

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 721 OF 2014
IN
ARBITRATION PETITION NO.361 OF 2011
WITH
NOTICE OF MOTION NO.40 of 2015
IN
APPEAL NO. 721 OF 2014
IN
ARBITRATION PETITION NO.361 OF 2011

Maharashtra State Electricity Generation

Company Limited

..Appellant

Vs.

Dirk India Private Limited

..Respondent

Mr. C. M. Korde, Senior Advocate a/w Mr. Shriram S. Kulkarni and
Mr. Prashant V. Bhalerao and Mr. Sachin Chavan, for the Appellant.

Mr. Zubin B. Kamdin a/w Shamima Taly, Pavitra Kacholia Mallika
Taly i/b S. Mahomedbhai and Co, for the Respondent.

**CORAM :- MOHIT S. SHAH, C.J. &
B. P. COLABAWALLA, J.**

DATE :- JANUARY 30, 2015.

P. C.:

The Appeal is directed against the judgment and order dated 24 July 2014 of the learned Single Judge of this Court in Arbitration Petition No.361 of 2011.

2 It is to be noted that the Arbitral Tribunal comprising of three retired Judges rendered an arbitral Award dated 31 March 2011. Aggrieved by the Award, both the parties challenged the same by filing Petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (“the Act”). The Respondent filed Arbitration Petition No. 361 of 2011 insofar as the Arbitral Tribunal rejected the claim made by the Respondent Contractor for specific performance of the agreement dated 4 October 2000 read with the terms and conditions of the minutes dated 11 April 2005. The Respondent contractor had also challenged the notice dated 23 November 2006 issued by the present Appellant- Maharashtra State Electricity Generation Company Limited (Mahgenco) terminating the aforesaid agreement between the parties.

3 Arbitration Petition No.695 of 2011 was filed by the present Appellant-Mahgenco challenging the said Award to the extent that the Arbitral Tribunal dismissed the counter claim of the Appellant-Mahgenco. The learned Single Judge heard both the Arbitration Petitions together, as question of law and facts were

common in both the Petitions. The learned Single Judge dismissed both the Petitions by the common judgment and order dated 24 July 2014 which has been impugned before us.

4 The Respondent-Dirk India Private Limited (the contractor) specialized in recycling by-products generated by thermal power stations. It uses pulverized fly ash which is a waste product generated in coal fired thermal power stations to manufacture cement replacement material under the brand name of “Pozzocrete”. The Appellant-Mahgenco is a Government Company having various thermal power plants one of which is at Nashik. The dispute between the parties relates to the said Nashik Thermal Power Station (“ NTPS”). The NTPS uses coal as fuel for generation of electricity. Coal is burnt in a boiler with the help of air supplied by fans. The waste product is ash. The ash generated is of two types. One is Furnace Bottom Ash comprising of coarse ash. Second is Pulverized Fly Ash (“PFA”).

5 In this Appeal, we are only concerned with the agreement between the parties relating to the disposal of PFA. The PFA which rises to the top of the boilers is trapped by Electrostatic Precipitators (ESPs) installed along the outer side of the boilers. Each particle of PFA has a small electric charge. If the PFA escapes in the air, it being very fine, can cause serious atmospheric pollution. Traditionally individual contractors were lifting a small

quantity of waste fly ash from NTPS, while most of the ash was being washed away into the lagoon or escaped into the air. In order to see that the entire PFA generated in the process of the electricity generation is utilized for manufacturing Pozzocrete, the parties entered into an agreement on 4 October 2000.

6 Pursuant to the above agreement, the contractor was allotted a piece of land for installing their ash and processing plant and machinery at some distance from the NTPS. The contractor commenced construction of the Ash Handling Plant (PFA Plant) on the land demarcated by Mahgenco. However, the issue arose as to whether the land allotted to the contractor was forest. There were also other issues. A serious dispute between the parties arose regarding the construction of four large hoppers by the Respondent-contractor. According to Mahgenco, the contractor was supposed to construct four large hoppers for collecting the PFA. According to the contractor, the hoppers could not be constructed, since system of delivery of the PFA was not provided by Mahgenco and the locations of the hoppers were not specified. Even after setting up of PFA plant by the contractor and its inauguration in January 2005, the dispute regarding collection of the PFA, however, remained unresolved. A meeting took place on 11 April 2005 between the Chairman of the respective parties. An agreement was reached and acted upon. This resulted into contractor making an additional investment of Rs. 5 Crores for processing the PFA from

NTPS and also made other investments.

7 Between January 2006 to March 2006, Mahgenco complained that the contractor failed to collect the required quantity of PFA and unless that was done, Mahgenco would deny the facility of collecting PFA. By letter dated 23 November 2006, Mahgenco purported to terminate the agreement between the parties. Mahgenco called upon the contractor to remove the plant and machinery and to hand over the vacant possession of the PFA plant site.

8 On 13 December 2006, the contractor filed a Petition in this Court under Section 9 of the Act for interim protection. On 22 December 2006, the Court passed an order permitting contractor to collect the PFA in the same manner before the termination notice was issued. It is not necessary to refer to the said interim order any further because upon the Arbitral Tribunal rendering the Award dated 31 March 2011, this interim arrangement came to an end. However, in view of the proceedings taken out by the contractor, the said interim arrangement continued till March 2013.

9 As stated earlier, by the impugned Award, the Arbitral Tribunal dismissed the claim of the contractor for specific performance of the agreement between the parties and the Arbitral Tribunal also dismissed the counter claim of Mahgenco for

damages.

10 In the Petitions filed by both the parties under Section 34 of the Act, the learned Single Judge noted that the dispute between the parties was regarding the PFA to be delivered from ESP to the hoppers i.e. stage (a) or first part of the operations and at the hearing of this Appeal also the learned counsel for the parties did not dispute this proposition recorded by the learned Single Judge. Clause 3.2 dealt with stage (a). The learned Single Judge has further recorded that instead of dealing with this issue, the Arbitral Tribunal dealt with the second stage which is referred to as stage (b) covered under Clause 3.5 for transporting fly ash from the hoppers to the PFA plant.

11 In paragraph nos.30 to 32 of the impugned judgment, the learned Single Judge has noted that the Arbitrators repeatedly referred to clause 3.5 of the Agreement which places responsibility on the contractor to carry PFA from hoppers to PFA plant i.e. stage (b), when there was no dispute between the parties in relation to stage(b). The learned Single Judge also noted that when the contract stipulated different kinds of obligations for different stages of transport and the parties knew that was so, the decision of the arbitrators ought to have been on those lines. However, the Arbitrators did not make any distinction between stage (a) and stage (b). The learned Single Judge further made the following

observations in paragraph no.32 as under:-

“ Now it will have to be considered whether findings on clause 3.5 and 3.2 can be severed. In my opinion, it is not possible. There is total confusion between the two stages of transportation. This confusion again and again appears in the award and it is so intrinsically mixed with the findings that it is very difficult to hold that even if the observations as regards clause 3.5 is kept aside, rest of the reasoning was the adjudication of the dispute between the parties. This flaw permeates through the entire fabric of the award and vitiates it. Failure to distinguish between two stages of transportation was a fundamental failure. Though there is a finding that Dirk India failed to lift the PFA from ESP by not constructing hoppers on the site, it is based on a wrong clause of the contract. To put in short, the responsibility for stage (a)-the real dispute, is decided by adjudicating the clause governing stage (b). In a petition under Section 34 of the Act, it may not be possible to test the merits of the award, but once it is found that outcome is a result of adjudication of dispute which never arose, then it will be a fundamental flaw. If the flaw is so fundamental and intermixed, then the entire award will be vitiated and cannot stand.”

(emphasis supplied)

12 The learned Single Judge then noted that whilst the Arbitrators decided the issue which never arose, did not decide the issues which arose for consideration of the Arbitral Tribunal. In paragraph no.33 the learned single Judge held as under:-

“Having dealt with the part where the Arbitrators decided the issue which never arose, now to the issues which arose but were not decided. Disputes was : whether hoppers had to be constructed first or whether the location had to be provided first; whether Dense Phase Conveying System had to be constructed; what is the effect of minutes of meeting of 11 April 2005, whether it constituted an amendment or not, whether it confirmed the obligations or whether new obligations were cast;

whether Dirk India had to provide a Dry Ash system.”

13 The learned Single Judge noted that the vital issues arising between the parties were not decided by the Arbitrators. The learned Single Judge also observed that it was for the parties to consider whether the Arbitrators should have a technical background or whether the Arbitrators should have a judicial background. Ultimately, the learned Single Judge held that the arbitral Award is fundamentally flawed and even within the restricted jurisdiction available under Section 34 of the Act, the Award was required to be set aside in its entirety and that it was not possible to sever the Award.

14 There was a specific finding that since the Arbitral Tribunal had not decided the dispute which arose and instead decided the dispute which never arose, the entire purpose of arbitration was lost, rendering it a completely futile exercise. In view of the above reasoning, the learned Single Judge allowed both the arbitration Petitions i.e. the petition filed by the contractor as well as the petition filed by the Appellant-Mahgenco.

15 The contractor has not challenged the judgment of the learned Single Judge allowing the Section 34 petition of Mahgenco, but Mahgenco has filed the present Appeal allowing the Section 34 petition of the contractor. The learned counsel for the Appellant-Mahgenco had submitted that the learned Single Judge erred in

holding that the entire Award was flawed. It is submitted that the learned Single Judge ought not to have interfered with the impugned Award insofar it rejected the contractor's claim for specific performance of the agreement dated 4 October 2000 read with the terms and conditions in the minutes of the meeting held in April 2005.

16 The learned counsel for the Respondent contractor has supported the judgment of the learned Single Judge.

17 Having heard the learned counsel for the parties, we find that the judgment of the learned Single Judge is a very well reasoned judgment. The learned Single Judge has discussed the various technical aspects in the agreement entered into between the parties and the different stages for transportation of PFA. Since the learned counsel for the Appellant is not in a position to successfully assail the findings given by the learned Single Judge, that there was no dispute regarding stage (b) relating to the transportation of PFA from the hoppers to the PFA plant, but the dispute was about the transport system to be set up for transporting PFA for stage (a). In other words, the learned counsel was unable to assail the finding that the Arbitral Tribunal failed to decide the issue that arose between the parties and instead decided an issue that did not arise for consideration of the Arbitral Tribunal. Thus, having regard to the fact that the claim of the contractor and

counter claim of the Appellant-Mahgenco pertain to the same agreement and the same plant, the issues arising between the parties are so interconnected and interlinked that it is not possible to hold that the impugned award is severable. We, therefore, do not find any infirmity in the order of the learned Single Judge allowing both the arbitration petitions. The Appeal is therefore without any merit and is, therefore, summarily dismissed.

18 It is clarified that we have not expressed any opinion on the merits of the issues. All contentions are kept open.

19 Since the Appeal is dismissed, the above Notice of Motion No.40 of 2015 also stands disposed of.

CHIEF JUSTICE

(B. P. COLABAWALLA, J.)