Rrb Energy Limited vs Vestas Wind Systems And Anr. on 15 April, 2015

Author: V.K. Shali

Bench: V.K. Shali

* HIGH COURT OF DELHI AT NEW DELHI

\+ C.S. (OS) No.999/2014

Decided on : 15th April, 2015

RRB ENERGY LIMITED ..... Plaintiff

Through: Mr. P.V.Kapur, Sr.Adv. with
Mr.Samiron Borkataky,
Mr.Indranil Ghosh,
Mr.Tashi Sherpa,
Mr.Sidhant Kapur,
Mr.Abhay Kapur, and

[

Mr. Biswajit Choudhury, Advocates.

Versus

VESTAS WIND SYSTEMS AND ANR. ... Defendants

Through: Mr. Sandeep Sethi, Senior Advocate with
Mr. Sulabh Rewari,
Mr. Arjun Pall, and
Ms.Poorvi Satija
Advocates for D-1.

Mr. Raj Shekhar Rao,
Mrs. Tine Abraham,
Mr. Aravind Varma and
Mr.Saurajay Prakas Nanda, Advocates
for D-2.

CORAM:
HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J.

IA No.6426/2014 (u/O 39 Rs 1 & 2 r/w Sections 94 & 151 CPC)

1. The present order shall dispose of application bearing IA No.6426/2014 under Order 39 Rule 1 & 2 CPC read with Section 94 & 151 CPC filed along with the main suit.

CS(OS) No.999/2014 Page 1 In the main suit, the plaintiff has prayed for the following reliefs

a) Pass a decree for declaration that the memorandum of understanding dated 23.01.2012 is a legal, valid and binding agreement between the plaintiff and the defendant No.1 .

b) Pass a decree of permanent injunction restraining the defendant No.1 from proceedings with the ICC Case No.19554/CYK.

2. In order to appreciate the facts and the issue involved, it would be better to refer to the parties by their initial names because there is other litigation pending in this very court where the defendant No.1 is the plaintiff and the defendant No.2 in the present case, is the defendant No.3 and plaintiff is the defendant No.1 in those proceedings. In those cases there is one more party Rakesh Bakshi who along with ECO RRB is alleged to be controlling 99% shares of the plaintiff in the present case. These suits initiated by defendant No.1 are bearing No.1448 and 1449/2013. The four parties to which three would be referred to are plaintiff as 'RRB', defendant No.1 as 'Vestas' and the defendant No.2 in the present suit as 'Henrik Norremark'. The fourth party is Mr.Rakesh Bakshi who is not a party in present case.

3. RRB is a company duly incorporated on 1st December 1987 under the laws of India and was formerly known as Vestas RRB India Limited. The plaintiff was originally incorporated as a Joint Venture between RRB Consultants and Engineers Private Limited and the Vestas for the purpose CS(OS) No.999/2014 Page 2 of manufacturing Vestas type Wind Electric Generators ('WEG' for short).

4. The Vestas is a company incorporated under the laws of the Denmark and is engaged in the business of manufacturing, selling and installing wind turbines and WEG's. The Henrik Norremark is the former Chief Financial Officer of the Vestas.

5. During the subsistence of the aforesaid joint venture agreement, Vestas is alleged to have entered into an agreement with NEG Micon A/S during the year 2004, which was a wholly owned subsidiary in India, namely NEG Micon India Pvt. Ltd. As a consequence of which disputes arose between the parties (RRB and Vestas) leading to the signing of a Settlement Agreement dated 11th May 2006 to settle the differences.

6. In accordance with the aforementioned Settlement Agreement, the plaintiff continued to use the name 'VERB' following the exit of the Vestas and the name was subsequently changed to RRB Energy Limited with effect from 25th April 2008.

7. Post the settlement agreement the RRB and the Vestas continued their commercial relationship and subsequently entered into two more Memorandum of Understandings dated 18th September 2011 and 23rd January 2012, which were signed by the Henrik Norremark who was the then Chief Financial Officer (hereinafter referred to as 'CFO') of the CS(OS) No.999/2014 Page 3 Vestas. Another MOU dated 30th September 2011 was also entered into between a subsidiary of the Vestas, namely Wind Power Invest A/S and an associate company of the Plaintiff, namely Eco RRB Infra Private Limited. The said MOU was also signed by Mr. Henrik Norremark herein for and on behalf of the subsidiary of Vestas.

8. Disputes and differences arose between the RRB and the Vestas, and their subsidiary/ associate companies wherein the Vestas has questioned the veracity, genuineness and the legality of the aforementioned three MOU's purported to have been signed between them.

9. The MOU's dated 18th September 2011 and 23rd January 2012 are the subject matter of CS(OS) No. 1448 of 2013 filed by the Vestas while the MOU dated 30 September 2011 is the subject matter of CS (OS) No. 1449 of 2013 filed by the subsidiary of Vestas. It may also be pertinent here to mention that on 23.01.2012 there were two MOUs signed between the parties, one MOU was for writing off the debt and the other for rescheduling the repayment by RRB to Vestas.

10. The RRB and Mr. Bakshi have been arrayed as defendant Nos. 1 & 2 respectively in the aforesaid suits while Mr. Henrik Norremark has been impleaded as defendant no. 3 in the said suits.

11. In both the aforementioned suits the Vestas has prayed for a grant of declaration to the effect that MOU's are void and the same should be cancelled on the ground that Mr. Henrik Norremark was not authorised CS(OS) No.999/2014 Page 4 to sign the above stated 3 MOU's and the same have been executed fraudulently and without any legal authority and in collusion with RRB, but it may be pertinent hereto mention that in Suit No.1448 Vestas have not specifically stated which of the two MOUs dated 23.01.2012, it wants to be declared a null and void meaning thereby that in the absence of the same, both the MOUs purported to have been executed on 23.01.2012 are being assailed by the Vestas.

12. It may be pertinent here to reproduce the exact para in Suit No.1448 to see what has been alleged by Vestas with regard to Henrik Norremark, its CFO and RRB.

> "7: The Plaintiff (Vestas) states that Defendant Nos. 1 to 3 (*RRB, Mr.Rakesh Bakshi and Henrik Norremark) have colluded and connived With each other to perpetrate a fraud of a grave and egregious nature whereby they have jointly in collusion with each other purported to write off Rs.29,90,00,000 (Rupees Twenty Nine Crores and Ninety Lakhs, only) and DKK 1,296,749 (Danish Kroner One Million Two Hundred and Ninety Six Thousand Seven Hundred and Forty Nine only) owed to the Plaintiff by purported Memorandums of Understanding ("MOUs") dated 18 September 2011 and 23 January 2012. Defendant Nos. 2 and 3 along with an RRB Group Company ECO RRB also entered into a fraudulent scheme, by a purported MOU dated 30 September 2011 (which is the subject matter of a separate suit bearing no. 1449), under which huge sums of money being EURO 14,586,970 (EURO Fourteen Million Five Hundred and Eighty Six Thousand Nine Hundred and Seventy One Only}, then amounting to Rs.95,28,99,529/- (Rupees Ninety Five CS(OS) No.999/2014 Page 5 Crores Twenty Eight Lakhs Ninety Nine Thousand Five Hundred and Twenty Nine Only) was remitted to ECO RRB and Defendant No. 2 without the knowledge or authority of Plaintiff, and/or its subsidiary Wind Power Invest A/S. The Defendants have by a secret scheme of deceit, connived amongst themselves to execute the aforesaid two MOUs which are the subject matter of the present suit in order to defraud the Plaintiff of its rightful and admitted dues thereby causing wrongful loss

to the Plaintiff and wrongful gain to themselves.

82. The Plaintiff further states that to Defendant Nos. 1 and 2's knowledge, Mr. Norremark had no authority on behalf of the Plaintiff to sign and execute the purported MOU dated 23 January 2012 and was in clear contravention to the signature rules at Vestas."

(* mark has been put to clarify the names of the parties.)

13. A perusal of the aforesaid two paras clearly shows that the Vestas are alleging fraud, deceit and collusion which is of grave and egregious nature between RRB and its employee Henrik Norremark in signing the MOU dated 23.01.2012 which includes both MOUs. It is further alleged that because of these MOUs a wrongful loss has been caused to Vestas and a wrongful gain to RRB. A thing is said to be done fraudulently according to Section 52 of the Indian Penal Code, 1860 in case it causes wrongful loss to one and/or wrongful gain to the other. But it is not sine qua non for making a case of fraud if it causes only wrongful loss to one party who is the aggrieved party.

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14. By virtue of this MOU the Vestas is purported to have written off Rs. Approximately 30 crores. It is also alleged by this very MOU and the MOU dated 18.09.2011, Sh.Rakesh Bakshi and Mr.Henrik Norremark along with RRB group of companies had entered into a fraudulent scheme under which a huge sums of money being equivalent to almost 96 crores was remitted to ECO RRB, the predecessor of the RRB Company.

15. So far as Henrik Norremark is concerned, he has already filed his reply in both the suits i.e. 1448 and 1449 initiated by Vestas. He has taken the stand that he had served CFO in Vestas for almost 18 years and during this tenure, he had signed nearly 700 contracts for Vestas. During this period no special power of attorney was ever required to be obtained by him or actually obtained by him as it was incongruous to his very appointment and the purpose for which he was appointed. It is stated by him that there were three exceptions only to his when an opposite side has asked for a specific authority. Also in these three cases, the contract value was exceptionally high being well over 842 crores or so, thus, in both these cases Henrik has owned the documents signed by him on 23.01.2012 and other documents.

16. The present suit concerns one of the MOU dated 23rd January 2012 ("Suit MOU" for short) entered into between the RRB and the Vestas which was also signed by Mr. Henrik Norremark on behalf of the Vestas.

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17. RRB has averred that the Vestas has denied the validity of the Suit MOU that is dated 23.01.2012 and has further disputed the signatures of Mr. Henrik Norremark on the ground that they have been fraudulently affixed by the RRB.

18. RRB on the other hand has stated that Vestas is trying to seek a recovery of payment of over Rs. 30 crores by denying Mr Henrik Norremark's authority to sign the Suit MOU, Vestas has impliedly alleged his complicity in the manufacturing/ fabrication of the suit MOU.

19. For the purposes of resolution of all the disputes, between RRB and Vestas, the Settlement Agreement of 11th May 2006 under clause 11.0 provided for an Arbitration as a mode to settle disputes between the parties therein and further the MOU's also contain a similar worded arbitration which is not disputed by either parties.

20. In addition to this the MOUs both dated 23.01.2012 also contain an agreement for arbitration for disputes resolution. The MOUs read as under:

> MEMORANDUM OF UNDERSTANDING This Memorandum of Understanding. (hereinafter referred to as the MOU). is Made between Vestas Wind Systems A/S (hereinafter 'referred to as VWS), a Company .organized 'under the laws of Denmark and .having its Registered Office at' Herieager 44, 8200 Aarhus N., Denmark of the first part and RRB Energy Limited, formerly known as Vestas RRE; India ltd.:(hereinafter referred to as RRBEL), a Company 'organized under the laws of the Republic of India and having its Registered Office, .cum Works at GA-1/6-1-

Extension, Mohan Co -operative Industrial Estate, CS(OS) No.999/2014 Page 8 Mathura Road, New Delhi - 110 044 of the second part.

The expressions VWS and RRBEL wherever- the context may admit shall include 'their respective - successors, administrators, assigns, liquidators and receivers.

Whereas 'VWS and ARBEL had signed a Settlement Agreement (hereinafter referred to as the SA) .on 11 May 2006. The SA became effective on 4 September 2006 and was terminated on 12 April 2008, except, in respect of certain obligations, specifically described in the SA, which, have continued to remain In force even beyond 12 April 2008.

In terms of SA, VWS is under obligation . to provide regular, timely and uninterrupted supply .of all .material-components, parts and goods required for Its various WEG models in India and till such time that RRBEL becomes self sufficient to produce the said models at par with those produced by VWS itself.

Consequently, on request .of RRBEL, VWS and/or Its 'designated affiliate(s) have been supplying components/parts to RRBEL to meet its requirements. In this regard, VWS among others has raised an Invoice No.2631 (1) dated 25 February 2011 for DKK 1,296,749 towards installation charges of Mould. In this regard, RRBEL has represented that this invoice has to be reviewed in the light of the discussions held on 15 September 2010 whereby VWS has agreed to supply 1 No.23 meter Blade line to RRBEL and the MOU dated 18 September 2011 signed between VWS and RRBEL whereby settlement has been reached with regard to the pending obligations.

RRBEL states that the amount of this invoice is not payable to VWS and has requested VWS to take a view in the matter. Considering the discussions already held and agreement reached for supply of 1 No.23 meter blade line and settlement reached on the pending obligations and past relationship of a former joint venture partner, VWS agrees to withdraw Its Invoice No.26311 dated 25 February 2011 for DKK 1,296,749 raised earlier on RRBEL. VWS agrees to write off this amount of DKK 1,296,749 and as such RRBEL shall not be required to pay this amount to VWS.

In the case of VWS to Vestas Wind Systems a/s, headgear 44, 8200 Aarhus N Denmark, and in the CS(OS) No.999/2014 Page 9 case of RRBEL to RRB Energy Limited, GA-

1/B1 Extension, Mohan Cooperative Industrial Estate Mathura Road, Delhi-110044, India or to such other address as the party may notify in writing from time to time.

4.0 All matters arising out of relating to this MOU shall be governed by and construed in accordance with the laws in India.

5.0 To the extent permissible under Indian law, all dispute, should any develop between VWS and RRBEL arising out of or relating to this MOU or any Memorandum of Understanding in furtherance hereof or the breach, termination or in validity thereof shall be finally settled by arbitration, in the English language, in conformity with the rules of conciliation and arbitration of the International Chamber of Commerce of Paris by one or more arbitrators appointed in accordance with such rules for the time being in force. The arbitration shall take place in New Delhi, India if recourse to arbitration is asked by VWS or Copenhagen, Denmark if asked by RRBEL 6.0 This MOU shall come into force on valid execution of MOU by both the parties.

In witness whereof the parties herein have set their hands to this MOU in their capacity as authorised representative at the respective places and on the respective dates mentioned below.

For Vestas Wind System A/S For RRB Energy Limited Signature: Sd/- Signature Sd/-

Date:23.01.2012 Date:23.01.2012

Name: Henrik Norremark Name: R.K.Sachdeva"

MEMORANDUM OF UNDERSTANDING

(SUIT MOU)

This Memorandum of Understanding. (hereinafter

referred to as the MOU). is Made between Vestas Wind Systems A/S (hereinafter 'referred to as VWS), a Company .organized 'under the laws of Denmark and .having its Registered Office at' Herieager 44, 8200 Aarhus N., Denmark of the first part and RRB Energy Limited, formerly CS(OS) No.999/2014 Page 10 known as Vestas RRE; India ltd.:(hereinafter referred to as RRBEL), a Company 'organized under the laws of the Republic of India and having its Registered Office, .cum Works at GA-1/6-1- Extension, Mohan Co -operative Industrial Estate, Mathura Road, New Delhi - 110 044 of the second part.

The expressions VWS and RRBEL wherever- the context may admit shall include 'their respective - successors, administrators, assigns, liquidators and receivers.

Whereas 'VWS and ARBEL had signed a Settlement Agreement (hereinafter referred to as the SA) .on 11 May 2006. The SA became effective on 4 September 2006 and was terminated on 12 April 2008, except, in respect of certain obligations, specifically described in the SA, which, have continued to remain In force even beyond 12 April 2008.

In terms of SA, VWS is under obligation . to provide regular, timely arid uninterrupted supply .of all .material-components, parts and goods required for Its various WEG models in India and till such time that RRBEL becomes self sufficient to produce the said models at par with those produced by VWS itself.

... .

Whereas RRBEL has represented to VWS that the operations of R RRBEL have suffered due to certain internal and external factors including adverse market conditions, global meltdown, reduction in turnover, which has affected the ability of RRBEL to meet its repayment liabilities/obligations to its bankers and its suppliers. The lender Banks of RRBEL, who have sanctioned working capital facilities to RRBEL have referred the matter to a corporate debt restructuring forum for the efficient restructuring of corporate debt of RRBEL which has become overdue. RRBEL, has requested VWS to consider extending support to RRBEL in this difficult period in the form of concessions and/or grant time to pay the amount in instalments.

And whereas considering the present position of RRBEL, past relationship of a former joint venture partner and taking note of the possibilities of likely delays in recovery, VWS agrees to the following:

> a) The overall dues quantum payable by RRBEL to VWS and its designated affiliate CS(OS) No.999/2014 Page 11
>
> (s) is Euro 4667452.98 DKK 13,836.24 and USD 1804.11. RRBEL is permitted to pay the outstanding dues to VWS and its affiliates in 3 (three) equal yearly instalments. The same shall be payable without any accrual of internet and no further claim in this regard shall be entertained at any point of time whatsoever.

b) The first instalment of the outstanding dues will become payable during the year 2014 and thereafter the remaining 2 instalments will be paid during the years 2015 and 2016.

4.0 All matters arising out of relating to this MOU shall be governed by and construed in accordance with the laws in India.

5.0 To the extent permissible under Indian law, all dispute, should any develop between VWS and RRBEL arising out of or relating to this MOU or any Memorandum of Understanding in furtherance hereof or the breach, termination or in validity thereof shall be finally settled by arbitration, in the

English language, in conformity with the rules of conciliation and arbitration of the International Chamber of Commerce of Paris by one or more arbitrators appointed in accordance with such rules for the time being in force. The arbitration shall take place in New Delhi, India if recourse to arbitration is asked by VWS or Copenhagen, Denmark if asked by RRBEL 6.0 This MOU shall come into force on valid execution of MOU by both the parties.

In witness whereof the parties herein have set their hands to this MOU in their capacity as authorised representative at the respective places and on the respective dates mentioned below.

For Vestas Wind System A/S For RRB Energy Limited Signature: Sd/- Signature Sd/-

Date:23.01.2012 Date:23.01.2012

Name: Henrik Norremark Name: R.K.Sachdeva"

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21. It's the case of the plaintiff that the defendant no. 1, suppressing the Suit MOU, invoked the Arbitration Agreement contained in the Settlement Agreement and sent a request for arbitration to the ICC on 20 th June 2013 claiming that the Plaintiff is in breach of its obligations under the Settlement Agreement and accordingly claimed the payment of the outstanding dues.

22. In response, the RRB objecting to the request for arbitration. It is stated that RRB without prejudice filed its submissions on 16th August 2013 claiming that the request for arbitration was in breach of the terms of the Suit MOU and the there was no occasion for the defendant no.1 to make any monetary claim beyond the terms of the said Suit MOU. Nevertheless, the ICC decided that the arbitration should continue and the plaintiff and the defendant no. 1 have submitted their respective pleadings on, inter alia, the aforesaid issue before the arbitral tribunal.

23. The RRB has prayed before this court for a decree of declaration, that the Suit MOU dated 23rd January 2012 is a legal, valid and binding agreement between the plaintiff and the defendant no. 1. Further has prayed for a decree of permanent injunction restraining the defendant no. 1 from proceeding before the arbitral tribunal.

24. The learned counsel of the plaintiff has averred that the arbitral tribunal does not have the requisite jurisdiction to adjudicate upon the issue of genuineness and validity of the MOU dated 23.01.2014 because the CS(OS) No.999/2014 Page 13 defendant has denied the signatures of Henrik Norremark and in effect has alleged fabrication and forgery of the document by RRB and Henry Norremark, inter alia, for the reason that Mr. Henrik Norremark is neither a party to the arbitration proceedings nor is the presently under the employment of the defendant no. 1. His presence and stand is necessary to adjudicate the validity and legality of the Suit MOU as the defendant no. 1 has disputed the signatures of Mr Henrik Norremark and his authority in case it is believed that the same has been signed by him. It is further stated that by denying the signatures of Mr. Henrik

Norremark, the defendant no. 1 has impliedly alleged his complicity in the fabrication of the Suit MOU.

25. The learned counsel for the plaintiff relying on the observations made by the Apex court in Booz Allen and Hamilton Inc. V. SBI Home Finance Limited and Ors; (2011) 5 SCC 532 wherein it was held that where a dispute involves serious questions of law or complicated questions of fact, such as forgery, creation of bogus documents, manipulations and similar serious allegations of fraud which would depend Upon detailed oral and documentary evidence, such disputes can only be settled in a court and cannot be properly gone into by an Arbitrator. The Ld. Senior Counsel for the RRB has also relied upon N. Radhakrishnan v.Maestro Engineers, (2010) 1 SCC 72) and Abdul Qadir v. Madhav Prabhakar, AIR 1962 SC 406.

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26. The learned counsel for the RRB relaying on the judgment rendered in SBP & Co. Vs. Patel Engineering; (2005) 8 SCC 618 has clarified that neither the existence of an Arbitration Agreement per se nor S.5 read with S. 16 of the Arbitration Act 1996 are a "bar" to the institution or trial of a civil suit or "bar" to oust the jurisdiction of a civil court. On the institution of a suit the defendant, who claims that there exists an arbitration agreement between him and the plaintiff in respect of the subject matter of the suit, has two choices- he may acquiesce in the abandonment of the arbitration agreement and submit to the jurisdiction of the civil court or apply under S.8 of the Arbitration and Conciliation Act 1996 and request the civil court to refer the parties to arbitration. Further if such application is made then before referring or declining to refer the parties to arbitration the civil court will be "entitled to, has to and is bound to decide the jurisdictional issue raised" such as that an arbitral tribunal has no jurisdiction to decide on disputes involving allegations of fraud or clandestine operations of business or creation of bogus documents, as the Vestas has alleged in the present case.

27. It is averred by the learned counsel of the RRB that 5 other agreements have been executed between the parties and all have been signed by the Henrik Norremark on behalf of the Vestas and therefore there was no opportunity for RRB to doubt the authority of Mr. Henrik Norremark who was the CFO of Vestas.

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28. It is alleged by the learned counsel of the RRB that the Vestas has resorted to the same methodology as applied for the suit MOU for denying their execution, that is, to first feign ignorance regarding the existence of the MOU's and subsequently claim being unaware of the execution of the MOU's by any person in the office of the Vestas and finally allege lack of authority on the part of Henrik Norremark to sign the said MOU's.

29. The learned senior counsel for RRB submits that in view of the aforesaid similarity in the stand taken by the Vestas/ its subsidiary with regard to the aforesaid MOU's, it's pertinent that the same must be tried by a single forum. Multiplicity of proceedings before different forums would result in

confusion on account of inconsistent fact finding and perhaps dramatically opposite conclusions which in turn would lead to delay in justice.

30. The learned Senior Counsel of RRB further averred that Mr. Henrik Norremark presently resides in the United States/ Denmark. He is therefore not subject to the jurisdiction of the ICC or the Indian Courts and is no more an employee of the Vestas and consequently securing his presence as a witness is next to impossible for it. In order to achieve the ends of justice it is therefore warranted that this court try the matter on merits and pass an order of declaration and injunction as prayed for in the present petition.

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31. The learned Senior Counsel for RRB has clarified on the point that the present suit is not bared under S. 34, 41(h) and 41(i) of the Specific Relief Act, 196. The remedy by way of arbitration is not an equally efficacious forum because arbitral tribunal is not a competent forum to try serious allegations of fraud etc. and that Henrik Norremark who is a necessary/proper party to the dispute is not a party to the arbitration agreement. Further even though the arbitration agreement is domestic yet it is ICC arbitration and the RRB has already been made to pay substantial amount of money and fees as advance for costs.

32. The learned counsel for the Vestas has raised questions on the maintainability of the present suit. It is asserted that the suit is barred by law under S. 5 and S. 16 of the Arbitration and Conciliation Act, 1996 ("Act"). Reliance is placed on the judgement of the Apex Court in Kvaerner Cementation India Limited v/s. Bajranglal Agarwal and Another (2012) 5 SCC 214 (TAB 1) where it was held as under:

> " ..The learned single judge of Bombay High Court came to hold that in view of the Section 5 of the Arbitration and Conciliation Act, 1996 read with Section 16 thereof since the arbitral tribunal has the power and jurisdiction to make rule on its own jurisdiction, the Civil court would not pass any injunction against any arbitral proceeding." (Emphasis Supplied)

33. The learned counsel for the Vestas has further relied on the judgment delivered by the Honourable Supreme Court in SBP & Co. v/s Patel Engineering (2005) 8 SCC 618 wherein it was held that the only remedy CS(OS) No.999/2014 Page 17 available when arbitration proceedings are pending is to file objections before the tribunal under S. 16 of the Act. Thereafter if the tribunal proceeds with the matter, it is open to the parties to challenge the same tht is the award under S.34 of the Arbitration and Conciliation Act 1996.

34. The learned counsel for the Vestas has also placed reliance on the judgment of this court in Shri Roshan Lal Gupta vs. Shri Parasram Holdings Pvt. Ltd. And Anr., OMP 205/1997 and RSA 131/2002 where it was held as follows:

> 20. Section 32 of the 1940 Act, barred a suit for decision upon the existence, effect and validity of an arbitration agreement; however Section 33 thereof permitted the court to determine the existence or validity of the agreement. The 1996 Act, however, marks a change in this regard. There is no equivalent to the Sections 32 and 34 of the old Act. On the contrary, S. 16 has been introduced and S. 34 providing for recourse against an arbitral award expressly makes the validity of the arbitration agreement a ground for setting aside the arbitral award.

A peremptory S. 5 prohibiting the jurisdiction of the Courts as expressly provided under the act has also been introduced. If inspite of the said change, this court is to hold that a suit is maintainable where the contract containing the arbitration clause is challenged on the ground of forgery and the court in such suit is empowered to injunct arbitration proceeding (as otherwise no purpose would be served by such suit), in my view, it would tantamount to negating the effect of the change in the statute. It may also be noticed that the arbitration is normally provided for in commercial agreements and where under after the disputes have arisen, one of the parties is always interested in delaying the disposal of the claims of the other. In fact, the parties while providing the arbitration in commercial contracts do so for the CS(OS) No.999/2014 Page 18 reasons of expediency. If notwithstanding the aforesaid material the changes between the old and the new act, it is to be held that a suit as a present one is maintainable, it would give a tool in the hands of the party wanting to delay the disposal of the claims of the other; in such case suits would be instituted and stay of arbitration proceedings would be sought."

In addition to these judgments the Ld. Senior Counsel for the Vestas has placed reliance on following judgements: Spentex Industries Ltd. Vs Dunavant SA and Anr. ILR(2009)Supp.(1)Delhi57, Airport Authority of India vs. Hindustan Steel Works Construction Ltd. 2009 (Suppl. 1) Arb LR 343 (Delhi) (DB), Shree Krishna Vanaspati Industries (P) Ltd. Vs. Virgoz Oils and Fats PTE Ltd. & Anr. 2009 (6) RAJ 511(Del), Shree Subhalaxmi Fabrics (P) Ltd. v. Chand Mal Baradia and Others) 2005 10 SCC 704, Aurohill Global Commodities Ltd. V. Maharashtra STC Ltd. (2007) 7 SCC 120, The Handicrafts & Handlooms Exports Corporation of India Ltd v. Ashok Metal Corporation & Anr.; 2010 (117) DRJ 370, Bhushan Steel Ltd. v.Singapore International Arbitration Centre and Anr; ILR (2010) VI Delhi 295, Oval Investment Pvt.Ltd v. Indiabulls Financial Services Ltd; (2009) 4 Arb.L.R. 284; Ultra Home Constructions (P) Ltd. v.Choice Hotels International Inc.& Ors; 2012 (1) Arb L.R. 318 (Delhi), ITE India Private Ltd. v. Shree Mukesh Sharma; 2006 (1) Arb.L.R.155 and Chatterjee Petrochem v. Haldia Petrochemicals;

(2014) 1 Comp.L.J. 24 (SC). All these judgements are essentially

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deciding the issue on case to case basis with one common thread that jurisdiction of a civil court is ousted where there is an arbitration agreement between the parties even of one of the parties challenges the validity of the arbitration agreement or the competence of the arbitral forum to decide the issue.

35. The learned counsel of the Vestas has categorically stated that as far as the issue of the impleadment of Henrik Norremark goes there are catena of judgments where the court has held otherwise. For the aforesaid the learned counsel has relied on the judgment rendered in ITE India Private Limited v/s Shree Mukesh Sharma 2006 (1) Arb LR 155, wherein it was held as under:

> " By piercing the corporate veil, the court went into the issue of whether the Plaintiff Company was a party to Arbitration Agreement and held that, in light of Kvaerner, the Court must refer these questions to the Arbitral Tribunal. In the case, Plaintiff, a registered Company, approached the Court with a Suit for Declaration and Injunction against the Defendant from proceeding with the Arbitration under ICC Rules in terms of shareholders agreement between Defendant no. 1, Defendant no. 2, a company and Defendant no. 3; Defendant no. 1being the major share holder in Plaintiff Company. An ad interim injunction was sought in that matter and the stand taken by the Plaintiff was that since the Plaintiff Company was not a party to the Arbitration Agreement, the claims could not be referred to Arbitration. Per contra, Defendant no. 2 adopted the stance that Plaintiff Company was only an alter ego of defendant no. 1 who is the major shareholder in the Company. Bharti was distinguished on the point that unlike Bharti, in this case the Court CS(OS) No.999/2014 Page 20 could not come to the conclusion that the agreement was null, void or inoperative. Sukanya was distinguished on the posit that there was no question of bifurcation of claim, partially governed by the Arbitration Agreement and partially falling out of it."

36. The learned counsel for Vestas has stated by way of clarification that the bar of Section 5 of the Act may not be available in the case of an arbitration with its seat outside India pursuant to the decision in Bharat Aluminium Technical Services Inc. (2012) 9 SCC 552. However, the present arbitration proceedings have their seat in New Delhi, and the suit is therefore barred due to S.5 and S.16 of the Arbitration and Conciliation Act 1956. Moreover, this is an arbitration without the intervention of the court in which the court need not interfere.

37. The learned counsel for Vestas has averred that the plaintiff's contention that defendant no.1 should have filed an application under S. 8 of the Arbitration and Conciliation Act 1996 is entirely misconceived. It is further averred that an application under S. 8 of the Arbitration and Conciliation Act 1996 is unnecessary as the prayer seeking declaration with respect to the validity of the Suit MOU is already the subject matter of the dispute pending before the arbitral tribunal and the second prayer of injunction is nothing but a challenge to the jurisdiction of the arbitral tribunal and is also therefore not required to be referred to the arbitral tribunal as the same is seized of the matter. It is the case of Vestas that the suit impugns the arbitration proceedings and since such a suit is CS(OS) No.999/2014 Page 21 barred by law, it has preferred an application under Order VII Rule 11 of the CPC, 1908 which can also be treated as an application under Section 8(1) of the Act.

38. In furtherance of the aforementioned arguments the learned senior counsel for the Vestas has stated that the judgments relied on by the plaintiff do not apply in the instant case as in the present facts, the dispute has already been submitted by parties (by consent) to the Arbitral Tribunal for

adjudication. Further the learned senior counsel for the Vestas has stated that even if it's is presumed that an application under S.8(1) of the Arbitration and Conciliation Act 1996 ('the Act') was made S.8(3) clearly stipulates that such an arbitration can proceed pending an application under S. 8(1) of the Act. Thus it is hardly any basis to injunct the pending arbitral proceedings.

39. The learned senior counsel for the Vestas relying on the decision rendered by the Apex Court in National Insurance Company Limited vs. Boghara Polyfab Private limited (2009) 1 SC 267, wherein the honourable Supreme Court has referred to the decision in SBP and Co. Vs. Patel Engineering (2005) 8 SCC 618 and stated that such issues were for the arbitral tribunal to decide. This was particularly so, when the reference to arbitration has been made without the intervention of the Court. Reliance has further been placed on the observations made in Chloro Controls India Private Limited vs. Severn Trent Water CS(OS) No.999/2014 Page 22 Purification Inc. And Others (2013) 1 SCC 641 wherein the while approving the judgment rendered in National Insurance Company Limited, observed that the said decision is in conformity with the decision rendered in SBP & Co. (supra).

40. The learned Senior Counsel for Vestas has tried to distinguish the judgment rendered in Booz Allen and Hamiliton Inc.(supra) which has been relied upon by the plaintiff on the ground that the said case categorically states that certain cases are reserved for public fora as a matter of public policy such as disputes relating to rights and liability which give rise to or arise out of criminal offence and since the present case is a claim for money, hence the judgment rendered in the aforesaid case is not applicable to the instant case.

41. The learned senior counsel for the Vestas has also contended that RRB has submitted to the jurisdiction of the Tribunal and having done so it was too late in the day to have raised an objection regarding the jurisdiction of the Tribunal.

42. It was also contended that RRB has failed to satisfy the three requirements which must exist for the grant of an injunction and therefore they do not deserve any injunction to be granted.

43. The issues which need to be considered by this court are essentially three fold. The first issue which the court has to consider is whether the Section 5 read with Section 16 confers an absolute bar on the judicial authority to CS(OS) No.999/2014 Page 23 entertain a suit in a case where there is an arbitration clause between the parties.

44. Secondly whether the filing of an application under Section 8 of the Arbitration and Conciliation Act, 1996 is a mandatory requirement or whether an application filed under Order 7 Rule 11 CPC can be treated as an application under Section 8 of the Act.

45. The third issue is whether in a case where there are allegations of fraud, forgery, manipulation, collusion alleged by one party, the disputes are arbitrable or not and whether in the light of these broad principles, the facts of the present case warrant entertainment of the present suit for declaration and grant of permanent injunction as well as grant of temporary injunction during the pendency of the main suit.

46. There is no dispute about the fact that by now a catena of judgments have laid down that the scope of judicial intervention in cases where there is an arbitration clause is very limited. The scope of intervention is envisaged under Section 34 of the Arbitration and Conciliation Act, 1996 meaning thereby that at the initial stage if any person or a party has raised an objection with regard to the validity of the arbitration clause or the competence of the arbitral tribunal to adjudicate the dispute then under Section 16 of the Arbitration and Conciliation Act, 1996, the Tribunal itself has the jurisdiction to decide the said issue and it is not open to such CS(OS) No.999/2014 Page 24 a party to rush to the court for an adjudication. Section 5 of the Act reinforces this principle by a non obstante clause that there cannot be any judicial intervention. Suffice it would be here to refer to the observations of one of the judgments of the apex court in Kvaerner Cementation India Limited's case(supra) in this regard which are as under. Though the judgment is of 2001, it was reported in 2012, and, by that time, number of other judgments had been pronounced including Booz Allen and N.Radhakrishan.

> "1. ...The learned single Judge of Bombay High Court came to hold that in view of Section 5 of the Arbitration and Conciliation Act, 1996 read with Section 16 thereof since the arbitral Tribunal has the power and jurisdiction to make rule on its own jurisdiction, the Civil Court would not pass any injunction against an arbitral proceeding." (emphasis supplied) Section 5 of the Act is not restricted to a bar to a suit questioning the existence or validity of an arbitration agreement. Even in Kvaerner, the reference to questions pertaining to the existence or validity of the arbitration agreement are by way of examples-
>
> "3. There cannot be any dispute that in absence of any arbitration clause in the agreement, no dispute could be referred for arbitration to an arbitral tribunal. But, bearing in mind the very object with which the Arbitration and Conciliation Act, 1996 has been enacted and the provisions thereof contained in S.16 conferring the power on the Arbitral Tribunal to rule on its own jurisdiction including ruling on any objection with respect to existence or validity of the arbitration agreement, we have no doubt in our mind that the Civil court cannot have jurisdiction to go into that question.
>
> 4. A bare reading of Section 16 makes it explicitly clear that Arbitral Tribunal has the power to rule on its own jurisdiction even when any objection with respect to CS(OS) No.999/2014 Page 25 existence or validity of the arbitration agreement is raised and a conjoint reading of sub-section (2)(4) and (6) of S.16 would make it clear that such a decision would be amenable to be assailed within the ambit of S.34 of the Act.
>
> 5. In this view of the matter, we see no infirmity with the impugned order so as to be interfered by this Court. The petitioner who is a party to the arbitral proceedings may raise the question of jurisdiction of the Arbitrator as well as the objection on the ground of non-existence of any arbitration agreement in the so called dispute in question and such an objection being raised, the Arbitrator would do well in disposing of the same as preliminary issue so that it may not be necessary to go into

> the entire gamut of arbitration proceedings."

(emphasis supplied).

5. The present suit is also barred due to section 16 of the Act. It is imperative to note that the ICC arbitration proceedings have been commenced without the intervention of a civil court, be it under Section 8 or under Section 11 of the Act. In these circumstances, and pending arbitration proceedings, it is not open to plaintiff to file a suit seeking a stay against the arbitration proceedings. The Supreme Court in SBP & Co. vs. Patel Engineering (2005) 8 SCC 618 (TAB 17)(paras 12, 20 and 95) has held that the only remedy available when arbitration proceedings are pending is to file objections before the tribunal under Section 16 of the Act (which is precisely what the Plaintiff has already done). Thereafter, if the tribunal proceeds with the matter, it is open to the Plaintiff to challenge the award in terms of Section 34 of the Act."

47. However, notwithstanding the aforesaid principle that the judicial intervention cannot be there at the stage of pre-Section stage, there have been instances where the courts have entertained the suits for declaration and permanent injunction and in all such suits, there have been allegations of fraud, forgery, etc. CS(OS) No.999/2014 Page 26

48. This view has been taken as early as in the year 1962 in Abdul Qadir's case (supra) that a dispute where there are serious allegations of fraud is not an arbitrable dispute and recently in two cases, the apex court in Booze Allen & N. Radhakrishnan's cases (supra) has echoed the same views that cases where there are allegations of fraud, the dispute will not be arbitrable.

49. It may be pertinent here to refer to the observations of 246 th Law Commission Report wherein it has suggested amendments to Section 16 of the Arbitration and Conciliation Act, 1996 for incorporation of a provision to clarify the position that even in cases where there are allegations of fraud, the arbitral tribunal will have the jurisdiction to decide its own jurisdiction and arbitrate the dispute between the parties.

50. The Law Commission has taken note of the fact that there is divergence of views between the different High Courts where two views have been expressed, one is in favor of the civil court having jurisdiction in cases of serious fraud and the other view encompasses that even in cases of serious fraud, the arbitral tribunal will rule on its own jurisdiction. It may be pertinent here to reproduce the observations of the Law Commission as contained in Para 50 & 51 which are as under:

> "50. The issue of arbitrability of fraud has arisen on numerous occasions and there exist conflicting decisions of the Apex Court on this issue. While it has been held in Bharat Rasiklal v. Gautam Rasiklal, (2012) 2 SCC 144 that when fraud is of such a nature CS(OS) No.999/2014 Page 27 that it vitiates the arbitration agreement, it is for the Court to decide on the validity of the arbitration agreement by determining the issue of fraud, there exists two parallel lines of judgments on the issue of whether an issue of fraud is arbitrable. In this context, a 2 judge bench of the Supreme Court, while adjudicating on an application under section 8 of the Act, in Radhakrishnan v.

Maestro Engineers, 2010 1 SCC 72 held that an issue of 28 fraud is not arbitrable.

This decision was ostensibly based on the decision of the three judge bench of the Supreme Court in Abdul Qadir v. Madhav Prabhakar, AIR 1962 SC 406.

However, the said 3 judge bench decision (which was based on the finding in Russel v. Russel [1880 14 Ch. 'D. 471]) is only an authority for the proposition that a party against whom an allegation of fraud is made in a public forum, has a right to defend himself in that public forum. Yet, following Radhakrishnan, it appears that issues of fraud are not arbitrable.

51. A distinction has also been made by certain High Courts between a serious issue of fraud and a mere allegation of fraud and the former has been held to be not arbitrable (See Ivory Properties and Hotels Private Ltd v. Nusli Neville Wadia, 2011 (2) Arb LR 479 (Bom); CS Ravishankar v. CK Ravishankar, 2011 (6) Kar LJ 417). The Supreme Court in Meguin GMBH v.

Nandan Petrochem Ltd., 2007 (5) R.A.J 239 (SC), in the context of an application filed under section 11 has gone ahead and appointed an arbitrator even though issues of fraud were involved. Recently, the Supreme Court in its judgment in Swiss Timing Ltd v Organising Committee, Arb. Pet. No. 34/2013 dated 28.05.2014, in a similar case of exercising jurisdiction under section 11, held that the judgment in Radhakrishnan is per incuriam and, therefore, not good law."

51. A perusal of the aforesaid two paragraphs would show two/three things that Law Commission has recognized that in cases of serious fraud, courts have entertained civil suits. Secondly, it has tried to make a distinction in CS(OS) No.999/2014 Page 28 cases where there are allegations of serious fraud and fraud simplicitor and thirdly it has also taken note of the fact that the apex court has recently in Swiss Timing Ltd v Organising Committee, Arb. Pet. No. 34/2013 dated 28.05.2014 has observed that the judgment of Radhakrishnan's case (supra) was per incuriam.

52. So far as the first observation is concerned, there can be no two opinions about the same with regard to the factual position that as on date there is the grey area as regards the cases of serious fraud and fraud to which I have used the word simplicitor. I feel that the Law Commission had in mind that there may be cases where fraud is prima facie supported by way of evidence and where fraud is merely alleged. While as in the case of former perhaps the arbitral tribunal may be conceived to have no jurisdiction while as in the latter case, where there are simple allegations of fraud without there being any prima facie proof just to forestall the proceedings before the arbitral tribunal, in such cases the arbitral tribunal ought to have the jurisdiction.

53. As regards the third proposition of Swiss Timing Ltd's case (supra) wherein the apex court has observed that even in cases of fraud, the dispute is arbitrable by the arbitral tribunal and the judgment which has been rendered per incuriam. I feel that this position is clarified by a recent judgment of the apex court that the judgment in Radhakrishnan's CS(OS) No.999/2014 Page 29 case (supra) cannot be treated to be judgment being per incuriam holding that in cases of serious allegation of fraud, the dispute is not arbitrable. This is on account of the fact that, Mr. Kapur, the learned senior counsel has brought to the notice of this court a recent judgment of the apex court

rendered by Hon'ble Mr.Justice R.F.Nariman in State of West Bengal & Ors. Vs. Associated Contractors in Civil Appeal No.6691/2005 wherein his Lordship has observed that the judgment which has been rendered in Swiss Timing Ltd (supra) was a judgment rendered while dealing with Section 11(6) of the Arbitration and Conciliation Act, 1996 and Section 11 of the Arbitration and Conciliation Act, 1996 essentially confers power on the Chief Justice of India or the Chief Justice of the High Court as a designate to appoint an arbitrator which power has been exercised by another Hon'ble Judge as a delegate of the Chief Justice. This power of appointment of an arbitrator under Section 11 by the court notwithstanding the fact that it has been held in SBP & Co. Vs. Patel Engineering; (2005) 8 SCC 618 as a judicial power, cannot be deemed to have precedential value and, therefore, it cannot be deemed to have overruled the proposition of law laid down in Radhakrishnan's case (supra).

54. In addition to this, Swiss Timing Ltd's case (supra) has been rendered by Hon'ble Mr.Justice Surinder Singh Nijjar sitting singly as a delegate of the Chief Justice of India and his Lordship himself in a case titled Bihar CS(OS) No.999/2014 Page 30 State Govt. Secondary School Teachers Association v. Bihar Education Service Association & Ors.; 2012 13 SCC 33 has held that a Bench of lesser number of judges cannot overrule the ratio laid down by the larger number of judges and more so in a case where collateral points are involved, yet the Hon'ble Judge has observed that the judgment in Radhakrishan's case (supra) which was rendered by a bench of two judges as being per incuriam while pronouncing judgment in Swiss Timing Ltd's case (supra) where his Lordship was sitting singly. For all these reasons, I feel that the view expressed in Swiss Timing Ltd's case (supra) would not be applicable to the facts of the case and the dispute cannot be referred to arbitral tribunal.

55. So far as Roshan Lal's case is concerned that being a Delhi High Court judgment, I am purposely not referring to the same in the light of three apex court judgments. Therefore, the aforesaid analysis, in my considered opinion, brings me to the view that broadly speaking the jurisdiction of the civil court is barred at a pre objection stage except where there are egregious/serious allegations of fraud involved. In my view a serious allegation of fraud is the one that is prima facie supported by documentary evidence so as to prima facie convince the court that there are real allegations of fraud which need to be investigated by the court. It has also been observed in the judgments that wherever there are allegations of fraud levelled against a party, then it should be at the option CS(OS) No.999/2014 Page 31 of such a party against whom allegations of fraud are alleged that he must be able to select the forum where he would like such allegations to be decided meaning thereby whether he would like to continue with the proceedings so as to contest the allegations of fraud levelled against him in an arbitral tribunal or before ordinary civil forum and this option is to be exercised by such a party and not by a party which is levelling the allegations.

56. Now coming back to the application of these broad principles to the facts of the present case. First of all what needs to be examined is that whether there are allegations of fraud levelled in the instant case or not and whether they can be considered to be serious or not. The case of the Vestas is that there are no allegations of fraud levelled by them against RRB and it is only recovery proceedings started by them before the arbitral tribunal. The recovery proceedings have been opposed by the RRB on the ground that Vestas through its Chief Financial Officer, Mr. Henrik

Norremark had signed a MOU on 23.01.2012 waiving off some dues from the RRB and deferring the payment of the other. It is this Memorandum of Settlement dated 23.01.2012 which essentially is to be considered as to whether it is genuine and valid or not. It may be pertinent hereto mention that before a suit for declaration was filed by RRB, Vestas themselves have filed two suits bearing Nos. 1448 and 1449/2013 challenging certain MOUs including the ones having been CS(OS) No.999/2014 Page 32 executed on 23.01.2012. The Memorandum of Understanding of the said date of 23.01.2012 have been challenged by them in Suit No.1448/2013 contending that the said MOU has been forged and fabricated by their Chief Financial Officer Mr. Henrik Norremark in collusion with RRB and its controlling shareholder Mr. Rakesh Bakshi. These allegations have been reproduced by me earlier in this judgment to briefly give a flavor of the allegations levelled by them. All these MOUs are part of the same transaction and entered pursuant to the settlement dated 11.05.2006. Therefore, they are intrinsically interconnected and cannot be dealt with in isolation.

57. It may also be pertinent here to mention that in the prayer clause it has not been specified by Vestas that they want each of the two MOUs to be declared as null and void and having been forged - whether it is one which tries to waive off the dues or the other by virtue of which the dues are purported to have been re-scheduled which is involved in the present suit No.999/2014.

58. This seems to have been left deliberately as vague so as to encompass both the MOUs and even if it is assumed that they have not been left deliberately vague, the court can certainly assume that both of them are alleged to have been forged by their CFO, Mr. Henrik Norremark and the RRB. Normally speaking, even if such an allegation would have been made, it could have been said that it was the option of RRB to select the CS(OS) No.999/2014 Page 33 forum whether it would like these allegations to be tried in a civil court or before the arbitral tribunal, but in the instant case, the Vestas themselves have gone to the civil court despite their being an arbitration clause between them and RRB and made Mr. Henrik Norremark as a party, thereby they have deemed to have not only abandoned, but also waived their right to have the dispute adjudicated by an arbitral tribunal despite there being an arbitration clause. If that be so, it is not open now to Vestas in a suit for declaration filed by RRB seeking a declaration to the effect that MOU dated 23.01.2012 by virtue of which the dates have been re-scheduled being declared as legal and valid to oppose the said suit on the ground they are only denying the signatures and the competence of their Chief Financial Officer to sign the MOU. If this is permitted to be done, it will tantamount to permitting the Vestas to take a stand which is contrary to their stand taken earlier. As a matter of fact, the RRB which in the absence of the two suits filed by Vestas would have been called upon to produce prima facie evidence to show the allegation of fraud being got a clear advantage on account of the admission having been made by Vestas that the documents are forged by filing two suits themselves in which the theme of the matter is that all the MOUs signed on their behalf by Chief Financial Officer Mr. Henrik Norremark were actually forged, fabricated and signed without authority and in collusion with RRB and Mr. Rakesh Bakshi. Therefore, this admission on the part CS(OS) No.999/2014 Page 34 of the Vestas clearly makes it a case of serious fraud, which cannot be subject matter of an arbitrable dispute before the tribunal.

59. I have also been informed that as a matter of fact, Vestas have already lodged a criminal complaint which has resulted in investigation against Mr. Henrik Norremark in Denmark where the

Vestas is registered.

60. This fact is also recorded in the order sheet of Suit No.1449/2013.

61. It is no argument to contend that even if Mr. Henrik Norremark is not a party to the arbitration agreement or is not made a party before the arbitral tribunal because he is neither a necessary nor proper party as alleged by Vestas, he could have been summoned as a witness by RRB.

62. In my view, this submission is without any merit. This is on account of the fact that Mr. Henrik Norremark is not only a proper but as a matter of fact necessary party because Vestas themselves are alleging that Mr. Henrik Norremark their Chief Financial Officer has forged, fabricated and without any authority signed the documents namely the aforesaid MOUs in collusion with RRB and its officials. Therefore, Mr. Henrik Norremark is a necessary party. A party is said to be a necessary party when its presence is necessary for the complete adjudication of the dispute between the parties. In the instant case, in order to have the complete adjudication of the dispute between RRB and Vestas, the CS(OS) No.999/2014 Page 35 presence of Mr. Henrik Norremark is very essential because he is the fulcrum of the entire dispute between the parties.

63. It may also be pertinent here to refer that Mr. Henrik Norremark has already filed his written statement in Suit No.1448 and 1449 of 2013 denying the allegations of forgery or fraud or collusion or lack of authority. As a matter of fact, he has taken a categorical stand that during his tenure for 18 years for which he has worked with Vestas, he signed as many as over 700 contracts and in all such contracts signed for and on behalf of Vestas, at no point of time except in three, he was required to obtain authorities and even in three cases where he had obtained special authority to sign the contract or the settlement or the document as the case may be, these were the cases where the opposite side had asked for the authority and in all these three cases, the value of the contract is stated to be well over Rs.832 crores, meaning thereby that he has denied the allegation of forgery and it was not necessary for RRB to summon him as a witness before the Tribunal or that the RRB had an opportunity before the Tribunal to summon him as a witness. On the contrary since Vestas are denying that the MOU has not been signed by Mr. Henrik Norremark, this is a fact especially within their knowledge, it must be established by them alone and not by RRB.

64. In the light of the aforesaid facts, I feel that not only there are allegations of fraud in the instant case, but there are allegations of serious fraud, CS(OS) No.999/2014 Page 36 forgery, manipulation and collusion between RRB and Mr. Henrik Norremark as alleged by the respondent and it cannot be treated as a simplicitor case of recovery of Rs.30 crores before the arbitral tribunal.

65. This forgery etc. is admitted by the Vestas themselves by filing two suits and it is not open for them to now wriggle out of their stand and contest the maintainability of the present suit because the allegations of fraud can be decided only in a civil fora and not in an arbitral tribunal. [[[[

66. It may also be pertinent here to mention that not only there is a waiver and abandonment by filing the suits regarding the jurisdiction of the arbitral tribunal by the Vestas, but they have also chosen not to file an application under Section 8 which is sine qua non for the purpose of ousting

the jurisdiction of the civil court. The application under Order 7 Rule 11 CPC filed by them cannot be treated equivalent to the application under Section 8 in the light of the decision of the apex court in Sukanya Holdings Pvt Ltd. Vs Jayesh H Pandya & Anr. AIR 2003 SC 2252.

67. The learned counsel for Vestas has vehemently argued that the suit is barred under S.34, 41(h) and 41(i) of the Specific Relief Act, 1963 as an equally efficacious and effective remedy is available before the arbitral tribunal which is already seized of the matter and since RRB has consciously participated in the proceedings he cannot be allowed to resile CS(OS) No.999/2014 Page 37 from the same. In my view this argument holds no water on the ground that the present matter involves a serious issue of fraud and thus involves a matter of public importance which is not arbitrable. Moreover, it has been stated by the learned senior counsel appearing for RRB that their participation before the arbitral tribunal has been without prejudice to their rights in the present suit.

68. For the reasons mentioned above, I feel that the RRB has been able to establish that not only it has a prima facie good case but the balance of convenience is also in its favour and that it would suffer an irreparable loss in case the arbitral tribunal is not injuncted from proceeding with the adjudication of the dispute so raised by the Vestas in any manner to give finality to the said proceedings.

69. Accordingly, the application is allowed and the arbitral tribunal is injuncted from proceeding ahead with the matter.

70. Expression of any opinion hereinbefore may not be treated as an expression on the merits of the case.

V.K. SHALI, J.

APRIL 15, 2015

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