IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **17.10.2024**

CORAM

THE HONOURABLE MR.JUSTICE **M.SUNDAR**
and
THE HONOURABLE MRS.JUSTICE **K.GOVINDARAJAN THILAKAVADI**

O.S.A No.152 of 2020
&
C.M.P.No.7326 of 2020
in
O.S.A No.152 of 2020

Indowind Energy Ltd.,
incorporated under the Provisions
of the Companies Act, 1956 and having its
Registered Office at
IV Floor, Kothari Buildings
114, Mahatma Gandhi Salai
Nungambakkam, Chennai - 600 034 ... Appellant

Vs.

The Bank of New York Mellon
a Company incorporated in New York
under the laws of the state of New York
Having its Registered Office at One Wall Street
New York, NY 102 68 and having its Principal
Office at One Canada Square, 40th Floor
London, E14, 5AL, United Kingdon through its
Attorney Mr.Navneet Singh .. Respondent

Original Side Appeal filed under Order 36 Rule 1 of Original Side Rules read with Clause 15 of Letters Patent to set aside the judgment and decree dated 20.05.2020 in C.P.No.172 of 2011.

For Appellant : Mr.N.Murali Kumaran
Senior counsel
for Mr.R.Gopinath

For Respondent : Mr.Arun Karthik Mohan
of M/s.Mcgan Law Firm

JUDGMENT

(Judgment of the Court was delivered by **M.Sundar, J.**)

Captioned intra-court appeal, for all practical purposes is a vintage matter, if not ancient. It is vintage because the epicenter is a Company Petition viz., C.P.No.172 of 2011, which was filed in the Company Court (on the Original Side of Madras High Court) on 23.11.2011 more than one decade and two years ago. In about one month from now, it will be 13 years from the date of filing of the company petition. This 'C.P.No.172 of 2011' shall be referred to as 'said CP' for the sake of convenience and clarity.

2. The said CP is a typical creditors winding up petition. In the classic sense, it is a petition under Section 433 (e) and (f) of 'the Companies Act, 1956' [hereinafter 'said Act' for the sake of convenience and clarity].

3. Before proceeding further, this Court makes it clear that it is acutely conscious that vide THE COMPANIES ACT, 2013 (18 of 2013) and THE COMPANIES (AMENDMENT) ACT, 2020 (29 of 2020), both of which are conditional legislations, many new provisions have since kicked in. 'THE COMPANIES ACT, 2013' shall be referred to as 'New Act' and 'THE COMPANIES (AMENDMENT) ACT, 2020' shall be referred to as 'Amendment Act', both for the sake of brevity and convenience. It is not necessary to delve into the New Act or the Amendment Act thereat, which are conditional legislations and as to the question whether equivalents sub-sections (e) and (f) of Section 433 of said Act have kicked in, as there is no disputation or contestation that said CP is governed by said Act and not by the New Act.

4. Reverting to the case on hand, 'Bank of New York Mellon' [hereinafter 'said Bank' for the sake of convenience] is the creditor petitioner and 'Indowind Energy Ltd.,' [hereinafter 'said Company' for the sake of convenience] is the Company which is sought to be wound up.

5. Short facts are that said Company is engaged in generating power from wind; that said Company issued an Offer Circular on 13.12.2007 announcing issue of 2.5% convertible bonds, which are also known as Foreign Currency Convertible bonds to the value of 30 Million

USD [USD 30,000,000]; that the bonds were to mature on 22.12.2012 with interest at 2.5% per annum payable semi-annually on the 6th and 12th month of each calender year after the issue date; that it is to be noted that issue date is 21.12.2007; that it is the case of the said Bank that from second semi-annual interest due on 21.12.2009, the said Company had not paid interest that had become due and payable on the scheduled dates; that according to said Bank, this default continued for 5 days in each of the instances and became an event of default; that notices in this regard were exchanged between said Bank and said Company; that in the exchange of notices, said Company contended that it had attempted to re-structure the bond in the year 2009; that all bond holders were put on notice about such re-structuring but the formal re-structuring had not taken place; that it is under such circumstances, said CP was filed by said Bank.

6. This Court, having set out the factual matrix in a nutshell, now proceeds to capture the trajectory of the matter in the Company Court.

7. The Company Court, on institution of said CP, issued notice and after hearing said Company, passed an order admitting the winding up petition, restraining said Company from transferring, alienating,

encumbering or dealing with immovable assets and directed publication in two Newspapers; that this is vide order dated 20.05.2020, this 20.05.2020 order has been called in question before us and therefore, the same shall be referred to as 'impugned order' for the sake of convenience and clarity. The said Company has filed the captioned OSA assailing the impugned order.

8. Notwithstanding myriad grounds in the memorandum of grounds of appeal, Mr.Murali Kumaran, learned Senior Advocate instructed by Mr.R.Gopinath, learned counsel of M/s.Mcgan Law Firm appearing for the appellant (to be noted, said Company is the appellant) made crisp submissions by predicating captioned appeal on three points and they are as follows:

(a) Company Court which made the impugned order lacks territorial jurisdiction;

(b) the Power of Attorney given in favour of an individual on the basis of which said Bank filed CP was not renewed; and

(c) that the liability itself is disputed.

9. Elaborating on the aforementioned submissions, learned Senior counsel submitted with regard to Point No.1 that said Bank is situate in United Kingdom, the convertible bonds are listed in Singapore Stock Exchange and therefore, there is no territorial jurisdiction. On Point No.2, it was pointed out that the Power of Attorney is valid for a period of one year and thereafter it was neither renewed nor resuscitated. On the third point as regards liability, it was submitted that as a bonafide dispute has arisen, it is not a debt.

10. In response to the aforesaid three points, Mr.Arun Karthik Mohan, learned counsel for said Bank submitted that as regards first point, the said Company is an Indian Company incorporated in India under Indian Law (Public Limited Company) and therefore, Indian Courts alone will have jurisdiction qua a winding up petition. In support of this submission, learned counsel pressed into service ***Sterlite Industries*** case [***Haryana Telecom Ltd., Vs. Sterlite Industries (India) Ltd.,*** reported in ***(1999) 5 SCC 688***] to say that winding up is *de hors* contractual terms. As regards the second point turning on Power of Attorney, it was pointed out that the Power of Attorney is dated 19.09.2011, said CP was filed on 23.11.2011 and therefore, said Power of Attorney was very much in force on the date of filing of the said CP.

On the third point, it was pointed out adverting to the *inter se* correspondence between said Company and said Bank, more particularly sub-paragraphs (f) to (n) of Paragraph 18 captioned 'Discussion' of the impugned order that the Company Court has come to the conclusion that *prime facie* there is a debt and on that basis ordered admission, publication (advertisement) and interim order against alienation.

11. This Court carefully considered the afore-referred points, our discussion and dispositive reasoning is as follows:

i) As regards the first point, the ***Sterlite Industries*** case pressed into service by learned counsel for said Company is really one pertaining to Section 8 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' [hereinafter 'A and C Act' for the sake of brevity] and not a winding up petition. In this context, Hon'ble Supreme Court held that power to order winding up of a Company is contained under the Companies Act and it is conferred on the Court and that an AT (Arbitral Tribunal) notwithstanding any agreement between the parties, would have no jurisdiction to order winding up of a Company. Therefore, it is more on arbitrability of a creditors winding up petition. In this regard, we respectfully remind ourselves of declaration of law in ***Padma Sundara Rao*** case ***i.e., Padma Sundara Rao Vs. State of Tamil Nadu*** reported in ***(2002) 3 SCC 533.*** In ***Padma Sundara Rao,*** on facts, land acquisition proceedings vide Land Acquisition Act, 1896 were put in issue and the question as to whether the State would get a fresh period for making a declaration under Section 6 when a 4(1) notification is quashed arose. In this context, Constitution Bench of Hon'ble Supreme Court laid down the manner in which precedents have to be relied on. This is captured in paragraph 9 of ***Padma Sundara Rao*** case and the same reads as follows:

> *'**9.**Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in Herrington v. British Railways Board [(1972) 2 WLR 537 : 1972 AC 877 (HL) [Sub nom British Railways Board v. Herrington, (1972) 1 All ER 749 (HL)]]. Circumstantial flexibility, one additional or different fact may make a world of difference*

between conclusions in two cases.'

If ***Padma Sundara Rao*** principle is applied, ***Sterlite Industries*** case does not come to the aid of said Bank. Be that as it may, the principle that the claim in a petition for winding up is not for money and that petition of this nature under the Companies Act i.e., said Act in this case, would be to the effect that the Company has become commercially insolvent and therefore, should be wound up is indisputable. The further principle that the power to order winding up of a company is contained in Companies Act and is conferred on the concerned Court is also indisputable. Therefore, applying this simple logic that said Company is a Public Limited Company incorporated in India under said Act, there is no difficulty in accepting the submission that power to entertain and order winding up (if that be so) qua said Company is only with the Company Court in India. This by itself draws the curtain on first point on territorial jurisdiction.

ii) The above takes us to the next point on Power of Attorney. This Court finds that there is no disputation or contestation that Power of Attorney is dated 19.09.2011. It is for a period of one year and therefore, it was valid on the date of filing of the said CP i.e., on 23.11.2011. The fact that it was thereafter not renewed is a matter which would fall for consideration when the said CP progresses further and that cannot be a basis for testing the impugned order of admission, advertisement and interim order qua alienation. Therefore, it is the end of the road as regards the second point.

iii) This takes us to the third point on liability itself being disputed. A careful perusal of the impugned order brings to light that in sub-paragraphs (f) to (n) of Paragraph 18 captioned 'Discussion', Company Court has elaborately gone into the exchange of notices between the parties and concluded that there is a *prima facie* reason to believe that there is a debt. In any event, there should be proof of debt under Rule 149 of 'THE COMPANIES (COURT) RULES, 1959' [hereinafter 'said Company Court Rules' for the sake of convenience] and Rule 149 of said Company Court Rules reads as follows:

*'149. **Proof of debt** – (1) In a winding-up by the*

Court, every creditor shall, subject as hereinafter provided, prove his debt, unless the Judge in any particular case directs that any creditors or class of creditors shall be admitted without proof.

(2) Formal proof of the debts mentioned in paragraph (d) of sub-section (1), of section 530 shall not be required, unless the Official Liquidator shall in any special case otherwise direct, in a winding-up by the Court.'

Therefore, this argument really does not cut ice or to put it differently, it does not pass muster in assailing the impugned order which is one for admission of CP, ordering of publication and an interim order qua alienation of assets of said Company. This means that the third point also does not enure to the benefit of appellant i.e., said Company.

12. Before we write the concluding part of this order, we deem it appropriate to recollect that there is no disputation or contestation before us that said CP is governed by said Act and not by New Act as already alluded to supra. To put it differently, both learned counsel submitted in unison in one voice that said CP will be governed by said Act and not New Act. This means that said Company Court Rules would come into play. Said Company Court Rules consists of about 361 Rules. To be noted, said Company Court Rules is a set of Rules made by

Hon'ble Supreme Court of India (after consulting High Courts) in exercise of Rule making power *inter alia* under Sub-sections (1) and (2) of Section 643 of said Act. In this said Company Court Rules, entire Part III consisting of Rules 95 to 338 (244 Rules) deals with winding up. To be noted, Part III under which Rules 95 to 338 sit in codification has been captioned WINDING-UP (Winding-up by Court).

13. Let us look at some of the Rules that are relevant for the case on hand. Rules 95 and 96 read as follows:

> *'R.95.* ***Petition for winding-up*** *- A petition for winding-up a company shall be in Form No.45, 46 or 47, as the case may be, with such variations as the circumstances may require, and shall be presented in duplicate. The Registrar shall note on the petition the date of its presentation.'*
>
> *'R.96.* ***Admission of petition and directions as to advertisement*** *- Upon the filing of the petition, it shall be posted before the Judge in Chambers for admission of the petition and fixing a date for the hearing thereof and for directions as to the advertisements to be published and the persons, if any, upon whom copies of the petition are to be served. The Judge may, if he thinks fit, direct notice to be given to the company before giving directions as to the advertisement of the petition.'*

Rule 149 as alluded to supra captioned Proof of debt, reads as follows:

'Rule 149. ***Proof of debt -***

(1) In a winding-up by the Court, every creditor shall, subject as hereinafter provided, prove his debt, unless the Judge in any particular case directs that any creditors or class of creditors shall be admitted without proof.

(2) Formal proof of the debts mentioned in paragraph (d) of sub-section (1), of section 530 shall not be required, unless the Official Liquidator shall in any special case otherwise direct, in a winding-up by the Court.'

14. Therefore, the question of Power of Attorney not being extended which turns on facts and liability itself being disputed can be gone into *inter alia* vide Rule 194 of said Rules. One of the reasons is, the matter turns heavily on facts. Another important reason is, the impugned order is an order of admission and advertisement albeit along side a interim order restraining alienation qua assets of the said Company and therefore, it is a *prima facie* view and this *prima facie* view will be subject to what the Company Court decides as the matter progresses and when the said CP goes through the legal drill vide the procedure laid down in said Company Court Rules.

15. In the light of the narrative, discussion and dispositive reasoning set out supra, it is clear that all the three points which were urged by the appellant are not cut ice with us in the captioned OSA and therefore captioned OSA fails. Consequently, captioned CMP thereat also perishes with the OSA. However, the observation regarding the legal drill when the CP progresses is the window in the case on hand.

Captioned OSA and CMP thereat are dismissed albeit with the window in the form of observation supra. There shall be no order as to costs.

(M.S.J.) (K.G.T.,J.)
17.10.2024

Index:Yes/No
Neutral Citation: Yes/No
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