

IN THE HIGH COURT OF DELHI AT NEW DELHI

OMP No. 355 of 2009

Reserved on: 31st January, 2013

Decision on: 28th February, 2013

POWER GRID CORPORATION OF INDIA LTD.

..... Petitioner

Through: Mr. S.B. Upadhyay, Senior Advocate
with Mr. Sujeet Keshari, Advocate.

versus

SIEMENS LIMITED

..... Respondent

Through: Mr. C. Mukund with Mr. P.V.
Saravananaraja and Mr. Ravi Kumar, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
28.02.2013

1. The Petitioner, Power Grid Corporation of India Limited ('PGCIL'), has in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') challenged the Award dated 20th February 2009 passed by the arbitral Tribunal ('Tribunal') awarding the Respondent, Siemens Limited ('Siemens') Rs.1,96,07,224 towards cost of pile foundation along with interest thereto at 10% per annum from 11th April 2005 to 10th February 2009 and cost of arbitration in the sum of Rs.12,50,000. Siemens was also awarded post-Award interest @ 10% p.a. till the date of payment in the event the awarded sum was not paid within two months.

Background Facts

2. PGCIL floated a tender inviting bids for two contracts for its sub-station at Gorakhpur. One was a work supplies contract and the other a services contract. As part of the bidding requirement, a joint venture ('JV') was entered into between Siemens and Transformers and Electricals Kerala Ltd. ('TEKL') in a proforma prescribed by PGCIL. A power of attorney ('PoA') was also executed by TEKL in favour of Siemens in the proforma stipulated by PGCIL on 10th December 2003, simultaneous with the execution of the JV agreement whereby TEKL constituted Siemens as the lawful attorney/ authorised representative/partner-in-charge "to exercise all or any of the power for and on behalf of the JV" in respect of the contracts for which bids had been invited by the PGCIL.

3. The dispute between the parties is in relation to the services contract executed on 29th March 2004 between PGCIL and the JV of Siemens and TEKL. The services contract agreement ('SCA') was executed by PGCIL and the JV, with Siemens acting on behalf of the JV as lead partner. The SCA was for a total value of Rs.8,24,41,262. Civil works covered under the services contract were of two categories: (i) for control room and administrative building and (ii) for switch yard area covering tower foundation. For the control room building, PGCIL provided Bill of Quantities ('BOQ') and prices were on unit rate basis. There is no dispute between the parties in relation to the work done for the control room and the administrative building. While for the control room PGCIL supplied foundation drawings, it did not do so for the 400 KV sub-station tower foundation. The foundation drawings for the control room foundation

envisaged a spread foot foundation. The tower foundation was to come up within a distance of about 100 meters from the control room. According to Siemens, on the reasonable presumption that the soil condition at the location where the tower foundation was to be erected, i.e. within 100 meters from the control room would be no different, Siemens gave a bid for spread foot foundation for the tower foundation as well.

4. After the contract was awarded to Siemens, it got soil investigation done in terms of the contract between May and August 2004. On 30th September 2004, Siemens informed PGCIL that given the soil condition in the area where the tower foundation had to be erected, it would be necessary to lay a pile foundation and not a spread foot foundation. This meant that the cost of the project would substantially increase. With no response to the letter, Siemens wrote a further letter on 4th October 2004 to PGCIL seeking confirmation of Siemens incurring extra cost towards pile foundation. On 29th November 2004, PGCIL wrote to Siemens rejecting the claim for pile foundation work by stating that it was covered under the scope of the contract. PGCIL asked for rate analysis and justification for the control room foundation works so that the claim could be processed. On its part Siemens wrote another letter on 3rd December 2004 stating that PGCIL's rejection for its claim for pile work for the tower foundation was unacceptable to it and should be reconsidered.

5. The case of Siemens is that there was delay in handing over of the leveled site for construction work for even the control room and reactor block. After

nearly three and a half months by a letter dated 10th/13th January 2005 PGCIL agreed for amendment to the contract as far as the control room building-cum-administrative building was concerned. Consequently the total contract price for that portion stood revised from Rs.8,24,41,262 to Rs.8,57,69,171. As against a rate of Rs.2,950 per meter per pile PGCIL conveyed its acceptance to a rate of Rs.1348 per meter per pile as claimed by Siemens although, this was much lower than what was claimed. However PGCIL refused to accord sanction for revision of payment as far as the tower foundation was concerned. Nevertheless Siemens commenced work on entire foundation using pile foundation and completed the work, with prior intimation to PGCIL on 10th April 2005. On 11th April 2005, Siemens wrote to PGCIL relying on Clauses 35.1, 35.2 and 35.3 of the General Conditions of Contract ('GCC') which referred to unforeseen conditions and the entitlement of the contractor for reimbursement of the additional cost incurred by it.

Proceedings before the Adjudicator

6. By a letter dated 8th June 2005, Siemens informed PGCIL that if no response was received to its request, it would invoke the GCC Clause 6 under which the disputes were to be referred initially to the named Adjudicator Mr. Adarsh Kumar, Chief Engineer (Retd.), PSEB. On 8th July 2005 when no response was received from PGCIL, Siemens referred the matter to Mr. Adarsh Kumar, the named Adjudicator. On 30th August 2005, PGCIL put forth its defence before the Adjudicator justifying its refusal to reimburse the extra cost incurred on the pile foundation for the tower foundation. On 30th November 2005, the Adjudicator held in favour of Siemens. By a letter dated

28th/29th December 2005 PGCIL informed Siemens that the decision of the Adjudicator was not acceptable to it and, therefore, in terms of Clause 6.1.2 of the GCC they notified their intention to commence arbitration. It was stated that it would be communicating Siemens the name of the Arbitrator separately. According to Siemens when no further communication was received from PGCIL, by a letter dated 31st January 2006 Siemens requested PGCIL to evaluate the pile foundation work and release payment along with interest @ 15% p.a. This request was reiterated by the letters dated 27th June 2006 and 20th July 2006. It enclosed an invoice for Rs.1,96,07,224 for the amount payable by the PGCIL for the pile foundation work for the tower foundation @ Rs.1,348.97 per meter, per pile which was the rate paid for the control room foundation.

7. By a letter dated 2nd August 2006, PGCIL informed Siemens that it did intend to go for arbitration and, therefore, could not consider the claim for extra work. By letters dated 8th August and 18th December 2006, Siemens again requested PGCIL to either commence arbitration or to release payment for the pile foundation in terms of the invoices raised by Siemens.

8. On 21st February 2007, PGCIL issued a completion certificate certifying successful completion of the work in all respects. On 6th June 2007, Siemens sent a legal notice nominating one of the Arbitrators and calling upon PGCIL to nominate its Arbitrator. On 22nd June 2007, the PGCIL nominated its Arbitrator. The two nominated Arbitrators then named the third Arbitrator and the Tribunal came to be constituted.

Arbitration proceedings

9. Upon the pleadings of the parties, the following issues were framed by the Tribunal for determination:

“(1) Whether the Arbitral Tribunal has no jurisdiction to arbitrate the disputes between the parties in the absence of M/s. Transformers and Electricals Kerala Ltd. with which the claimant entered into joint venture?

(2) Whether the concept of Pile Foundation adopted by the claimant for 400 KV Tower Foundation is justified (issue suggested by Mr. Mukund).

(3) Whether the work of Pile Foundation executed by the claimant is covered within the scope of the contract which amounts to extra work (issue suggested by Mr. Upadhyay)?

(4) In view of the aforesaid issues, whether the claimant is entitled to Piling Charges amounting to Rs.1,96,07,224/- as per invoice dated 29.3.2004?

(5) Whether the claimant is entitled to any interest and, if so, on what amount, at what rate and for what period?

(6) Whether Mr. H.K. Mallick is authorized to file and verify the statement of defence on behalf of the respondent?

(7) Relief, if any.”

10. Siemens examined Mr. J.P. Singh, its Senior Project Manager and Mr. Amresh Kakar, Senior Manager as witnesses. PGCIL examined four witnesses Mr. Prabhat Rastogi, Chief Engineer of PGCIL, Mr. R.N. Prasad,

Additional General Manager, Mr. C.S. Gupta, Manager (Contract Services) and Mr. H.K. Mallick, General Manager.

11. Before the Tribunal for the first time PGCIL raised an objection that the arbitral proceedings were not maintainable. It is stated that only the JV could invoke the arbitration clause and there was no privity of contract with Siemens as such.

Award of the Tribunal

12. The Tribunal rejected the above plea by pointing out that for the work carried out as regards the control room building with pile foundation it was Siemens which raised an invoice for extra work. PGCIL made payment against the said invoice without any objection. When notices were issued by Siemens claiming the amounts its *locus* to raise such a claim was never objected to by PGCIL. Even when it demanded arbitration, PGCIL did not raise any objection that only the JV could do so. Further PGCIL itself invoked the arbitration clause before Siemens. There was nothing on record to suggest that PGCIL ever apprehended that there would be any claim by TEKL having Siemens as the lead partner of the JV duly authorised to sign the contract on behalf of the JV.

13. The Tribunal noted that the soil investigation was carried out by M/s. Sanguine Consultants ('Consultant') who was engaged by Siemens after approval of PGCIL. On the boundary walls the Consultant suggested open foundation. However for the remaining portion pile foundation was recommended both for the control room-cum-administrative building and

switch yard (tower foundation). This report had been accepted by the PGCIL. Whereas the original control room drawings suggested spread footing, after soil investigation was done by the Consultant, pile foundation was recommended for the control room as well. This was accepted by PGCIL and on that basis payment was made to Siemens. It was held that PGCIL should have accepted the report of the Adjudicator and avoided going for arbitration.

14. It was observed by the Tribunal in para 33 of the impugned Award as under:

“33. But for Clause 35, we would have certainly agreed with the submissions of Mr. Upadhyay, Sr. Advocate for Power Grid. However, we find that Clause 35 is applicable even though it was lump sum contract. Site was not available even for site inspection. It was neither acquired nor in possession of Power Grid. There were agricultural activities at the site and requirement of the contract was that clean site was to be handed over to the contractor. Site was changed 17 days prior to the date of bidding. If it is assumed that soil investigation was to be done prior to bidding it was not possible to do so. Admittedly it took 4 to 5 months to complete the soil investigation. It is apparent that Power Grid itself could not have done any soil investigation and yet Power Grid gave spread foot foundation for control room building since the area was one and Switchyard tower foundation was to be laid only about 100 meters away, it was reasonable for the Siemens to assume that soil investigation had been done by Power Grid for it to give spread foot drawings of that area. Power Grid has not explained as to why it gave spread foot foundation drawing and why it changed subsequently pile foundation when soil investigation was done by Siemens. Now Power Grid also wanted pile foundation for control room building. Howsoever

experienced the contractor may be, he would certainly have been misled by spread foot drawing for control room building given by Power Grid in the circumstance of the case. Moreover, design and detailing of foundation was to be done based on approved data and sub-soil condition as well as for all possible critical loads and combination thereof. Both Control Room and switchyard foundation required pile foundation. When Power Grid agreed to pay for pile foundation for control room building there appears to be no reason why Power Grid did not pay for pile foundation for switchyard tower foundation. All the factors as enumerated in Clause 35 regarding 'unforeseen conditions' exist."

15. Accordingly on the issues framed, the Tribunal answered Issue No.1 negating the contention of PGCIL that it had no jurisdiction to arbitrate the disputes. Issue No.2 was held in favour of Siemens by answering in the affirmative the question whether the concept of pile foundation adopted by the Claimant for 400 KV tower foundation was justified. Issue No.3 was answered by holding that the work of pile foundation executed by Siemens was covered under Clause 35 of the GCC. Issue No.4 was allowed by holding that Siemens was entitled to Rs.1,96,07,224 towards piling charges in terms of the invoice dated 29th march 2004. Under Issue No.5, Siemens was held entitled to interest @ 10% p.a. on the awarded sum from 11th April 2005. Issue No.6 was not pressed by Siemens. Costs of Rs.12,50,000 were also awarded to Siemens.

Submissions of counsel

16. On the issue whether the Tribunal erred in holding that it had jurisdiction to adjudicate the arbitral dispute between the parties notwithstanding the fact

that TEKL, the other JV partner did not participate, it was submitted by Mr. S.B. Upadhyay, learned Senior counsel for PGCIL, that the JV was an entity independent of Siemens and TEKL and it was the JV alone that was a party to the arbitration agreement under Section 2(h) of the Act read with Section 7 thereof. The JV as the Contractor was party to the arbitration agreement and Siemens was not. It was urged that the JV agreement dated 10th December 2003 did not empower Siemens to initiate arbitral proceedings without consent/authority of TEKL relying on Section 45 of the Indian Contract Act, 1872 ('ICA'). It was submitted that in the absence of TEKL being a Claimant along with Siemens, the arbitration initiated by Siemens alone was not maintainable. Reliance was placed on the decision in *New Horizons Limited v. Union of India (1995) 1 SCC 478* where the expression 'Joint Venture' has been explained by the Supreme Court. Reliance was also placed on the decision of the Gujarat High Court in *Asia Foundations & Constructions Ltd. v. State of Gujarat AIR 1986 Gujarat 185*.

17. Mr. Upadhyay submitted that a separate application had been filed by the PGCIL under Section 16 of the Act on the issue of jurisdiction but a decision on the said application was deferred till the making of the final Award. It was submitted that the rejection of the application by the Tribunal on the ground that PGCIL had not raised it at the time of referring the dispute for arbitration under Section 4 and 2(h) of the Act, was unjustified. In other words, it was open to either party to the arbitration at any time prior to the filing of the statement of defence to raise an objection to the Tribunal's jurisdiction. Referring to clauses of the JV agreement as well as the PoA, it was submitted by learned Senior counsel for PGCIL that Siemens was only acting as a lead

partner and the management and control in fact vested in the JV. The PoA did not expressly authorise Siemens to initiate arbitral proceedings. On the question whether an entity that was not to an arbitration agreement could maintain a claim in arbitration or be made party thereto, Mr. Upadhyay relied on the decision in ***Indowind Energy Limited v. Wescare (India) Limited*** (2010) 5 SCC 306.

18. Countering the above submissions Mr. C. Mukund, learned counsel for Siemens referred to clauses of the PoA which authorised Siemens to receive monies on behalf of the JV which included the share of TEKL. He submitted that if Siemens was authorised to receive monies on behalf of the JV then clearly it could raise the disputes in relation to the payment of such monies. Referring to the decisions in ***Firm Hardayal Mal-Mohri Lal v. Firm Messrs. Kishan Gopal Jhanji & Sons AIR 1938 Lahore 673*** and ***Tashi Delek Gaming Solutions Ltd. v. State of Karnataka (2006) 1 SCC 442***, he submitted that in the present case although Siemens was an agent of the JV this was a case of an 'agency coupled with interest' and, therefore, the ordinary rule under Section 203 of the ICA was inapplicable. It was submitted that as an agent coupled with interest, Siemens was entitled to make a claim against PGCIL independently. Mr. Mukund also referred to the decision in ***A. Viswanatha Pillai v. Special Tahsildar for Land Acquisition No. IV AIR 1991 SC 1966*** to urge that even one co-owner could file a suit against strangers for recovery of the property in question. On the concept of a JV, reference was made to the decisions in ***Gammon India Limited v. Commissioner of Customs, Mumbai (2011) 12 SCC 499***, ***Faqir Chand Gulati v. Uppal Agencies Private Limited (2008) 10 SCC 345*** and ***New***

Horizons Limited (supra). Mr. Mukund placed reliance on the decision in ***Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. 2012 (9) SCALE 595.***

19. It was also contended by Mr. Mukund that the principles of acquiescence and estoppel would apply in the instant case. Referring to the correspondence between the parties it was submitted that PGCIL had itself recognised Siemens as the party against whom the arbitral proceedings could commence. The entire invoicing in the contract had been done only by Siemens and payments had been made throughout only through Siemens even for the work performed by TEKL. The claim for reimbursement of excess amount for construction of control room was raised only by Siemens and was paid for by PGCIL without insisting that the claim should be made by the JV. There was not a single communication addressed to PGCIL by TEKL in relation to the JV. Reference was made to the decisions in ***Tata Industries Ltd. v. Grasim Industries Ltd. (2008) 10 SCC 187***, ***Bestech India Private Ltd. v. MGF Developments Ltd. 161 (2009) DLT 282***, ***Ravi Prakash Goel v. Chandra Prakash Goel (2008) 13 SCC 667*** and ***McDermott International Inc. v. Burn Standard Co. Ltd. (2006) 11 SCC 181***. On the issue of interpreting the PoA, reliance was placed by Mr. Mukund on the decisions in ***Syndicate Bank, Bangalore v. I.K. Amitha AIR 1985 Karnataka 213*** and ***Doddarajappa v. Venkoba Rao AIR 1986 Karnataka 70.***

PGCIL was entitled to object to the Tribunal's jurisdiction

20. The Court finds merit in the contention of PGCIL that the Tribunal was not perhaps right in rejecting its objection as to jurisdiction, for which it had

filed a separate application under Section 16 of the Act only on the ground that such objection cannot be raised at the time of filing of the claim.

21. For appreciating the above contention, reference may be made to the relevant portions of Sections 4 and 16(2) of the Act which read as under:

“Section 4 - Waiver of right to object

A party who knows that—

(a) any provision of this Part from which the parties may derogate, or

(b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.”

“16 (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.”

22. It is plain from a reading of the above provisions that the objection as to jurisdiction could be raised by any party to the arbitral proceedings as defined under Section 2(h) read with Section 7 thereof. The outer time limit for raising such an objection would be the ‘submission of the statement of defence’. Section 16 (2) of the Act further clarifies that “a party shall not be precluded from raising such a plea merely because that he has appointed, or

participated in the appointment of, an Arbitrator.” Clearly, therefore, in the present case PGCIL was not precluded from objecting to the jurisdiction of the Tribunal merely because it had participated in the constitution of the Tribunal. There is no dispute that PGCIL objected to the jurisdiction simultaneous with the filing of the statement of defence and definitely not later than that. The tribunal was therefore not right in rejecting PGCIL’s objection as to maintainability of the claim by Siemens on this ground.

Maintainability of the claim

23. Nevertheless, the question whether Siemens was entitled to maintain its claim before the Tribunal is required to be answered. A perusal of the JV agreement entered into between Siemens and TEKL shows that it has been in the proforma mandated by the PGCIL itself. In fact the JV agreement begins with the following paragraph:

“Proforma of joint venture agreement between Siemens Limited, and Transformer and Electricals Kerala Limited, Anganmally South P.O, Ernakulam (Distt.) Pin 683573, Kerala, for Bid Specification No. C-41406-S948-I & C-41407-S948-I of Power Grid Corporation of India Limited.”

24. The first recital refers to Siemens as ‘lead partner’ and the operative clause begins with stating that the agreement is between the partners to the JV and that “Siemens Limited shall act as lead Partner.” Clause 1 of the JV agreement reads as under:

“1. In consideration of the award of the contract by the employer to the joint venture partners, we, the Partners to the joint venture agreement do hereby agree that M/s. Siemens

Limited shall act as lead Partner and further declare and confirm that we shall jointly and severally be bound unto the employer for the successful performance of the contract and shall be fully responsible for the design, manufacture, supply, and successful performance of the equipment in accordance with the contract.”

25. Clauses 2, 5 and 7 further read as under:

“2. In case of any breach of the said Contract by the Lead Partner or other partner(s) of the Joint Venture agreement, the partner(s) do hereby agree to be fully responsible for the successful performance of the contract and carry out all the obligation and responsibilities under the contract in accordance with the requirement of the contract.

5. It is expressly understood and agreed between the partners to this joint venture agreement that the responsibilities and obligation of each of the partners shall be as delineated in Appendix-1 (*To be incorporated suitably by the partners) to this agreement. It is further agreed by the partners that the above sharing of responsibilities and obligations shall not in any way be a limited of joint and several responsibilities of the partners under this contract.

7. In case of an award of a contract, We the partner to the joint venture agreement do hereby agree that we shall be jointly and severally responsible for furnishing a contract performance security from a bank in favour of the Employer in the currency/currencies of the contract.”

26. The JV agreement has been countersigned by TEKL. A collective reading of the above clauses shows that for all practical purposes PGCIL had decided

to deal with the lead partner in all matters relating to the execution of the contract. It could, however, proceed against the other partner for enforcing its liabilities. As long as the lead partner did not avoid its liability it did not matter to PGCIL that TEKL was also not in the picture.

27. The SCA executed by PGCIL and Siemens with Siemens being authorised to do so as a lead partner of the JV was made between PGCIL and the JV. The first preamble paragraph of the SCA read as under:

“Whereas the “Lead Partner” shall sign this Contract with “the Employer” and execute the Contract for and on behalf of the “Joint Venture” by virtue of the Power of Attorney issued by the “Joint Venture” in favour of “Lead Partner” and signing of this Contract by the “Lead Partner” shall bind the “Joint Venture” as if done by itself i.e., the “Joint Venture”.

28. Therefore there was no doubt that it was Siemens as lead partner that had signed the SCA on behalf of the JV. The JV was referred to as the ‘Contractor’. The PoA, which was part of the contract documents, was in the format prescribed by PGCIL. In terms thereof, Siemens was appointed as ‘attorney/authorised representative/partner-in-charge’ to “exercise all or any of the power for and on behalf of the JV” in relation to the contracts to be executed by the JV pursuant to the bids invited by PGCIL (referred to in the PoA as ‘Employer’). Siemens was authorised under the PoA to do the following acts:

“(i) To submit proposal and participate in the aforesaid Bid Specification of the Employer on behalf of the “Joint Venture”.

(ii) To negotiate with the Employer the terms and condition for the award of the Contract pursuant to the aforesaid Bid and to sign the Contract with the Employer for and on behalf of the “joint venture”.

(iii) To do any other act or submit any document related to the above.

(iv) To receive and execute the contract for and on behalf of the joint venture.

It is clearly understood that the partner in charge (lead partner) shall ensure performance of the contract(s) and if one or more partner fail to perform their respective portions of the contract(s), the same shall be deemed to be a default by all the partners.

It is expressly understood that this power of attorney shall remain valid binding and irrevocable till completion of the defect liability period in terms of the contract.

The joint venture hereby agree and undertakes to ratify and confirm all the whatsoever the said attorney/authorized representatives/partner-in-charge quotes in the bid, negotiates and signs the contract with the Employer and/or proposes to act on behalf of the joint venture by virtue of this power of attorney and the same shall bind the joint venture as if done by itself.”

29. A perusal of all of the above documents collectively, leads to the conclusion that for all practical purposes the JV was acting only through Siemens. The bills for the work done were raised by Siemens and it was authorised “to receive and execute the contract for and on behalf of the JV.” Although there was a joint and several liability of the partners in the JV, it

was clearly understood between the parties that it was Siemens which would act as the lead partner.

30. In *New Horizons Limited* (supra), the Supreme Court explained the concept of a 'Joint Venture'. It was stated that a 'Joint Venture'

“connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses. (*Black's Law Dictionary*, 6th Edn., p. 839) According to *Words and Phrases*, Permanent Edn., a joint venture is an association of two or more persons to carry out a single business enterprise for profit (p. 117, Vol. 23). A joint venture can take the form of a corporation wherein two or more persons or companies may join together. A joint venture corporation has been defined as a corporation which has joined with other individuals or corporations within the corporate framework in some specific undertaking commonly found in oil, chemicals, electronic, atomic fields. (*Black's Law Dictionary*), 6th Edn., p.342) Joint venture companies are now being increasingly formed in relation to projects requiring inflow of foreign capital or technical expertise in the fast developing countries in East Asia, viz., Japan, South Korea, Taiwan, China, etc. [See *Jacques Buhart: Joint Ventures in East Asia-Legal Issues* (1991)] There has been similar growth of joint ventures in our country wherein foreign companies join with Indian counterparts and contribute towards capital and technical know-how for the success of the venture.”

31. In *Faqir Chand Gulati* (supra), the concept of a JV in relation to construction and sale of apartments was examined by the Supreme Court. It

was observed in the context of a building contract that where the land owner has no control over the construction but is merely lending his name, it does not *per se* make it a JV. The clauses of the document would have to be examined for that purpose. In ***Gammon India Limited*** (supra), it was explained that although Gammon India Limited ('Gammon') was a constituent of the JV Gammon-Atlanta which had entered into an agreement with the National Highways Authority of India for construction of a 31.40 Km of road, the import made by Gammon of the "Concrete batching plant 56 cum/hr" could not be considered as an import by the JV since neither Gammon nor the JV fulfilled the requisite requirement of the exemption notification.

32. In light of the legal position explained in the above decisions, there is merit in the contention of Mr. Mukund that, as far as the case in hand is concerned, when it is apparent that Siemens as JV partner acted not on its behalf but throughout on behalf of the JV then the right of Siemens to also make a claim on behalf of the JV ought to be recognised. There can be no manner of doubt that the SCA was entered into by PGCIL with the JV. Right from the beginning it was Siemens, as a lead partner, that was representing the JV.

33. The arbitration clause forming part of the GCC envisaged as a pre-condition, the dispute having to be first referred to an Adjudicator. When Siemens made a reference to the Adjudicator it did so only as a lead partner of the JV. Its *locus* at that stage was not questioned by PGCIL. In fact, when PGCIL objected to the Adjudicator's decision in favour of Siemens and

informed Siemens it would be invoking the arbitration clause, it implicitly recognised that Siemens was lead partner of the JV and was the proper party to the dispute. The correspondence by PGCIL was only with Siemens.

34. There is also merit in the contention of Mr. Mukund, learned counsel for Siemens that this was not a simple case of a relationship between principal and agent. Siemens was an agent having an interest in the transaction and, therefore, it was a case of an agency coupled with an interest. In ***Firm Hardayal Mal-Mohri Lal*** (supra), the Lahore High Court recognised this concept and held that ordinary rule under Section 230 ICA would not apply. The right of the agent having an interest in the contract to sue in his own name and not in the name of the principal was recognised. In ***Tashi Delek Gaming Solutions Ltd.*** (supra), this decision was referred to with an approval by the Supreme Court. It was held that where there was an agency coupled with an interest the agent could enforce his right independently and not necessarily only through the principal. When Siemens filed its claim before the Tribunal it was doing so as lead partner of the JV although it did not expressly describe itself as such. That, however, would not make any difference to the legal position that Siemens did have a necessary *locus standi* as lead partner of the JV to act on behalf of the JV.

35. The mere fact that the PoA did not contain a clause specifically empowering Siemens to sue on behalf of the JV would not make a difference to the legal position as was explained in ***Syndicate Bank, Bangalore*** (supra). The Division Bench of the Karnataka High Court held that “one has to look at the manner in which the power is given to the agent by the principal and

the purpose for which it is given in order to ascertain the extent of power.” The above principle was reiterated in the subsequent decision in *Doddarajappa* (supra). The wording of the PoA in the present case indicates that the power given was neither restricted nor qualified. Once the power to receive payments and “execute the contract for and on behalf of the JV” was given to the lead partner i.e. Siemens, those words must be held to be wide enough to include the power to bring forth an action on behalf of the JV to recover amounts due to the JV.

36. The conduct of PGCIL in recognising Siemens as a lead partner and also supplying its bills in relation to the civil works concerning control tower indicates acquiescence on its part to Siemens acting on behalf of the JV even for the purposes of raising claims and recovering monies due to the JV. In that view of the matter, the objection of the PGCIL to Siemens being a party to the arbitral proceedings in its own capacity cannot be countenanced.

37. The facts in *Indowind Energy Limited* (supra), on which considerable reliance was placed by Mr. Upadhyay, learned Senior counsel for PGCIL, were that an objection was raised, at the earliest opportunity, to the subsidiary company being made party to the arbitral proceedings. The said decision did not involve the question of a lead partner in a JV seeking to make an arbitral claim on behalf of the JV. The said decision recognised that the holding and subsidiary were two separate entities and that merely because both companies had common shareholders or common Directors did not make the two companies a single entity. That is not the situation as far as the present case is concerned. The facts make it clear that Siemens came into the picture as lead

partner of the JV and has throughout been corresponding with PGCIL and acting in that capacity. It was not necessary, in view of the conduct of the PGCIL itself, for Siemens to assert on every occasion that it was acting as lead partner of the JV. Significantly, at no point in time did TEKL object to Siemens pursuing the claim on behalf of the JV.

38. For all the aforementioned reasons, this Court is unable to sustain the objection by the PGCIL to the *locus standi* of Siemens in maintaining the arbitral claim against PGCIL. Therefore, although the Court disagrees with the reasons given by the Tribunal, the said objection of the PGCIL for the above reasons cannot be sustained in law.

Objection to the Award on merits

39. This brings us to PGCIL's objections to the impugned Award on merits. At the outset the settled position in law on the scope of interference by the Court with an Award under Section 34 of the Act may be recapitulated. In ***McDermott International Inc.*** (supra), the Supreme Court reviewed the entire position with reference to the Act and after noticing the decision of the Court in ***Oil and Natural Gas Corporation Ltd. v. SAW Pipes Ltd.*** AIR 2003 SC 2629 reiterated that the illegality vitiating an Award warranting interference "must go to the root of the matter". An Award could also be set aside "if it is so unfair and unreasonable that it shocks the conscience of the Court." Further, it was held that "interpretation of a contract is a matter for the Arbitrator to determine even if it gives rise to a determination of a question of law."

40. In *P.R. Shah, Shares and Stock Brokers Private Limited v. BHH Securities Private Limited (2012) 1 SCC 594*, it was emphasized by the Supreme Court as under:

“21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

41. Likewise, in *Rashtriya Ispat Nigam Limited v. Dewan Chand Ram Saran (2012) 5 SCC 306*, the above principles were reiterated. In the background of the above settled legal position, the Court proceeds to examine the objections of PGCIL to the impugned Award on merits.

42. It was submitted that PGCIL had by its letter dated 29th November 2004 rightly rejected Siemens' claim for the pile foundation work for the tower foundation since the design for the tower foundation was to be made by the

JV. It was for the JV to choose either the pile foundation or the spread footing as per Clause 10.1.7 of the bid document. It was the Contractor who was guilty of oversight in proper sight inspection to acquaint itself about the nature of the soil inspected. It was pointed out that Clause 35 of the GCC relied upon by Siemens would operate only if during the execution of the contract, “the contractor shall encounter any physical condition or artificial condition that could not have been reasonably foreseen prior to the date of contract agreement by an experienced contractor on the basis of reasonable examination of the data relating to facilities including any data as to boring tests provided by the employer and on the basis of information that it could have obtained from visual inspection of the site.” Since the Contractor in this case was an experienced one and it did not make any effort to inspect the site it could not take advantage of its own wrong and claim a higher amount for the pile foundation subsequent to the execution of the SCA.

43. Mr. Upadhyay referred to the evidence of the witnesses of Siemens admitting that it did not bring to the notice of the PGCIL the obstruction by the villagers at the site or even sought extension of time for the purposes of site inspection. It is further submitted that by allowing the claim of Siemens the Tribunal had travelled beyond its jurisdiction and had decided contrary to the terms of the contract. It is pointed out that under Clause 39.4 (b) of Section 5 Vol. I GCC read with the price break-up at page 1118 for the tower foundation and Note-1 to Appendix B the contract price for civil work of the tower foundation was fixed as a lump sum amount. Further under Clause 9.2 GCC Section 4 Volume IA the Contractor had acknowledged that any failure

to acquaint itself with all such data and information would not relieve it of the responsibility for properly estimating the difficulty.

44. Reference was also made to Clause 39.1.3 GCC Section 4 which provides that no change made necessarily because of the default of the Contractor in performance of its obligation shall be deemed to be a change and such change shall not result in any adjustment to the contract price or the time of completion. Reliance was placed on the decision in ***Rajasthan State Mines & Minerals Ltd. v. Eastern Engineering Enterprises (1999) 9 SCC 283***. It is submitted that since the drawings and designs for the tower foundation were within the scope of work of the JV and the contract being a fixed price contract, no additional cost was payable. It is submitted that the impugned Award is in violation of Section 28(3) of the Act and the principles explained by the Supreme Court in ***Hindustan Zinc Ltd. v. Friends Coal Carbonisation (2006) 4 SCC 445*** and ***Delhi Development Authority v. R.S. Sharma and Company (2008) 13 SCC 80***.

45. Countering the above submissions, Mr. Mukund referred to the detailed examination on the merits by the Tribunal. He submitted that the impugned Award had analysed the evidence in great detail to come to the conclusion that Clause 35 GCC was applicable whether the contract was a unit rate contract or a lump sum contract.

46. The facts of the case as detailed in the impugned Award of the Tribunal show that until PGCIL was unable to hand over clear land to Siemens, soil inspection was not practically feasible. The site itself was changed 17 days

before submission of the bids. It subsequently took four to five months to conduct soil investigation. Also when the area where the tower foundation had to be erected was only 100 meters away from the place where the control room was to be constructed. It was reasonable for Siemens to have proceeded on the basis that the said construction also required spread foot foundation which had been provided by PGCIL for the control room. Ultimately as it turned out that the control room also required pile foundation, the price therefor had to be revised. While PGCIL accepted the changed price for the control room as a result of pile foundation having to be constructed, it did not explain satisfactorily why it was rejecting a similar claim for the tower foundation. This is clear from the report of the soil investigation by the Consultant which had been discussed by the Tribunal at length in the impugned Award as under:

“In the present case, soil investigation was carried out in the presence of officials of Power Grid. If reference is made to report of Soil Investigation by M/s. Sanguine Consultants (Ex.RW-2/1) which was submitted to Power Grid it was recorded that the work of soil investigation has been carried out under the supervision of Power Grid and the work was awarded to M/s. Sanguine Consultants by Siemens after approval of the consultants of Power Grid. On boundary walls the consultants suggested open foundation but for the remaining portion pile foundation was recommended i.e. both for control room-cum-administrative building and switch yard (tower foundation). The report was accepted by Power Grid. As a matter of fact, the report bears the signatures of not only of the consultants but also of the representatives of Siemens and Power Grid. It is an admitted fact that control room drawings originally suggested spread footing and control room drawings were given by Power Grid along with the tender documents and formed part of the

contract. After the soil investigation was done by Siemens, pile foundation was recommended for control room as well. This was accepted by Power Grid. Obviously spread footing foundation suggested in the bid documents was not correct. This was realized only after the report of soil investigation. Control room was constructed on pile foundation and Siemens paid for that.”

47. The Court is unable to discern any error in the above analysis of the evidence by the Tribunal which can be considered to be contrary to the provisions of the contract. The Tribunal has in the impugned Award discussed Clause 35 of the GCC which it held to apply both to a unit rate contract as well as a lump sum contract. The Tribunal rightly pointed out that as a result of the soil investigation carried out by Siemens it became clear to PGCIL that only a pile foundation was required for the control room and not a spread footing for which it had given drawings to Siemens. It was rightly concluded that “there would have been grave risk if Control Room block had been constructed with spread footing foundation”. This was, therefore, clearly an unforeseen condition of the soil even from the point of view of PGCIL. In the circumstances, the conclusion of the Tribunal that Clause 35 GCC “is fully applicable in the circumstances of the present case” cannot be faulted. Consequently, this Court rejects the plea of PGCIL that the impugned Award of the Tribunal is contrary to the clauses of the contract and, therefore, violative of Section 28(3) of the Act.

48. The Court finds that PGCIL has not been able to demonstrate that the impugned Award requires to be interfered with on any of the grounds in Section 34 of the Act. The petition is accordingly dismissed with costs of

OMP No. 355 of 2009 *Page 27 of 28*

Rs.20,000 which will be paid by PGCIL to Siemens within a period of four weeks.

S. MURALIDHAR, J.

FEBRUARY 28, 2013
dn

