IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 11.11.2020

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.442 of 2020

M/s.Jones Foundations Private Ltd.,
No.2, Moovarasampet Main Road
Madipakkam, Chennai-600 091.
Represented by its Managing Director ... Petitioner

vs.

M/s.G4S Secure Solutions (India) Pvt. Ltd.,
Represented by its General Manager/HR Head
Chennai Hub
New No.49, Old No.42A
C.P.Ramasamy Road
Abhiramapuram, Chennai-600 018. ... Respondent

Original Petition filed under Section 34(2)(b)(ii) r/w 34(2A) of the Arbitration and Conciliation Act, 1996, to set aside the arbitral award dated 20.03.2020 passed in A.F.No.158 of 2018 and allow the original petition.

For petitioner : Mr.Neelakantan
assisted by Mr.Chindan
of M/s. Menon Karthik Mukundan
and Neelakantan

For Caveator : Ms.P.V.Rajeswari

<u>O R D E R</u>

Captioned 'Original Petition' ('OP' for the sake of brevity) is an application under Section 34 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)', which shall hereinafter be referred to as 'A and C Act' for the sake of convenience and clarity.

2. Captioned OP has been filed assailing an 'arbitral award dated 20.03.2020 bearing reference No.A.F.158/2018 O.P.No.622 of 2018', which shall hereinafter be referred to as 'impugned award' for the sake of convenience made by an 'Arbitral Tribunal' ('AT' for the sake of brevity) constituted by a sole arbitrator, who is a former Hon'ble member of the Bench of this Court.

3. In the web hearing on a video conferencing platform today, Mr.Neelakantan, learned counsel assisted by Mr.K.Chindan, of M/s.Menon Karthik Mukundan and Neelakantan (Law Firm) on behalf of petitioner and Ms.P.V.Rajeswari, learned counsel for caveator (to be noted, lone respondent in captioned OP has lodged a caveat) are before

me.

4. The petitioner in captioned OP was respondent before AT and obviously, sole respondent in captioned OP was claimant before AT. From hereon, for the sake of convenience and clarity, the petitioner shall be referred to as 'JFPL' denoting 'Jones Foundations Private Limited' and respondent shall be referred to as 'G4S Security' denoting 'G4S Secure Solutions (India) Private Limited'. To be noted, this is for the sake of convenience and clarity as the ranks of the parties stand reversed as between AT and captioned OP.

5. Instant OP being an application under Section 34 of A and C Act, short facts shorn of elaboration or in other words factual matrix in a nutshell containing essential facts imperative for appreciating this order will suffice. In this view of the matter, suffice to state that JFPL is in the business of real estate development, construction etc.,; that 'G4S Security' is in the business of providing security/guarding services; that the two entities entered into a 'contract dated 08.09.2016' (hereinafter

'said contract' for the sake of convenience and clarity); that said contract was for a period of 12 months; that said contract was for providing security/guarding service for two sites/projects of JFPL namely, one which goes by the name 'Jones Cassia' at Ottiyambakkam and other, which goes by the name 'Jones Dawn Villas' at Ponnar Village; that this Court is informed that both these sites are in Tamil Nadu; that there is an arbitration clause in said contract; that this arbitration clause is Clause 42 under Part XI; that this clause serves as an arbitration agreement between JFPL and G4S Security i.e., arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act; that after said contract started operating, JFPL terminated the contract vide termination notice dated 09.05.2017; that arbitrable disputes erupted; that this Court vide an order dated 24.08.2018 made in O.P.No.622 of 2018 being a Original Petition under Section 11 of A and C Act appointed a former Hon'ble Judge of this Court as sole arbitrator; that the sole arbitrator, who constituted the AT entered upon reference, embarked upon the exercise of adjudicating the arbitrable disputes between parties and made the impugned award; that before the AT, as already mentioned supra, G4S

Security was the claimant and JFPL was the respondent; that the claim of G4S Security before AT was *inter-alia* for a total sum of Rs.32,48,582/- (Rupees Thirty Two Lakhs Forty Eight Thousand Five Hundred and Eighty Two Only) with interest which is essentially 14 invoices for various sums of money raised by G4S Security vide said contract for services; that JFPL made a counter claim in a sum of Rs.48,60,000/- (Rupees Forty Eight Lakhs and Sixty Thousand Only) with interest, which according to JFPL is towards losses suffered by it on account of alleged deficiency in service on the part of G4S Security; that vide impugned award, which was made after full contest, AT allowed the claim of G4S Security partly i.e., invoices upto May 2017 and rejected counter claim of JFPL in its entirety; that before AT, there was both oral and documentary evidence; that oral evidence was in the form of one witness each on the side of JFPL and G4S Security; that documentary evidence was in the form of exhibits namely, Ex.C1 to Ex.C19 on behalf of G4S Security and Ex.R1 to Ex.R33 on behalf of JFPL; that captioned OP has been filed assailing the impugned award.

6. This Court, having set out the factual matrix in a nutshell containing essential facts imperative for appreciating this order, now proceeds to set out the submissions made in support of challenge to the impugned award, discuss the same and give its dispositive reasoning. To be noted, in the factual matrix supra, this Court has also captured broadly the trajectory this matter on hand has taken in reaching this Court by way of captioned OP.

7. Mr.Neelakantan, learned counsel assailing the impugned award, made focussed submissions (notwithstanding various averments and grounds in captioned OP), which can be broadly summarised as follows:

(a) Certain provisions of said contract *inter-alia* Clause Nos.17, 18 and 31 etc., are lopsided and deserve to be legally knocked off.

(b) That AT erred in holding that termination of said contract vide 09.05.2017 termination notice is not valid.

(c) AT having found that there have been lapses on the part of G4S Security, ought not to have acceded to the claim of G4S Security.

(d) A faint attempt was made to say that counter claim made by JFPL ought to have been acceded to.

8. This Court having set out the broad summation of submissions made by learned counsel, now proceeds to discuss the same and give its dispositive reasoning. Before doing that, it is made clear that this Court has reminded itself that captioned OP has been presented in this Court on 28.09.2020 and therefore, the same is governed by post 23.10.2015 regime of A and C Act. To be noted, this is by applying ***Ssangyong*** principle being the principle laid down by Hon'ble Supreme Court in this regard in ***Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India*** reported in ***(2019) SCC Online SC 677.***

9. Learned counsel for petitioner, furthering his submissions on the above lines submitted that the impugned award is vitiated owing to being in conflict with public policy of India besides being infarcted by patent illegality. In other words, to put it in legal parlance or statutory parlance, the submission of learned counsel is that the impugned award is liable to be set aside under Sections 34(2)(b)(ii) and 34(2A) of A and C Act. To be noted, though the specific clauses under Explanation 1 to Section 34(2)(b)(ii) have not been set out, from the nature of submissions made before this Court, it is clear that the submissions are predicated and posited on Clause(ii) of Explanation 1 to Section 34(2)(b)(ii).

10. This Court has also reminded itself that in ***Ssangyong Engineering*** case law or in other words ***Ssangyong*** principle is to the effect that owing to Explanation 2 to Section 34(2)(b)(ii), with regard to contravention with fundamental policy of India, a Section 34 drill does not entail a review on the merits of the matter. This is contained in Paragraph Nos.34 to 36 of ***Ssangyong*** principle, which read as follows

Paragraph Nos. 34 to 36 of Ssangyong case law:

*'**34.** What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paras 18 and 27 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] i.e. the fundamental policy of Indian law would be relegated to "Renusagar" understanding of this expression. This would necessarily mean that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] expansion has been done away with. In short, Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as explained in paras 28 and 29 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in para 30 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] .*

35. *It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paras 36 to 39 ofAssociate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.*

36.*Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paras 18 and 27 of Associate Builders[Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , or secondly, that such award is against basic notions of justice or morality as understood in paras 36 to 39 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as understood in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , and paras 28 and 29 in particular, is now done away with.'*

11. To be noted, the above paragraph Nos.34 to 36 of ***Ssangyong*** principle have been extracted from SCC Online report.

12. Likewise, this Court has also noticed that ***Ssangyong*** principle is to the effect that perversity, as laid down and explained by Hon'ble Supreme Court in oft-quoted ***Associate Builders case*** being ***Associate Builders Vs. Delhi Development Authority*** reported in ***(2015) 3 SCC 49,*** will no more be available as a ground post ***Ssangyong*** principle, but will be available only as a patent illegality ground i.e., under sub-section (2A) of Section 34 of A and C Act. This principle has been instructively articulated by Hon'ble Supreme Court in paragraph No.41 of ***Ssangyong*** **case law,** which reads as follows:

Paragraph 41 of Ssangyong case law:

*'**41.**What is important to note is that a decision which is perverse, as understood in paras 31 and 32 of Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision*

would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.'

13. To be noted, the above paragraph No.41 of ***Ssangyong* case law** is also from the SCC Online report.

14. This Court, having reminded itself about the impact of 23.10.2015 amendment to A and C Act, as explained by Hon'ble Supreme Court in ***Ssangyong*** case law, now proceeds to discuss and give its dispositive reasoning qua the submissions made by learned counsel for petitioner bearing in mind the instructive principles laid down by Hon'ble Supreme Court.

15. The first submission pertains to certain Clauses of said contract. This Court is unable to countenance this submission as challenge to covenants in a contract, which has been entered into

between two commercial entities, cannot be called in question much less in a Section 34 application. In any event, this Court carefully noted the aforementioned provisions which learned counsel drew the attention of this Court namely, Clauses 17, 18 and 31 of said contract. This Court is unable to find any ground to interfere much less countenance such a submission. This view of this Court is fortified by ***Nabha Power principle*** laid down by Hon'ble Supreme Court in ***Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL)*** reported in ***(2018) 11 SCC 508,*** penned *by* ***Hon'ble Mr.Justice Sanjay Kishan Kaul.*** To be noted, ***Nabha Power principle*** pertains to interpretation of terms of a commercial contract and what goes into the making of a commercial contract.

16. Therefore, the submissions made by learned counsel at best turns on what this Court understands as contra proferentem principle. There is absolutely no play or no width for applying contra proferentem principle in the case on hand for the reason that have been alluded to supra i.e., Nabha Power Principle which says that commercial sense of

contracting entities is reflected in covenants in a commercial contract. In the case on hand this Court finds the contracting parties to be on even keel.

17. This takes us to the next point articulated by learned counsel for petitioner which turns on termination notice dated 09.05.2017. A careful perusal of said contract reveals that termination is contained in part X of said contract, which is made up of two covenants namely, covenants 40 and 41. Entire part X reads as follows:

'PART X - TERMINATION

40. This Contract may be terminated forthwith by either party by giving written notice to the other if:

40.1 The other party is in material breach of its obligations under this Contract and, in case such breach is capable of being remedied, falls to remedy that breach within thirty days of receiving notice from the non-breaching party of such breach (such notice to specify that it is given under this Part);

40.2 The other party commits an act of bankruptcy or goes into liquidation other than for the purposes of reconstruction or amalgamation or suffers the appointment of a receiver or administrator of any of its property or income or makes any deed or arrangement with or composition for the benefit of any *of its creditors.*

41. This contract may be terminated by either party without cause by giving the other party One (1) months prior written notice thereof.'

18. A perusal of the above said covenants leaves this Court with the considered view that termination by giving a month's notice as well as termination without assigning any reason is permissible. In this view of the matter, the view taken by AT in answering Issue No.4 cannot be said to be implausible. For the sake of ease of reference, this Court deems it appropriate to extract Issue No.4 and findings of AT on Issue No.4, which read as follows:

Issue No.4:

'Whether the termination of the agreement by the respondent dated 08.09.2016 is valid?'

Findings of AT on Issue No.4:

'To appreciate this issue we will have to see the various clauses in the Agreement. Part-X of the Agreement deals with the termination of the contract. Clause-40 of Part-X says that the contract may be terminated by either party by giving written notice to the other if the other party is in material breach of its obligation under the contract and in case such breach is

capable of being remedied, falls to remedy that breach within 30 days of receiving notice from the non-breaching party of such breach. Clause-41 of Part-X says that the contract may be terminated by either party without cause by giving the other party one month prior written notice thereof. Therefore, from the above 2 Clauses the termination can be effected either by giving prior written notice or if the party who has committed breach failed to remedy the breach after the same has been brought to its notice, the other party can terminate the contract. In this case according to the Respondents the contract was terminated by the Respondent through its notice dated 09.05.2017. In the said notice the Respondent had only mentioned about the thefts that had taken place and also the damages caused to its property and respondent did not grant any time to the claimant to rectify the defects. Admittedly, one month prior notice was given while the Respondent terminated the contract on 09.05.2017. Therefore, the Respondent has not followed the Terms of the Contract which deal with termination. Hence, the termination of the Contract by the Respondent contrary to the Clauses 40 & 41 would lead to the conclusion that the termination was not valid in accordance with law. I therefore, hold that the termination of the contract by the Respondent is not valid and I answer this issue against the Respondent.'

19. On a careful perusal of Issue No.4 and finding of AT, this

Court is unable to convince itself that the view taken by the Hon'ble Arbitrator is an implausible view. In other words, it is a plausible view. The moment it is a plausible view, there is no scope for judicial intervention under Section 34 of A and C Act. After all, review on the merits of the matter is impermissible. For a protagonist of a petition under Section 34 to succeed, he/she should be able to demonstrate with clarity and specificity that the view taken by AT qua impugned award is implausible. This douses the second point sparked and urged by learned counsel. The third point urged by learned counsel turns on issue Nos.1 and 2. The sum and substance of this submission is that the AT has returned a finding that there were lapses on the part of G4S Security, but has gone on to accede to the claim of G4S Security. What is of relevance is, AT has allowed the claims of G4S Security, which are in the nature of services provided upto termination. That there were lapses and the invoices for service already rendered have been seen by AT as two independent issues and that AT has come to a conclusion on the basis of evidence before it that G4S Security is entitled to the invoices raised as per said contract upto date of termination, is not an implausible view. In this regard, it is necessary to discuss and give dispositive reasoning with regard to the submissions on counter claim also. As already alluded to supra, counter claim made by JFPL is with regard to alleged losses said to have been suffered by JFPL on account of lapses on the part of G4S Security. As many as 33 exhibits were before AT on behalf of JFPL and they are Ex.R1 to Ex.R33. As already mentioned supra, though a faint attempt was made by learned counsel to say that the counter claim ought to have been sustained, it is clear in the hearing that none of these documents (Ex.R1 to R33) support the counter claim of JFPL i.e., that JFPL has suffered losses much less losses on account of lapses on the part of G4S Security. Therefore, when the counter claim of JFPL on this account is not sustained, it is axiomatic that G4S Security is entitled to payments qua invoices raised upto date of termination. Beyond this, it will amount to traversing into the forbidden arena of examining the award on merits / appreciation of evidence before AT, which this Court will refrain from doing, as this Court has to perambulate within the legal perimeter and statutory landscape of Section 34 of A and C Act.

20. Learned counsel for petitioner, as part of his persuasive effort to convince this Court to judicially intervene qua the impugned award, pressed into service a 1965 judgment of Hon'ble single Judge of this Court being ***Lily White Vs. R.Munuswami*** reported in ***1965 78 Law Weekly 467.*** A careful perusal of this crisp and short judgement, leaves this Court with the considered view that ***Lily White*** case is of no help to the petitioner in the case on hand. The reason is, ***Lily White*** case arose out of a revision under Section 115 of 'Code of Civil Procedure, 1908' ('CPC' for the sake of brevity) and it is in that context that Hon'ble Court held that a term which is *prima facie* opposed to both public policy and fundamental principles of law of contracts cannot be enforced by a Court.

21. In the instant case, as already alluded to and delineated supra we are guided by ***Nabha power principle*** laid down by Hon'ble Supreme Court under the A and C Act owing to which this Court has negatived the contra proferentem argument and therefore, there is no scope to apply ***Lily White*** principle in the case on hand.

22. While drawing curtains on dictation of this order a last effort was also made to press into service ***Patel Engineering case law being Patel Engineering Ltd. Vs North Eastern Electric Power Corporation Ltd. (NEEPCO) reported in 2020 SCC Online SC 466.*** This Court is of the considered view that this case law does not aid the petitioner (in the light of discussion and dispositive reasoning which has been set out supra), as this case law also reiterates implausible view theory qua patent illegality ground as set out in Associate Builders and reiterated in ***Ssangyong.***

23. It follows as a sequitur that captioned OP, which is a challenge to the impugned arbitral award, fails and the same cannot but be dismissed.

24. Captioned OP is dismissed and consequently, Application No.2422 of 2020 is also dismissed. There shall be no order as to costs.

11.11.2020

Speaking/Non-speaking order
Index : Yes / No
Internet : Yes / No
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M.SUNDAR.J.,

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