IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:19.08.2020

CORAM:

THE HONOURABLE Mr.JUSTICE M.SUNDAR

O.P.No.353 of 2020
&
A.No.1653 of 2020

OPG Power Generation Pvt. Ltd.,
No.6, Sardar Patel Road
Guindy
Chennai – 600 032
Represented by Senior Engineer
S.Venkatesh ... Petitioner

Vs.

Shree Karthik Papers Ltd.,
25, 50 Feet Road
Krishnaswamy Nagar
Ramanathapuram
Coimbatore – 641 045 ... Respondents

Prayer: Petition filed under Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996 praying to set aside the arbitral award dated 31.01.2020 passed by the sole Arbitrator.

For Petitioner : Mr.Vinod Kumar

For Caveator : Mr.Krishnappan
Senior Counsel
for Ms.R.Swarnalatha

ORDER

Captioned 'Original Petition' ('OP' for the sake of brevity) is an application under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act 26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for the sake of brevity and convenience.

2. Captioned OP has been filed with a prayer to set aside /dislodge an 'arbitral award dated 31.01.2020' (hereinafter 'impugned award' for the sake of brevity) made by an 'Arbitral Tribunal' ('AT' for brevity) constituted by a sole Arbitrator.

1. Owing to captioned OP being an application under Section 34 of A and C Act where the contours are limited and where legal perimeter does not permit free perambulation qua assailing all and every aspect of the impugned award on every conceivable ground, short facts shorn of details/facts/particulars not imperative for appreciating this order will suffice.

2.

4.Factual matrix in a nutshell or in other words, short facts shorn of unnecessary particulars are that there was an agreement dated 18.04.2018 between 'OPG Power Generation Pvt. Ltd.,' (hereinafter 'OPG' for the sake of brevity) and 'Shree Karthik Papers Ltd.' ('SKP' for the sake of brevity) and this agreement shall hereinafter be referred to as 'said contract' for the sake of convenience and clarity; that said contract is a Power Supply Agreement and therefore besides said contract is a 'PSA' denoting 'Power Supply Agreement' shall also be a form of reference; that said contract was for a period of 3 years and tariff has been set out for initial one year; that OPG has supplied power to SKP under said contract; that monthly bills were raised computing the month from 28th to 27th of succeeding month qua English Calender; that SKP had 7 days time to make the payments qua monthly bills (inclusive of billing date); that bill for the month 28.08.2018 to 27.09.2018 was raised on 01.10.2018; that OPG stopped supply of power on and from 28.09.2018; that SKP took the stand that owing to this abrupt stoppage of power, it had to procure / buy power from TANGEDCO (Tamil Nadu Generation and Distribution Corporation Limited) at a higher rate resulting in loss; that SKP complained that this abrupt stoppage of supply of power is a breach of said contract; that there is an arbitration clause in the said contract being Clause No.12 captioned 'Governing Law and Arbitration'; that clause 12 being arbitration clause in said contract, serves as arbitration agreement between SKP and OPG being arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act; that the arbitration agreement was triggered; that AT, which was constituted by orders of this Court, entered upon reference; that AT after complete adjudication or in other words, full contest (which included marking of documents and letting-in of oral evidence) made the impugned award wherein and whereby OPG was directed to pay a sum of Rs.51,55,488/- (Rupees Fifty One Lakhs Fifty Five Thousand Four Hundred and Eighty Eight only) together with interest at the rate of 12% per annum; that complaining that impugned award is hit by the vice of being in conflict with public policy, besides being vitiated by patent illegality (decision not in accordance with the substantive law for the time being in force in India) and that the impugned award has not taken into account the terms of said contract, captioned OP has been filed.

5. In the web-hearing on a video-conferencing platform today, when the matter was listed under the caption 'MOTION CASES', SKP

had lodged a caveat and Ms.R.Swarnalatha, learned counsel for Caveator led by Mr.Krishnappan, learned senior counsel and Mr.Vinod Kumar, learned counsel for OPG were before me.

6. This Court heard learned counsel for petitioner first with regard to whether the petitioner (OPG) is able to make out a case for notice being issued.

7. Learned counsel for petitioner submitted that though caption in the OP or in other words, caption to the captioned OP refers only to Section 34(2)(b)(ii), he should be permitted to make submissions touching upon 34(2A), 28(1)(a) and 28(3) of A and C Act. Owing to the facts and circumstances of the case, this Court permitted learned counsel to make submissions touching upon these provisions also.

8. A summation of sheet anchor submissions of learned counsel for petitioner (OPG) is as follows:

a) There is no causal connection between breach and the loss said to have been suffered by SKP;

b) Having answered Issue 5 (which deals with cessation of supply of power by OPG) in favour of OPG, AT committed patent illegality in passing the impugned awarding loss compensation to SKP;

c) Notwithstanding terms of said contract AT has proceeded on the basis that consent of SKP is required for enhancement of tariff.

9. This Court now proceeds to consider the submissions of learned counsel for petitioner and first test whether the learned counsel for petitioner has made out a case for notice being issued.

10. Before this Court does that, it is necessary to set out that this Court reminded itself about the scope of captioned OP, which is under Section 34 of A and C Act. An application under Section 34 of A and C Act is neither an appeal nor a revision. It is not even a full-fledged review. It is a mere challenge to an arbitral award within the 8 slots adumbrated under sub-section (2) of Section 34 and the facets of these 8 slots as explained by courts in various judgments. Therefore, the scope is limited as already alluded to supra elsewhere in this order. Be that as it may, procedure to be adopted for hearing and disposing of a Section 34 application has been laid down categorically with clarity by Hon'ble Supreme Court in ***Fiza Developers*** case [***Fiza Developers and Inter-***

Trade Private Limited Vs. AMCI (India) Private Limited reported in ***(2009) 17 SCC 796***], which was reiterated in ***Emkay Global*** case [***Emkay Global Financial Services Ltd. v. Girdhar Sondhi*** reported in ***(2018) 9 SCC 49]*** as a step in the right direction and further reiterated recently in ***Canara Nidhi Limited*** case [***M/S. Canara Nidhi Limited vs M. Shashikala*** reported in ***2019 SCC Online SC 1244*****].** Therefore, this is challenge to arbtiral award within the 8 slots and the facets of the same as explained by Courts is by way of a summary procedure. This court has also reminded itself that some of the 8 slots, more particularly Section 34(2)(b)(ii) (conflict with public policy of India) and Section 34(2A) (patent illegality) are further circumscribed by explanations or proviso thereat. To be noted, Explanation (2) of Section 34(2)(b)(ii) makes it clear that while testing whether there is contravention with fundamental policy of India (conflict with public policy of India slot), the same would not entail a review on the merits of the dispute. To be noted, in the instant case learned counsel made it clear that the ground touching upon Section 34(2)(b)(ii) (conflict with public policy of India) is posited on sub-clause (ii) of Explanation 1, namely contravention with fundamental policy of Indian law and one limb of sub-clause (iii) of

Explanation 1, namely conflict with basic notions of justice. Likewise, there is a proviso sub-section (2A) of Section 34. This proviso is made up of two limbs. One limb is to the effect that mere erroneous application of law cannot be a ground to set aside an award as patent illegal and the second limb is to the effect that re-appreciation of evidence forbidden/impermissible while testing an award for patent illegality. To be noted, Fiza Developers principle (summary procedure) is also to the effect that a Section 34 application is a one issue proceeding meaning presentation of application assailing an award itself constitutes an issue.

11. After reminding itself about the aforesaid scope of Section 34, and specific provisions on which captioned OP has been posited, predicated and argued, this Court now proceeds to consider the submissions that have been made before it. As already alluded to supra, the preliminary submission was that there is no casual connection between alleged breach and alleged loss. For this it is necessary to look at some uncontraverted and undisputed dates. The uncontraverted and undisputed dates are that there was no default in payment of tariff for the

power consumed by SKP prior to 28.08.2018. A bill was raised for the period from 28.08.2018 to 27.09.2018 and this bill is dated 01.10.2018. To be noted, this bill was marked as an exhibit before AT. Time available for SKP for payment of this bill is 7 days and the same elapsed on 07.10.2018. Be that as it may, cessation of supply of power by OPG was on 28.09.2018. In this regard, this Court deems it appropriate to extract relevant covenants in said contract. Relevant covenants in said contract are Clauses 3.8 and 1.1(xvi), which are as follows:

'3.8. If the Member Consumer defaults in making payments by the Due Date of any of the Invoice(s) raised by the Generator and/or fails to consume the Contracted Capacity in any Billing Period, whether in part or in full, then the GENERATOR may as its sole option and discretion, without any intimation to the Member Consumer, with immediate effect:

(a) Transfer or cause the Escrow Agent to transfer the Equity Shares (in part or in full, as determined by the Generator in accordance with the Electricity Rules, 2005) held by the Member Consumer to any person and/or

(b) Terminate this Agreement, and/or

(c) Reduce the allotment and supply of the Contracted Capacity, or cease the allotment and supply of the Contracted Capacity to the Member Consumer, and/or

(d) Invoke the Letter of Credit and the Additional Letter of

Credit.'

'1.1(xvi) "Due Date" mean within seven days from the Billing Date including the Billing Date, In the case of a Commercial invoice, and Seven day from the date specified in a Supplementary invoice, as the case may be.'

12. In the light of the above scenario, cessation of supply of power by OPG on 28.09.2018 is clearly untenable and a reading of the case file before this Court leaves this Court with the considered view that this by itself is clearly a breach of said contract. Be that as it may, this takes us to the next point which touches upon Issue No.5 being answered in favour of OPG. This finding qua issue No.5 is hit by Section 28(3) may be a strong argument but argument of OPG is as answer to issue No.5 is in its favour compensating SKP for loss is untenable owing to absence of casual connection between breach and loss. It is more than obvious that OPG is not towing the line of assailing finding returned qua issue No.5 as it would otherwise be self destructive. Whether there was loss to SKP owing is another aspect and the same is a matter of evidence before AT.

13. Be that as it may, there is no explanation whatsoever for the

subsequent period which turns on enhancement of tariff. This takes us to subsequent period of enhancement of tariff which turns on clauses 11.8 and 11.4 which read as follows:

> *'11.8 In the event of Change in Law and/or change in price of fuel for the Power Plant or change in transmission or wheeling losses and charges, the Generator shall have right to revise terms of this Agreement especially relating to Price, mode, method, billing and Contribution towards Energy.'*
>
> *'11.4 No variation, waiver or modification of any of the terms of this Agreement shall be valid unless reduced to writing and signed by both the parties.'*

14. Therefore, argument that AT has proceeded on the basis that consent of SKP is required for enhancement of tariff is erroneous does not stand a moments scrutiny owing to Clause 11.4. In this regard, a careful perusal of the impugned award leaves this Court with the considered view that clauses 11.8 and 11.4 have to be read in conjunction and on a harmonious reading of clauses 11.8 and 11.4 of said contract, AT has returned a finding that enhancement of tariff ought to have been done by taking SKP on board. On this limb there is a certain breach.

15. This takes us to the question of breach itself and learned counsel for petitioner pressed into service ***Kanchan Udyog Ltd., Vs.***

United Spirits Ltd., judgment reported in ***(2017) 8 SCC 237*** for the proposition that there should be casual connection between breach and loss. In the instant case, with regard to increase of tariff without taking SKP on board is certainly a breach of terms of contract and thereafter causal connection is a matter of evidence before AT which has found on facts based on evidence before it that SKP has suffered loss. In this regard, it is to be noted that adjudication before AT included letting-in oral evidence on both sides i.e., one witness on both sides, besides marking of as many as 23 documents on the side of SKP, which was the claimant before AT and 7 documents on the side of OPG, which was the respondent before AT.

16. In this regard, this Court also reminds itself of the ***Hodgkinson*** principle which is to the effect that AT would be the best Judge of the quality and quantity of evidence before it. Be that as it may, without even entering into that arena, a careful reading of impugned award makes it clear that there is no room for judicial intervention with regard to conjoint/harmonious interpretation of Clauses 11.4 and 11.8. Therefore, this puts an end to the campaign qua Section 28(3). To be noted, Section 28(1)(a), 34(2)(b)(ii), Explanation 1 clause (ii) fall in one

basket.

17. With regard to distinct juristic doctrines culled out in ***Western Geco*** case ***[ONGC Ltd. Vs. Western Geco International Ltd.,*** reported in **(2014) 9 SCC 263**] and reiterated in Associate Builders case [***Associate Builders Vs. Delhi Development Authority*** reported in ***(2015) 3 SCC 49]***, this Court takes note of the position that captioned OP has been presented in this Court on 23.03.2020, which means the ***Ssangyong*** principle will apply. To be noted, **Ssangyong** principle is ratio laid down by Hon'ble Supreme Court in recent ***Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India*** reported in ***(2019) 15 SCC 131*** judgment. Most significant paragraph in ***Ssangyong*** case is Paragraph 34 and in paragraph 34 it has been laid down by Hon'ble Supreme Court very elucidatively that ***Western Geco*** case expansion has been done away with and ***Western Geco***, as explained in Paragraphs 28 and 29 of ***Associate Builders*** *case* would no longer obtain, owing to which under the guise of interfering with an award qua judicial approach Court's intervention on merits of the award is impermissible. **Ssangyong** principle is to the effect that, of the

three distinct juristic principles culled out and laid down by Hon'ble Supreme Court in Western Geco and reiterated in Associate Builders only one doctrine, namely NJP, which stands for Natural Justice Principle survives and public policy is Renusagar principle. It is nobody's case in captioned OP that there is a violation of NJP. If there is allegation of violation of NJP, obviously there will be a test on the bedrock *audi alteram partem* principle. That does not arise in instant case. There cannot be review on merits of the matter.

18. Lastly it is necessary for the purpose of capturing the proceedings before me as comprehensively as possible to mentioned that, learned counsel drew the attention of this Court to Section 73 of the Contract Act and submitted that a go by has been given to Section 73 of the Indian Contract Act qua the causal connection. With regard to causal connection, this Court has already delineated its views elsewhere supra in this order while dealing with Kanchan Udhyog principle argument and therefore, this argument posited on Section 73 also does not hold water.

Owing to all that have been set out supra, this Court finds that no ground has been made out within the contours, confines and legal perimeter of the statutory geometry of Section 34 for judicial intervention qua impugned award. Therefore, captioned OP fails and the same stand dismissed. Consequently, A.No.1653 of 2020 also stands dismissed. There shall be no order as to costs.

19.08.2020

Speaking Order: Yes / No
Index : Yes / No
gpa/sgl

M.SUNDAR, J.

gpa/sgl

O.P.No.353 of 2020

19.08.2020