

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

FRIDAY, THE 17TH DAY OF SEPTEMBER 2021

THE HON'BLE MR. JUSTICE N.SATHISH KUMAR

O.P. No. 449 of 2018

Disputes arising under the contract Agreement for supply of Gas Turbine Generator dated 05.08.2008 between Bharat Heavy Electricals Limited and Parrys Sugars Refinery India Private Limited ( Previously known as Silkroad Sugar Private Limited) and Arbitration under the Arbitration and conciliation Act, 1996 (As Amended in 2015)

Bharat Heavy Electricals Limited,  
Represented by its Executive Director  
(CPP, PMG and CC)  
Mr.M.K.Sharma,  
BHEL Industry Sector,  
Integrated Office Complex,  
Lodhi Road, New Delhi – 110 003.

.. Petitioner

Vs.

Parrys Sugars Refinery India Private Limited  
( Previously known as Silkroad Sugar Private Limited),  
Dare Hose, 234, N.S.C.Bose Road,  
Chennai – 600 001.

.. Respondent

Original Petition praying that this Hon'ble Court be pleased to set aside the Impugned Award dated 15.10.2017 passed by the majority of the Arbitral Tribunal in relation to the dispute between the petitioner and the Respondent by allowing the claim of the petitioner along with interest thereon with costs throughout.

This Original Petition along with O.P.No.448 of 2018 coming on this day before this Court for hearing in the presence of Mr.V.V.Sivakumar for M/s. Dua Associates, Advocates for the petitioner herein and Mr.Rahul Balaji, Advocate for the respondent herein and upon reading the petition and the award dated 15.10.2017 filed herein and this Court having observed that the claimant has asserted that there was delay on the part of the respondent and particularly pointed out a specific instances of delay on the part of the respondent, it is for the claimant to establish those delays by way of necessary facts either oral or documents, therefore, one cannot expect that mere filing some correspondence, his stand is automatically vindicated without proof of the documents by way of evidence, this Court do not find any of the ground under Section 34 available to interfere with the award passed by the arbitral tribunal and, it is ordered as follows:-

That the O.P.No. 449 of 2018 be and is hereby dismissed.

2. That there shall be no costs of this petition.

WITNESS THE HON'BLE MR. JUSTICE SANJIB BANERJEE,  
CHIEF JUSTICE, HIGH COURT AT MADRAS AFORESAID, THIS  
THE 17TH DAY OF SEPTEMBER 2021.

Sd/-

ASSISTANT REGISTRAR (O.S. II)

//Certified to be true copy//

Dated at Madras this the       day of       2021.

COURT OFFICER(O.S.)

From 25th Day of September 2008 the Registry is issuing certified  
copies of the Orders/Judgments/Decrees in this format.

EVK  
26/10/2021

O.P.No. 449 of 2018

ORDER

DATED : 17.09.2021

THE HON'BLE MR. JUSTICE  
N.SATHISH KUMAR

FOR APPROVAL: 26/10/2021

APPROVED ON: 27/10/2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.09.2021

CORAM

THE HON'BLE Mr. JUSTICE N.SATHISHKUMAR

**O.P.Nos.448 and 449 of 2018**

Bharat Heavy Electricals Limited,  
Rep. by its Executive Director (CPP, PMG and CC)  
M.K.Sharma,  
BHEL Industry Sector,  
Integrated Office Complex,  
Lodhi Road, New Delhi-110003.

.. Petitioner  
[in both Ops]

Vs

Parry Sugars Refinery India Private Limited,  
(Previously known as Silkroad Sugar Private Limited)  
Dare House, 234, N.S.C.Bose Road,  
Chennai-600001.

.. Respondent  
[in both OPs]

**Prayer in O.P.No.448 of 2018:** Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (as amended in 2015) to set aside the Impugned Award dated 15.10.2017 passed by the majority of the Hon'ble Arbitral Tribunal in relation to the dispute between the Petitioner and the Respondent by allowing the claim of the Petitioner along with the interest thereon with costs throughout.

**Prayer in O.P.No.449 of 2018:** Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (as amended in 2015) to set aside the Impugned Award dated 15.10.2017 passed by the majority of the Hon'ble Arbitral Tribunal in relation to the dispute

between the Petitioner and the Respondent by allowing the claim of the Petitioner along with the interest thereon with costs throughout.

For Petitioner : Mr.V.V.Sivakumar  
[in both Petitions]

For Respondent : Mr.Rahul Balaji  
[in both Petitions]

- - - -

These two Original Petitions arose out of the common award dated 15.10.2017 passed by the Arbitral Tribunal, dismissing the claim made by the claimants.

**Brief facts leading to filing of these Original Petition are as follows:**

2. Pursuant to the invite of bids for erection and commissioning of one Frame-6 (PG6581B) Gas Turbine Generator with all its auxiliaries at the respondent's sugar refinery plant at Vakalapuri Village, East Godavari District, Andhra Pradesh, the claimant has become successful bidder in relation to the tender and was awarded the aforesaid work as per the award of tender notice dated 05.03.2007. The price for the work was fixed at Rs,55,50,00,000/-(Rupees Fifty Five Crores and Fifty Lakhs Only) and for its erection and commissioning at a lump sum of Rs.2,50,00,000/- (Rupees Two Crores and Fifty Lakhs Only) totaling Rs.58,00,00,000/- (Rupees Fifty Eight Crores Only). Accordingly, two contracts were entered into by the parties as contracts A & B.

3. It is the contention that the claimant had completed the supply of Gas Tube Generator along with auxiliaries under the Contract 'A' well within the contractual period of August 2008 as per Clause 2.8.2 of contract 'A' and also requested the respondent vide letter dated 15.04.2008 calling upon the respondents to make the foundation ready along with approach roads and to properly fence the site to safeguard the materials at site. The erection and commissioning activities under the contract 'B' was commenced by the claimant in June'2008. As per the claimants, the following are the reasons for the delay;

- a) Contractual fuel was not provided by the respondent to commission the Gas Turbine Generator.
- b). Final supply of 'loose items' for erection completion was done on 09.10.2009 as these items were brought to site as and when required to erection.
- c). DM water was not available from 13.11.2009 for commissioning of GTG and the same was synchronised with Electricity Board's grid only on 09.02.2010 and was commissioned with gas on 06.09.2010. However, the same could not run continuously due to non availability of gas due to which the parties could not carry out performance guarantee test with full load in operation.
- d). The respondent failed to provide gas flow meter in the

natural gas inlet line due to which water injection could not be completed by the claimant.

e). Air filter pulsing system was defective.

4. Upon successful completion of facilities and guarantee test referred to in clause No.1.14 of (General condition of the contract) for supply contract (Contract 'A') and clause No.1.10 of (General condition of the contract) of E & C contract (Contract 'B') and the claimant raised their final invoice for a total value of Rs.58 Crores for both contract 'A' and 'B' and the respondent had made payment of Rs.55,25,36,130/- (Rupees Fifty Five Crores Twenty Five Lakhs Thirty Six Thousand One Hundred and Thirty Only) leaving an outstanding balance of Rs.3,36,98,199/- (Rupees Three Crores Thirty Six Lakhs Ninety Eight Thousand One Hundred and Ninety Nine Only) under both contract 'A' and 'B'. Hence the present claim.

5. It is the contention of the respondent that the equipment was commissioned by the claimant was made only on 02.11.2009 i.e after a delay of more than 64 weeks. Therefore, the respondent had levied liquidated damages of Rs.2,90,00,000/- (Rupees Two Crores and Ninety Lakhs Only) for inordinate delay in commissioning. It is the contention of the respondent that the delay was contributed by the claimant, rejoinder was filed by the claimant and based on the pleadings, framed the following issues. Finally the learned Arbitral Tribunal has observed that the claimant has not

proved his contention by examining himself and also in the document. The main attack of the learned counsel for the petitioner is that the learned Arbitral Tribunal has ignored vital documents available on record, which clearly indicate the fact that the delay was attributed by the respondent. This aspect was not taken into account by the tribunal. Their contractual term which provide for levying liquidated damages show that only when the entire delay is attributable on the claimant, the levy of the liquidated damages is permissible. Whereas, the delay was not solely attributable to the claimants, which has not been taken note of by the learned tribunal.

6. It is the further contention that when the respondent witness himself has admitted that the delay was hanging on their side and the documents filed by the claimants has not disputed, the question of examining the witness by the claimant is not at all relevant. The above aspect has not been taken note of by the learned arbitral tribunal. Hence it is submitted that ignoring the vital documents and dismissing the entire claim would go to root of the matter and accordingly seeks set aside the award.

7. Mr.Rahul Balaji, learned counsel appearing for the respondent submitted that though the specific claim is that the claimant has pointed only few delays attributed by the respondents, the same has not been proved despite he aggrieved to findings of the arbitral tribunal and the learned Arbitral tribunal has also

examined them by question and answers put to the respondent witness and found that the above answers will not prove the claimant's case, besides it is the contention that Ex.R23 the document filed by the respondent had not been contravened by the claimant and the same is indicated that the claimant already given up the claim towards liquidated damages, whereas the final account shows only a sum of Rs.15,04,974/-. On the contrary, they made huge claim. The learned Arbitral tribunal has recorded the above finding and held that only for the reason that Ex.R.23 is part of the list of the documents and the cross examined has not done by the claimant and dismissed the claim.

8. In the light of the above submission, the contract among the parties in Clause 2.1.2 , reads as follows;

**2.1.2 Liquidated damages for delay in completion schedule**

**The SUPPLIER shall endeavour to complete their scope of work within the time period specified in the contract. It may be noted that "time is the essence of this contract" subject to clauses 1.15 and 1.21 of the General Conditions of Contract. If due to reasons solely attributable to SUPPLIER, the SUPPLIER fails to supply any or all the goods to suit commissioning within the time period specified in the contract the PURCHASER shall, without prejudice to their other remedies under the contract, deduct from the contract price, as liquidated damages, a sum equivalent to 0.5% of the total contract price for each week of delay until actual performance, up to a maximum deduction of 5% of the total contract price, the total contract price being inclusive of**

**subsequent modifications and price escalation, if contractual. Once the maximum is reached, the PURCHASER may consider termination of the contract. LD shall be leviable only in case commissioning gets delayed beyond a grace period of 15 days after the contractually agreed commissioning schedule or further extended period if any. LD shall not be leviable in case of delay in spares. LD shall also not be applicable on spares prices.**

9. On perusal of the said contracts, the delay is solely attributable to the supplier. The purchaser shall deduct from the contract price as liquidated damages, a sum equivalent to 0.5% of the total contract price.

10. It is the specific contention of the respondent before the tribunal that the delay is on the part of the claimant in erection and commissioning of the machines, therefore, they deducted liquidated damages as per the contract. Whereas it is the contention of the claimant that the delay is not solely attributable to the claimant, therefore Clause found in the liquidated damages under the contract cannot be pressed into service. The claimant in the claim petition has specifically pointed out certain delay which were attributable to the respondent namely purchaser as per contract.

11. According to the claimant, mainly five delays mentioned in

the claim petition are not attributed on the claimant alone. The delays are as follows;

a) Contractual fuel was not provided by the respondent to commission the Gas Turbine Generator.

b). Final supply of 'loose items' for erection completion was done on 09.10.2009 as these items were brought to site as and when required to erection.

c). DM water was not available from 13.11.2009 for commissioning of GTG and the same was synchronised with Electricity Board's grid only on 09.02.2010 and was commissioned with gas on 06.09.2010. However, the same could not run continuously due to non availability of gas due to which the parties could not carry out performance guarantee test with full load in operation.

d). The respondent failed to provide gas flow meter in the natural gas inlet line due to which water injection could not be completed by the claimant.

e). Air filter pulsing system was defective.

12. Though the documents have been filed on the side of the claimant, namely Ex.C1 to Ex.C51, most of the documents have been denied by the respondent. The much emphasise has been made by the Applicant that the documents filed on the side of the claimant indicates the delay on the part of the respondent. This Court has also seen the said documents. The said documents are in

the nature of correspondence. Rather one party accepted and others denied. Whether those contents are properly proved are not are moot questions to decide this matter.

13. Admittedly, the claimant has not given any oral evidence to prove the documents which relied upon to prove the specific delay pleaded in the claim petition, which are attributed to the respondent herein. Without the proof of the particular document and correlating the same, the attempt of the claimant to rely upon the oral evidence and admission of the respondent namely RW1 and to contend that entire documents filed by the claimant has been proved, cannot be countenanced.

14. It is to be noted that the learned arbitrator has also considered the the nature of the questions of RW1. Totally there were 23 questions have been put. In fact the learned arbitral tribunal has found that none of the answers given by the respondent/RW1 witness prove the contents of the documents filed by the claimants. When the oral and documentary evidences properly analysed by the learned arbitral tribunal and found that the oral evidence of the RW1 do not prove the contents of the documents marked by the claimants, this Court exercising jurisdiction under Section 34 of the Act cannot re-appreciate the entire evidence once again.

15. It is also relevant to note that the arbitral tribunal also recorded the specific finding in respect of Ex.R23/Statement of Accounts issued by the claimant, wherein the final account on date 31<sup>st</sup> December'2014 shown only as Rs.15,04,947/-. The statement of accounts issued after so called dispute arose between the parties. The learned arbitral tribunal also recorded that in fact the claimant had given up the liquidated damages while drawing the final statement as on 31<sup>st</sup> December 2014 and recorded finding that when the very admitted claim of the claimant was only a sum of Rs.15,04,947/-, claimant making huge claim thereafter cannot be reliable. That was the reason Ex.R23 was not been confronted by the claimant during the arbitral proceedings. That apart, it is also to be noted that this Court has also gone through the questions and answers relied upon by the learned counsels, which has specifically put to the witnesses. The question Nos. 7,8,9,10,11 and 13 particularly brought to the notice of the Court to contend that the above answers will prove the contentions of the claimant that the delay is attributed to the respondent.

16. On perusal of the answers, this Court is of the view that the above answers given do not qualify as an admission and prove the contents of the documents filed by the claimant. When the claimant has asserted that there was delay on the part of the respondent and particularly pointed out a specific instances of delay

on the part of the respondent, it is for the claimant to establish those delays by way of necessary facts either oral or documents. Therefore, one cannot expect that mere filing some correspondence, his stand is automatically vindicated without proof of the documents by way of evidence. This Court do not find any of the ground under Section 34 available to interfere with the award passed by the arbitral tribunal.

17. In the result, both these Original Petitions are dismissed. No costs.

Sd./-N.S.K.J.  
17.09.2021

//Certified to be true copy//

Dated at Madras this the     day of     2021.

COURT OFFICER(O.S.)

From 25th Day of September 2008 the Registry is issuing certified copies of the Orders/Judgments/Decrees in this format.