IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 04.01.2021

Delivered on: 05.02.2021

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

O.P.No.103 of 2016
&
O.P.No.611 of 2016

O.P.No.103 of 2016

OPG Energy Pvt. Ltd.,
Currently at "KNOWLEDGE TOWER" 4th Floor
New No.36, Sanjeevarayanpettai
Little Mount, Chennai-600 015

And Previously at No.117 P.S.Sivasamy Salai
St. Ebbar's Avenue, Mylapore
Chennai – 600 004 ... Petitioner

vs.

1.M/s.Precot Meridian Industries Ltd.,
SUPREM, PB 7161, Green Fields
737, Puliakulam Road, Coimbatore – 641 045

2.HON'BLE MR.JUSTICE N.V.BALASUBRAMANIAN
No.40, Sankarapuram
Alamelumangapuram
Mylapore
Chennai – 600 004

3.MR.S.PARTHASARATHY
161, V.M.Street
Royapettah
Chennai -600 014

4. MR.D.I.J.RAJ KUMAR
47, Anand Nagar Main Road
Thoraipakkam
Chennai – 600 097 ... Respondents

(R2 to R4 are given up vide endorsement
dated 10.08.2016 made by counsel for petitioner
and deleted vide proceedings dated 13.10.2020)

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 15.10.2015 passed by the learned Arbitral Tribunal in so far as it awards a sum of Rs.1,60,13,416/- with interest at 7.5% in favour of the First Respondent.

For Petitioner : Mr.Satish Parasaran,
senior counsel
for Mr.P.Vinod Kumar

For Respondents : Mr.D.Balaraman

O.P.No.611 of 2016

M/s.Precot Meridian Industries Ltd.,
"Suprem", PB 7161
Green Fields
Puliakulam Road
Coimbatore – 641 045 ... Petitioner

Vs.

M/s.OPG Energy Pvt. Ltd.,
No.26, K.B.Dasan Road
Teynampet, Chennai – 600 018 ... Respondent

Original Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to declare the award amount of Rs.2,17,79,971 passed under the minority award is correct and the same is enforceable and reduction of the claim amount under majority award is not correct, to declare that the award granting interest only 7 ½ % per annum is not correct, to declare that the Petitioner is entitled to 18% per annum from the date of cause of action /demand i.e., 08.03.2010 till the date of payment and to pay the costs to the petitioner and to pass such further or other orders as this Hon'ble Court may deem fit and thus render justice.

For Petitioner : Mr.D.Balaraman

For Respondent : Mr.Satish Parasaran, senior counsel for Mr.P.Vinod Kumar

COMMON ORDER

At the outset, this Court deems it appropriate to extract / reproduce the common proceedings / orders made in captioned two matters in two earlier listings, on 23.07.2020 and the other on 13.10.2020, which read as follows:

'***Proceedings dated 23.07.2020***

For the sake of convenience and clarity, 'O.P.No.103 of 2016' shall be referred to as 'Senior OP' and 'O.P.No.611 of 2016' shall be referred to as 'Junior OP'.

2. Mr.Vinod Kumar of M/s.J Sagar associates (Law Firm) on behalf of sole petitioner in senior OP and Mr.D.Balaraman, learned counsel on record for the contesting first respondent in the senior OP are before me in this web-hearing on a video-conferencing platform. To be noted, the two counsel stand swapped in the junior OP. This Court is informed that senior and junior OPs are directed against the same arbitral award and are in the nature of cross-OPs as Senior OP has been preferred by the respondent before the Arbitral Tribunal and Junior OP has been preferred by the Claimant before the Arbitral Tribunal.

3. Both learned counsel agree that main OPs can be taken up for final disposal if the matter is re-scheduled.

List this matter under the same caption on 24.08.2020.'

*' **<u>Proceedings dated 13.10.2020</u>***

Captioned 'Original Petitions' ('OPs' in plural and 'OP' in singular for the sake of convenience and clarity) are applications 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.

2 'O.P.No.103 of 2016' shall be referred to as 'Senior OP' and 'O.P.No.611 of 2016' shall be referred to as 'Junior OP'. This is based on the sequence of numbers assigned and it is for the sake of convenience.

3 Both senior and junior OPs are directed against the same arbitral award, namely, arbitral award dated 15.10.2015 made by a 'three member Arbital Tribunal' ('AT for the sake of brevity) by a 2 : 1 majority. Therefore, senior and junior OPs are for all *practical purposes cross OPs.*

4 Be that as it may, today in this web hearing by a video conferencing platform, Mr.Satish Parasaran, learned senior counsel instructed by Mr.P.Vinod Kumar, learned counsel of M/s.J Sagar Associates (Law Firm) on record for petitioner in senior OP and Mr.D.Balaraman, learned counsel on record for Precot Meridian Industries Ltd. are before me.

5 To be noted, the parties and their respective counsel stand swapped in junior OP.

6. In senior OP, three noblemen who constituted the AT have been arrayed as respondents 2,3 and 4. Today, learned senior counsel and learned counsel, i.e., learned counsel on both sides submit in unison without any disputation or disagreement that the presence of these three noblemen in the array of parties in senior OP is not necessary owing to the nature of challenge to the award in both senior and junior OPs. Therefore, this court following the procedure adopted by Hon'ble Supreme Court in Vinay Heavy Equipments case [Zonal General Manager, Ircon International Limited Vs. Vinay Heavy Equipments reported in (2015) 13 SCC 680], deletes respondents 2,3 and 4 in senior OP. This means, Precot Meridian Industries Ltd. now becomes the lone respondent in the senior OP.

7 Be that as it may, both captioned OPs were taken up for final disposal with the consent of both sides and learned senior counsel for petitioner in senior OP commenced submissions. For continuation, list this matter with sub caption 'PART HEARD' within parenthesis on 02.11.2020.'

2. This Court, having extracted/reproduced proceedings / orders made in two earlier listings, makes it clear that the aforesaid proceedings/orders now become an integral part and parcel of this common order. The short forms, abbreviations and reference to captioned matters as 'senior OP' and 'junior OP', as set out in the earlier proceedings/listings, shall continue to be used in this common order also.

3. Owing to captioned OPs being applications under Section 34 of A and C Act assailing an 'arbitral award dated 15.10.2015' (hereinafter 'impugned award' for the sake of convenience and clarity) made by AT, factual matrix in a nutshell containing essential facts imperative for appreciating this order will suffice. This is owing to legal landscape of proceedings under Section 34 of A and C Act being limited by the short statutory perimeter of Section 34. To put it differently, captioned OPs are neither appeals nor revisions, but are mere limited challenges to impugned award within the contours and confines of Section 34 of A and C Act and the legal drill of testing the impugned award should perambulate within the limited statutory perimeter of Section 34. Hon'ble Supreme Court has repeatedly held that Section 34 proceedings are summary proceedings insofar as procedure is concerned and with

regard to its legal character, this Court has held that it is a fine and delicate balance between sacrosanct finality of arbitral award ingrained in Section 35 of A and C Act read in conjunction with minimum judicial intervention ingrained in Section 5 of A and C Act on one side and sanctus judicial review as an essential philosophy of substantive due process of law on the other side. 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***] has held that Section 34 is a summary procedure. It was also held by Hon'ble Supreme Court that it is a one issue summary procedure. Subsequently, in ***Emkay Global*** case, being ***Emkay Global Financial Services Ltd., v. Girdhar Sondhi*** reported in ***(2018) 9 SCC 49***, Hon'ble Supreme Court held that ***Fiza Developers*** principle is a step in the right direction. To be noted, this ***Fiza Developers*** principle reiterated in ***Emkay Gobal*** was further reiterated in ***Canara Nidhi Limited case [M/S. Canara Nidhi Limited vs M. Shashikala*** reported in ***2019 SCC Online SC 1244].*** In this regard, it is made clear that Hon'ble Supreme Court has instructively made it clear that by one issue summary procedure, it does not mean that the lis should turn on one issue. It has been elucidatively explained by

Hon’ble Supreme Court that the impugned award being put to challenge itself is the issue in a Section 34 application and therefore, it is described as a one issue summary procedure.

4. Factual matrix in a nutshell is that 'OPG Energy Pvt. Ltd.,' (hereinafter 'OPG' for the sake of convenience and clarity) and 'Precot Meridian Industries Ltd.,' (hereinafter 'Precot' for the sake of convenience and clarity) entered into a 'Power Sharing Agreement' (hereinafter 'PSA' for the sake of brevity) dated 30.11.2002 followed by a 'Memorandum of Understanding' ('MOU' for the sake of brevity) dated 30.03.2003; that PSA and MOU together constitute the contractual relationship between OPG and Precot, therefore, the same shall be compendiously and collectively referred to as 'said contract'; that Precot was originally Meridian Industries Limited and on its merger with Precot Mills Limited vide amalgamation proceedings in the Company Court in Madras High Court it was rechristened as Precot Meridian Industries Limited, which is now being referred to as 'Precot'; that there were two supplementary agreements dated 04.04.2008 and 01.08.2008 and the same shall also be deemed to form part of said contract; that PSA and MOU are Exs.C1 and C2 respectively before AT; that the two

supplementary agreements dated 04.04.2008 and 01.08.2008 are Exs.C10 and C11 respectively before AT; that the period of said contract is 10 years with certain conditions precedent adumbrated therein; that said contract is essentially for supply of power (electricity) by OPG to Precot; therefore 'PSA' may well denote 'Power Supply Agreement' rather than 'Power Sharing Agreement' but this nomenclature makes little difference to the matter on hand and therefore it is best left at that; that OPG, at the time of entering into said contract, was planning to promote a gas based power generating company in Tamil Nadu and Precot was in the business of manufacture of Yarn, Yarn dyed fabrics etc.,; that said contract did take off; OPG commenced supply of power to Precot in the year 2004; that said contract envisaged investment of about 145 lakhs by Precot in OPG in lieu of which OPG allotted preferential shares and equity shares; that there was call option qua preferential shares at the end of five years; that at the instance of OPG, a proposal to redeem/purchase preferential share was made and the same was accepted by Precot within this 5 years period; that such redemption/purchase was with a condition that OPG should continue to supply power to Precot; that OPG continued to supply power to Precot; that OPG continued to supply power till January 2009;

that there was short supply, thereafter there was termination by OPG / OPG had completely stopped power supply to Precot; that this short supply and stoppage of power supply became the bone of contention between the parties; that there is no disputation that there is an arbitration clause in said contract, which serves as an arbitration agreement between the parties being arbitration agreement within the meaning of Section 2(1)(b) read with Section 7 of A and C Act; that owing to short supply and stoppage of power supply becoming the bone of contention, arbitration agreement was triggered; that AT came to be constituted; that AT entered upon reference; that before the AT, Precot as claimant claimed compensation for what according to Precot is additional amount incurred owing to short supply and stoppage of power supply {to be noted, compensation claimed was Rs.570.68 lakhs towards additional amount incurred towards diesel cost, Genset maintenance cost and the differential cost qua purchase of power from TNEB (Tamil Nadu Electricity Board)} and there was an alternate claim for Rs.269.65 lakhs; that termination of said contract by OPG was sought to be declared as null and void; that there were other limbs (heads of claim) of prayer including directions to supply power and claim of compensation towards loss of production, hardship, inconvenience and loss caused etc.,; that there was a counter claim by OPG qua transfer of shares; that AT, after full contest made the impugned award by 2:1 majority awarding a compensation of Rs.1,60,13,416/- (Rupees One Crore Sixty Lakhs Thirteen Thousand Four Hundred and Sixteen only) towards compensation for additional amount incurred in respect of HTSC 230 alone for a specified period with interest at the rate of 7.5%; that the counter claim of OPG seeking a direction to Precot to transfer 14,000 class A shares was acceded to; that this impugned award has been called in question by both parties i.e., OPG and Precot vide captioned OPs; that captioned OPs were taken up for final disposal by consent of both sides in a virtual hearing i.e., web-hearing on a video-conferencing platform.

5. This Court, having set out the facutal matrix in a nutshell, which also captures the trajectory which this matter has taken thus far, now proceeds to set out some other details, which are essential for appreciating this order.

6. Senior OP was presented on 12.01.2016 and junior OP was presented on 12.02.2016 in this Court. Therefore, applying the ***Ssangyong*** principle i.e., principle laid down by Hon'ble Supreme Court

in ***Ssangyong Engineering and Construction Company Limited Vs. National Highways Authority of India*** reported in ***(2019) 15 SCC 131,*** both the captioned OPs will stand governed by post 23.10.2015 regime of A and C Act or in other words they will be governed by A and C Act as it stood post amendment by amending Act 3 of 2016 which kicked in retrospectively on and with effect from 23.10.2015.

7. This Court, while setting out the factual matrix in a nutshell supra, has *inter-alia* captured the fact that impugned award **was** made by a three member Arbitral Tribunal i.e., AT by a 2:1 majority. In this regard, it is necessary to make it clear that only with regard to quantum of compensation there is a difference as amongst the arbitrators, while Presiding Arbitrator and one member have pegged the compensation which Precot is entitled to at Rs.50,13,416/-(Rupees Fifty Lakhs Thirteen Thousand Four Hundred and Sixteen only), the lone minority member has pegged it at Rs.2,17,79,971/- (Rupees Two Crores Seventeen Lakhs Seventy Nine Thousand Nine Hundred and Seventy One only). In all other aspects, including acceding to the counter claim of OPG, the impugned award is unanimous. For this purpose, this Court deems it appropriate to set out the 7 heads of claim made by Precot before AT and

they are as follows:

'A. Directing the Respondent to pay a sum of Rs.570.68 lacs towards the compensation for the additional amount incurred towards the diesel-cost, power maintenance cost and the difference cost from purchase of power by the Respondent for the month of April, 2008 to October 2010;

Alternatively

Directing the respondent to pay a sum of Rs.269.65 Lacs towards the compensation for the additional amount incurred towards the diesel cost for operating gensets, relating to mill connected with HTSC No.230, due to discontinuance of power by the Respondent for the month of Apri, 2008 to October 2010

B. To declare that the termination of the Power Sharing Agreement dated 30.11.2002 and the Memorandum of Understanding dated 30.03.2003 by the Respondent in its letter dated 15.04.2020 is invalid and the same is null and void;

C. Directing the Respondent to supply the power to the Claimant from January 2011 till the end of the term of Agreement or in the event of failure to supply, direct the Respondent to reimburse the additional cost incurred by the Claimant on submission of bills with supporting documents;

D. Directing the Respondent to pay a sum of Rs.2,00,00,000/- towards the loss of production, hardship, inconvenience and loss caused to the Claimant;

E. Directing the Respondent to pay interest @ 18% for the amounts under Items A & D abvoe from the date of cause of *action until the date of payment;*

F. Directing the respondent to pay the cost of the Arbitration and

G.For such other relief as this Hon'ble Tribunal may deem fit and proper in the circumstances of the case and thus render justice.'

8. The lone head of counter claim made by OPG is contained in paragraph 7 of the 11.03.2011 reply statement of OPG before AT and the same reads as follows:

'7. For the reasons stated above it is hereby prayed that this Hon'ble Tribunal may be pleased to dismiss Claims of Claimant and pass an award in favour of the Respondent directing the Claimant to transfer the 14,000 Class A Shares of the Respondent held by the Claimant and pass such other relief as this Hon'ble Tribunal may deem fit and proper in the circumstances of the case and thus render justice.'

9. As already alluded to supra, with regard to claim of Precot under claim head A alone, there is a difference in quantum between the majority and minority views, the details of which have already been set out supra whereas in all other aspects there is unanimity qua impugned award of AT.

10. Before this Court plunges into discussion/analysis of the core

contest i.e., crux and gravamen of challenge to impugned award in captioned OPs, there is a peripheral issue which needs to be set out as it is peripheral qua core contest but pertinent qua appreciating dispositive reasoning and conclusion contained in this order. This peripheral issue turns on prayers in the senior and junior OPs, which are as follows:

'Prayer in the senior OP reads as follows:

'In view of the above, the Petitioners pray that this Hon'ble Court may be pleased to set aside the award dated 15.10.2015 passed by the Learned Arbitral Tribunal in so far as it awards a sum of Rs.1,60,13,416/- with interest at 7.5% in favour of the First Respondent and thus render justice.'

'Prayer in the junior OP reads as follows:

'12. The Petitioner is praying a fixed Court Fees of the Rs.5000/- in the Petition under Article 11(m)(ii)(3) of Schedule II of Tamil Nadu Court Fees and Suits Valuation Act, 1955.

The Petitioner therefore prays that this Hon'ble Court may be pleased:

i) To declare the award amount of Rs.2,17,79,971 passed under the Minority award is correct and the same is enforceable and reduction of the claim amount under majority award is not correct;

ii) to declare that the award granting interest only 7 ½ % per annum is not correct;

iii) To declare that the Petitioner is entitled to 18% per *annum from the date of cause of action /demand i.e., 08.03.2010 till the date of payment;*

iv) to pay the costs to the Petitioner, and

v) Pass such further or other orders as this Hon'ble Court may deem fit and thus render justice.'

11.From the prayer in the junior OP it comes to light that there is a reference to 'minority award'. As rightly pointed out by learned senior counsel for OPG there is only one award and that is the impugned award. This Court makes it clear that the impugned award has been made by a 2:1 majority by a three member AT (though the divergent views are not with regard to entirety of the impugned award but only some parts of the impugned award). There is a 'minority view' and a 'majority view' in the impugned award. Therefore, this Court is of the considered view that the expression 'minority award' is a misnomer. It should read as 'minority view' and axiomatically the other view should read as 'majority view'. The correct nomenclature would be minority view and majority view. To put it differently with specificity, there are two views in one award i.e., impugned award. Be that as it may, the prayers in both senior and junior OPs assail only certain parts of the impugned award i.e., those parts/portions of the impugned award which have gone against the petitioners in the respective OPs. In this regard, Hon'ble Supreme Court in ***J.G.Engineers*** case [***J.G.Engineers Private Limited Vs. Union of India and another*** reported in ***(2011) 5 SCC 758*****]** has held that when heads of claim can be segregated in an award, the challenge can be segregated and dealt with. Relevant portion of ***J.G. Engineers*** principle reads as follows:

> *'**25.**It is now well settled that if an award deals with and decides several claims separately and distinctly, even if the court finds that the award in regard to some items is bad, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent....'*

12. Therefore, in this order this Court will apply J.G.Engineers principle and will proceed by treating the two captioned OPs as challenges to segregable heads of impugned award.

13. In the final hearing of captioned OPs in virtual hearing i.e, web-hearing on a video-conferencing platform, Mr.Satish Parasaran, learned Senior Counsel instructed by learned counsel Mr.P.Vinod Kumar of M/s.J Sagar Associates (Law Firm) on behalf of OPG and Mr.D.Balaraman, learned counsel on record for Precot were before this virtual Court. Learned counsel on both sides made it clear that the lone

point of contest is compensation. Learned senior counsel for OPG submitted that his challenge to the impugned award will be predicated on patent illegality and conflict with public policy of India slots of Section 34 of A and C Act. Statutorily speaking this means that challenge to impugned award is predicated on Section 34(2A) and 34(2)(b)(ii) read with clauses (ii) and (iii) of Explanation 1. It was submitted by learned senior counsel that his submissions would be on damages (according to him breach having been established) and submissions on damages in turn would be predicated on three limiting factors qua damages, namely a) causation, b) remoteness and c) mitigation.

14.Learned senior counsel went on to submit that

a) There is no evidence on loss. To be noted, it was the specific plea and stated position of learned senior counsel that no evidence plea is with regard to loss alone;

b) There is no unbroken chain of damages is his say. In this regard it was submitted that causation, remoteness and mitigation being the limiting factors qua damages, even if one proceeds on the basis that there is breach, the unbroken chain leading to damages is absent.

15. In response to the above submission and as protagonist of junior OP, learned counsel for Precot made submissions which are as follows:

a) There is sufficient evidence with regard to loss as AT has shifted the evidence pertaining to surplus that were available through other sources.

b) The minority view qua the impugned award ought not to have been reduced by the majority view;

16. In reply submission, learned senior counsel for OPG submitted that Paragraph 15 of the impugned award is a non-sequitur qua Paragraphs 1 to 14 and it was submitted that there is a sequitur fallacy. Learned senior counsel for OPG submitted that this may well be a case of infarct of Section 31(3) of A and C Act and it was submitted that this infarct is fatal qua impugned award. This submission of impugned award being vitiated owing to non-compliance to Section 31(3) not setting the basis on which the impugned award has been made, was predicated primarily on what according to learned senior counsel is sequitur fallacy.

17. This Court having set out the rival submissions now embarks upon the exercise of discussion / analysis qua the same and give its dispositive reasoning infra in the paragraphs to follow.

18. It has already been alluded to supra that submissions are restricted to damages aspect of the matter and the limiting factors thereto, namely causation, remoteness and mitigation. To appreciate these submissions and find an answer to the core question as to whether the impugned award is vitiated by patent illegality, as to whether it is in conflict with public policy of India owing to being in conflict with most basic notions of justice and / or whether impugned award sets out the basis, this Court carefully read through and examined the impugned award in the light of submissions of learned counsel on both sides. In the impugned award, as many as 14 issues have been framed and they are as follows:

(i) Whether the claim relating to the supply of power after August 2008 by the Respondent are beyond the scope and jurisdiction of Arbitral Tribunal ?

(ii) Whether there was short supply of energy by the Respondent to the Claimant from April 2008 to July 2009, and if so, what is the extent of short supply, and if there is any short supply,

whether the Respondent was justified in the short supply of energy?

(iii) Whether the non-supply of energy by the Respondent to the Claimant from August 2009 is justified?

(iv) Whether the claimant has incurred any additional costs for generating power and if so, is the Claimant entitled to claim the same from the Respondent?

(v) Whether the Claimant is entitled to a sum of Rs.570.68 lakhs towards the compensation for the alleged additional amount incurred towards the diesel cost, Genset maintenance cost and the difference cost from the purchase of power from TNEB and whether the alleged cost was incurred due to discontinuance of power by the Respondent for the period from April 2008 to October 2010?

(vi) Whether the Claimant is entitled to seek specific performance of the agreement between the parties?

(vii) Whether the termination of the Power Sharing Agreement dated 30.11.2002 and the MOU dated 30.03.2003 by the Respondent in its letter dated 15.04.2010 is valid?

(viii) Whether the claimant is entitled to seek supply of power as a captive consumer of the Respondent after the alleged termination of the agreement between the parties?

(ix) Whether the Claimant is entitled to supply of power from the Respondent from January 2011 till the end of the term of the agreement or in the event of failure to supply, whether the claimant is entitled from the Respondent to reimburse the additional cost?

(x) Whether the Claimant is entitled to a sum of Rs.2,00,00,000/- towards the loss of production, hardship, inconvenience and the loss alleged to have been caused to the Claimant?

(xi) Whether the Respondent is entitled to an award directing the Claimant to transfer the Class A Shares in the Respondent company as allotted to the Claimant in April 2003 in terms of MOU dated 30.03.2003?

(xii) Whether the parties are entitled to interest for the claim amount and if so at what rate?

(xiii) Whether the parties are entitled to the cost of the Arbitration proceedings?

(xiv) To what reliefs are the parties entitled to?'

19. A careful perusal of the minority view makes it clear that there is copious reference to oral evidence in Paragraph 46. To be noted, oral evidence was let in by Precot, but no oral evidence was let in by OPG. Documentary evidence was marked on both sides i.e., Exs.C1 to C36 on the side of Precot and Exs.R1 to R3 on the side of OPG. Relevant portion of the minority view qua impugned award which copiously refers to the oral evidence reads as follows:

'The following are the extracts of the Questions and Answers of CW1 in cross examination which are considered relevant:

Q9. Can you tell the Tribunal as to when the claimant unit at

Achipatti, Pollachi was started ?

Ans: The production started in the year 1995.

Q10. How many units are there in the particular unit at Achipatti, Pollachi?

Ans: 2 units.

Q11. What is the service connection number in respect of the 2 units at Achipatti, Pollachi?

Ans: HTSC 230 and HTSC 291.

Q42. Can you tell me as per the agreement between the parties to which service connection of the claimant was the respondent required to make supplies?

Ans: HTSC 230

Q43. Is it not true that the respondent was not required to supply power to any other service connection of the claimant other than HTSC 230?

Ans: Yes.

Q44. Would it be correct to say that TNEB bill filed at page 119 as part of Ex C18 is unrelated to HTSC 230?

Ans: Yes it is not connected to HTSC 230 and it relates to 604.

Q45. See Page 123. Can you tell me if the documents which is part of Ex C18 relates to HTSC 230?

Ans: No. It is not related to HTSC 230 and it relates to 291.

Q46. See page 166. Can you tell me if the document which is part of Ex C18 relates to HTSC 230?
Ans: No. It relates to HTSC 230. For account purposes the Board had changed the service number and shifted to Coimbatore Electricity Distribution System.

Q47. Have you produced any document before this Tribunal to show that the service connection No.230 was changed to service connection No.593?
Ans: No.

Q49. See pages 119 to 214. Would it be correct to say that as part of Ex.C18, you have filed TNEB invoices which are not related to HTSC 230 which is the subject matter of the present dispute?
Ans: Pages upto 119 to 165 relate to HTSC 291. Pages 166 to 2154 relate to HTSC 230.

Q50. I put it to you that you have deliberately filed these unrelated documents in support of your claim to mislead the Tribunal?
Ans: I deny.

Q51. Are you trying to say that the documents filed at page 119 to 165 are relevant to this proceeding?
Ans: Yes.
Q85: What is the distance between each of the three units in Pollachi?
Ans: Two units in the same campus (HTSC 230 and HTSC 291).

Unit with HTSC 238 is around 50 km from the other two units.

Q87. Which is the M unit of the claimant at Pollachi?
Ans: Units with HTSC No.230 and HTSC 291 are the M unit.

Q91. Of the 30 lakh units per month required for M unit, how many units are required to run the installations supported by the power consumed through HTSC 230?
Ans: 16 lakh units per month.

Q 119. What are the normal working hours at the M unit of Claimant?
Ans: 24 hours in 3 shifts It is a continuous process, closing only during National holidays. We don't close even for maintenance and maintenance work will be carried out during the national holidays.

Re-examination by the learned counsel for the claimant:

1. *See Q 162. Why the bills relating to HTSc No.291 was included in the annexure 19(pg 215) and supporting documents from page 119 to 164. (Learned counsel for the respondent object to the question on the ground that there is no ambiguity in the answer and the claimant is trying to fill up the lacuna.) The witness is directed to answer the question.*

A. *Respondent supplied around 9.5 lakh units per months to service connection 230 and stopped supply from Aug.2009. So* *to run the unit, we have shifted the CPP power of service connection 291 to service to service connection 230. Subsequently some extent we have run generators in service connection 291. So both service connections are linked for this case as we have combined both energy consumption and generation details of HTSC 230 and 291. We have shifted one portion of demand and energy quota from 291 to 230 to manage short fall.'*

20. Thereafter, the minority view refers to both oral, documentary evidence in detail and an illustrative sample of the same is at Paragraph 58 of the impugned award, which reads as follows:

'58. To substantiate the claim of Rs.217.99 lakhs, the claimant has let in both oral and documentary evidence. Beginning from the log books for the diesel generators, we have carefully considered all the documents and the oral evidence let in on behalf of the claimant. We are convinced that the log books were maintained in the normal course of business and we find no reason to reject them. A few mistakes or corrections are quite normal in any log books of the nature. Similarly, we find that the claimant has adopted reasonable methods to mitigate the losses. We do not find any flaw in the details of calculations to arrive at the amount claimed. There is nothing to discredit the evidence placed before us. We hold that the amount arrived at by the claimant towards additional costs incurred by the claimant is just and reasonable and that the claimant is entitled to claim the amount from the respondent. The Respondent who is a power

generating company with easy access to several captive consumers like the claimant herein, has not placed any material before us to establish any flaw or defect in the method of calculations or the details furnished by the claimant or any other evidence either oral or documentary to discredit the evidence tendered by the claimant. We are not convinced by the mere suggestions in the cross examination of CW1. Therefore, on a careful considerations of the pleadings, the oral and documentary evidence let in and the submissions made by both the learned Senior Counsels, we hold that the claimant has established that they have incurred the additional costs for production of power due to the shot supply of power for the period from April 2008 to July 2009 and non supply of power for the period from August 2009 to June 2010 and the amount is determined at Rs.217.99 1 lakhs. The additional costs incurred are with reference to HTSC 230.'

21. Likewise, the majority view of the impugned award penned by Presiding Arbitrator and one member Arbitrator also deals with evidence before AT in extenso. The most relevant portion of majority view in impugned award is Paragraphs 11, 12 , 13 and the same read as follows:

' 11. In so far as the year 2009-10 is concerned, the claimant has taken 1,06,30,375/- units as short supply, and adopting the same formula, namely one sixth of the same should be taken as short supply during the peak hours, the additional cost incurred by the

claimant is arrived at Rs.100.93 lakhs. In so far as that period is concerned, the respondent has supplied for the period from April 2009 to July 2009, but according to the claimant there was short supply and for the period from Aug 2009 to March 2010, admittedly, there was no supply by the respondent. In so far as first period is concerned, namely, the short supply for the months of April 2009, May 2009, June 2009 and July 2009 is concerned, the respondent had supplied the power during the peak hour period also and it had supplied power as seen from debit notes (Ex.C36 series) 50,000 units for April 2009, Nil units for May 2009, 30000 units for June 2009, and 62813 units for July 2009 totaling 1,42,813 units. The claimant had received power from Sai Regency and power from its own wind mill and for the months of June and July 2009 the claimant had not drawn power from TNEB source. There is no complaint or objection by the claimant regarding the quantity of power supplied by the respondent during the peak hour period and it must be taken that the respondent had supplied the power as requisitioned by the claimant during the peak hours, and it stands to reason that if there was any short supply of the power requisitioned by the claimant, the claimant would have objected to the same and there is no evidence for any such objection and the amount demanded by the respondent was also paid.

12. There is no evidence from the side of the claimant to establish that the claimant had objected to the short supply or non supply of power by the respondent during peak hours and the respondent was also not put in notice by the claimant that they would be operating the diesel gensets to compensate the shortfall in the *supply of power by the respondent and the respondent would be liable to bear the cost of generation of power through the gensets. Atleast, had the respondent been informed that they would be saddled with a huge liability towards the cost incurred for running the gensets, the respondent would have acted to avoid such a liability. As a matter of fact, when there was a short supply in the quantity of power in the month of Jan'2007, the respondent was informed by letter dt.12.2.2007 (Ex.C5) and the respondent by letter dt. 30.3.2007 (Ex.C6) has assured the claimant that they would safeguard the interest of the claimant to run the plaint in full capacity. It is only on 8.3.2010, the claimant had informed the respondent by letter dt.8.3.2010 (Ex.C13) regarding the short supply of power, for which the respondent sent the reply notice dt. 15.4.2010 (Ex.C14) giving its explanation for the non supply and also the notice for termination. There is no evidence from the claimant to show that as soon as the short supply had occurred and commenced from Dec'2008, the respondent was informed of the same and in the notice dt. 8.3.2010 (Ex.C13) the claimant had requested for payment of additional expenditure incurred by running the diesel gensets and respondent immediately issued the notice of termination. If the short supply had commenced in Dec'2008 and non supply from Aug'2009, there is no explanation from the claimant for its inaction till 8.3.2010 (Ex. C13) when the notice was issued by the claimant for extra expenditure stating that they have been using the gensets and made a claim for extra expenditure. Though it is stated in the claim statement that the claimant had issued several emails and contacted the respondent* *over phone regarding the short supply of power agreed under the contract, there is no evidence to support the statement of the claimant in paragraph 19 of the statement of claim, especially when the respondent had denied the same in paragraph 4.18 of the reply statement.*

13. As far as the period from Aug'2009 to March 2010 is concerned, there was non-supply and the claimant was drawing power from Sai Regency and power from its own wind mill, but it had not drawn any power from TNEB source from Aug 2009 to Nov 2009 as seen from Annexure 19 A. CW1 in its answer to Q.240 has stated that TNEB power was not available in peak hours and other private generated power was also not available consistently or continuously. There is no evidence to show after 1.11.2008 when the power quota was introduced by the TNEB the claimant would be in a position to draw power from TNEB grid and the power fed by the respondent to the TNEB grid during peak hours also. The claimant had not produced the order of the TNEB also and the nature of restrictions imposed by the TNEB during the peak hour period. Annexure 19-A would clearly show that the user of gensets for production of energy is not due to non supply of power by respondent. Moreover the claimant, as a commercial man, could have diverted the energy drawn from Sai Regency and the power from its own power plant during peak hour and used the TNEB source during non peak hours which it had been in excess and which went unutilized to mitigate the loss of the respondent. It is also seen from annexure 19A, the claimant is not the sole supplier *of energy as the claimant was getting power from Sai Regency also and there is no acceptable explanation for foisting the entire liability towards running of the diesel gensets during peak hours on the respondent alone. It is no doubt true that the issues arising out of the contractual matters have to be decided on the basis of law of contract and not on the basis of the doctrine of fairness and reasonableness which apply to administrative law, but when there are more than one suppliers, the claimant should have let in evidence to establish as to why the respondent was alone responsible for running the diesel gensets due to the non supply of power by the respondent.'*

22. AT vide the impugned award has made lack of evidence as basis qua criticals.

23. In the aforesaid backdrop, this Court is left with the considered view that causation, remoteness and mitigation have been considered extensively vide the impugned award by adverting to available evidence (oral and documentary) before AT. The manner in which evidence has been appreciated is beyond the ken of Section 34 for two reasons. First is, this Court is not sitting on appeal qua impugned award i.e., not reviewing the impugned award and the second is, reappreciation of evidence is specifically forbidden with regard to one of the grounds urged i.e., patent illegality. This is a classic case where the

Hodkinson principle comes into play without being whittled down by exceptions. ***Hodgkinson*** principle was laid by an English Court way back in 1857 in ***Hodgkinson Vs. Fernie*** reported in ***140 ER 712. Hodkinson*** principle has been recognized by Indian Courts i.e., Hon'ble Supreme Court in the oft-quoted Associate Builders case [***Associate Builders Vs. Delhi Development Authority*** reported in ***(2015) 3 SCC 49***] which held this principle to be relevant and applicable to cases where arbitral awards are tested. If stated in simplistic terms or to put in a reductionist perspective, Hodkinson principle is to the effect that the AT is the best judge of the quality and quantity of evidence before it.

24. This takes this Court to the ***Ssangyong*** principle wherein Hon'ble Supreme Court made it clear that post 23.10.2015, an award cannot be examined on merits, relevant paragraphs are Paragraphs 16, 17, 19 and the same read as follows:

*' **Applicability of the Arbitration and Conciliation (Amendment) Act, 2015***

***16.** Since the Section 34 petition in the present case is dated 30-7-2016, an important question as to the applicability of the parameters of review of arbitral awards would arise in this case. More particularly, radical changes have been made by the Arbitration and Conciliation (Amendment) Act, 2015 (the 2015 Amendment Act) with* *effect from 23-10-2015 — in particular, in the "public policy of India" ground for challenge of arbitral awards. The question which arises is whether the amendments made in Section 34 are applicable to applications filed under Section 34 to set aside arbitral awards made after 23-10-2015.*

***17.** This Court, in BCCI v. Kochi Cricket (P) Ltd. [BCCI v. Kochi Cricket (P) Ltd., (2018) 6 SCC 287 : (2018) 3 SCC (Civ) 534] (BCCI), has held that the Amendment Act, 2015 would apply to Section 34 petitions that are made after this date. Thus, this Court held: (SCC pp. 335 & 338-39, paras 75 & 78)*

> *"75. Shri Viswanathan then argued, relying upon R. Rajagopal Reddy v. Padmini Chandrasekharan [R. Rajagopal Reddy v. Padmini Chandrasekharan, (1995) 2 SCC 630] , Fuerst Day Lawson Ltd. v. Jindal Exports Ltd. [Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., (2001) 6 SCC 356] , Sedco Forex International Drill. Inc. v. CIT [Sedco Forex International Drill. Inc. v. CIT, (2005) 12 SCC 717] and Bank of Baroda v. Anita Nandrajog [Bank of Baroda v. Anita Nandrajog, (2009) 9 SCC 462 : (2009) 2 SCC (L&S) 689] , that a clarificatory amendment can only be retrospective, if it does not substantively change the law, but merely clarifies some doubt which has crept into the law. For this purpose, he referred us to the amendments made in Section 34 by the Amendment Act and stated that despite the fact that Explanations 1 and 2 to Section 34(2) stated that "for the avoidance of any doubt, it is clarified", this is not language that is conclusive in nature, but it is open to the court to go into whether there is, in fact, a substantive change that has been made from the earlier position or whether a doubt has merely been clarified.*

According to the learned Senior Counsel, since fundamental changes have been made, doing away with at least two judgments of this Court, being Saw Pipes Ltd. [ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705] and Western Geco [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] , as has been held in para 18 in HRD Corpn. v. GAIL (India) Ltd. [HRD Corpn. v. GAIL (India) Ltd., (2018) 12 SCC 471 : (2018) 5 SCC (Civ) 401] , it is clear that such amendments would only be prospective in nature. We do not express any opinion on the aforesaid contention since the amendments made to Section 34 are not directly before us. It is enough to state that Section 26 of the Amendment Act makes it clear that the Amendment Act, as a whole, is prospective in nature. Thereafter, whether certain provisions are clarificatory, declaratory or procedural and, therefore, retrospective, is a separate and independent enquiry, which we are not required to undertake in the facts of the present cases, except to the extent indicated above, namely, the effect of the substituted Section 36 of the Amendment Act.

***

78. The Government will be well-advised in keeping the aforesaid Statement of Objects and Reasons in the forefront, if it proposes to enact Section 87 on the lines indicated in the Government's Press Release dated 7-3-2018. The immediate effect of the proposed Section 87 would be to put all the important amendments made by the Amendment Act on a back-burner, such as the important amendments made to Sections 28 and 34 in particular, which, as has been stated by the Statement of Objects and Reasons,

'... have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act'.

and will now not be applicable to Section 34 petitions filed after 23-10-2015, but will be applicable to Section 34 petitions filed in cases where arbitration proceedings have themselves commenced only after 23-10-2015. This would mean that in all matters which are in the pipeline, despite the fact that Section 34 proceedings have been initiated only after 23-10-2015, yet, the old law would continue to apply resulting in delay of disposal of arbitration proceedings by increased interference of courts, which ultimately defeats the object of the 1996 Act. [These amendments have the effect, as stated in HRD Corpn. v. GAIL (India) Ltd. [HRD Corpn. v. GAIL (India) Ltd., (2018) 12 SCC 471 : (2018) 5 SCC (Civ) 401] of limiting the grounds of challenge to awards as follows: (SCC p. 493, para 18)

'18. In fact, the same Law Commission Report has amended Sections 28 and 34 so as to narrow grounds of challenge available under the Act. The judgment in ONGC v. Saw Pipes Ltd. [ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705] has been expressly done away with. So has the judgment in ONGC v. Western Geco International Ltd. [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] Both Sections 34 and 48 have been brought back to the position of law contained in Renusagar Power Co. Ltd. v. General Electric Co. [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] , where "public policy" will now include only two of the three things set out therein viz. "fundamental policy of Indian law" and "justice or morality". The ground

relating to "the interest of India" no longer obtains. "Fundamental policy of Indian law" is now to be understood as laid down in Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] . "Justice or morality" has been tightened and is now to be understood as meaning only basic notions of justice and morality i.e. such notions as would shock the conscience of the court as understood in Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Section 28(3) has also been amended to bring it in line with the judgment of this Court in Associate Builders [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] , making it clear that the construction of the terms of the contract is primarily for the arbitrator to decide unless it is found that such a construction is not a possible one.']

It would be important to remember that the 246th Law Commission Report has itself bifurcated proceedings into two parts, so that the Amendment Act can apply to court proceedings commenced on or after 23-10-2015. It is this basic scheme which is adhered to by Section 26 of the Amendment Act, which ought not to be displaced as the very object of the enactment of the Amendment Act would otherwise be defeated."

(emphasis supplied)

19. *There is no doubt that in the present case, fundamental changes have been made in the law. The expansion of "public policy of India" in ONGC v. Saw Pipes Ltd. [ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705] ["Saw Pipes"] and ONGC v. Western Geco International Ltd. [ONGC v. Western Geco International Ltd., (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12] ["Western Geco"] has been done away with, and a new ground of "patent illegality", with* *inbuilt exceptions, has been introduced. Given this, we declare that Section 34, as amended, will apply only to Section 34 applications that have been made to the Court on or after 23-10-2015, irrespective of the fact that the arbitration proceedings may have commenced prior to that date.*

25. This leaves this Court with the sequitur fallacy submission. A careful perusal of Paragraphs 1 to 14 followed by Paragraph 15 of the majority view of the impugned award would make it clear that paragraph 15 is not a sequitur to Paragraphs 1 to 14 and the reasons will be articulated elsewhere infra. To be noted, it is on this basis that learned senior counsel submitted that this is a case of sequitur fallacy.

26. In this regard, learned senior counsel pressed into service ***Dyna Technologies*** principle being principle laid down by Hon'ble Supreme Court in ***[Dyna Technologies Pvt. Ltd. Vs. Crompton Greaves Ltd. reported in (2019) 20 SCC 1 = 2019 SCC OnLine SC 1656].*** By placing reliance on ***Dyna Technologies***, learned senior counsel submitted that Hon'ble Supreme Court has culled out three facets of basis not being set out qua Section 31(3) of A and C Act. To be noted, those three facets are (a) proper, (b) intelligible and (c) adequate. A careful perusal of Paragraphs 1 to 14 of the majority view of impugned award makes it

clear that this is more in the nature of narrative. In the considered view of this Court, it cannot therefore be gainsaid that Paragraph 15 is strictly a sequitur to Paragraphs 1 to 14 as the reasons for the conclusion expressed in Paragraph 15 is set out in paragraph 15 itself. In other words, paragraph 15 is self contained paragraph, while Paragraphs 1 to 14 are in the nature of narrative. The majority view of the impugned award has effectively said that it does not accept the contention of OPG that there was no short supply as it had not accepted the case that there was excess supply as shown in Tables A and B. It is on that basis that the majority view had concluded that there is short supply of 1,60,13,416 units. Thereafter, the majority view goes on to accept the case of Precot that short supply for the periods from April 2008 to March 2009 is 24,85,041 units, from April 2009 to March 2010 is 1,06,30,375 units and from April 2010 to June 2010 is 28,98,000 units. The majority view is that in all these periods, the unutilized quota from TNEB source is far in excess of the short supply.

27. A further closer analysis of paragraphs 1 to 14 followed by paragraph 15 of the majority view of the impugned award brings to light that paragraph 15 begins with the term 'however'. It is apparently on this basis that it was argued that paragraph 15 is a sequitur to paragraphs 1 to 14. This Court has already taken the view that it cannot be gainsaid that paragraph 15 is a sequitur to paragraphs 1 to 14 as paragraphs 1 to 14 are in the nature of narrative, not discussion and Paragraph 15 contains the reason in itself by saying during the relevant periods, quota from TNEB source far and excess the short supply remained unutilized.

28. Be that as it may, on a demurrer even if read it as a continuous thread (as paragraph 15 beings with the term 'however'), it is at best in the nature of an exception to paragraphs 1 to 14. In other words, it should be construed that paragraph 15 which contains the conclusion is notwithstanding narrative in Paragraphs 1 to 14. Therefore, in perambulating within the perimeter of Section 34 of A and C Act in this Section 34 legal drill, this Court is unable to sustain the submission that the basis of award is not proper as it is not a flaw in the decision making process owing to the facts of this case i.e., flaw within the legal landscape of Section 34. Similarly, this Court is unable to persuade itself

that it is unintelligible as this is not an appeal. With regard to adequacy of reason, even in the ***Dyna Technologies*** principle Hon'ble Supreme Court has made it clear that in Section 34 proceedings, Court has to adjudicate an adequacy facet qua Section 31(3) of A and C Act based on the degree of particularities of reasoning required having regard to the nature of issues falling for consideration in a given case. In the case on hand, the issue being whether there was a short supply, majority award having come to the conclusion that there was unutilized quota from TNEB source, in excess of the short supply, it does not clear Section 34 fence qua adequacy facet. In this regard, this Court deems it appropriate to extract and reproduce Paragraph 34 and part of Paragraph 35 of ***Dyna Technologies*** supra, which read as follows:

> *'**34.** The mandate under Section 31(3) of the Arbitration Act is to have reasoning which is intelligible and adequate and, which can in appropriate cases be even implied by the courts from a fair reading of the award and documents referred to thereunder, if the need be. The aforesaid provision does not require an elaborate judgment to be passed by the arbitrators having regard to the speedy resolution of dispute.'*
>
> *'**35.** When we consider the requirement of a reasoned order, three characteristics of a reasoned order can be fathomed. They are : proper, intelligible and adequate. If the reasonings in the*

order are improper, they reveal a flaw in the decision-making process. If the challenge to an award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided under Section 34 of the Arbitration Act. If the challenge to an award is based on the ground that the same is unintelligible, the same would be equivalent of providing no reasons at all. Coming to the last aspect concerning the challenge on adequacy of reasons, the Court while exercising jurisdiction under Section 34 has to adjudicate the validity of such an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration. The degree of particularity cannot be stated in a precise manner as the same would depend on the complexity of the issue.' .

29. The above plea is so inextricably dovetailed with the plea of learned counsel for Precot that the majority of view ought not to have reduced the quantum awarded by the minority view. It is made clear that this Court is not evaluating the merits and demerits of the minority and majority views and is only testing the challenge to an impugned award made by an three member AT wherein impugned award is not unanimous but it has been made by an 2:1 majority.

30. Hon'ble Supreme Court upholding the minority view in Ssangyong case law(supra) is an exception and it has been made clear by

Hon'ble Supreme Court in Ssangyong case law itself that it has been done in exercise of power under Article 142 as that was a case of application of formula and rearbitration would be cumbersome. In this view of the matter as the majority view which is effectively the impugned award is not being dislodged and as this Court is not judicially interferring qua the impugned award, the plea of learned counsel for Precot that the quantum awarded by the minority view ought not have been reduced by the majority view axiomatically fails.

31. In the light of the narrative thus far, this Court is left with the considered view that both OPG and Precot as protagonists of Senior OP and Junior OP respectively have not made out a case for judicial intervention qua the impugned award.

Both OPs fail and the same are dismissed. There shall be no order as to costs.

05.02.2021

Speaking order: Yes
Index: Yes
gpa

M.SUNDAR.J.,

gpa

Order in
O.P.No.103 of 2016 &
O.P.No.611 of 2016

05.02.2021