE A VISIONARY AND PROVIOE INFORMATION . Ensure that the staff and Board have

sufficient and up-to-date information · Look to the future for change opportunities and leverage your experience of 25 years in the power industry.

· Serve as the interface between the Board and employees · Serve as the interfaces between the Company and community C. BE A DECISION MAKER · Formulate policies, strategic plans, establish operating plans, implement processes for project management and implementation of power projects and submit these recommendations to the Board Decide or guide courses of action In operations by staff D. BE A MANAGER · Oversee operations of the Company in India · Implement plans approved by the Executive Committee · Manage human resources of the Company · Manage financial and physical resources OMP No.388/2015 Page 21 E. ASSIST IN BOARD DEVELOPMENT · Assist in the selection and evaluation of potential board members · Makes recommendation and support the Board during orientation and self-evaluation II. SPECIFIC RESPONSIBILITIES· In addition to any· specific duties assigned to you by the Board from time to time, you shall also have the following responsibilities:

A. Leverage your relationships and experience with Investors and lenders alike to secure financing for ARRL's projects in India.- You have been thoroughly debriefed on the financing strategy for ARRL and it will require significant Input from you as the Head of the Company's operations In India. You will oversee the operations of the company's' projects from accounting, financial tax and compliance point· of view and working with the core corporate finance team to achieve departmental and organizational goals. You will coordinate with banking institutions on various matters to. Include project financing, creating, reviewing and updating business models.

B. Project Development, Implementation and Commissioning Oversee business development on a nationwide basis, expand technical partnerships, implement project management capabilities and ensure timely delivery and commissioning of power project.

C. Financial, Tax, Risk and Facilities Management- Recommend yearly budget for Board approval and prudently manage the Company's resources within OMP No.388/2015 Page 22 those budget guidelines according to current laws and regulations D. Human Resource Management-Effectively manage the human resources of the Company according to authorized personnel policies and procedures that fully conform to current laws and regulations. Develop the core management team for the Company to oversee its power projects in first 6 months of tenure as discussed with Executive Committee. You will run the day-to-day operations of the Company, implementing the business plan and hire the support team.

E. Raise Market Capitalization of the Company through successful execution of its operating plan to develop 300MW's of renewable energy projects in 3- 4 years. Build

a sustainable and profitable business model that will lead to wealth creation for all stakeholders, employees, shareholders and founders.

F. Community and Public Relations Assure the Company and its mission, programs, products and services are consistently presented in strong, positive image to relevant stakeholders.

G. Any other duty which may be assigned to him from the Board of Directors from time to time."

41. The Arbitrator has examined the above mentioned emails and has concluded as under:

"2.16 The Respondents' contention regarding non performance centres on the Claimant's alleged inability to OMP No.388/2015 Page 23 deliver on this target, resulting in reduced income streams and alleged losses for them which are the basis of their counter claim. In support of this contention, the Respondents cite email correspondence from Shri Ameet Shah to the Claimant on 22 January 2010 (Annexure"C" in Documents referred to in Respondents' Written Submissions), 2 May 2012 (Annexure "D"), 13 July 2012 (Annexure "E"), 31 July 2012 (Annexure "F") to buttress their claim that they were dissatisfied with the Claimant's performance. While an examination of this correspondence reflects· the unsatisfactory performance of the Company, it cannot be said to unequivocally demonstrate that the Claimant was solely or directly responsible for this. On the contrary a paragraph of the email dated 22 January 2010 cited above appears to support the Claimant's contention that the entitlement to shares under Clause 2(a) was not linked to performance. The paragraph reads:

"Your put option to the Company for 100 shares at USD275K needs to be linked to a minimum of 50 MW of capacity being commissioned in the Company. As it stands - the Company is liable to pay you a cash fee of USD, 753 per day amounting to USD 275K for the year 2010. This is simply not a viable option for the Company for 2010 and a source for cash savings for the Company this year which is being demanded by the investors. This restructure does not mean the put option is being taken away, it simply aligns it with the Company's operations generating cash."

xxxx 2.20 Taken together, these elements do not in any way establish the Respondents' contentions that the Claimant was guilty of poor performance. On the contrary, the fact that the Respondents were still considering a role for Claimant subsequent to his resignation would seem to OMP No.388/2015 Page 24 suggest that they valued his services. The reference to "your shareholding" in Shri Shah's message quoted above also points to an acknowledgement of the Claimant's entitlements. The Respondents have argued that the above correspondence took place before the Claimant's alleged violations of Clauses 9 and 11 of the Employment Agreement came to their notice. Be that as it may, that cannot wash away the fact that there was neither a suggestion of poor performance nor of any lack of entitlement to the shares under Clause 2(a) of the SIA in the contemporaneous correspondence.

xxxx 3.9 The Employment Agreement does not contain any penal provisions for non achievement of any of the deliverables in Clause 4.II. Moreover, it is the burden of the Respondents to establish that the non-achievement of the above target was due to the lapses of the Claimant. The Respondents have cited the correspondence listed in paragraph 2.16 above to show that the Claimant was repeatedly cautioned about his poor performance. However, none of these messages invokes or refers to the contractual provisions of Clause 4. None of these messages reflects the Respondents' view that the poor performance was solely or substantially due to the lapses of the Claimant.

xxxxxxx Conclusion- It is not for the undersigned to conduct a forensic examination of the causes of non-achievement of targets by the Company. The brief question which is required to be answered here is whether the Respondents have demonstrated a clear nexus between the contractual responsibilities of the Claimant and the performance of the Company. In view of the factual and evidentiary Matrix laid out above, the only conclusion which can be drawn is OMP No.388/2015 Page 25 that the Respondents have not demonstrated such a nexus. Therefore, it is concluded that the Respondents have not established their counter claim."

42. The Arbitrator having examined the emails and come to the conclusion, which is neither found to be arbitrary nor unreasonable, cannot be interfered with in exercise of limited jurisdiction of this Court under Section 34 of the Act.

43. It is further contended by the learned senior counsel for the petitioners that the Arbitrator having found the respondent guilty of violation of Clause 11 of the Appointment Agreement, he could not have proceeded to grant pro-rata shares in favour of the respondent. He submits that in terms of Clause 2(a) of SIA, future allotment of shares in favour of the respondent was subject to his fulfillment of the representation and warranty under the Appointment Agreement. Once the respondent was held to be in breach of the agreement, he was disentitled to any future allotment of shares. It is contended that the Arbitrator, while awarding the pro-rata shares in favour of the respondent, has travelled beyond the terms of the contract.

44. I am unable to accept the above submission of learned senior counsel for the petitioner.

45. Clause 2(a) of the SIA has been reproduced above. It specifically states that where the Employment Agreement is terminated "for any reason whatsoever prior to the aforesaid periods" i.e. two years, three years, four years and five years respectively from the Employment Date, the respondent shall be entitled to fractional value of the shares on the basis of number of days of completed service. The Employment OMP No.388/2015 Page 26 Agreement was terminated only on 02.01.2013 on the acceptance of resignation letter, therefore, the respondent may have been entitled to pro-rata shares till that date. The Arbitrator has, however, held respondent entitled to pro-rata shares only till 07.5.2012 i.e. the date on which the respondent committed breach of Clause 11 of the Appointment Agreement as per the Sole Arbitrator.

46. In any case, the Arbitrator interpreted Clause 2(a) of SIA, in my opinion little more favourable of the petitioners as under:

"2.13 It is clear that Clause 2(a) could have been drafted with greater clarity. While on the one hand it would be unusual for the issue of performance linkage to figure in both Clause 2(a) as well as 2(b), it would be equally anomalous for the proviso in the second sentence of Clause 2(a) to completely override the stipulations in the first sentence.

Conclusion -After having examined the text of Clause 2(a) and considered the arguments of the Parties, the undersigned is of the view that the stipulations in the first part of the first sentence of Clause 2(a)(" Subject to and in reliance upon the representations, warranties, terms and conditions of this Agreement and the Employment Agreement, the Company agrees to issue to you, ……. ") are a precondition for the Claimant's entitlement of shares · and cannot be overridden by the proviso in the second sentence."

47. The Arbitrator further discusses the impact of breach of Clause 11 of the Appointment & Employment Agreement on the rights of the respondent as under:

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"2.35 The key issue to be decided is whether on

satisfaction of the stipulations in the first sentence of Clause 2(a), the shares vested in the Claimant or whether his entitlements were further subject to the procedural requirements listed in Clauses 3, 4 and 8(b)(vi) of the SIA.

2.36 It is important to distinguish the substantive from the procedural issues. The substantive issue is that on satisfaction of the stipulations in Clause 2(a), an entitlement or interest was created in favour of the Claimant.(How the violation of Clause 9 of the Employment Agreement by the Claimant affects this entitlement is dealt with separately). Whether or not the shares were delivered physically is a subsidiary issue which does not detract from the fact that the entitlement was created. An examination of the correspondence referred to by the Claimant makes it clear that this interest or entitlement in favour of the Claimant was not disputed by the Respondents at that time.

Conclusion- Whether or not the events envisaged in Clauses 3, 4 and 8 of the SIA took place is not relevant for determining whether an interest was created in favour of the Claimant by the provisions of Clause 2(a). The creation of the interest was subject to the provisions of Clause 2(a) alone. Once the interest was created, the Claimant was entitled to the repurchase option under Clause 7 of the SIA.

48. A reading of the above would show that the present is not a case where the Arbitrator has acted in ignorance of the terms of the Agreement, but is a case where the Arbitrator has interpreted the terms of the Agreement to reach a particular conclusion. This distinction is very relevant as construction of the terms of the contract is primarily for an OMP No.388/2015 Page 28 Arbitrator to decide unless the Arbitrator construed the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.

49. In this regard, the Supreme Court in the case of Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49 reiterated as under:

> "42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:
>
> "28.Rules applicable to substance of dispute.--(1)-
>
> (2)*** (3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

43. In McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co.

OMP No.388/2015 Page 29 Ltd., (2006) 11 SCC 181] , this Court held as under:

> (SCC pp. 225-26, paras 112-13) "112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract.

Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law.

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."

44. In MSK Projects (I) (JV) Ltd. v. State of Rajasthan [(2011) 10 SCC 573 (SCC pp. 581-82, para

17) "17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he

commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award OMP No.388/2015 Page 30 can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award."

45. In Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [(2012) 5 SCC 306], the Court held: (SCC pp. 320- 21, paras 43-45) "43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in SAIL v. Gupta Brother Steel Tubes Ltd.(2009) 10 SCC 63 and which has been referred to above. Similar view has been taken later in Sumitomo Heavy Industries Ltd. v. ONGC Ltd.(2010) 11 SCC 296 to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.

45. This para 43 reads as follows: (Sumitomo case [(2010) 11 SCC 296, SCC p. 313) OMP No.388/2015 Page 31 '43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse.

Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in Kwality Mfg.

Corpn. v. Central Warehousing Corpn. (2009) 5 SCC 142 the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding."

50. In the present case, the interpretation given to the Clause 2(a) of the Appointment Agreement is most reasonable and cannot be faulted.

51. It is then contended by learned senior counsel for the petitioners that the Arbitrator has proceeded to award in excess of even what was claimed by the respondent. In this regard he drew my attention to the prayer made by the respondent in its Statement of Claim wherein the

respondent had claimed only the value of 1.08 shares. He submits that the Arbitrator, in the Impugned Award, granted 2.43 shares in favour of the respondent i.e. much beyond the claim made by the respondent himself.

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52. Prayer A in the Statement of Claim filed by the respondent is reproduced herein below:

> "A. USD 1,144,000 being the value of the 1.08 Shares to which Claimant is entitled and in respect of which payment must be made by the Respondents to the Claimant. The total amount receivable by the Claimant, under this head as per the current exchange rate amounts to Rs.6,87,65,840/- (Rs.Six Crores, Eighty Seven Lakhs, Sixty Five Thousand, Eight Hundred and Forty Only)."

53. On the other hand, learned counsel for the respondent, in my opinion rightly so, submits that the plea taken by the petitioners is not only fallacious but is also mala fide as the petitioners are trying to take advantage of an inadvertent typographical error in the prayer clause of the Statement of Claim. In this regard he draws my attention to paragraph 8 of the Statement of Claim which clearly shows that the respondent had claimed an amount of Rs.6,87,65,842/- as the current value of 3.08 shares, which is the same amount being claimed in prayer A quoted above. Learned counsel for the respondent further draws attention of this Court to the issues framed by the Arbitrator wherein the first issue is as to "whether the claimant is entitled to recover from the respondents, the value of 3.08 shares, as claimed".

54. From the above, it is clear that the objection raised by the petitioners is merely trying to take advantage of a typographical error in the Statement of Claim, which caused no prejudice to the petitioners inasmuch as the petitioners were at all time aware that the respondent's claim was to 3.08 shares and not 1.08 shares.

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55. It is then contended by the learned senior counsel for the petitioners that the Arbitrator has wrongly valued the shares in the Impugned Award. It is submitted that while the respondent had failed to give fair value of the shares, the petitioners had tendered in evidence the valuation thereof in form of a certificate from Chartered Accountant, which showed the value of the shares as only USD 24.68 as on 31.03.2013. He therefore, submits that the Arbitrator has wrongly applied the value of USD 275,000 per share to the 0.43 shares to which the respondent was held entitled to in the Award.

56. On the other hand, learned counsel for the respondent submits that the alleged certificate issued by the Chartered Accountant had not been proved on record by the petitioners as the author of the said certificate was not produced as a witness. He further submits that the fair value of the shares was within the knowledge of the petitioners and could have been derived only from the books of account of the petitioner no.2; the same were not produced before the Arbitrator. He further

submits that on the other hand, the respondent had led evidence of one Mr.Sunil M.Buckshee (CW-1), Chartered Accountant and Cost Accountant, who had deposed that in his opinion the value of the shares would be higher than the base value of USD 275,000. Learned counsel for the respondent submits that though 47 questions were put to the said witness, there was no question put to him challenging his opinion on the valuation of the shares. It is lastly contended by learned counsel for the respondent that a reading of the email dated 01.02.2013 from Co-Chairman and Director of the petitioners would show that even the petitioners were of the opinion that the valuation of the shares would be much more than USD 275,000.

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57. I have considered the submissions made by the counsels for the parties. Clause 7 of the SIA provides that the pre-agreed value of the first and second share was USD 275,000 per share. Therefore, there can be no dispute on the same. The value of the subsequent shares was to be determined on the fair market value. In the present case, the Arbitrator has taken the fair market value to be USD 275,000. He has held as under:

> III: The parties have not produced any basis for calculating the "fair market value" of the share entitlement beyond the first 2 shares as required under Clause 2(a) of the SIA. It is therefore decided that the value of these shares will be the same as for the first 2 shares, i.e. US$275,000 per share. The value of 0.43 shares therefore works out to US$119,041 (one lakh nineteen thousand and forty one).
>
> In absence of evidence, the arbitrator has taken the value of the first two shares to be also applicable for the next 0.43 shares. The same is a reasonable approach and I do not find any infirmity with the same.

58. It is next contended by the learned senior counsel for the petitioners that the Arbitrator has erred in granting interest @ 12% p.a. in favour of the respondent. I find no merit in the said submission. Grant of interest @ 12% p.a. cannot be said to be so unreasonable so as to warrant interference by this Court in exercise of its power under Section 34 of the Act. Award of interest is at the discretion of the Arbitrator and until and unless it is shown that said discretion is exercised in a perverse manner, the same cannot be interfered with by the Court in exercise of its power under Section 34 of the Act. Section 31(8) of the Act, prior to its amendment in 2015, in fact, prescribed that unless the award otherwise OMP No.388/2015 Page 35 directed, the sum awarded by the arbitrator shall carry interest @18% p.a. Therefore, challenge to award of interest @12% p.a. cannot be sustained.

59. It is lastly submitted by learned senior counsel for the petitioners that the Impugned Award makes both the petitioners jointly and severely liable for the payment of the awarded amount where this liability could only have been of petitioner no.2, who was the party of the SIA. It is seen from the correspondence that the petitioners were dealing jointly with the respondent in connection with the employment. The Arbitrator has also held that the two agreements form part of the same transaction. The petitioner no.2 is the parent company of petitioner no.1. In my view, therefore, the

petitioners cannot take benefit of corporate veil to deny their joint and several liability under the Award.

60. In view of the above, I find no merit in the present petition and same is accordingly dismissed with cost, quantified at Rs.50,000/-.

NAVIN CHAWLA, J

JANUARY 15, 2018/Arya