

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.06.2019

C O R A M

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

O.P.No.702 of 2018
and
A.Nos.6462 & 6097 of 2018

M/s.Soundararaja Mills Limited,
Soundararaja Buildings,
GTN Salai, Dindigul - 624 005

... Petitioner

Vs.

Clarion Wind Farm Private Limited,
Sigapi Achi Building, 4th Floor,
18/3, Rukmani Lakshmipathi Road,
Egmore, Chennai - 600 008.

... Respondent

PRAYER: The Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award passed by the Sole Arbitrator in Arbitration Case No. nil dated 12.07.2016.

For Petitioner : Mr.P.Subba Reddy
Senior Counsel for
Mr. P.Raja

For Respondent : Mr.Rahul Balaji
for Mr.R.Parthasarathy

ORDER

The original petition has been filed to challenge the award dated 12.07.2016 passed by the Sole arbitrator under Section 34 of the Arbitration and Conciliation Act, 1996 (*herein after referred to as 'the Act'*).

2. The brief facts, in a nutshell, are thus:-

2.1. The respondent/claimant is engaged in the business of generation of renewable energy, more particularly, wind energy generation. The respondent company is the subsidiary company of Orient Green Power Company Limited, which was in turn promoted by Shriram EPC Ltd. In the course of business, the claimant had entered into a Memorandum of Understanding (MOU) with the petitioner on 05.10.2009 for the purchase of 20 wind mills with a total capacity of 25 MW. Out of which, four wind mills have been situated at Irukandurai, Tirunelveli District and the remaining 16 wind mills have been situated at Sankaneri. The total consideration is Rs.90 crores, which has to be paid in two tranches. The first tranche of Rs.16 crores was paid on the date of execution of MOU and the second tranche of Rs.74 crores might be paid on or before 30th November 2009. The petitioner had incurred the liability and obtained loan from various Banks towards the purchase of 16 windmills and a charge framed in respect of the said windmills as security. The respondent has paid the remaining consideration

of Rs.74 crores by way of Letter of Credit (LC) arranged by the Shriram EPC Ltd., which was discounted by the petitioner. Thereafter, the respondent has claimed the cost of generation from the date of payment till the date of transfer. Therefore, the respondent made a claim to the tune of Rs.1,41,88,391/-.

2.2. The main contention of the petitioner before the arbitrator is that there was no contractual obligation between the petitioner and the respondent/claimant. The claimant being a total stranger, is not entitled to maintain the claim. It is also denied that the claimant was not promoted by Shriram EPC Ltd. Further, it is stated that the claimant did not comply with the terms and conditions of MOU dated 05.10.2009 as the full consideration was not paid on or before 30.11.2009 and hence, the MOU itself is null and void. It is further stated that the payments were made only by Shriram EPC Ltd., and that the wind mills have been sold to Shriram EPC Ltd., in turn sold to the claimant. It is further stated that there is no privity of contract and there was no generation amount. It is also stated that the petitioner has paid the excess amount and that they are entitled for a sum of Rs.38,88,930/-.

3. Based on the above pleadings, the following issues have been framed by the arbitrator :

“1. Whether the MOU dated 05.10.2009 entered into between the Claimant and the respondent became null and void on 30th November, 2009 ?

2. Whether the payment by Shriram EPC Ltd., was for discharging the liability of the Claimant as per the MOU?

3. Whether Shriram EPC Ltd., had accepted to bear the discounting charges in respect of the LC?

4. Whether the admissions of liability on the part of the respondent can be stated to be issued by a person without authority and therefore not binding upon it?

5. Whether the Claimant is entitled to the sum of Rs.1,41,88,391/- together with interest at the rate of 18% per annum from the due date of payment to the date of the claim despite the payment of Rs.1,80,77,321/- made by Respondent to Claimant on 06.07.2010?

6. Whether the counter claim of the respondent is barred by limitation ?

7. Whether the respondent is entitled to the counter claim of an amount of Rs.38,88,930/-?

8. Whether the Claimant would, under the MOU and in law, be entitled to the income arising out of the power generated from the windmills which are the subject matter of the transfer under the MOU at the agreed rate of Rs.2.70 per KWH, for the period between the completion of the sale and transfer of the service connection to the name of the Claimant?

9. Whether the Claimant is entitled to further interest on the claim at the rate of 18% from the date of award until the date of payment?

10. Whether the claimant is entitled to costs of the arbitration?

11. Whether the parties are entitled to any other reliefs ? ”

Ultimately, after analysing the entire issues, the arbitrator allowed the claim and passed an award.

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4. The learned Senior Counsel appearing for the petitioner would contend that there was no contractual obligation between the petitioner and the respondent/claimant. The payment has not been paid as per the Memorandum of Understanding and the Letter of Credit was issued on

24.12.2009 only by Shriram EPC Ltd., not by the claimant. Therefore, the question of issuing generation fees to the respondent/claimant does not arise at all, which is beyond the terms and conditions of the contract. It is the further contention that the amount has to be paid as per the MOU on or before 30.11.2009, which has not been paid by the respondent/claimant. Hence, his contention is that there is no privity of contract and that the amount awarded by the arbitrator towards generation of fees from November 2009 to February 2010, is beyond the terms of the contract. It is further submitted that even MOU does not stipulate paying of such generation income to the claimant. Hence, his contention is that the entire award established is beyond the contract.

5. The learned counsel for the respondent would contend that admittedly, on the date of MOU 16 crores have been paid. Though, the remaining 74 crores have to be paid on or before 30.11.2009, the same was paid only on 24.12.2009, by way of LC which was issued by the subsidiary company of the claimant i.e. Managing Director of Shriram EPC Ltd. The LC was discounted on 05.01.2010. Further, the petitioner has given "No Objection Certificate" for transfer of ownership in the name of the claimant to the TANGEDCO. It appears that there were many correspondence between the parties, which clearly indicates that the payment was made

and that the petitioner agreed to pay the generation fees and pleaded further time. The learned counsel for the respondent reiterated the oral and documentary evidence and submitted that there is no ground made out in this petition to interfere with the award under Section 34 of the Act.

6. It is well settled that the award can be interfered only when the grounds set out under the Act is made out. On perusal of the entire award, it is seen that there is no patent illegality, which goes into the root of the matter. Similarly, it is contended that there is violation of public policy. However, I find no materials available on record. Scope of interference under the Act is discussed in *Oil and Natural Gas Corporation Ltd., v. Saw Pipes Ltd.*, [2003 (5) SCC 705], wherein the Honourable Apex Court has held that an Award can be set aside if it is contrary to:

a) fundamental policy of Indian law; or

b) the interest of India; or

c) justice or morality; or

d) if it is patently illegal

Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court.

7. In a subsequent judgment in *McDermott International Tnc., v. Burn Standard Co.,Ltd.*, [2006 (11) SCC 181] where the Apex Court explained the term patent illegality and held that the patent illegality must go to the root of the matter. Public Policy violation should be so unfair and unreasonable as to shock the conscience of the Court. The supervisory role of the Court under Section 34 of the Act is to be kept at a minimum level and interference is envisaged only in case of fraud or bias or violation of natural justice, etc. If the Arbitrator has gone contrary to or beyond the express of law of the contract or granted relief in the matter not in dispute that would come within the purview of Section 34 of the Act.

8. A Division Bench of this Court in *Puravankara Projects Limited v. Mrs.Ranjani Venkatraman Ganesh and Another* [2018 (6) MLJ 588] also followed the above judgment of the Apex court and held that only in the circumstances envisaged under the decision of the Apex Court the Award can be interfered.

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9. In *Swan Gold Mining Ltd., v. Hindustan Copper Ltd* reported in 2015(5) SCC 739 the Honourable Apex Court has held as follows:

"12. Section 34 of the Arbitration

and Conciliation Act, 1996 corresponds to Section 30 of the Arbitration Act, 1940 making a provision for setting aside the arbitral award. In terms of sub-section (2) of Section 34 of the Act, an arbitral award may be set aside only if one of the conditions specified therein is satisfied. The Arbitrator's decision is generally considered binding between the parties and therefore, the power of the Court to set aside the award would be exercised only in cases where the Court finds that the arbitral award is on the fact of it erroneous or patently illegal or in contravention of the provisions of the Act. It is a well settled proposition that the Court shall not ordinarily substitute its interpretation for that of the Arbitrator. Similarly, when the parties have arrived at a concluded contract and acted on the basis of those terms and conditions of the contract then substituting new terms in the contract by the Arbitrator or by the Court would be erroneous or illegal.

13. It is equally well settled that the Arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him.

21. Mr. Sharan, learned senior counsel appearing for the appellant, also challenged the arbitral award on the ground that the same is in conflict with the public

policy of India. We do not find any substance in the said submission. This Court, in the case of Oil and Natural Gas Corporation Ltd. (supra), observed that the term 'public policy of India' is required to be interpreted in the context of jurisdiction of the Court where the validity of award is challenged before it becomes final and executable. The Court held that an award can be set aside if it is contrary to fundamental policy of Indian law or the interest of India, or if there is patent illegality. In our view, the said decision will not in any way come into rescue of the appellant. As noticed above, the parties have entered into concluded contract, agreeing terms and conditions of the said contract, which was finally acted upon. In such a case, the parties to the said contract cannot back out and challenge the award on the ground that the same is against the public policy. Even assuming the ground available to the appellant, the award cannot be set aside as because it is not contrary to fundamental policy of Indian law or against the interest of India or on the ground of patent illegality.

22. The words "public policy" or "opposed to public policy", find reference in [Section 23](#) of the Contract Act and also [Section 34 \(2\)\(b\)\(ii\)](#) of the Arbitration and Conciliation Act, 1996. As stated above, the interpretation of the contract is matter of the Arbitrator, who is a Judge, chosen by the parties to

determine and decide the dispute. The Court is precluded from re-appreciating the evidence and to arrive at different conclusion by holding that the arbitral award is against the public policy."

10. From the above judgments it is well settled that the award cannot be interfered, unless there is patent illegality or violation of public policy, which goes into the root of the matter. Even, such case re-appreciation of fact is not possible. It is to be noted that the arbitrator elaborately discussed at paragraph Nos.21 to 24 with regard to the clause 7 of the MOU. Though it is submitted that there is no privity of contract between the parties, the arbitrator has taken into consideration all the documents, particularly Ex.C-6, issued by the Senior General Manager (Finance and Legal) of the petitioner's company, wherein the petitioner categorically admitted the privity of contract and income and sought further time to pay the amount.

11. Further, taking into consideration of the facts, the petitioner has transferred the wind mills in the name of the claimant on the very next day, after discounting the Letter of Credit, the arbitrator has come to a conclusion that the claim made by the claimant is well maintainable and

reasonable. It is further to be noted that the arbitrator has also passed a well reasoned and passed award.

12. At this juncture, the learned counsel for the petitioner has brought to the notice of this Court to clause 7 of the MOU, which deals with the generation of income only in respect of 4 wind mills, for which, the payment has been made on the date of demand. The above clause is not applicable to the remaining 16 wind mills.

13. The learned arbitrator, in his award discussed clearly and came to a conclusion that such clause would not be applicable to the entire contract but, confined to 4 windmills alone. The reason for making such conclusion is that the payment was made on the same date. Hence, I am of the view that it is well settled that the arbitrator is the final authority to decide the facts and Court cannot act as an appellate Court to re-appreciate the entire evidence. Therefore, I do not find any patent, illegality or violation of public policy. Hence, no grounds have been made out against the well reasoned award passed by the arbitrator.

14. Accordingly, the original petition is dismissed. No costs.

Consequently, connected applications are closed.

19.06.2019

Index:Yes/No

Internet:Yes/No

Speaking Order / Non Speaking Order

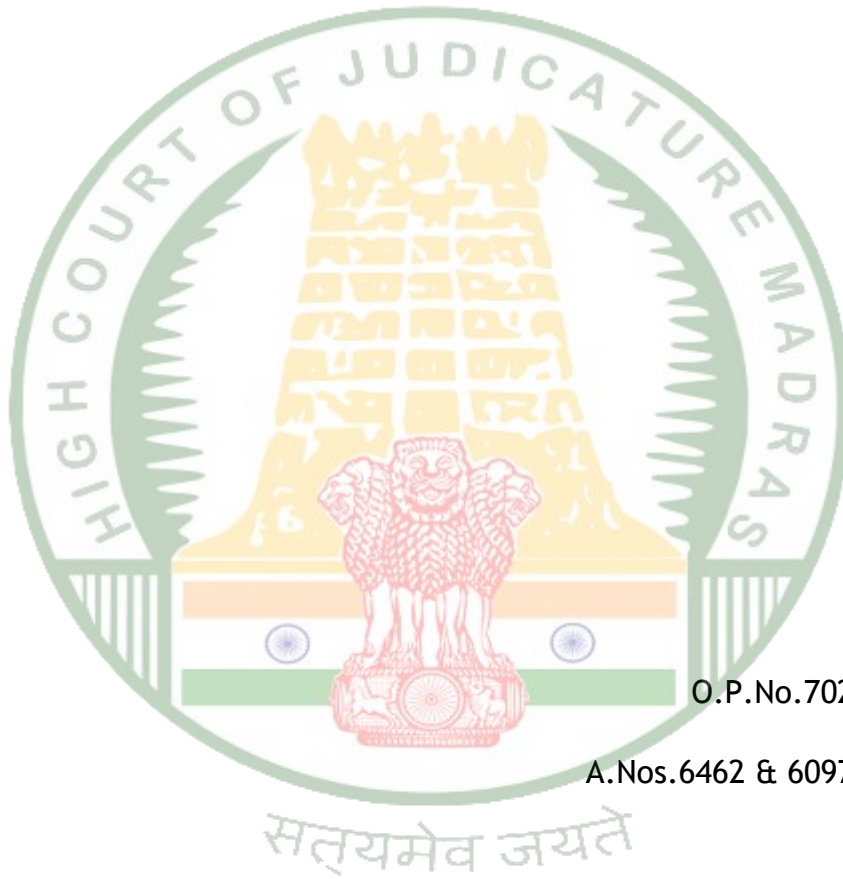
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