

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	27.11.2019
Judgment pronounced on	22.01.2020

CORAM

THE HONOURABLE Mr. JUSTICE **SENTHILKUMAR RAMAMOORTHY**

O.P. No.592 of 2016
and
O.P.No.607 of 2018

Saheli Exports Pvt. Ltd,
No.25, Sir Madhavan Nair Road,
Mahalingapuram,
Nungambakkam,
Chennai – 600 034.

... Petitioner
(in O.P.No.592 of 2016 and
Respondent in O.P.No.607/2018)

Vs.

M/s.Sri Karthikeya Spinning & Weaving Mills Pvt. Ltd.
No.484, Kamaraj Road,
Uppilipalayam,
Coimbatore – 641 015.

... Respondent
(in O.P.No.592 of 2016 and
Petitioner in O.P.No.607/2018)

PRAYER IN O.P.NO.592 OF 2016: Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 07.04.2016 passed by the Arbitral Tribunal in so far as it awards a sum of Rs.1,91,12,547/- as damages and Rs.80,28,622/-

towards refund of advance payments with interest at 18% from 01.10.2009 in favour of the first Respondent.

PRAYER IN O.P.NO.607 OF 2018: Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 07.04.2016 passed by the learned Arbitrators to the extent that the Award seeks to dismiss/reject the Petitioner's claim, including its claim of reimbursement of the additional cost of Rs.4,23,64,130/- with interest at 18% incurred in procuring supply from other sources at higher cost during the contract period from September 2009 to March 2011 and consequential reliefs towards the supply of power to Unit B and the finding that the contract was frustrated on grounds of the Respondent on longer being a captive power generator and consequently allow the Petitioner's claim towards the reimbursement of the additional cost incurred during the contract period from September 2009 to March 2011 and supply of power to Unit B as also hold that no case of frustration has been made out and grant the relief in that regard and for costs.

For Petitioner : Mr.R.Murari, senior counsel
for Mr.Vinod Kumar, counsel for the
Petitioner in O.P.No.592/2016
Respondent in O.P.No.607/2018

For Respondent : Mr.Rahul Balaji, counsel for the
Petitioner in O.P.No.607/2018
Respondent in O.P.No.592/2018
Mr.Vinod Kumar
Respondent in O.P.No.607/2018

COMMON ORDER

This dispute relates to and arises out of the Power Purchase Agreement dated 21.06.2004(the PPA) between Saheli Exports Pvt. Ltd.(Saheli) and M/s.Sri Karthikeya Spinning & Weaving Mills Pvt. Ltd(Karthikeya). The PPA was for a period of six years from the date of commencement of supply and, therefore, would have ordinarily remained in force up to March 2011. After the execution of the PPA, Saheli supplied power to Karthikeya for use by Unit-A of Saheli at Coimbatore. Subsequently, upon request by Karthikeya, Saheli commenced supply of power to Unit-B of Saheli from January 2006. Based on such supply, invoices were issued by Saheli separately for Unit- A and Unit-B. On or about 10.01.2009, Saheli issued a letter convening an urgent meeting to discuss the terms of power purchase under the PPA and a dispute ensued between the parties. Thereafter, by letter dated 03.02.2009, Saheli purported to terminate the PPA with effect from 03.05.2009, i.e. 90 days from the said notice. The said termination was rejected by Karthikeya by reply dated 17.04.2009. Eventually, the said dispute was referred to arbitration. Saheli was the claimant in the arbitration and made several claims such as for a declaration that the termination of the PPA by letter dated 03.02.2009 is illegal, null and void; for a direction to Saheli to pay a sum of Rs.91,01,348/- as compensation for the penal levy imposed by

TNEB and paid by Karthikeya for exceeding the quota due to discontinuation of power supply by Saheli for the month of April 2009; directing Saheli to pay a sum of Rs.58,33,331/- towards compensation for the additional cost incurred due to discontinuation of power supply by Saheli for the month of May 2009; directing Saheli to pay a sum of Rs.82,68,987/- towards compensation for additional cost incurred by purchasing power from third parties due to discontinuation of power supply by Saheli for the month of June to August 2009; directing Saheli to refund Rs.80,28,622/-, namely, the excess advance payment received by Saheli with interest from the respective date of payment till the date of realisation by Karthikeya; directing Saheli to supply power to Karthikeya from October 2009 till the end of the term of agreement or, in case of default, direct Saheli to reimburse the additional costs and direct Saheli to pay a sum of Rs.10,00,000/- towards mental agony, hardship, inconvenience etc. By reply statement and counter claim, Saheli refuted all the claims and counter claimed a sum of Rs.2,90,317/- towards interest on over due payments with interest thereon. The Arbitral Tribunal framed 13 issues, which are set out at internal Pages 7 and 8 of the Award. Karthikeya adduced evidence through two witnesses(C.W.1 and C.W.2) and filed documents that were exhibited as C-1 to C-70. Saheli adduced evidence through one witness (R.W.1) and filed documents that were exhibited as R-1 to R-29.

2. An Arbitral Award dated 04.06.2016 was pronounced, which consists of three separate awards. For the sake of convenience, the learned Arbitrator, Mr.T.K.Seshadri, is referred to as the First Arbitrator, the learned Arbitrator, Mr.D.I.J.Rajkumar, as the Second Arbitrator and Justice K.P.Sivasubramaniam, as the Presiding Arbitrator. On certain claims there was unanimity on the part of the Arbitral Tribunal, whereas, on other claims, a combination of the First and Presiding Arbitrator or the Second and Presiding Arbitrator, as the case may be, concurred and that constitutes the Majority Award. The Majority Award is referred to as the Award and, needless to say, is the subject matter of challenge here. The nature of the Award would be clear from the following narrative. All three Arbitrators agreed that the PPA did not apply to the supply of power to Unit-B of Karthikeya and was confined to the supply of power to Unit-A. By majority, the Arbitral Tribunal ruled that the notice of termination is invalid. A majority of two Arbitrators, consisting of the Second and the Presiding Arbitrators, agreed that Karthikeya is entitled to a sum of Rs.58,31,331/- as compensation for the losses incurred by Karthikeya on account of the discontinuance of power supply by Saheli for the month of April 2009. As regards non-supply in May 2009, once again, the Arbitral Tribunal, by a majority of two Arbitrators, consisting of the Second and Presiding Arbitrators, concluded that Karthikeya is entitled to the claim of Rs.58,33,331/-. All three Arbitrators agreed that Karthikeya is entitled to

a refund of a sum of Rs.80,28,622/- towards surplus remaining with Saheli after adjusting the advance towards the supply that was made. With regard to the period from June to August 2009, the Arbitral Tribunal through a majority of two, consisting of the Second and Presiding Arbitrators, allowed the claim of Karthikeya to the extent of Rs.74,45,885/-. As regards the prayer for supply of power from September 2009 till the expiry of PPA, the Arbitral Tribunal by majority of two, consisting of the First and Presiding Arbitrators, concluded that the PPA was frustrated by virtue of Saheli ceasing to be a captive power plant. Saheli challenged the Award in so far as it awards a sum of Rs.1,91,12,547/- as damages and directs Saheli to pay Rs.80,28,622/- towards refund of advance payments with interest thereon at 18% per annum. Karthikeya also challenged the Award in so far as Karthikeya's claims for reimbursement of the additional cost of Rs.4,23,64,130/- for the period extending from September 2009 to March 2011 is concerned and also to the extent it was concluded that Unit-B is outside the scope of the PPA with consequential claims for damages as regards Unit-B.

3. I heard Mr.R.Murari, the learned senior counsel for Saheli, assisted by Mr.Vinod Kumar, and Mr.Rahul Balaji, the learned counsel for Karthikeya.

4. The learned senior counsel, Mr.R.Murari, commenced his submissions by providing an overview of the nature of the contract between the parties. By drawing reference to the recitals of the PPA, he pointed out that the said PPA was entered into so as to enable the sale and purchase of 10 million units per year by Saheli and Karthikeya, respectively, on firm power basis. He also pointed out that, as per Article III.1.2, Saheli was required to supply power by offering a discount of 9% per unit as compared to TNEB's HT I Tariff. He, thereafter, invited my attention to the termination clause of the PPA; in specific, Article VI.1.4, which reads as under:

"Either party wishing to terminate this Agreement at the end of 6 years, shall give Ninety (90) days advance notice to the other party, failing which this Agreement is deemed to continue".

He also pointed out that the PPA enabled the parties to terminate the same before the end of six years. In this connection, he pointed out that Article VI.2.1 and 2.2, respectively, enabled Saheli and Karthikeya to terminate for breach by the other party and, in addition, Article VI.3 enabled unilateral termination. The said Article VI.3 reads as under:

"The parties to the agreement can also terminate this agreement before the end of the term of this

agreement on any other grounds by giving an advance notice of not less than 90 days."

By advertng to the said clause, the learned senior counsel contended that this clause enables both Saheli and Karthikeya to terminate the PPA by citing reasons or grounds provided an advance notice of not less than 90 days is given. According to the learned senior counsel, the only reasonable interpretation of this clause is that it enables unilateral termination on a "no fault" basis. With the aforesaid preamble, the learned senior counsel commenced his specific submissions. His first contention was that the PPA specified that power supply was to be made at the locations committed by Karthikeya as per Schedule – I of the PPA. By advertng to Schedule – I, he pointed out that it is the admitted position that Karthikeya's unit or factory at Uppilipalayam, Coimbatore with service connection(SC)No.101 is the only unit mentioned in Schedule-I. Therefore, he pointed out that Saheli had contended successfully before the Arbitral Tribunal that Unit-B is not covered by the PPA. In this connection, he pointed out that an application was filed under Section 16 of the Arbitration and Conciliation Act,1996(the Arbitration Act) and that, by order dated 25.09.2010, it was concluded that Unit-B is not covered by the PPA. He also pointed out that the Arbitral Tribunal unanimously reiterated this view in the Award.

5. Thereafter, he pointed out that the claims of Saheli may be divided into 4 periods, namely, (a) April 2009; (b) May 2009; (c) June-August 2009; and (d) September 2009 to March 2011. According to the learned senior counsel, although April 2009 was within the 90 day notice period under the termination notice, Karthikeya failed to prove that it incurred loss on account of the non-supply of power during the said period. In effect, he contended that Saheli cannot be held liable for the imposition of penalty by TNEB. To put it differently, it was his contention that Karthikeya would have been entitled to damages if the price at which Karthikeya procured power was higher than the price at which Saheli was required to supply power but Saheli cannot be held responsible or accountable for the imposition of penalty and that such penalty is an indirect consequence and not a direct consequence. As regards the second period, namely, May 2009, he submitted that this period is after the expiry of the notice period under the termination notice. Therefore, Karthikeya would not be entitled to the claim for compensation unless it is established that the termination is invalid and that Karthikeya incurred losses as a direct consequence of such termination. In this connection, he relied upon the findings of the First Arbitrator to the effect that the normal charges for power for the month of April 2009 are reflected in Ex.C.14 dated 01.05.2009, which is the bill from the TNEB for the month of April 2009, and because there is no difference between the rate as per Ex.C-32

dated 28.02.2009 and Ex.C14 dated 01.05.2009, Karthikeya failed to prove loss and, therefore, the award of damages of Rs.58,31,331/- is invalid and liable to be set aside. With regard to the second period, he pointed out that Saheli is not liable in respect of the penalty of Rs.7/- per unit, which was allegedly imposed by TNEB. On this claim also, he relied upon the findings of the First Arbitrator. With regard to the third period, namely, June to August 2009, he further pointed out that Karthikeya failed to produce the best evidence in the form of TNEB bills, which were produced for the earlier periods. Consequently, he submitted that Karthikeya had also failed in its obligation to mitigate loss by procuring power from the less expensive source, namely, TNEB. With regard to the 4th period, namely, from September 2009 to March 2011, he pointed out that the Arbitral Tribunal, by a majority consisting of the First and Presiding Arbitrators, concluded that Saheli ceased to be a captive power plant and that, therefore, the PPA was frustrated. Consequently, he submitted that the Award is not liable to be interfered with as regards the finding that the PPA stood frustrated.

6. He next focused on the findings of the Presiding Arbitrator. In particular, he pointed out that the Presiding Arbitrator rendered self-contradictory findings: (a) that it is not necessary to examine whether the agreement enables Saheli to terminate the agreement for any reason or

without giving reason; and (b) that the reason given cannot be justified. In this regard, he submitted that there is no justification for the Arbitral Tribunal to examine the justifiability or validity of the reasons provided by Saheli in the termination notice, if Saheli is contractually entitled to terminate without providing justifiable grounds for such termination. He also pointed out that with regard to the second period, namely, May 2009, the Presiding Arbitrator accepted the reasoning of the Second Arbitrator without any discussion or finding. With regard to the third period, namely, June to August 2009, once again, he pointed out that the Presiding Arbitrator recorded the finding that there is no proper explanation as to why Karthikeya had availed supply from other purchasers instead of applying for an increased quota from TNEB or by purchasing power from All India Energy Exchange. In spite of recording such finding, he pointed out that the Presiding Arbitrator accepted the reasoning of the Second Arbitrator and awarded a sum of Rs.74,45,885/-.

7. With reference to the third period, namely, between June 2009 and August 2009, he submitted that there is a categorical finding by the First Arbitrator that the TNEB bill, which is the best evidence, was not produced and that no proof was adduced to establish that TNEB could not supply power. By contrast, he contended that the Second Arbitrator held that the claim had been proved based on the TNEB audit slip and that

there is no reason to doubt the said document. He also pointed out that the Second Arbitrator concluded that Karthikeya, as a prudent business entity, would have taken all steps to mitigate the expenses although no proof was available on record in support of the above mentioned conclusion (Page 182 of Volume-I in O.P.No.592 of 2016). On this claim, he pointed out that the findings of the Second Arbitrator and the Presiding Arbitrator are patently erroneous in as much as they concluded that Karthikeya had taken all steps to mitigate loss by first consuming wind energy and, thereafter, TNEB energy and 3rd party energy. In particular, he pointed out that the said conclusions are completely baseless in the absence of evidence of procurement from TNEB and in the absence of a request for an increased quota from TNEB.

8. With regard to the termination, he reiterated that the only reasonable interpretation of Article VI.3 is that it applies to "no fault or no default termination". In support of this contention, he pointed out that Article VI.2.1(b) and Article VI.2.2(c) provide for termination in the event of material breach, which is not remedied within 10 days. He also pointed out that Article VI.2.1(a) and Article VI.2.2(b) cover default in fulfillment of payment and supply obligations, respectively, by Karthikeya and Saheli and that, consequently, all the probable causes for termination for breach are already covered by Article VI.2.1 and VI.2, respectively and,

therefore, Article VI.3 can only apply to termination without a material breach by the counter party. In this connection, he referred to the findings of the Second Arbitrator and that of the Presiding Arbitrator. By referring to the said findings, he pointed out that the Second Arbitrator concluded that the reasons cited by Saheli, namely, force majeure and break down of the generating equipment were not valid reasons. Similarly, he pointed out that the Presiding Arbitrator concluded that the reasons given in the order of termination are not justifiable reasons by agreeing with the Second Arbitrator. In this connection, he contended that Article VI.3 of the PPA does not stipulate that termination could be resorted to only for justifiable reasons. If so, the relevant clause would have used the adverbs "reasonable" or "justifiable" before the verb "grounds", whereas no such words were used in the PPA.

9. In summary, the learned senior counsel raised three main contentions. The first contention is that the Arbitral Tribunal failed to decide whether Article VI.3 enabled termination on a "no fault" basis. Secondly, the Arbitral Tribunal did not decide as to whether Karthikeya sustained any direct loss as a consequence of the alleged breach by Saheli and also did not decide whether Karthikeya had fulfilled its obligation under Section 73 of the Contract Act to mitigate loss. For this principle, the judgment in **Muralidhar Chiranjitlal v. Harishchandra**

Dwarakadas AIR 1962 SC 366 was relied upon. In addition, the learned senior counsel relied upon the judgment of the Hon'ble Supreme Court in **Indian Oil Corporation Ltd vs. Amritsar Gas Services and others (Indian Oil), (1991) 1 SCC 533**, wherein, at paragraph 14 thereof, the Hon'ble Supreme Court held that a contract, which is revocable by either party by giving 30 days notice, is determinable in nature as per unamended Section 14(1)(c) of the Specific Relief Act, 1963 (the SRA) and that, therefore, the only relief that could be granted was the award of compensation for the notice period of 30 days. He also relied upon the judgment of the Hon'ble Supreme Court in **Central Bank of India Limited, Amritsar vs. Hartford Fire Insurance Co. Ltd.(Hartford), AIR 1965 SC 1288**, wherein, at paragraphs 7 and 18, the Hon'ble Supreme Court held that if the words of a contract are clear, the plain language should be given effect to even if the Court does not like the result. In particular, the Hon'ble Supreme Court held that Clause 10 of the insurance policy, in that case, enabled either party to terminate the insurance policy at will and that it cannot be construed as a conditional termination. Further, he relied on the judgments in **Altus Group India Pvt. Ltd. v. Darrameks Hotels & Developers Pvt. Ltd. (Altus Group) 2018 SCC Online Del 8263** and **Darrameks Hotels & Developers Pvt. Ltd. v. Altus Group India Pvt. Ltd. (Darrameks Hotels) (2018) 191 PLR 1** for the proposition that commercial contracts are determinable by

nature and that ex facie erroneous interpretations by an Arbitral Tribunal may be interfered with by a court under Sections 34 and 37 of the Arbitration Act.

10. In response and to the contrary, Mr.Rahul Balaji, the learned counsel for Karthikeya submitted that Saheli is a gas based power generator for captive consumption. He pointed out that the PPA, in this case, is not contingent on the retention of the captive power producer status by Saheli. He also pointed out that both Unit-A and Unit-B were within the scope of the PPA and that the documents on record establish the same. For this purpose, he relied upon the letter issued by Saheli to the TNEB requesting that Unit-B should also be added to the wheeling arrangement with TNEB and that this vital document was disregarded by the Arbitral Tribunal.

11. As regards the termination, he contended that the real reasons for termination were that demand out-stripped supply during the relevant period and, consequently, market rates were higher than the PPA rates. With regard to the interpretation of Article VI.3, he pointed out that this is not a simple contract for the sale of goods. The PPA is a contract containing obligations for minimum guaranteed off-take and, on default, take or pay obligations. It also entailed investment by Karthikeya

and a consequential discount, which was benchmarked against the TNEB HT 1 rate. When viewed in this factual and contractual context, he submitted that the expression "any other grounds" in Article VI-3 can only mean reasonable or justifiable grounds.

12. With regard to the contention that the non-supply was on account of force majeure, he pointed out that the contention regarding force majeure was based on the alleged break down of the engine and that by reply dated 17.01.2009 (Page 23 of Volume II of the common compilation of documents), it was pointed out that the engine break down is not a force majeure event as per the PPA. In order to substantiate that the PPA covered both units A & B, he referred to the invoices at pages 48 to 66 of volume 2 of the common compilation of documents and pointed out as to how these invoices were issued by Saheli for supply either to Unit-A or Unit -B and that the terms of supply were identical thereby reflecting that it is as per the PPA. In particular, he pointed out that the invoices at pages 60,62 and 66, all of which relate to Unit-B, also specify that generation tax is payable as per the agreement. Thus, he submitted that Karthikeya had produced evidence that supply to Unit-B was also as per the PPA but that the said evidence was ignored by the Arbitral Tribunal. He also referred to the letter to TNEB from Saheli, wherein Saheli had pointed out that Unit- B had been inadvertently omitted from the original wheeling order.

13. He, thereafter, referred to the issues that were framed by the Arbitral Tribunal and to the findings thereon. In particular, he referred to the findings of each of the Arbitrators on issue Nos.6,7 and 8. He, thereafter, referred to the cross examination of CW-1 and, in specific, to questions 51 to 58 and the answers thereto. He also referred to the cross examination of RW-1 and, in particular, to the answer to question 71, whereby it was suggested to Saheli's witness, RW-1, that Saheli was deliberately not producing the letter dated 16.05.2005 from Saheli to TNEB because it would contradict Saheli's stand. He thereafter referred to question 22 and 23 to RW-1 and the answers thereto and to the re-examination of RW-1, wherein, in answer to question No.1, RW-1 agreed that the commercial terms of the PPA dated 21.06.2004 also applied for supply of power to Unit-B.

14. The learned counsel also referred to the Order of TNEB at Page 115 of the compilation of documents, Volume-I, so as to contend that Saheli lost its captive power plant status but not open access and that the PPA is not contingent on the maintenance of captive power plant status. In this connection, he concluded his submissions by relying upon the judgment of the Hon'ble Supreme Court in **Sharma and Associates Constructions Private Limited vs. Progressive Constructions Limited (2017) 5 SCC 743**, for the proposition that the Arbitrator is a creature of contract and that equity had no role to play.

15. By way of rejoinder, Mr.Vinod Kumar, the learned counsel for Saheli pointed out that the TNEB invoice, which constitutes best evidence, was not filed for the period commencing from May 2009. He also pointed out that the invoice at Page 43 of Volume II disclosed that the permitted energy quota from TNEB was 439358 units and that, therefore, an adverse inference should have been drawn by the Arbitral Tribunal against Karthikeya. With regard to Unit-B, he contended that it was in existence even before the PPA. He also pointed out that the PPA refers to the specific location in several clauses such as Article 1.9, Article II.2.2 and Article III.1 r/w Schedule-1. He also submitted that it is the admitted position that Schedule-1 was not amended at any point of time. Therefore, he submitted that Unit-B cannot be introduced into the PPA by implication especially because the parties consciously chose not to amend Schedule-1 and include Unit-B therein. With regard to frustration, he submitted that Saheli was required to maintain a particular share holding pattern so as to retain its status as a captive power plant, whereas one investor transferred its shares and, therefore, Saheli lost the said status. In other words, he submitted that the frustration was not self-induced and was on account of the conduct of a third party over which Saheli did not have control. With regard to the cancellation of wheeling, he pointed out that it was done for the purpose of avoiding the payment of substantial wheeling charges and it was not intended to constitute proof of

frustration. He also referred to Section 42 of the Electricity Act, 2003 so as to establish that Saheli would be required to pay surcharge unless it retained its status as a captive power plant. With regard to the validity of termination, he pointed out that no terms should be implied in a contract unless it satisfies the 5 conditions that were specified in the judgment in **Nabha Power Limited(NPL) vs. Punjab State Power Corporation Limited(PSPCL) and another (Nabha Power)(2018) 11 SCC 508** and that the said conditions were certainly not satisfied in this case because it is not necessary to imply the words "reasonable" or "justifiable" before the words "any other grounds" so as to ensure that the PPA is workable. In specific, he submitted that the expression "on any other grounds" should be interpreted as per the plain language thereof.

16. The submissions of the learned senior counsel/counsel for the respective parties were considered carefully and the records were examined. At the outset, it is pertinent to note that both these Petitions were filed after 23.10.2015, when the Arbitration and Conciliation (Amendment Act) 2015 came into force. Accordingly, these Petitions are required to be decided as per the amended Section 34 of the Arbitration Act.

17. Before dealing with other issues, I propose to deal with the issue related to the validity or invalidity of the termination of the PPA and the implications thereof. Article VI.3 of the PPA provides for termination "on any other grounds". Obviously, the expression "on any other grounds" implies that it is on grounds other than that specified in Article VI.2.1 and 2.2. In this regard, it was contended by the learned senior counsel for Saheli that Article VI.2.1. and 2.2 provide for termination both for breach of payment or supply obligations, as the case may be, and for material breach of the provisions of the PPA. On that basis, he pointed out that Article VI.3 clearly provided for termination on grounds other than those permitted by Article VI.2.1 and 2.2. This contention is valid and merely means that termination under Article VI.3 was not intended to apply in case of breach by the counter party concerned. In other words, Saheli was entitled to issue a termination notice under Article VI.3 even though Karthikeya had not committed breach of the payment obligation under VI.2.1(a) or a material breach under VI.2.1(b). However, the question that arises is whether it can be concluded that Article VI.3, therefore, enables termination on a "no fault" and "without cause" basis. The typical "no fault" and "without cause" termination clause would state that either party may terminate the agreement without assigning any reason by providing notice of a specified duration. Undoubtedly, Article VI.3 does not state that either party may

terminate without assigning any reason. On the contrary, it states that either party may terminate "on any other grounds". The use of the words "on any other grounds" clearly indicates that reasons should be provided. Therefore, should it be implied that it must be a reasonable or justifiable ground? As correctly contended by the learned senior counsel/counsel for Saheli, Article VI.3 would be workable even without implying the words "reasonable" or "justifiable" before the words "grounds". Consequently, as per the law on implying terms in a contract, as elucidated in **Nabha Power and Adani Power (Mundhra) Ltd. v. Gujarat Electricity Regulatory Commission 2019 SCC Online SC 819**, the test for implying a term on the basis of business efficacy is a test of necessity, which is not satisfied in this case. Nonetheless, the word "grounds", in the expression "on any other grounds" is used as a verb. When used as a verb, the word "grounds" may be defined as "to provide a basis for" and, therefore, indicates that the cited reason cannot be baseless or groundless even without implying an adverb such as reasonable or justifiable. Thus, I am of the view that termination under Article VI.3 may be on "no fault" basis but it is not on "without cause" basis. As a corollary, the construction of Article VI.3 by the Arbitral Tribunal cannot be termed as perverse or unreasonable so as to warrant interference under Section 34 of the Arbitration Act. In this regard, the judgment in **Darrameks Hotels** to the effect that an ex facie erroneous interpretation may be

interfered with is distinguishable because the interpretation, in this case, is not ex facie erroneous.

18. An off-shoot of the above issue is the contention, on a demurrer, by the learned senior counsel for Saheli that the award of damages should, at worst, be limited to the 90 day notice period. For this purpose, the learned senior counsel relied on the judgments of the Supreme Court in **Indian Oil** and **Hartford**. In **Indian Oil**, clause 28 of the dealership agreement provided for "no fault" and "without cause" revocation and the decision that it was a contract that was determinable in nature turned on that clause, as would be evident from paragraph 14 thereof. Equally, the conclusion that the only permissible compensation would be the loss of earnings for 30 days hinged on that clause. Similarly, in **Hartford**, clause 10 of the insurance policy enabled termination at will by either party. Thus, both these judgments are distinguishable. In this connection, I do not concur with the opinion of the Delhi High Court in paragraph 17 of **Altus Group** that "all commercial contracts are by their very nature determinable". While it is true that all commercial contracts are determinable under specific circumstances, they are not necessarily determinable by nature.

19. The next issue that should be determined is whether the finding that Unit-B is not covered by the PPA is valid. The Arbitral Tribunal examined the PPA and, in particular, Article III.1 r/w Schedule-1 thereof and concluded that Unit-B is not covered by the PPA. Although the invoices issued by Saheli in respect of supply to Unit-B draw reference to the generation charges being in terms of the agreement, this has been explained in oral evidence, re-examination question 1 and the answer thereto by R.W-1, by stating that the commercial terms are as per the PPA. The other piece of evidence, in this regard, is the letter from Saheli to the TNEB requesting that Unit-B should be included in the wheeling arrangement. This document does not establish that Unit-B is within the scope of the PPA. Therefore, it cannot be concluded that the Arbitral Tribunal's interpretation of the PPA and of relevant documents such as the invoices or the letter from Saheli to TNEB is implausible or perverse so as to warrant interference.

20. The finding that Saheli committed breach of the PPA on account of non-supply in April 2019 is considered next. On this issue, it is the admitted position that the 90 day notice period had not expired in April 2009. Therefore, the only contentious issue is whether Karthikeya had proved that it incurred losses on account of the non-supply. In this regard, both the Second Arbitrator and the Presiding Arbitrator concluded

that Karthikeya had proved the loss by adducing evidence in the form of TNEB invoices for the month of April 2009(Ex.C14) and proved payment of such penalty by way of the receipt and vouchers. Thus, the findings on this issue are based on a reasonable appreciation of the relevant evidence and, therefore, do not warrant interference.

21. As regards the conclusion on non-supply in May 2009 and the losses caused as a result thereof, I find that the Second Arbitrator examined the letter dated 27.07.2009(Ex.C.64), which shows that a penalty of Rs.1,10,69,394/- was imposed for the period December 2009 to May 2009. The learned Arbitrator also examined the audit slip dated 25.01.2009 with the annexure thereto and concluded on that basis that the penalty for consumption of excess units of 8,83,807 from the month of 2009 is Rs.61,68,649/- and that payment thereof was proved by way of Ex.C.64. The Presiding Arbitrator concurred with this finding. Once again, I find that the conclusion that Karthikeya proved its loss to the extent of Rs.58,33,331/- is based on a reasonable appraisal of Ex.C64 and Ex.C-69 and, therefore, no interference is warranted.

22. On the claim in respect of the period from June to August 2009, the Second Arbitrator examined the evidence in the form of Ex.C.67 series, which consists of invoices issued by third party suppliers and, on

that basis, concluded that Karthikeya had taken requisite steps to mitigate the losses by first consuming wind energy followed by TNEB energy, third party energy and lastly diesel generator energy. Although the Presiding Arbitrator entered a finding that a proper explanation was not provided by Karthikeya for the procurement of power from third parties, the learned Presiding Arbitrator also recorded that there is evidence to show that Karthikeya utilized wind energy first and also power from TNEB. In light of the said findings by a majority of the Arbitral Tribunal, I find that it cannot be concluded that the findings of the Arbitral Tribunal are unreasonable or perverse. It is no doubt true that Karthikeya did not produce the best evidence, in this regard, by producing the relevant TNEB invoices but, nonetheless, it does not make out a case for interference under Section 34 of the Arbitration Act. In matters relating to interference with the appreciation of evidence, the Hon'ble Supreme Court held in paragraph 31 of **Associate Builders vs. DDA (2015) 3 SCC 49** read with paragraph 42 of the judgment in **Ssangyong Engineering & Construction Co. Ltd vs. National Highways Authority of India(NHAI) (2019) SCC Online SC 677** that such interference is warranted only when irrelevant evidence was relied upon or the Award is based on no evidence or vital evidence was disregarded. In my view, those requirements are not satisfied in this case. As regards the refund of the excess advance payment, the Arbitral Tribunal concluded that

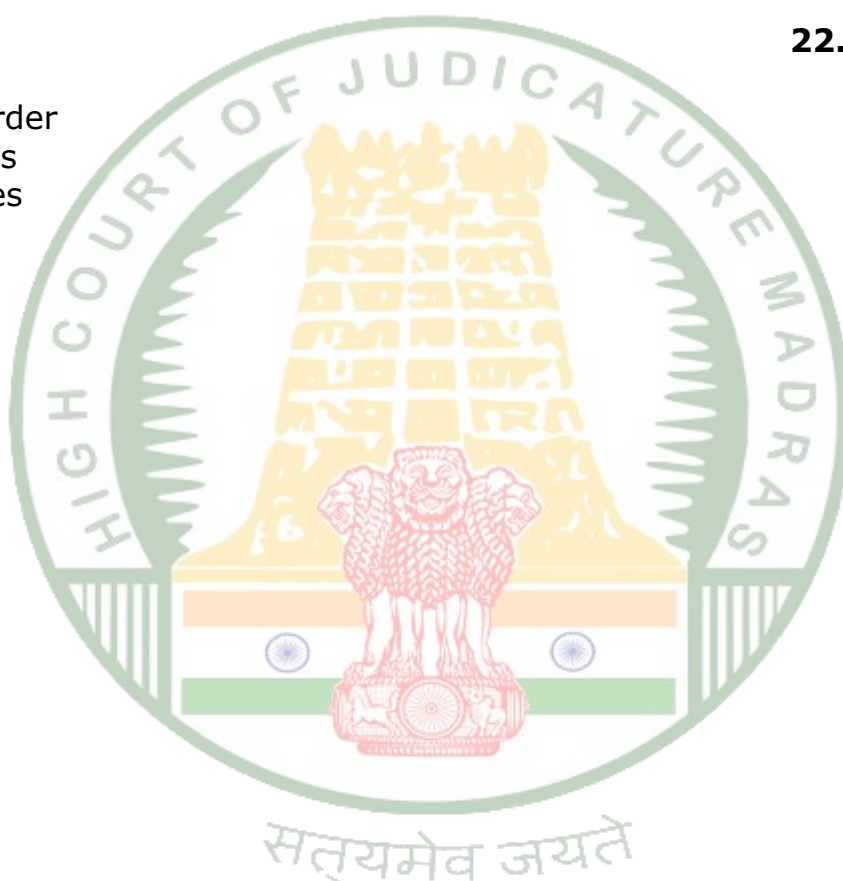
Karthikeya is entitled to the refund. In view of the findings by the Second Arbitrator that the PPA was not amended and that the price was not revised, there is no doubt that Karthikeya is entitled to the refund.

23. The last issue that remains to be considered is the finding that the PPA was frustrated because Saheli lost its status as a captive power plant and the implications thereof. On this issue, I find that the Arbitral Tribunal by a majority of two concluded that the PPA was frustrated because one of the shareholders of Saheli transferred the shares and, therefore, the requisite minimum 26% shareholding by captive consumers could not be maintained. The conclusion that the frustration of the PPA was not self-induced by Saheli is based on a reasonable appreciation of the relevant evidence in the form of the letters regarding the loss of captive power plant status. Although it was contended by Karthikeya that the frustration was self-induced on the basis of the request to terminate the wheeling arrangement, it was explained by Saheli that the termination of the wheeling arrangement was for the purpose of obviating the payment of wheeling charges. As a consequence of the above finding, the claims made for the fourth period, i.e. from October 2009 to March 2011 were rejected. Once again, I find that the conclusion of the Arbitral Tribunal is based on a reasonable appreciation of the evidence on record and, therefore, does not warrant interference.

24. For the reasons set out above, the challenge to the Award by Saheli and Karthikeya fails. Consequently, both the Petitions to set aside the Award are rejected. No costs.

22.01.2020

Speaking order
Index: Yes
Internet: Yes



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O.P.Nos.592 of 2016
and 617 of 2018

SENTHILKUMAR RAMAMOORTHY, J.
rrg



Pre Delivery order
in
O.P.No.592 of 2016
and
O.P.No.617 of 2018

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22.01.2020