HON'BLE Dr. JUSTICE B.SIVA SANKARA RAO

C.R.P. No.5334 OF 2016

ORDER:

The Transmission Corporation of Andhra Pradesh Limited (APTRANSCO) represented by its Chief Engineer (Transmission) is the revision petitioner. The revision respondent is M/s.Equipment Conductors and Cables Limited (for short 'ECCL'), represented by its Director Sri Alok Sharma, who is party-in-person, with the direction of the Court submitted arguments, since the advocate on record, who submitted arguments earlier failed to attend.

2) The revision is maintained impugning the order dated 17.08.2016 passed in E.A. No.414 of 2016 in E.P.SR No.10950 of 2016 which was later numbered as E.P. No.50 of 2016, on the file of Executing Court-cum-Chief Judge, City Civil Court, Hyderabad and consequently passing the prohibitory order in E.A. No.414 of 2016 on 21.06.2010 as illegal, arbitrary and unsustainable and liable to be set-aside.

3) Heard both sides. Perused the material on record.

4) It is the submission of the learned Advocate General for the State of Andhra Pradesh representing the Standing Counsel for APTRANSCO that there is no executable arbitration award even after the order passed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short 'Arbitration Act') by the Arbitration Court-cum-Additional District Judge, Chandigarh in Arbitration Case No.361 of 2010 dated 28.08.2014, to enforce within the meaning of Section 36 of the Arbitration Act, 1996 amended by Act 3 of 2016 w.e.f., 23.10.2015 and thereby, the Execution Petition is liable to be dismissed, holding as

unsustainable, equally the pro-order in E.A. No.414 of 2016. In fact, in this regard, the APTRANSCO as J.Dr filed objections before the Executing Court on 10.08.2016. There is nothing reflecting with regard to said objections in the order of the Executing Court. The impugned order passed by the Executing Court reads as under:

> "Upon hearing the petitioner/ decree holder and perusal of the record, I find that the present EPSR along with E.A. No.414 of 2016 is filed to permit the petitioner/ decree holder to number the present E.P.S.R for execution of the award for bills mentioned at S.Nos.1 to 57 of annexure-I of Award No.HMSEFC/2010/06, dated 21.06.2010 passed in case No.3, read with judgment, dated 28.08.2014 of ADJ, Chandigarh in Arbitration Case No.361 of 2010.
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> Further earlier the petitioner/ decree holder has filed E.P. No.62 of 2011 for the bills mentioned at S.Nos.58 to 82 of Annexure-I of the award passed on 21.06.2010, which is still pending for realization.
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> Unless, the present E.A. is ordered, it is not possible for the petitioner/ decree holder to realize the fruits of the decree. Hence, permission may be accorded to simultaneously execute the decree by registering the enclosed E.A.S.R. No.10950 of 2016, which is filed for realization of bills mentioned at S.Nos.1 to 57 of Annexure-I of Award No.HMSEFC/2010/06, dated 21.06.2010 passed in Case No.3, read with judgment dated 28.08.2014 of ADJ, Chandigarh in Arbitration Case No.361 of 2010.
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> In view of the facts narrated above, this Court is satisfied that it is a fit case to grant permission for simultaneous execution of the decree.
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> Accordingly, the petition is allowed and ordered to number the E.P.S.R No.10950 of 2016, if it is otherwise in order."

5) From reading of the impugned order, the petition is filed by the D.Hr (ECCL), under Order XXI Rule 21 C.P.C to direct

to number the E.P. (SR) No.10950 of 2016 and put in process for satisfaction of the money decree and the same was came up for hearing before the Executing Court-cum-Chief Judge, City Civil Court, Hyderabad on 17.08.2016 in the presence of D.Hr, authorized director as party in person and J.Dr representing by his advocate Sri B.Harinath Rao. However, the order supra speaks only as upon hearing the petitioner/ D.Hr and on perusal of the record, the executing Court finds that E.P.SR along with E.A. No.414 of 2016 is filed to permit the petitioner/ D.Hr to number the E.P (SR) for simultaneous execution of the award for bills mentioned at Sl.Nos.1 to 57 of Annexure-I of Award No.HMSEFC/2010/06, dated 21.06.2010 read with judgment dated 28.08.2014 of ADJ, Chandigarh in Arbitration Case No.361 of 2010. It also refers, earlier the petitioner/ D.Hr has filed E.P. No.62 of 2011 for the bills mentioned at Sl.Nos.58 to 82 of Annexure-I of the award passed on 21.06.2010, which is still pending for realization.

6) The prayer in the E.P (SR) No.10950 of 2016 is as follows:

> 1) to issue notice to garnishee Nos.1 and 2 of Schedule A under Order XXI Rule 46, Sub rule 1 (i) of C.P.C and Rule 46-A of CPC prohibiting the creditor from receiving the debt and the debtor from making the payment to the tune of decretal amount and to direct the garnishees to pay into the Court, the attached amount of Rs.32,81,71,056/- upto 31.05.2016 against the decretal amount to satisfy the decree under Order XXI Rule 46-A of C.P.C from the accounts of the J.Dr.

2) to issue notice to garnishee Nos.3 to 5 of schedule A under Order 21 Rule 46 and Rule 46-A of CPC prohibiting from making payments to the J.Dr to the extent of the decree amount and to direct the garnishees to pay into the Court the attached amount of Rs.32,81,71,056/- upto 31.05.2016 against the decretal amount to satisfy the decree under Order XXI Rule 46-A of C.P.C and

3) To pass any further order or orders as the Court deems fit and proper in the circumstances of the case.

7) The arbitration award covers item Nos.1 to 82 of annexure-I undisputedly. So far as item Nos.58 to 82 are concerned, that were held in favour of ECCL. So far as item Nos.1 to 57 are concerned, the claim is negated by the arbitrator holding as barred by limitation.

8) It is the same the ECCL disputed, leave about the APTRASCO also filed objections under Section 34 of the Act, against allowing the claim for item Nos.58 to 82 in Arbitration Case No.579 of 2010, which is not the subject matter herein. From the above, so far as the claim in relation to item Nos.1 to 57 are concerned, the ECCL maintained the Arbitration Case No.361 of 2010 under Section 34 of the Arbitration Act for setting aside the award dated 21.06.2010, passed by arbitrator viz., the Haryana Micor and Small Enterprises Facilitation Council, Chandigarh.

9) The Arbitration Court-cum-ADJ, Chandigarh while passing separate orders in Arbitration case No.579 of 2010 in respect of item Nos.58 to 82 observed of the non-compliance of the so-called deposit of 75% of the awarded amount along with interest. So far as Arbitration Case No.361 of 2010 is concerned,

the Arbitration Court referring to the Special Act, 27 of 2006 (The Micro, Small and Medium Enterprises Development Act, 2006 (for short 'MSMED Act, 2006)), held that the award is passed disallowing the claim of item Nos.1 to 57, as claimed, after expiry of the period of limitation by the arbitrator is not correct and the same is in ignorance of law of limitation. Thus, the claim is maintainable in accordance to the provisions of Section 32 of MSMED Act, 2006 as the provisions earlier existing in the Act 1993 were not totally repealed. Thus, the award was passed by ignoring the law applicable to the dispute and the same is liable to be set aside. It is observed further from para No.11 of the order passed in A.C. No.361 of 2010 in deciding the item Nos.1 to 57 on 28.08.2014 by holding further at para No.12 that in view of the above discussion, the objection petition is allowed and the matter is remanded back to the arbitrator for fresh decision.

10) It is important to note here that, the claim was disallowed by the Arbitrator so far as item Nos.1 to 57 from the objections filed by the claimant. The objection petition was allowed in Arbitration Case No.361 of 2010 while remanding the matter for fresh decision. There is no observation that the claim was allowed even the ECCL claimed that the item Nos.1 to 57 claim also could have been considered by the arbitrator.

11) Impugning the same, review application is filed by the ECCL to review said order dated 28.08.2014 in Miscellaneous Application No.1836 of 2014 before the Court of Additional District Judge, Chandigarh invoking order XLVII CPC. The review application was ended in dismissal on 27.08.2015 and the operative portion of the review dismissal order at para No.5 reads

that "in view of the discussion, the application is without any merit and the same is dismissed". Once the review application is dismissed, the order of remand only by setting aside the award disallowing the claim is upheld and but for that, there is no order with regard to allowing the claim. This Court cannot ignore these facts. At cost of repetition here from the above, there is no further order allowing of the claim for item Nos.1 to 57 supra but for saying conclusion of the claim is barred by limitation is not sustainable in remanding the matter for re-determination. Thus, it shows the matter is remanded to the arbitrator for re-determination of the items 1 to 57 is concerned instead of holding as barred by time from apparently not barred by time.

12) It is the same when impugned by the unsuccessful review petitioner of the arbitration case No.361 of 2010, leave about once the review is filed, another appeal is maintainable against self same order or not is academic, for no appeal filed after review by the ECCL. It is because two appeals were filed before the High Court only by the APTRANSCO viz., F.A.O. No.10507 of 2014 so far as remanding the matter in relation to item Nos.1 to 57 and F.A.O. No.10525 of 2014 so far as allowing of the claim of item Nos.58 to 82.

13) When the two appeals came up for common disposal before the learned Single Judge of the Hon'ble Punjab & Haryana High Court on 29.01.2016 it was observed that as items Nos.58 to 82 and the issue in relation to the deposit of 75% of the awarded amount along with interest was also involved, now it is not the subject matter of the revision herein, hence it is not necessary to discuss the same. Insofar as F.A.O. No.10507 of 2014 in relation

to the disallowing of the claim of item Nos.1 to 57 by the arbitrator that was set-aside by the Arbitration Court in remanding matter for fresh determination, it was observed by the arbitration Court in F.A.O.P. Nos.10525 of 2014 as under:

> "I have heard learned counsel for the parties and appraised the paper book as well as case law cited.
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> Shorn of the facts and submissions noticed above, and as well as case law, I am of the opinion that ratio decidendi culled out by the Division Bench of Bombay High Court that the objecting Court has no power to remand the matter back to the arbitrator once the Court has set aside the award is squarely applicable to the present case. The relevant portion of the judgment in ***Geojit Financial Services Limited vs Kritika Nagpal*** is reproduced herein below.
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> "14. Under sub-section 4 of Section 34, the Court is vested with the discretion, where it is appropriate and where the court is requested by a party, to adjourn the proceedings for a period of time. An adjournment is granted in order to furnish the arbitral tribunal with an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the Tribunal will eliminate the grounds for setting aside the award. Sub-section 4 of Section 34, therefore, does not contemplate a situation where the proceedings are remanded back to the arbitrator after setting aside the arbitral award. Once an arbitral award is set-aside under Section 34, that brings to a conclusion a proceeding before the Court. What sub-section 4 of Section 34 envisages is an opportunity to the arbitral tribunal to resume the arbitration proceedings or to take such other action as would eliminate the grounds for setting aside the award. Without meaning to be exhaustive, we can conceive of a situation where the arbitral tribunal has overlooked a particular item of claim on which parties have led evidence and have addressed arguments. A challenge to the arbitral award in such a case would be on the ground that the arbitral tribunal has failed to decide a claim which was raised, controverted and

submitted upon. The provisions of Section 34 enables the Court to adjourn the petition under Section 34 so that instead of setting aside the award, the arbitral tribunal can resume the proceedings and take necessary steps to eliminate a ground of challenge. Section 34 (4), however, does not contemplate or vest a power in the Court to remand proceedings back to the arbitral tribunal once the Court has set aside the award. Once an award has been set aside, recourse cannot be taken to Section 34 (4) since it is evident that the power can be exercised by the Court while adjourning a petition under Section 34.

15. The jurisdiction under Section 34 (4) can be exercised in a manner which is strictly consistent with that provision. The equitable jurisdiction which the Court exercises under Article 226 of the Constitution is clearly inapposite when dealing with a petition under Section 34. The learned Single Judge has relied upon his earlier decision in Angel Capital and Debt Market Limited vs Sharad Munoti, which seems to suggest that the Court has while setting aside an award a general power to remand the proceedings for reconsideration. We clarify that this would not reflect the correct position in law."

With the aforesaid observations, the orders passed by the Objecting Court remanding the matter back is hereby set-aside.

14) From the above, what was remanded is in requirement of determination in relation to the claim of item Nos.1 to 57. So far as item Nos.58 to 82 claim concerned of the revision on depositing 75% of the awarded amount along with interest by revision petitioner for re-determination. Thus, what was set-aside is to the extent of remand by the arbitration Court in relation to the claim in A.C. No.361 of 2010 of disallowing the claim so far as item Nos.1 to 57.

15) From the above, applying the doctrine of merger, the Punjab & Haryana High Court, Chandigarh in the expression

supra, has set-aside the order of the arbitration Court to the extent of remanding the matter and nothing more. The conclusion is once award is set-aside, the question of remand does not arise as laid down by the expression of the Bombay High Court by following and deferring to the expression relied by the arbitration Court of Angel Capital and Debt Market Limited vs Sharad Munoti.

16) It is also necessary there from to mention in nutshell that, there is no arbitration award allowing item Nos.1 to 57, as the award disallowed the claim holding as barred by limitation and even arbitration Court in A.C. No.361 of 2010 held as not barred by limitation, there is no determination, but for remanded for re-determination and the said remand even impugned by the claimant by filing review, the same was dismissed and even impugned in the appeal by APTRANSCO, that was dismissed as remanded, but the said remand held unsustainable. Thus, the claim in relation to item Nos.1 to 57 requires re-determination by the arbitration Court for no right to remand other than determination.

17) From the above, once there is no re-determination of the disallowed claim, much less by allowing the claim in respect of Item Nos.1 to 57 of annexure-1 by the Arbitration Court-cum-Additional District Judge, Chandigarh under Section 34 of the Act in the Arbitration Case No.361 of 2010 for review also ended in dismissal and appeal only set-aside to the extent of remand in practically directing instead of remanding for determination only by the arbitration Court. Once it requires determination and there is no determination, then there is no final award for execution much less to enforce under Section 36 of the Act.

18) Once such is the case, the objection field by APTRANSCO before executing Court for numbering as unsustainable for no enforceable award, so far as item Nos.1 to 57 are concerned and before the executing Court, even filed objections by the APTRANSCO, the executing Court did not discuss and even ignored the submissions, simply from the impugned order referred supra perused only the execution petition and considered only the submissions of the D.Hr, in passing the order, which is uncalled for, for not a judicial adjudication in passing the order in the eye of law and thereby same is unsustainable and prone to revision jurisdiction of this Court to sit against and to set-aside

19) It is made clear from the above, thereby that there is no enforceable award to execute under Section 36 of the Arbitration Act from the arbitration proceeding so far as the claim of Items 1 to 57 is concerned for what arbitrator held the claim as barred by law and the objecting Court-cum-arbitration Court in A.C. No.361 of 2010 even held not barred by law, did not determine, but for remanded to re-determine in this regard and same was even questioned in review, the review petition was dismissed and other side when questioned what was held by the High Court is that remand is not correct for lack of jurisdiction, thereby practically for re-determination and once it is not re-determined, there is no award and when there is no award, there is no question of execution and when there is no question of execution, there is no question of entertaining the unnumbered E.P much less to number the same or even to pass any consequential pro-order that are impugned in the revision.

20) Accordingly and in the result, the revision is allowed by setting aside the order of the Chief Judge, CCC, Hyderabad dated 17.08.2016 in E.A. No.414 of 2016 in numbering the E.P.SR No.10950 of 2016 as E.P. No.50 of 2016 and passing the consequential pro-order in E.A. No.414 of 2016 is set-aside holding the pro-order is unsustainable and the very E.P as not maintainable by dismissing the same for no enforceable award within the meaning of Section 36 of the Arbitration Act to execute. No order as to costs.

21) Consequently, pending miscellaneous petitions, if any, shall stand dismissed.

Dr.JUSTICE B. SIVA SANKARA RAO

Dt.08.11.2016
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