
(2008) 08 MAD CK 0030
In the Madras High Court
Case No : OP No. 748 of 2007

Wescare (India) Limited

APPELLANT

Vs

Subuthi Finance Limited and Another

RESPONDENT

Date of Decision : 01-08-2008

Acts Referred:

Arbitration Act, 1940 — Section 20(1), 20(2), 20(3), 20(5)

Arbitration and Conciliation Act, 1996 — Section 11, 2(1), 7, 7(3), 7(4)

Citation : (2008) 4 ARBLR 278 : (2010) 4 CompLJ 456

Hon'ble Judges : A.K. Ganguly, C.J

Bench : Single Bench

Advocate : Sriram Panchu and A.J. Jawad, for the Appellant; C.S.K. Sathish and R. Thiagarajan, for the Respondent

Final Decision : Allowed

Judgement

A.K. Ganguly, C.J.—This petition u/s 11 of the Arbitration and Conciliation Act, 1996 (hereinafter called "ACA") was filed on 12.07.2007

by M/s. Wescare (India) Limited, praying for appointment of a sole arbitrator to arbitrate upon the disputes between the petitioner and the

respondents arising out of an agreement dated 24.02.2006 and pass an award thereof.

2. The material facts are that the petitioner, first respondent and the second respondent are all companies registered under the Companies Act and

having their registered offices in Chennai.

3. The case of the petitioner is that it is engaged inter alia in the business of setting up of operation and management of wind farms for generation of

power from wind electric generators. The first respondent is the promoter of the second respondent and both the first and the second respondents

approached the petitioner sometime in the month of January/February 2006 to the effect that they were in the process of developing the business

of the second respondent and expressed their desire to purchase certain business assets of the petitioner for and on behalf of the second

respondent. The petitioner's case is that the respondents offered to purchase liabilities and obligations of the petitioner for a total sale consideration

of Rs. 98,19,00,000. The further case is that though the assets were to be sold for the benefit and consumption of the second respondent, the

respondents wanted the agreement to be signed only by the first respondent as the second respondent was coming out with a public issue.

4. Accordingly, an agreement for sale was entered into between the petitioner and both the respondents on 24.02.2006. The same was signed by

the first respondent for and on behalf of the second respondent for selling the petitioner's business assets to the second respondent for the

aforesaid total consideration of Rs. 98,19,00,000. In the said agreement, there is an arbitration clause, which runs as follows:

This agreement shall be governed by and interpreted in accordance with the laws of India. The parties submit to the exclusive jurisdiction of the

courts in the city of Chennai, Tamil Nadu. Any disputes, differences, 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 at

Chennai and the language of the arbitration shall be English.

It is common ground that IW is an abbreviation for Indowind, the second respondent.

5. In this matter, a counter statement has been filed by the second

respondent. In paragraph 4 of the counter statement, it has been stated that the second respondent is not a signatory to the agreement dated

24.02.2006 and no privity of contract exists between the petitioner and the second respondent. The second respondent has also referred to an

order passed by this court dated 21.08.2007 in a proceeding u/s 9 of ACA

initiated at the instance of the petitioner and to certain observation of the learned judge to the effect ""a genuine doubt arises as to the binding nature of the agreement on the second respondent, who is not a signatory to the agreement"". However, Section 9 petition filed by the petitioner was dismissed by an order wherein it is stated:

The said order is not in any manner intended to be the findings on the merits of the case and it is open to the applicant to commence arbitration

proceedings and prove the case before the tribunal. Needless to add that what has been said in this order is only for the purpose of disposal of

Section 9 application, leaving all the questions open to be determined by the arbitrator uninfluenced by the observations made in this order.

6. The Section 9 application was however dismissed by the learned judge inter alia on a finding that since there is no manifest intention on the part

of the petitioner to commence arbitration proceedings, so no relief can be granted to the petitioner in the Section 9 proceeding. But in the said

judgment of the learned judge it was also made clear that whatever has been said in the said judgment is not intended to be said on the merits of

the case as it is open to the petitioner to commence arbitration proceedings and prove its case before the tribunal [See para 15 of the said

judgment at page 354 of the typed set].

7. It is further stated on behalf of the second respondent that 39 Wind Electric Generators (WEGs), which have been purchased by it under

invoice dated 15.03.2006 were purchased by it independently and without any reference to the agreement dated 24.02.2006. It is also stated that

the Directors of the second respondent have never approved or ratified the said agreement nor did they act upon the same.

8. In view of the aforesaid contention raised by the rival parties, this court has to decide, at this stage of Section 11, whether there is an arbitration

agreement between the parties and whether the second respondent is a party to that agreement.

9. Insofar as the existence of arbitration agreement is concerned, the same has been accepted by both the respondents. In paragraph 6 of the

counter statement of the second respondent in this proceedings, it has been stated that ""this respondent states that it is no doubt true that the

petitioner and the first respondent entered into an agreement for sale dated

24.02.2006 at Chennai for sale of the business assets of the petitioner

along with the liabilities created over them with third parties"". In paragraph 3 of the counter of the first respondent, it has been stated that ""I submit

that in the said circumstances, the 1st respondent in normal course of its business activities had on 24.02.2006 entered into a sale agreement"".

10. Therefore, the existence of the agreement in the facts of the case cannot be questioned either by the first or the second respondent. Since the

existence of agreement has not been questioned by the respondents, the existence of arbitration Clause which is part of the agreement cannot be

questioned either.

11. The next question is whether the second respondent is a party to the said agreement.

12. In order to appreciate the contentions raised, certain admitted facts may be taken note of. Admittedly, the second respondent is the nominee of

the first respondent in the agreement. In the preamble to the agreement, the second respondent is referred to as the nominee and the said

expression is inclusive of ""buyer"". Clause 4.2 of the agreement shows that the second respondent agreed to give consideration for the assets up to

Rs. 98.19 crores in accordance with the terms mentioned in the agreement. Those terms are as follows:

4.2. IW has agreed to make consideration for the assets totalling Rs. 98.19 crores as follows:

(i) By issue of 74 lakhs shares at a face value of Rs. 10 and premium of Rs. 90 per share, aggregating Rs. 74 crores. It is also agreed upon that

Indowind shall not issue equity shares of Rs. 10 each to any entity at a premium of less than Rs. 90 per share.

(ii) By cash payment of Rs. 9.00 crores to be paid in the following manner:

1. Initial advance payable...Rs. 0.25 crores

2. Further payment by discounting of power sale...Rs. 4.25 crores

3. Payment of sale of WEGs...Rs. 4.50 crores.

Clause 4 of the agreement provides for purchase consideration out of which Clause 4.1 gives the following detail, which is set out below:

4.1. The total consideration is arrived at based on the following valuation of assets and liabilities as per the Seller's representation to the Buyer:

Assets Rs. Mode/Purpose of Payment

(In crores)

A.

1. Deposits with finance com- 23.00 23.00 lakhs no. equity
panies as per Annexure I shares of Indowind to
Wescare.

2. 2.71 crores units of banked 07.32 Rs. 4.5 crores cash payable
power with AP TRANSCO to Wescare on realization
and balance 2.82 lakhs
equity shares of Indowind
to Wescare.

3. Spares as per Annexure 2 12.00 12 lakhs no. equity shares
of Indowind to Wescare.

4. Site offices and buildings 0.30 30,000 no. equity shares of
situated in the sites pertai- Indowind to Wescare.
ing to the 89 WEGs and 215
points together with office.

13. Clauses 4.4 to 4.6 of the agreement provide:

4.4. Wescare also owns 50 WEGs of 250 kw each which is more fully described in
Annexure 6. Wescare agrees to invoice the said WEGs to

Indowind at Rs. 40 lakhs as per WEG, which has been agreed to by Indowind,
subject to Clause 4.6 below.

4.5. The above referred 50 WEGs are under term loan with IREDA and Oriental
Bank of Commerce and the outstanding liability on term loan of

Rs. 46.14 crores is detailed in Annexure 7.

4.6. Wescare and the Buyer agree to approach and negotiate with the said institutions and to obtain their consent letters for settlement of liabilities

on terms acceptable to Seller, Buyer and Lender. On receipt of consent from the institutions on such terms, Wescare shall invoice Indowind for the

50 WEGs @ Rs. 40 lakhs per WEG amounting to Rs. 20 crores and Indowind shall pay the consideration to Wescare.

The arbitration clause, which has been set out hereinabove, expressly covers the second respondent. It is provided in the arbitration Clause that the

sole arbitrator is to be appointed by the consent of Seller, Buyer/IW. IW is the second respondent. Clause 11 of the agreement provides that the

agreement cannot come into existence unless approved by the second respondent.

14. The second respondent has admitted in the counter affidavit that they have purchased 28 out of 39 WEGs under invoice dated 15.03.2006 for

a consideration of Rs. 4.5 crores in cash and the balance by issuing 9,42,000 shares of the second respondent at Rs. 100 per share. This is in

terms of Clause 4.1 read with Clauses 4.2 and 4.3 of the agreement.

15. The second respondent passed a resolution in its extraordinary general meeting dated 15.04.2006 approving the allotment of 74,00,000 equity

shares at a price of Rs. 10 per share towards purchase of both the encumbered and unencumbered assets of the petitioner [This will appear from

page 64 of the typed set].

16. The second respondent has also passed a resolution in its board meeting on 17.04.2006 issuing 9,42,000 equity shares at Rs. 100 per share

towards part-payment of the price of the unencumbered 39 WEGs [See page 40 of the typed set]. The second respondent has also issued a draft

red herring prospectus in respect of its proposed public issue in January 2007 admitting that the second respondent agreed to acquire the assets of

the petitioner and only part of the acquisition is to be completed [This appears from page 84 of the typed set]. All these things appear to have been

done pursuant to the said agreement inasmuch as it is not the case of the second respondent that it has any other agreement with the petitioner,

except the one dated 24.02.2006. So, I am prima facie of the opinion that the second respondent acted upon the said agreement.

17. In the typed set filed by the second respondent, it appears from its red herring prospectus:

One of our promoters, Subuthi Finance Limited, has entered into an agreement dated February 24, 2006 with Wescare (India) Limited for

acquiring the wind mills and other assets in the name of its nominee, viz. Indowind Energy Limited for a consideration aggregating approximately

Rs. 98.19 crores. (paragraph 21, page 21)

18. Apart from that, the second respondent entered into an operation and maintenance contract for the unencumbered 265 WEGs of the petitioner

under a work order dated 29th March, 2006 issued by the petitioner addressed to the second respondent. This is again followed by another letter

dated 03.04.2006 issued by the petitioner clarifying the work order [See pages 35 and 38 of the typed set]. These work orders appear to have

been issued in terms of Clause 7-C of the agreement and the issuance of work order has been admitted by the second respondent in paragraph 8

at page 6 of the counter used by them.

19. Apart from that, the second respondent wrote two letters dated 19.04.2006 and 24.07.2006 to M/s. Sundaram Finance Limited and M/s.

Oriental Bank of Commerce respectively regarding its proposal to take over the unencumbered WEGs from the petitioner and all these letters have

been signed by one Raja Sukumar on behalf of the second respondent, who is also a signatory to the agreement on behalf of the first respondent.

20. These things are prima facie suggestive of the fact that the buyer under the agreement includes the second respondent. Raja Sukumar is the

Director of the first respondent and Vice-President of the second respondent. With the lifting of the corporate veil it would possibly appear that

virtually R1 and R2 may be one and the same party.

21. In terms of Clause 3 of the agreement, the employees of the petitioner resigned from the services of the petitioner on 31.03.2006 and joined

the services of the second respondent with effect from 01.04.2006 with the appointment letters issued by the second respondent.

22. In view of the aforesaid factual position prima facie it appears that the second respondent is a party to the agreement.

23. u/s 2(1)(h) of the ACA ""party"" has been defined as-""party"" means a party to an arbitration agreement"". Under 1940 Act, there is no definition

for the expression ""party"". Rather Section 20(1) of the said Act starts with an expression ""where any persons have entered into an arbitration agreement"". Sub-section (2) of Section 20 of the said Act however uses the expression ""parties"". Similarly, Sub-section (3) of Section 20 of the said Act uses the expression ""parties"". Sub-section (5) of Section 20 of the said Act also uses the expression ""parties"".

24. In UNCITRAL Model Law, the word ""party"" has not been defined. However, in the English Arbitration Act, 1996, the term ""party"" has been more comprehensively defined than it has been done in ACA. The term ""party"" has been defined in Section 82(2) of English Arbitration Act, 1996 as under:

A reference to a party to an arbitration agreement includes any person claiming under or through a party to the agreement.

25. Even going by the provision of Section 2(1)(h) of ACA, I am of the opinion that in the facts and circumstances of this case, the second respondent must be construed to be a party to the agreement.

26. It has been argued by the learned Counsel for the second respondent that since the second respondent has not signed the agreement, he

cannot be said to be a party to the agreement. Going by the Section 7 of the ACA, it cannot be said that in order to constitute an arbitration

agreement, it must be signed by all the parties. Section 7(3) of the ACA provides that the arbitration agreement shall be in writing. It is a

mandatory requirement. Section 7(4) says that the arbitration agreement shall be in writing, if it is a document signed by all the parties. But a

perusal of Clauses (b) and (c) of Section 7(4) would show that a written document which may not be signed by the parties even then it can be

arbitration agreement. Section 7(4)(b) provides that an arbitration agreement can be culled out from ""an exchange of letters, telex, telegrams or

other means of telecommunication which provide a record of the agreement"". It is well-known that in these days of e-commerce, an arbitration

agreement even though in writing need not be signed by the parties if the record of agreement is provided by exchange of letters, telex, telegrams

or other means of telecommunication. Section 7(4)(c) provides that there can be an arbitration agreement in the exchange of statements of claims

and defence in which the existence of the agreement is alleged by one party and

not denied by the other. If it can be prima facie shown that the parties are at ad idem, then mere fact of one party not signing the agreement cannot absolve him from the liability under the agreement. In the present day e-commerce, in cases of internet purchases, tele purchases, ticket booking on internet and in standard forms of contract, terms and conditions are agreed upon. In such agreements, if the identity of the parties is established, and there is a record of agreement it becomes an arbitration agreement if there is an arbitration Clause showing ad idem between the parties. Therefore, signature is not a formal requirement of arbitration agreement either u/s 7(4)(b) or Section 7(4)(c) or under 7(5) of the ACA.

27. Reference in this connection is made to the decision in the case of Babaji Automotive Vs. Indian Oil Corporation Limited, . The learned judge held (para 10 at page 569):

My reading of Section 7 of the Arbitration and Conciliation Act, 1996 is that under Sub-section (3) of Section 7 of the said Act, it is imperative that an arbitration agreement must be in writing. Sub-sections (4) and (5) of Section 7 explain as and when an arbitration agreement is considered to be in writing. Written agreement means an agreement in which the terms agreed by the parties are reduced into writing. It is, therefore, not necessary that the agreement must be signed by both the parties.

28. Reference can also be made to paragraph 10 of the judgment of Delhi High Court in Swapn Construction v. IDPL Employees Co-operative Group Housing Society Limited 2006 (1) Raj 486 (Del.). The relevant portions from the aforesaid paragraph are extracted below:

An arbitration agreement should be in writing, i.e. its terms should be reduced to writing but if the agreement is not signed and it is established by another written contemporaneous document, it will be binding between the parties. The Apex Court in Jugal Kishore Rameshwardas Vs. Mrs. Goolbai Hormusji, had held that in order to constitute an arbitration agreement in writing it is not necessary that it should be signed by the parties, and it is sufficient if the terms are reduced into writing and the agreement of the parties thereto is established.

29. Apart from that, this court is of the opinion that an agreement with an arbitration Clause is a commercial document and has to be interpreted in

such a manner as to give effect to the agreement rather than invalidate it. On the principle of construction of a commercial agreement, Scruff on

Charter Parties (17th Edition, Sweet & Maxwell, London, 1964), explained that commercial agreement has to be construed, according to the

sense and meaning as collected in the first place from the terms used and understood in the plain, ordinary and popular sense [See Article 6 at

page 16]. The learned author also said that the agreement has to be interpreted "in order to effectuate the immediate intention of the parties".

Similarly, Russell on Arbitration (21st Edition) opined, relying on *Astro Vendeor Compania Naviera SA v. Mabanft GmbH* (1970) 2 Lloyd's

Rep. 267, that the court should, if the circumstances allow, lean in favour of giving effect to the arbitration Clause to which the parties have agreed.

The learned author has also referred to another judgment in *Paul Smith Ltd. v. H&S International Holdings Inc.* (1991) 2 Lloyd's Rep. 127 in

order to emphasize that in construing an arbitration agreement the court should seek to "give effect to the intentions of the parties" [See page 28 of

the book].

30. The Hon'ble Apex Court also in the case of *The Union of India (UOI) Vs. D.N. Revri and Co. and Others*, similarly held in para 7 at page

2262 of the report that a commercial document between the parties must be interpreted in such a manner as to give efficacy to the contract rather

than to invalidate it. The learned judges clarified it by saying:

It would not be right while interpreting a contract, entered into between two lay parties, to apply strict rules of construction which are ordinarily

applicable to a conveyance and other formal documents. The meaning of such a contract must be gathered by adopting a common sense approach

and it must not be allowed to be thwarted by a narrow pedantic and legalistic interpretation.

Going by the aforesaid well-known principles, I am of the opinion that in the facts and circumstances of the instant case, it is prima facie clear that

the second respondent is a party to the arbitration agreement, even though it was not signed by it.

31. It is clear that for construing an arbitration agreement, the intention of the parties must be looked into. The materials on record which have been

discussed hereinabove make it very clear that the second respondent was prima

facie acting pursuant to the agreement between the parties. So, it is not very material whether it was signed by the second respondent or not.

32. In this connection, learned Counsel for the petitioner relied on the judgment of the Court of Appeal in *Shayler v. Woolf* (1946) 2 All ER 54. In

the said judgment, it has been held that if a benefit under the contract is otherwise assignable, an arbitration Clause will not prevent it from being

assigned. An arbitration Clause in its very nature is assignable. However, in the instant case, an arbitration Clause expressly covers the second

respondent inasmuch as the sole arbitrator has to be appointed on his consent.

33. Relying on the aforesaid decision of the Court of Appeal in *Shayler v. Woolf* (supra), Justice Sabyasachi Mukharji (as His Lordship then was)

in the case of *Hindustan Steel Works Construction Ltd. Vs. Bharat Spun Pipe Co.*, held that whether a contract is assignable or not depends upon

the nature of the contract and a contract in the nature of personal covenant cannot be assigned. The rights under the contract can be assigned, but

the obligations under a contract cannot be lawfully assigned. Moreover, the intention of the assignability would depend upon the terms and the

language used in the contract. The learned judge held that mere existence of arbitration Clause per se does not make the contract non-assignable.

In coming to the said conclusion, the learned judge also relied upon the decision of the Supreme Court in the case of *Khardah Co. Ltd. v. Raymon*

& Co. (I) (P) Ltd. AIR 1962 SC 1810. The learned judges of the Supreme Court at page 1818 of the report held that if a contract is otherwise

assignable arbitration Clause will follow assignment of the contract. Here, the second respondent is the nominee of the first respondent, and from

the tenor of the contract it is clear that there is an assignment in favour of the second respondent. Both the petitioner and the first respondent

approved the agreement [See pages 23 and 25 of the typed set filed by the petitioner]. Prima facie it appears that the second respondent acted

upon the same agreement and is bound by it.

34. Learned Counsel for the second respondent cited a number of decisions on what constitutes arbitration clause. But, in the instant case, the

existence of the arbitration Clause is not in dispute as it appears from the facts of the case and pleadings of the parties, which have been discussed

above. Since factually that is not an issue, this court refrains from discussing the

decisions cited by the learned Counsel on what would constitute an arbitration clause.

35. For the reasons aforesaid, this court holds that the second respondent is prima facie a party to the arbitration agreement and is also bound by

it. There are various arbitral disputes between the parties. The request for appointment of arbitrator made by the petitioner vide its letter dated

09.05.2007 was turned down by the first and the second respondents respectively by their letters dated 10.06.2007 and 09.06.2007.

36. I, therefore, appoint Hon''ble Mr. Justice K. Venkataswami, 36, 1st Avenue, Indira Nagar, Chennai - 600020, a former Judge of the Hon''ble

Supreme Court, the sole arbitrator to arbitrate upon the disputes between the parties. The arbitrator shall enter upon the arbitration, issue notice to

both the parties and pass an award in accordance with the provisions of the Arbitration and Conciliation Act, 1996 as early as possible, preferably

within a period of six months from the commencement of arbitration proceedings.

37. The question of fixing the remuneration and other incidental expenses is left to the discretion of the hon''ble arbitrator.

38. The petition is allowed as above.

39. No costs.