SUPREME COURT OF INDIA

Indowind Energy Ltd.

Vs.

Wescare (I) Ltd.

C.A.No.3874. of 2010

(R.V.Raveendran J.)

27.04.2010

JUDGEMENT

R.V.Raveendran, J.

1. Leave granted.

2. The appellant and respondents 1 and 2 are companies incorporated under the Companies Act, 1956. Wescare Care (I) Ltd., the first respondent (for short `Wescare'), is in the business of setting up and operating/managing windfarms and generation of power from Wind Electric Generators. Subuthi Finance Ltd - second respondent (`Subuthi' for short) is a promoter of the appellant company - Indowind Energy Ltd., (referred to as `Indowind'). On 24.2.2006 an agreement of sale was entered into between Wescare and Subuthi. The agreement described "Wescare (India) Ltd. including its subsidiary RCI Power Ltd" as the "seller/Wescare". It described Subuthi Finance Ltd. and its nominee as "buyer" and as the "promoters of Indowind Energy Ltd." Under the said agreement, the seller agreed to transfer to the buyer certain business assets of the seller for a consideration of Rs.98.19 crores, of which Rs.24.19 crores was payable in cash and Rs.74 crores by issue of 74 lakhs shares (of the face value of Rs.10/- at a premium of Rs.90/- per share). Clause 10 of the agreement relates to arbitration. Clause 11 of the agreement relates to approval. The said clauses are extracted below:

> "10. Governing Law and Jurisdiction.
>
> This AGREEMENT shall be governed by and interpreted in accordance with the laws of India. The Parties submit to the exclusive jurisdiction of the court in the city of Chennai, Tamil Nadu. Any dispute, difference, claims or questions arising under this agreement or concerning any matter covered by this Agreement or touching upon this Agreement, the same shall be referred to arbitration before a sole arbitrator to be appointed by consent of Seller, Buyer/IW. The decision/award of the Sole Arbitrator shall be final and binding on all parties. The provisions of the Arbitration and

Conciliation Act, 1996, with such amendments thereto as may be applicable, shall apply to the proceedings. The venue of the arbitration shall be Chennai and the language of the Arbitration shall be English."

"11. Approval.

Notwithstanding anything to the contrary herein contained in this AGREEMENT this agreement is expressly subject to the approval of the respective Boards of Directors/Shareholders by the Seller, the Buyer and Indowind Energy Limited and if such approval is not obtained either by the Seller, the Buyer or IW on or before 30th June 2006 this AGREEMENT shall be null and void and of no effect whatsoever and all transactions done under the agreement shall be reversed with all the costs and damages to the defaulting party."

3. The Board of Directors of Wescare at its meeting held on 28.2.2006 accorded approval to the agreement dated 24.2.2006. The Board of Directors of Subuthi at its meeting held on 1.3.2006 approved the said agreement.

"There was however no such approval by the Board of Directors of Indowind."

4. According to Indowind, Wescare sold 31 Wind Electric Generators (WEGs) to Indowind on 15.3.2006 for a consideration of Rs.13,48,00,700/-, out of which Rs.4.5 crores was paid in cash and Rs.8.84 crores by allotment of 884,000 shares of Indowind to Wescare. Further, towards the purchase of another 8 WEGs from Wescare, Indowind allotted 58,000 shares.

5. According to Wescare, certain disputes arose between Wescare on the one hand and Subuthi and Indowind on the other, in respect of the said agreement. Wescare filed three petitions under section 9 of the Arbitration and Conciliation Act, 1996 (`the Act', for short) against Subuthi and Indowind seeking the following interim measures:

"(i) OA No.641/2007 to restrain Subuthi and Indowind from alienating, encumbering or otherwise disposing of the 31 WEGs and the land appurtenant thereto.

(ii) OA NO.642/2007 to restrain Subuthi and Indowind from operating or running the WEGs pending completion of arbitration proceedings.

(iii) OA NO.975/2007 to restrain Indowind from proceeding with the issue of initial public offer, proposed under the Red Herring Prospectus issued by it, pending final disposal of the arbitration proceedings."

6. The said applications were dismissed by a learned Single Judge of the Madras High Curt on 21.8.2007, holding as follows:

"(a) As Indowind has not signed nor ratified the agreement dated 24.2.2006, the maintainability of the applications under section 9 of the Act was doubtful.

(b) As the WEGs were purchased by Indowind after paying the entire sale consideration, Wescare was not entitled to an injunction restraining Indowind from alienating the WEGs.

The order however clarified that whatever had been stated therein was in the context of disposal of the applications seeking interim measures under section 9 of the Act and nothing contained therein should be construed as findings on merits and the Arbitrator should determine the issues raised before him uninfluenced by the observations made in the said order."

7. Wescare filed a petition under section 11(6) of the Act against Subuthi and Indowind for appointment of a sole arbitrator to arbitrate upon the disputes between them in respect of agreement dated 24.2.2006. Subuthi resisted the said petition alleging that as the agreement dated 24.2.2006 did not contemplate any transaction between Wescare and itself (Subuthi) and as no transaction took place between Wescare and Subuthi under the agreement dated 24.2.2006, there was no cause of action nor any arbitrable dispute between them. Indowind resisted the petition on the ground that it was not a party to the agreement dated 24.2.2006 entered into between Wescare and Subuthi; that it had not ratified the agreement dated 24.2.2006 or acted upon it; that there was no arbitration agreement between Wescare and Indowind; that the transactions of purchase of 31 WEGs were neither covered by nor in pursuance of the agreement dated 24.2.2006 and therefore the petition was liable to be dismissed.

8. The learned Chief Justice of the Madras High Court allowed the said application under section 11 of the Act, by the impugned order dated 1.8.2008 and appointed a sole arbitrator.

9. The learned Chief Justice held that Indowind was prima facie a party to the arbitration agreement and was bound by it, even though it was not a signatory to the agreement dated 24.2.2006. His conclusion was based on the following findings:

"(a) Execution of the agreement dated 24.2.2006 between Wescare and Subuthi containing the arbitration agreement, was not in dispute.

(b) Subuthi is one of the promoters of Indowind. Both of them had a common registered office and common Directors. The correspondence emanating from Indowind was signed by Raja Sukumar who was the signatory on behalf of Subuthi in the agreement dated 24.2.2006. By lifting the corporate veil, it could be seen that Subuthi and Indowind was one and the same party.

(c) The agreement dated 24.2.2006 described Subuthi as the promoter of Indowind and also described Indowind as the nominee of Subuthi.

Subuthi had entered into an agreement for purchase of the business assets of Wescare for its nominee Indowind. The signatory to the agreement on behalf of Subuthi was also a Director of Indowind.

(d) The agreement dated 24.2.2006 contemplated Indowind purchasing the assets of Wescare including the WEGs. and making payment therefor, both in cash and by allotment of shares. Indowind had in fact purchased from Wescare 39 WEGs. in March, 2006, the consideration for which was paid partly in cash and partly by allotment of shares, thereby indicating that Indowind acted in terms of the agreement dated 24.2.2006.

(e) The Red Herring Prospectus issued by Indowind in connection with the public issue of equity shares gives a clear indication that it is bound by the agreement dated 24.2.2006 between Wescare and Subuthi (vide Risk Factor Nos.30 and 31).

(f) Signature of a party is not a formal requirement of an arbitration agreement either under sub-section (4)(b) and (c) or under sub-section (5) of section 7 of the Act. Therefore, Indowind could be held to be a party to the agreement dated 24.2.2006, even if it had not executed the said agreement.

The said judgment is challenged in this appeal by special leave. On the contentions urged the following two questions arise for consideration:

(i) Whether an arbitration clause found in a document (agreement) between two parties, could be considered as a binding arbitration agreement on a person who is not a signatory to the agreement? (ii) Whether a company could be said to be a party to a contract containing an arbitration agreement, even though it did not sign the agreement containing an arbitration clause, with reference to its subsequent conduct?"

10. Section 7 defines an arbitration agreement and it is extracted below:

"7. Arbitration agreement.--(1) In this Part, "arbitration agreement"

means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-- (a) a document signed by the parties' (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other, (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

The term `party' is defined in section 2(h) as referring to a party to an arbitration agreement. The term arbitration agreement is defined under section 2(b) as an agreement referred to in section 7. An analysis of sub-sections (2), (3) and (4) of section 7 shows that an arbitration agreement will be considered to be in writing if it is contained in : (a) a document signed by the parties; or (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other, or (d) a contract between the parties making a reference to another document containing an arbitration clause indicating a mutual intention to incorporate the arbitration clause from such other document into the contract."

11. It is fundamental that a provision for arbitration to constitute an arbitration agreement for the purpose of section 7 should satisfy two conditions : (i) it should be between the parties to the dispute; and (ii) it should relate to or be applicable to the dispute. [See: *Yogi Agrawal v. Inspiration Clothes & U & Ors.*[1]].

12. Wescare has not entered into any agreement with Indowind, referring to the agreement dated 24.2.2006 containing the arbitration agreement, with the intention of making such arbitration agreement, a part of the their agreement. Nor is it the case of Wescare that there has been any exchange of statements of claim and defence in which it had alleged the existence of an arbitration agreement and the same had been accepted and not denied by Indowind in the defence statement. It is also not the case of Wescare that any exchange of letters, telex, telegrams or other means of telecommunication referred to and provided a record of any arbitration agreement between the parties. It therefore follows that neither sub-section (5) nor clauses (b) and (c) of sub-section (4) of section 7 applies. Therefore, what remains to be seen is whether there is any `document signed by parties', as provided in clause (a) of sub-section (4) of section 7.

13. Wescare puts forth the agreement dated 24.2.2006 as an agreement signed by the parties containing an arbitration agreement but the said agreement is signed by Wescare and Subuthi and not by Indowind. It is not in dispute that there can be appointment of an arbitrator if there was any dispute between Wescare and Subuthi. The question is when Indowind is not a signatory to the agreement dated 24.2.2006, whether it can be considered to be a `party' to the arbitration agreement. In the absence of any document signed by the parties as

contemplated under clause (a) of sub-section (4) of section 7, and in the absence of existence of an arbitration agreement as contemplated in clauses (b) or (c) of sub-section (4) of section 7 and in the absence of a contract which incorporates the arbitration agreement by reference as contemplated under sub-section (5) of section 7, the inescapable conclusion is that Indowind is not a party to the arbitration agreement. In the absence of an arbitration agreement between Wescare and Indowind, no claim against Indowind or no dispute with Indowind can be the subject- matter of reference to an arbitrator. This is evident from a plain, simple and normal reading of section 7 of the Act.

14. Learned counsel for Wescare referred to various clauses in the agreement dated 24.2.2006 to contend that it should be deemed to be an agreement executed/signed by Indowind. Firstly it was submitted that the agreement was entered into by Subuthi as promoter of Indowind and also described Indowind as its nominee and the agreement was signed on behalf of Subuthi by a person who was also a Director of Indowind. It is submitted that the agreement also specifically stated that Subuthi was desirous of purchasing certain assets of Wescare for its nominee Indowind, and in fact, Indowind purchased the said assets of Wescare. This according to the learned counsel for Wescare, led to an irresistible conclusion that Indowind was acting in terms of the agreement dated 24.2.2006 and therefore, it would be bound by the arbitration clause therein.

15. It is not in dispute that Subuthi and Indowind are two independent companies incorporated under the Companies Act, 1956. Each company is a separate and distinct legal entity and the mere fact that two companies have common shareholders or common Board of Directors, will not make the two companies a single entity. Nor will existence of common shareholders or Directors lead to an inference that one company will be bound by the acts of the other. If the Director who signed on behalf of Subuthi was also a Director of Indowind and if the intention of the parties was that Indowind should be bound by the agreement, nothing prevented Wescare insisting that Indowind should be made a party to the agreement and requesting the Director who signed for Subuthi also to sign on behalf of Indowind. The very fact that parties carefully avoided making Indowind a party and the fact that the Director of Subuthi though a Director of Indowind, was careful not to sign the agreement as on behalf of Indowind, shows that the parties did not intend that Indowind should be a party to the agreement. Therefore the mere fact that Subuthi described Indowind as its nominee or as a company promoted by it or that the agreement was purportedly entered by Subuthi on behalf of Indowind, will not make Indowind a party in the absence of a ratification, approval, adoption or confirmation of the agreement dated 24.2.2006 by Indowind.

16. Clause 11 of the agreement dated 24.2.2006 categorically states that the agreement shall be null and void and of no effect whatsoever unless it is expressly approved by the respective Board of Directors/shareholders of Wescare, Subuthi and Indowind. It is admitted that the Board of Directors of Wescare and Subuthi approved the agreement. But the Board of Directors or the shareholders of Indowind did not approve the agreement. In the absence of such approval by Indowind, and in the absence of Indowind being a party or signatory to the agreement dated 24.2.2006, it is ununderstandable as to how Indowind can be deemed to be a

party to the agreement dated 24.2.2006 and consequently a party to the arbitration agreement contained therein.

17. Wescare referred to several acts and transactions as also the conduct of Indowind to contend that an inference should be drawn that Indowind was a party to the agreement or that it had affirmed and approved the agreement or acted in terms of the agreement. An examination of the transactions between the parties to decide whether there is a valid contract or whether a particular party owed any obligation towards another party or whether any person had committed a breach of contract, will be possible in a suit or arbitration proceeding claiming damages or performance. But the issue in a proceeding under section 11 is not whether there was any contract between the parties or any breach thereof. A contract can be entered into even orally.

> "A contract can be spelt out from correspondence or conduct. But an arbitration agreement is different from a contract. An arbitration agreement can come into existence only in the manner contemplated under section 7. If section 7 says that an arbitration agreement should be in writing, it will not be sufficient for the petitioner in an application under section 11 to show that there existed an oral contract between the parties, or that Indowind had transacted with Wescare, or Wescare had performed certain acts with reference to Indowind, as proof of arbitration agreement."

18. A Constitution Bench of this Court in *Economic Transport Organisation v. M/s. Charan Spinning Mills (P) Ltd.*[2] pointed out that court examines a document from different perspectives in different types of cases. This Court observed:

> "20. In this context, it is necessary to remember that the nature of examination of a document may differ with reference to the context in which it is examined. If a document is examined to find out whether adequate stamp duty has been paid under the Stamp Act, it will not be necessary to examine whether it is validly executed or whether it is fraudulent or forged. On the other hand, if a document is being examined in a criminal case in the context of whether an offence of forgery has been committed, the question for examination will be whether it is forged or fraudulent, and the issue of stamp duty or registration will be irrelevant.
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> But if the document is sought to be produced and relied upon in a civil suit, in addition to the question whether it is genuine, or forged, the question whether it is compulsorily registrable or not, and the question whether it bears the proper stamp duty, will become relevant. If the document is examined in the context of a dispute between the parties to the document, the nature of examination will be to find out that rights and obligation of one party vis-`-vis the other party. If in a summary proceedings by a consumer against a service provider, the insurer is added as a co-complainant or if the insurer represents the consumer as a power of attorney, there is no need to examine the nature of rights inter-se between the consumer and his insurer."

19. The scope of examination of the agreement dated 24.2.2006, by the learned Chief Justice or his Designate under section 11(6) is necessarily to be restricted to the question whether there is an arbitration agreement between the parties. The examination cannot extend to examining the agreement to ascertain the rights and obligations regarding performance of such contract between the parties. This Court in *SBP & Co. v. Patel Engineering Limited*[3] and in *National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd.*[4] has held that when an application is filed under section 11, the Chief Justice or his Designate is required to decide only two issues, that is whether the party making the application has approached the appropriate court and whether there is an arbitration agreement and whether the party who has applied under section 11 of the Act, is a party to such agreement. Therefore, the Chief Justice exercising jurisdiction under section 11 of the Act has to only consider whether there is an arbitration agreement between the petitioner and the respondent/s in the application under section 11 of the Act. Any wider examination in such a summary proceeding will not be warranted.

20. In so far as the issue of existence of arbitration agreement between the parties, the learned Chief Justice or his Designate is required to decide the issue finally and it is not permissible in a proceeding under section 11 to merely hold that a party is prima facie a party to the arbitration agreement and that a party is prima facie bound by it. It is not as if the Chief Justice or his Designate will subsequently be passing any other final decision as to who are the parties to the arbitration agreement. Once a decision is rendered by the Chief Justice or his Designate under section 11 of the Act, holding that there is an arbitration agreement between the parties, it will not be permissible for the arbitrator to consider or examine the same issue and record a finding contrary to the finding recorded by the court. This is categorically laid down by the Constitution Bench in SBP. Therefore the prima facie finding by the learned Chief Justice that Indowind is a party to the arbitration agreement is not what is contemplated by the Act. 21 It is no doubt true that if Indowind had acknowledged or confirmed in any correspondence or other agreement or document, that it is a party to the arbitration agreement dated 24.2.2006 or that it is bound by the arbitration agreement contained therein, it could have been possible to say that Indowind is a party to the arbitration agreement. But that would not be under section 7(4)(a) but under section 7(4)(b) or section 7(5). Be that as it may.

> "That is not the case of Wescare. In fact, the delivery notes/invoices issued by Wescare do not refer to the agreement dated 24.2.2006. Nor does any letter or correspondence sent by Indowind refers to the agreement dated 24.2.2006, either as an agreement executed by it or as an agreement binding on it. We may now refer to the several documents referred to and relied on by Wescare."

22. The first is in regard to the sale of WEGs by Wescare to Indowind.

> "The letter dated 15.3.2006 enclosing the invoice, the delivery notes dated 15.3.2006 given by Wescare to Indowind, the confirmation dated 15.3.2006 by Wescare to

Indowind relating to the sale of WEGs, relied on by Wescare, very significantly do not refer to the agreement dated 24.2.2006. They are straight and simple delivery notes and an invoice in regard to the sale of goods. They can be independent transactions which do not depend on or relate to the agreement dated 24.2.2006. If they were with reference to the agreement dated 24.2.2006, it is strange that Wescare did not choose to refer to the said agreement in any of these documents."

23. Strong reliance is placed on the Red Herring Prospectus issued by the Indowind in connection with the public issue of its shares. We extract below the relied upon portions of the prospectus:

"30. We have agreed to takeover the assets of Wescare (India) Limited, subject to approval of owners of assets and statutory formalities, but only a portion of acquisition has been completed.

Our Company agreed to takeover wind mills along with land, infrastructure and spares from Wescare India Limited. But due to non receipt of approvals from the lenders/lessors, only a part of the total being 6.49 MW has been acquired by us. The Company is not certain of completing the remaining acquisition. We had paid the total amount for 39 windmills, however only 28 windmills were delivered to us representing nearly 72% of the total money paid by us.

31. One of our Promoters, Subuthi Finance Limited, has entered into an agreement dated February 24, 2006 with Wescare (India) Limited for the acquiring wind mills and other assets in the name of its nominee viz. Indowind Energy Limited for a consideration aggregating approximately Rs.9819 lacs.

The consideration for the above was to be partly settled in partly in cash (Rs.2419 lacs) and partly by way of shares (74 lacs) of Indowind Energy Limited.

Wescare (India) Limited has filed the following applications before the Hon'ble High Court of Madras under Section 9 of the Arbitration and Conciliation Act, 1996 :

18 SNo. Application No. Applicant Respondents 1 O.A.No.641 of 2007 Wescare India (i) Subuthi Finance Limited Limited (ii) Indowind Energy Limited 2 O.A.No.642 of 2007 -same as above- -same as above- 3 Appl. No.3808 of 2007 -same as above- -same as above- 4 Appl. No.3808 of 2007 -same as above- -same as above- All above applications are pending before the Hon'ble High Court of Madras. For further details of the same, please refer section titled "Outstanding Litigations and Material Developments" on page 190 of this Red Herring Prospectus."

Para 30 of the Prospectus merely refers to Indowind agreeing to take over the wind mills along with land, infrastructure and spares from Wescare. It does not refer to the agreement dated 24.2.2006 nor does it state that the takeover of the wind mills etc.,

was in pursuance of the agreement dated 24.2.2006. Para 31 of the Prospectus specifically states that Subuthi had entered into an agreement dated 24.2.2006 with Wescare to acquire WEGs and other assets in the name of its nominee Indowind. This has never been disputed by anyone. But what is significant is that there is no acknowledgement or statement that the said agreement was authorized to be entered on its behalf by Indowind or Indowind had ratified or approved the said agreement. Para 31 also refers to the applications under section 9 filed by Wescare and the interlocutory applications filed in such applications. But then that also does not help as in fact in the said application under section 9 19 the High Court has held that Indowind is not a party to the agreement dated 24.2.2006 and therefore not a party to an arbitration agreement."

24. Wescare relied upon two decisions of the US Court of Appeals to contend that a person to be bound by an arbitration agreement need not personally sign the written arbitration agreement. [*FISSER v. International Bank*[5] *and J.J.Ryan & Sons, Inc. v. Rhone Poulene Textile, S.A.*[6]]. These decisions are of no assistance as they do not relate to a provision similar to section 7 of the Indian Act.

25. In view of the above, we allow this appeal, set aside the order of the High Court appointing an Arbitrator in regard to the claims of Wescare against Indowind and dismiss the application under section 11(6) of the Act filed by Wescare in so far as Indowind is concerned. The appointment of Arbitrator in so far as Subuthi is concerned, is not disturbed. It is however open to Subuthi to raise all contentions including the contention relating to absence of arbitral dispute, before the Arbitrator.

[1]*2009 (1) SCC 372*
[2]*2010 (2) SCALE 427*
[3]*2005 (8) SCC 618*
[4]*2009 (1) SCC 267*
[5]*282 F.2d 231 (1960)*
[6]*863 F.2d 315*