IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.03.2018

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THE HONOURABLE MR.JUSTICE M.M.SUNDRESH

Original Petition No.105 of 2016

Shriram EPC Limited
Sigappi Achi Building, 4th Floor,
18/3, Rukmini Lakshmipathy Road,
Egmore, Chennai. ... Petitioner

Vs

1. Hyquip Technologies Limited,
   Hyquip House, 8-2 120/76, Road No.2,
   Banjara Hills, Hyderabad – 500 034.

2. Hon'ble Mr.Justice K.Govindarajan (Retd.)
   New No.8, Old No.5, Justice Ramanujam Road,
   Malaviya Avenue, Shastri Nagar,
   Chennai – 600 041.

3. Hon'ble Mr.Justice R.Balasubramanian (Retd.)
   No.5, Tiger Varadhachary 1st Road,
   Kalakshetra Colony, Besant Nagar,
   Chennai – 600 020.

4. Mr.M.S.Krishnan, Senior Advocate,
   24, Sriramnagar North Street, Alwarpet,
   Chennai – 600 018. ... Respondents

(R2 to R4 are given up)

Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, against the impugned award dated 29.08.2015 passed by the learned Arbitral Tribunal allowing the claim of the first respondent and rejecting the counter claim of the petitioner.

For Petitioner : Mr.Yashor Vardhan
Senior Counsel
for Mr.Vinod Kumar

ORDER

Heard the learned senior counsel appearing for the petitioner.

2. The petitioner sent a notice to the last known address of the first respondent. As the notice got returned as "addressee left", paper publication was ordered by this Court. After due compliance, the learned Master posted the matter before this Court for arguments. Hence, this Court is constrained to decide the matter on merits.

3. The petitioner is an EPC contractor, who was appointed by M/s.OPG Power Generation Pvt. Ltd., for construction of its power plant. The respondent No.1 was the sub contractor for the supply and erection of coal handling system for the power plant. Two documents have been executed by the parties towards supply order and work order on 07.03.2008. The value of the supply order was Rs.21,15,00,000/-. The value of work order was Rs.85,00,000/-.

4. For the supply of three items, the first respondent made an advance with chinese concern. However, the first respondent faced some difficulty in releasing the letter of credit and in order to get over the said problem, a tacit understanding was reached between M/s.OPG Power Generation Pvt. Ltd. and the respondent No.1 by which the said concern itself has agreed to make the remaining payment and take the equipments and to procure it. Accordingly, the supply order dated 07.03.2008 was amended by the subsequent document dated 19.05.2008, as a result of which, three items which form part of the earlier one were removed and consequently, the value of the contract was reduced to Rs.10,32,00,000/- as against the earlier one of

Rs.21,15,00,000/-.

5. Dispute arose between the parties is with respect to various claims. The claims of the respondent can be categorized into two. One is with respect to Rs.1,63,00,000/- being an advance paid to the chinese supplier, for which the supply order was amended and payment was made by M/s.OPG Power Generation Pvt. Ltd. itself. The second is for the non payment of money for the work done. Claiming that the work was abandon resulting in loss, liquidated damage was sought for by the petitioner through the counter claim made.

6. The Tribunal, after giving a finding that there was a negotiation of contract with respect to three items, nonetheless, passed an order including a sum of Rs.1,63,00,000/- paid by the respondent No.1 by way of advance to the foreign chinese company. A further sum of Rs.46,16,079/- was awarded, for the non payment towards work done. Challenging the same, the present Original Petition has been filed.

7. The learned Senior Counsel appearing for the petitioner submits that admittedly, three items which form part of the earlier work order dated 07.03.2008 has been modified by subsequent order dated 19.05.2008, thus, there was not only a deletion, but also reduction of value of the contract to Rs.10,32,00,000/-. This coupled with the agreement between M/s.OPG Power Generation Private Limited and the respondent No.1, to purchase the aforesaid items, by itself would clearly show that the Tribunal has exceeded its jurisdiction. Resultantly, the value of the contract was increased to the original one. Insofar as the claim of Rs.46,16,079/- is

concerned, it is contended that the Tribunal has not considered it at all.

8. Coming to the second issue first, a perusal of the award would show that the Tribunal considered the material available on record before rendering a finding on the liability of Rs.46,16,079/-. This finding being based upon the factual adjudication, no interference is required. As rightly held by the Tribunal under Section 74 of the Contract Act, duty is imposed upon the Tribunal to assess the actual loss in awarding liquidated damages. Thus in the absence of any material produced by the petitioner, it was accordingly rejected.

7. Coming to the primary issue of awarding of Rs.1,63,00,000/-, this Court finds a considerable force on the submissions made that there is no dispute on the fundamental facts. The earlier supply order dated 07.03.2008 stands modified with the subsequent order dated 19.05.2008. The fact that three items were deleted resulting in reduction of the value of contract is not in dispute. When once, by agreement, it was decided to reduce the value, even an action done pursuant to the earlier one cannot be put against the other party. M/s.OPG Power Generation Private Limited paid only remaining consideration of the case. Therefore, the payment of the advance amount paid by the petitioner is the subject matter between M/s.OPG Power Generation Pvt. Limited and the respondent No.I. The approach of the Tribunal in this regard cannot be sustained in the eye of law. Once there is novation, the consequence would follow. After all, a novation takes place by agreement between the parties. Therefore, when the items have gone out of the purview, there is no jurisdiction for the Tribunal to adjudicate upon it. In such view of the matter, the Tribunal has committed a fundamental error in coming to an end the issue, for which

there is no jurisdictional authority to adjudicate upon. In other words, the Tribunal has re-written the contract entered subsequently by consent. Admittedly, an amendment or modification of the earlier agreement was made by changing the earlier one to the extent of such amendment. What is relevant to be seen is the removal of three items corresponding to the reduction in the value of the contract. Thus, the subsequent supply order dated 19.05.2008 is the primary issue to be considered. Only those issues governed therein alone would be subject to the jurisdiction of the arbitral tribunal. Therefore, the awarding of Rs.1,63,00,000/- by the Tribunal is purely beyond the jurisdiction vested with it. In such view of the matter, the petition is allowed insofar as the awarding of Rs.1,63,00,000/- with corresponding interest and for the remaining amount of Rs.46,16,079/-, the award stands confirmed.

12.03.2018

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M.M.SUNDRESH, J.

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