

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.02.2018

PRONOUNCED ON : 15.03.2018

CORAM

THE HON'BLE MR.JUSTICE **M.M.SUNDRESH**

O.P.No.220 of 2015

Kaveri Gas Power Limited,
Maruthur Village, Therizhundur P.O.,
Myladuthurai Taluk, Nagai District. .. Petitioner

-Vs-

1.M/s Madura Coats Pvt. Ltd.,
New Jail Road, Madurai-625 001.
2.Hon'ble Mr.Justice N.V.Balasubramanian(Retd.,)
No.40, Sankarapuram,
Alamelumangapuram,
Mylapore, Chennai-600 004. .. Respondents

Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 22.12.2014 passed by the learned Arbitral Tribunal.

For Petitioner : Mr.Rahul Balaji

For respondents : Mr.P.S.Raman, S.C.,
for Ms.S.P.Arthi for R1

* * * * *

ORDER

The petitioner is a company involving in the production of captive power generation. The raw material for the aforesaid purpose is the natural gas. Agreements have been entered into between the petitioner and the first respondent. These agreements include a power supply agreement with its supplementaries. The arrangement between the parties is to the effect that the petitioner shall supply a specified power at a price, which is less than Rs.0.47 paise than the one supplied by the Tamil Nadu Electricity Board. The first respondent has also become a shareholder in the petitioner company. Apart from these arrangements, two Memorandum of Understanding were entered into between the parties for the supply of 1 and 0.5 MW respectively with the price fixed at Rs.7.25 per KWH as against the earlier one of Rs.3.31 per KWH.

2. The following are the relevant Clauses in the Power Supply Agreement dated 11.03.2004 signed between the parties.

I.1.4 "TNEB Tariff" shall mean the base tariff for one Kwh of electrical power charged by TNEB and the Electricity Tax payable on such tariff by high tension consumers but shall not

include any demand charges, peak hour charges and any other additional charges levied now or in future by TNEB.

II.1.15 In case of any shut down or repair, shall endeavor in its utmost competence to replace or restore the power plant to its normal working condition with the greatest urgency and least possible delay. However, if there is a delay of more than 30 days in restoring the power plant to its normal working condition and consequently KGPL is unable to supply the contracted demand, KGPL shall pay to the CONSUMER, liquidated damages to the extent of loss of electrical power cost reduction as stipulated in Article III.1.5 of this Agreement. सत्यमेव जयते

II.1.16 Shall ensure and own all risks and liabilities in respect of the power plant and/or arising out of and resulting from its use/operation, maintenance and storage and for accidents causing injuries to or death of

any person whether he is the agent or servant or employee of KGPL or third party(ies) and the CONSUMER shall have no liability attached thereto.

II.1.17 KGPL alone shall have absolute liability under all applicable laws and rules in respect of work done, directly or indirectly, through their sub contractors or agents towards use, operation, maintenance and storage of the power plant.

II.1.18. Shall undertake all liability/responsibility and shall be liable for all costs, demands, claims, losses, damages or expenses which may be incurred by or made on the CONSUMER and arising from the transaction hereby entered into and/or the installation use, maintenance or operation of the power plant or any of its failure to operate or to perform or any other cause whatsoever and howsoever arising."

3. These Clauses come under Article II dealing with the obligations and undertakings. As per Clause II.1.15, in the event of inability to supply of contract demand, the petitioner has to pay to the first respondent the liquidated damages to the extent of loss of electrical power as stipulated under Article III.1.5 of the agreement. Under Clause II.1.18, the petitioner undertakes all damages and expenses incurred on the first respondent, when it occurred at the instance of the petitioner.

4. Article III deals with sales and purchase of energy price payable. The relevant Article III.1.5 is as follows.

"III.1.5 In case KGPL is unable to supply the electrical power to the extent of contracted demand on firm basis the Consumer may request the KGPL to effect such supply by suitably amending the delivery schedule. On the other hand, if KGPL is still unable to meet its delivery commitments, then KGPL shall pay the fixed difference of Re.0.47 (Forty seven paise only) per unit to the CONSUMER for

such quantity of power not supplied by KGPL as against the contracted demand/revised delivery schedule on firm basis during a contract year. The claim, if in order and payable, shall be settled by KGPL within 30 days of receipt of the claim from the Consumer."

This Article also speaks about the inability of the petitioner to supply electrical power to the extent of contracted demand on firm basis resulting in payment of liquidated damages at a fixed price of Rs.0.47 paise per unit.

5. The petitioner did not make the supply as per the agreement admittedly. As a consequence to that, the first respondent was made to purchase the power from outside to run its unit at a higher price. As the petitioner failed to make the supply despite the request made by the first respondent, there was also an excess drawal from the grid beyond the quota allotted by the Tamil Nadu Electricity Board (hereinafter referred to "TNEB"), in turn, resulted in the levy of penalty. The first respondent also used diesel gen set.

6. The aforesaid process adopted incurred huge loss to the first respondent. Thus, the first respondent invoked the arbitration clause making various claims against the petitioner. The claims were made on the basis of liquidated damages.

7. The Tribunal, by an exhaustive and extensive award granted part of the claims in favour of the first respondent. Findings were given that the failure to make the supply was not borne out of inability but otherwise. In the process, the first respondent did incur the loss. It was not correct to state that there was insufficient supply of gas. The over drawal made by the first respondent was due to the refusal of the petitioner in making the supply as the grid being the same. Article III.1.5 of the power supply agreement does not apply to the case on hand. So is the case of Article II.1.15. Therefore, it is a case of non-supply not falling under Article II.1.15 and III.1.5 of the power supply agreement. The fact that the first respondent became the shareholder of the petitioner will not debar it from making the claim. Hence, the case on hand would come under Article II.1.18. The petitioner has deliberately diverted the power produced to the third party for sale at a higher rate. The first respondent would not

be in a position to know the non-supply till the bill was raised by the TNEB. There is no material to hold that the first respondent did not even utilise the contract and power from the TNEB. No plea towards mitigating the loss was taken nor there is any material on the part of the petitioner to that effect. The Audit Report of the TNEB would show the excess energy drawn. The very fact that the first respondent entered into two Memorandum of Understandings with the petitioner would show that the cheaper power from the TNEB was not available. The petitioner did admit the requirement of the first respondent. The documents filed by the first respondent would show the expenses incurred in generating the electricity. However, it is to be noted that the Tribunal did not take into consideration of two enhancements made in the tariff by the TNEB. Thus, a sum of Rs.1,05,87,121/- has been wrongly awarded. This factual error has been fairly admitted by the first respondent.

8. Heard the learned counsel appearing for the petitioner and the learned Senior Counsel appearing for the first respondent and perused the documents and written submissions.

9. The learned counsel appearing for the petitioner would submit

that the first respondent did not prove that it had actually required the power as per the contract. There cannot be any higher liquidated damages than the one provided under Article III.1.15 and II.1.5 of the Power Supply Agreement. The burden to prove the loss was wrongly cast on the petitioner. The audit slips ought not to have been relied upon by the Tribunal. The first respondent did not establish the usage of TNEB quota, overdrawal, payment of penalty and the loss. The materials produced for the purchase of power from outside and usage of diesel for operating through gen set are not sufficient. The monthly invoices raised by the TNEB was not produced. The first respondent did not establish the steps taken to mitigate against the plausible loss. The tariff payable by way of liquidated damages was fixed by taking into consideration of the price fixed under the Memorandum of Understandings, which is not sustainable in law. In support of his contention, the learned counsel has made reliance on the following judgments.

1. ASSOCIATE BUILDERS V. DELHI DEVELOPMENT AUTHORITY (2015) 3 Supreme Court Cases 49);
2. TITANIUM TANTALUM PRODUCTS LTD., V. SHRIRAM ALKALI AND CHEMICALS (Manu/DE/8699/2006);
3. STATE OF RAJASTHAN AND ANOTHER v. FERRO

CONCRETE CONSTRUCTION PRIVATE LIMITED

((2009)12 Supreme Court Cases 1;

4.DRAUPADI DEVI AND OTHERS V. UNION OF INDIA

AND OTHERS ((2004) 11 Supreme Court Cases 425);

5.ARYA ANTHERJANAM V. KERALA STATE

ELECTRICITY BOARD, TRIVANDRUM (1996) SCC

Online Ker 5);

6.MURLIDHAR CHIRANJILAL V. HARISHCHANDRA

DWARKADAS AND ANOTHER ((1962) 1 SCR 653);

7.MAULA BUX V. UNION OF INDIA ((1962) 2 Supreme

Court Cases 554);

8. MCDERMOTT INTERNATIONAL INC. V. BURN

STANDARD CO. LTD., AND OTHERS ((2006) 11 Supreme

Court Cases 181); and

9.KAILASH NATH ASSOCIATES V. DELHI

DEVELOPMENT AUTHORITY AND ANOTHER ((2015) 4

Supreme Court Cases 136.

10. The learned Senior Counsel appearing for the first respondent would submit that admittedly, supply was not made as agreed. The factual finding is to the effect that the non supply was deliberate to augment more revenue from the third party. The permission given by the TNEB was qualified . Thus, even the said

permission was violated. The overdrawal is solely attributable to the petitioner. The power was drawn from the said grid and therefore, the first respondent was not aware as to whether it comes from the petitioner or TNEB. The first respondent was kept in tenterhooks all the time though the methodology were adopted in view of the failure of the petitioner to provide electricity. The first respondent was forced to adopt the other modes to secure electricity. The Tribunal has considered all the materials while assessing the loss. Section 73 of the Indian Contract Act, 1872 has to be read with Section 74. As rightly held by the Tribunal, we are not dealing with the case of the deliberate supply but deliberate denial. Therefore, Article II.1.15 and III.1.5 do not have any application as against Article II.1.18. The Tariff was fixed as it was the one agreed by the parties. It was even less than the one otherwise payable to TNEB. In any case, the damages involved four periods and therefore, different methodologies were adopted to secure power. The issue regarding the alleged non consumption was raised only after the completion of the evidence. The production was on the increase contrary to the statement made by the petitioner. Similarly placed persons invoked Section 9 of the Arbitration and Conciliation Act, 1996, and obtained the orders and got the supply. It is not, as if, the Tribunal has awarded all the claims. In

fact, the claims made under several heads were granted only partially. As the award was an exhaustive and elaborate one, no interference is required. However, the learned Senior Counsel fairly stated that the award can be modified by reducing a sum of Rs.1,05,87,121/-. The decision relied on by the learned Senior Counsel is as follows:

(1) STEEL AUTHORITY OF INDIA LIMITED V. GUPTA BROTHER STEEL TUBES LIMITED ((2008) 10 Supreme Court Cases 63).

11. The fundamental and basic facts are not in dispute with respect to the agreements and communication between the parties. Thus, the liability to supply cannot be denied. On this, the Tribunal has rendered a factual finding that this is not a case of supply not made due to inability but a deliberate refusal to augment higher revenue through the sale in favour of third parties. The Tribunal has also found that it was not correct to state that there was inadequate of raw materials viz., gas for the power production. These findings being factual cannot be assailed and therefore, they formed the foundation on the other issues.

12. Interpreting an agreement lies within the jurisdiction of the Tribunal. The Tribunal interpreted Article III.1.15 and II.1.5 and

III.1.18 correctly on the factual foundation. Thus, there is no difficulty in upholding the reasoning of the Tribunal with respect to the liquidated damages payable.

13. Mitigating the loss was never pleaded but raised belatedly. A mitigation has to be seen on a fact situation. Different methods were adopted by the first respondent due to the contingencies created by the circumstances and the petitioner. The over drawal happened because of the petitioner's refusal to supply. The audit slips were taken note of for awarding part of the claim.

14. Section 73 of the Indian Contract Act, 1872, has to be read with Section 74. Section 73 of the said Act speaks about the knowledge of the party on the consequence of breach leading to the situation resulting in damages. As rightly submitted by the learned Senior Counsel appearing for the first respondent, Illustration "A" to Section 73 of the Indian Contract Act, 1872, would govern the case. Similarly, Section 74 of the Indian Contract Act, 1872, does not have an application when a party responsible for the breach does it deliberately to get financial gain. Otherwise, it might lead the situation

where despite payment of liquidated damages under Section 74 of the Indian Contract Act, 1872, a party, who is responsible for the breach would benefit more. In such view of the matter, the statement of law dealt with by the Tribunal required to be confirmed.

15. Coming to the materials produced while claiming damages, the Tribunal has considered them at length while passing an Award. The price govern by the Memorandum of Understanding was taken, being a reasonable one. The penalty was forced upon the first respondent on the deliberate refusal of the petitioner to supply. The first respondent was made to purchase power from outside at a higher price and use diesel gen set also for the aforesaid reason. These steps were taken by the first respondent at different periods warranted by the continued failure of the petitioner to supply. It is also to be noted that the petitioner did make its supply to other similarly placed persons, who have obtained orders from this Court under Section 9 of the Arbitration and Conciliation Act, 1996. When once the Tribunal gives a finding on analysing the materials paced before it, in coming to the quantum of compensation, this Court is not expected to interfere with it under Section 34 of the Arbitration and Conciliation

Act, 1996. The award was passed on a consideration of the materials produced. The requirement is not in dispute as admitted by the petitioner itself. After all, the petitioner is bound to make good the loss suffered by the first respondent for its deliberate act. The first respondent, being the shareholder, can never be a factor to deny the relief sought for. There is nothing wrong in taking note of the evidence in the form of balance sheet, auditor's report and audit slips. After all, as stated earlier, it is not, as if, all the claims were allowed. In fact, the Tribunal did not agree with some of the claims by declining to accept the materials produced.

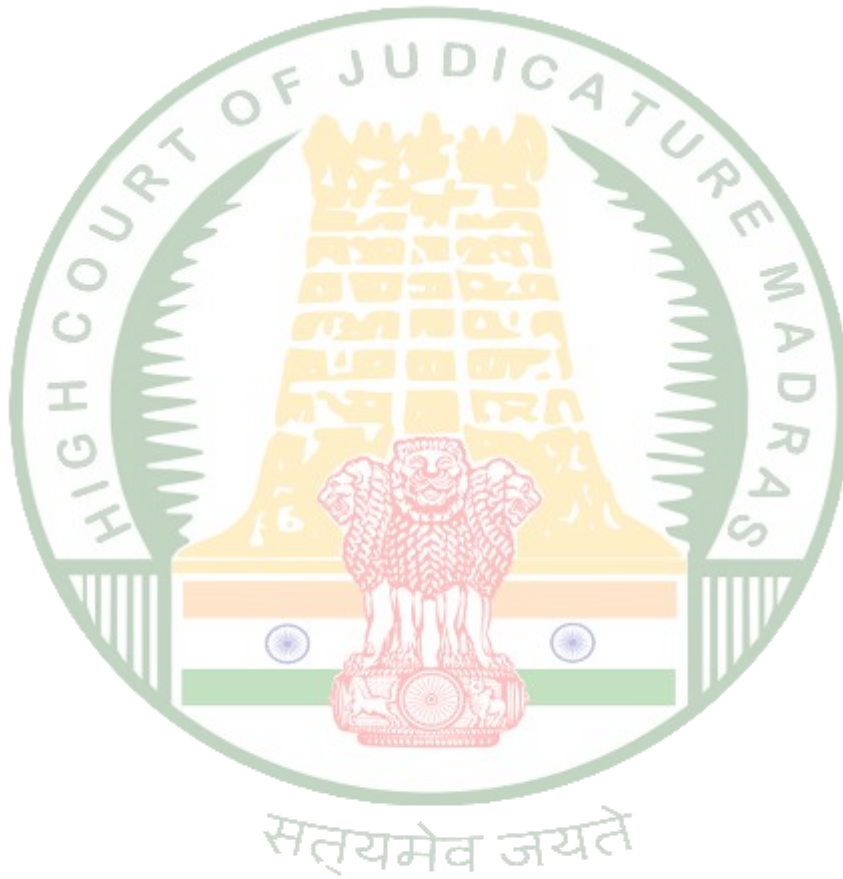
16. Though the learned counsel for the petitioner relied upon few decisions, this Court is not dealing with the ratio laid down as being unnecessary and not relevant to this case. After all there is no doubt on the legal statements made. In such view of the matter, this Court does not find any error in the award passed warranting interference and accordingly, the original petition stands dismissed. However, in view of the fair submission made by the learned Senior Counsel for the first respondent, taking note of the error committed, not taking note of two enhancements made by the TNEB, a sum of

Rs.1,05,87,121/- is accordingly deducted from the award passed. No costs.

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M.M.SUNDRESH, J.

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**Pre-Delivery Order in
O.P.No.220 of 2016**

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