IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 1760 OF 2015

1 Wind World (India) Limited
a Company incorporated under the
laws of India and having its
registered office at Wind World Tower,
Veera Industrial Estate,
Veera Desai Road, Andheri (West),
Mumbai – 400 053 (India)

2 Mr. Yogesh Mehra
being Indian Inhabitant residing at
101, Hare Krishna Presidency Society,
North South Road no.8,
J.V.P.D. Scheme, Vile Parle (West),
Mumbai – 400 048 (India)

3 Mr. Ajay Mehra
being Indian Inhabitant residing at
101, Hare Krishna Presidency Society,
North South Road no.8,
J.V.P.D. Scheme, Vile Parle (West),
Mumbai – 400 048 (India) .... Petitioners

vs.

1 Enercon GmbH
A Company duly incorporated
and existing under the laws of
Germany and having its registered
office at Dreekamp 5, D26605.
Aurich, Germany

2 Wobben Properties GmbH
A Company duly incorporated
and existing under the laws of
Germany and having its registered
office at Dreekamp 5, D26605.
Aurich, Germany ... Respondents

Mr. Pesi Modi, Senior Counsel a/w Mr. R. Rajadhyaksha, Mr. Neville Lashkari, Mr. P. Shroff and Ms. Swati Singh i/by AZB & Partners, Advocate for the petitioners.

Mr. S. U. Kamdar, Senior Counsel a/w Ms. Zubin Behramkamdin, Ms. Trisha Sarkar and Ms. Shaheda Madraswala i/by Bharucha & Partners, Advocate for the respondents.

Coarm : Smt. R. P. SondurBaldota, J.
Date : 9th December, 2015.

JUDGMENT :

1. This highly contested petition filed under Section 37 of the Arbitration and Conciliation Act, 1996 ('the Arbitration Act') arises out of the order dated 11th July, 2015 passed by the Arbitral Tribunal on the application of the petitioners. The petition is contested on it's merit as well as maintainability.

2. It would be convenient to notice at this stage the history of the Arbitral proceedings relevant for the present purposes. Petitioner No.1 is a joint venture company of which 44% share capital is held by petitioners No.2 and 3 along with their family members (hereinafter referred to as Mehras). Petitioner No.2 is the Managing Director and petitioner No.3 is one of the Directors of petitioner No.1. Respondent No.1 (hereinafter referred to as Enercon) holds the balance 56% of the share capital of petitioner No.1. In the year 2007, Enercon initiated proceedings before the Company Law Board alleging

oppression and mismanagement under Sections 397 and 398 of the Companies Act. The Mehras also, in the year 2008 filed identical petition before the Company Law Board against Enercon. The two petitions were tagged together and heard by the Company Law Board. By its common judgment and order dated 14th December, 2012, the Company Law Board dismissed the petition filed by Enercon and allowed the petition filed by Mehras.

3. Enercon had filed an interim application in company petition seeking from Mehras, information relating to the affairs of petitioner No.1. The application was contested by Mehras contending that Enercon was prone to misuse the information by addressing malicious and disruptive correspondence to the customers, bankers, suppliers and vendors of petitioner No.1 with intent to bring the business of petitioner No.1 to a standstill so that Enercon could buy the shareholding of Mehras at a depressed value. The Company Law Board by its order dated 19th October, 2009 had directed Mehras to furnish information upon a oral undertaking by the counsel for Enercon that “the information furnished would not be used for any purpose other than the purpose of valuation of the petition.” The oral undertaking by the counsel for the Enercon was considered by the Mehras as inadequate protection and hence, they challenged the order by

preferring Company Appeal No.91 of 2009 to this Court. That appeal was disposed off by the consent order dated 27th November, 2009 recording that Mehras were willing to provide the information subject to an undertaking filed by the Enercon as set out in para 2 of the order. The specific wording of the undertaking as set out in para 2 reads as under ;

> *"(i) the information furnished by the Petitioners shall not be used for any other purpose other than for the purpose of valuation or for the purpose of the proceedings before the CLB; and (ii) [Enercon] shall not utilize the information furnished for engaging in any correspondence with any third party, save and except for the valuers and the auditors of [Enercon]"*

Within a fortnight, however Enercon made an application for relieving it of the undertaking but that application was dismissed by the order dated 15th December, 2009. The Company Law Board noted that Enercon had not given undertaking as directed by this Court. It rejected the submission of the counsel for Enercon that the undertaking was not relevant for the purpose of valuation and called upon Enercon to furnish the undertaking in the terms as directed by this Court. Enercon unsuccessfully challenged the order by preferring an appeal to this Court and further carried the order to the Apex Court by filing Special Leave Petition No. 22641 of 2012. The Apex Court by its order dated

26th September, 2012 dismissed the Special Leave Petition and confirmed the orders directing furnishing of the undertaking. Despite consistent failure in challenging the order, Enercon did not furnish undertaking to the Company Law Board in compliance with the order passed by this Court.

4. Enercon preferred appeals to this Court against the final decision of the Company Law Board on both the Company Petitions. The appeals were allowed by the order dated 20th August, 2015, this Court set aside the orders and remanded the company petitions to the Company Law Board for fresh consideration. This order was finally carried to the Apex Court and the Apex Court by its judgment dated 14th February, 2014 referred all the disputes between the parties under various agreements i.e. (i) Shareholders Agreement, (ii) Technical Know How Agreement, (iii) Supplementary Shareholders Agreement, (iv) Supplementary Technical Know-How Agreement, (v) Agreed Principles and (vi) draft Intellectual Property License Agreement to arbitration by the Arbitrators named in the order.

5. The seat of Arbitration was held to be in India and the Arbitration meetings were held to be in London as a matter of geographical convenience. On 5th September, 2014 Enercon filed an application before the Arbitral Tribunal under Section 17 of

the Arbitration Act seeking production of documents. The Mehras opposed the application setting out various grounds and also referring to the conduct of Enercon in the past, of addressing malicious correspondence to the third parties and of failure to furnish undertaking in that regard in compliance with the orders of several Courts including the Apex Court. The Arbitral Tribunal disposed off the application after oral hearing by the consent order dated 24th January, 2015 (Procedural Order No.1) whereby Mehras were to redact the names of suppliers and component manufacturers and any other parts that point to their identity from their affidavit and the documents produced by them. Arbitral Tribunal also directed, at para 6 of the order, that any document produced by a party or non-party shall be kept confidential, by itself and all the parties and shall be used only in connection with the Arbitral proceedings.

6. On 27th April, 2015 both sides made requests for production of further documents. As regards the request of Enercon, the same objection as earlier, was raised by Mehras. The Arbitral Tribunal disposed off the requests by the order dated 22nd June, 2015 (Procedural Order No.2) by allowing production of some of the documents. This time it refused oral hearing with observation that oral hearings on the document requests are

unusual in international arbitrations and there was nothing in the case that made oral hearing necessary. As regards the confidentiality, the Arbitral Tribunal held as follows :

> *"9 All documents produced by either party will be subject to the confidentiality provisions of paragraph 6 of Procedural Order No.1. No further undertakings are required. The question of undertakings to the Indian courts is a matter for the Indian Courts, but the Tribunal considers that the order of the Indian Supreme Court mentioned above confers upon it full jurisdiction to conduct the arbitration in accordance with the Indian Arbitration and Conciliation Act, 1996."*

7. Immediately after Procedural Order No.2 i.e. on 29th June, 2015, Mehras filed an application under Section 17 of the Arbitration Act seeking leave to (i) to produce redacted documents under request nos. 13(B), 14(A), 14(B), 22 and 23 to the Claimants and (ii) to produce un-redacted copies of the documents under request nos.13(B), 14(A), 14(B), 22 and 23 to LCIA to be held in a sealed envelope. In the application Mehras referred to Procedural Order No.1 and sought protection identical to that granted under it. Enercon by it's reply opposed redaction stating that un-redacted documents are material to the liability and quantification of loss. It contended that the application as filed did not fall within Section 17 of the Arbitration Act. It denied that previously there was misuse of the documents. It referred to

the confidentiality provision in para 6 of Procedural Order No.1 to contend that Mehras were sufficiently protected by it.

8. The Arbitral Tribunal rejected the application by the order impugned herein which is a majority order with one of the Arbitrators dissenting from the view of the majority.

9. The impugned order holds that the application of Mehras was not within the terms of Section 17 because Mehras were not seeking an order against a party requiring the party to take some measure of protection in respect of subject matter of dispute and the application simply sought to vary Procedural Order No.2. On merit it did not consider that Mehras require the right to redact the documents. In it's opinion, protection of confidentiality in para 6 of Procedural Order No.1 was sufficient. It further opined :

> *"It does not consider that the Respondents have shown, at this interlocutory stage, a prima facie case that the Claimants have abused confidential information in the past. The communications with third parties of which the Tribunal has evidence appear to have been no more than assertions of the rights which the Claimants claim in this arbitration and there is nothing to show that such assertions were not made in good faith."*

10. The minority view in the dissenting judgment holds that the application was within the frame of Section-17 and that

the request for redacting as made by Mehras was justified in the facts of the case.

11. Mr. Kamdar the learned Senior Counsel appearing for Enercon submits that the present petition filed under Section 37 of the Arbitration Act is not maintenable because the order impugned therein is not an order under Section 17 of the Arbitration Act. According to him the application made by Mehras was under Section 19 of the Arbitration Act. He points out that Section 19 of the Arbitration Act provides for, determination of rules and procedure by the Arbitral Tribunal under which, the parties by agreement, and on failure of any agreement between the parties, the Arbitral Tribunal can decide upon the procedure to be followed by the Arbitral Tribunal in conducting its proceedings and the power of the Arbitral Tribunal under Section 19(3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence. Mr. Kamdar submits that, direction for production of documents related only to the procedural aspect of the arbitration and hence fell under Section 19 of the Arbitration Act.

12. In view of the unquestionable scope of Section 37 of the Arbitration Act, the dispute that needs to be considered at the threshold is about the provision under which the application filed

by Mehras would lie, whether Section 19 or Section 17 of the Arbitration Act.

13. Mr. Kamdar submits that irrespective of the title given by Mehras to their application, the same cannot be said to be an application under Section 17. He argues that an application under the provision must necessarily be i) against party to the arbitral proceedings, ii) for direction to take interim measure of protection and iii) in respect of subject matter of the dispute. He submits that since none of the three conditions are satisfied by the application, the same cannot be treated as a application under Section 17.

14. Mr. Kamdar, refers to the decision of the Apex Court in the case of ***MD, Army Welfare Housing Organisation Versus. Sumangal Services (P) Ltd. reported in (2004) 9 SCC page 629*** to support his submission that an interim order under Section 17 must relate to the protection of the subject matter of the dispute and the order may be addressed only to a party to the arbitration. It cannot be addressed to other parties. The Apex Court has also observed therein that, the power of the Arbitrator under Section 17 is a limited one. He cannot issue any direction which would go beyond the reference or the arbitration agreement. The factual background against which the

observations of the Apex Court were made, was that, even before filing of the statements of claims and counter-claims the parties had jointly requested the Arbitrator to pass an interim Award as regards the ownership of the lands as to whether the petitioner before the Apex Court, by reason of the purported deeds of sale, became absolute owner of certain immovable properties. When the learned Arbitrator was not inclined to accede to the request, an application had been filed by the petitioner to allow it to commence and complete construction work of a housing project at the risk of the respondent. That application had been allowed subject to certain conditions. It was contended by the respondent that, the petitioner was not the owner of the property and the real object of the application was to dispossess the respondent. In these facts of the case, the Apex Court held that, an Arbitrator in a situation of this nature, had no jurisdiction to pass the interim order in the absence of any specific agreement in relation thereto. The Learned Arbitrator, by an interim order, could not have placed the parties in a situation which would travel beyond the subject matter of dispute and differences referred to for arbitration. As no claim and counter-claim had been filed before the Arbitrator, the Arbitrator was not even aware of the nature of the claims of the parties. He had neither found any, *prima-facie* case, nor balance of convenience for passing the said interim order.

15. The second decision cited on this aspect by Mr. Kamdar, is the decision of Single Judge of this Court in ***Mahavirchand s/o. Suganchand Deoda and Another Vs. Ashaykumar s/o. Bhavarsing Parakh, reported in 2011 (6) Mh.L.J. page 170.*** In the facts of the case, for deciding the disputes between the partners of a partnership firm, an application was made for appointment of an qualified Chartered Accountant for the purpose of taking internal audit of the firm. That application was allowed with several directions to the Auditor. In the challenge to the application, it was contended that, the application was not in consonance with Section 17 and the directions issued by the order, where not in the nature of interim measures. The Learned Single Judge held that, considering the tenor of the order, it did not appear to be an order within the four corners of Section 17. However, the directions issued by the Tribunal were maintained as being referable to Section 26(1)(a) of the Arbitration Act.

16. The third decision cited by Mr. Kamdar is of a Single Judge of Delhi High Court in the ***Intertoll ICS Cecons O & M Co. Pvt. Ltd. Versus. National Highways Authority of India,***

reported in ILR (2013) II Delhi page 1018. The Delhi High Court was required to consider the question, whether the scope of the power of Arbitral Tribunal under Section 17 of the Act is narrower than or as wide as that of Section 9 of the Act. Within that, it considered the scope and powers of the Tribunal under Section 17 of the Act. The challenge in the appeal before the Delhi High Court was the orders of the Arbitral Tribunal directing the appellant to furnish security either of immovable property or in the form of a bank guarantee for satisfaction of the amount of counter-claims of the respondent that may be awarded by the Tribunal. One of the contentions raised before the Arbitral Tribunal and also later before the Delhi High Court was that, the Arbitral Tribunal cannot, in exercise of the power conferred upon it by Section 17 of the Act direct a party before it to furnish security for the amount claimed which was yet to be determined. The Arbitral Tribunal had held that, the principle underlying Section 9 of the Act, can determine the scope and ambit of the power conferred by the Tribunal under Section 17 of the Act and for the purpose of Section 17 "subject matter of the dispute" does not have to be only tangible property. It can include a monetary claim. Therefore, it had power to call upon a party to furnish security for the claim amount. The observations in the judgment of the Delhi High Court relied upon by Mr. Kamdar read as under :-

> *"13. The interim measure of protection under Section 17 of the Act has to be understood with reference to the "subject-matter of the dispute". A plain reading of the provision shows that an arbitral Tribunal can in exercise of its powers thereunder direct a party "to take any interim measure of protection" "in respect of the subject-matter of the dispute". The words "take" and "protection" give an indication as to the legislative intent behind the words "subject-matter of the dispute". The protection envisaged is in relation to some tangile property and not an indeterminate monetary claim."*

17. Mr. Mody, the learned Senior Counsel appearing for the petitioner submits that the scope of Section 17 of the Act, is not limited to a relief to be sought from the other party requiring the other party to take some measure of protection in respect of the subject matter of the dispute. It is his argument that, the direction thereunder need not necessarily be by one party against the other party. It is his further argument that, in any case, the effect of the petitioners contention was to seek a direction to the respondents not to insist upon disclosure of the names and

details of components, manufactures, suppliers, customers etc. of petitioner No.1. Therefore, the application was clearly maintainable under Section 17 of the Act. As regards the observations of the Arbitral Tribunal, that the petitioners, by their application was seeking to vary Procedural Order No.2, Mr. Mody submits that, the petitioners had merely requested the extension of protection already granted by Procedural Order No.1 to the documents to be produced under Procedural Order No.2 to ensure that the interests of petitioner no.1 are safeguarded and adequately protected until such time that the proceedings before the Arbitral Tribunal are concluded and the rights of the parties decided.

18. Section 17 of the Arbitration Act, as applicable, at the relevant time reads as under :-

> *"**17. Interim measures ordered by arbitral tribunal**. -*
> *(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.*
> *(2). The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1).*

Section 17 is seen to provide for interim measures during the pendency of the Arbitral proceedings. There is nothing in the section to indicate that the interim measure to be ordered thereunder is restricted to the direction to the "other party" to the arbitration. It is significant to note that, the term "other party" does not find mention in Section 17. The direction thereunder can be sought against "a party". The direction is for any "interim measure of protection" that may be necessary in respect of the subject matter of the dispute. In the facts of the present case, the subject-matter of the dispute is essentially the control over the business of petitioner no.1 and the management of petitioner no.1, Company. As seen from the record, the origin of the arbitral proceedings is the Company applications filed by the both the groups with allegations of oppression and mismanagement against each other. Both the sides also have rival claims under different agreements between them including the Technical Know-How Agreements and Intellectual Property License Agreements. The rival rights claimed are yet to be adjudicated by the Arbitral Tribunal. In the circumstances, it cannot be said that the interim protection sought by the petitioner is not in respect of the subject-matter of the dispute. Further, the measure of protection sought was towards oneself. An order was invited from the Arbitral Tribunal by the petitioner to take interim measure of protection to redact the documents to be produced by it. Therefore, the application of the petitioner clearly fell within Section 17 of the Arbitration Act. In these facts of the case, the decisions cited by Mr. Kamdar, can have no application. Since the application is seen to be covered by Section 17 of the Arbitration Act the present appeal filed under Section 37 of the Act is maintenable.

19. This brings us to the merits of the case. It has been the contention of Enercon and also the view of the majority in the impugned order that the protection of confidentiality in para 6 of Procedural Order No.1 is adequate protection to Mehras. Mr. Kamdar, in addition refers to Article 3(13) of IBA Rules on the taking of Evidence in International Arbitration to submit that protection of confidentiality is already made available to Mehras. The said Rule reads as under ;

> *"Rule 3(13) Any Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration. This requirement shall apply except and to the extent that disclosure may be required of a Party to fulfil a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. The Arbitral Tribunal may issue orders to set forth the terms*

of this confidentiality. This requirement shall be without prejudice to all other obligations of confidentiality in the arbitration."

20. It is now to be seen whether the protection stated to be available to Mehras is adequate in the facts of the case. The adequacy will obviously depend upon the extent of the threat to confidentiality. It is to be noted that Enercon has not denied or disputed the fact of noncompliance with the orders of this Court as well as the Apex Court in the matter of giving an undertaking in the terms as directed and the fact of sending letters to, not less than 11 customers of petitioner No.1. The customers are valued customers and include Essar Constructions (India) Ltd., CLP Power Supply Pvt. Ltd., Tata Power Management, Aditya Birla Chemicals Ltd., Larsen and Toubro Ltd., etc. Enercon seeks to justify it's conduct on both the counts. It's stand as regards the undertaking is that its purpose has come to an end, with the company petitions finally culminating into Arbitral proceedings. As regards the correspondence with the customers it contends that the same was a legitimate and appropriate attempt on it's part to protect it's rights to the technology for the wind turbines.

21. There can be no doubt that refusal to give undertaking in compliance of the orders of even the highest Court of the country

is a defiant stance. It indicates strong possibility of indulgence on the part of Enercon in entering into similar correspondence with the customers of petitioner No.1. Copies of the past correspondence with the customers have been annexed to the petition. Each letter is identical. It alleges breaches by petitioner No.1 of the conditions of licence to use the technology of which the intellectual property rights allegedly belong to Enercon and consequent repudiation of the licence. It warns the addressees that purchase of wind turbine generators or acquiring the same in any other way from petitioner No.1 would be at the risk of infringement of rights of Enercon and may result into action by Enercon against them. After the warnings, the letter significantly invites the customers to solutions by Enercon. For that purpose it seeks following information from the addressee about the commitments with petitioner No.1 :

> *"(i) the date(s) on which commitment(s) were made/entered into;*
>
> *(ii) products involved;*
>
> *(iii) your position as today;*
>
> *(iv) payments made to EIL; and payments yet to be made to EIL.*

The above correspondence has led to the customers of petitioner

No.1 seeking explanation from it.

22. Another argument advanced on behalf of Enercon on the correspondence is that the same is a stale event. Mr. Kamdar, submits that, all the letters relied upon by the Mehras are of the year 2009 and hence should not be considered adversely after the gap of six years. Mr. Mody, points out on the other hand, that the disputes between the two groups had started around the same time and even invocation of arbitration had been in the same year. In my opinion, the time period of the correspondence could have become insignificant only in the absence of defiant stance adopted by Enercon.

23. As has been rightly submitted by Mr. Mody, the argument advanced on behalf of Enercon that, the correspondence entered into by it, was only for the purpose of protecting its own rights in the particular technology to the exclusion of Mehras cannot be accepted because the exclusive rights is a subject matter of the arbitral dispute. Mr. Mody, points out that, the exclusive claim to the technology made by Enercon is yet to be decided by the Arbitral Tribunal and in the event of their claim being rejected, unless the interest of Mehras is protected by redaction of the documents, the petitioners would suffer not only loss of business but also damage to the reputation.

24. There is one more aspect of the matter which has been taken into account in detail in the note of dissent of one of the learned Arbitrators. Three of the documents directed to be produced under Procedural Order no.2 i.e. documents no. 13(B), 14(A) and 14(B), are covered by Procedural Order no.1. That means, the protection of redaction is already available in respect of those documents. The impugned order in effect takes away that protection.

25. In all the above circumstances, even on merit, the request of Mehras ought to have been accepted. With the unredacted documents being deposited with the Arbitral Tribunal, there can also be no inconvenience for the Tribunal in the matter of arrival at the decision. Hence, the petition is allowed in terms of prayer clauses (a) and (b). The parties to bear their own costs.

[Smt. R. P. SondurBaldota, J.]