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Arb.O.P.(Com.Div) No.423 of 2023

In the High Court of Judicature at Madras

Reserved on : 10.10.2025	Delivered on: 17.10.2025
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Coram :

The Honourable Mr.Justice N.ANAND VENKATESH

Arbitration O.P.(Com.Div). No.423 of 2023

M/S.Viterra B.V.

formerly known as M/s.Glencore
Agriculture B.V. and prior thereto
known as Glencore Grain B.V.,
rep by its Power of Attorney
Shrenik Jain, Office at Energy,
Unit B, 4th Floor, Appasaheb
Marathe Marg, Prabhadevi,
Mumbai-400025.

...Petitioner

Vs

M/s.S.K.T.Textile Mills

having its office at 182,
Chettipalayam Road, Palladam (TK),
Tirupur-641 664, Tamil Nadu rep.
by its partner P.M.Nachimuttoo

...Respondent

PETITION under Sections 47 to 49 of the Arbitration and Conciliation Act, 1996 praying to pass an order that the petitioner is entitled to enforce and execute the final award dated 30.4.2020 as a decree of this Court against the respondent, along with costs as awarded by the Arbitrator and costs of the present petition.

For Petitioner : Mr.Rahul Balaji



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For Respondent : Mr.C.Manishankar, SC for
Mr.B.A.Sujay Prasanna

ORDER

This is a petition filed by the petitioner under Sections 47 to 49 of the Arbitration and Conciliation Act, 1996 (for short, the Act) seeking to order that the petitioner is entitled to enforce and execute the final award dated 30.4.2020 as a decree of this Court against the respondent along with costs as awarded by the Arbitrator and for costs of the present petition.

2. Heard both.

3. The case of the petitioner is as follows :

(i) The petitioner entered into a contract dated 29.5.2019 with the respondent to sell 200 Metric Tons (MTs) of raw cotton at the rate of USD 1,829,835 per MTs. The contract was prepared by the petitioner in Rotterdam, Netherlands and it was scanned and sent to the respondent in Tiruppur, India through an e-mail.



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(ii) The grievance of the petitioner is that the respondent failed to fulfill their obligations, as it was required to do in terms of the contract, by not opening a timely workable letter of credit to ship the cotton to the respondent. In view of the same, the petitioner requested the respondent to issue a no objection certificate (NOC), which would allow changes to the Bill of Lading in order to mitigate the loss by selling the appropriated goods elsewhere.

(iii) It is alleged that due to non cooperation of the respondent, the petitioner incurred costs of transshipment and demurrage. On 13.9.2019, the petitioner communicated to the respondent that they failed to pay the outstanding amounts and that they would refer the matter for arbitration. Further, the petitioner made a request to the respondent on 07.11.2019 for arbitration under the English Arbitration Act, 1996 before the International Cotton Association Ltd. (ICA), Liverpool, England, UK as per the contract dated 29.5.2019. Further, the contract was governed by the laws of England. The seat of arbitration was at Liverpool, England. The petitioner also nominated their arbitrator.

(iv) However, the respondent replied that there was no contract or agreement existing between the petitioner and the respondent and



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that therefore, they were not obligated to be a party to the arbitration proceedings since they had not signed any contract or agreement.

(v) On receipt of this communication, the Arbitrator was appointed as requested by the ICA., on the side of the respondent. Thereafter, the Chairman of the Arbitral Tribunal was appointed and a Three Member ICA Arbitral Tribunal was constituted.

(vi) Ultimately, the Arbitral Tribunal passed the award dated 30.4.2020 and allowed the claims of the petitioner in the following terms :

"1. Glencore shall invoice back to SKT 200 metric tons, or the equivalent of 440,920 lbs net at the unit price of 70.21 uscents/lb.

. US\$ 48,677.57, being the principal amount awarded to us under the Award (as per paragraph 6 at page 14 of the Award);

. US\$ 26,020.00, being the logistical costs and documentary charges awarded to us under the Award (as per paragraph 6.2 at page 14 of the Award);

. US\$ 3,852.55, being the interest on the above amounts for the period between 23 August 2019 and the date of the award of 30 April 2020 (as per para. 6.4 at page 14 of the Award);



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. *US\$ 13,009.23, being the interest on the above amounts for the period between 21 May, 2020 till 8th August, 2022 (as per para 6.5 at page 14 of the Award. The New York Prime Interest Rate being 3.25%) and which continues to run until date of payment.*

. *£4,797.50 (equivalent to US\$ 5774.20 calculated basis 1£ = 1.20 US\$), being the costs of the Award paid by Glencore (as per para. 8 at page 14 of the Award)."*

(vii) The above award became final and attained finality since the respondent chose not to file any appeal against the said award. It was under those circumstances, the petitioner filed the above petition seeking to enforce the final award dated 30.4.2020 in terms of Sections 47 to 49 of the Act.

4. The learned counsel for the petitioner submitted as follows :

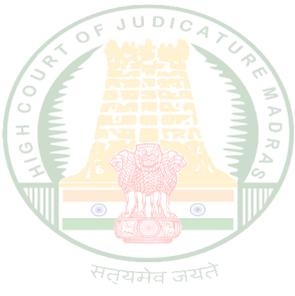
(a) The respondent had an opportunity to participate in the arbitration proceedings before the ICA. But, it had not participated deliberately. Hence, the respondent forfeited their own right to put up a defence by stating that they were not provided with adequate opportunity to present their case before the Arbitral Tribunal.



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(b) Even though the respondent had not affixed their signature in the contract, the conduct of the respondent in terms of the e-mail communications established that there was a contract subsisting between the parties. The Arbitral Tribunal rendered a finding that there was a subsisting contract between the parties, which was ultimately clinched by the e-mail communication dated 31.8.2019 whereby the respondent issued the NOC to the petitioner in order to deal with the matter at their end for making amendments to the Bill of Lading suitably. Accordingly, the respondent should not be allowed to take a stand that it was a non signatory as they did not sign the contract dated 29.5.2019.

(c) The deliberate non participation of the respondent in the arbitration proceedings must be construed as a forfeiture of their own right to object to the procedural conduct of arbitration. Under Section 48(1)(b) of the Act, the respondent must prove that it was denied an effective opportunity to be heard and this requires the respondent to demonstrate a fundamental procedural defect that was unfair and outside its control. On the facts of this case, no such circumstance ever existed.



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(d) The learned counsel for the petitioner, in order to substantiate his submissions, relied upon the following judgments :

(1) of the Hon'ble Apex Court in ***Government of India Vs. Vedanta Ltd.***
[reported in 2020 (10) SCC 1];

(2) of the Hon'ble Apex Court in ***Centrotrade Minerals & Metals Inc. Vs. Hindustan Copper Ltd.***
[reported in 2020 (19) SCC 197];

(3) of the Hon'ble Apex Court in ***PEC Ltd. Vs. Austbulk Shipping SDN.BHD.***
[reported in 2019 (11) SCC 620];

(4) of a learned Single Judge of this Court in ***Krish Technologies Vs. Micronova Singapore Pte. Ltd.***
[C.R.P.No.4701 of 2017 dated 13.6.2025];

(5) of the Hon'ble Apex Court in ***M/s. Govind Rubber Ltd. Vs. M/s.Louids Dreyfus Commodities Asia Pvt. Ltd.***
[reported in 2014 (12) SCR 488];



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(6) of the Hon'ble Apex Court in ***Trimex International FZE Ltd. Dubai Vs. Vedanta Aluminium Ltd., India [reported in 2010 (1) SCR 820];***

(7) of the Hon'ble Apex Court in ***Shakti Bhog Foods Ltd. Vs.Kola Shipping Ltd. [reported in 2008 (13) SCR 925];***

(8) of the Hon'ble Apex Court in ***Smita Conductors Ltd. Vs. Euro Alloys Ltd. [reported in AIR 2001 SC 3730]; and***

(9) of a learned Single Judge of the Delhi High Court ***in Glencore International AG Vs. Indian Potash Limited [reported in 2019 SCC OnLine Delhi 9591].***

5. Per contra, the learned Senior Counsel appearing on behalf of the respondent submitted as follows :

(a) Section 44 of the Act governs enforcement of a foreign award, which outlines three key conditions. They are : (1) there must be differences between the parties arising from a legal relationship;



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(2) this relationship must be in pursuance of a written arbitration agreement; and (3) the arbitration must be conducted in a jurisdiction, that is a party to the New York Convention as recognized by the Government.

(b) In the case in hand, there was no legal relationship between the parties under a written agreement for arbitration. Therefore, this petition does not fall within the purview of Section 44 of the Act and consequently, it must be dismissed.

(c) There was no arbitration agreement between the petitioner and the respondent in terms of Section 7 of the Act. There was only a draft agreement, which was never enforced as a contract. There was only a bargain, which never attained finality. In view of the same, there was no concluded contract between the parties.

(d) There was no privity of contract between the petitioner and the respondent in view of the fact that the respondent neither signed the contract nor through their conduct, consented to enter into an agreement with the petitioner. Since there was no contract formation in the absence of consent, there was no question of enforcing the foreign award.



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(e) The petitioner was contacting only with a person named as Mr.Santhosh by assuming that he was the agent of the respondent whereas the said Mr.Santhosh was neither directly nor indirectly appointed as an agent by the respondent. Therefore, the respondent is not bound by the act of the said Mr.Santhosh. In the absence of any material to show that the respondent had only transacted with the petitioner and concluded the contract, the role played by the said Mr.Santhosh cannot be put against the respondent.

(f) In the absence of a definite legal relationship between the parties, there is no question of enforcing an award, which is not binding on the respondent.

(g) The learned Senior Counsel appearing on behalf of the respondent, in order to substantiate his submissions, relied upon the following judgments :

(1) of the Hon'ble Apex Court in ***U.P. Rajkiya Nirman Nigam Ltd. Vs. Indure Pvt. Ltd. [reported in 1996 (2) SCC 667];***

(2) of the Hon'ble Apex Court in ***Harshad J.Shah Vs. LIC of India [reported in 1997 (5) SCC 64];***



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(3) of the Hon'ble Apex Court in ***Rickmers Verwaltung GMBH Vs. Indian Oil Corporation Ltd. [reported in 1999 (1) SCC 1];***

(4) of a learned Single Judge of the Delhi High Court in ***Virgoz Oils & Fats Pte.Ltd. Vs. National Agricultural Co-Operative Marketing Federation of India Ltd. [reported in 2016 SCC OnLine Delhi 6203];***

(5) of the Court of Appeal (Civil Division), England and Wales in ***DHL Project & Chartering Ltd. Vs. Gemini Ocean Shipping Co.Ltd. [reported in 2022 EWCA Civil 1555];***

(6) of the Hon'ble Apex Court in ***Ramathal and Others Vs. K.Rajamani (Dead) through legal heirs [reported in 2023 SCC OnLine SC 1022];*** and



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(7) of the Hon'ble Apex Court in **Cox & Kings Ltd. Vs. SAP India (P) Ltd. [reported in 2024 (4) SCC 1].**

6. This Court has carefully considered the submissions of the learned counsel on either side and perused the materials available on record and more particularly the impugned award.

7. The petitioner and the respondent had entered into a contract for the sale of US raw cotton vide contract dated 29.5.2019. As per this contract, the respondent was expected to open a workable letter of credit. Accordingly, the respondent requested the details of the advising bank on 03.5.2019 to open a letter of credit, to which, the petitioner replied even on the same day. On 06.6.2019, the respondent sent a draft of the letter of credit, which was deemed unworkable by the petitioner. Further, the petitioner requested for carrying out certain amendments in the letter of credit.

8. There were communications that were taking place back and forth starting from 13.6.2019 onwards. On 17.6.2019, the respondent

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sent a copy of the letter of credit. However, the letter of credit remained uncontractual as the expiry date was not correct. Thereafter, repeated communications were made and on 01.7.2019, the amended letter of credit was submitted to the petitioner. Even in this amended letter of credit, the last date of shipment was amended as 10.7.2019 whereas th date of expiry of the letter of credit was 31.7.2019. This was not found to be in accordance with the terms of the contract since, as per the contract, the expiry date of the letter of credit should have been a minimum of 30 days after the last day of the shipment period.

9. Therefore, according to the petitioner, the expiry of the letter of credit should have also been simultaneously amended as 10.8.2019. Pursuant to that, the petitioner requested the respondent to make the corresponding amendment to the letter of credit. From 05.8.2019 to 20.8.2019, the petitioner continued to insist upon the amendments to the letter of credit. In the Interregnum, the letter of credit expired and again, the petitioner had requested the respondent to extend the period of the letter of credit.

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10. Ultimately, since the respondent was not fulfilling their obligations, the petitioner insisted on a deadline, within which, the letter of credit should be amended, failing which, it was made clear that the invoice should be paid. Even thereafter, since the respondent failed to amend the letter of credit nor made the payment, the petitioner invoiced back the contract on 23.8.2019 along with the deadline to settle the amount for invoicing back by 30.8.2019. The petitioner also requested the respondent for the NOC, which would allow changes to the Bill of Lading in order to mitigate the losses by selling the appropriated goods elsewhere.

11. The main ground that was taken on the side of the respondent was that the respondent did not sign the contract and that even by conduct, the agreement was not finalized. It was further contended that in the absence of non formation of a contract owing to the respondent not consenting for the terms of the agreement, the respondent was questioning the very invocation of the arbitration clause under the agreement, which, according to the respondent, did not come to a fruition.



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12. In order to substantiate the above submission, the learned Senior Counsel appearing on behalf of the respondent pointed out that the petitioner has been contacting only with one person named Mr.Santhosh by assuming him to be the agent of the respondent without any substantive proof or written authorization from the respondent. The respondent has taken a very specific stand that the said Mr.Santhosh was neither directly nor indirectly appointed as the agent of the respondent.

13. In reply to the above stand taken by the respondent, it was contended on the side of the petitioner that the NOC dated 31.8.2019 issued to the petitioner would show that the respondent admitted the existence of a subsisting contractual relationship between the parties and all those communications had earlier taken place only on behalf of the respondent.

14. The foreign award, after extracting all the earlier communications, gave the details of constructing the agreement between the parties, which ultimately ended with the NOC that was issued by the respondent dated 31.8.2019 in favour of the petitioner.



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सत्यमेव जयते For proper appreciation, the NOC is extracted as hereunder :

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"No Objection Certificate

Ref: Contract No. GABV 1907224/29.05.19
BL.No.OOLU2622615300/ 02.07.19
(EXPORTER GLENCORE AGRICULTURE
USA - NEW YORK) Inv.No.
1902028000/ 01.08.19

M/s. S.K.T. Textiles is issuing this NOC without any liability to either of the parties, either to M/s S.K.T. Textiles or to M/s. Glencore or any other parties involved in the transaction covered by the above contract or connected to the above contract as the contract has been cancelled due to the non-compliance of shipping schedules by M/s. Glencore to M/s S.K.T. and accordingly, no objection is provided to M/s. Glencore to deal with the matter at their end for making amendments to the Bill of Lading suitably without liability to M/s. S.K.T. Textiles."

15. If the respondent was not a party to the contract and if the parties had not reached any agreement, there was no requirement for the respondent to issue the NOC in favour of the petitioner. Hence, this NOC issued by the respondent virtually clinches the fact that there was an agreement between the parties and due to various reasons,

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the respondent did not cooperate in making the amendment to the letter of credit. In fine, the respondent thought it fit to issue the NOC to the petitioner. If the said Mr.Santhosh was not a representative or agent of the respondent and if the communications were taking place between the petitioner and the said Mr.Santhosh in his individual capacity, there was no reason as to why the respondent ultimately gave the NOC. Hence, it is too late in the day for the respondent to contend that the said Mr.Santhosh was acting in his individual capacity.

16. The other ground raised on the side of the respondent is that the respondent has not signed any agreement.

17. This is a hyper technical plea taken on the side of the respondent.

18. The Hon'ble Apex Court, in the decision in ***Trimex International FZE Ltd. Dubai***, reiterated the earlier view taken in ***Shakti Bhog Foods Ltd.***, and held that the existence of an arbitration agreement can be inferred from various documents duly approved and

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signed by the parties in the form of exchange of e-mails, letters, etc.

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19. The Hon'ble Apex Court in the decision in **Cox & Kings Ltd.,** has affirmed that a non signatory can be bound by an arbitration agreement through its conduct. For proper appreciation, paragraph 123 is extracted as hereunder :

"123. The participation of the non-signatory in the performance of the underlying contract is the most important factor to be considered by the Courts and tribunals. The conduct of the non-signatory parties is an indicator of the intention of the non-signatory to be bound by the arbitration agreement. The intention of the parties to be bound by an arbitration agreement can be gauged from the circumstances that surround the participation of the non-signatory party in the negotiation, performance, and termination of the underlying contract containing such agreement. The UNIDROIT Principle of International Commercial Contract, 2016 [UNIDROIT Principles of International Commercial Contracts, 2016, Article 4.3.] provides that the subjective intention of the parties could be ascertained by having regard to the following circumstances:

(a) preliminary negotiations between the parties;



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- (b) *practices which the parties have established between themselves;*
- (c) *the conduct of the parties subsequent to the conclusion of the contract;*
- (d) *the nature and purpose of the contract;*
- (e) *the meaning commonly given to terms and expressions in the trade concerned; and*
- (f) *usages."*

20. It is relevant to take note of the judgment of the Hon'ble Apex Court in ***Smita Conductors Ltd.***, wherein a foreign award was enforced against a party, which had not signed the contract, but it acted upon by opening a letter of credit. The relevant portion is extracted as hereunder :

"In the present case, we may advert to the fact that there is no letter or telegram confirming the contract as such but there is certain correspondence which indicates a reference to the contract in opening the letters of credit..... If the two contracts stood affirmed by reason of their conduct as indicated in the letters exchanged, it must be held that there is an agreement in writing between the parties in this regard."



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21. In the case in hand, there were detailed negotiations between the parties regarding the establishment of a letter of credit and most crucially after its breach, the respondent had ratified the contract by issuing the NOC dated 31.8.2019, which would clearly make a reference to contract No.GABV 1907224. This conduct on the part of the respondent sufficiently establishes that there was an agreement between the parties regarding the establishment of a letter of credit. This was taken into account by the Arbitral Tribunal, which passed the foreign award.

22. The agreement contained an arbitration clause, which was taken note of by the Arbitral Tribunal. The seat of arbitration in this case is Liverpool and the arbitration was conducted under the ICA Rules and the English Law governs the validity of the arbitration agreement.

23. Consequently, Section 5 of the UK Arbitration Act, 1996 defines an agreement in writing, which is broad enough to include even an agreement where the signature of one of the parties is not available and such agreement is evidenced by the conduct of the



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parties, which, in the present case, is by means of various communications that took place between the parties.

24. The respondent was previously engaged in the letter of credit negotiations with the petitioner and it ended in the issuance of the NOC, which specifically referred to the relevant contract. The Arbitral Tribunal, which was seated in England, found that there was an enforceable contract between the parties. When that foreign award is sought to be executed, an Indian Court, operating under the pro-enforcement framework of the New York Convention, should accord significant deference to the finding of the Arbitral Tribunal, which was made in accordance with the law of the arbitral seat.

25. In the light of the above, this Court rejects the stand taken by the respondent that there was no privity of contract between the petitioner and the respondent, since the respondent was a non signatory to the agreement and is not bound by the foreign award passed by the Arbitral Tribunal. This defence taken by the respondent is untenable and it is too late in the day for the respondent to take such a stand. It deserves to be rejected by this Court and is accordingly rejected.

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26. The Hon'ble Apex Court in the case of **Vijay Karia v.**

Prysmian Cavi E Sistemi SRL [reported in 2020 (11) SCC 1]

made it abundantly clear that heavy burden lies on the party, which is resisting enforcement of a foreign award.

27. To succeed under Section 48(1)(b) of the Act, the respondent must prove that it was denied an effective opportunity to be heard and this would require demonstrating a fundamental procedural defect that was unfair and outside the control of the respondent. Some of the instances where a party may be genuinely unable to present their case will include a case where there was a failure to serve notice of arbitration or that it was deliberately sent to an incorrect address. It can even arise in a case where the notice is served, but insufficient time was given to the party to prepare the defence and to instruct the counsel. One more instance that can arise is where the proceedings are conducted in a language unknown to the party without providing proper translation. It can also arise in a case where there is a procedural ambush by the Arbitral Tribunal by



denying a party their right to file evidence or by preventing them to file a document on a key issue.

28. It will be relevant to take note of the decision of the Hon'ble Apex Court in **Centrotrade Minerals and Metals Inc.**, wherein a Three Judges' Bench, in its judgment, authored by Justice Rohinton Fali Nariman encapsulated the principles in the following terms :

"19. The law on the subject-matter of Section 48(1)(b) of the Arbitration Act has been laid down in a recent judgment of this Court in Vijay Karia [Vijay Karia v. Prysmian Cavi E Sistemi SRL, (2020) 11 SCC 1 : (2021) 1 SCC (Civ) 389] . In para 21 of the aforesaid judgment, this Court stated that it was important to note that no challenge was made to the aforesaid award under the English arbitration law, though available, just as in the facts of the present case. This Court then set out the parameters of a Section 48 challenge which reaches this Court as follows : (SCC pp. 39-40, para 24)

'24. Before referring to the wide-ranging arguments on both sides, it is important to emphasise that, unlike Section 37 of the Arbitration Act, which is contained in Part I of the said Act, and which provides an appeal against either setting aside or refusing to set aside a "domestic" arbitration award, the legislative policy



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so far as recognition and enforcement of foreign awards is that an appeal is provided against a judgment refusing to recognise and enforce a foreign award but not the other way around (i.e. an order recognising and enforcing an award). This is because the policy of the legislature is that there ought to be only one bite at the cherry in a case where objections are made to the foreign award on the extremely narrow grounds contained in Section 48 of the Act and which have been rejected. This is in consonance with the fact that India is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (hereinafter referred to as "New York Convention") and intends — through this legislation — to ensure that a person who belongs to a Convention country, and who, in most cases, has gone through a challenge procedure to the said award in the country of its origin, must then be able to get such award recognised and enforced in India as soon as possible. This is so that such person may enjoy the fruits of an award which has been challenged and which challenge has been turned down in the country of its origin, subject to grounds to resist enforcement being made out under Section 48 of the Arbitration Act. Bearing this in mind, it is important to remember that the Supreme Court's jurisdiction under Article 136 should not be used to circumvent the legislative policy so contained. We



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are saying this because this matter has been argued for several days before us as if it was a first appeal from a judgment recognising and enforcing a foreign award. Given the restricted parameters of Article 136, it is important to note that in cases like the present — where no appeal is granted against a judgment which recognises and enforces a foreign award — this Court should be very slow in interfering with such judgments, and should entertain an appeal only with a view to settle the law if some new or unique point is raised which has not been answered by the Supreme Court before, so that the Supreme Court judgment may then be used to guide the course of future litigation in this regard. Also, it would only be in a very exceptional case of a blatant disregard of Section 48 of the Arbitration Act that the Supreme Court would interfere with a judgment which recognises and enforces a foreign award however inelegantly drafted the judgment may be. With these prefatory remarks we may now go on to the submissions of counsel.'

20. The Court then went on to refer to *Minmetals Germany GmbH v. Ferco Steel Ltd.* [*Minmetals Germany GmbH v. Ferco Steel Ltd.*, 1999 CLC 647 : (1999) 1 All ER (Comm) 315] in para 64, and *Jorf Lasfar Energy Co. v. AMCI Export Corpn.* [*Jorf Lasfar Energy Co. v. AMCI Export Corpn.*, 2008 WL 1228930 (US District



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*Court, WD Pennsylvania)] in para 66 as follows :
(Vijay Karia case [Vijay Karia v. Prysmian Cavi E Sistemi SRL, (2020) 11 SCC 1: (2021) 1 SCC (Civ) 389] , SCC pp. 68-70, paras 64 & 66)*

'64. The English judgments advocate applying the test of a person being prevented from presenting its case by matters outside his control. This was done in Minmetals Germany GmbH v. Ferco Steel Ltd. [Minmetals Germany GmbH v. Ferco Steel Ltd., 1999 CLC 647 : (1999) 1 All ER (Comm) 315] as follows:

'In my judgment, the inability to present a case to arbitrators within Section 103(2)(c) contemplates at least that the enforcee has been prevented from presenting his case by matters outside his control. This will normally cover the case where the procedure adopted has been operated in a manner contrary to the rules of natural justice. Where, however, the enforcee has, due to matters within his control, not provided himself with the means of taking advantage of an opportunity given to him to present his case, he does not in my judgment, bring himself within that exception to enforcement under the convention. In the present case that is what has happened.'

66. An application of this test is found in Jorf Lasfar Energy Co. v. AMCI Export Corpn. [Jorf



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Lasfar Energy Co. v. AMCI Export Corpn., 2008 WL 1228930 (US District Court, WD Pennsylvania)] , where the US District Court, W.D. Pennsylvania decided that if a party fails to obey procedural orders given by the arbitrator, it must suffer the consequences. If evidence is excluded because it is not submitted in accordance with a procedural order, a party cannot purposefully ignore the procedural directives of the decision-making body and then successfully claim that the procedures were unfair or violative of due process. Likewise, in Dongwoo Mann+Hummel Co. Ltd. v. Mann + Hummel GmbH [Dongwoo Mann + Hummel Co. Ltd. v. Mann+Hummel GmbH, 2008 SGHC 275] , the Singapore High Court held:

'145. A deliberate refusal to comply with a discovery order is not per se a contravention of public policy because the adversarial procedure in arbitration admits of the possible sanction of an adverse inference being drawn against the party that does not produce the document in question in compliance with an order. The Tribunal will of course consider all the relevant facts and circumstances, and the submissions by the parties before the Tribunal decides whether or not to draw an adverse inference for the non-production. Dongwoo also had the liberty to apply to the High Court to compel production of the documents under Sections 13 and 14 of the IAA, if it was not



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content with merely arguing on the question of adverse inference and if it desperately needed the production by M+H of those documents for its inspection so that it could properly argue the point on drawing an adverse inference. However, Dongwoo chose not to do so.

146. Further, the present case was not one where a party hides even the existence of the damning document and then dishonestly denies its very existence so that the opposing party does not even have the chance to submit that an adverse inference ought to be drawn for non-production. M+H in fact disclosed the existence of the documents but gave reasons why it could not disclose them. Here, Dongwoo had the full opportunity to submit that an adverse inference ought to be drawn, but it failed to persuade the Tribunal to draw the adverse inference. The Tribunal examined the other evidence before it, considered the submissions of the parties and rightfully exercised its fact-finding and decision-making powers not to draw the adverse inference as it was entitled to do so. It would appear to me that the Tribunal was doing nothing more than exercising its normal fact-finding powers to determine whether or not an adverse inference ought to be drawn'.

21. The Court finally summed up its conclusion on this aspect of the case, as follows :



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(Vijay Karia case [Vijay Karia v. Prysmian Cavi E Sistemi SRL, (2020) 11 SCC 1 : (2021) 1 SCC (Civ) 389] , SCC p. 84, para 81)

'81 [Ed. : Para 81 corrected vide Official Corrigendum No. F.3/Ed.B.J./10/2020 dated 18-3-2020.] . Given the fact that the object of Section 48 is to enforce foreign awards subject to certain well-defined narrow exceptions, the expression "was otherwise unable to present his case" occurring in Section 48(1)(b) cannot be given an expansive meaning and would have to be read in the context and colour of the words preceding the said phrase. In short, this expression would be a facet of natural justice, which would be breached only if a fair hearing was not given by the arbitrator to the parties. Read along with the first part of Section 48(1)(b), it is clear that this expression would apply at the hearing stage and not after the award has been delivered, as has been held in Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131: (2020) 2 SCC (Civ) 213] . A good working test for determining whether a party has been unable to present his case is to see whether factors outside the party's control have combined to deny the party a fair hearing. Thus, where no opportunity was given to deal with an argument which goes to the root of the case or findings based on evidence which go behind the back of the party and which



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results in a denial of justice to the prejudice of the party; or additional or new evidence is taken which forms the basis of the award on which a party has been given no opportunity of rebuttal, would, on the facts of a given case, render a foreign award unenforceable on the ground that a party has been unable to present his case. This must, of course, be with the caveat that such breach be clearly made out on the facts of a given case, and that awards must always be read supportively with an inclination to uphold rather than destroy, given the minimal interference possible with foreign awards under Section 48.'

22. *Shri Raval took exception to the interpretation of the word "otherwise" occurring in Section 48(1)(b) and cited a Constitution Bench judgment of this Court in Valparaiso Kottarathil Kochuni v. States of Madras & Kerala [Valparaiso Kottarathil Kochuni v. States of Madras & Kerala, (1960) 3 SCR 887 : AIR 1960 SC 1080] , for the proposition that the expression "otherwise" cannot be read ejusdem generis with words that precede it.*

.....

27. *As has been held in para 81 of Vijay Karia [Vijay Karia v. Prysmian Cavi E Sistemi SRL, (2020) 11 SCC 1 : (2021) 1 SCC (Civ) 389] , the context of Section 48 is recognition and*



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enforcement of foreign awards under the New York Convention of 1958. Given the context of the New York Convention, and the fact that the expression "otherwise" is susceptible to two meanings, it is clear that the narrower meaning has been preferred, which is in consonance with the pro-enforcement bias spoken about by a large number of judgments referred to in Vijay Karia [Vijay Karia v. Prysman Cavi E Sistemi SRL, (2020) 11 SCC 1 : (2021) 1 SCC (Civ) 389] . Kochuni case [Valparaiso Kottarathil Kochuni v. States of Madras & Kerala, (1960) 3 SCR 887 : AIR 1960 SC 1080] dealing with an entirely different Act with a different object cannot, therefore, possibly apply to construe this word in the setting in which it occurs.

.....

30. In a significant paragraph which foreshadowed the law as it is today, this Court referred to the Minmetals [Minmetals Germany GmbH v. Ferco Steel Ltd., 1999 CLC 647 : (1999) 1 All ER (Comm) 315] judgment and held as follows : (Sohan Lal Gupta case [Sohan Lal Gupta v. Asha Devi Gupta, (2003) 7 SCC 492] , SCC pp. 509-510, para 43)

'43. Furthermore, in this case Ghanshyamdas Gupta expressly relinquished his right by filing an application stating that he would withdraw his objection. Such relinquishment in a



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given case can also be inferred from the conduct of the party. The defence which was otherwise available to Ghanshyamdas Gupta would not be available to others who took part in the proceedings. They cannot take benefit of the plea taken by Ghanshyamdas Gupta. Each party complaining violation of natural justice will have to prove the misconduct of the Arbitration Tribunal in denial of justice to them. The appellant must show that he was otherwise unable to present his case which would mean that the matters were outside his control and not because of his own failure to take advantage of an opportunity duly accorded to him. (See Minmetals Germany GmbH v. Ferco Steel Ltd. [Minmetals Germany GmbH v. Ferco Steel Ltd., 1999 CLC 647 : (1999) 1 All ER (Comm) 315]) This Court's decision in Renusagar Power Co. Ltd. v. General Electric Co. [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] is also a pointer to the said proposition of law.'

(emphasis supplied)

.....

36. In Eastern European Engg. v. Vijay Consulting [Eastern European Engg. v. Vijay Consulting, (2019) 1 LLR 1 (QBD)] , the Queen's Bench Division dealt with the "inability to present case" challenge by following Cuckurova Holding



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[Cuckurova Holding A.S. v. Sonera Holding B.V., 2014 UKPC 15] and Minmetals [Minmetals Germany GmbH v. Ferco Steel Ltd., 1999 CLC 647: (1999) 1 All ER (Comm) 315], and then concluding:

'89. It was also common ground that, as indicated as a "given" by Lord Clarke in Cuckurova [Cuckurova Holding A.S. v. Sonera Holding B.V., 2014 UKPC 15] at [53], the party challenging the award must also demonstrate that the outcome of the arbitration would have been different had there been no breach of natural justice.'

Applying the test of 'matters outside one's control', it was found that VCL's challenge on this ground was not outside its control as follows:

'98. In this specific context what VCL did not do (and perfectly well could have done) was to raise with the arbitrator the question of whether the form of his order in fact shut them out from putting in a statement from Dr du Toit Malan, or to make submissions as to why they needed to get evidence from some other identified person in order to respond to the submissions made. Instead they chose to seek to challenge the decision on the basis that they should be allowed to put in new evidence which covered all issues, not simply in response to Large 3. This decision to challenge on



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one basis and not the other is a matter which was entirely within VCL's control.

99. In those circumstances too I accept the submission that the admission of Large 3 (or failure to allow responsive evidence) would not have had an impact on the result of the arbitration. The liability decision was based on the earlier reports of Mr Large and other witnesses. That is common ground. In relation to quantum, the arbitrator's reliance upon Large 3 had the effect of reducing the quantum awarded to EEEL (by some €9 million). It therefore cannot be said that VCL was prejudiced by Large 3. If it was prejudiced it was by its failure to avail itself of the opportunity given it to respond.'

(emphasis supplied)

37. Jorf Lasfar [Jorf Lasfar Energy Co. v. AMCI Export Corpn., 2008 WL 1228930 (US District Court, WD Pennsylvania)] , referred to in para 61 of Vijay Karia [Vijay Karia v. Prysmian Cavi E Sistemi SRL, (2020) 11 SCC 1 : (2021) 1 SCC (Civ) 389] , is also instructive. This case deals with a specific plea relating to natural justice in relation to a Tribunal's procedural orders as follows:

'7. We disagree. AMCI was given a full and fair opportunity to present its case. However, AMCI failed to meet its obligations under the Tribunal's procedural orders, 3 and suffered the



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consequences. It failed to submit any witness statements by the deadline set forth by the Tribunal. Rather, AMCI attempted to name Mr Thrasher as a witness after the deadline, and without submitting a witness statement. AMCI submitted no documentary evidence save a governmental report indicating that coal was in short supply around the time of the alleged breach.

9. The requirements of Procedural Order No. 4 are clear, reasonable, and common in international arbitration practice. There is no dispute that AMCI understood what the Order required at the time. A party cannot purposefully ignore the procedural directives of a decision-making body, and then successfully claim that the procedures were fundamentally unfair, or violated due process. Under the circumstances, we find that AMCI has failed to satisfy its burden to prove that the arbitral process violated our basic notions of fundamental fairness and justice. As such, AMCI cannot avail itself of either the Article V(1)(b) defence or the Article V(2)(b) defence.'

(emphasis supplied)''



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29. The Hon'ble Apex Court held that the party, which fails to take advantage of an opportunity duly accorded to, it cannot later invoke that ground.

30. The ground under Section 48(1)(b) of the Act will not be available to a party, which makes a conscious and deliberate decision not to participate in the arbitral proceedings after receiving due notice of their commencement. The written communication made by a party refusing to participate in the proceedings constitutes a waiver of their own right to present their case and to receive further notices regarding the procedural steps taken in the arbitration. The burden is also on the resisting party to prove that they were denied an opportunity to be heard due the circumstances beyond their control. Such a circumstance cannot be presumed by merely showing that the award was passed ex parte. To hold otherwise would allow a recalcitrant party to strategically boycott foreign arbitrations and thereafter prevent an award holder at the enforcement stage, which will undermine the efficacy of international commercial arbitration and India's treaty obligation under the New York Convention.



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31. In the case in hand, there is no doubt that the notice of arbitration was served on the respondent.

32. The respondent took a conscious and deliberate decision not to participate in the arbitration proceedings after receiving the notice of its commencement. A party, which fails to take advantage of an opportunity duly accorded by the Arbitral Tribunal, cannot invoke the ground of being unable to present its case.

33. The respondent's email dated 18.11.2019 is a proof of its deliberate choice and not its inability. The judgment of the Hon'ble Apex Court in **Centrotrade Minerals & Metals Inc.**, directly applies to the facts of this case.

34. Once a notice of arbitration is served, the respondent is deemed to have knowledge of the proceedings and a party, which chooses not to participate, cannot complain of violation of the principles of natural justice. The judgment of a learned Single Judge of the Delhi High Court in **Glencore International AG** is directly on the point.

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35. The respondent was given the opportunity to participate and present its defence before the Arbitral Tribunal and the respondent consciously chose to forfeit that right. Hence, the respondent cannot use its own default as a ground to resist enforcement of the resultant foreign award. The respondent cannot be permitted to raise the grounds, which ought to have been raised before the Arbitral Tribunal by participating in the proceedings.

36. The respondent also raised a procedural objection under Section 47 of the Act stating that the original or a certified copy of the arbitration agreement was not filed at the time of filing this petition.

37. During the pendency of this petition, the certified copy of the arbitration agreement was filed and the defect has been cured.

38. The Hon'ble Apex Court, in the decision in **PEC Ltd.**, held that this requirement is only directory in nature and that the non compliance will not entail in the dismissal of the application. In any



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case, the learned counsel for the respondent did not urge this point seriously at the time of final arguments.

39. In the light of the above discussions, the above original petition is allowed by holding that the final award dated 30.4.2020 is enforceable as a decree of this Court and that the respondent shall pay the amount due under the award together with accrued interest to the respondent. There shall be a further direction to the respondent to pay costs of **Rs.2,50,000/- (Rupees two lakhs and fifty thousand only)** to the petitioner.

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Index : Yes

Neutral Citation : Yes

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