
(2013) 01 BOM CK 0210
In the Bombay High Court
Case No : Writ Petition No. 676 of 2010

GL Asia Mauritius II Cayman Limited and Others	APPELLANT
Vs	
Pinfold Overseas Limited and Another	RESPONDENT

Date of Decision : 11-01-2013

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 9

Citation : (2013) 4 ABR 1063 : (2013) 2 ARBLR 334 : (2013) 3 BomCR 589

Hon'ble Judges : F.M. Reis, J

Bench : Single Bench

Advocate : M.S. Sonak, Ajit Warriee and Sandeep Grover, for the Appellant; Ravi Gupta Sr., Rajneesh Chopra and Priyanka K. for the Respondent No. 1, for the Respondent

Judgement

F.M. Reis, J.—Heard Shri M.S. Sonak, learned counsel appearing for the petitioners, and Shri R. Gupta, learned senior counsel appearing for the respondent no. 1. The above petition challenges an order dated 21.08.2010 passed by the learned District Judge, South Goa at Margao in Arbitration Application No. 31/2008 whereby the preliminary objection raised by the petitioners herein with regard to the jurisdiction of the learned judge to entertain an application u/s 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the said Act") came to be disposed of inter alia holding that the court had jurisdiction to entertain such application.

2. The above matter was adjourned from time-to-time in view of the fact that the point for consideration in the present petition as to whether Part I of the said Act is applicable in cases of international commercial agreements was under consideration before the Apex Court. It was pointed out by the learned counsel that the matter has been disposed of by the Apex Court in the judgment reported in Bharat Aluminium Company and Others Vs. Kaiser Aluminium Technical Service, Inc. and Others etc. etc., in the case of Bharat Aluminium Company Ltd. vs. Kaiser Aluminium Technical Services Inc. Whilst disposing of

the said point the Hon"ble Supreme Court has directed that the judgment would be operative only prospectively with regard to the agreements which have been executed only subsequent to the passing of the said judgment. Considering that the subject matter of the present case is in respect of an agreement which was executed prior to the said date, the above petition is taken up for hearing.

3. Shri M.S. Sonak, learned counsel appearing for the petitioners, has assailed the impugned order on four counts. It is his first contention that the learned judge whilst passing the impugned order has taken a view that the respondent no. 2 is an implied party to the arbitration agreement which according to him is not tenable. The learned counsel further pointed out that the learned judge whilst passing the impugned order has misconstrued the agreement to come to such conclusion. The learned counsel has further pointed out that admittedly the respondent no. 4 is not a party to the said agreement and, as such, the question of coming to the conclusion that the respondent no. 2 is an implied party is totally misplaced. The learned counsel in any event pointed out that it is not open to the learned judge to curl out an arbitration agreement as against the respondent no. 2 when admittedly the respondent no. 2 was not a signatory to such agreement. The learned counsel in support of his submissions has relied upon the judgment of the Apex Court in the judgment passed in Civil Appeal No. 3874/2010, decided on 27.04.2010 [reported as Indowind Energy Ltd. Vs. Wescare (I) Ltd. and Another, in the case of Indowind Energy Ltd. vs. Wescare (I) Ltd. and another. The learned counsel, as such, submits that the finding of the learned judge to that effect cannot be sustained and deserves to be quashed and set aside. The learned counsel further pointed out that the learned judge whilst passing the impugned order failed to consider that the parties to disputed agreement which is styled as call option agreement dated 19.09.2007 were not Indian Nationals nor had any Indian connection and, as such, the said agreement cannot be considered to be an international commercial agreement within the meaning of Section 2(1)(f) of the said Act. The learned counsel has taken me through the definition and pointed out that it is necessary that company of the party should be an Indian company for the same to be termed as an international commercial agreement and, as such, submits that on this count also the impugned order deserves to be quashed and set aside. The next contention of the learned counsel is that the learned judge has failed to consider that there was an express exclusion of the applicability of Part I of the said Act. On going through the agreement between the said parties the learned counsel pointed out that as per the terms of the said agreement the governing law was the English Law whereas arbitration proceedings were to be governed as per Singapore International Arbitration Centre Rules, 2007 (SIAC Rules). The learned counsel further pointed out that considering that the arbitration proceedings were to be governed under the SIAC Rules, the question of invoking proceedings of Section 9 of the said Act would not arise. The learned counsel further pointed out that the learned judge has misconstrued the agreement and has come to the conclusion that the applicable law would be the governing law which is totally

contrary to the agreement which clearly provides that the governing law would be the English Law. Upon going through the definition, the learned counsel pointed out that the applicable law was to be applied in specific situation and not in the context in which the respondents were trying to seek relief u/s 9 of the said Act. The learned counsel has taken me through the finding of the learned judge on that count and pointed out that the learned judge has failed to consider that the governing substantial law was the English Law and consequently the finding of the learned judge to that effect cannot be sustained. The last contention of Shri Sonak, learned counsel is that the learned judge whilst passing the impugned order has come to the conclusion that merely because the respondent would ultimately hold 40% of the shares in the joint venture company in view of the fact that 100% shares of the petitioner no. 3-company were agreed to be transferred in favour of the respondents they had co-ownership right in the immovable properties. The learned counsel has further pointed out that it is well settled that merely because a person is entitled for share in a company incorporated under the Companies Act, 1956 by itself cannot create interest or right in the property. The learned counsel has taken me through the impugned order and pointed out that the learned judge has totally misconstrued the relevant provisions of law and erroneously come to the conclusion that respondent no. 1 was entitled to file an application u/s 9 of the said Act. The learned counsel, as such, submits that the impugned order cannot be sustained as according to him the learned judge had no jurisdiction to entertain the application u/s 9 of the said Act and consequently the same deserves to be quashed and set aside. Shri Sonak, learned counsel in support of his submissions has relied upon the judgment of the Apex Court in Videocon Industries Limited Vs. Union of India (UOI) and Another, in the case of Videocon Industries Limited vs. Union of India and another.

4. On the other hand, Shri Gupta, learned senior counsel appearing for respondent no. 1, has supported the impugned order. Dealing with the first contention of Shri Sonak, learned counsel appearing for the petitioners, he pointed out that though the learned judge has come to the conclusion that respondent no. 4 is an implied party to the said agreement nevertheless according to him considering that the respondents were entitled to undergo joint venture to put up a resort/hotel in the property belonging to respondent no. 2 would by itself disclose that the respondent no. 1 has a cause of action against the respondent no. 2 and consequently maintain an application u/s 9 of the said Act. The learned senior counsel further pointed out that the Division Bench of this court has held that an application u/s 9 of the said Act is also maintainable against parties who are not parties to the arbitration agreement. In support of the said contention the learned senior counsel has relied upon the judgment of the Division Bench of this court reported in 2010 (1) Bom. CR 31 in the case of Girish Mulchand Mehta and another vs. Mahesh S. Mehta and another. The learned senior counsel further pointed out that considering the said aspect, the fact whether the respondent no. 2 is an implied party or not is not at all relevant

as an application u/s 9 of the said Act is maintainable as against respondent no. 2. The learned senior counsel has thereafter taken me through the relevant terms in the said agreement and pointed out that the whole intention of the parties in entering in such call option agreement was to put up a hotel/resort in the suit property. The learned senior counsel further pointed out that the respondent no. 1 has invested a substantial amount in the project and on account of such investment one of the Directors appointed in the company of the respondent no. 2 is a representative of the respondent no. 1. The learned senior counsel further pointed out that this action itself shows that the parties have acted upon the said agreement as according to him one of the terms clearly specified that the representative of respondent no. 1 would be taken as Director of the respondent no. 2. The learned senior counsel has initially taken me through the terms of the agreement and pointed out that the land as specified therein clearly discloses that it was part and parcel of land admeasuring an area of 1,51,513 square metres as described in the schedule. The learned senior counsel has thereafter taken me to Clause 7.2 of the said agreement and pointed out that there is specific embargo reserved therein to show that the said property would not be alienated or disposed of except with the written approval of the respondent no. 1. The learned senior counsel further pointed out that this itself shows that the respondents are entitled to invoke the said terms by filing an application u/s 9 of the said Act. The learned senior counsel has thereafter taken me through Clause 9 of the said agreement and pointed out that it is substantially provided therein inter alia that specific performance as well as any objection or equitable relief can be obtained to the extent permitted by the applicable law. The learned senior counsel further pointed out that the definition of the "applicable law" as provided therein includes the laws in India and consequently it is his contention that the application u/s 9 is maintainable before the learned District Court. The learned senior counsel, as such, submits that the contention of Shri Sonak, learned counsel to the effect that the application is not maintainable or that the learned judge has no jurisdiction to entertain the said application u/s 9 cannot be accepted. The learned senior counsel in support of his submissions has relied upon the judgment of the learned Single Judge of this court reported in 2003 (3) Arb. LR 537 (Bom.) in the case of Liverpool & London Steamship Protection and Indemnity Association Ltd. vs. Arabian Tankers Co., LLC and others. The learned senior counsel has taken me through the said judgment and pointed out that even in the said judgment the parties to the agreement were not Indian companies and according to him despite the said fact an application u/s 9 of the said Act was held to be maintainable. The learned senior counsel further pointed out that the judgment relied upon by Shri Sonak, learned counsel in the case of Videocon Industries Limited is not applicable to the facts of the present case as according to him the Apex Court was dealing with a situation wherein an application u/s 9 of the said Act was filed when the arbitration proceedings had already commenced. The learned senior counsel further pointed out that in the present case an application u/s 9 of the said Act was filed much before the arbitration proceedings had commenced and

consequently on this count the ratio laid down by the Apex Court cannot be applied to the present case. The learned senior counsel further pointed out that in terms of the agreement considering that the applicable law is the law in force in India the respondent no. 1 was entitled to file the said application u/s 9 of the said Act in any event to invoke the terms of the agreement in accordance with the applicable law as provided in Clause 9 of the said agreement. The learned senior counsel, as such, submits that the contention of Shri Sonak, learned counsel is not sustainable. With regard to the contention of Shri Sonak, learned counsel to the effect that merely because a party has agreed to purchase share would not by itself have a right in the property, Shri Gupta, learned senior counsel fairly accepts the said position. The learned senior counsel however pointed out that in the present case it was not the case of the respondent no. 1 that they have any right in the property but according to him the claim of the respondent no. 1 was on the basis that in terms of the said agreement respondent no. 1 was entitled to enter into a joint venture with the petitioners in order to put up a hotel/resort in the said property. The learned senior counsel further pointed out that considering that the terms of the agreement were duly acted upon by the petitioners, the question of now contending that respondent no. 1 is not entitled to put up such resort cannot be accepted. The learned senior counsel, as such, submits that no interference is called for in the impugned judgment.

5. I have carefully considered the submissions of the learned counsel and I have also gone through the judgments relied upon by the respective counsel and the records in the present petition. With regard to the first contention of Shri Sonak, learned counsel appearing for the petitioners, to the effect that the learned judge was not justified to come to the conclusion that respondent no. 2 is an implied party to the said agreement, I am in agreement with the said submissions in view of the judgment of the Apex Court relied upon by the learned counsel in the case of Indowind Energy Ltd. vs. Wescare (I) Ltd. and another (supra). It has been observed by the Apex Court at paras 6(a), 12, 13 and 15 thus (at pages 236, 239 and 240 of Arb. LR=pages 276, 279 and 280 of SCACTC):

6. The said applications were dismissed by a learned Single Judge of the Madras High Court on 21.08.2007, holding as follows:

(a) As Indowind has not signed nor ratified the agreement dated 24.02.2006, the maintainability of the applications u/s 9 of the Act was doubtful.

xxx xxx xxx

12. Wescare has not entered into any agreement with Indowind, referring to the agreement dated 24.02.2006 containing the arbitration agreement, with the intention of making such arbitration agreement, a part of 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 24.02.2006 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 24.02.2006, 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.

xxx xxx xxx

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 24.02.2006 by Indowind.

6. Considering the ratio laid down by the Apex Court, it was not open to the

learned judge, in view of the stipulations in the call option agreement referring to the respondent no. 2, to hold that they were implied party to such agreement when admittedly they were not signatories to the said documents. Hence, the question of claiming that the respondent no. 2 is an implied party to the said agreement, cannot be accepted. It is well settled that the arbitral court cannot lift the corporate veil to ascertain a party who is not a party to the agreement. In the present case, admittedly, respondent no. 2 was not a party to the said agreement nor have they signed the said agreement and consequently the finding of the learned judge to the effect that respondent no. 2 is an implied party to the said agreement cannot be sustained.

7. Be that as it may, in view of the judgment of the Division Bench of this court in Girish Mulchand Mehta, Section 9 of the Arbitration Act of 1996 can be invoked only by party to the arbitration agreement. It does not limit the jurisdiction of the court to pass orders of interim measures only against the parties to the agreement or arbitration proceedings. It has been observed by the learned Division Bench at para 12 thus:

12. The next question is whether order of formulating the interim measures can be passed by the court in exercise of powers u/s 9 of the Act only against a party to an arbitration agreement or arbitration proceedings. As is noticed earlier, the jurisdiction u/s 9 can be invoked only by a party to the arbitration agreement. Section 9, however, does not limit the jurisdiction of the court to pass order of interim measures only against party to an arbitration agreement or arbitration proceedings; whereas the court is free to exercise same power for making appropriate order against the party to the petition u/s 9 of the Act as any proceedings before it. The fact that the order would affect the person who is not party to the arbitration agreement or arbitration proceedings does not affect the jurisdiction of the court u/s 9 of the Act which is intended to pass interim measures of protection or preservation of the subject matter of the arbitration agreement.

8. Considering the said aspect, an application u/s 9 of the said Act against the respondent no. 2 would be maintainable and the contention that the same can be filed only against the parties to the arbitration agreement, cannot be accepted. Hence, merely because the respondent no. 2 is not a party to the agreement wherein the arbitration clause exists, it cannot be said that the respondent no. 1 is precluded from filing such application u/s 9 of the said Act in the light of the said observations of the learned Division Bench of this court. As such, the first contention of Shri Sonak, learned counsel, is partly accepted.

9. With regard to the next contention of Shri Sonak, learned counsel, to the effect that the learned judge has erroneously come to the conclusion that the applicable law is the substantive law, I find that such finding of the learned judge cannot be sustained and deserves to be quashed and set aside. On perusal of the agreement, the governing law and/or the substantive law is the English Law. Clause 20.1 of the call option agreement provides thus:

20. Governing law and arbitration--

20.1. This agreement and all questions of its interpretation shall be construed in accordance with the laws of England without regard to its principles of conflicts of laws.

10. On plain reading of the said clause, it cannot be accepted that the applicable law would be the substantive law which would govern the rights of the parties in terms of the call option agreement. Applicable law is clearly defined in the said agreement. It reads thus:

1.1. Definitions--Applicable law shall mean any law, rule, regulation, ordinance, order, treaty, judgment, decree, bye-law, terms, or any governmental approval administrative instruction, directive, guideline, or any other norm prescribed by any state organ or any decision of, or determination by any court, tribunal, governmental department or agency or any state authority (including but not limited to the Reserve Bank of India), having the force of law in any country having jurisdiction over any of the parties or over their assets or over the company and shall include along with any of the foregoing, or injunction, permit or decision of any central, state, local or municipal government, authority, agency, tribunal, court or other body in Mauritius, the Cayman Islands and the United States of America, as such applicable law may exist from time-to-time.

11. As such, applicable law, would be applicable only in the situations as provided therein and it cannot be said that the substantive law governing the rights of the parties to the agreement is the applicable law. The substantive law as such is the governing law which is stated to be the law of England. To that extent, the finding of the learned judge cannot be sustained.

12. With regard to the finding of the learned judge in the impugned order that because there was an agreement to purchase 40 per cent of the shares of the petitioner no. 3-company who had 100 per cent shares with the respondent no. 2, would mean that the respondent no. 1 would acquire co-ownership rights to the immovable property, I am afraid that the said submission cannot be accepted. A shareholder acquires a right to participate in the profits of the company but it is not possible to accept the contention that the shareholder acquires any interest in the assets of the company. A shareholder does not have any right to the properties of the company. There is nothing in the Companies Act to warrant the assumption that a shareholder who holds shares by itself acquires any interest in the property of the company who is a juridical person entirely distinct from the shareholder. The true position of a shareholder is that on buying shares, the investor becomes entitled to participate in the profits of the company in which he holds the shares if and when the company declares dividends subject to the articles of association. The property of the company cannot be considered to be the property of its members. In fact, Shri Gupta, learned counsel appearing for the respondent no. 1, has not disputed the said proposition and, as such, the finding of the learned judge on that count cannot

be sustained.

13. The only aspect to be considered in such circumstances would be the contention of Shri Gupta, learned senior counsel appearing for respondent no. 1, to the effect that it is their case that by the application u/s 9 of the said Act, the respondent no. 1 desires to invoke the terms of the agreement as specified in Clause 7.2 which reads thus:

7.2. The seller and the company undertake and covenant that until the termination of this agreement, the seller, the company and Sunset shall not except with the prior written approval of the grantee:

(a) Permit Sunset to issue equity shares or any security of Sunset which is convertible into equity shares of Sunset to any person if such issuance would cause the shareholding of the company (prior to the restructuring mentioned in Clause 7A) or the shareholding of new co. (after the restructuring mentioned in Clause 7A) in Sunset to fall below 40% of the paid-up capital of Sunset.

(b) Permit the sale of any part of the land or any part of any superstructure constructed thereon.

(c) Permit Sunset to raise any loan other than a permissible loan and other than any borrowing to meet the working capital requirements of Sunset.

(d) The seller and the company further covenant that, until the termination of this agreement, they shall not undertake any act, which results in any of the representations and warranties of the seller or the company respectively under Clauses 3.2 and 3.3 to become false.

14. Clause 9 of the said agreement reads thus:

9. Specific performance--Without prejudice to the rights of the parties to pursue other remedies in respect of a breach of any obligation hereunder, the parties specifically acknowledge that monetary damages may not be an adequate remedy for a violation of this agreement and that a party shall be entitled to seek equitable relief, including injunctive relief and specific performance, in addition to any other remedies at law or in equity that it may have, to enforce this agreement or to prevent any violation hereof and that, to the extent permitted by applicable law and to the extent the party seeking such relief would be entitled on the merits to obtain such relief, each party waives any objection to the imposition of such relief.

15. No doubt, on going through the said terms of the agreement, there is a reference to the effect that injunction can be obtained to the extent permitted by the applicable law, nevertheless, whether the applicable law would be the law in terms of the provisions of Section 9 of the said Act, is a matter which would have to be considered. Whilst dealing with the said aspect, the judgment of the Apex Court in the case of Bhatia International vs. Bulk Trading S.A. and another reported in Bhatia International Vs. Bulk Trading S.A. and Another, would have to

be considered wherein it has been held that the provisions of Part I of the said Act are equally applicable to the international commercial arbitration held outside India unless any or all such provisions have been excluded by an agreement between the parties expressly or by implication.

16. Shri Sonak, learned counsel appearing for the petitioners, however, points out that by no stretch of imagination, can it be said that the applicable law for such purposes would be the law under the said Act. According to him, at the most, the applicable law would be the law under the provisions of Specific Relief Act, 1963 as in force in India. Shri Sonak, learned counsel, also points out that the applicable law cannot decide the substantive right of the parties which emerge from the call option agreement.

17. The learned senior counsel has also raised the contention that it is the case of the respondent no. 1 that they did not claim any interest in the immovable property but according to him, their claim was that the respondent no. 1 was supposed to enter into a joint venture with the petitioners and to achieve such goal, the call option agreement came to be executed.

18. On perusal of the impugned order, I find that the said aspect has not been dealt with by the learned judge. In this context, the contention of Shri Sonak, learned counsel appearing for the petitioners, whether the agreement meets the definition of an international commercial agreement in terms of Section 2(1)(f) of the said Act, would have to be considered in the light of the judgment reported in the case of Liverpool & London Steamship Protection and Indemnity Association Ltd. vs. Arabian Tankers Co., LLC and others (supra) and other judgments relied upon by the learned senior counsel appearing for the respondent no. 1. Taking note of the contention of the learned counsel appearing for the respective parties, as the contention of Shri Gupta, learned senior counsel appearing for the respondent no. 1, referred to hereinabove, has not been considered in the light of his submissions that the respondents intended to go in a joint venture to put up a hotel in the suit property, I find it appropriate, without going into the rival contentions with that regard, to direct the learned judge to decide the said aspect afresh after hearing the parties in accordance with law. Whilst dealing with the said aspect, the learned judge would also have to reconsider whether Part I of the said Act has been expressly and impliedly excluded by the parties to the agreement in the light of the submissions of Shri Gupta, learned senior counsel appearing for the respondent no. 1, that such interim reliefs have been specifically stipulated to be considered as per the applicable law in India in terms of the said agreement.

19. Considering the facts and circumstances of the case, the learned judge is directed to dispose of the objections raised by the petitioners in the light of the observations made hereinabove as expeditiously as possible within three months from the date of the receipt of the order. In view of the above, I pass the following order:

ORDER

- (i) The impugned order dated 21.08.2010 is quashed and set aside.
- (ii) The learned judge is directed to decide the application filed by the petitioners at Exhibit B-1 afresh in the light of the observations made hereinabove in accordance with law.
- (iii) Rule is made absolute in the above terms.
- (iv) The petition stands disposed of.
- (v) The parties are directed to appear before the learned judge on 08.02.2013 at 10.00 a.m.