Jinneng Clean Energy Technology Ltd vs Sunedison Energy Holding (Singapore) ... on 2 September, 2024

Author: C.Saravanan

Bench: C.Saravanan

Arb.O.P.(Com.D

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On 28.03.2024
Pronounced On 02.09.2024

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com. Div.)No.186 of 2023
and
E.P.No.143364 of 2022

Jinneng Clean Energy Technology Ltd. ... P

.vs.

1. SunEdison Energy Holding (Singapore) Pte.Ltd. (She)
2. SunEdison Solar Power India Pvt. Ltd. (SSPI)
3. SEI Adhavan Power Pvt. Ltd. (SEI Adhavan) ... Re

Prayer:

i. Arb.O.P.(Com.Div.)No.186 of 2023 has been filed under Sectio 47 to 49 of the Arbitration and Conciliation Act, 1996 to:

a) declare that the Final Arbitral Award dated 22nd February 20 Addendum to Final Arbitral Award dated 8th March 2021 pass the Arbitral Tribunal appointed by the Singapore Internati Arbitration Centre is enforceable under Part-1 Chapter-II Arbitration & Conciliation Act, 1996;

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b) direct the Respondents to make payment of;

i. US$ 7,348,403.10 along with interest at the ra of 5.33% per annum from 1 April 2016 upto the date of payment;

ii. US$ 275,000.00 along with interest at the rat of 5.33% per annum from 20 August 2018 upto the date of payment; and

iii. S$ 796,000.00, S$36,986.01, US$ 21,543.20, RMB 5,144.00 and USD 349,093.95 being the legal costs, disbursements, cost of arbitration along with interest at the rate of 5.33% per annum from the date of payment in terms of the Arbitral Award dated 22 February 2021 till the date of payment in terms of the Arbitral Award dated 22 February 2021 till the date of payment in terms of the Arbitral Award dated 22 February 2021 and addendum to Final Award dated 8 March 2021 made and published by SIAC.

c) Direct the Respondents to pay the Petitioner the costs of th Petition.

ii. E.P.No.143364 of 2022 has been filed to execute the Final A Award dated 22nd February 2021 and Addendum to Final Arbit Award dated 8th March 2021 passed by the Arbitral Tribunal appointed by the Singapore International Arbitration Centr the Respondent.

For Petitioner : Mr.Rahul V.Narichania
Senior Counsel
Mr.Sunilkumar V
Neelambaran and Kannan P.T.

For Respondents :
For R1 : Mr.V.Ramakrishnan Viraraghavan
Senior Counsel
for Ms.Apporva vinjamur for
M/s.Dua Associates

For R3 : Mr.M.S.Krishnan
Senior Counsel
for M/s.Edward James

ORDER

The above Original Petition has been filed by the successful Award Holder under Chapter I Part II of the Arbitration and Conciliation Act, 1996 to recognize the Final Award dated 22.02.2021 and the addendum to the Final Award dated 08.03.2021.

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2. The respective legal contentions of the Petitioner (the claimant) and the Award Debtor Respondent No.2 (the Engineering Company) and the Award Debtor Respondent No.3 (the Project Company) shall be adverted after narrating the facts of the case. I propose to narrate the facts in two parts.

3. In Part I, I shall narrate the facts prior to initiation of the Arbitral Proceedings. In Part II, I shall narrate the facts after the initiation of Arbitral Proceedings up to the culmination of the Award dated 22.02.2021. In Part III, I shall advert to the submission of the Petitioner, the Respondent No.2 and the Respondent No.3 and thereafter proceed to give my reasons followed by the conclusion in Part-IV.

4. The Petitioner has also filed EP.No.143364 of 2022 simultaneously on 10.02.2023 to execute the aforesaid Award. The Respondent No.3 herein was in caveat. Initially, the Respondent No.1 was not a party to the proceedings. Subsequently, the Respondent No.1 was _____ Page No 4 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 impleaded as Respondent No.3. By an Order dated 30.01.2024, the ranks of each of the Respondents were thereafter interchanged corresponding to their ranks in the Arbitral proceedings before the Arbitral Tribunal.

5. By an Award dated 22.02.2021, the Arbitral Tribunal has awarded the following amounts to the Petitioner herein (Award Holder) who was the Claimant before the Arbitral Tribunal. Operative portion of the said Award reads as under:-

> XVIII. SUMMARY OF FINDINGS ON ISSUES
>
> 234. The findings of the Tribunal are as follows:-
>
> a) The Claimant and the Respondents, jointly and severally, entered into the PV Modules Delivery Agreement, which includes NDU-3 on the terms contained therein.
>
> b) The Respondents are parties to NDU-3.
>
> c) The Respondents are parties to the arbitration agreement in Clause 9 of NDU-3.

d) NDU-3 is a negative pledge: it does not vest in the Claimant any security interest in the NDU Shares, and it does not create an express trust or any trust by operation of law.

e) The Respondents were unjustly enriched by the _____ Page No 5 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 delivery of the remaining PV Modules to enable the Adhavan Project to be completed in time, thereby increasing their economic value as a "yieldco" under SunEdison Ine business model.

f) The Claimant has no equitable lien on the Adhavan Project.

g) NDU-3 was not superseded by subsequent events as alleged by the Respondents.

h) The Respondents were in breach of the PV Modules Delivery Agreement and NDU-3 and caused loss and damage to the Claimant for which it was entitled to payment of the unpaid invoices amounting to US$7,348,403.10.

i) The 2nd Respondent was in breach of NDU-3 by selling the NDU Shares to Greenko without the consent of the Claimant, and the 3rd Respondent was in breach of NDU-3 by allowing the acquisition of the NDU Shares by Greenko and thereby caused loss and damage to the Claimant in the sum of US$7,348,403.10.

j) The Claimant is entitled to claim as damages against the 2nd and 3rd Respondents jointly and severally its unrecovered costs in the Indian proceedings amounting to US$275,000,121 “249. The cost of arbitration being the Tribunal’s fees and expenses as well as SIAC’s administrative fees and expenses as fixed by the Court of Arbitration of SIAC below, shall be borne by the Respondents _____ Page No 6 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Tribunal’s Fees & Expenses USD Mr Chan Sek Keong SC 151,423.50 Expenses 226.35 GST N/A Sub-Total 151,649.85 Professor Lawrence Boo 75,711.75 Expenses 332.02 GST 5,323.06 Sub-total 81,366.83 Mr.V.K.Rajah SC 75,711.75 Expenses Nil GST N/A Sub-total 75,711.75 TOTAL ARBITRATOR’S FEES & EXPENSES 308,728.43 SIAC Fees & Expenses Administration Fee 38,680.50 SIAC Expenses and Incidentals 320.00 GST – Respondent’s share only 1,365.02 TOTAL SIAC ADMINISTRATION FEES & 40,365.52 EXPENSES TOTAL COSTS OF ARBITRATION 349,093.95 _____ Page No 7 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023

6. Initially, the Registry had raised the following objections on 16.03.2023 after Arb.O.P.No.(Com.Div.)No.186 of 2023 was filed:-

1) On verification it is found that Court fee not paid for enforcement of the Award under Section 47 of the Arbitration and Conciliation Act, 1996;

2) There is no provision to receive Court fee for enforcement of Award in EP proceedings.

Hence, enforcement of Award should be filed separately as OP with necessary Court fee.

3) EP could not entertained by the Registry before an order of this Court in OP for enforcement of Award u/s 47 of Arb.O.P. Hence, EP is returned with above facts.

Facts in Brief:-

7. The Respondents are part of SunEdison Group of Companies.

SunEdison Products Singapore Pte. Ltd. ("Non-Party" to Arbitral Proceeding) was the global procurement arm of the SunEdison Group of Companies. The SunEdison Products Singapore Pte. Ltd. procured material from international vendors such as the Petitioner through a 'direct delivery' model for various projects of its subsidiaries. _____ Page No 8 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023

8. This meant that while the Non-Party negotiated the pricing and terms of the procurement from vendors exclusively, the products were to be delivered at the site of the relevant project. Special Purpose Vehicle (hereinafter referred to as SPV) were set up for the project in India namely Respondent No.2 namely M/s.Sun Edison Solar Power India Private Limited (hereinafter also referred to as “the Engineering Company”) and Respondent No.3 namely M/s.SEI Adhavan Power Private (hereinafter also referred to as the “ the Project Company”).

9. 99.99% shares were held by the Respondent No.1 in both the Respondent No.2 [the Engineering Company] and the Respondent No.3 [the Project Company] and the balance 0.1% were held by SunEdison Energy Holding BV and SunEdison Products Singapore Pte. Ltd (Non- Party) in these two Respondents respectively.

10. There is no dispute that the Respondent No.1 is the Holding Company of both the Respondent No.2 (the Engineering Company) and the Respondent No.3 (the Project Company). _____ Page No 9 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023

11. On 19.08.2015, the Petitioner entered into a Module Supply Agreement (hereinafter referred to as "MSA") with the Non- Party namely SunEdison Products Singapore Pte.Ltd whereby the Petitioner agreed to sell and supply, and the Non-Party agreed to purchase, certain Photovoltaic Modules (hereinafter referred to as PV Modules), for use in the 50MW solar power plant at Virudhnagar, Tamil Nadu ("Adhavan Project") for Respondent No.3 (the Project Company). MSA read with the amendment thereto, specifically provided that the payment terms could not be assigned.

12. Under the MSA, Purchase Orders were raised by the Non-Party on the Petitioner. In turn Commercial Invoices were raised by the Petitioner on the Non-Party. The Petitioner's claim in the arbitration proceedings arose on account of a few of the Commercial Invoices raised by it on the Non-Party, under the MSA dated 19.08.2015 which were remained outstanding and remained unpaid to the Petitioner. The only company which had privity of contract with the Petitioner was the Non- Party SunEdison Products Singapore Pte.Ltd. _____ Page No 10 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023

13. Respondent No. 3 (the Project Company) is a company duly incorporated and registered under the Companies Act, 2013 and was incorporated as an SPV which owned the Adhavan project, including its assets and liabilities.

14. Respondent No. 3 (the Project Company) in turn engaged the Respondent No. 2 (the Engineering Company) as the EPC Contractor for its Project and entered inter alia into an Equipment and Material Supply Agreement dated 02.03.2016 for the procurement of all material required for the Adhavan Project. Respondent No. 3 (the Project Company) had a contractual relationship only with the Respondent No. 2 (the Engineering Company).

15. The Respondent No.3 (the Project Company) had its contractual relationship with Respondent No.2 (the Engineering Company) under Equipment and Material Supply Agreement dated 02.03.2016. _____ Page No 11 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023

16. Under the contract, the Respondent No.3 (the Project Company) intended to develop, own and operate the PV Plant and therefore, required design, engineering, procurement, manufacturing, supply, inspection, testing and commissioning of the PV Plant.

17. Respondent No.2 (the Engineering Company) was obliged under the contract to execute the project on a lump sum fixed fee on turnkey basis inclusive of execution of all supplies as set out in Clause 2.2 in accordance with Timelines, Executive Design, EHS Guidelines and other terms and conditions as set out under the Equipment and Material Supply Agreement dated 02.03.2016.

18. Since the Non-Party had failed to make payment for the supplies already made for the project of the Respondent No.3 (the Project Company), the Petitioner withheld further supply of PV Module for the project of the Respondent No.3 (the Project Company) which was being executed by the Respondent No.2 (the Engineering Company). _____ Page No 12 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023

19. The Non-Party as also the Respondent No.1 and SunEdison Energy Holding BV (Non-Party No.2) and Respondent No.1 namely SunEdison Energy Holding (Singapore) Pte. Ltd. are the subsidiary of the ultimate holding Company namely Sun Edison Inc.

20. 99.9% of the shares in both Respondent No.2 (the Engineering Company) and the Respondent No.3 (the Project Company) are held by the Respondent No.1. 0.01% shares in the Respondent No.2

(the Engineering Company) and 0.01% shares in the Respondent No.3 (the Project Company) are held by SunEdison Energy Holdings BV (Non- Party No.2) and by SunEdison Products Singapore Pte. Ltd (Non-Party) respectively.

21. Respondent No.1 has remained absent. Meanwhile, bankruptcy proceedings under Chapter-I were initiated against the Non-Party namely SunEdison Products Singapore Pte.Ltd.

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22. At the time when the Petitioner suspended delivery of the modules, the Non-Party namely SunEdison Products Singapore Pte. Ltd., approximately owed a sum of $29.40 Million (USD) to the Petitioner on account of the supplies of PV Modules to the Respondent Nos.2 & 3 (the Engineering Company) and the Project Company for the solar products being implemented for the Respondent No.3 (the Project Company).

23. The aforesaid outstanding was reduced to $7.35 Million (USD) from $29.40 Million (USD) due to certain transactions between the Petitioner and the Non-Party namely SunEdison Products Singapore Pte. Ltd. Since the PV Modules were urgently required for the project being implemented by the Respondent No.2 (the Engineering Company) for the Respondent No.3 (the Project Company), under Equipment and Material Supply Agreement dated 02.03.2016, the Directors of the Respondent No.1 namely Mr.Pashupathy Gopalan, and Mr.Ramesh Subbarao, the Director of the Respondent No.2 held negotiations with the Directors of the Petitioner.

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24. In the process, three rounds of Agreements namely Non-disposal Undertaking [NDU] was prepared and deliberated upon. A consensus was arrived at the stage of NDU-3. The drafts were signed by the Director of the Respondent No.3 namely Mr.Vinay Bhatia as the authorized signatory of the Respondent No.1.

25. The drafts of NDU-1, NDU-2 and NDU-3 also contained the arbitration clause which led to the invocation of the arbitration clause by the Petitioner as no payments were made to the Petitioner which ultimately culminated in the Award which is sought to be enforced by the Petitioner and stoutly opposed by the Respondent No.2 (the Engineering Company) and the Respondent No.3 (the Project Company). During the interregnum, Respondent No.1 sold its shares in Respondent No.3 (the Project Company) to a third party which were offered as a security for payment by Respondent No.2 (the Engineering Company).

26. The negotiations were initiated by the Respondent No.1 represented by its Director namely Mr.Pashupathy Gopalan between _____ Page No 15 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 15.03.2016 and 18.03.2016 with the Petitioner to persuade the Petitioner to deliver remaining PV Modules to complete the

Adhavan Project of Respondent No.3 (the Project Company) which was being implemented by the Respondent No.2 (the Engineering Company) for the Respondent No.3 (the Project Company) under Equipment and Material Supply Agreement dated 02.03.2016 on behalf of the SunEdison Group Companies.

27. While MSA dated 19.08.2015 was signed by Mr.David A.Ranhoff, the President, Solar Materials of the Non-Party., NDU-1, NDU-2 and NDU-3 were signed by Mr.Vinay Bhatia, the Director of the Respondent No.3 (Project Company) on behalf of the Respondent No.1 for a resumption of the delivery of the remaining PV Modules for implementation of the project of Respondent No.3 (the Project Company).

28. Under NDU, the Respondent No.1 appointed the Respondent No.3 (the Project Company) as its agent to receive and acknowledge on its behalf for service of writ, summons, order, judgment, notice or other legal process in connection with the undertaking. _____ Page No 16 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023

29. These Agreements also records that Respondent No.1 holds 99.99% of the aggregate equity capital in the Respondent No.3 (the Project Company) and further records that certain invoices raised by the Petitioner under the Sub-Contract Agreement were currently pending payment from the Respondent No.2 (Client).

30. These Agreements provide a security for the Petitioner in respect of NDU shares in Respondent No.3 (the Project Company) as in Section 2.1 of the said Agreement as mentioned above.

31. Respondent's obligation under NDU-3 reads as under:-

> "2. SUNEDISON'S UNDERTAKING 2.1 Save for as set out herein or specifically permitted by the Contractor, SunEdison^ shall until the complete discharge of the Payment Obligations by the Client*, continue to legally and beneficially hold and retain at least 24% (Twenty Four per cent) of the equity in the Company# as more specifically described in Annexure 2 ("NDU Shares") free of any Security Interest, and shall not, without prior approval from the Contractor**, until the complete and full discharge of the Payment Obligations, sell, transfer, assign, dispose of, pledge, charge or create any Security Interest on the NDU Shares in favoiur of _____ Page No 17 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 any person (including to TerraForm Global ("GLBL") or any of its affiliates pursuant). 2.2 Provided the limitation set out in this Clause 2 shall not prevent SunEdison or shall require SunEdison from obtaining any consent from the Contractor for creating any Security Interest over all or a part of NDU Shares in favour of project finance lender(s), and upon such creation, the undertaking set out herein shall automatically get subordinated to the newly created Security Interest in favour of the project finance lenders.

2.3 All obligations under this Undertaking shall automatically terminate upon receipt of the complete payment of the Invoices by the Client or SunEdison.

5. MISCELLANEOUS 5.1 Binding Obligations SunEdison confirms that its obligations under this Undertaking shall be binding upon its successors and permitted assigns.

5.2 Amendments and Waivers No term, covenant, agreement or condition of this Undertaking may be terminated, amended or compliance therewith waived (either generally or in a particular instance, retroactively or prospectively) except by an instrument or instruments in writing executed by SunEdison.

5.3 Severability of Provisions Any provision of this Undertaking which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of prohibition or unenforceability but that shall not invalidate the _____ Page No 18 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 remaining provisions of this Undertaking or affect such provision in any other jurisdiction" Note:

SunEdison^ : Respondent No.1 Client* : Respondent No.2 (the Engineering Company) Contractor** : Petitioner/Claimant Company# : Respondent No.3 (the Project Company)

32. Thus, under NDU-3, an undertaking was given to not to sell or transfer the shares in Respondent No.3 (the Project Company) by the Respondent No.1 until all the payments due to the Petitioner by the Respondent No.1 were made to the Petitioner. However, after NDU-3 was signed by the Respondent No.1 represented by Mr.Vinay Bhatia, the Director of the Respondent No.3 (the Project Company), a breach was committed by the Respondent No.1 and the Respondent No.2 (the Engineering Company) in making payments of $7.35 Million (USD) to the Petitioner.

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33. The Respondent No.1 has post facto sold all its shares to Greenko Power Projects (Mauritius) Limited in breach of clause 2 of NDU-3.

34. Respondent No.1 sold all the shares in the Respondent No.3 (the Project Company) to a third party during March 2017 in breach of Clause 2 of NDU-3. It appears that further transfers were made with which this Court is not concerned with.

35. Under these Agreements, the Respondent No.1 also represented that it had taken all necessary corporate actions/approvals to authorize execution, delivery, and performance of the Undertaking and further confirmed that save as set out in this Undertaking, the execution, delivery and performance of the obligation under the Undertaking will not be violated or conflict with:-

i. Its constitutional documents and corporate authorizations / corporate resolutions;
ii. Any other deed or document to which it is a party and by which it may be bound;

iii. Applicable Law in the jurisdiction of its _____ Page No 20 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 incorporation;

iv. SunEdison confirms in respect of itself that the execution or entering into and performance of its obligations under this Undertaking by it will constitute, private and commercial acts done and performed for private and commercial purposes;

v. SunEdison confirms that it is a duty incorporated and validly existing company under the laws of the Singapore;

vi. SunEdison represents and warrants that as on the date of this Undertaking, it holds 99.99% of issued and paid up Equity Share Capital in the Company and NDU Shares form part of these shares.

36. The Agreement also has an Arbitration Clause which reads as under:-

"9. ARBITRATION

a) If one party to this Undertaking gives the other party a notice stating that a dispute has arisen (a "Dispute Notice") and such parties are unable to resolve the dispute amicably within 30 (thirty) days of service of the Dispute Notice (or such longer period as the parties may mutually agree), then the Dispute shall be referred to arbitration at the end of such 30 (thirty) days period ("Arbitration Reference") in accordance with the terms set out in this _____ Page No 21 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Section 9.

b) The arbitration proceedings shall be governed by the provisions of Rules of Conciliation and Arbitration of the International Chamber of Commerce for the time being in force ("ICC Rules").

c) For the purpose of such arbitration, the arbitral tribunal shall comprise 3 (three) arbitrators. SunEdison, Company and Client (acting together) shall appoint an arbitrator, and the Contractor shall appoint one arbitrator within 15 days of Arbitration Reference. The two arbitrators so appointed shall, in consultation with each other, appoint the third presiding arbitrator within a period of 15 (fifteen) days thereafter.

d) The arbitration proceedings shall be held at Singapore International Arbitration Centre. The arbitration proceedings shall be in English language. The award shall be substantiated in writing. The arbitral tribunal shall also determine and decide the cost of arbitration proceedings. The award shall be binding on the disputing parties subject to applicable Laws and the award shall be enforceable in any competent court of law. The provisions of this Clause shall survive the termination of this Agreement." _____ Page No 22 of 184

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37. The Procurement Company (Non-Party) and the Respondent No.1 had a direct interest in the successes of the project implemented at the Respondent No.3 (the Project Company) out of the PV Modules supplied by the Petitioner to the Respondent No.2 (the Engineering Company) at the project site of the Respondent No.3 (the Project Company).

38. Thus, under NDU-3 dated 17.03.2016, Respondent No.2 (the Engineering Company) was to ensure payment to the Petitioner and pending payment Respondent No.1 was to ensure 24% of its stake in Respondent No.3 (the Project Company) shall not be sold, transferred, assigned, disposed or pledged or changed or create any Security Interest on the NDU shares in favoiur of any person (including to Terra Form Global ("GLBL") or any of its affiliates). All obligations under NDU-3 dated 17.03.2016 was to automatically terminate upon receipt of the complete payment of the Invoices either by Respondent No.1 or Respondent No.3 (the Project Company).

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39. The enforcement of the Award dated 22.02.2021 is resisted by the Respondent No.2 (the Engineering Company) and the Respondent No.3 (the Project Company) on the ground that the aforesaid Award dated 22.02.2021 is not a binding Award enforceable against them under Chapter I of Part II of the Arbitration and Conciliation Act, 1996 and further the Award does not satisfy the definition of "Foreign Award" within the meaning of Section 44 of the Arbitration and Conciliation Act, 1996. Respondent No.1 has remained absent.

40. Specifically it is the common arguments of the respective Respondents who are present in this proceeding that the "Foreign Award" was not made in pursuance of any agreement in writing for an Award to bind them as set forth in the First Schedule of the Arbitration and Conciliation Act, 1996.

41. Specifically, it is stated that the Arbitral Proceedings did not satisfy the requirement of Article II Rule 2 of the First Schedule which defines expression "Agreement in Writing". It is submitted that there was _____ Page No 24 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 neither an Arbitral Clause in the Contract nor an Arbitration Agreement signed between the parties or was contained in any exchange letters or telegram as is contemplated in Article II Rule 2 of the First Schedule of the Arbitration and Conciliation Act, 1996 and therefore the Award is not binding either on the Respondent No.2 (the Engineering Company) or the Respondent No.3 (the Project Company). PART-I (PRE-ARBITRATION-LITIGATION IN INDIA)

42. The Respondent No.3 (the Project Company) had earlier filed C.S.No.502 of 2017 where the Petitioner was the Defendant No.1. The Respondent No.1 was the Defendant No.2. Singapore International Arbitration Centre was the Defendant No.3 in the said Suit.

43. C.S.No.502 of 2017 was filed for the following reliefs:-

i. a permanent injunction to restrain the Petitioner herein (the 1st Defendant therein) from proceeding further against the 3rd Respondent herein in Arbitration Case No.094 of 2017 (ARB094/17/ARB) before the _____ Page No 25 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Singapore International Arbitration Centre, the 3rd defendant therein;

ii. for a permanent injunction to restrain the said Arbitration Centre from administering the arbitration pursuant to request dated 11.04.2017 of the petitioner herein against the 3rd Respondent herein (Plaintiff therein) and others (other Respondents herein) in Arbitration Case No. 094 of 2017 (ARB094/17/ARB);

iii. for a permanent injunction to restrain the petitioner herein or any person acting under it from proceeding with and prosecuting with the said arbitration proceeding or any other proceeding against the 3rd Respondent pursuant to a Non Disposal Undertaking referred to as "NDU" dated 17.03.2016 signed between the petitioner and the 1st respondent herein viz., SunEdison Energy Holding (Singapore) Pte. Ltd.

44. The Respondent No.3 (the Project Company) herein had also filed applications for certain interim reliefs.

45. Similarly, C.S.No.12 of 2018 was also filed by the Respondent No.2 (the Engineering Company) for similar relief. _____ Page No 26 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023

46. After hearing the parties hereto, this Court by a Common Order dated 24.04.2018 dismissed the respective applications filed by the Respondent No.2 (the Engineering Company) and the Respondent No.3 (the Project Company) herein in C.S.No.502 of 2017 and in C.S.No.12 of 2018 and the suit and allowed the application filed by the Petitioner.

47. Details of the applications filed and disposed vide Order dated 24.04.2018 are as under:-

TABLE-I Suit C.S.No.502 of 2017 C.S.No.12 of 2018 Application filed O.A.Nos.642, 643 and 644 of O.A.Nos.6 and 7 of 2018# for Injuction of 2017# Plaint by the Petitioner Application filed A.Nos.6461, 6462 and 6463 of A.Nos.477, 478 and 479 of 2018* for Rejection of 2017* Plaint by the Petitioner Result Allowed A.Nos.6461, 6462 and 6463 of A.Nos.477, 478 and 479 of 2018* 2017* Dismissed O.A.Nos.642, 643 and 644 of O.A.Nos.6 and 7 of 2018# 2017# _____ Page No 27 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Note:

i. * Filed by the Petitioner ii. # Filed by the respective Plaintiffs viz., R2 and R3 herein

48. This Court by a Common Order dated 24.04.2018 in O.A.No.642 of 2017 and etc., held as under:-

"66. In the present case, Sei Adhavan#, SSPI* and SunEdison are group Companies. The undertaking signed by SunEdison binds both Sei Adhavan and SSPI. The above discussion naturally brings the Court to the conclusion that the reliefs sought for by the Plaintiffs cannot be granted.

67. In the result, O.A.Nos.642, 643 and 644 of 2017 and O.A.Nos.6 and 7 of 2018 are dismissed. A.Nos.6461, 6462 and 6463 of 2017 and A.Nos.477, 478 and 479 of 2018 are allowed. No costs." Note:

? : Respondent No.1 * : Respondent No.2 (the Engineering Company) # : Respondent No.3 (the Project Company)

49. This decision was rendered when Courts recognized the Group _____ Page No 28 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 of Companies Doctrine. Aggrieved by the Common Order dated 24.04.2018 in the above mentioned applications, the Respondent No.3 (the Project Company) filed O.S.A.No.170-175 of 2018 while the Respondent No.2 (the Engineering Company) filed O.S.A.No.206-210 of 2018.

50. Before the Hon'ble Division Bench in O.S.A.No.170-175 of 2018 and O.S.A.No.206-210 of 2018 also the Respondent No.1 herein namely Sunedison Energy Holding (Singapore) Pte Ltd. was the Respondent No.2 while the Singapore International Arbitration Centre was the Respondent No.3 while the Petitioner was Respondent No.1.

51. The challenge before the Hon'ble Division Bench in O.S.A.No.170-175 of 2018 and O.S.A.No.206-210 of 2018, was influenced by the decision of the Hon'ble Supreme Court in Chloro Controls India Private Limited vs. Severn Trent Water Purification Inc. & Others, 2013 (1) SCC 641, which dealt with the Group of Companies Doctrine. The above decision was rendered much prior to the decision in Cox and Kings Limited vs. SAP India Pvt. Ltd and _____ Page No 29 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Another, (2023) SCC Online 1634.

52. The Hon'ble Supreme Court in Chloro Controls India Private Limited vs. Severn Trent Water Purification Inc. & Others, 2013 (1) SCC 641 had held as under:-

"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.

> 106. The question of formal validity of the arbitration agreement is independent of the nature of parties to the agreement, which is a matter that belongs to the merits and is not subject to substantive assessment.

Once it is determined that a valid arbitration agreement exists, it is a different step to establish which parties are bound by it. The third parties, who are not explicitly mentioned in an arbitration agreement made in writing, may enter into its ratione personae scope. Furthermore, the Convention does not prevent consent to arbitrate from being provided by a person on behalf of another, a notion which is at the root of the theory of implied consent.

107. If one analyses the above cases and the authors' views, it becomes abundantly clear that reference of even non-signatory parties to an arbitration agreement can be made. It may be the result of _____ Page No 30 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 implied or specific consent or judicial determination. Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those to the action. But this general concept is subject to exceptions which are that when a third party i.e. non-signatory party, is claiming or is sued as being directly affected through a party to the arbitration agreement and there are principal and subsidiary agreements, and such third party is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be referred to arbitration.

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 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 _____ Page No 31 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 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."

53. The Hon'ble Division Bench vide its detailed Order dated 23.07.2018 after considering the decision of the Hon'ble Supreme Court in Chloro Controls India Private Limited referred to supra

held as under:-

> "6.4. We are dealing with the better case than the one dealt with by the Apex Court cited supra. The undertaking does refer to the appellants and put them in the same basket as that of respondent No.2. Therefore, the appellants cannot contend that the agreement is inoperative on the sole basis that they are not signatories in a literal sense. This is an unsustainable technical plea to avoid participation before the Respondent No.3.
>
> 6.5. The purchase orders produced by the respondent _____ Page No 32 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 No.1 in pursuant to the direction of the Court will not help the case of the appellant. The purchase orders have already been mentioned in the undertaking.

Invoices have also been defined therein. The appellant No.2 did not deny the factum of supply. In pursuant to the supply there is also no denial of transfer made."

54. The Hon'ble Division Bench of this Court in its Order dated 23.07.2018 ultimately concluded as under before dismissing the respective appeals filed by the Respondent No.2 and the Respondent No.3 herein.

6.6. The decision relied upon by the appellants are not cases in point. In Indowind Energy Ltd., vs. Wescare India Ltd., and another ((2010) 5 Supreme Court Cases

306), the Apex Court was dealing with Section 11 of the Act which comes under Part-I. Similarly in ECONOMIC TRANSPORT ORGANISATION VS. CHARAN ECONOMIC TRANSPORT ORGANISATION TION VS. CHARAN SPINNING MILLS ((2010) 4 Supreme Court Cases) 114) the Apex Court was dealing with the Consumer Protection Act. The issue was on the interpretation of Contract of Subrogation in a insurance policy. So also the facts of the case in DURO FELGUERA SA VS. GANGAVARAM PORT LTD., ((2017) 9 Supreme Court Cases 729). Even here the Apex Court was concerned with Section 11 of the Act, which comes under Part I. In this connection, it is to be noted that the Apex Court in AMEET LALCHAND SHAH AND OTHERS VS. RISHABH ENTERPRISES AND OTHERS (CIVIL APPEAL NO.4690 OF 2018 (Arising out of SLP © No.16789 of 2017) decided on 03.05.2018 reported in _____ Page No 33 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 MANU/SC/0501/2018 was pleased to held that the principle laid down in CHLORO CONTROLS INDIA PRIVATE LIMITED cited supra can also be applied for Section 8 of the Act as well. The following are the relevant paragraphs.

"21..... What is evident from the facts and intention of the parties is to facilitate procurement of equipments; sale and purchase of equipments. installation and leasing out the equipments to Dante Energy. The dispute between the parties to various agreements could be resolved only by referring all the four agreements and the parties thereon to arbitration.

22. Parties to the agreements namely Rishabh and Juwi India:- (i) Equipment and Material Supply Agreement; and (ii) Engineering, Installation and Commissioning Contract and the parties to Sale and Purchase Agreement between Rishabh and Astonfield are one and the same as that of the parties in the main agreement namely Equipment Lease Agreement (14.03.2012). All the four agreements are inter- connected. This is a case where several parties are involved in a single commercial project (Solar Plant at Dongri) executed through several agreements/contracts. In such a case, all the parties can be covered by the arbitration clause in the main agreement ie. Equipment Lease Agreement (14.03.2012).

48. The basic principle which must guide _____ Page No 34 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 judicial decision making is that arbitration is essentially a voluntary assumption of an obligation by contracting parties to resolve their disputes through a private tribunal. The intent of the parties is expressed in the terms of their agreement. Where commercial entities and persons s of business enter into such dealings, they do so, with a knowledge of the efficacy of the arbitral process. The commercial understanding is reflected in the terms of the agreement between the parties. The duty of the court is to impart to that commercial understanding a sense of business efficacy."

7. Section 45 of the Act 26 of 1996 Though the learned Senior Counsel appearing for the respondent No.1 made submission on the maintainability of the appeal qua an order allowing an application filed under Section 45 of the Act, we do not propose to go into the same for the reason that even assuming the same can sustain in the eye of law, the appeals as against the other applications are certainly maintainable. Secondly, invoking Section 45 of the Act 26 of 1996 and the order passed therein are consequential. To be noted, the respondent No.1 has already initiated the process by invoking clause 9 o the undertaking before the respondent No.3. Thus, there is nothing wrong in directing the appellants to participate in the proceedings before the Respondent No.3. This is, even assuming that the application under 45 is not maintainable. The learned single Judge has rightly took into consideration of the undertaking given and its effect on the appellants. _____ Page No 35 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023

8. Conclusion:

> In fine, we do not find any merit in these original side appeals. Accordingly, they are dismissed. No costs. Consequently, connected C miscellaneous petitions are also dismissed."

> 55. Aggrieved by the aforesaid Order of the Hon'ble Division Bench dated 23.07.2018, the Respondent No.3 (the Project Company) herein filed Civil Appeal No.22483-22504 of 2018, while the Respondent No.2 (the Engineering Company) herein filed SLP.(C).No.22505 – 22526 of 2018.

> 56. The Hon'ble Supreme Court ultimately dismissed the SLP.(C).No.22505 – 22526 of 2018 and Civil Appeal No.22483-22504 of 2018 holding that it found no merits in

> the Civil Appeal and the Special Leave Petition filed by the Respondent No.2 (the Engineering Company) and the Respondent No.3 (the Project Company) respectively.

PART-II (POST ARBITRATION LITIGATION – IN SINGAPORE)

57. It is pursuant to the above, the Arbitral Tribunal proceeded _____ Page No 36 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 under the aegis of the Singapore International Arbitration Centre (SIAC). The Arbitral Tribunal has thus passed the Award in SIAC Arbitration No.094 of 2017 (ARB094/17/ARB) on 22.02.2021 and later an addendum to it on 08.03.2021.

58. After the Award was passed by the Arbitral Tribunal viz., the Singapore International Arbitration Centre, the aforesaid Award was also challenged before the High Court of the Republic of Singapore in HC/Originating Summons No.482 of 2021 by the Respondent No.2 (the Engineering Company). Similarly, the Respondent No.1 herein filed HC/Originating Summons No.489 of 2021 while HC/Originating Summons No.492 of 2021 was also filed by the Respondent No.3 (the Project Company).

59. The said High Court of the Republic of Singapore dismissed HC/Originating Summons No.482, 489 and 492 of 2021 in its detailed Common Order dated 25.02.2022.

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60. The stand of the Respondents before the General Division of the High Court of the Republic of Singapore was primarily on the ground that there was neither a binding contract with the Respondent No.3 (the Project Company) nor with the Respondent No.2 (the Engineering Company) pursuant to Non-disposal Undertaking dated 17.03.2016 between the petitioner and the Respondent No.1.

61. The Respondent No.2 (the Engineering Company) herein who was the Respondent No.3 in HC/Originating Summons No.482 of 2021 and the Defendant No.2 in HC/Originating Summons No.489 of 2021 in the said proceedings was also allowed to adduce and relied on affidavit from a witness even though the witness had not given evidence before the Arbitral Tribunal in the arbitral proceedings by referring to Article 34(2)(a)(i) of the Model Law.

62. Paragraph 108 of the Order of the High Court of the Republic of _____ Page No 38 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Singapore in Case.No.:HC/OS 482/2021 dealt with negotiations between the parties. Relevant portion of the Order dated 25.02.2022 of the Republic of Singapore in Case.No.:HC/OS 482/2021 reads as under:-

> "108. NDU-3 contains the arbitration clause that the claimant relied on to commence the arbitration. The burden lies on the claimant to establish that this arbitration clause binds each respondent. All of the respondents accept that, if I find that the

March 2016 negotiations gave rise to a contract, the arbitration clause in NDU-3 is a term of that contract."

63. The above decision of the General Division of the High Court of the Republic of Singapore dated 25.02.2022 in HC/Originating Summons Nos.482, 489 and 492 of 2021 was appealed before the Court of Appeal of Republic of Singapore by all the Respondents in Civil Appeal Nos.12, 13 and 15 of 2022. These appeals filed by these Respondents were also dismissed by the Court of Appeal of Singapore by its Order dated 11.10.2023.

PART-III-A [SUBMISSIONS ON BEHALF OF THE PETITIONER]

64. The learned Senior Counsel for the Petitioner had narrated the _____ Page No 39 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 background leading to the dispute from the date of signing of MSA dated 19.08.2015 between Non-Party and the Petitioner details of which have been already captured.

65. The learned Senior Counsel for the Petitioner would submit that the Award passed by the Arbitral Tribunal was enforceable in terms of Part-II of the Arbitration and Conciliation Act, 1996.

66. In support of the plea for enforcement of the Award and for execution of the Award, learned Senior Counsel for the Petitioner would submit that the Award satisfies the definition of "Foreign Award" under Section 44 of the Arbitration and Conciliation Act, 1996.

67. It is submitted that the "Foreign Award" was made in pursuance of an Agreement in writing namely MSA dated 19.08.2015 and NDU's dated 17.03.2016 to which the convention set forth in the first schedule to the Act applies namely convention on the recognition and enforcement of Foreign Arbitral Awards applied.

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68. The learned Senior Counsel for the Petitioner also submits that the said Foreign Award is enforceable in terms of Section 46 of the Arbitration and Conciliation Act, 1996.

69. In support of the procedural requirement, the Original Award and the certified copy of the Contract was produced. It is further submitted that the Foreign Award satisfies all the conditions under Section 48 of the Arbitration and Conciliation Act, 1996 for its enforcement.

70. It is further submitted that none of the conditions in Sub- Section (2) to Section 48 of the Arbitration and Conciliation Act, 1996 are attracted in the facts of the case and therefore, the Award has to be enforced against the Respondent No.2 and the Respondent No.3 who are the subsidiaries of the Respondent No.1.

71. The learned Senior Counsel for the Petitioner highlighted that the obligations in NDU was negotiated by the Respondent No.1 _____ Page No 41 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 represented by its Director namely Pashupathy Gopalan, the Respondent No.2 (the Engineering Company) represented by its Director namely Mr.Ramesh Subbarao and signed by Mr.Vinay Bhatia, the Director of Respondent No.3 (the Project Company) as the authorized representative of the Respondent No.1.

72. In this connection, learned Senior Counsel for the Petitioner drew attention to the decisions of the Court in the following cases:-

> i. Shree Chamundi Mopeds Ltd. vs. Church of South India Trust Association CSI Cinod Secretariat, Madras, (1992) 3 SCC 1; ii. Pijush Kanti Chowdhury vs. State of West Bengal and Ors., 2007 SCC OnLine Cal 267; iii. Raffles Education Investment (India) Pte. Ltd. and Another vs. Educomp Professional Education Limited, 2023 SCC OnLine Del 3936;
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> iv. Vijay Karia and Others vs. Prysmian Cavi E sistemi Srl and Others, (2020) 11 SCC 1; v. Cruz City 1 Mauritius Holdings vs. Unitech Limited, 2017 SCC OnLine Del 7810;
>
> vi. State of Uttar Pradesh and Others vs. Combined Chemicals Company Private Limited, (2011) 2 SCC 151;
>
> vii.Smita Conductors Ltd vs. Euro Alloys Ltd, _____ Page No 42 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 (2001) 7 SCC 728;

viii.Jiangsu Overseas Group Co., Ltd. vs. Concord Energy Pte. Ltd., [2016] SGHC 153; ix. AQZ vs. ARA, [2015] SGHC 49;

x. Cox and Kings Ltd. vs. SAP India Pvt. Ltd. and Another, 2023 SCC OnLine SC 1634;

xi. Austbulk Shipping SDN BHD vs. P.E.C. Limited, 2005 SCC OnLine Del 202;

xii.PEC Limited vs. Austbulk Shipping SDN BHD, (2019) 11 SCC 620;

xiii.Government of India vs. Vedanta Limited, (2020) 10 SCC;

xiv.Gemini Bay Transcription Private Limited vs. Integrated Sales Service Limited and Another, (2022) 1 SCC 753;

xv.Shri Lal Mahal Limited vs. Progetto Grano Spa, (2014) 2 SCC 433;

xvi.Fuerst Day Lawson Ltd. vs. Jindal Exports Ltd., (2001) 6 SCC 356;

xvii.Tropic Shipping Co. vs. Kothari Global Ltd., 2002 (2) Mh.L.J.;

xviii.Chloro Controls India Private Limited vs. Severn Trent Water Purification Inc. and Others, (2013) 1 SCC 641;

xix.Unissi (India) Private Limited vs. Post Graduate Institute of Medical Education and Research, (2009) 1 SCC 107;

xx. Powertech World Wide Limited vs. Delvin International General Trading LLC, (2012) 1 _____ Page No 43 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 SCC 361.

73. It is submitted that the Foreign Award cannot be challenged on merits as there is a bias for both Recognition and Enforcement of Foreign Arbitral Awards under Part II of the Arbitration and Conciliation Act, 1996.

74. In this connection, a reference was made to the decision of the Hon'ble Supreme Court in Vijay Karia and Others vs. Prysmian Cavi E Sistemi Srl and Others, (2020) 11 SCC 1, referred to supra.

75. It is submitted that the Respondents are not in a position to establish that in any the circumstances under Section 48(2) of the Arbitration and Conciliation Act, 1996 are attracted.

76. It is submitted that enforcement of the Foreign Award would be contrary to Public Policy of India as is contemplated under Explanation 1

(ii) to Section 48(2)(b) of the Arbitration and Conciliation Act, 1996 _____ Page No 44 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 only under exceptional circumstances. It should be demonstrated by the party opposing enforcement of a Foreign Award as has been held by the Hon'ble Supreme Court in Gemini Bay Transcription Private Limited vs. Integrated Sales Service Limited and Another, (2022) 1 SCC 753 and by the Hon'ble Supreme Court in Ssangyong Engineering & Construction Co. Ltd v. National Highway Authority of India (NHAI) AIR 2019 SC 5041.

77. That apart, learned Senior Counsel for the Petitioner would submit that the expression used in Section 48(2) of the Arbitration and Conciliation Act, 1996 “may be refuse” and therefore, Court has to evaluate the nature, extent in the light of the public policy involved and adopt a course which is less pernicious.

78. It is further submitted that the width of the discretion is narrow and limited and unless sufficient grounds are established, Court is not precluded from enforcing an Award, rather bound to recognize and enforce the Award.

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79. It is submitted that the expression made in Section 48 of the Arbitration and Conciliation Act, 1996 can depending upon the context mean “shall” or as connoting that a residual discretion remains in the court to enforce a foreign award, despite grounds for its resistance having been made out. What is clear is that the width of this discretion is limited to the circumstances, in which case a balancing act may be performed by the court enforcing a foreign award.

80. It is submitted that the objection to enforcement on the ground of Public Policy must be such that it should offend the core values of a member State’s National Policy and which it cannot be expected to be compromised. It is submitted that the expression “Fundamental Policy of Law” must be interpreted in that perspective and must mean only the fundamental and Substratal Legislative Policy and not a provision of any enactment.

81. It is submitted that contravention in enactments even otherwise is not to be concluded to contravention of Fundamental Policy in India.

82. It is further submitted that the Singapore High Court in Paragraph 63 has clearly concluded that five senior executives of the SunEdison Group entities that were responsible for its business in India participated in the March 2016 negotiations are Mr.Ahmad Chatila, Mr.Pashupathy Gopalan, Mr.Vinay Bhatia, Ramesh Subbarao and Mr.Robin Yan (Non-Party).

83. It is submitted that the Singapore High Court has observed that on March 2016 negotiations gave rise to a contract. Arbitration Clause in NDU-3 is a term of that contract and all the Respondents accepted that if the Court found March 2016 negotiations gave rise to a contract, the Arbitration Clause in NDU-3 is the term of that contract.

84. It is submitted that the Arbitral Tribunal has accepted the contention of the Petitioner that parties concluded a basic and essential terms of contract on 17.03.2016 and then on full terms on 18.03.2016 and this conclusion made that there was an Valid Arbitration Agreement between the parties and thus, concluded that Clause-9 of MDU-3 contains an Agreement to arbitrate the dispute.

85. A reference was also made to paragraph 142 of the decision of the Singapore High Court, wherein it has been observed as under:-

> “142. It is clear on the face of NDU-3, of course, that neither the second respondent nor the third respondent are signatories to NDU-3. But I consider that feature to be a point of form rather than a point of substance. It is true that a person who signs a contract containing an arbitration agreement is, prima facie at least, a party to the arbitration agreement (Gary B Born, International Commercial Arbitration (Wolters Kluwer 2nd Ed, 2014) at pp 1521-1522). That is merely the application of a general

point of contract law to the specific case of an arbitration agreement. But it does not follow that a party who has not signed a contract containing an arbitration agreement is not a party to an arbitration agreement incorporated into that contract: The sterile formality of a signature is not always necessary in law to breathe life into contractual undertakings" (Midlink Development Pte Ltd v. The Stansfiled Group Pte Ltd [2004] 4 SLR(R) 258 at [55]). More importantly, given my findings on the parties' contract, only part of the contract is found in _____ Page No 48 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 NUD-3. Accordingly, the fact that the second and third respondents are not signatories to NDU-3 is not conclusive as to whether they are parties to the contract of which NDU-3 forms a part.

187. I make two observations. First, the notice of arbitration was drawn widely. It referred to arbitration a claim arising from or connected with a contract contained in or evidenced by NDU-3. The dispute which the claimant referred to arbitration was not said to arise only out of NDU-3 as a contract, but also out of a contract evidenced by NDU-3. Further, the dispute which the claimant referred to arbitration does not only arise from NDU- 3 but is also connected to NDU-3.

188. In my view, the claimant framed the dispute which it referred to arbitration by its notice of arbitration sufficiently widely to encompass a partly oral and partly written contract arising out of the March 2016s negotiations and connected to or evidenced by NDU-3."

86. Therefore, it is submitted that it is beyond doubt that there was an Arbitral Agreement in writing signed by Mr.Vinay Bhatia, the Director of Respondent No.3 (the Project Company) on behalf of the Respondent No.1 binding of the parties to the Agreement not only to pay the amount but also to agree for arbitration in agreement in any dispute. _____ Page No 49 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023

87. It is submitted that this view has also been accepted by the Singapore Court of Appeal in its finding in Paragraph 52 to 54, 61, 67, 77 and 83 wherein Court has come to a conclusion that the exchange of correspondence that the parties conduct during March 2006 negotiation lead to the necessary inference that a valid contract was concluded between the parties namely the Petitioner and the Respondents.

88. The learned Senior Counsel for the Petitioner also drew attention to a copy of an e-mail dated 17.03.2017 of the Director of the Respondent No.2 namely Mr.Ramesh Subbarao to Mr.Yang Daniel and Robin Yan of the Petitioner attaching a copy of NDU-3.

89. It is submitted that although NDU-3 that was e-mailed by the Director of the Respondent No.2 (the Engineering Company) namely Mr.Ramesh Subbarao, it was signed on behalf of the Respondent No.1 by Mr.Vinay Bhatia, the Director of Respondent No.3 (the Project Company) as the authorized representative Respondent No.1. Content of NDU-3 was objected by Mr.Yang Daniel

of the Petitioner by reply e-mail dated _____ Page No 50 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 18.03.2016 explained concerns over the Clauses in NDU-3 and that Mr.Yang Daniel sent a revised copy of NDU-3 with certain corrections which was not acted upon and therefore, parties had agreed for the terms of NDU-3 sent by Mr.Ramesh Subaarao of the Respondent No.2 (the Engineering Company) signed by Mr.Vinay Bhatia, the Director of Respondent No.3 (the Project Company) as the authorized signatory of Respondent No.1. A reference was also made to Paragraph 105 to 125 of the Award which lead to the negotiations between the parties from NDU-1 to NDU-4.

90. It is submitted that since NDU-3 was initially rejected, it cannot be revised orally and that NDU-3 must be revived in writing and that the Petitioner never negotiated within writing and oral communication of NDU-3 since NDU-4 was sent which was not signed by any of the party containing the changes in NDU-3.

91. It cannot be said that oral acceptance of NDU-3 does not satisfy the requirement of Section 44(1)(a) Part-II of the Arbitration and _____ Page No 51 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Conciliation Act, 1996 or the First Schedule to the Act namely New York Convention of Enforcement of Foreign Award.

92. It is submitted that NDU-3 was not rejected by the Petitioner and that the objection of the Respondents are ex-facie incorrect and misleading because Arbitral Tribunal has also held that NDU-3 was not rejected. A reference was made to the discussion in the Award with reference to e-mail that were exchanged during 16.03.2016, 17.03.2016 and 18.03.2016 which has attained finality as not only the Singapore High Court but also the Singapore Court of Appeal have given their seal of approval.

93. It is submitted that although Court is not required to go into the merits of the case, on 18.03.2016, Mr.Yang Daniel of the Petitioner sent an E-Mail to Mr.Robin Yan, Senior Director of MEMC, a wholly owned subsidiary of SPC (Non-Party) with the copy marked to Mr.Ramesh Subbarao of the Respondent No.2 (the Engineering Company), Dr.Yang Liyou of the Petitioner and M/s.Saraswathi, wherein copy of NDU-4 was _____ Page No 52 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 attached.

94. It is submitted that the same submission was made before the Arbitral Tribunal as is found from a reading of Paragraph 90 to 94.

95. It is submitted that the Arbitral Tribunal has given a clear finding in Paragraph 115 that on 18.03.2016, Mr.Daniel Yang of the Petitioner sent an e-mail to Mr.Robin Yan, Senior Director of MEMC, a wholly owned subsidiary of SPC (Non-Party) to the Agreement.

96. It is submitted that the Tribunal has answered the issue in Paragraph 116 and 118. A reference was made to Paragraph 116 and 118, which reads as under:-

"116.Pertinently, there is no mention of any 'rejection' by the Claimant in this email. Why did Daniel Yang (Petitioner) say that NDU-3 was not what he and Robin Yan (Sr.Director of MEMC, a wholly owned subsidiary of SPS) had agreed to during their conversation? The Tribunal is of the view that Daniel Yang's (Petitioner) understanding _____ Page No 53 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 of what he had earlier discussed with Robin Yan (Sr.Director of MEMC, a wholly owned subsidiary of SPS) was not unreasonable, although he could have been mistaken. When Robin Yan (Sr.Director of MEMC, a wholly owned subsidiary of SPS) sent Daniel Yang (Petitioner) the email of 17 March 2015, 3:38 PM, he referred only to the percentage of shares to be pledged – only 24% was available, and did not mention the other changes that Daniel Yang (Petitioner) had inserted in NDU-2. When Daniel Yang (Petitioner) replied at 5:10 PM on the same day, he agreed to 24% and said that "the rest of revise shall be accepted." The statement could suggest that during the discussion on the changes in NUD-2, since Robin Yan (Sr.Director of MEMC, a wholly owned subsidiary of SPS) had not said that they were not acceptable. Daniel Yang (Petitioner) thought they had been accepted. This was not an unreasonable position to take.

119. Paragraph 34 of Robin Yan's (Sr.Director of MEMC, a wholly owned subsidiary of SPS) statement above shows that Robin Yan (Sr.Director of MEMC, a wholly owned subsidiary of SPS) and Daniel Yang (Petitioner) were still discussing the amendments that the latter wanted to make to NDU-3. They were not intended to be a categorical or irrevocable rejection of NDU-3. On 18 March 2016, 2.13 PM, Daniel Yang (Petitioner) e-mailed Robin Yan (Sr.Director of MEMC, a wholly owned subsidiary of SPS) (copied to Ramesh, Dr Yang (Petitioner) and Ms.Saraswathy) as follows:

"Kindly find the final version of NDU ("NDU-4") per we discussed just now. Please have this signed and sealed ASAP" _____ Page No 54 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023

97. The learned Senior Counsel for the Petitioner also drew attention to Paragraph 125 to 132 of the Award and Paragraph 122 to 136 of the Order of the Singapore High Court. Similarly, a reference was also made to few passages from the decision of the Court of Appeal from Paragraph 66 to 68.

98. It is further submitted that the Hon'ble Supreme Court has also clarified the position in Government of India vs. Vedanta Ltd and Ors., (2020) 10 SCC 1, that enforcement Court is not to correct the errors under Section 48 and take review of the Award. The power that is conferred under Section 48 is limited either to recognize/enforce or to refuse enforcement if the grounds are made out.

99. It is submitted that the Respondent has not made out any ground under Section 48(2) of the Arbitration and Conciliation Act, 1996 for refusal of recognition of enforcement of the Award in this

case on the issue that the Award cannot be challenged on merits under Section 48(1) of the _____ Page No 55 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Arbitration and Conciliation Act, 1996.

100. It is submitted that PV Modules were delivered pursuant to MDA and NDU-3 and not pursuant to any oral contract. PART-III-B (SUBMISSION OF RESPONDENT NO.2)

101. The learned Senior Counsel for the Respondent No.2 would submit that the The Award is not a “Foreign Award” under Section 44 of the Arbitration and Conciliation Act, 1996 (“Arbitration Act”).

102. The primary issue is whether the Award dated 22.02.2021 ("Award") is a foreign award as defined in section 44 of the Arbitration Act. It is submitted that the Award is not a foreign award within the meaning of section 44. Consequently, the Award cannot be enforced under section 48 of the Arbitration Act.

103. It is submitted that there was no agreement in writing to bind the Respondent No.2. Section 44 defines "foreign award" to mean "an arbitral award made on or after the 11th day of October, 1960 in pursuance _____ Page No 56 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies.

104. It is submitted that the First Schedule verbatim reproduces the New York Convention (NYC). Article II (2) of the First Schedule defines "agreement in writing" The arbitration agreement relied on by the petitioner is NDU-3. It is submitted that NDU-3 is not an agreement in writing falling within Article II (2) of the First Schedule of the New York Convention (NYC). Consequently, the Award has not been made pursuant to an agreement in writing for arbitration and is not a foreign award.

105. It is submitted that the issue in para 1 arises for the first time for consideration by this Hon'ble Court. The arbitration clause provides for arbitration in Singapore and the applicable law is the law in force in Singapore. The Arbitral Tribunal and the Singapore Courts (the High Court and the Court of Appeal) considered the definition of "arbitration _____ Page No 57 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 agreement" only under Section 2A of the Singapore International Arbitration Act. Section 2A of the Singapore International Arbitration Act is materially different from the definition under Article II(2), First Schedule to the Arbitration and Conciliation Act, 1996.

106. Therefore, this Hon'ble Court must independently (i) consider the facts relating to the formation of the arbitration agreement as found by the arbitral tribunal (and by the Singapore Courts) and (ii) decide on the basis of these facts, whether the arbitration agreement is an agreement in writing as defined in analysis of Article II (2) by the Supreme Court in Smita Conductors Ltd vs. Euro Alloys Ltd, (2001) 7 SCC 728.

107. It is submitted that the Supreme Court divided Article II (2) into four parts:-

(1) a contract containing an arbitration clause signed by the parties;

(2) an arbitration agreement signed by the parties; (3) an arbitral clause in a contract contained in exchange of letters and telegrams;

(4) an arbitral agreement contained in exchange of letters or telegrams.

108. It is therefore submitted that NDU-3 does not satisfy any of the above requirements of Article II (2).

109. It is submitted that Clause 9 of NDU 3 contains the arbitration clause. However, NDU 3 has not been signed either by Respondent No.2 (the Engineering Company) or by Respondent No.3 (the Project Company) excepting Respondent No.1. Therefore, NDU-3 dated 17.03.2016 does not satisfy the requirements of (1) and (2) above.

110. It is submitted that there are also exchange of letters, telegrams or emails between the parties evidencing acceptance of NDU 3. NDU 3 was sent to the Petitioner by email on 17.03.2016 by Respondent No.1. The Petitioner replied the very next day stating “Your returned NDU is NOT what we both agreed on the phone today” It is therefore submitted that the findings of the Arbitral Tribunal and the Singapore Courts on the arbitration agreement are incorrect and in any event not binding on this Court.

111. The Arbitral Tribunal held that after the aforesaid email, the Petitioner was persuaded to drop its objections to NDU-3 and accept NDU 3 as executed.

112. The learned Senior Counsel for the Respondent No.2 drew attention to the Petitioner's evidence extracted in the Award at para 124 (sub- para 54 of the award) where the witness states "I informed Robin Yan that Jinergy accepted the executed NDU and would make arrangements. In other words, it is submitted that the Petitioner's acceptance of NDU-3 was by words and conduct and not in writing. It is submitted that the Petitioner did not record such change in its stance in writing or over e-mail to the First Respondent, which was a signatory to the NDU's. It is submitted that same is surprising by the Petitioner, considering the quantum involved and the fact that the rejection of NDU-3 was in writing.

113. The learned Senior Counsel for the Respondent No.2 referred to para 89, 95, 96-98, 119, 124 (sub- para 54), 127- 128, 130, 132, 163- 164 of the Award which were reiterated by the Singapore High Court and by the Singapore Court of Appeal.

114. The three Singapore forums (the Arbitral Tribunal, the High Court and the Court of Appeal) found that the Petitioner accepted NDU orally and by conduct and not in writing.

115. In view of these findings, it is reiterated that there was no exchange of letters etc in relation to NDU 3. Therefore, the third and fourth parts of Article II(2) also are not satisfied. Consequently, it is submitted that the arbitration agreement is not "an agreement in writing"

and the Award is not a foreign award.

116. It is further submitted that the Petitioner has also accepted in para 5 of its petition "the present disputes arise out of an agreement consisting of oral and written terms, and which includes a Non-Disposal _____ Page No 61 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Undertaking which dated 17th March 2016 ("NDU 3") is referred to in the Arbitral Award as the "PV modules delivery agreement.

117. It is further submitted that the Orders of the High Court both Single Judge and Division Bench do not amount to res judicata.

118. It is submitted that the orders of the Hon'ble Madras High Court (Single Judge and Division Bench) in C.S.No.502 of 2017 etc. referring the parties to arbitration will not amount to res judicata.

119. It is submitted that the findings of the Court at that stage were only prima facie views based on the evidence available before the Court. This position is reiterated in Cox and Kings Ltd. vs. SAP India Pvt. Ltd. and Another, 2023 SCC OnLine SC 1634, para 168.

120. Secondly, it is submitted that this High Court applied Indian law which recognized the group of companies doctrine. The Arbitral Tribunal applied Singapore law since that was the Governing Law. The _____ Page No 62 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Group of Companies Doctrine is not recognized in Singapore.

121. Thirdly, it is further submitted the Hon'ble Supreme Court in Cox and Kings Ltd. vs. SAP India Pvt. Ltd. and Another, 2023 SCC OnLine SC 1634 held that the approach in Chloro Controls India Private Limited vs. Severn Trent Water Purification Inc. and Others, (2013) 1 SCC 641 was erroneous. It is submitted that since the orders of this Court were based on Chloro Controls case, these decisions cannot be held to have a binding force of law any longer.

122. For the above reasons, the findings of this Court in the Suit will not amount to res-judicata and will not preclude Respondent No.2 (the Engineering Company) from contending that the Arbitral Award is not a foreign award under section 44.

123. It is submitted that the Hon'ble Supreme Court in Smita Conductors Ltd vs. Euro Alloys Ltd, (2001) 7 SCC 728 interpreted Article II(2) and laid down the requirements of Article II (2) vide page _____ Page No 63 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 735 placitum. The Hon'ble Supreme Court in Cox and Kings Ltd. explained Smita

Conductors Ltd in para 188.

124. It is submitted that in Smita Conductors Case, the Hon'ble Supreme Court has held that in the absence of a signature, the consent to arbitrate can be gathered from written correspondence that shows its conduct pursuant to the contract containing the Arbitration Agreement. It is submitted that even these requirements were not satisfied in the present case.

125. It is submitted that the learned Single Judge of the Delhi High Court in Virgoz Oil held that Article II (2) requires an exchange of either “letters” or “telegrams” vide paragraphs 18-23 of the judgment. This was also confirmed by the Division Bench of the Delhi High Court vide para 16.19.30 and the case is pending before the Supreme Court on further appeal.

126. Distinguishing the citations given by the learned Senior _____ Page No 64 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Counsel for the Petitioner in AQZ vs. ARA, (2015) SGHC 49 and Jiangsu Overseas Group Co Ltd vs. Concord Energy Pte Limited [2016] SGHC

153. It is submitted that these judgments are not relevant. They are judgments of the Singapore High Court and do not discuss Article II (2).

127. It is further submitted that the following citations relied on by the petitioner are not relevant since they do not discuss Article II (2).

i. Campos Bros Farms vs. Matru Bhumi Supply Chain Private Limited, 2019 SCC Online Delhi 8350;

ii. Duro Felguera vs. Gangavaram Port Ltd, (2017) 9 SCC 729;

iii. Fuerst Day Lawson Ltd Vs. General Exports Ltd (2001) 6 SCC 356;

iv. Germany Bay Transcription Private Limited Vs. Integrated Sales Service Ltd (2022) 1 SCC 753;

v. Inox Wind Ltd Vs. The More Cables Ltd, (2018) 2 SCC 519;

vi. MR Engineers and Contractors Private Limited vs. Som Datt Builders Ltd (2009) 7 SCC 696;

vii. Vijay Karia (2020) 11 SCC 1;

viii.Shri Lal Mahal Ltd (2014) 2 SCC 433;

ix. Government of India vs. Vedanta Ltd (2020) 10 SCC 1 _____ Page No 65 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023

128. It is submitted that Chloro Controls India Private Limited case is distinguishable on facts. It is a case of exchange of letters. The contractors submitted a bid and the bid was accepted on behalf of

the Governor of Uttar Pradesh vide para 17 of the judgment.

129. It is submitted that Austbulk Shipping case is distinguishable as there was an exchange of letters and documents as is indicated in vide paragraphs 26, 30 and 31 of the judgment. on facts. It is a case where there Jaldhi Overseas is distinguishable on facts. There, the Calcutta High Court recorded the exchange of correspondence in para 4, 16, 18 and 20. The matter is pending before the Supreme Court.

130. It is submitted that in Cruz City case, there was no dispute that the award was a foreign award vide paragraph 17 of the order.

131. The learned Senior Counsel for the Respondent No.2 adopted the arguments of the learned Senior Counsel for the Respondent No.3 on the merits of the Award Evidence pertaining to payments made by Second _____ Page No 66 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Respondent has not been considered.

132. Without prejudice to the above, it is submitted that the Respondent No.2 (the Engineering Company) is not bound by the terms of NDU-3. The Original Module Supply Agreement was between the Petitioner and SPS a “Non-Party”. SPS is not a party to the present proceedings. The Petitioner submitted during oral arguments that SPS was Respondent No 1, which is incorrect. SPS, being the company that entered into the original agreement under which the supplies were made, was a necessary party to the arbitration.

133. It is further submitted that there is no privity of contract, evidenced in writing, between the Respondent No.2 (the Engineering Company) and the Petitioner.

134. Moreover, the Respondent No.2 (the Engineering Company) has already discharged its payment obligations towards the invoices raised for the modules procured from Non-Party, the procurement company, by _____ Page No 67 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 making payments directly to Non-Party.

135. An auditor's certificate evidencing that payments were made by the Respondent No.2 (the Engineering Company) towards the invoices raised by Non-Party was filed in the present proceedings. It is submitted that the Respondent No.2 (the Engineering Company) cannot be held liable for the dues to the Petitioner. It is submitted that the Respondent No.2 cannot be burdened with double payment.

136. In fact, the Petitioner has admitted that the Second Respondent had paid a large portion of the dues from Non-Party. A reference was made to page 568 of the Petitioner's Addl. Compilation of documents.

137. In light of the above, it is submitted that the Award is not a foreign award under section 44 and therefore the same is not recognizable and enforceable in India. It is humbly prayed that the present petition be dismissed with costs.

138. The Award is not a 'Foreign Award' under section 44 of the Arbitration and Conciliation Act, 1996 ("Arbitration Act").

139. While enforcing an award under Chapter I, Part II of the Arbitration Act, the enforcing court must first be satisfied that the Award is indeed a foreign award, as defined and is enforceable against persons who are bound by the award.

140. It is submitted that for an award to be designated as a 'Foreign Award' under Section 44 of the Arbitration Act (of which enforcement may be sought in India under Chapter 1, Part II of the Arbitration Act) the following four ingredients are not only necessary but should be satisfied:-

> a) the dispute must be considered to be a commercial dispute under the law in force in India;
>
> b) it must be made in pursuance of an agreement in writing for arbitration;
>
> c) it must be disputes that arise between "persons" (without regard to their nationality, residence, or domicile);
>
> d) the arbitration must be conducted in a country which is a signatory to the New York _____ Page No 69 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Convention. (emphasis supplied).

141. The learned Senior Counsel for the Respondent No.3 submits that the Award is not a "Foreign Award" since it is not in pursuance of an "Agreement in Writing" for arbitration to which the New York Convention applies.

142. It is submitted that under Article II (1) of the New York Convention, India, is a signatory to the New York Convention. It is submitted that Courts in India are bound to recognize arbitration agreements that are in writing. In this case there was no agreement in writing.

143. It is submitted that under Article II (2) of the New York Convention, the term "Agreement in Writing" is defined to include Arbitration Clause in contract or Arbitration Agreement signed by the parties or contained in an exchange of letter or telegram.

144. In the present case, the Arbitration Agreement pursuant to which the Award has been passed is stated to be contained in an agreement _____ Page No 70 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 called the NDU-3 which has neither been signed by any of the Respondents. It is submitted that the Respondent No.2 (the Engineering Company) and the Respondent No.3 (the Project Company) are in any event not a party to the agreement. In fact, it is the Petitioners' case that Respondent No.3 (the Project Company) is

said to be a signatory and a party to the agreement since Mr. Pashupathy Gopalan of Respondent No.1 and Mr. Vinay Bhatia of Respondent No.3 (the Project Company) had negotiated and signed NDU-3, respectively. The said submission has been accepted by the Tribunal on the basis of evidence produced before it. It was however submitted that there is no material whatsoever to arrive at the said finding, and the said finding was perverse and illegal.

145. It is submitted that the onus and burden to prove that the Award was a "Foreign Award" was on the Petitioner under Section 47(1)(c) of the Arbitration Act, which the Petitioner has not satisfied.

146. It is submitted that this Hon'ble Court's jurisdiction to assess whether the Award is a “Foreign Award” or not and is not circumscribed _____ Page No 71 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 by any limitations, either under the statute or under any case law including. A reference was made to the decision of the Court in Renusagar Power Cp. Ltd. v. General Electric Co. (1994 Supp (1) SCC

644), and Shri Lal Mahal Ltd. v. Proteggo Grano SpA ((2014) 2 SCC

433), etc.

147. Further, it is submitted that under Section 47 of the Arbitration Act, before putting its imprimatur or seal of approval on the Award, this Court has to come to a judicial finding after assessing material placed before it, that the Award is a "Foreign Award" and has been rendered pursuant to an agreement in writing.

148. The Arbitral Tribunal has concluded that Respondent No. 3 (the Project Company) is party to the NDU-3, as an appendage to the Modules Delivery Agreement, and consequently, the arbitration clause contained therein. It is submitted that the said findings of the Arbitral Tribunal are not based on any cogent evidence or material. It is based on only conjectures and surmises drawn by the Arbitral tribunal, unsupported by material on record. A reference was invited to paragraphs 131-132 _____ Page No 72 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 (@pg. 112-113), 141, 144 146 (@pg. 114-115), 163- 164 (@pg 118-119) of the Award-Petitioner's List of Documents). III. Award is unenforceable under Section 48(2)(b)(ii) of the Arbitration Act -

149. It is further submitted that the enforcement of the Award would be in contrary to the public policy of India for being in contravention with the fundamental position of Indian law and the most basic notions of justice. A reference was made to Paragraph 34 of the decision of the Hon’ble Supreme Court in Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC. Wherein it wasa held that;

> "34. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49: (2015) 2 SCC (Civ) 2041 ie, the fundamental policy of

Indian law would be relegated to "Renusagar" understanding of this expression."

150. A reference was also made to Paragraph 18 and 27 from _____ Page No 73 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC, wherein a reference was made to Associate Builders v. DDA, (2015) 3 SCC 49. Relevant Paragraph from Ssangyong Engg. & Construction Co. Ltd. vs. NHAI, (2019) 15 SCC reads as under:-

> "18. In Remusagar Power Co Lid. v. General Electric Co. [Renusagar Power Co. Lid. v. General Electric Co., 1994 Supp (1) SCC 644], In construing the expression "public policy" in the context of a foreign award, the Court held that an award contrary to (i) The fundamental policy of Indian law, (ii) The interest of India, (iii) Justice or morality, would be set aside on the ground that it would be contrary to the public policy of India. It went on further to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation (see SCC p. 685, para 75). Equally, disregarding orders passed by the superior courts in India could also be a contravention of the fundamental policy of Indian law, but the recovery of compound interest on interest, being contrary to statute only, would not contravene any fundamental policy of Indian law (see SCC pp. 689 & 693, paras 85 & 95).
>
> 27. Coming to each of the heads contained in Saw _____ Page No 74 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Pipes [(2003) 5 SCC 705: AIR 2003 SC 2629] judgment, we will first deal with the head "fundamental policy of Indian law". It has already been seen from Renusagar judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law."

151. Further, the Hon'ble Supreme Court in Para 76 of Ssangyong Engg. & Construction Co. Ltd. vs. NHAI, (2019) 15 SCC held that:-

> "76. However, when it comes to the public policy of India, argument based upon "most basic notions of justice", it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to entered into with the other party, the agreement be liable to perform a bargain not Clearly, such a course of conduct would be contrary to fundamental

> principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be _____ Page No 75 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment."

152. It was submitted that to enforce the Award against Respondent No.3 (the Project Company), which never entered into the PV Modules Delivery Agreement/Modules Delivery Agreement or NDU-3 or the Arbitration Agreement contained therein, would tantamount to holding Respondent No. 3 liable to perform a bargain which they never entered into, which would amount to the breach of a fundamental principle of justice.

153. In the facts of the present case, it is submitted that two aspects are to be considered as being violative of the fundamental policy of Indian law and for violating the most basic notions of justice under Section 48(2)(b) read with Clause (ii) to Explanation I of the Arbitration Act.

154. It is submitted that the Award was passed in violation of the requirements specified under Section 21 of the Companies Act, which _____ Page No 76 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 governs Respondent No. 3 (the Project Company); and the Award was passed on the basis of the 'single economic entity' doctrine. IV. Violation of requirements specified under Section 21 of the Companies Act, 2013.

155. Both Respondent No.2 (the Engineering Company) and the Respondent No.3 (the Project Company) are a juristic person and can enter into or can be bound by contracts only in accordance with the statute which governs that as juristic personality/ existence viz. the Companies Act.

156. Respondent No. 2 (the Engineering Company) and the Respondent No.3 (the Project Company) are a private limited Indian company conferred with juristic existence under the Companies Act. As such, the provisions of the Companies Act are applicable to, and govern Respondent No. 2 (the Engineering Company) and the Respondent No.3 (the Project Company) and their functioning. Further, their ability to enter into contracts is strictly governed by its parent statute, ie, the Companies Act, 2013 and its constitutional documents, being their Memorandum of _____ Page No 77 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Association and Articles of Association.

157. For a contract to be valid and binding on a company governed under the Companies Act, it must be in (ii) writing; (ii) signed by its key manager personnel or an officer of the Company or employee; (ii) who is authorised by the board of directors of the company to sign the agreement.

158. It is submitted that this requirement codifies the public policy of India in furtherance of good corporate governance against the public policy of India to hold that a company governed by the

Companies Act is bound by an oral agreement or any agreement which is in part oral.

159. It is submitted that fastening of liability on the Respondent No. 2 (the Engineering Company) and the Respondent No.3 (the Project Company), is thus in violation of the requirements specified in Section 21 of the Companies Act which embodies the fundamental policy of Indian law.

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160. It is submitted that Section 21 of the Companies Act, 2013 marks a deliberate departure from the earlier legal regime under the Companies Act, 1956 insofar as it requires that for an agreement to be binding on the company, it (i) has to be in writing; and (ii) signed by a key managerial personnel duly authorized by the board of directors of the company in this behalf. This is in contradiction to Section 46 of the Companies Act, 1956, which envisaged oral agreements entered into on behalf of the company.

161. It is submitted that the stricter requirements under the Companies Act, 2013 viz., Agreement in Writing signed by a key managerial personnel specifically authorized by the Board have been brought in deliberately to augment transparency and better Corporate Governance. It is submitted that Enhanced level of Transparency and Corporate Governance are an integral part underlying the basic policy of the Companies Act, 2016. As such, making the Respondent No. 2 (the Engineering Company) and the Respondent No.3 (the Project Company) liable under a contract which does not adhere to the requirements of _____ Page No 79 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Section 21 of the Companies Act, 2013 would violate the fundamental policy of Indian law and most basic notions of justice.

162. It is submitted that the Arbitral Tribunal could not have ignored this fundamental requirement under Indian company law and policy before fastening liability on the Respondent No. 3 (the Project Company). It is submitted that the doctrine of indoor management has no application in the present case, since the Petitioner itself has insisted on procuring corporate authorizations insofar as the signatory to NDU-3 is concerned. Similarly, the Petitioner was well aware that this issue would be governed by the law in the jurisdiction of the Respondent No.3 (the Project Company).

163. Thus, it is respectfully submitted that a company cannot be bound by a contract signed by a director unsupported by a Board resolution authorizing the said director to sign the agreement. A reference was made to Narne Estates Pvt. Lud and Another v. Gomedha Estates Pvt. Ltd., 2020 SCC Online TS 3426 @ para 7-12, followed by Hon'ble _____ Page No 80 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Calcutta High Court in Jaishree Steels Private Limited MANU/WB/0019/2023 @ pg. 6 & 14) Shivan Dhatu Udyog Pvt. Ltd.

164. It is submitted that an admitted position that there was no Board resolution in favour of Mr. Vinay Bhatia authorising later to sign the agreement of behalf of Respondent No. 3 (the Project Company). Therefore it is submitted that Respondent No. 3 can never be considered to have signed or a party to NDU-3. Further, there is no evidence to suggest that Respondent No. 3 (the Project

Company) was party to any oral/ written agreement to pay unpaid dues to the Petitioner for supplies to be made by it under the MSA.

165. It is submitted that the Respondent No. 3 was neither a party nor a signatory to NDU-3. It was never agreed between the parties that Respondent No. 3 was to be made a party to the contract with the Petitioner or for it to be bound by any such contract. Accordingly, no agreement in writing to resolve disputes through arbitration exists between Respondent No.2 and 3 with the Petitioner. A reference was made to _____ Page No 81 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Indowind Energy Limited vs. Wescare (India) Limited and Another, (2010) 5 SCC 306 @Pr. 17-20; Dale and Carrington Invt. (P) Ltd and Ors vs. P.K Prathapan and Ors., AIR 2005 SC 1624 @para 12).

166. In fact, it was not even the Petitioner's case in the Arbitration Proceedings that the Respondent No.3 had passed any Board Resolution which authorized Mr. Vinay Bhatia or any of its key managerial personnel or officer or employee to sign NDU-3. It is further submitted that it is not disputed that Mr. Pashupathy Gopalan, Mr. Ramesh Subbarao and/or Mr. Vinay Bhatia were not authorized by the Board of Directors of Respondent No. 3 to enter into NDU-3. On the contrary, NDU-3 was expressly stated to have been signed by Mr.Vinay Bhatia only in his capacity "as authorised representative of [Respondent No.1] (---) [i.e. SHE] authorised pursuant to a Resolution of its Board of Directors passed on the 17 th day of March, 2016".

167. It is thus humbly submitted that both Respondent No.2 and 3 are separate and distinct legal entity from SunEdison Inc., the Non-Party, _____ Page No 82 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Respondent No.1 and/or Respondent No. 2 and/or its other shareholders or officers or directors. The factum of Mr. Pashupathy Gopalan being the President of SunEdison Inc.'s Asia-Pacific operations or Mr. Vinay Bhatia being SunEdison India's General Counsel and also a Director on the Board of the 3rd Respondent, does not dilute the separate existence or entity of 3rd Respondent, and can in no manner lead to a conclusion that the 3 rd Respondent would be bound by a contract signed by Respondent No. 1 or obligations undertaken by it. Recognizing and enforcing an award which has been passed on the basis of the 'single economic entity' doctrine would violate the fundamental policy of Indian law and the most basic notions of justice.

168. It is submitted that although, the stated position of the Arbitral Tribunal that it has not based its conclusion on the functioning/business model of the SunEdision group entities as one unit, the crucial findings of the Arbitral Tribunal are based on its findings on the business model and the alleged intention of Mr. Pashupathy Gopalan to treat the Respondents as 'Single Economic Unit (SEU) for the purpose of implementing its _____ Page No 83 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 business model in relation to the Adhavan project. (Refer Paras-167 to 174 of the Award @pg. 119, 120 of Petitioner's LOD).

169. It is submitted that the Tribunal has decided the issue on the basis of the partly oral and partly written contract purportedly entered into by the Petitioner with the Respondents, after deciding that the persons involved in the negotiations had the authority to bind the Respondents to such a

contract, while seemingly treating the SunEdison Group Companies as a Single Economic Entity' (SEE), although categorically stating that it is not relying on the group of companies doctrine'. The Court of Appeal of the Republic of Singapore ignored this finding of the Tribunal by holding that the Tribunal's reference to the 'group of companies' doctrine was merely to reflect the commercial reality of the situation. (Refer Paras-75 & 76 of the Judgement @pg. 559 of Petitioner's Addl. LOD).

170. It is submitted that enforcing the Award against the Respondent No.2 and 3 would amount to making the Respondent No.2 and 3 party to an arbitration agreement, to which they had not consented and fastening _____ Page No 84 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 liability upon them on the basis of the 'Single Economic Entity' (SEE) doctrine, which employs tools such as alter ego and piercing of corporate veil in order to negate the separate legal entity of a company.

171. It is submitted that the 'Single Economic Entity' (SEE) doctrine no longer finds a place pursuant to the judgement of the Constitution Bench of the Hon'ble Supreme Court of India in Cox & Kings Limited v. SAP India Pvt. Ltd. and Another (2023 SCC OnLine 1634). The said judgment, in paragraphs 172 and 231, has clearly held that the principle of alter ego or piercing the corporate veil cannot be the basis for application of the group of companies' doctrine to bind non-signatories to an arbitration agreement. Thus, in other words, the Hon'ble Supreme Court has expressly held that the 'single economic entity doctrine cannot be recognized and given effect to as a fundamental policy of Indian law.

172. It is submitted that it is relevant to refer to Para 57 of the Cox and Kings judgement - In Manuchar Steel Hong Kong Limited v. Star Pacific Line Pte Ltd. [2014] SGHC 181, the Singapore High Court has _____ Page No 85 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 expressly rejected the group of companies doctrine to bind non-signatories to arbitration agreement. The High Court reasoned that the group of companies doctrine was: first, anathema to the logic of consensual basis of an agreement to arbitrate, and second, ordering of companies within a broader group did not mean position dispense with legal entity. The Singapore High Court relied on position of law taken in peterson Farms INC (supra) to observe that enforceable obligations cannot be imposed on "strangers" to an arbitration agreement.

173. It is submitted that notably, the Tribunal has gone against the Singapore law as recognized in the Cox and Kings judgment. Hence, the Award passed by the Tribunal is bad in law as it evidently ignores the law of Singapore.

174. It is further submitted that the test for deciding whether a company, within a group of companies, which is not a signatory to the arbitration agreement, can be held to be bound by it, has been provided by the Hon'ble Supreme Court of India in ONGC v. Discovery Enterprises _____ Page No 86 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Pvt. Ltd and Anr. ((2022) 8 SCC 42, @ para 40).

175. Thus, it is submitted that recognizing and enforcing an award which has been passed on the basis of the 'single economic entity' doctrine would violate the fundamental policy of Indian law and

the most basic notions of justice.

176. It is further submitted that Respondent No.3 was not a signatory or party to NDU-3, it did not undertake any payment obligations there under and it did not consent to be bound by the arbitration agreement contained therein. There was no consensus ad idem, in relation to PV modules delivery or to resolve disputes by arbitration. The burden is on the Petitioner to estab- lish that 3rd Respondent intended to consent to arbitration and/or be bound by it. Reckitt Benckiser (India) Pvt. Ltd. v. Reynders Label Printing India Pvt. Ltd. & Anr. (2019) 7 SCC 62.

177. It is further submitted that under Section 44 of the Arbitration Act, a foreign award is required to meet specified criteria, including for it to _____ Page No 87 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 be made in pursuance of an agreement in writing for arbitration. There are no limitations on the Hon'ble Court's jurisdiction to assess whether an arbitral award is a foreign award. Renusagar Power Cp. Ltd. v. General Electric Co. 1994 Supp (1) SCC 644, Shri Lal Mahal Ltd. v. Proteggo Grano SpA (2014) 2 SCC 433.

178. It is submitted that the Award is unenforceable under Section 48(2)(b) of the Arbitration Act, and enforcement thereof would be contrary to the fundamental policy of Indian law and most basic notions of justice. Ssangyong Engg. & Construction Co. Ltd. v. NHAI (2019) 15 SCC 131, Associate Builders v. DDA (2015) 3 SCC 49.

179. It is submitted that the Award is passed in violation of require- ments specified under Section 21 of the Companies Act, which requires that for a contract to be binding on a company, it should be in writing, signed by its KMP or officer or employee who is authorized by the board sign the agreement Narne Estates Pvt. Ltd. and Another v. Gomedha Estates Pvt. Ltd. 2020, SCCOnline TS 3426, followed by Hon'ble Clerv Gomedha Es- _____ Page No 88 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 tat Saishree Steels Private Limited v. Shivan Dhatu Udyog Pvt. Ltd, MANU/WB/0019/2023.

180. It is submitted that there is no agreement in writing, to resolve disputes through arbitration, entered into by 3rd Respondent with the Peti- tioner. Indowind Energy Limited v. Wescare (India) Limited and Anoth- er (2010) 5 SCC 306, Dale and Carrington Invt. (P) Ltd and Ors vs. P.K Prathapan and Ors. AIR 2005 SC 1624.

181. In view of the aforesaid submissions, it is prayed that this Hon'ble Court may be pleased to dismiss the above Arbitration OP (Commer- cial Division) No.186 of 2023, with exemplary costs, in the interest of justice and equity.

PART-III-D (Petitioner's Response to Respondent No.3's Submissions)

182. It is submitted that Respondent No.3 in its brief written submissions dated 14th May 2024 referred to a case law/judgement in the matter of Reckitt Benckiser (India) Pvt. Ltd. v Reynders Label Printing India Pvt. Ltd. to contend that the burden is on the Petitioner to establish _____ Page No 89 of 184 https://www.mhc.tn.gov.in/judis

Arb.O.P.(Com.Div.)No.186 of 2023 that Respondent No.3 intended to consent to arbitration and/or be bound by it.

183. It is submitted that Respondent No.3 at this juncture cannot rely upon this judgment as they had not cited this judgment during the final hearing/arguments. Hence, this objection may kindly be upheld by this Hon'ble Court.

184. It is submitted that in any event, without prejudice to what is stated above, the Petitioner will deal with the case law/judgement relied upon by the Respondent No.3:-

> (a) Reckitt Benckiser deals with Section 11 arbitration application pursuant to an arbitration agreement entered into between two Indian parties i.e. the Applicant and Respondent No.1;
>
> (b) Applicant sought to implead Respondent No.2, a Belgium based company, in the proposed arbitration proceedings despite it being a non- signatory to the agreement;
>
> (c) The Applicant invoked the jurisdiction of the Hon'ble Supreme Court on the premise that it is an international commercial arbitration;
>
> (d) The Hon'ble Supreme Court dismissed the arbitration application as against Respondent No.2, however in the interest of justice and with the consent of Applicant and Respondent _____ Page No 90 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 No.1, the Hon'ble Supreme Court appointed an arbitrator to conduct domestic commercial arbitration at New Delhi between the Applicant and Respondent No. 1. In this context the Hon'ble Supreme Court, without dilating on other contentions, has held that the burden is on the Applicant to establish that Respondent No.2 had an intention to consent to the arbitration agreement and be party thereto.

185. It is submitted that in the facts of the present case, the Learned Arbitrators (SIAC, Singapore) have found that there is a binding arbitration agreement between all the three Respondents.

186. It is submitted that the reasoning of the Arbitral Tribunal has also been upheld by the High Court of the Republic of Singapore and further affirmed by 3-Judges of the Singapore Court of Appeal. It is further submitted that the findings of fact by the Arbitral Tribunal which was upheld all the way by the Singapore Court of Appeal, cannot be interfered with as per law cited by the Petitioner during the hearing. PART-IV (DISCUSSION AND CONCLUSION) _____ Page No 91 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023

187. I have considered the arguments advanced by the learned Senior Counsel for the Petitioner and the learned Senior Counsel for the Respon- dents. I have also perused the written submissions and the case laws submit- ted by the learned Senior Counsel for the Petitioner and the learned Senior Counsel for the Respondents. I have also perused the Award. I have also perused the decision of the

High Court of Singapore and the decision of the Court of Appeal.

188. The issue that arises for consideration in the present cases is whether the Final Award dated 22.02.2021 and the addendum to the aforesaid Final Award dated 08.03.2021 are to be recognized and enforced under Part-II of the Arbitration and Conciliation Act, 1996 read with First Schedule to the said Act.

189. The Petitioner's claims in the arbitration proceedings arise in the background of certain outstanding payments in respect of invoices raised by it on SunEdison Products Singapore Pte. Ltd., the Non-Party under the Module Supply Agreement (MSA) dated 19.08.2015, and due to defaults committed by the aforesaid Non-Party in releasing payments towards the outstanding dues.

190. To secure the release of the PV Modules, the Petitioner thus decided to withhold further deliveries of PV Modules which were to be used in the Adhavan Project of the Respondent No.3 (the Project Company) until payment was released by the Non-party. Thus, negotiations took place during the period between March 15, 2016 and March 18, 2016, between the representatives of the Petitioner and representatives of SunEdison Group entities namely the Respondents herein. Thus, invoices, defaults and claims which were subject matter of the Module Supply Agreement (MSA) dated 19.08.2015 between the Petitioner and the Non-Party was reduced in writing in the form of Non Disposal Undertaking (NDU) dated 17.03.2016.

191. Non Disposal Undertaking (NDU) dated 17.03.2016 was in the form of an appendage to Module Supply Agreement (MSA) dated 19.08.2015 between the petitioner and the said Non-Party namely SunEdison Products Singapore Pte. Ltd.

192. Both Respondent No.2 (the Engineering Company) and Respon- dent No.3 (the Project Company) are signatory to NDU-3 dated 17.03.2016. They have not explicitly signed NDU-3 dated 17.03.2016. Independently, they are party to an Equipment and Material Supply Agreement dated 02.03.2016 between them.

193. To provide comfort to the Petitioner for payment, drafts of Non- Disposal Undertakings ("NDUs") (creating a negative pledge regarding the transfer of a percentage of Respondent No.1's shareholding in Respondent No.3) (the Project Company) as security were exchanged between March 15, 2016 to March 18, 2016.

194. Under NDU-3 dated 17.03.2016, Respondent No.2 (the Engineering Company) along with Respondent No.1 undertook to pay the petitioner. NDU-3 dated 17.03.2016 was signed by Mr.Vinay Bhatia, the Director of the Respondent No.3 (the Project Company) on behalf of Respondent No. 1, as an authorised representative of Respondent No. 1. NDU-3 dated 17.03.2016 was pursuant to a resolution of Board of Directors of Respondent No. 1.

195. There are no Board resolution passed by Respondent No. 3 which authorised Mr. Bhatia, the Director of the Respondent No.3 (the Project Company) to sign any version of the NDUS, including NDU-3 for Respondent No.1 binding later to the obligation therein.

196. Mr.Vinay Bhatia, the Director of Respondent No.3 (the Project Company), incidentally is the General Counsel, India of both Respondent No.2 (the Engineering Company) and Respondent No.3 (the Project Company). NDU-4 also dated 17.03.2016 was subsequently shared by the Petitioner with further amendments to NDU-3 dated 17.03.2016 with the respondents and was emailed to the respondents. NDU-4 was, however neither signed nor acted upon. Therefore, under NDU-3 dated 17.03.2016, a concluded contract was reached and acted upon by the Petitioner and thus further supplies were made by the petitioner to Respondent No.2 (the Engineering Company) / Respondent No.3 (the Project Company) for the latter's project.

197. Thus, the point for consideration before this Court is whether Respondent No. 2 (the Engineering Company) and Respondent No. 3 (the Project Company) who were made signatory to NDU-3, dated 17.03.2016, can be bound by the Arbitration Clause in NDU-3 dated 17.03.2016.

198. The burden is on the Petitioner to establish that Respondent No. 3 (the Project Company) and Respondent No. 2 (the Engineering Company) had an intention to consent for arbitration under NDU-3 dated 17.03.2016 and be bound by it as held in Reckitt Benckiser (India) Pvt. Ltd. v. Reynders Label Printing India Pvt. Ltd & Anr. (2019) 7 SCC 62, (para 12-14).

199. NDU-3 dated 17.03.2016 itself suggests that Respondent No. 3 (the Project Company) was appointed as the agent of Respondent No.1 to receive notice on behalf of Respondent No.2. In this connection clause 4, particularly clause 4.1, 4.2, 4.4 and 4.8 of NDU-3 dated 17.03.2016 are relevant. They read as under:-

> Clause 4.1 Clause 4.2 Clause 4.4 Clause 4.8 Except as All such notices The contact Without prejudice otherwise and details of the to any other expressly communications Company*** are mode of service provided herein shall be effective as follows:- allowed under or in any of the only on actual any relevant law, Clause 4.1 Clause 4.2 Clause 4.4 Clause 4.8 Agreements, all receipt by the Kind Attention: SunEdison ***:-
>
> notices and other officer of the General Counsel (a) irrevocably communications Client#, the India. appoints the provided for Contractor*, the Company as hereunder or Company** or its agent to there under shall SunEdison*** as Address: receive and be (i) in writing the case may be SEI Adhavan acknowledge (including telex for whose

Power Private on its behalf and telecopier attention the Limited** service of any except as noted notice or th writ, 10 Floor, below) and (ii) communication summons, telexed, has been expressly Menon Eternity, order telecopied or sent marked. Old No.110, New judgment, by a Person, No.165, notice or overnight other legal courier (if for St. Marys Road, process in inland delivery) Alwarpet, connection or with this Chennai – 600 international Undertaking;

018, courier (if for and overseas Tamil Nadu.

delivery) to a Party hereto at its address and contact number specified below, or at such other address and contact number as is designated by such party in a written notice to the other parties hereto.

(b) agree failu proce to SunEd the will inval proce conce

Respondent No.2 (the Engineering Company) * The Petitioner ** Respondent No.3 (the Project Company) *** Respondent No.1

200. Respondent No. 3 is named in NDU-3, and the Notices clause provides its contact details. Payment obligations are defined in Clause 1 of NDU-3 dated 17.03.2016 to mean "the payment obligations of the Client Respondent No. 2 namely (the Engineering Company) pursuant to the Invoices".

201. Clause 2 of NDU-3 dated 17.03.2016 sets out Respondent No. 1's undertaking to not to alienate its shareholding in Respondent No. 3 (to the extent of 24%) till payment obligations were discharged on the supplies made and to be made. Although, Respondent No. 3 (the Project Company) has not undertaken any payment obligations under NDU-3 dated 17.03.2016, though it is the beneficiary of NDU-3 dated 17.03.2016. _____ Page No 98 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023

202. As per clause 2.3 all obligations under the NDU-3 dated 17.03.2015 shall automatically terminate upon receipt of the complete payment of the Invoices by the Respondent No.1 and Respondent No.2 (the Engineering Company).

203. As far as Respondent No.1, the obligation is in clause 2.1 which reads as under:-

> 2.1 Save for as set out herein or specifically permitted by the Contractor, SunEdison shall until the complete discharge of the Payment Obligations by the Client, continue to legally and beneficially hold and retain at least 24% (Twenty Four per cent) of the equity in the Company as more specifically described in Annexure 2 ("NDU Shares") free of any Security Interest, and shall not, without prior approval from the Contractor, until the complete and full discharge of the Payment Obligations, sell, transfer, assign, dispose of, pledge, charge or create any Security Interest on the NDU Shares in favour of any person (including to TerraForm Global ("GLBI.") or any of its affiliates pursuant)

204. The definition of parties in NDU-3 refers to Petitioner and Respondent No. 1. NDU-3 deals with Respondent No. 1's obligation to not to dispose of its shareholding in Respondent No. 3 (the Project Company). _____ Page No 99 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023

205. Clause 3 lists the representations and warranties of Respondent No.1 alone. There are no representations and warranties of Respondent No.3.

206. Although Respondent No. 3 (the Project Company) has not expressly bound itself to any obligation in NDU-3, the fact remains that Mr.Vinay Bhatia, the Director of the Respondent No.3 (the Project Company)'s Director signed NDU-3 dated NDU-3 dated 17.03.2016 and agreed to receive notice to resolve any disputes by way of Arbitration that may be raised by the Petitioner regarding payment.

207. As per clause 4.2 of NDU-3 dated 17.03.2016, Mr.Vinay Bha- tia, the Director of the Respondent No.3 as the General Counsel, India of Respondents agreed to receive notice not only on behalf of Respondent No.2 (the Engineering Company) and Respondent No.3 (the Project Company) but also on behalf of Respondent No.1. It is a very clear drafting of agreement by the Respondents. Even if the doctrine of Contra- _____ Page No 100 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Proferentem is applied, it has to be construed that all the respondents agreed to be bound by NDU-3 dated 17.03.2016.

208. Thus, under NDU-3 dated 17.03.2016 signed by Mr. Vinay Bhatia, the Director of the Respondent No.3 (the Project Company) as the Authorized representative of Respondent No.1 received notice on behalf of Respondent No.1 and Respondent No.2 (the Engineering Company). Thus, all the parties were involved in negotiations which led to signing of NDU-3 dated 17.03.2016.

209. Thus, Notice was to be served on Mr.Vinay Bhatia, the Director of the Respondent No.3 (the Project Company), for both Respondent No.2 (the Engineering Company) and Respondent No.3 (the Project Company) and Sun Edison Group.

210. Under Clause 5.1 Respondent No. 1 has undertaken a binding obligation upon itself and its successors. Same is also reflected in Clause 6 of NDU-3 which clearly sets out the term of the Undertaking. It states that _____ Page No 101 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 "the obligations of SunEdison (Respondent No.1) under this Undertaking shall be automatically and released conditionally upon the discharge of the Payment Obligations as defined here".

211. Consensus ad idem stands demonstrated both in relation to: (i) Module Delivery; (ii) NDU-3 dated 17.03.2016; and (iii) to resolve disputes by arbitration. This is why the Tribunal has considered these aspects separately.

212. Thus, NDU-3 dated 17.03.3016 manifests a clear intention of all the respondents to be bound by it. Therefore, on facts it is clear that the parties agreed for the Arbitration Clause in NDU-3 dated 17.03.2016.

213. That apart, entire equity shareholding of Respondent No. 1 in Respondent No.3 (the Project Company) was sold to Greenko Group entity even before dues were settled to Petitioner contrary to the undertaking/representation in NDU-3 dated 17.03.2016. Thus, the Petitioner termed this act as a breach of NDU-3 dated 17.03.2016 and _____ Page No 102 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 issued a notice of addressing of dispute dated 11.11.2016 (and thereafter invoked arbitration) against the Respondents under NDU-3.

214. The primary defense of the Respondent No.2 & Respondent No.3 is that the law that is applicable in Singapore should be applied for enforcing an award in terms of Section 48(1) (a) of Arbitration and Conciliation Act, 1996. It is submitted that the Courts in Singapore had not recognized the concept of Group of Companies. They have relied upon the decision of Singapore High Court in Manuchar Steel Hong Kong Ltd. v. Star Pacific Line Pte Ltd., 2014 SGHC 181, to reiterate the proposition that Group of Companies Doctrine/Single Economic Entity concept is not recognised in Singapore and hence, the award cannot be enforced.

215. In this regard, the factual differences should be noted and not missed. In Manuchar Steel Hong Kong Ltd. v. Star Pacific Line Pte Ltd., 2014 SGHC 181 heavily relied on by the respondents, enforcement of Award was sought against a non-party to the Arbitral proceedings on the _____ Page No 103 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 ground that the said non-party was a part of Single Economic Entity of the Award Debtor against whom the award was sought to be enforced.

216. There, an application was thus filed to ascertain the same. It was a pre-action discovery from Star Pacific Line Pte Ltd (“Star Pacific”) of all documents relating to the hire, use or operation of a

vessel, Fusion 1, by Star Pacific or its servants or agents. In that context, the Singapore High Court in Manuchar Steel Hong Kong Ltd. v. Star Pacific Line Pte Ltd., 2014 SGHC 181 held that the Group of Companies Doctrine under the Arbitration law was not acceptable. The Court there followed its views in Lew Syn Pau and Win Line (UK) Ltd v. Masterpart (Singapore) Pte Ltd and another [1999] 2 SLR(R) 24 ("Win Line") wherein the concession by both parties' counsel that the separate corporate legal personality principle presented a considerable obstacle to a finding that the act of Compart Mauritius was to be taken as an act of BIGL.

217. Lew Syn Pau and Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd and another [1999] 2 SLR(R) 24 ("Win Line") _____ Page No 104 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 was a case of piercing the corporate veil because what was sought to be done was to attribute the act of a company to its controller. There was no argument or discussion to the effect that because Compart Mauritius and BIGL, together with other entities, operated as a single economic entity or each belonged to that single economic entity with the consequence that the acts and liabilities of each of the companies in that entity may be attributed to the other.

218. There, the Court in Lew Syn Pau and Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd and another [1999] 2 SLR(R) 24 ("Win Line") was dealing with a situation whether BIGL, had committed an offence by giving prohibited financial assistance to a purchaser for the acquisition its shares. There, a company which was the target of an intended acquisition was prohibited, subject to certain statutory exceptions, from directly or indirectly giving any financial assistance for the purposes of or in connection with the acquisition. The financial assistance was taken in the form of a loan by one of BIGL's subsidiaries, namely Compart Mauritius. The Court thus held that Single Economic _____ Page No 105 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Entity was not applicable. This view was followed by the Singapore High Court in Manuchar Steel Hong Kong Ltd. v. Star Pacific Line Pte Ltd., 2014 SGHC 181 in the case of One Ship Company.

219. Further, in Manuchar Steel Hong Kong Ltd. v. Star Pacific Line Pte Ltd., 2014 SGHC 181, the Singapore High Court was concerned with the issue as to why a single economic entity concept has no place in Singapore law in the context of one-ship companies.

220. There the Court in Manuchar Steel Hong Kong Ltd. v. Star Pacific Line Pte Ltd., 2014 SGHC 181 held that if the single economic entity concept were accepted, all such one-ship companies would be considered as part of the same Single Economic Entity with the corollary that the liability of a one-ship company may be visited on several (or all) of its other sister companies and mere existence of a group structure; the piercing of the corporate veil exception would not even be needed. _____ Page No 106 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023

221. In short, it held that there would be no place for the survival of the one-ship companies practice and doctrine which has long existed and recognised as a legitimate tool for limiting liability. Therefore, the Court concluded that the Single Economic Entity concept had very little traction in

International Arbitration Community, especially outside jurisdictional issues (such as whether a company was within the group or is part of the group for the purposes of jurisdiction).

222. However, in the present case, the Arbtiral Tribunal was not involved with a situation from the perspective of Single Economic Entity to award the amounts to the Petitioner, although under Indian Law, all the Respondents will certainly come within the Group Company Doctrine/Single Economic Entity. The, Arbitral Tribunal has given a factual finding that all the respondents were party to the agreement, although it was signed by the Respondent No.1 which was signed by the Director of Respondent No.3 binding Respondent No.2. _____ Page No 107 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023

223. In this case, after examining the facts and evidence, in response to Issue No.1, the Arbitral Tribunal observed as under:-

> E.ANALYSIS AND FINDINGS ON FRAMED ISSUES Issue 1 as framed by the Claimant (As to whether there is a contract beween the parties and what the terms are)
>
> 129. When Ringhofer was asked by the Tribunal as to when the Respondents first communicated to the Claimant that they did not consider NDU-3 to be valid or binding, he was unable to point to any such communication. Ringhofer was also unable to identify any documentary evidence to support his claim that SunEdison at all times internally considered NDU-3 to be invalid he confirmed that there are no internal documents between the SunEdison entities to show that any of them considered NDU-3 not to be binding. It bears mention that none of the Respondents responded to Claimant's Notices of Dispute in relation to NDU-3, which were served on them on 11 November 2016" and 8 January 2017, to deny its existence or validity, The very first time that any of the Respondents denied the existence or validity of NDU- 3 was after the commencement of this arbitration in April 2017.

....

131. For the above reasons, the Tribunal finds the Respondents' arguments that NDU-3 constituted entire contract between the Parties, that it was rejected by the Claimant, that the terms therein are uncertain, and/or that NDU-3 is not workable, are wholly without merit on the facts and the law, The evidence shows (a) that _____ Page No 108 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Pashupathy was head of the Asia operations of SunEdison Inc represented the SunEdison group's interests in India, (b) that Vinay Bhatia was a director of the 3rd Respondent when he signed NDU-3 as authorised representative of the Ist Respondent, and was also General Counsel of SunEdison's group operations in India, and (c) that Ramesh was the Chief Operating Officer of SEEI and a director of the 2nd Respondent at the material time. Pashupathy, together with Vinay Bhatia and Ramesh negotiated the terms of NDU-3 from 15-18 March 2016. The Tribunal finds that Pashupathy had authority to represent the Respondents, which he did, 100 in agreeing to pay the Claimant's unpaid invoices for

PV Modules delivered for the Adhavan Project in consideration of the Claimant delivering the remaining shipments of PV Modules to enable the Adhavan Project to be completed in time on the terms set out in the PV Modules Delivery Agreement. In this connection, we do not accept Ringhofer's testimony that Pashupathy had no legal authority to represent the 3rd Respondent in negotiating the terms of NDU-3 for the reasons set out at [42] above. He also had no personal knowledge of the events that led to the execution of NDU-3 Finding on Issue 1

132. The Tribunal finds that the Claimant and the Respondents, jointly and severally, entered into the PV Modules Delivery Agreement, which includes NDU-3 on the terms contained therein.

224. In response to Issue No.2- whether Respondents were parties to NDU-3, the Arbitral Tribunal observed as under:-

> D. Claimant's case
>
> 138. The Claimant's case is that although the 1"
>
> Respondent signed NDU-3 and is therefore a party to the NDU, the 2nd and 3rd Respondents are bound by the terms of NDU-3 as they are parties to the PV Modules Delivery Agreement which includes the terms of NDU-3 to regulate the security provided by the 1st Respondent.
>
> E. Tribunal's analysis .....
>
> 143. Not only did Pashupathy agree to provide "security" for the payment of the unpaid invoices, he also promised that "we will pay as soon as we drawdown the loan", i.e., under the Facility Agreement dated 4 November 2015 which provided financing for the Adhavan Project of up to Rs 317 crores on the projected cost of Rs 514.5 crores. Similarly, Robin Yan also emailed Daniel Yang that "We will pay 9M next week before the last 9MW arrived. Risk exposure for Jinergy is only 7.5M USD."

144. By using the expressions "we" and "SunEdison", and involving the 2 ^ (nd) and 3 ^ 4 Respondents as well, Pashupathy was understood by Dr Yang to warrant that the Respondents would jointly and severally undertake to pay Jinergy's unpaid invoices, instead of SPS pursuant to the MSA. As far as Dr Yang was concerned, SPS ceased to be a relevant party in the delivery of the remaining PV Modules to the 2 ^ (sd) Respondent. The 1" Respondent, as the 99.99% owner of the 2 ^ (nd) and 3rd Respondents, assumed the responsibility for itself and its 99.99% subsidiaries, to agree to pay the Claimant for all unpaid invoices in order to persuade Dr Yang to agree to deliver the last shipments of PV Modules, without which the Adhavan Project could not be completed in time to enjoy a higher price for the supply of electricity under the

terms of the ESA. Pashupathy had promised that the unpaid invoices would be paid from the drawdowns from the Facility Agreement, that is to say, by the 3 ^ w Respondent, who was the borrower.

145. Finally, the Tribunal is of the view that Clause 9(c) of NDU-3 which provides that for the purpose of arbitrating a dispute arising thereunder, the Respondents must act together to appoint an arbitrator implies that the Respondents are a unified party to NDU-3. Since neither the 2nd Respondent nor the 3rd Respondent provided the security in the form of the NDU Shares, their joint obligation or right to appoint an arbitrator implies they had a common interest in the dispute, which in the present case, is not only the loss suffered by the Claimant by the wrongful disposal of the NDU Shares but also the claim for payment of the unpaid invoices for PV Modules delivered at the request of the Respondents. Clause 9(c) assumes that the Respondents are parties to the main or primary agreement, i.e, the PV Modules Delivery Agreement. F. Finding of Tribunal

146. For the above reasons, the Tribunal accepts the submissions of the Claimant that the Respondents are parties to NDU-3." _____ Page No 111 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023

225. Similarly for Issue No.3 as to whether the Respondents were parties to the arbitration agreement in clause 9 in NDU-3, the Arbitral Tribunal observed as under:-

> E. Findings of Tribunal on Issue 3
>
> 162. The 1" Respondent having failed to show that the NDU-3 was rejected, has no other basis to say that it is not a party to the arbitration agreement. The Tribunal finds that the arguments of the 2nd and 3 Respondents that they are not parties to NDU-3 have no merit since they are based on the premise that there was no concluded contract between the Parties since NDU-3 was rejected, or that there was no agreement reached on the terms of the contract and/or NDU-3 was incomplete and not workable because the unpaid invoices in respect of which the Claimant is claiming were not included in NDU-3.
>
> 163. The Tribunal accepts the Claimant's submissions that on the evidence the Parties had entered into a broader agreement in the form of the PV Modules Delivery Agreement, of which NDU-3 was an appendage. There was an agreement by the Respondents to pay the unpaid invoices in consideration of the release of the remaining PV Modules by the Claimant. There was a separate document, viz., NDU-3, which set out the terms of the "security" that Pashupathy had offered the Claimant _____ Page No 112 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 after Dr Yang did not agree to release the remaining shipment of PV Modules for the Adhavan Project simply on the words of Pashupathy.

> 164. The Tribunal has found that Pashupathy, Ramesh and Robin Yan had authority to negotiate the terms of the release on behalf of the Respondents who, together, owned the Adhavan Project. The 1" Respondent in effect owned and constructed the Adhavan Project using two SPVs, viz., the 2nd and 3rd Respondents to do so, in line with the SunEdison business model described above. The Respondents were collectively parties to the PV Modules Delivery Agreement, with NDU-3 as an appendage, even though only the 1st Respondent was the signatory to NDU-3. Accordingly, the Respondents were parties to the arbitration agreement, and the Tribunal has jurisdiction to determine the claims of the Claimant against the Respondents under the PV Modules Delivery Agreement.

Was the PV Modules Agreement a guarantee for the liabilities of the 3* Respondent?

165. The 3rd Respondent has argued at [3]-[4] of it Reply Closing Submissions as follows:

> 3. However, the Claimant's reliance on terms outside of the four walls of the NDU is fundamentally defective. Section 6(b) of the Civil Law Act (Cap. 43) ("CLA") provides:
>
> No action shall be brought against any defendant upon any special promise to answer for the debt, default or miscarriage of another person unless the promise or agreement upon which such action _____ Page No 113 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person lawfully authorised by him.
>
> 4. The Claimant had raised the Invoices on SPS pursuant to the MSA, and it was SPS that was obliged to pay for these Invoices. Even assuming arguendo that the 3rd Respondent had promised to directly pay (or ensure payment of) the Invoices on behalf of SPS, such a promise must be in writing and signed by the 3rd Respondent before any action can be commenced against the 3rd Respondent.

Section 6(b) of the CLA is an absolute bar against the Claimant's claim for breach of its alleged obligation to directly pay (or ensure payment of) the Invoices. The Claimant's claim against the 3rd Respondent for breach of contract vis-à-vis non- payment of the sum of US$7,348,403.10 must fail in limine.

166. The Tribunal does not agree with this argument. 10% The short answer is that the PV Modules Delivery Agreement constitutes new obligations by the Respondents to pay the unpaid invoices, in substitution for the obligations of the 1ª Respondent. Pashupathy did not suggest to Dr Yang that "we" will guarantee payment of the unpaid invoices by SPS under the MSA, but that "we" will pay all unpaid invoices issued pursuant to Purchase Orders. At this time, all the Purchase Orders for modules needed for the Adhavan Project had been made under the ESA. The role of SPS as a conduit in the procurement of PV Modules for the Adhavan Project came to an end.

 Does the "group of companies" or "single economic entity" doctrine apply in Singapore?

167. The 3rd Respondent has submitted that it is indisputable that under Singapore law, the "group of companies" or "single economic entity" doctrine is not recognized, citing as authority for this proposition, Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte. Ltd. [2014] 4 SLR 832 ("Manuchar"). The Tribunal does not agree with this submission. There is no reason in principle why the doctrine does not apply if a party to a contract intended to contract in that manner. If, as in the present case, SunEdison Inc (under the authority of Pashupathy in India) intended to treat the Respondents as a single entity for the purpose of obtaining delivery of the remaining PV Modules from the Claimant, and offered to pay the unpaid invoices and also to provide security for their obligations, and the Claimant accepted those terms,there is no principle of law that prevents the court / arbitral tribunal from giving effect to such an agreement. Indeed, it is the court's duty to give effect to the contractual intention of the parties, unless the terms are contrary to public policy. That is a basic principle of contract.

168. Manuchar is distinguishable on the facts and in the realm of shipping practice. That case concerned an application for pre-action discovery for documents on the basis that the defendant was part of a single economic entity. The High Court dismissed the application on the ground that pre-discovery was not necessary. The court also said that the single economic entity concept has not been recognised in the case law from Singapore and other common law jurisdictions, and that it was not even a clearly established concept in international arbitration. 107 Those statements were obiter, in so far as they purported to apply to commercial transactions other than those in the case of one-ship companies.

169. In the shipping industry, the use of one-ship companies by shipping enterprises are an established feature of the business for the purposes, inter alia, of preventing claimants or creditors from arresting sister ships. All ships so owned are operationally independent, having their own captains and crews. The common owner of such companies treats them as independent economic units under the law for financial, operational and third-party liability reasons. So do the courts in recognition of their economic function. Manuchar is not an authority for the 3rd Respondent's proposition. In comparison, the evidence in this arbitration shows that the Respondents were indeed a single economic unit and were intended to be so by the ultimate owner, SunEdison Inc, in accordance with its business model. None of the Respondents had management and operational staff to carry out the functions of the Respondents. They were performed by other entities within the SunEdison group of global entities. When the solar power plant developed as the Adhavan Project was sold in SunEdison Inc's Chapter 11 proceedings, the proceeds of sale were not paid to the Respondents, but to SunEdison's creditors. There was no question that the Respondents were treated and managed as a single economic unit that would eventually result in the creation of a yieldco for the sole benefit of SunEdison Inc, and not for the Respondents as separate and independent economic units.

170. None of the authorities referred to in Manuchar are directly on point in relation to the facts in this arbitration. The strongest judgment the court relied to opine that the single economic entity doctrine does not apply in Singapore is the judgment of Slade LJ in Adams v Cape Industries plc [1990] Ch 433 ("Adams") at 536), which was based on the judgment of Roskill LJ in Albacruz (Cargo Owners) v Albazero (Owners) (The Albazero) [1977] AC 774 at 807. Adams was cited with approval in PP v Lew Syn Pau [2006] 4 SLR(R) 210 ("Lew Syn Pau") at [193]) and Win Line (UK) Ltd v Masterpart (Singapore) Pie Lid [1999] 2 SLR(R) 24. None of these cases were really concerned with a real case of a single economic entity. Indeed, Professor Gower was far, far ahead of his time when he wrote in Modern Company Law, 3rd ed (1969), p 216 that:

> "there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group."

171. The High Court's statement in Manuchar that, apart from the Dow Chemical arbitration case, the single economic entity concept has very little traction in the international arbitration community, especially outside jurisdictional issues (such as whether a company within the group is part of the group for the purposes of jurisdiction). This may be so. It all depends on the facts. If a global company like SunEdison Inc organizes its business worldwide in such a recognizable way that certain groups of entities within the group are treated as a single economie entity vis-à- vis suppliers of services and materials to that single entity, there is no principle of law that debars a court _____ Page No 117 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 from recognizing that entity as a single entity as a matter of law. After all, it is an established principle that the courts should give effect to commercial arrangements or realities, whenever it is not contrary to law or public policy.

172. The editors of Vol 6 of Halsbury's Laws of Singapore on Company Law (2010 Reissue) write:

> "The important point about the cases in which a group was treated as one entity is that there was a functional unity among the companies within the group. It is suggested that there are two aspects to this: unity of ownership and unity of control. If this functional unity is not present, there will be no justification to treat the group. The court will decline to lift the corporate veil of incorporation. If. on the other hand, it can be shown that the group is managed as a functional whole, a lifting of the veil may occur.
>
> The Tribunal would approve of this statement with reference to the Respondents who, together, constituted a single economic unit with functional unity.

173. Having said that, the Tribunal would also say that in the present case, it is not necessary for the Tribunal to rely on the single economic unit doctrine, although the SunEdison business model and the evidence in this case supports the intention of Pashupathy to treat the Respondents as a single economic unit for the purpose of implementing its business model in relation to the Adhavan Project. The Tribunal has found as a fact that Pashupathy, in his capacity of President, SunEdison

_____ Page No 118 of 184 https://www.mhc.tn.gov.in/judis
Arb.O.P.(Com.Div.)No.186 of 2023 India, with responsibility for all SunEdison Inc's Asia- Pacific operations, had corporate authority to represent the Respondents jointly and severally in concluding the broader agreement, including NDU-3, with the Claimant.

174. In this connection, it may be mentioned that the Indian Supreme Court of India has recognized the group of companies or single economic entity. Indeed, in dismissing the appeals by the 1 and 2nd Respondents against the decision of a single judge of the Madras High Court on 23 July 2018, the Madras High Court (Appellate Jurisdiction) referred to the decision of the Supreme Court in Choloro Controls India Pte Lid v Severn Trent Water Purification Inc & Ors (2013) 1 SCC 641 which upheld the "group companies doctrine", and read it into section 45 of Act 26 of 1996 (i.e. the (Indian) Arbitration and Conciliation Act, 1996). The Court explained that what was important was the intention of the parties and held that the instant case was even "better" than the Choloro decision. NDU-3 referred to the two appellants, viz., the 2nd and 3rd Respondents, and can be put in the same basket as that of respondent No 2, viz., the 1™ Respondent. The same thing can be said of the present case. It is clearer and stronger on the facts than the facts in Choloro because, here, Pashupathy had the authority to agree, and did agree, on behalf of the Respondents jointly and severally to pay the unpaid invoices in consideration of the Claimant agreeing to release the remaining PV Modules so that the Adhavan Project could be completed in time to qualify for a higher price for electricity to be supplied under the ESA. Accordingly, the Tribunal finds that the Respondents collectively _____ Page No 119 of 184 https://www.mhc.tn.gov.in/judis
Arb.O.P.(Com.Div.)No.186 of 2023 entered into the PV Modules Delivery Agreement with NDU-3 as an appendage.

226. The appeal against the Award passed by the Arbitral Tribunal before the Higher Court of Singapore was also decided against the respondents vide its order dated 25.02.2022. Relevant portion of the Order of the High Court of Singapore reads as under:-

> “143. Indeed, in the course of oral submissions before me, counsel for the third respondent candidly conceded that if I were to find that Aragon (Mr.Pashupathy Gopalan)* had the authority, actual or apparent, to represent the third respondent (Adhavan)* in the March 2016 negotiations with the claimant (Jinneng)*, and to find that a contract arose out of those negotiations, then the third respondent (Adhavan)* would be bound by the contract despite not being a signatory to NDU-3. This must be correct in principle. Although counsel for the second respondent (SSPI)* did not expressly make the same concession, it must be equally correct for the second respondent (SSPI)*.
>
> .....
>
> 149.Returning to the facts of this case, I accept that Boromir (Mr.Vinay Bhatia)* and Frodo (Mr.Ramesh Subbarao)* had implied actual authority from the second respondent (SSPI)* and the third respondent (Adhavan)* respectively to participate in the March 2016 negotiations and to bind those companies to the contract. Boromir

_____ Page No 120 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 (Mr.Vinay Bhatia)* was a director of the third respondent (Adhavan)* in March 2016 in addition to being a director of the first respondent (SEEH)*. Further, Frodo (Mr.Ramesh Subbarao)* was a director of the second respondent (SSPI)* in March 2016. He was also a senior employee of the second respondent (SSPI)*.

150.I also find that Aragon (Mr.Pashupathy Gopalan)* also had authority to bind the second respondent (SSPI)* and the third respondent (Adhavan)*, even though he was not a director of either company in March, 2016. The second respondent (SSPI)* and the third respondent (Adhavan)* argue that Aragon (Mr.-

Pashupathy Gopalan)* lacked any authority to bind either the second respondent (SSPI)* or the third respondent (Adhavan)* because neither company had passed a directors' resolution specifically authorising Aragon (Mr.Pashupathy Gopalan)* to represent it in the March 2016 negotiations. I do not accept this submission. The lack of a directors' resolution establishes only that Aragon (Mr.Pashupathy Gopalan)* did not have actual express authority from either the second respondent (SSPI)* or the third respondent (Adhavan)* to participate in the March 2016 negotiations on their behalf and to bind them to the contract which resulted.

151.The absence of a directors' resolution confer- ring express actual authority on Aragon (Mr.Pashupathy Gopalan)* does not address Aragon's (Mr.Pashupathy Gopalan)* implied actual authority. I find that Aragon (Mr.Pashupathy Gopalan)* had implied actual authority to participate in the March 2016 negotiations on behalf of _____ Page No 121 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 the second respondent (SSPI)* and the third respondent (Adhavan)* and to bind each of them to the contract it gave rise to. I say this for two reasons. First, Boromir (Mr.Vinay Bhatia)* and Frodo (Mr.Ramesh Subbarao)*, as directors of the second respondent (SSPI)* and the third respondent (Adhavan)* respectively, participated in the March 2016 negotiations and remained silent while Aragon (Mr.Pashupathy Gopalan)* took the lead in these negotiations speaking for both the second respondent (SSPI)* and the third respondent (Adhavan)*. Second, Aragon (Mr.Pashupathy Gopalan)* held a senior position in the Rohan Group (SunEdison Group)* as a result of which both the second respondent (SSPI)* and the third respondent (Adhavan)* conferred implied authority on Aragon (Mr.Pashupathy Gopalan)*.

152.The starting point in the analysis is to appreciate Aragon's (Mr.Pashupathy Gopalan)* position within the Rohan Group (SunEdison Group)*. His position is telling as to the ambit of his authority. He was hired to establish the Rohan Group's (SunEdison Group)* business operations in Gondor (India)* and was given the title of "President" of the Rohan Group's (SunEdison Group)* operations in Gondor (India)*. His senior managerial role meant that Aragon (Mr.Pashupathy Gopalan)* had overall responsibility for supervising the Rohan Group's (SunEdison Group)* activities in Gondor (India)*. This extended to overall responsibility for the second respondent (SSPI)* and the third respondent (Adhavan)*. Indeed, a member of the Rohan Group's (SunEdison Group)* in-house legal team accepts in his _____ Page No 122 of 184 https://www.mhc.tn.gov.in/judis

Arb.O.P.(Com.Div.)No.186 of 2023 affidavit that Aragon (Mr.Pashupathy Gopalan)* was a "senior leader" who was "near the top of the chain of command". Aragon (Mr.Pashupathy Gopalan)* was therefore the person to whom most employees in the Rohan Group's (SunEdison Group)* business in Gondor (India)* reported by virtue of his position."

153.Aragon's (Mr.Pashupathy Gopalan)* role and designation in the Rohan Group's (SunEdison Group)* operations in Gondor (India)* also meant that he had overall responsibility for the Project. Indeed, this was something which Aragon (Mr.Pashupathy Gopalan)* himself pointed out to Legolas (Dr.Yang Liyou)* when they spoke on 15 March 2016. That was when Aragon (Mr.Pashupathy Gopalan)* assured Legolas (Dr.Yang Liyou)* that the second respondent (SSPI)* would pay the claimant (Jinneng)* once the third respondent (Adhavan)* managed to draw down the loans from the project financers (see [84(c)] above). The successful completion of the Project, on time and within budget, was Aragon's (Mr.Pashupathy Gopalan)* responsibility. This must extend to resolving difficulties standing in the way of completing the Project on time and within budget, such as the claimant’s (Jinneng)* suspension of delivery of Modules for the Project. I am satisfied that the second respondent (SSPI)* and the third respondent (Adhavan)* gave Aragon (Mr.Pashupathy Gopalan)* their implied ex- press authority to move each of them in directions that he thought were in the best interests of the Rohan Group (SunEdison Group)* in order to complete the Project on time and within budget. I therefore conclude that Aragon _____ Page No 123 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 (Mr.Pashupathy Gopalan)* had the implied actual authority to participate in the March 2016 negotiations on behalf of the second respondent (SSPI)* and the third respondent (Adhavan)*, and to bind them to the contract which resulted.

154.Having reached this conclusion, it is not necessary for me to consider the parties' submissions on apparent authority.

Conclusion on the validity of the arbitration agreement

155. For all these reasons, I find that there is a valid arbitration agreement between the claimant (Jinneng)* and each of the respondents. The tribunal accordingly had jurisdiction over the dispute which the claimant (Jin- neng)* referred to arbitration. The respondents' challenge to the award on this ground fails.” Note-* For easy reference as the High Court has substituted the names for the sake of hiding the identity

227. Thus, the facts of the present case are clearly distinguishable from the Singapore High Court in Manuchar Steel Hong Kong Ltd. v. Star Pacific Line Pte Ltd., 2014 SGHC 181, as the respondents herein were party to the arbitration proceedings and on facts, the findings in the award were that they were not strangers to the Arbitration Agreement in NDU-3 dated 17.03.2015.

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228. Since, the Award was not decided on the basis of Group of Companies doctrine/Single Economic Entity, the arguments of the respondent that the Arbitral Tribunal decided the case by involving Group of Companies doctrine/Single Economic Entity are to be rejected.

229. I shall delve further in my discussion to Part II of the Arbitration and Conciliation Act, 1996 which deals with enforcement of certain Foreign Awards. Chapter I of Part II which encompasses Sections 44 to 52 of Arbitration and Conciliation Act, 1996 deals with New York Convention Awards.

230. Section 44(a) of the Arbitration & Conciliation Act, 1996 which defines the expression "foreign award", is extracted hereunder for reference.

"44. Definition. — In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as _____ Page No 125 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 commercial under the law in force in India, made on or after the 11th day of October, 1960—

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

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

231. Section 44 of the Arbitration and Conciliation Act, 1996 merely states that "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960 -

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

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

232. If the Award satisfies the definition of a "foreign award", it is enforceable under Chapter I of Part II to the Arbitration and Conciliation _____ Page No 126 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Act, 1996. It shall be treated as binding for all purpose on all the persons as between whom it was made and may accordingly be relied on by any of those persons by way of defense, set-off or otherwise in any legal proceed- ings in India and any references in this Chapter to enforcing a "foreign award" shall be construed as including references to relying on an award.

233. All that is required to be satisfied by a successful Award Holder is to demonstrate that the Award was made in pursuance of an agreement in writing to which New York Convention applies. The Petitioner is required to satisfy that the award which is sought to be enforced satisfies the definition of "Foreign Award" in Section 44 (a) of the Arbitration and Conciliation Act, 1996.

234. There is no dispute that parties hereto are governed by the New York Conventions Award in terms of Chapter I of Part II of the Arbitration and Conciliation Act, 1996 read with First Schedule to the Act which deals in Convention for both Recognition and Enforcement of Foreign Arbitral Award. There is no dispute that NDU-3 dated 17.03.2016 is an agreement _____ Page No 127 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 which has been treated as an appendage to the Main Module Supply Agreement dated 19.08.2015 between the petitioner and Non-Party.

235. As per Section 44(a) of the Arbitration and Conciliation Act, 1996, unless the context otherwise requires a "Foreign Award" is an Award made in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule to the Act applies and in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to the territories to which the said Convention applies.

236. It has to be remembered that this Court, while dealing with recognition and enforcement of a "foreign award" under Chapter I of Part II of the Arbitration & Conciliation Act, 1996, is not an appellate court to examine question of facts of whether there existed an arbitration agreement or not, as that decision has been given by the Arbitral Tribunal. Chapter of I of Part II of the Arbitration & Conciliation Act, 1996 is modeled on the NY Convention.

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237. All that is required to be seen is whether the "foreign award" was made between the parties based on an underlying "agreement in writing" and the said "agreement in writing" contained an arbitration clause to resolve the dispute through Arbitration.

238. Therefore, the respondents cannot question the existence of "agreement in writing" for arbitration under section 44 (a) of the Arbitration and Conciliation Act, 1996 at the stage of the enforcement of a "foreign award".

239. The Hon'ble Supreme Court in PASL Wind Solutions (P) Ltd. v. GE Power Conversion (India) (P) Ltd., (2021) 7 SCC 1, held that Section 44 of the Arbitration Act is modelled on Articles I and II of the New York Convention.

240. As per clause 2 to Article II of New York Convention, the expression "Agreement in Writing" includes the arbitral clause in a _____ Page No 129 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 contract or the arbitration

agreement, signed by the parties or contained in an exchange of letters or telegrams.

241. In para 30 of Gemini Bay Transcription (P) Ltd. v. Integrated Sales Service Ltd., (2022) 1 SCC 753, the Hon'ble Supreme Court, while interpreting Section 44 of the Arbitration and Conciliation Act, 1996, recognised the following six ingredients for an award to be termed as "foreign award" under Section 44 of the Arbitration and Conciliation Act, 1996, namely:-

> i. It must be an arbitral award on differences between persons arising out of legal relationships. ii. These differences may be in contract or outside of contract, for example, in tort.
>
> iii. The legal relationship so spoken of ought to be considered "commercial" under the law in India. iv. The award must be made on or after the 11th day of October, 1960.
>
> v. The award must be a New York Convention award — in short it must be in pursuance of an "agreement in writing" to which the New York Convention applies and be in one of such territories.
>
> _____ Page No 130 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 vi. It must be made in one of such territories which the Central Government by notification declares to be territories to which the New York Convention applies.

242. Para 30 of Gemini Bay Transcription (P) Ltd. v. Integrated Sales Service Ltd., (2022) 1 SCC 753 is extracted as under:-

> "30. A reading of Section 44 of the Arbitration and Conciliation Act, 1996 would show that there are six ingredients to an award being a foreign award under the said section. First, it must be an arbitral award on differences between persons arising out of legal relationships. Second, these differences may be in contract or outside of contract, for example, in tort. Third, the legal relationship so spoken of ought to be considered "commercial" under the law in India. Fourth, the award must be made on or after the 11th day of October, 1960. Fifth, the award must be a New York Convention award — in short it must be in pursuance of an agreement in writing to which the New York Convention applies and be in one of such territories. And sixth, it must be made in one of such territories which the Central Government by notification declares to be territories to which the New York Convention applies."
> _____ Page No 131 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023

243. Although the First Schedule to the Arbitration and Conciliation Act, 1996 is titled as "Convention on the Recognition and Enforcement of Foreign Arbitral Awards", Article II to the first schedule is clearly intended to implement the requirements of Section 45 of the Arbitration and Conciliation Act, 1996.

244. The definition of the expression “agreement in writing” in Clause-2 to Article-II of the New York Convention in the First Schedule to the Arbitration and Conciliation Act, 1994 is intended for the purpose of Section 45 of the Arbitration and Conciliation Act, 1996. The definition of the expression “agreement in writing” in Clause-2 to Article-II is really not intended for an enquiry as to whether an agreement exists or not at the stage of Recognition and Enforcement of an International Award in Part-II of the Arbitration and Conciliation Act, 1996.

245. For easy reference, Article I and II of the New York Convention 1958, as in the First Schedule to Arbitration and Conciliation Act, 1996 are extracted as under:-

> _____ Page No 132 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Article 1 Article II
>
> 1. This Convention shall apply to 1. Each Contracting State shall the recognition and recognize an agreement in enforcement of arbitral awards writing under which the made in the territory of a parties undertake to submit to State other than the State arbitration all or any where the recognition and differences which have arisen enforcement of such awards or which may arise between are sought, and arising out of them in respect of a defined differences between persons, legal relationship, whether whether physical or legal. It contractual or not, shall also apply to arbitral concerning a subject matter awards not considered as capable of settlement by domestic awards in the State arbitration.

where their recognition and 2. The term “agreement in enforcement are sought. writing” shall include an

2. The term “arbitral awards” arbitration clause in a shall include not only awards contract or an arbitration made by arbitrators appointed agreement, signed by the for each case but also those parties or contained in an made by permanent arbitral exchange of letters or bodies to which the parties telegrams.

have submitted. 3. The court of a Contracting

3. When signing, ratifying or State, when seized of an acceding to this Convention, or action in a matter in respect notifying extension under of which the parties have article X hereof, any State may made an agreement within on the basis of reciprocity the meaning of this article, declare that it will apply the shall, at the request of one of Convention to the recognition the parties, refer the parties to and enforcement of awards arbitration, unless it finds made only in the territory of that the said agreement is null another Contracting State. It and void, inoperative or may also declare that it will incapable of being _____ Page No 133 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Article 1 Article II apply the Convention only to performed.

differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

246. Further, the expression “agreement in writing” in Article II Clause-2 is an inclusive definition. It includes an arbitration clause in a contract or the Arbitration Agreement, signed by the parties or contained in an exchange of letters or telegrams.

247. The expression “agreement in writing” as in Clause-2 to Article-II is of wide purport. The argument that the Final Award dated 22.02.2021 and the addendum to the Final Award dated 08.03.2021 were not made in pursuance of an “Agreement in Writing” for arbitration as required by the Convention set forth in the first schedule of the Arbitration and Conciliation Act, 1996, namely New York Convention cannot be countenanced as the expression termed “agreement in writing” as in _____ Page No 134 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Clause-2 to Article-II includes an arbitration clause in a Contract or an Arbitration Agreement signed by the parties or contained in an exchange of letters or telegrams.

248. Since the definition of “agreement in writing” in Clause 2 of Article II of the New York Convention is inclusive, covering correspondence through the exchange of letters or telegrams, the application of the ejusdem generis would also encompass exchanges of emails between the parties to the contract. The facts indicate that all parties were involved in negotiations from 15.03.2016 to 17.03.2016, culminating in NDU-3 dated 17.03.2016.

249. It was at that stage, the officers of the respondents, who had dual role both in the group companies as also in the respondents Companies, swung into action and negotiated with the petitioner for supply of the remaining solar modules, which were urgently required for _____ Page No 135 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 completion of the projects of the third respondent (the Project Company) by the second respondent (the Engineering Company).

250. That apart, none of the respondents are strangers to the negotiation which culminated in NDU-3 dated 17.03.2016, which is an appendage to Module Supply Agreement (MSA) dated 19.08.2015 between the petitioner and the non-party.

251. If the requirement of Sub Clause (3) of Article II of New York Convention is fulfilled, a “foreign award” is binding under section 46 of the Arbitration and Conciliation Act, 1996, between the parties.

252. The requirements of an “agreement in writing” under Article II(2) of the New York Convention has been explained in the case of Smita Conductors v. Euro Alloys Ltd., (2001) 7 SCC 728 by the Hon’ble Supreme Court as follows:-

> “6. What needs to be understood in this context is that the agreement to submit to arbitration must be in writing. What is an agreement in writing is explained by para (2) of Article II. If we break down para (2) into _____ Page No 136 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 elementary parts, it consists of four aspects. It includes an arbitral clause (1) in a contract

> containing an arbitration clause signed by the parties, (2) an arbitration agreement signed by the parties, (3) an arbitral clause in a contract contained in exchange of letters or telegrams, and (4) an arbitral agreement contained in exchange of letters or telegrams.

If an arbitration clause falls in any one of these four categories, it must be treated as an agreement in writing."

253. A reading of Article II of the New York Convention, particularly clause (1) to (3), indicates that it gets triggered at the stage of institution of arbitral proceedings, although Article II is grouped in Chapter I of Part II of the Arbitration and Conciliation Act, 1996 for the Recognition and Enforcement of foreign award.

254. This is similar to Section 8 of the Arbitration and Conciliation Act, 1996 in the matter of domestic Arbitration in India and Section 6 of Singapore International Arbitration Act, 1994. Both provisions are inspired from Clause 3 of Article II of the New York Convention, 1958. A _____ Page No 137 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 comparison of Clause (3) to Article II of New York Convention in the First Schedule of the Arbitration and Conciliation Act, 1996, Section 8 and Section 45 of the Arbitration and Conciliation Act, 1996 and Section 6 of Singapore International Arbitration Act, 1994 clearly illustrates this. These provisions are extracted below:-

> Article II of the Section 8 of the Section 45 of the Section 6 of the New York Arbitration and Arbitration and International Convention Conciliation Act, Conciliation Act, Arbitration 1958 1996 1996 Act, 1994
>
> 8. Power to refer 45. Power of Enforcement of parties to judicial authority international arbitration where to refer parties to arbitration there is an arbitration.- agreement.-

arbitration agreement.-

(2) The term (1) A judicial Notwithstanding (1) Despite "agreement in authority, before anything Article 8 of the writing" shall which an action is contained in Part Model Law, include an brought in a I or in the Code where any party arbitral clause in matter which is of Civil to an arbitration a contract or an the subject of an Procedure, 1908 agreement to arbitration arbitration (5 of 1908), a which this Act agreement, agreement shall, judicial authority, applies institutes signed by the if a party to the when seized of an any proceedings parties or arbitration action in a matter in any court contained in an agreement or any in respect of against any other exchange of person claiming which the parties party to the letters or through or under have made an agreement in telegrams. him, so applies not agreement respect of any _____ Page No 138 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Article II of the Section 8 of the Section 45 of the Section 6 of the New York Arbitration and Arbitration and International Convention Conciliation Act, Conciliation Act, Arbitration 1958 1996 1996 Act, 1994 (3) The court of

later than the date referred to in matter which is a Contracting of submitting his section 44, shall, the subject of State, when first statement on at the request of the agreement, seized of an the substance of one of the parties any party to the action in a the dispute, then, or any person agreement may, matter in notwithstanding claiming through at any time after respect of any judgment, or under him, filing and which the decree or order of refer the parties serving a notice parties have the Supreme Court to arbitration, of intention to made an or any Court, refer [unless it prima contest or not agreement the parties to facie finds] [Sub- contest and within the arbitration unless it stituted 'unless it before meaning of this finds that prima finds' by Act delivering any article, shall, at facie no valid No.33 of 2019, pleading (other the request of arbitration dated 9.8.2019.] than a pleading one of the agreement exists. that the said asserting that the parties, refer agreement is null court does not (2) The application the parties to and void, have jurisdiction referred to in arbitration, inoperative or in the sub-section (1) unless it finds incapable of proceedings) or shall not be that the said being performed. taking any other entertained unless agreement is step in the it is accompanied null and void, proceedings, by the original inoperative or apply to that arbitration incapable of court to stay the agreement or a being proceedings so duly certified copy performed. far as the thereof:

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		arbitration agreement or a certified copy thereof is not		(2 wh ap

Article II of the New York Convention 1958	Section 8 of the Arbitration and Conciliation Act, 1996	available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy	Section 45 of the Arbitration and Conciliation Act, 1996	Se In Ar Ac be ac su to or te co co st pr fa pr re ma is

	of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court. (3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the		th ag nu in in be pe (3 co or su th fo of ri ma in su

Article II of the New York Convention 1958	Section 8 of the Arbitration and Conciliation Act, 1996 judicial authority, an arbitration may be commenced and an arbitral award made.	Section 45 of the Arbitration and Conciliation Act, 1996	Secti Inter Arbit Act, order court in re prope is th the d which under subse relat (4) W party proce taken step proce a per least after stayi proce been court

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Article II of the Section 8 of the Section 45 of the Section 6 of the New York Arbitration and Arbitration and International Convention Conciliation Act, Conciliation Act, Arbitration 1958 1996 1996 Act, 1994 proceedings to be reinstated.

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255. The Preamble to Singapore International Arbitration Act, 1994 also makes it clear that International Arbitration Act, 1994 is intended to make provision for the conduct of international commercial arbitrations based on the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law and conciliation proceedings and to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and for matters connected therewith.

256. Thus, when a Court of a Contracting State is seized of an action in a matter in respect of which the parties have made an agreement within the meaning of Article-II, the said Court has to, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

257. Thus, it is clear that it is at the stage of reference, under section 45 of Arbitration and Conciliation Act, 1996, the question whether an _____ Page No 143 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 “arbitration agreement” as is required under Section 44 exists or not is to be examined. In this case, whether there existed an “arbitration agreement” in writing for reference under section 45 was already considered against the respondents in their anti-arbitration injunction suits in C.S.No.12 of 2018 and C.S.No.502 of 2017 vide order dated 24.04.2018.

258. In fact, in response to CS.No.12 of 2018 and C.S.No.502 of 2017 filed by respondent Nos.2 and 3 respectively, the petitioner had filed applications praying that the Court refer the parties to the above suits, which includes all the parties herein to Arbitration, in terms of the Clause 9 of the NDU-3 dated 17.03.2016 in accordance with Section 45 of the Arbitration and Conciliation Act, 1996 which was answered against the respondents No.2 &3. Therefore, prima-facie It cannot be said that the Award was not made in pursuance of an “agreement in writing” as is contemplated under Arbitration and Conciliation Act, 1996 and New York Convention 1958.

259. The decision of the Court in C.S.No.12 of 2018 and C.S.No.502 of 2017 was affirmed by the Hon'ble Division Bench of this Court in its Order dated 23.07.2018 in Sei Adhavan Power Private Limited Vs. Jinneng Clean Energy Technology Limited and Ors in Order in O.S.A.170 to 175 of 2018.

260. The Hon'ble Division Bench, after considering the facts of the case, also referred the dispute for arbitration under section 45 of the Act, 1996. Thus, in this case, it was prima facie established immediately after the commencement of the arbitration proceedings in accordance with Article 21 of the UNCITRAL Model Law, there existed an arbitration agreement for resolution of dispute under Arbitration. Section 21 of Arbitration and Conciliation Act, 1996 is identical with Article 21 of UNCITRAL Model Law.

261. After the Courts in India recognized the existence of an "agreement in writing" whether the agreement was valid or not for the _____ Page No 145 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 purpose of arbitration was to be considered by the Arbitral Tribunal itself while exercising its power under Section 10 (2) of the Singapore International Arbitration Act, 1994. Section 10 (2) of the Singapore International Arbitration Act, 1994 is similar to Section 16 of the Arbitration and Conciliation Act, 1996. Both are based on the doctrine of Kompetenz-kompetenz which are incorporated in Article 16 of the UNCITRAL Model Law which implies it is for the Arbitral Tribunal to determine whether it has jurisdiction to proceed with the case or not.

262. The Arbitration & Conciliation Act, 1996 also incorporates the separability presumption in Section 16(1) along the lines of the UNICITRAL Model Law. Section 3 of Arbitration Act, 2001 of Singapore, makes it clear that the said Act applies to any arbitration where the place of arbitration is Singapore and where Part 2 of the International Arbitration Act, 1994 does not apply to that arbitration. Since Part 2 of the International Arbitration Act 1994 applied, the Award was passed by the Arbitral Tribunal under the provision of the the International Arbitration Act, 1994. Section 16(1) of the Arbitration & Conciliation _____ Page No 146 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Act, 1996, Section 10(2) of the Singapore International Arbitration Act,1994 and Article 16 of UNICITRAL Model Law reads as follows:-

Section 16(1) of the UNICITRAL Model	Section 10(2) of the International Arbitration Act, 1994	Article 16 of Singapore Law
Competence of arbitral tribunal to rule on its jurisdiction- (1) This section has effect despite Article 16(3) of the Model Law.	Appeal on ruling of jurisdiction- (1) The Arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitral arbitration proceedings.	Competence of Competence of Arbitral Tribunal to jurisdiction- (1) This section has rule on its jurisdiction. - effect despite (1) The Arbitral tribunal may rule on its own jurisdiction, including ruling on including any on a plea that it has no respect to the jurisdiction at any stage of the validity of the arbitral arbitration proceedings.

agreement, and for agreement. For that that purpose, purpose, an

(a) an arbitration arbitration clause agreement which which forms part of forms part of a a contract shall be contract shall be treated as an treated as an agreement agreement independent of the independent of other terms of the the other terms of contract. A the contract; and decision by the arbitral tribunal that _____ Page No 147 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Section 16(1) of the Section 10(2) of the Article 16 of Arbitration & Singapore UNICITRAL Model International Law Conciliation Act, 1996 Arbitration Act, 1994

(b) a decision by the the contract is null Arbitral Tribunal and void shall not that the contract entail ipso jure the is null and void invalidity of the shall not entail arbitration clause.

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(2) A plea th arbitral does jurisdict raised no the submi the state defence. not from rais plea by t he has ap or partic the appoi an ar plea that tribunal exceeding scope authority raised as the matte to be bey scope authority

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Section 16(1) of the Arbitration & Conciliation Act, 1996

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			may, in eithe admit a later it considers delay justifi
			(3) The tribunal may on a plea re to in paragr of this Arti as a prelimi question or award o merits. arbitral rules preliminary question tha jurisdiction party may re within thirt after received not that ruling, court specif Article 6 to the matter, decision sha

Section 16(1) of the Arbitration & Conciliation Act, 1996	Section 10(2) of the Singapore International Arbitration Act, 1994	Article 16 of UNICITRAL Model Law	subject appeal; whi a requ pending, arbitral may continu arbitral pr and make an

263. The Arbitral Tribunal as also the Singapore High Court and the Court of Appeals, Singapore have clearly concluded that the Arbitration Clause in NDU-3 dated 17.03.2016 indeed contained an Arbitration Clause signed by the parties owing to the nature of communications that took place at the time when the petitioner decided to withhold further supply of PU modules for the third respondent's (the Project Company) project.

264. In Interplay Between Arbitration Agreements under A&C Act, 1996 & Stamp Act, 1899, In re, (2024) 6 SCC 1 at page 69, the Constitution Bench of the Hon'ble Supreme Court referred to Article 16 of the Model Law and observed that the Arbitral Tribunal's jurisdiction will be affected only when the defect causing invalidity is directed at the arbitration agreement.

265. The Hon'ble Supreme Court further observed that the invalidity of the underlying contract will not necessarily entail the invalidity of an arbitration agreement contained in the contract. Paragraph No.110 and &112 of the said judgment reads as under:-

> "110. Article 16 of the Model Law deals with the competence of an Arbitral Tribunal to rule on its own jurisdiction. Article 16(1) provides:
>
> "16. Competence of arbitral tribunal to rule on its jurisdiction.—The Arbitral Tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the Arbitral Tribunal that the contract is null and _____ Page No 151 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 void shall not entail ipso jure the invalidity of the arbitration clause." (emphasis supplied) ******
>
> 112. According to the UNCITRAL Working Group, the separability presumption is incorporated under Article 16(1) to complement the principle of competence-

competence. The separability presumption further ensures that the invalidity of the underlying contract does not affect the jurisdiction of the Arbitral Tribunal to decide on the nullity of the contract or any other issues submitted to its jurisdiction by the parties "unless it finds that the defect which causes the nullity of the contract affects also the arbitration clause itself." ["Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration", A/CN.9/264 (25-3-1985) 38.] The last sentence of Article 16(1) (extracted above) states the general principle of contractual validity of arbitration clauses. [Gary Born, International Arbitration Law and Practice (3rd Edn., 2021) 403.] It connotes that the invalidity of the underlying contract will not necessarily entail the invalidity of an arbitration agreement contained in the contract. Accordingly, the Arbitral Tribunal's jurisdiction will be affected only when the defect causing invalidity is directed at the arbitration agreement. [Digest of Case Law on the Model Law on International Commercial

Arbitration (2012) 76.]"

266. Further in Interplay Between Arbitration Agreements under A&C Act, 1996 & Stamp Act, 1899, In re, (2024) 6 SCC 1, the Hon'ble Supreme Court further observed that the ability of an Arbitral Tribunal to _____ Page No 152 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 determine its own jurisdiction is an important facet of arbitration jurisprudence because it gives effect to the separability presumption. The separability presumption insulates the arbitration agreement from the defects of the underlying contract, and thereby ensures the sustenance of the tribunal's jurisdiction over the substantive rights and obligations of the parties under the underlying contract even after such a contract is put to an end. In fact, in paragraph No.127, the Hon'ble Supreme Court observed that under Singaporean law, Article 21(1) of the Arbitration Act, 2001 incorporates the doctrine of competence-competence insofar as domestic arbitration is concerned. It further observed that Article 21(1) of the Arbitration Act, 2001 provides that an Arbitral Tribunal may rule on its own jurisdiction, including a plea that it has no jurisdiction and any objections to the existence or validity of the arbitration agreement at any stage of the arbitral proceedings. It further observed that the conduct of international commercial arbitrations in Singapore is governed by the International Arbitration Act, 1994 (IIA) and that Section 3 of the IIA states that the Model Law has the force of law in Singapore. _____ Page No 153 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023

267. Relevant paragraphs from the said Judgment are extracted as under:-

> G. The doctrine of competence-competence
>
> 123. The doctrine of kompetenz-kompetenz (also known as competence-competence), as originally developed in Germany, was traditionally understood to imply that arbitrators are empowered to make a final ruling on their own jurisdiction, with no subsequent judicial review of the decision by any court. [Fouchard, Gaillard, Goldman on International Commercial Arbitration, Emmanuel Gaillard and John Savage (Eds.), (1999) 396.] However, many jurisdictions allow an Arbitral Tribunal to render a decision on its jurisdiction, subject to substantive judicial review. [Gary Born, International Arbitration Law and Practice (3rd Edn., 2021) 1143.]
>
> 124. It is a well-recognised principle of public international law that a legal authority possessing adjudicatory powers has the right to decide its own jurisdiction. [Interpretation of the Greco-Turkish Agreement of December 1st, 1926, In re, 1928 SCC OnLine PCIJ 5] Similarly, it is a general rule of international arbitration law that an Arbitral Tribunal has the power to determine its own jurisdiction. The ability of an Arbitral Tribunal to determine its own jurisdiction is an important facet of arbitration jurisprudence because it gives effect to the separability presumption. The separability presumption insulates the arbitration agreement from the defects of the underlying contract, and thereby ensures the sustenance of the tribunal's jurisdiction over the substantive rights and obligations of the parties under the underlying

contract even after such a contract is put to an end. The doctrine _____ Page No 154 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 of competence-competence allows the tribunal to decide on all substantive issues arising out of the underlying contract, including the existence and validity of the arbitration agreement.

(i) Comparative analysis

125. The doctrine of competence-competence is now a part of all major jurisdictions. Section 30 of the UK Arbitration Act provides that the Arbitral Tribunal may rule on its own substantive jurisdiction with respect to :

first, whether there is a valid arbitration agreement; second, whether the tribunal is properly constituted; and third, what matters have been submitted to arbitration in accordance with the arbitration agreement. The basis for the jurisdictional competence of an Arbitral Tribunal can be evinced from the following observation of Lord Hoffman in Fili Shipping Co. [Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd., 2007 Bus LR 1719 (HL) : 2007 UKHL 40] : (Bus p. 1725, para 13) “13. In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal.” In Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs of the Government of Pakistan [Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs of the Government of Pakistan, (2011) 1 AC 763 : (2010) 3 WLR 1472 : 2011 Bus LR 158 (SC) : 2010 UKSC 46] the United Kingdom Supreme Court held that the tribunal's own view of its jurisdiction has no legal or evidential value when the issue pertains to the exercise of legitimate authority by the tribunal.

Thus, the UK position is that although the Arbitral Tribunal is empowered to consider whether it has _____ Page No 155 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 jurisdiction, its determination is subject to the examination of the Courts.

126. The Courts in the United States have considered the principle of competence-competence to be intertwined with the separability presumption. In Prima Paint [Prima Paint Corpn. v. Flood & Conklin Mfg. Co., 1967 SCC OnLine US SC 160 : 18 L Ed 2d 1270 : 388 US 395 (1967)] , the United States Supreme Court held that if a claim is made to the effect that the underlying contract was induced fraudulently, then the issue should be determined by the Courts. The Supreme Court concluded that all the other issues should be left for the determination of the Arbitral Tribunal to “not only honor the plain meaning of the statute but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the Courts. (Prima Paint case [Prima Paint Corpn. v. Flood & Conklin Mfg. Co., 1967 SCC OnLine US SC 160 : 18 L Ed 2d 1270 : 388 US 395 (1967)] , SCC OnLine

US SC para 10)" In Buckeye Check Cashing [Buckeye Check Cashing Inc. v. Cardegna, 2006 SCC OnLine US SC 14 : 546 US 440, 444 (2006)] , the United States Supreme Court reiterated Prima Paint [Prima Paint Corpn. v. Flood & Conklin Mfg. Co., 1967 SCC OnLine US SC 160 : 18 L Ed 2d 1270 : 388 US 395 (1967)] by holding that the Arbitral Tribunal should consider the issue of the validity of underlying contract in the first instance. Thus, the position in the US is that the Courts should only check if any invalidity is directed at the arbitration agreement, leaving all the other issues, including that of the validity of the underlying contract, to the Arbitral Tribunal. _____ Page No 156 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023

127. Under Singaporean law, Article 21(1) of the Arbitration Act, 2001 incorporates the doctrine of competence-competence insofar as domestic arbitration is concerned. It provides that an Arbitral Tribunal may rule on its own jurisdiction, including a plea that it has no jurisdiction and any objections to the existence or validity of the arbitration agreement at any stage of the arbitral proceedings. The conduct of international commercial arbitrations in Singapore is governed by the International Arbitration Act, 1994 (IIA). Section 3 of the IIA states that the Model Law has the force of law in Singapore.

128. In Malini Ventura v. Knight Capital Pte. Ltd. [Malini Ventura v. Knight Capital Pte. Ltd., 2015 SGHC 225 (Singapore)], the issue before the Singapore High Court was whether the Arbitral Tribunal has primacy to determine the existence of an arbitration agreement in the context of international commercial arbitration. The Court analysed the scope and purpose of Article 16(1) of the Model Law to hold that an Arbitral Tribunal has first priority in determining whether an arbitration agreement exists and the Court's consideration must come after the tribunal's own examination of the issue. It was further observed that:

> "the tribunal's powers in relation to the issue are wide because it can consider not only validity but also the very existence of the arbitration agreement."

(ii) India

129. Under the previous arbitration regime in India, that is the 1940 Act, the issue of determining the existence or validity of arbitration agreement was exclusively within the domain of the Courts. To that effect, Section 33 of the 1940 Act allowed any party to the arbitration agreement _____ Page No 157 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 to file an application before the Courts challenging the existence or validity of an arbitration agreement. In view of this, this Court consistently held that the question as to the existence or validity of an arbitration agreement was to be decided only by application to courts and not by the Arbitral Tribunal. [DhanrajamalGobindram v.

Shamji Kalidas & Co., 1961 SCC OnLine SC 28; Khardah Co. Ltd. v. Raymon & Co. (India) (P) Ltd., 1962 SCC OnLine SC 28.]

130. This position has now undergone a complete metamorphosis in the present legislation. Section 16 of the Arbitration Act, which is based on Article 16 of the Model Law, recognises the doctrine of competence- competence in Indian arbitration law.

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135. In Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455, the issue before this Court was whether a Referral Court at the stage of appointment of arbitrators would be required to decide the issue of limitation or leave it to the Arbitral Tribunal. A Bench of two Judges of this Court held that the doctrine of competence-competence is "intended to minimise judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties." Moreover, this Court held that Section 16 is an inclusive provision of very wide ambit : (SCC p. 462, para 7) "7. ... 7.13. In view of the provisions of Section 16, and the legislative policy to restrict judicial intervention at the pre-reference stage, the issue of limitation would require to be decided by the arbitrator. Sub-section (1) of Section 16 provides that the Arbitral Tribunal may rule on its own jurisdiction, "including any objections" with respect to the existence or validity of the arbitration agreement. Section 16 is an inclusive provision, which _____ Page No 158 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 would comprehend all preliminary issues touching upon the jurisdiction of the Arbitral Tribunal. The issue of limitation is a jurisdictional issue, which would be required to be decided by the arbitrator under Section 16, and not the High Court at the pre-reference stage under Section 11 of the Act. Once the existence of the arbitration agreement is not disputed, all issues, including jurisdictional objections are to be decided by the arbitrator." (emphasis in original and supplied)

268. Thus, the doctrine of competence-competence [doctrine of kompetenz-kompetenz] has been given full recognition under Singapore International Arbitration Act, 1994. Since the Arbitral Tribunal gets the first priority to determine issues with respect to the very existence of an "agreement in writing", the jurisdiction of the Courts are limited to a prima facie determination under Section 8 or 45 of the Arbitration and Conciliation Act,1996 as the case may be.

269. As far as enforcement of foreign Award in India is concerned, it is Section 49 of the Arbitration and Conciliation Act, 1996, which is _____ Page No 159 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 relevant. It is similar to Section 19 of International Arbitration Act, 1994. They read as under:-

Section 19 of International Conciliation Act, 1996	Section 49 of Arbitration and Arbitration Act, 1994
19. Enforcement of awards - An award on an arbitration agreement may, by permission of the General Division of the High Court, be enforced in the same manner as a judgment or an order of	49. Enforcement of foreign award - (1) Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of

that to the same effect and, where Court.

permission is so given, judgment may be entered in terms of the award.

270. Section 5 (1) in Part 2 of of Singapore International Act, 1994, further makes it clear that the said Act applies to International Arbitration, unless the parties agree in writing that Part 2 or The Model Law (Unilateral Model Law) is not to apply to that Arbitration. Section 5 (1) of the Singapore International Act, 1994, reads as under:-

> "Section-5.Application of this Part-
>
> (1) This Part and the Model Law do not apply to an arbitration which is not an international arbitration unless the parties agree in writing that this Part or the Model Law is to apply to that arbitration." _____ Page No 160 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023

271. As per Section 5(2) of Singapore International Arbitration Act, 1994, despite Article-1(3) of the Model Law, an Arbitration is International, if:-

> (a) least one of the parties to an arbitration agreement, at the time of the conclusion of the agreement, has its place of business in any State other than Singapore;
>
> (b) one of the following places is situated outside the State in which the parties have their places of business:
>
> i. the place of arbitration if determined in, or pursuant to, the arbitration agreement;
> ii. any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or
>
> (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

272. Thus, question of arbitrability of a dispute could have been raised and decided before the Court in Singapore if the respondent had filed an anti-arbitration suit in Singapore instead of Chennai, in India. _____ Page No 161 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 Thereafter, the only option that was available for the respondents was before the Arbitral Tribunal as per the doctrine of Kompetenz – Kompetenz, which was raised by the respondent and answered against them, which decision was not only affirmed by the Singapore High Court, but also Court of Appeal of Singapore. Thus, it is not open for the respondents to question either the Arbitrability of the dispute at the stage of Recognition and Enforcement of the International Award passed by the Arbitral Tribunal.

273. The fact that in response to petitioner's Notices of Dispute in relation to NDU-3 dated 17.03.2016, which was served on the respondents on 11 November 2016 and 8 January 2017, the respondents did not deny the existence of NDU-3 dated 17.03.2016. It shows they also did not question the existence of the Agreement in NDU-3 dated 17.03.2016.

274. Only after commencement of the Arbitration proceedings in April 2017, the respondent No.2 & 3 disputed the binding Nature of NDU-3 dated 17.03.2016 on them.

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275. Section 47 of the Act deals with the obligation of the person applying for the enforcement of a foreign award. The person applying for the enforcement of a foreign award shall at the time of the application, produce before the Court the original award or a copy thereof duly authenticated in the manner required by the law of the country in which it was made and the original agreement for arbitration or a duly certified copy thereof and such evidence as may be necessary to prove that the award is a foreign award.

276. In this regard, it is pertinent to note the interpretation of section 47 of the Hon'ble Supreme Court in the case of Gemini Bay Transcription (P) Ltd. v. Integrated Sales Service Ltd., (2022) 1 SCC

753. The Hon'ble Supreme Court held that Section 47(1) of the Arbitration and Conciliation Act,1994 was procedural in nature, the object being that the enforcing court must first be satisfied that it is indeed a foreign award, _____ Page No 163 of 184 https://www.mhc.tn.gov.in/judis
Arb.O.P.(Com.Div.)No.186 of 2023 as defined, and that it is enforceable against persons who are bound by the award. The Supreme Court held as under:-

> "38. From this, is clear that all the requirements of sub-section (1) are procedural in nature, the object being that the enforcing court must first be satisfied that it is indeed a foreign award, as defined, and that it is enforceable against persons who are bound by the award."

277. The Hon'ble Supreme Court further observed as under:-

> "As a matter of fact, Section 47(1)(c) speaks of only evidence as may be necessary to prove that the award is a foreign award. This section only has reference to the six ingredients of a foreign award that have been outlined hereinabove, which are contained in the definition section, namely, Section 44. Ingredients 1 to 4 can easily be made out from the foreign award itself as the award would narrate facts which would show the legal relationship between the "persons" bound by the award (who need not necessarily be parties to the arbitration agreement), and as to whether the award deals with matters that can be considered commercial under the law in force in India. Equally, the date of the foreign award would appear on the face of the foreign award itself. Thus, Section 47(1)(c) would apply to adduce evidence as to whether the

arbitration agreement is a New York Convention agreement. Also, the requisite Central Government notification can be produced under Section 47(1)(c), so that Section 44(b) gets satisfied. To argue that the burden of proof is on the person enforcing the award and that this burden can only be discharged by such person leading evidence to affirmatively show that a non-

 signatory to an arbitration agreement can be bound by a foreign award is outside Section 47(1)(c)." (emphasis supplied)

278. Section 48 of the Arbitration and Conciliation Act, 1996 stipulates the conditions for enforcement of foreign awards. There are two parts to Section 48 of the Arbitration and Conciliation Act, 1996. For the sake of clarity, sub-clause (1) and sub-clause (2) are shown in a table below:-

Section 48 – Conditions for Enforcement of Foreign Awards (1) Enforcement of a foreign (2) Enforcement of an arbitral award may be refused, at the award may also be refused if the request of the party against whom Court finds that-

it is invoked, only if that party furnishes to the Court proof that-

(a) The parties to the agreement (a) The subject-matter of the dif- referred to in Section 44 were, ference is not capable of set- under the law applicable to tlement by arbitration under them, under some incapacity, the law of India; or or the said agreement is not (b) The enforcement of the award valid under the law to which would be contrary to the pub- the parties have subjected it lic policy of India. or, failing any indication thereon, under the law of the Explanation-1: For the avoid- Country where the award was ance of any doubt, it is clari-

made; fied that an award is in co

Section 48 – Conditions for Enforcement of Foreign Awards

(b) The party against whom the flict with the public property award is invoked was not of India, only if- given proper notice of the i. The making of the award appointment of the arbitrator was induced or affected or of the arbitral proceedings by fraud or corruption or or was otherwise unable to was in violation of Sec- present his case; tion 75 or Section 81;

(c) The award deals with a ii. It is in contravention with difference not contemplated the fundamental policy of by or not falling within the Indian Law;

terms of the submission to arbitration, or it contains decisions on matters beyond Explanation-2: For the avoid- the scope of submission to ance of any doubt, the test as arbitration; to whether there is a contra- Provided that, if the decisions vention with the fundamental on matters submitted to policy of Indian Law shall not arbitration can be separated entail a review on the merits from those not so submitted, of the dispute. that part of the award which contains decisions on matters submitted to arbitration may be enforced;

(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;

(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.

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1), the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

279. None of the grounds under Section 48(1) of the Arbitration and Conciliation Act, 1996 are discernible in the facts of the present case for this Court to refuse enforcement of the award. It cannot be said that the agreement was neither valid under the law to which the parties have subjected themselves namely the substantive law prevailing in Singapore, nor can it be said that enforcement would be contrary to public policy of India under the circumstances shown in Explanation-II to Section 48(2) of the Arbitration and Conciliation Act, 1996.

280. The Supreme Court in Shri Lal Mahal Ltd. v. Progetto Grano SpA, (2014) 2 SCC 433, took a view that was followed in Vijay Karia v. Prysmian Cavi E Sistemi SRL, (2020) 11 SCC 1, held that:-

> “45. Moreover, Section 48 of the 1996 Act does not give an opportunity to have a “second look” at the foreign award in the award enforcement stage. The scope of inquiry under Section 48 does not permit review of the foreign award on merits. Procedural defects (like taking into consideration inadmissible evidence or ignoring/rejecting the evidence which may be of binding nature) in the course of foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy.”

281. The contention of the respondents that the award was passed in contravention with the fundamental policy of Indian law as provided under Explanation I (ii) to section 48(2) of the Arbitration and Conciliation Act, 1996, based on the decision of the Constitution Bench of Supreme Court in Cox & Kings Ltd. v. SAP India (P) Ltd., (2024) 4 SCC 1 on the ground that "Single Economic Entity" is not recognised in Singapore cannot be countenanced. Neither the "Single Economic Entity" was involved nor the "Group of Companies" doctrine was involved by the Arbitral Tribunal while passing the award. Therefore, the _____ Page No 168 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 argument that the "Single Economic Entity" doctrine is not recognised in Singapore, the enforcement of the Award would be in breach of the fundamental policy of Indian law cannot be countenanced. As mentioned in Para 208 of this Order, the decision of the Singapore High Court in Manuchar Steel Hong Kong Ltd. v. Star Pacific Line Pte Ltd., 2014 SGHC 181 cannot be applied as that was a case where at the stage of enforcement, the Court frowned upon the invocation of Single Economic Entity doctrine holding that it had limited traction in the International Arbitration community, especially outside jurisdictional issues. Whereas, the Arbitral Tribunal, the High Court of Singapore and Court of Appeal of Singapore in the present case have uniformly not invoked either the "Group Company Doctrine" or "Single Economy Entity Doctrine"to fasten the liability on the respondents. In Manuchar Steel Hong Kong Ltd. v. Star Pacific Line Pte Ltd., 2014 SGHC 181, the Court was dealing with the liability of a One-Ship Company.

282. Further, Explanation I (ii) of section 48(2) of the Arbitration and Conciliation Act, 1996 has to be read with Explanation 2 of the same, _____ Page No 169 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 which clearly states that for the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

283. Secondly, the phrase "fundamental policy of Indian Law" was discussed in detail and interpreted as under in SsangyongEngg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131, which held as under:-

> 34. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49] i.e. the fundamental policy of Indian law would be relegated to "Renusagar" (Renusagar Power Co. Ltd. v.

General Electric Co., 1994 Supp (1) SCC 644) understanding of this expression. This would necessarily mean that Western Geco [ONGC v. Western GecoInternational Ltd., (2014) 9 SCC 263] expansion has been done away with. In short, Western Geco, as explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49], would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. ... ***** _____ Page No 170 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023

37. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

284. In fact, the objection of the Respondent No.2 (the Engineering Company) and Respondent No.3 (the Project Company) is indeed an veiled attempt to review the Arbitral Tribunal decision, which has crystallized the liability against the Respondents which stands affirmed thrice: first by the Arbitral Tribunal, second by the High Court of Singapore, third by the Court of Appeal of Singapore.

285. Thirdly, the respondents have limited their reference to the decision of the Constitution Bench of the Hon'ble Supreme Court in Cox & Kings Ltd. v. SAP India (P) Ltd., (2024) 4 SCC 1 to submit that _____ Page No 171 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 proposition that "Single Economic Entity" cannot be used as a sole basis to invoke the Group of Companies doctrine. In reality, the Constitution Bench of the Hon'ble Supreme Court in Cox & Kings Ltd. v. SAP India (P) Ltd., (2024) 4 SCC 1 clarified in para 119 as under:-

> 119. .....We accordingly clarify that the principle of "single economic entity" cannot be used as a sole basis to invoke the Group of Companies doctrine.

286. On the other hand, a detailed reading of the decision of the Constitution Bench of the Hon'ble Supreme Court in Cox & Kings Ltd. v. SAP India (P) Ltd., (2024) 4 SCC 1 reveals that, the Hon'ble Supreme Court expanded the interpretation of Group of Companies Doctrine. It held that Group of Companies Doctrine is not merely the principle of alter ego or piercing of corporate veil, but also a fact based doctrine wherein the consent of the non-signatories, whether implied or expressed, is determined in formation of the arbitration agreement. The relevant portion at page 65 of the decision is extracted as under:-

> (ii) Adopting a pragmatic approach to consent
>
> 95. In the context of arbitration law, the intention of the parties has to be derived from the words used in the arbitration agreement. While construing the arbitration _____ Page No 172 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 agreement, it is the duty of the Court to not delve deep into the intricacies of the human mind, but only consider the expressed intentions of the parties. [Kamla Devi v.

Takhatmal, AIR 1964 SC 859; Bangalore Electricity Supply Co. Ltd. v. E.S. Solar Power (P) Ltd., (2021) 6 SCC 718] The words used in the contract reflect the commercial understanding between the parties. The intention of the parties has to be ascertained from the words used in the contract,

considered in light of the surrounding circumstances and the object of such contract. [Bank of India v. K. Mohandas, (2009) 5 SCC 313;M. Dayanand Reddy v. A.P. Industrial Infrastructure Corpn. Ltd., (1993) 3 SCC 137.]

96. An arbitration agreement encapsulates the commercial understanding of business entities as regards to the mode and manner of settlement of disputes that may arise between them in respect of their legal relationship. In most situations, the language of the contract is only suggestive of the intention of the signatories to such contract and not the non-signatories. However, there may arise situations where a person or entity may not sign an arbitration agreement, yet give the appearance of being a veritable party to such arbitration agreement due to their legal relationship with the signatory parties and involvement in the performance of the underlying contract. Especially in cases involving complex transactions involving multiple parties and contracts, a non-signatory may be substantially involved in the negotiation or performance of the contractual obligations without formally consenting to be bound by the ensuing burdens, including arbitration.

287. The Constitution Bench of the Hon'ble Supreme Court in Cox & Kings Ltd. v. SAP India (P) Ltd., (2024) 4 SCC 1, ultimately answered the reference as under:-

> H. Conclusions
>
> 170. In view of the discussion above, we arrive at the following conclusions:
>
> 170.1. The definition of "parties" under Section 2(1)(h) read with Section 7 of the Arbitration Act includes both the signatory as well as non-signatory parties;
>
> 170.2. Conduct of the non-signatory parties could be an indicator of their consent to be bound by the arbitration agreement;
>
> 170.3. The requirement of a written arbitration agreement under Section 7 does not exclude the possibility of binding non-signatory parties;
>
> 170.4. Under the Arbitration Act, the concept of a "party" is distinct and different from the concept of "persons claiming through or under" a party to the arbitration agreement;
>
> 170.5. The underlying basis for the application of the Group of Companies doctrine rests on maintaining the corporate separateness of the group companies while determining the common intention of the parties to bind the non-signatory party to the arbitration agreement;

Arb.O.P.(Com.Div.)No.186 of 2023 170.6. The principle of alter ego or piercing the corporate veil cannot be the basis for the application of the Group of Companies doctrine;

170.7. The Group of Companies doctrine has an independent existence as a principle of law which stems from a harmonious reading of Section 2(1)(h) along with Section 7 of the Arbitration Act; 170.8. To apply the Group of Companies doctrine, the Courts or tribunals, as the case may be, have to consider all the cumulative factors laid down in Discovery Enterprises [ONGC Ltd. v. Discovery Enterprises (P) Ltd., (2022) 8 SCC 42]. Resultantly, the principle of single economic unit cannot be the sole basis for invoking the Group of Companies doctrine; 170.9. The persons "claiming through or under" can only assert a right in a derivative capacity; 170.10. The approach of this Court in Chloro Controls [Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641] to the extent that it traced the Group of Companies doctrine to the phrase "claiming through or under" is erroneous and against the well-established principles of contract law and corporate law;

170.11. The Group of Companies doctrine should be retained in the Indian arbitration jurisprudence considering its utility in determining the intention of the parties in the context of complex transactions involving multiple parties and multiple agreements; Arb.O.P.(Com.Div.)No.186 of 2023 170.12. At the referral stage, the referral court should leave it for the Arbitral Tribunal to decide whether the non-signatory is bound by the arbitration agreement; and 170.13. In the course of this judgment, any authoritative determination given by this Court pertaining to the Group of Companies doctrine should not be interpreted to exclude the application of other doctrines and principles for binding non-signatories to the arbitration agreement.

288. On the basis of the above proposition laid down by the Supreme Court in Cox & Kings Ltd. v. SAP India Ltd., (2024) 4 SCC 1, the contention of the respondents that the award contravenes the fundamental policy of Indian law also cannot be countenanced.

289. The Constitution Bench in Cox & Kings Ltd. v. SAP India (P) Ltd., (2024) 4 SCC 1, while considering whether the signature of the party to the arbitration agreement was mandatory or not, held as under:-

> 101. A formalistic construction of an arbitration agreement would suggest that the decision of a party to not sign an arbitration agreement should be construed to mean that the mutual intention of the parties was to exclude that party from the ambit of the arbitration Arb.O.P.(Com.Div.)No.186 of 2023 agreement. Indeed, corporate entities have the commercial and contractual freedom to structure their businesses in a manner to limit their liability. However, there have been situations where a corporate entity deliberately made an effort to be not bound by the underlying contract containing the arbitration agreement, but was actively involved in the negotiation and performance of the contract. The level of the non-

signatory party's involvement was to the extent of making the other party believe that it was a veritable party to the contract, and the arbitration agreement contained under it. Therefore, the Group of Companies doctrine is applied to ascertain the intentions of the parties by analysing the factual circumstances surrounding the contractual arrangements. [Gary Born, International Arbitration Law and Practice, (3rd Edn., 2021) at p. 1568.]

102. Increasingly, multinational groups often adopt new and sophisticated corporate structures for execution and delivery of complex commercial transactions such as construction contracts, concession contracts, licence agreements, long-term supply contracts, banking and financial transactions, and maritime contracts. For the execution of such contracts, corporate structures may take the form of groups based on equity, joint ventures, and informal alliances. [Stavros Brekoulakis, “Parties in International Arbitration : Consent v. Commercial Reality” in Stavros Brekoulakis, Julian DM Lew, et al. (Eds.) in The Evolution and Future of International Arbitration (2016) 119, 120.] A multi-corporate structure helps a group in adopting commercially effective models of operation as different companies can get involved at different stages of a single transaction. Often, persons or entities, who are not signatories to the underlying contract containing the _____ Page No 177 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 arbitration agreement, are involved in the negotiation, performance, or termination of the contract. In the context of arbitration law, the challenge arises when only one member of the group signs the arbitration agreement, to the exclusion of other members. Should the non-signatories be excluded from the arbitration proceedings, even though they were implicated in the dispute which forms the subject-matter of arbitration? As a response to this challenge, arbitration law has developed and adopted the Group of Companies doctrine, to allow or compel a non-signatory party to be bound by an arbitration agreement.

290. That apart, the Hon’ble Supreme Court in para 83 of Vijay Karia v. Prysmian Cavi E Sistemi SRL, (2020) 11 SCC 1 held that a foreign award must be read as a whole, fairly, and without nit-picking. If read as a whole, the said award has addressed the basic issues raised by the parties and has, in substance, decided the claims and counterclaims of the parties; enforcement must follow. Para 83 is reproduced below:-

> 83. Having said this, however, if a foreign award fails to determine a material issue which goes to the root of the matter or fails to decide a claim or counterclaim in its entirety, the award may shock the conscience of the Court and may not be enforced, as was done by the Delhi High Court in Campos Bros. Farms v. Matru Bhumi Supply Chain (P) Ltd., 2019 SCC OnLine Del 8350 on the ground of violation of the public policy of India, in that it would then offend a most basic notion of _____ Page No 178 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 justice in this country [In SsangyongEngg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 this Court cautioned that this ground would only be attracted with the following caveat : (SCC pp. 199-200, para
>
> 76)“76. However, when it comes to the public policy of India argument based upon “most basic notions of justice”, it is clear that this ground can be attracted only in

> very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. ... However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment."] . It must always be remembered that poor reasoning, by which a material issue or claim is rejected, can never fall in this class of cases. Also, issues that the Tribunal considered essential and has addressed must be given their due weight — it often happens that the Tribunal considers a particular issue as essential and answers it, which by implication would mean that the other issue or issues raised have been implicitly rejected. For example, two parties may both allege that the other is in breach. A finding that one party is in breach, without expressly stating that the other party is not in breach, would amount to a decision on both a claim and a counterclaim, as to which party is in breach. Similarly, after hearing the parties, a certain sum may be awarded as damages and an issue as to interest may not be answered at all. This again may, on the facts of a given case, amount to an implied rejection of the claim for interest. The important point to be considered is that _____ Page No 179 of 184 https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.)No.186 of 2023 the foreign award must be read as a whole, fairly, and without nit-picking. If read as a whole, the said award has addressed the basic issues raised by the parties and has, in substance, decided the claims and counterclaims of the parties, enforcement must follow.

291. The contention of the respondents that the Group of Companies Doctrine was not recognised in Singapore and therefore, was bad in law as it ignored the law of Singapore is irrelevant. This contention that the award was bad in law of the State in which the award was passed is also not an argument available to the respondents at the enforcement stage in a different Jurisdiction especially after losing the Case all way. That apart, as mentioned above, the Arbitral Tribunal has not invoked either the "Group of Companies" doctrine or "Single Economic Entity" doctrine while passing the Award.

292. The award in fact, was not based on the Group of Companies doctrine or Single Economic Entity, and NDU-3 dated 17.03.2016 was not a standalone contract but part of the original contract which encompassed the arbitration agreement.

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293. The Arbitral Tribunal has discussed the factual matrix, relied on evidence, and thereafter confirmed that NDU-3 dated 17.03.2016 was part of the original contract which encompassed arbitration agreement. The award was also confirmed on appeal before the Court of Appeal of the Singapore. The respondents stand that the Group of Companies Doctrine/Single Economic Entity

Doctrine are not recognized in Singapore and therefore cannot be enforced, cannot be countenanced as the Award was not based on these two Doctrines.

294. Hence, it is not open to the respondents to ask this Court to interpret the findings and reasonings of the Arbitral Tribunal at the stage of enforcement of the Award.

295. If the Court is satisfied that the Foreign Award is enforceable under Chapter I to Part II of the Arbitration and Conciliation Act, 1996, the Award shall be deemed to a decree of the Court as per Section 49 of the Act.

296. Having lost the case all the way before the forums in Singapore i.e., before the Arbitral Tribunal, Singapore, before the Singapore High Court and the Court of Appeal in Singapore, it is not open either for the second respondent (the Engineering Company) and/or the third respondent (the Project Company) to scuttle the enforcement on a skewed reading of both facts and the provisions of the Arbitration and Conciliation Act, 1996 by invoking either Section 48(1) or Section 48(2) of the Arbitration and Conciliation Act, 1996.

297. In the result, Arb.O.P.(Com.Div.)No.186 of 2023 filed to recognize the Award dated 22.02.2021 passed by the Arbitral Tribunal along with the addendum to the Final Award dated 08.03.2021 constituted under the aegis of the Singapore International Arbitration Centre in SIAC Arbitration No.094 of 2017 (ARB094/17/ARB) is allowed.

298. The Petitioner is permitted to proceed with E.P.No.143364 of 2022.

02.09.2024 Index : Yes/No Internet : Yes/No Speaking Order/Non-Speaking Order

 Neutral Citation : Yes/No rgm C.SARAVANAN, J.

rgm Arb.O.P.(Com.Div.)No.186 of 2023 and