

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 04.07.2018	Delivered on 23.07.2018
---------------------------	----------------------------

CORAM:

The Honourable Mr.Justice M.M.SUNDRESH
and
The Honourable Mr.Justice N.ANAND VENKATESH

Original Side Appeal Nos.170 to 175 and 206 to 210 of 2018
and C.M.P.Nos.9048 to 9053 and 10304 to 10308 of 2018

M/s SEI Adhavan Power Private Limited,
Menon Eternity, 10th Floor, New No.165,
Old No.110, St Mary's Road, Alwarpet,
Chennai-600 018, Tamil Nadu.

Represented by its authorised signatory

Mr.S.Sateesh

... Appellant in

O.S.A.Nos.170 to 175 of 2018

M/s SunEdison Solar Power India (Pvt.) Limited,
Menon Eternity, 10th Floor, New No.165,
Old No.110, St Mary's Road, Alwarpet,
Chennai-600 018, Tamil Nadu.

Represented by its authorised signatory

Mr.N.Ravindra

... Appellant in

O.S.A.Nos.206 to 210 of 2018

Vs.

1.M/s Jinneng Clean Energy Technology Limited,
No.1 Wenshui Economic Zone,
Lvliang, Shanxi Province, China,
Represented by its Authorised
Signatory Mr.Robert Pavrey

2.M/s SunEdison Energy Holding (Singapore) Pte. Ltd.,
11 Lorong 3 Toa Payoh,
Blk B Jackson Square,
4th Floor, Singapore 319579.
Represented by its Managing Director.

3.M/s Singapore International Arbitration Centre,
Represented by its Deputy Registrar Kevin Nash,
32, Maxwell Rd., #02-01, Maxwell Chambers,
Singapore 069 115. ... Respondents in all O.S.As.

Original Side Appeals are filed under Order XXXVI Rule 9 of the O.S. Rules, 1956 read with Clause 15 of the Letters Patent against the order dated 24.04.2018 passed in A.No.6462, 6461 & 6463 of 2017 and O.A.No.642, 643 & 644 of 2017 in C.S.No.502 of 2017 and A.Nos.479, 477 & 478 of 2018 and O.A.Nos.6 & 7 of 2018 in C.S.No.12 of 2018.

Prayer in A.No.6461 of 2017:

Application praying that this Hon'ble Court be pleased to Revoke the leave granted in Application No.3270/17 in C.S.D.No.20444/17.

Prayer in A.No.6462 of 2017:

Application praying that this Hon'ble Court be pleased to refer the parties herein to arbitration in terms of clause 9 of the non Disposal undertaking dated March 17, 2016 in accordance with section 45 of the Arbitration and conciliation Act 1996.

Prayer in A.No.6463 of 2017:

Application praying that this Hon'ble Court be pleased to reject the plaint in C.S.No.502 of 2017.

Prayer in O.A.No.642 of 2017:

Original Application praying that this Hon'ble Court to be pleased to pass an order of ad interim injunction restraining the first respondent/defendant from proceeding with the arbitration against the applicant/plaintiff in arbitration case no.ARB.94/17/AKB before the third respondent/defendant pursuant to request for arbitration dated 11/04/2017 pending disposal of the suit.

Prayer in O.A.No.643 of 2017:

Original Application praying that this Hon'ble Court be pleased to pass an order of ad interim injunction restraining the first respondent/defendant their men agents servants attorneys assigns or any person claiming under or through him jointly or severally from proceeding with and prosecuting the arbitration proceeding or any other proceedings as against the applicant /plaintiff arising out non disposal undertaking dt.17.03.2016 entered into between the 1st & 2nd respondent defendant pending disposal of the suit.

Prayer in O.A.No.644 of 2017:

Original Application praying that this Hon'ble Court be pleased to pass an order of ad interim injunction restraining the third respondent/defendant from administering the arbitration proceedings pursuant to request dated 11.04.2017 from first respondent/defendant against the applicant/plaintiff and others in arbitration case no.ARB094/17/AKB pending disposal of the suit.

Prayer in C.S.No.502/17:

The Plaintiff therefore prays for a Judgment and decree against the Defendants to:

a) For a Permanent Injunction restraining the first defendant from proceeding with the Arbitration against the Plaintiff in Arbitration case No. ARB094/17/AKB before the third Defendant pursuant to request for arbitration dated 11/04/17.

b) For a Permanent Injunction restraining the third defendant from administering the Arbitration pursuant to request dated 11/4/2017 from 1st defendant against the Plaintiff and others in Arbitration case No.ARB094/17/AKB.

c) For Permanent injunction, restraining the first Defendant their men, against, attorneys, servants, assigns or any of pension claiming under or through him jointly or severally from proceeding with and prosecuting the Arbitration proceeding or any other proceedings as against the Plaintiff arising out of the Non Disposal undertaking dated 17/3/2016 entered into between the 1st & 2nd defendant.

d) for costs of the suit.

Prayer in A.No.479 of 2018:

Application praying that this Hon'ble Court be pleased to refer the parties herein to arbitration in terms of clause 9 of the Non Disposal undertaking dated March 17,2016 in accordance with section 45 as the Arbitration & Conciliation Act 1996.

Prayer in A.No.477 of 2018:

Application praying that this Hon'ble Court be pleased to Revoke the Leave granted to sue dated 18/12/2017 in A.O.No.4758 of 2017 in C.S.D.24371 of 2017.

Prayer in A.478 of 2018:

Application praying that this Hon'ble Court be pleased to reject the Plaint in C.S.No.12/18.

O.A.No.6 of 2018:

Original Application praying that this Hon'ble Court be pleased to pass an order of ad interim injunction restraining the third Respondent/Defendant from administering the Arbitration proceedings pursuant to request dated 11/04/2017 from first Respondent/Defendant against the Applicant/Plaintiff and others in Arbitration Case No.ARB094/17/AKB pending disposal of the suit.

O.A.No.7 of 2018:

Original Application praying that this Hon'ble Court be pleased to pass an order of ad interim injunction restraining the first Respondent/Defendant their men agents servants attorneys assigns or any person claiming under or through him jointly or severally from proceeding with an prosecuting the Arbitration proceedings or any other proceedings as against the Applicant/Plaintiff arising out of the Non Disposal undertaking dt 17/03/2016 entered into between the 1st and 2nd Respondent/Defendant pending disposal of the suit.

Prayer in C.S.No.12 of 2018:

The Plaintiff therefore prays for a Judgment and Decree against the Defendants to;

a) For a permanent injunction restraining the 1st defendant their men agents attorneys servants assigns or any person claiming under or through him jointly or severally from proceeding with and prosecuting the Arbitration Proceeding or any other proceedings as against the plaintiff arising out of the Non Disposal Undertaking dt. 17.3.2016 entered into between the 1st and 2nd defendants;

b) For a permanent injunction restraining the 3rd Defendant from administering the Arbitration pursuant to request dated 11/4/2017 from 1st Defendant against the Plaintiff and others in Arbitration case No.ARB094/17/AKB;

c) for costs of the Suit.

For Appellants in : Mr.R.Venkatavaradan for
OSA.170 to 175 Mr.V.Srikanth
of 2018

For Appellants in : Mr.Vijay Narayan, Advocate General,
OSA.206 to 210 Assisted by M/s Shubharanjani Ananth
of 2018

For 1st Respondent : Mr.Sathish parasaran, S.C.,
in all O.S.As. Asst. by M/s Priyanka Shetty for
Mr.P.Giridharan, Mr.Dominic David,
Mr.S.Santhosh & Mr.H.Siddarth

COMMON JUDGMENT

M.M.Sundresh, J.

As all these original side appeals filed by the appellant No.2 were disposed of by the learned single Judge through a common order involving same fact and law, we propose to do the same. For the sake of brevity, the appellant in O.S.A. Nos.170 to 175 of 2018 is taken as appellant No.1 and the appellant in O.S.A. Nos.206 to 210 of 2018 is taken as appellant No.2. The respondents are accordingly arrayed as such.

2. Heard Mr.R.Venkatavaradan for Mr.V.Srikanth, learned counsel appearing for the appellant in OSA. Nos.170 to 175 of 2018 and Mr.Vijay Narayan, learned Advocate General, Assisted by M/s Shubharanjani Ananth, learned counsel appearing for the appellant in OSA. Nos. 206 to 210 of 2018 and Mr.Sathish parasaran, learned Senior Counsel assisted by M/s Priyanka Shetty for Mr.P.Giridharan, Mr.Dominic David, Mr.S.Santhosh and Mr.H.Siddarth, learned counsel appearing for the first respondent in all the appeals and perused the written submissions filed on 12.07.2018.

3. Facts in brief

3.1. The appellants and respondent No.2 constitute a single Economic Entity namely Sun Edison Group of Companies along with M/s Sun Edison Energy Holding (Singapore) Private Limited (Respondent No.2). The appellant No.1 is an Indian Company involving itself in the process of constructing a 50 MW AC power plant at Virudhunagar Village, Tamil Nadu referred as "project".

M/s Sun Edison Energy Holding (Singapore) Private Limited (Respondent No.2) was holding 99.99% of the aggregate equity capital in the appellant No.1. The appellant No.1 had engaged the appellant No.2 as the contractor to provide certain construction related services qua the Project. The appellant No.2, in turn, entered into a sub contract qua supply of modules to the respondent No.1 in pursuant to the mutually agreed contracts executed vide purchase orders issued by respondent No.2 - M/s Sun Edison Energy Holding (Singapore) Private Limited in favour of respondent No.1. The respondent No.1 raised certain invoices which were pending payment from the respondent No.2 with the appellant No.2. Thus, the appellants and the respondent No.2 are intrinsically connected to each other.

3.2. Under those circumstances, the respondent No.2 executed a Non Disposal Undertaking in favour of the respondent No.1. The facts narrated above were reiterated in the aforesaid document executed on 17.03.2016. This Non Disposal Undertaking was with respect to the shares held by the respondent No.2 with the appellant No.1. This document was prepared by one Mr.Pasupathy Gopalan being the President of respondent No.2. Incidentally, he controlled all the operations of the appellant No.1 as well.

3.3. In the aforesaid document, the respondent No.1 was referred as "Sun Edison", the respondent No.2 as the "Contractor", the appellant No.1 as the "company" and the appellant No.2 as the "client".

3.4. While defining invoices, it was made clear that they mean, the invoices issued pursuant to the sub contract agreements and others added to the Annexure by mutual agreement by appellant No.2 and respondents 1 and 2. The payment obligation was defined as that of the appellant No.2 to the respondent No.1 qua the invoices raised.

3.5. Accordingly, the respondent No.2 gave an undertaking, which shall stand valid until the complete discharge of the Payment Obligations by the appellant No.2, to hold and retain atleast 24% of the equity in the appellant No.1 company. Thus, without prior approval of the respondent No.1 and until the complete and full discharge of the payment obligations, there shall not be any encumbrance by way of a transfer etc. This undertaking was meant to be terminated automatically upon receipt of the complete payment of the invoices by appellant No.2 or the respondent No.2 to the respondent No.1.

3.6. The appellants are functioning from the same office. All the group of companies belonging to the Sun Edison correspond through the same E-mail ID. The respondent No.2 as

per the undertaking appointed the appellant No.1 as its Agent to receive and acknowledge any notice by way of writ in connection with the undertaking. The undertaking also confirms its obligation as binding upon its successors and permitted assigns. It was also agreed that neither the respondent No.2 nor the appellant No.1 shall assign or transfer any interest in its rights benefits etc., under the Undertaking without prior written consent of the respondent No.1. The law of Singapore is to be applied.

3.7. The undertaking contains an arbitration agreement. It is governed by International Chamber of Commerce (ICC) Rules. The Tribunal shall comprise of three Arbitrators. The appellants and the respondent No.2 acting together shall appoint one, respondent No.1 as Contractor shall appoint another and thereafter, both the Arbitrators in turn and in consultation with each other appoint the third preceding one. The seat of arbitration is "Singapore International Arbitration Centre" viz., respondent No.3. The following clauses contained in the undertaking are apposite.

WHEREAS:

A) WHEREAS, SEI Adhavan Power Privatge Limited, an Indian company having its office at menon Eternity, 10th Floor, New No.165 Old No.110, St Mary's Road, Alwarpet, Chennai-600 018, India (hereinafter referred to as the "Company" which expression shall unless repugnant to the context or meaning thereof, include its successors and permitted assigns), is the process of constructing a 50 MW AC plant at Virudhunagar Village, Tamil Nadu the "Project");

B) SunEdison holds 99.99% of the aggregate Equity capital in the Company.

C) The Company has engaged SunEdison Solar Power India Private Limited (the "Client") as a contractor to provide certain construction related services in connection with the Project. The Client has sub-contracted a part of the supply of modules to the Contractor pursuant to mutually agreed contracts executed vide Purchase Order No.924112, No.927415 and No.927420 issued by SunEdison to the Subcontractor. ("Sub Contract Agreements").

D) Certain Invoices (as defined later) raised by the Contractor under the Sub Contract Agreements

are currently pending payments from the Client. NOW, THEREFORE, SunEdison, currently holding 99.99% of the total issued and paid up Equity share capital of the Company, in consideration of the premises set forth herein and other good and valuable consideration, receipt of which is acknowledged.

2. SUNEDISON'S UNDERTAKING

2.1. Save for as set out herein or specifically permitted by the Contractor, SunEdison shall until the complete discharge of the Payment Obligations by the Client continue to legally and beneficially hold and retain at least 24% (Twenty Four percent) of the equity in the Company as more specifically described in Annexure 2 ("NDU Shares") free of any Security Interest, and shall not, without prior approval from the Contractor, until the complete and full discharge of the Payment Obligations, sell, transfer, assign, dispose of, pledge, charge or create any Security Interest on the NDU Shares in favour of any person (including to Terra Form Global ("GLBL") or any of its affiliates pursuant.

2.2. Provided the limitation set out in this Clause 2 shall not prevent SunEdison or shall require SunEdison from obtaining any consent from the Contractor for creating any Security Interest over all or a part of NDU Shares in favour of project finance lender(s), and upon such creation, the undertaking set out herein shall automatically get subordinated to the newly created Security Interest in favour of the project finance lenders.

2.3. All obligations under this Undertaking shall automatically terminate upon receipt of the complete payment of the Invoices by the Client or SunEdison.

4. NOTICES:

.....

4.8. Without prejudice to any other mode of service allowed under any relevant law, SunEdison:

- (a) irrevocably appoints the Company as its agent to receive and acknowledge on its behalf service of any writ, summons, order, judgment, notice or other legal process in connection with this Undertaking; and
- (b) agrees that the failure by a process

agent to notify SunEdison of the process will not invalidate the proceedings concerned.

5.1. Binding Obligations:

SunEdison confirms that its obligations under this Undertaking shall be binding upon its successors and permitted assigns.

7. Changes to the Parties:

Neither SunEdison nor the Company shall assign or transfer any interest in its rights, benefits and/or obligations under this Undertaking without the prior written consent of the Contractor.

9. Arbitration:

(a) If one party to this Undertaking gives the other party a notice stating that a dispute has arisen (a "Dispute Notice"), and such parties are unable to resolve the dispute amicably within 30 (thirty) days of service of the Dispute Notice (or such longer period as the parties may mutually agree), then the Dispute shall be referred to arbitration at the end of such 30 (thirty) days period ("Arbitration Reference") in accordance with the terms set out in this section 9.

(b) The arbitration proceedings shall be governed by the provisions of Rules of Conciliation and Arbitration of the International Chamber of Commerce for the time being in force ("ICC Rules").

(c) For the purpose of such arbitration, the arbitral Tribunal shall comprise 3 (three) arbitrators. SunEdison, Company and Client (acting together) shall appoint an arbitrator, and the Contractor shall appoint one arbitrator within 15 days of Arbitration Reference. The two arbitrators so appointed shall, in consultation with each other, appoint the third presiding arbitrator within a period of 15 (fifteen) days thereafter.

(d) The arbitration proceedings shall be held at Singapore International Arbitration Centre. The arbitration proceedings shall be in English language. The award shall be substantiated in writing. The arbitral Tribunal shall also

determine and decide the cost of arbitration proceedings. The award shall be binding on the disputing parties subject to applicable Laws and the award shall be enforceable in any competent court of law. The provisions of this Clause shall survive the termination of this Agreement."

3.8. Contrary to the undertaking, the shares were sold by the respondent No.2. Thus, the respondent No.1 invoked the arbitration clause. When notices were issued in terms of Clause 9 of the undertaking, it was received by the appellants inter alia contending that they are not parties to the undertaking. Not stopping with that, the appellants approached this Court and filed C.S.Nos.502 of 2017 and 12 of 2018 seeking the following relief.

- a. Permanent injunction, restraining the 1st respondent, from proceeding with the arbitration against the Appellant in arbitration case No.ARB94/17/AKB, before the 3rd respondent, pursuant to the request for arbitration, dated 11.04.2017;
- b. for permanent injunction, restraining the 3rd respondent, from administering the arbitration pursuant to request dated 11.04.2017 from the 1st respondent, against the appellants and others in arbitration case No.ARB94/17/AKB;
- c. for permanent injunction, restraining the 1st respondent or anybody acting under them, from proceeding with and prosecuting the arbitration proceedings or any other proceedings, as against the Plaintiff, arising out of the Non Disposal Undertaking (hereinafter referred to as NDU) dated 17.3.2016, entered into between the 1st and 2nd respondents;
- d. for costs of the suit."

3.9. Pending suits, applications have been filed seeking the below mentioned interim reliefs.

- "a. Interim injunction restraining the 1st respondent from proceeding with the arbitration against the appellant in arbitration case No.ARB/094/17/ARB before the 3rd defendant, pursuant to the request of arbitration dated 11.4.2017, pending disposal of the suit.
- b. interim injunction, restraining the 1st respondent or anybody acting under them from proceeding with or prosecuting the arbitration proceedings arising out of the Non Disposal Undertaking dated 17.3.2016, entered into between the 1st and 2nd respondents, pending disposal of the suit.

c. interim injunction, restraining the 3rd respondent from administering the arbitration proceedings pursuant to the request, dated 11.4.2017, from the 1st respondent against the appellant and others in arbitration case No.ARB/094/17/ARB, pending disposal of the suit."

3.10. The respondent No.1 filed applications viz., A.No.6461 of 2017 seeking to revoke the leave granted in A.No.3270 of 2017, A.No.6463 of 2017 - to reject the complaints and A.No.6462 of 2017 - to refer the parties to arbitration.

3.11. The learned single Judge, by a common order allowed the applications filed by the respondent No.1 and thus, dismissed that of the appellants. Aggrieved, the present original side appeals are filed before us.

4. Submissions of the Appellants:

4.1. The learned counsels for the appellants would submit that the appellants are not parties to the Non Disposal Undertaking. They are separate and distinct legal entities. Their knowledge cannot be inferred. They did neither sign nor authorise the undertaking. Mr.Pasupathy Gopalan proposed the undertaking on behalf of the respondent No.2 alone, in his capacity as the President of specific operations. Similarly, Mr.Vinay Bhatia signed the undertaking only on behalf of the respondent No.2 notwithstanding he being a Director with one of the appellants viz., the appellant No.1. Thus, the inter se relationship between the aforesaid persons on one hand and the appellants on the other would not create a binding agreement. There is no relief that can be claimed against the appellants. There is no material to hold that the appellants were aware of the undertaking. Therefore, in the absence of privity of contract between the appellants and the respondent No.1, Clause 9 of the undertaking cannot be invoked.

4.2. It is their submission that Section 45 of the Arbitration and Conciliation Act, 1996 does not have any application to the case on hand. It can be invoked against the non signatories only on exceptional circumstances, which are not available in the case on hand. The appellants are legal entities on their own.

4.3. To buttress their submissions they made reliance upon the following decisions:

1.SHRIRAM EPC LIMITED VS. RIOGLASS SOLAR SA
(MANU/TN/1399/2018);

2.HANSRAJ NAYYAR MEDICAL INDIA VS. SMITH MEDICAL INTERNATIONAL LIMITED (2014) SCC ONLINE BOM. 696); and
3.MODI ENTERTAINMENT NETWORK AND ANOTHER VS. W.S.G. CRICKET PTE. LTD., (MANU/SC/0039/2003).

5. Submissions of the Respondents

5.1.The learned Senior Counsel appearing for the respondent No.1 would submit that the appellants and respondent No.1 are parts of the same entity having a common central control. Their E-mail ID domain name is the same. The appellants have their offices in the same building. 99.99% of the paid up share capital of the appellant No.1 was held by M/s Sun Edison Energy Holding(Singapore) Pte. Ltd., (Respondent No.2). The appellants were the subsidiary of M/s Sun Edison Energy Holding (Singapore) Pte. Ltd. All of them represented as the common business venture at the time of the execution of the undertaking. The Contractors of the appellant No.2 were marked with the copies of the relevant E-mail correspondence. The transactions took place with respect to the same project. The project involves the appellants. The undertaking was given to honour the outstanding invoice due from the appellant No.2. The purchase orders along with invoices would clearly show that the appellants and the respondent No.2 are the one and the same, though operating as different entities.

5.2. The modules were supplied and delivered to the appellant No.2 and the purchase orders were raised in relation to the project of the appellant No.1. The purchase orders themselves clearly state the involvement of the appellants and the respondent No.2. The appellants were very much aware of the purchase orders, invoices and the resultant due payment. Deliberately, these documents were not filed.

5.3. The suits do not disclose any cause of action. Merely because, the undertaking was signed on behalf of the respondent No.2 at Chennai, no cause of action would arise. The suits are to be dismissed on the principle of forum non conveniens. The seat of arbitration is at Singapore. It is only the Singapore law that would apply. The proceedings are governed by ICC Rules. Therefore, it is the third respondent alone, who has got jurisdiction.

5.4. The issue involved is squarely covered by the judgment of the Apex Court in CHLORO CONTROLS INDIA PRIVATE LIMITED VS. SEVERN TRENT WATER PURIFICATION INC. AND OTHERS ((2013) 1 Supreme Court Cases 641) and thus, Section 45 of the Arbitration and Conciliation Act, 1996 would certainly apply. The appellants are, in fact, parties to the undertaking. The

decisions relied upon for the first time before the Court on behalf of the appellants are not applicable to the case on hand. Thus, the appeals will have to be dismissed.

6. Discussion:

6.1. That the appellants and the respondent No.2 are part of the same group is not in dispute. The transactions were also with respect to the "Project". The respondent No.2 was holding 99.99% aggregate equity capital in the appellant No.1. The respondent No.2 did give an undertaking. It emanated due to the non payment of the obligations arose in pursuant to the invoices raised against the appellant No.2. It is the appellant No.1, which was in the process of constructing the Project. It did engage the appellant No.2 as the Contractor. Therefore, for the convenience sake, the group of companies divided the work between themselves to carry out different activities among which the project is one. With respect to the same project, the appellant No.2 entered into the sub contract resulting in the purchase orders issued by the respondent No.2. The respondent No.1 did comply with these obligations as against the appellant No.2. Factually there was a breach. Therefore, the undertaking came into being. The relationship between Mr.Pasubathiy Gopalan and the signatory by name Mr.Vinay Bhatia on the one side with the appellants and the respondent No.2 on the other side is not in dispute.

6.2. It is interesting to note that the very undertaking itself makes it abundantly clear that the appellants and respondent No.2 were each other's alter ego. That is the reason why, the obligation was read into that of the others. Not only the E-mail address, office address, mode of service, the obligation and terms are also meant to be applied by inter changing on many aspects. The arbitration clause clearly puts the appellants and respondent No.2 in one basket with the respondent No.1 the other. On the question of cause of action, we find that the mere signing of the undertaking will not create one and to contend that the undertaking does not bind them. After all a cause of action involves material facts. A real cause of action has arisen only because of the fact that the first respondent has invoked the arbitration clause. Thus we are of the view that the learned single Judge was right in holding that no cause of action was available to the appellants to maintain the suit. Resultantly, the only way open to the appellants is to contest their case before the third respondent.

6.3. It is to be noted that the execution of the undertaking is not in dispute. The Apex Court in CHLORO CONTROLS INDIA PRIVATE LIMITED VS. SEVERN TRENT WATER PURIFICATION INC. AND OTHERS ((2013) 1 Supreme Court Cases 641) has considered the

principle governing "group of companies doctrine" and held that in a given case an arbitration agreement entered into by a company within the group of companies can bind its non signatory affiliates. It was further held that what is important is the intention of the parties. Thus, the "group of companies doctrine" was made applicable and read into Section 45 of the Act 26 of 1996. Similarly, the circumstances under which a third party can be made to go through the arbitration proceedings is also dealt with. Therefore, the non signatory third party also would come within the purview of an arbitral agreement. The following paragraphs are apposite.

70. Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlining that agreement. But, it does occasionally happen that the claim is made against or by someone who is not originally named as a party. These may create some difficult situations, but certainly, they are not absolute obstructions to law/the arbitration agreement. Arbitration, thus, could be possible between a signatory to an arbitration agreement and a third party. Of course, heavy onus lies on that party to show that, in fact and in law, it is claiming 'through' or 'under' the signatory party as contemplated under Section 45 of the 1996 Act. Just to deal with such situations illustratively, reference can be made to the following examples in Law and Practice of Commercial Arbitration in England (Second Edn.) by Sir Michael J. Mustill: "1. The claimant was in reality always a party to the contract, although not named in it.

2. The claimant has succeeded by operation of law to the rights of the named party.

3. The claimant has become a part to the contract in substitution for the named party by virtue of a statutory or consensual novation.

4. The original party has assigned to the claimant either the underlying contract, together with the agreement to arbitrate which it incorporates, or the benefit of a claim which has already come into existence."

71. Though the scope of an arbitration agreement is limited to the parties who entered into it and

those claiming under or through them, the Courts under the English Law have, in certain cases, also applied the "Group of Companies Doctrine". This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement. ['Russell on Arbitration' (Twenty Third Edition)].

72. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, 'intention of the parties' is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties.

73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The Court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the Court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the Court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed.

103. Various legal basis may be applied to bind a non-signatory to an arbitration agreement.

103.1 The first theory is that of implied consent, third party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities.

103.2 The second theory includes the legal doctrines of agent- principal relations, apparent authority, piercing of veil (also called the "alter ego"), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law.

104. We may also notice the Canadian case of The City of Prince George v. A.L. Sims & Sons Ltd. [YCA XXIII (1998), 223] wherein the Court took the view that an arbitration agreement is neither inoperative nor incapable of being performed if a multi-party dispute arises and not all parties are bound by the arbitration agreement: the parties bound by the arbitration agreement are to be referred to arbitration and court proceedings may continue with respect to the other parties, even if this creates a risk of conflicting decisions.

105. We have already discussed that under the Group of Companies Doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties. "

6.4. We are dealing with the better case than the one dealt with by the Apex Court cited supra. The undertaking does refer to the appellants and put them in the same basket as that of respondent No.2. Therefore, the appellants cannot contend that the agreement is inoperative on the sole basis that they are not signatories in a literal sense. This is an unsustainable technical plea to avoid participation before the respondent No.3.

6.5. The purchase orders produced by the respondent No.1 in pursuant to the direction of the Court will not help the case of the appellant. The purchase orders have already been mentioned in the undertaking. Invoices have also been defined therein. The appellant No.2 did not deny the factum of supply. In pursuant to the supply there is also no denial of transfer made.

6.6. The decision relied upon by the appellants are not cases in point. In INDOWIND ENERGY LTD., VS WESCARE INDIA LTD., AND ANOTHER ((2010) 5 Supreme Court Cases 306), the Apex Court was dealing with Section 11 of the Act which comes under Part-I. Similarly in ECONOMIC TRANSPORT ORGANISATION VS. CHARAN SPINNING MILLS ((2010) 4 Supreme Court Cases) 114) the Apex Court was dealing with the Consumer Protection Act. The issue was on the interpretation of Contract of Subrogation in a insurance policy. So also the facts of the case in DURO FELGUERA SA VS. GANGAVARAM PORT LTD., ((2017) 9 Supreme Court Cases 729). Even here the Apex Court was concerned with Section 11 of the Act, which comes under Part I. In this connection, it is to be noted that the Apex Court in AMEET LALCHAND SHAH AND OTHERS VS. RISHABH ENTERPRISES AND OTHERS (CIVIL APPEAL NO.4690 OF 2018 (Arising out of SLP © No.16789 of 2017) decided on 03.05.2018 reported in MANU/SC/0501/2018 was pleased to held that the principle laid down in CHLORO CONTROLS INDIA PRIVATE LIMITED cited supra can also be applied for Section 8 of the Act as well. The following are the relevant paragraphs.

21.....What is evident from the facts and intention of the parties is to facilitate procurement of equipments, sale and purchase of equipments, installation and leasing out the equipments to Dante Energy. The dispute between the parties to various agreements could be resolved only by referring all the four agreements and the parties thereon to arbitration.

22. Parties to the agreements namely Rishabh and Juwi India:- (i) Equipment and Material Supply Agreement; and (ii) Engineering, Installation and Commissioning Contract and the parties to Sale and Purchase Agreement between Rishabh and Astonfield are one and the same as that of the parties in the main agreement namely Equipment Lease Agreement (14.03.2012). All the four agreements are interconnected. This is a case where several parties are involved in a single commercial project (Solar Plant at Dongri) executed through several agreements/contracts. In such a case, all the parties can be covered by the arbitration clause in the main agreement i.e. Equipment Lease Agreement (14.03.2012).

48.The basic principle which must guide judicial decision-making is that arbitration is essentially a voluntary assumption of an obligation by contracting parties to resolve their disputes through a private tribunal. The intent of the parties is expressed in the terms of their agreement. Where commercial

entities and persons of business enter into such dealings, they do so with a knowledge of the efficacy of the arbitral process. The commercial understanding is reflected in the terms of the agreement between the parties. The duty of the court is to impart to that commercial understanding a sense of business efficacy."

7. Section 45 of the Act 26 of 1996

Though the learned Senior Counsel appearing for the respondent No.1 made submission on the maintainability of the appeal qua an order allowing an application filed under Section 45 of the Act, we do not propose to go into the same for the reason that even assuming the same can sustain in the eye of law, the appeals as against the other applications are certainly maintainable. Secondly, invoking Section 45 of the Act 26 of 1996 and the order passed therein are consequential. To be noted, the respondent No.1 has already initiated the process by invoking Clause 9 of the undertaking before the respondent No.3. Thus, there is nothing wrong in directing the appellants to participate in the proceedings before the Respondent No.3. This is, even assuming that the application under 45 is not maintainable. The learned single Judge has rightly took into consideration of the undertaking given and its effect on the appellants.

8. Conclusion:

In fine, we do not find any merit in these original side appeals. Accordingly, they are dismissed. No costs. Consequently, connected miscellaneous petitions are also dismissed.

Sd/-

Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

raa

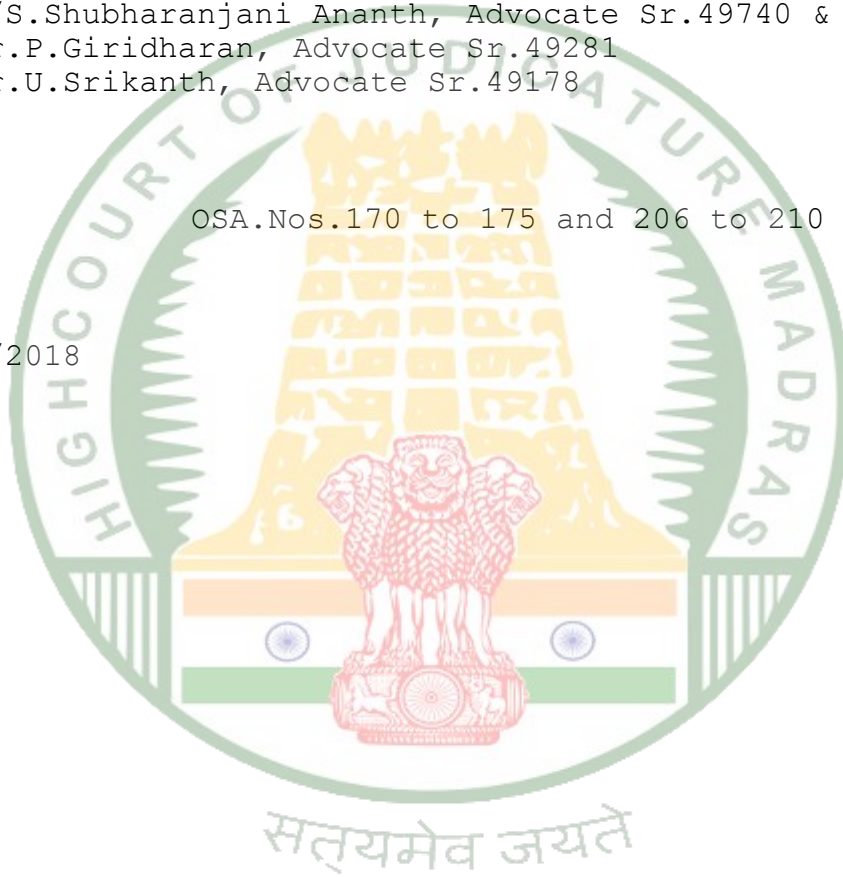
To:

The Sub. Asst. Registrar
Original Side,
High Court,
Madras.

+2cc to M/S.Shubharanjani Ananth, Advocate Sr.49740 & 49179
+1cc to Mr.P.Giridharan, Advocate Sr.49281
+1cc to Mr.U.Srikanth, Advocate Sr.49178

OSA.Nos.170 to 175 and 206 to 210 of 2018

rv[col]
srg 27/08/2018



WEB COPY