

(2012) 09 BOM CK 0047

In the Bombay High Court

Case No : Notice of Motion (LDG.) No. 1968 of 2012 in Suit (LDG.) No. 1703 of 2012

JSW ISPAT Steel Limited

APPELLANT

Vs

Jeumont Electric and Another

RESPONDENT

Date of Decision : 14-09-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 11(6), 11(7), 11(8), 16
Constitution of India, 1950 — Article 136, 226, 32

Citation : (2013) 1 BomCR 879 : (2012) 114 BOMLR 3320

Hon'ble Judges : B.R. Gavai, J

Bench : Single Bench

Advocate : Virag Tulzapurkar, with Ranjit Shetty and Saurabh Gadkari instructed by Juris Corp, for the Appellant; Pradeep Sancheti with Vishal Lohire, Sagar Ghogre instructed by . Ajit Anekar for defendant No. 1, for the Respondent

Judgement

B.R. Gavai, J.—The plaintiff has filed the present suit for a declaration that there is no arbitration agreement between the plaintiff and defendant No. 1 including in relation to contract No. 4600006177 dated 7th September 2006 as amended on 4th July 2007. The plaintiff has also taken out a notice of motion praying for an order of restraint restraining defendant No. 1 from proceeding with or prosecuting the arbitration proceeding initiated by it before the International Chamber of Commerce vide letter dated 24th May 2012 on the basis of the aforesaid contract. The plaintiff had also moved this court for ex parte ad-interim relief. Vide order dated 3rd July 2012, I had granted ad-interim relief in terms of prayer clause (a). The said order was carried in appeal before the Division Bench. The Division Bench, vide order dated 6th August 2012, has disposed of the appeal requesting this court to take up the notice of motion for hearing and to grant the opportunity of hearing to the appellant- defendant on the question of extension or otherwise of the ad-interim relief, if the motion cannot be heard finally on that date. Accordingly, the matter was listed before me on 14th August 2012. On the said date, it was submitted on behalf defendant No. 1- firm that on

the question as to whether the proceedings are vexatious or oppressive was a matter of interpretation and for that affidavit-in-reply was not necessary. I have, therefore, recorded a statement that the defendant No. 1 was willing to proceed with the motion without filing affidavit-in-reply, in the order dated 14th August 2012. As such, I have heard the learned counsel for the plaintiff and defendant No. 1 on the motion without there being any affidavit-in-reply on behalf of defendant No. 1. Shri Tulzapurkar, learned senior counsel appearing for the plaintiff submits that there is no privity of contract between the plaintiff and defendant No. 1. It is submitted that though defendant No. 2 is a subsidiary of the plaintiff, it has an independent existence and, as such, independent contracting capacity. The learned counsel submits that defendant No. 2 had placed an order on defendant No. 1 on 6th November 2002 for refurbishment, supervision of erection and commissioning of two generators at Power Project at village-Dolvi, district- Raigad in the State of Maharashtra. It is the case of the plaintiff that on 7th September 2006, another contract was entered into between defendant No. 1 and defendant No. 2. The learned counsel submits that as per clause-18 of the said contract, the general terms and condition attached at Annexure-A was to constitute and form part of the contract. Learned counsel submits that per the said terms and conditions, the term "owner" would mean the defendant No. 2 and term "contractor" would be the defendant No. 1. The learned counsel submits that the parties have also been defined as the owner and contractor. Learned counsel submits that clause-28 of the said terms and conditions deals with dispute resolution and arbitration and the same also refer to the parties. Learned counsel further submits that the contract has been further amended on 4th July 2007. It is submitted that in the said amended contract also the plaintiff has no role to play. Learned counsel further submits that even notice demanding the payment by defendant No. 1 is only addressed to defendant No. 2 and the correspondent with regard to that is only between defendant No. 1 and defendant No. 2. It is further submitted that the plaintiff without being in any way involved in the contract between defendant No. 1 and defendant No. 2, has been dragged by defendant No. 1 in the arbitration proceeding. The learned counsel relying on the judgment of the Apex Court in the case of Indowind Energy Ltd. Vs. Wescare (I) Ltd. and Another, submits that since there is no privity of contract between the plaintiff and defendant No. 1, the arbitration proceedings initiated against the plaintiff are not sustainable on law. In reply to the contention of learned counsel for defendant No. 1 that the said defendant is not amenable to the personal jurisdiction of this court and, as such, injunction cannot be granted at this stage, learned counsel for the plaintiff submits that since the defendant has attachable property at Mumbai and the obedience of the court's order can be secured by attachment of property in Mumbai, this Court has jurisdiction. In this regard, he relies on the judgment of the learned single Judge of Nagpur High Court in the case of Tarabai v. Chogmal and Anr., AIR 1932 Nagpur 114; judgment of Division Bench of this Court in the case of Harshad Ratilal Shah v. Ishardas Sudarshan Lal, 1986 Mh.L.J. 325 and the judgment of the Apex Court in the case of Harshad Chiman

Lal Modi v. DLF Universal Ltd., (005) 7 SCC 791. Learned counsel for the plaintiff further submits that the question as to whether the arbitration agreement exists or not is required to be decided by this Court except when the matter is taken to the tribunal directly by both parties, without the court having come into the picture. Learned counsel in this regard relies on the judgment of the Apex Court in the case of S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, and in the case of National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., . Learned counsel further submits that the Arbitration and Conciliation Act, 1996 ("said Act" for short) does not oust the jurisdiction of the civil Court. It is submitted that even perusal of section 8 and section 45 of the said Act would reveal that the defendants have an option to continue with the suit or the arbitration proceedings. It is, therefore, submitted that since the defendant No. 1 has not applied u/s 45, the plaintiff's suit does not come to an end and, as such, the Court has jurisdiction to entertain and try the suit. The learned counsel in this regard relies on the judgments of Apex Court in the case of P. Anand Gajapathi Raju and Others Vs. P.V.G. Raju (Died) and Others, and Sukanya Holdings Pvt. Ltd. Vs. Jayesh H. Pandya and Another, ; judgments of single Judge of this Court in the case of Ivory Properties and Hotels Pvt. Ltd. Vs. Nusli Neville Wadia, and Onyx Musicabsolute.com Pvt. Ltd. and Others Vs. Yash Raj Films Pvt. Ltd. and Others, Onyx Mobile Pvt. Ltd. and Virtual Marketing India P. Ltd., and judgment of learned single Judge of Delhi High Court in the case of P.K. Bajaj v. Reminiscent India Television Ltd., 2006 (2) ARBLR 361 (Delhi). Learned counsel, therefore, submits that the arbitration proceedings as initiated at the instance of defendant No. 1 are not tenable in law and, as such, the motion needs to be allowed.

2. Shri Sancheti, learned senior counsel appearing for defendant No. 1 submits that defendant No. 1 is incorporated in France. It has its office in France and does not have office in India. The learned counsel, therefore, submits that defendant No. 1 is not amenable to the jurisdiction of this court and, as such, in view of law laid down by the Apex Court in the case of Modi Entertainment Network and Another Vs. W.S.G. Cricket PTE. Ltd., , an anti-suit injunction cannot be granted by this Court. Learned counsel also relying on the judgment of the learned single Judge of this Court in case of Shree Precoated Steels Limited Vs. Macsteel International Far East Ltd. and Another, submits anti-suit injunction as sought cannot be granted. Learned counsel submits that since there is no pleading in the plaint regarding lifting of corporate veil the injunction as granted cannot be granted against defendant No. 1. Learned counsel in this respect relies on the judgment of the Apex Court in the case of Delhi Development Authority v. Skiper Construction Company, AIR 1966 SC 2005. Learned counsel relying on the provision of section 16 read with section 5 of the said Act submits that by now it is a settled principle of law that in arbitration matters, the court should not interfere. Learned counsel relied on the following judgments: Kvarener Cemevatation India Ltd. v. Bajrangalal Agarwal, 2001 (3) RAJ 414 (SC); S.B.P. and Co. Vs. Patel Engineering Ltd. and Another, ; Shree Subhlaxmi Fabrics Pvt.

Ltd. v. Chan Mal Baradia, 2005 (2) UC 807; and Sandip Industries v. Sperpack, 2008 (5) Mh.L.J. 313. Learned counsel further submits that Part-I of the said Act is applicable to the International Arbitration and, therefore, in view of provisions of section 5 and 16 of the said Act, the interference by this Court is not permissible. Learned counsel relies on the judgments of Apex Court in the case of Bhatia International Vs. Bulk Trading S.A. and Another, and Venture Global Engineering v. Satyam Computer Service Ltd., AIR 2008 SC 1061 and judgment of learned single Judge of the Delhi High Court in the case of Aitreya Limited Vs. Dans Energy Pvt Ltd and Others, .

3. Learned counsel submits that the objection regarding jurisdiction of the arbitration is also required to be raised before the Arbitrator. He submits that when two contracting parties coming from two different countries agree to subject them to the neutral country all the questions between them are required to be decided by that forum, according to the law of that neutral country, including whether the third party is party to the agreement or not. The learned counsel relying on various articles submits that in the international arbitration, the parties who are not signing parties can also be subjected to the arbitration proceedings. The learned counsel further submits that in the plaint there is no pleading as to how the Court at Mumbai will have territorial jurisdiction and, therefore, the suit on the face of it is liable to be rejected. It is submitted that just because the arbitration is in foreign land cannot be a ground to term it vexatious. Learned counsel submits that in any case if the learned Arbitrator find that the plaintiff was unnecessarily dragged in the arbitration proceedings before the International Arbitrator, the actual costs can be awarded and, as such, no prejudice would be caused to the plaintiff. Learned counsel, thus, submits that not only the motion but the entire suit deserves to be dismissed.

4. With the assistance of the learned counsel for the parties I have gone through the provisions of law, the judgments cited and the material placed on record.

5. I will first deal with the submission of Shri Sancheti with regard to not granting of anti-suit injunction unless the party is subjected to the personal jurisdiction of this Court and with regard to the territorial jurisdiction of this Court.

6. No doubt that Shri Sancheti is right in relying on the judgment of the Apex Court in the case of Modi v. DLF Universal Ltd. (supra); wherein the Apex Court has laid down certain principles in the matter of anti-suit injunction, one of which is that defendant against whom an injunction is sought should be amenable to the personal jurisdiction of the Court which grants injunction.

7. The Apex Court in the case of Ramesh Chand Ardawatiya Vs. Anil Panjwani, has held that the question of jurisdiction is to be determined primarily on the averments made in the plaint. The Apex Court, in the case of Sopan Sukhdeo Sable and Others Vs. Assistant Charity Commissioner and Others, has observed thus:

15. There cannot be any compartmentalization, dissection, segregation and inversions of the language of various paragraphs in the plaint. If such a course is adopted it would run counter to the cardinal canon of interpretation according to which a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction or words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time it should be borne in mind that no pedantic approach should be adopted to defeat justice on hairsplitting technicalities.

8. In so far as the pleading as to how the defendant No. 1 is amenable to the jurisdiction of this Court and territorial jurisdiction of this Court to entertain the present suit is concerned, the plaintiff has pleaded in para-15 of the plaint. Para-15 of the plaint reads thus:

15. The Plaintiff submits that for reasons aforesaid the Plaintiff is nowhere concerned with the suit Contract at all. The Plaintiff further states that although Defendant No. 1 is situated in and operates from France, it has a wholly owned subsidiary in Mumbai, India called Jeumont Electric India Pvt. Ltd. ("Jeumont India"). The registered office of Jeumont India is at 615-616, 6th Floor, B-wing, Bonanza, Sahar Plaza, Andheri-Kurla Road, Andheri East, Mumbai - 400 059. Defendant No. 1 has more than 99% shareholding in Jeumont India. Form 20B filed by Jeumont India with the Registrar of Companies which shows the details of shareholders and shareholding pattern of Jeumont India is annexed hereto and marked as Exhibit "G". This form has been obtained from the Ministry of Corporate Affairs website as checked on June 28, 2012. The plaintiff accordingly submits that through its shareholding, and including its shareholding (which is a movable property), Defendant No. 1 has its presence and property in Mumbai and in that manner also carries on business in Mumbai. Defendant No. 1 is also earning monies/profit through its said subsidiary in Mumbai. Defendant No. 1 has assets within the jurisdiction of this Hon'ble Court and Defendant No. 1/its said assets can be proceeded against to secure compliance with the order of this Hon'ble Court. In view thereof, plaintiff says and submits that this Hon'ble Court has personal jurisdiction over Defendant No. 1. Without prejudice to the aforesaid, the Plaintiff submits that it is not a party to the arbitration agreement, and despite that position, Defendant No. 1 has impleaded it as a party to the arbitration proceedings. As a result of this, financial and legal injury is caused to the Plaintiff within the jurisdiction of this Hon'ble Court. In all the circumstances aforesaid, this Hon'ble Court has jurisdiction to entertain, try and dispose of the present suit. The Plaintiff and Defendant No. 2 each have its office in Mumbai and thus this Hon'ble Court has jurisdiction to entertain, try and dispose of the present suit.

(emphasis supplied)

9. It is to be noted that though defendant No. 1 was specifically asked whether it would like to file any reply to the notice of motion, the learned counsel for defendant No. 1 categorically stated that in the facts of the case it was not necessary. It can, thus, be seen that the averments made by the plaintiff in so far as amenability of defendant No. 1 to the jurisdiction of this Court and jurisdiction of this Court to entertain the present suit have gone unchallenged. As already discussed hereinabove, in view of the law laid down by the Apex Court, the averments made in the plaint will have to be read as a whole and for considering the issue of jurisdiction, the averments in the plaint will have to be taken into consideration. In that view of the matter, in view of the uncontroverted pleadings, which have been reproduced hereinabove, I find that the plaintiff has made sufficient averments in so far as amenability of defendant No. 1 to the jurisdiction of this Court and jurisdiction of this Court to entertain the present suit. In that view of the matter, I am not inclined to accept the contention as raised by defendant No. 1 in that regard. I, therefore, proceed to consider the merits of the matter in so far as prayers made in the motion are concerned.

10. Clause- 18 of the contract dated 7th September 2006 entered into between defendant No. 1 and defendant No. 2 reads thus:

18. GENERAL

The General Terms and Conditions of the Contract which is attached as Annexure-A shall constitute and form part of this contract.

The relevant clauses in the definition clause read thus:

1. DEFINITIONS

The following terms or expressions, as used in these General Conditions, specification and in other parts of the tender documents shall have the meanings defined hereunder, except where the context otherwise requires.

1.1 Owner: The term "Owner" shall mean Ispat Energy Limited, having its Registered office at 71-75, Mittal Tower "C" Wing, Nariman Point, Mumbai- 400 021 and shall include its authorised representatives, agents, successors and assigns.

1.2 Contractor/ Contractors: The term "Contractor/ Contractors" shall mean Jeumont Industries having their office at # 27, rue de l'industrie, BP 18959573, Jeumont Cedex, France and shall include their heirs, legal representative, successors and assigns approved by the Owner.

1.4 Contract: The term "Contract" shall mean a contract agreement between the Owner and the Contractor for the execution of the order and shall supersede all prior contracts whether written or oral, and all Letter of Intent, understanding, memoranda, minutes of documents, if any, made between the parties in relation

to the Contract.

1.7 "Parties" means Owner and Contractor.

1.8 "Party" means Owner or Contractor, as the case may be."

The relevant sub-clauses of clause-28 which deals with the dispute resolution and arbitration read thus:

28. DISPUTE RESOLUTION AND ARBITRATION

28.1

28.1.1 Each Party shall designate in writing to the other Party a representative who shall be authorized to resolve any disagreement, dispute, controversy or claim arising under or in connection with this Agreement (a "Dispute") in an equitable manner, and, unless otherwise provided herein, to exercise the authority of the Parties to make decisions by agreement. If the designated representatives are unable to resolve any such Dispute within 15 (fifteen) days of either of the Parties giving written notice that a Dispute has arisen, such dispute shall be referred by such representatives to a senior officer designated by the Owner and a senior officer designated by Contractor, respectively, who shall attempt to resolve the Dispute within a further period of fifteen 15 (fifteen) days.

28.1.2

28.1.3

28.2 Arbitrations

In the event the Parties are unable to resolve any Dispute by resolution, such Dispute, shall be referred to an exclusively resolved in accordance with the following

28.2.1. Submission of Disputes

In any such arbitration, either Party shall be entitled to present positions and rely upon information supplemental to or different from those relied upon for purposes of any attempted dispute resolution. Notwithstanding any reference to arbitration hereunder, each Party's obligations and rights under this Agreement shall be continuing and in full force during the term of the arbitration proceedings unless the Parties otherwise agree.

28.2.2. Arbitration Rules

Each arbitration shall be conducted in accordance with the rules of conditions and arbitration of the international chamber of commerce. The arbitrator shall apply the Swiss Federal Court of Obligations to the merits of dispute and in all cases shall decide in accordance with the terms of the contract.

28.2.3

28.2.4

28.2.5

28.2.6 Appointing Authority.

The arbitration shall take place before a tribunal of 3 (three) arbitrators, two of whom shall be nominated by the respective Parties. The third arbitrator (who will act as chairman) will be nominated by the two party-nominated arbitrators.

28.2.7

28.2.8 Related Dispute.

If any dispute to be referred to arbitration under this Agreement raises issues which are substantially the same as or connected with issues raised in a related dispute between Owner and Contractor and if the related dispute has already been referred to arbitration for determination, Owner hereby agree that such Dispute under this Agreement shall be referred to the arbitrators appointed to determine the related dispute. Such arbitrators shall have power to deal with both such disputes as they think just and convenient.

11. It is to be noted that though the contract was further amended on 4th July 2007, there is no reference whatsoever to the plaintiff's participation in the said amended contract also. The perusal of the definitions would reveal that the "owner" has been defined as defendant No. 2 and the "contractor" has been defined as defendant No. 1. The "contract" has been defined as contract agreed between the owner and the contractor for the execution of the order. The parties have been defined to mean the owner and the contractor. The entire reference to clause-28 would reveal that the reference is to the party or parties. Clause-28.1.1. provides that each party shall designate in writing to the other party a representative who shall be authorised to resolve any disagreement etc. in an equitable manner. Clause 28.2 provides that in the event the parties are unable to resolve any dispute by resolution, such dispute shall be referred to and exclusively resolved in accordance with the procedure stated therein. Clause 28.2.1 provides that in any such arbitration, each party shall be entitled to present positions and relevant such information. Clause 28.2.6 provides that the arbitration shall take place before the a tribunal of three arbitrators, two of whom shall be nominated by the respective parties and the third arbitrator, who has to act as a Chairman, is to be nominated by the party-nominated arbitrators. Clause 28.2.7 provides that the decision or the award of the arbitral tribunal is to be final and binding upon the parties. It further provides that the parties undertake to carry out any award of the arbitrators relating to such dispute without delay. It further provides that the parties waive any rights to appeal or to review of such award by any court or tribunal. Clause 28.2.8 provides that if any dispute referred to the arbitrator raises issues which are substantially the same as or concerned with issues raised in a related dispute the owner and the contractor, such disputes shall also be referred to the arbitrators. It can, thus,

clearly be seen that the contract, the general terms and conditions and the clauses reproduced hereinabove clearly refer to the owner and the contractor as parties and the reference and binding effect of the arbitration proceedings between the parties.

12. It is to be noted that all earlier correspondence is addressed by defendant No. 1 to defendant Not and not to the plaintiff. Not only this, but the legal notice dated 22nd December 2012 issued by the advocate of defendant No. 1 is also addressed to defendant No. 2 only; wherein the defendant No. 2 has been called upon by defendant No. 1 to make all requisite payments to defendant No. 1, failing which it is informed that the legal proceeding may be initiated against defendant No. 2 at the risk of defendant No. 2.

13. It is for the first time that vide communication dated 29th May 2012 issued by the International Chamber of Commerce that the plaintiff is sought to be implicated in the arbitration proceedings at the instance of defendant No. 1. The ground on which the plaintiff is sought to be impleaded in the arbitration proceedings is that it is the claimant's understanding that defendant No. 2 was created by the plaintiff in order to set up 110 MW Power Plant in Raigad district. The further reason given is that there was all likelihood that defendant No. 2 was to wound up and liquidate and further that the plaintiff had intervened during the negotiations of the orders and, as such, it is bound by the arbitration agreement. In para- 16 of its claim, defendant No. 1 states that in view of this reasoning the claimant has decided to drag the plaintiff in the arbitration. It can, thus, clearly be seen from the contract as well as the correspondence between defendant No. 1 and defendant No. 2, that plaintiff is not a contracting party or even a consenting party to the contract between defendant No. 1 and defendant No. 2. Not only that but the entire correspondence with regard to the claim of defendant No. 1 is only between defendant No. 1 and defendant No. 2. It is only for the first time that in the arbitration proceedings the plaintiff has been implicated and as the words used by defendant No. 1 itself in the claim "to drag in this arbitration". In this factual background, the present question will have to be considered.

14. I am of the considered view that the present case is squarely covered by the law laid down by the Apex Court in the case of Indowind Energy Ltd. v. Wescare (I) Ltd. (supra). In the said case, all the three parties i.e. appellant and respondent Nos. 1 and 2 were companies incorporated under the Companies Act, 1966. Wescare (I) Ltd. was in the business of setting up and operating/managing windfarms and generation of power from Wind Electric Generators. Subuthi Finance Ltd. was the promoter of the appellant company i.e. Indowinde Energy Ltd. On 24th February 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.". The agreement between the Wescare and Subuthi was approved by

their board of directors respectively. However, no such approval was granted by Indowind. According to the Wescare, certain disputes arose between Wescare on one hand and Subuthi on the other hand in respect of the said agreement. Accordingly, three applications u/s 9 of the said Act were filed against Subuthi and Indowind seeking certain interim measures. The said applications were dismissed by the learned single Judge of the Madras High Court holding that since Indowind has neither signed nor ratified the agreement, the maintainability of the applications u/s 9 itself was doubtful. Thereafter, Wescare filed petition u/s 11(6) of the said Act against Subuthi and Indowind for appointing its sole arbitrator. The learned Chief Justice of the Madras High Court allowed the said petition and appointed Sole Arbitrator holding that Indowind was, prima facie, a party to the arbitration agreement. The said order was challenged by Indowind before the Apex Court. The Apex Court observed thus:

10.

The term "party" is defined in Section 2(h) as referring to a party to an arbitration agreement. The term arbitration agreement is defined u/s 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 Agarwal Vs. Inspiration Clothes and U and Others, .

The Apex Court further observed as under:

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 un-understandable 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.

The Apex Court, therefore, quashed and set aside the impugned order passed by the learned Chief Justice of Madras High Court in so far as appointing arbitrator in respect Indowind was concerned, however, upheld the order in so far as Subuthi is concerned. It is, thus, clear that the Apex Court in clear terms has held that to constitute an arbitration agreement it is necessary that it should be between the parties to the dispute and should relate to or be applicable to the dispute. The Apex Court in unequivocal terms observed that unless the party who is sought to be implicated in the arbitration proceeding is signatory to the agreement it cannot be roped in the arbitration proceedings. The Apex Court further held that 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 24th February 2006. It can, thus, be seen that in the aforesaid case though Subuthi described Indowind as its nominee or as a company promoted by it, the Apex Court held that Indowind was not the party to the arbitration agreement and hence cannot be roped into the arbitration proceedings.

15. The facts in the present case are on better footing. The agreement with defendant No. 1 by defendant No. 2 is in its independent capacity. There is no reference in the agreement to any role played by the present plaintiff. Not only that, but the correspondence addressed by defendant No. 1 is only to defendant No. 2 raising its claim and threatening to take action. It is further to be noted that there is not even ratification by the board of directors of the plaintiff to the contract entered into between defendant No. 1 and defendant No. 2. In that view

of the matter, I find that the present case is squarely covered by the law laid down by the Apex Court in the case of Indowind Energy Ltd. v. Wescare (I) Ltd. (supra).

16. It is the basic contention of learned counsel for defendant No. 1 that the Court should not pass any orders which shall have effect of interfering with the arbitration proceedings. Mr. Sancheti, learned counsel for defendant No. 1, in this regard, relies on provisions of sections 5, 8 and 16 of the said Act and various judgments of the Apex Court as well as this Court. In so far as order passed by the Apex Court in the case of Kvaerner Cemevatation India Ltd. v. Bajrangalal Agarwal (supra) is concerned, from the order passed by the Apex Court is not clear as to what were the facts for consideration before the Apex Court. However, it appears that one of the parties to the contract had contended that there does not exist any arbitration clause. Though the Apex Court observed that there cannot be any dispute that in the absence of any arbitration clause in the agreement, no dispute could be referred to the arbitral tribunal, the Apex Court found that such an objection could be raised before the learned Arbitrator itself. In the absence of the facts in the said order, it is difficult to appreciate as to whether, as a matter of fact, there was any agreement between the parties before the Apex Court or not. In that view of the matter, I find that the said order passed by the Apex Court would not be of any assistance to the case of defendant No. 1, particularly, when the facts of the present case are almost identical to the case of Indowind Energy Ltd. v. Wescare (I) Ltd. (supra) decided by the Apex Court.

17. In so far as judgment of the Constitution Bench of the Apex Court in the case of M/s. S.B.P. & Co. v. M/s. Patel Engineering Ltd. (supra) is concerned, the question that arose for consideration before the Constitution Bench was as to what is the nature of functions of the Chief Justice or his designate u/s 16 of the said Act. It will be relevant to refer to paragraphs- 19 and 24 of the said judgment, which read thus:

19. Section 16 is said to be the recognition of the principle of Kompetenz - Kompetenz. The fact that the arbitral tribunal has the competence to rule on its own jurisdiction and to define the contours of its jurisdiction, only means that when such issues arise before it, the Tribunal can and possibly, ought to decide them. This can happen when the parties have gone to the arbitral tribunal without recourse to Section 8 or 11 of the Act. But where the jurisdictional issues are decided under these Sections, before a reference is made, Section 16 cannot be held to empower the arbitral tribunal to ignore the decision given by the judicial authority or the Chief Justice before the reference to it was made. The competence to decide does not enable the arbitral tribunal to get over the finality conferred on an order passed prior to its entering upon the reference by the very statute that creates it. That is the position arising out of Section 11(7) of the Act read with Section 16 thereof. The finality given to the order of the Chief Justice on the matters within his competence u/s 11 of the Act, are incapable of being

reopened before the arbitral tribunal. In *Konkan Railway (Supra)* what is considered is only the fact that u/s 16, the arbitral tribunal has the right to rule on its own jurisdiction and any objection, with respect to the existence or validity of the arbitration agreement. What is the impact of Section 11(7) of the Act on the arbitral tribunal constituted by an order u/s 11(6) of the Act, was not considered. Obviously, this was because of the view taken in that decision that the Chief Justice is not expected to decide anything while entertaining a request u/s 11(6) of the Act and is only performing an administrative function in appointing an arbitral tribunal. Once it is held that there is an adjudicatory function entrusted to the Chief Justice by the Act, obviously, the right of the arbitral tribunal to go behind the order passed by the Chief Justice would take another hue and would be controlled by Section 11(7) of the Act.

.....

24. It was thus held that an order passed u/s 11(6) of the Act, by the Chief Justice of the High Court or his nominee, was an administrative order, its purpose being the speedy disposal of commercial disputes and that such an order could not be subjected to judicial review under Article 136 of the Constitution of India. Even an order refusing to appoint an arbitrator would not be amenable to the jurisdiction of the Supreme Court under Article 136 of the Constitution. A petition under Article 32 of the Constitution was also not maintainable. But, an order refusing to appoint an arbitrator made by the Chief Justice could be challenged before the High Court under Article 226 of the Constitution. What seems to have persuaded this Court was the fact that the statement of objects and reasons of the Act clearly enunciated that the main object of the legislature was to minimize the supervisory role of courts in arbitral process. Since Section 16 empowers the arbitral tribunal to rule on its own jurisdiction including ruling on objections with respect to the existence or validity of an arbitration agreement, a party would have the opportunity to raise his grievance against that decision either immediately or while challenging the award after it was pronounced. Since it was not proper to encourage a party to an arbitration, to frustrate the entire purpose of the Act by adopting dilatory tactics by approaching the court even against the order of appointment of an arbitrator, it was necessary to take the view that the order was administrative in nature. This was all the more so, since the nature of the function performed by the Chief Justice was essentially to aid the constitution of the arbitral tribunal immediately and the legislature having consciously chosen to confer the power on the Chief Justice and not on the court, it was apparent that the order was an administrative order. With respect, it has to be pointed out that this Court did not discuss or consider the nature of the power that the Chief Justice is called upon to exercise. Merely because the main purpose was the constitution of an arbitral tribunal, it could not be taken that the exercise of power is an administrative power. While constituting an arbitral tribunal, on the scheme of the Act, the Chief Justice has to consider whether he as the Chief Justice has jurisdiction in relation to the contract, whether there was an arbitration agreement in terms of Section 7 of the Act and whether the person

before him with the request, is a party to the arbitration agreement. On coming to a conclusion on these aspects, he has to enquire whether the conditions for exercise of his power u/s 11(6) of the Act exist in the case and only on being satisfied in that behalf, he could appoint an arbitrator or an arbitral tribunal on the basis of the request. It is difficult to say that when one of the parties raises an objection that there is no arbitration agreement, raises an objection that the person who has come forward with a request is not a party to the arbitration agreement, the Chief Justice can come to a conclusion on those objections without following an adjudicatory process. Can he constitute an arbitrary tribunal, without considering these questions? If he can do so, why should such a function be entrusted to a high judicial authority like the Chief Justice. Similarly, when the party raises an objection that the conditions for exercise of the power u/s 11(6) of the Act are not fulfilled and the Chief Justice comes to the conclusion that they have been fulfilled, it is difficult to say that he was not adjudicating on a dispute between the parties and was merely passing an administrative order. It is also not correct to say that by the mere constitution of an arbitral tribunal the rights of parties are not affected. Dragging a party to an arbitration when there existed no arbitration agreement or when there existed no arbitrable dispute, can certainly affect the right of that party and even on monetary terms, impose on him a serious liability for meeting the expenses of the arbitration, even if it be preliminary expenses and his objection is upheld by the arbitral tribunal, therefore, it is not possible to accept the position that no adjudication is involved in the constitution of an arbitral tribunal.

(emphasis supplied)

Perusal of paragraph- 19 would reveal that section 16 would apply and give jurisdiction to the tribunal to decide on its own jurisdiction when the parties have gone to the arbitral tribunal without recourse to section 8 or 11 of the said Act. Further it has been clearly held that section 16 cannot be held to empower the arbitral tribunal to ignore the decision given by the judicial authority or the Chief Justice before the reference to it was made. The Apex Court has also clearly rejected the contention raised before it that it was not correct to say that by mere constitution of an arbitral tribunal the rights of the parties are not affected. The following observations of the Apex Court would aptly be applicable to the facts of the present case:

.....Dragging a party to an arbitration when there existed no arbitration agreement or when there existed no arbitrable dispute, can certainly affect the right of that party and even on monetary terms, impose on him a serious liability for meeting the expenses of the arbitration, even if it be preliminary expenses and his objection is upheld by the arbitral tribunal, therefore, it is not possible to accept the position that no adjudication is involved in the constitution of an arbitral tribunal.

(emphasis supplied)

18. In the present case also the plaintiff is not a party to the arbitration agreement and in own words of defendant No. 1, "the plaintiff has been dragged in the arbitration proceedings". Though there is no agreement between plaintiff and defendant No. 1 to refer any matter between them to the arbitration, the plaintiff has been dragged to appear before the Arbitrator and, that too, in a foreign land. The implication of the plaintiff in the arbitration proceedings is likely to affect the plaintiff on the monetary terms so as to meet the expenses of the Arbitrator. It will be relevant to refer to clauses- 4, 6 and 9 of the conclusion of the Apex Court in paragraph- 46 of the said judgment, which read thus:

46. We, therefore, sum up our conclusions as follows:

(i) to (iii)

(iv) The Chief Justice or the designated judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be, his own jurisdiction, to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the judge designated would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the judge designate.

(v)

(vi) Once the matter reaches the arbitral tribunal or the sole arbitrator, the High Court would not interfere with orders passed by the arbitrator or the arbitral tribunal during the course of the arbitration proceedings and the parties could approach the court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

(vii)

(viii)

(ix) In a case where an arbitral tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the arbitral tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

(x) to (xii)

19. It can, thus, clearly be seen that while exercising the power u/s 11(6) of the said Act, the Chief Justice is entitled to go into the question of existence of valid arbitration agreement etc. However, once the matter reaches the arbitral tribunal, the High Court would not interfere with the orders passed by the arbitrator or the arbitral tribunal during the course of the arbitration proceedings and the parties could approach the Court only u/s 37 or 34 of the Act. It is further held that in case the arbitral tribunal has been constituted without any

recourse to section 11(6) of the Act, the arbitral tribunal will have the jurisdiction to decide all the matter as contemplated u/s 16 of the Act.

20. In so far as judgment of the Apex Court in the case of Shree Subhlaxmi Fabrics Pvt. Ltd. v. Chan Mal Baradia (supra), it is to be noted that in the contract terms and conditions mentioned in clauses 6 and 7 of the agreement between the parties there is a specific provision for arbitration by the Hindustan Chamber of Commerce, Bombay. In the present case, leave aside any such clause there is no agreement at all between the plaintiff and defendant No. 1 and, as such, the said judgment would not be applicable to the facts of the present case. So also in the case of Sandip Industries v. Sperpack (supra) decided by the Division Bench of this court is concerned, it has been found that there was an existence of an arbitration agreement between the parties. As such, the said judgment would also be not applicable to the facts of the present case. In so far as judgment of the Apex Court in the case of Bhatia International v. Bulk Trading S.A. (supra) is concerned, no doubt, the Apex court in the said case has held that the provisions of Part-I of the said Act are applied to all the arbitrations and proceedings relating to that. However, in the facts and circumstances of the present case, I find that there is no agreement at all between the plaintiff and defendant No. 1. Therefore, this judgment is also not applicable to the facts of the present case. For the same reasons I find that the judgment of the Apex Court in the case of Venture Global Engineering v. Satyam Computer Service Ltd. (supra) and the judgment of learned single Judge of the Delhi High Court in the case of Aitreya Ltd. v. Dans Energy Pvt. Ltd. (supra) would not be applicable to the facts of the present case.

21. Though various judgments are also cited on behalf of the plaintiff, I do not find it necessary to go into those judgments inasmuch as, in my considered view, the present case is covered by the law laid down by the Apex Court in the case of Indowind Energy Ltd. v. Wescare (I) Ltd. (supra). I, therefore, find that the plaintiff has made out prima facie case for grant of injunction.

22. I further find that even the test of balance of convenience and irreparable loss also tilts in favour of the plaintiff rather than defendant No. 1. If the injunction as sought is not granted, the plaintiff, who is not a party to any agreement, will be unnecessarily dragged in the international arbitration proceedings and required to spend huge amount thereon. As against this, even if the injunction as against defendant No. 1, only so far as plaintiff is concerned is granted, defendant No. 1 can very well proceed in the arbitration proceedings against defendant No. 2 with whom it has entered into a contract agreement to refer any of the disputes between them to arbitration. In that view of the matter, I am inclined to allow this motion. Notice of motion is made absolute in terms of prayer clause (a). Needless to mention that this order will not come in the way of continuance arbitration proceedings between defendant No. 1 and defendant No. 2.