

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.03.2021

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

O.P.No.484 of 2017

Phoenix Solar Pte Ltd,
209, Syed Alwi Road,
Singapore- 207742,
Represented by,
Mr. Eric Thomas Fleckten, Director,

...Petitioner

Vs

Zynergy Solar Projects & Services Pvt Ltd,
3rd Floor, Block A, Bannari Amman Towers,
No.29, Dr.Radhakrishnan Road,
Mylapore, Chennai - 600004,
Tamil Nadu, India
Represented by Mr.Rohit Rabindranath, Director.

...

Respondent

Prayer : Petition filed under Sections 47-49 of the Arbitration and Conciliation Act, 1996 with the following prayer:

a) That the Award dated 31.01.2017, be deemed to be a decree of this Court;

b) That this court pronounce judgment according to the Award dated 31.01.2017, made and published by the Singapore International Arbitration Centre and direct the respondent to pay to the petitioner a sum of USD \$ 626,254.07/- along with interest at the rate of 9 % per annum, as more particularly set out in paragraph 25 of this petition and

c. That the respondent be ordered and decreed to pay the petitioner the costs of this petition.

For Petitioner : Mr. Thriyambak Kannan

For Respondent : Mr. Akhil Bhansali

ORDER

This petition has been filed under Sections 47 to 49 of the Arbitration and Conciliation Act 1996 for the following reliefs:

a) That the Award dated 31.01.2017, be deemed to be a decree of this Court;

b) That this court pronounce judgment

according to the Award dated 31.01.2017, made and published by the Singapore International Arbitration Centre and direct the respondent to pay to the petitioner a sum of USD \$ 626,254.07/- along with interest at the rate of 9 % per annum, as more particularly set out in paragraph 25 of this petition and

c. That the respondent be ordered and decreed to pay the petitioner the costs of this petition.

2. Mr. Thriyambak Kannan, learned counsel appearing on behalf of the petitioner would submit that the Award dated 31.01.2017 has been passed after due contest by the parties and the Appeal filed by the respondent before the High Court of the Republic of Singapore in HC/OS 209 of 2017 had also ended in dismissal.

3. He would therefore submit that the Award should be deemed to be a decree of this Court and should be enforced as such.

4. Mr. Akhil Bhansali, learned counsel appearing on behalf of the respondent would submit that this application cannot be enforced in the light of Section 48 (1) (b) and (d) of the Act.

5. He would draw the attention of the Court to the arbitration rules of the Singapore International arbitration centre (hereinafter referred to as the SIAC Rules) and would point out to Rule 5 which deals with Expedited Procedure.

6. He would submit that the arbitrator in contravention of Rule 1 of SIAC Rules had proceeded to conduct the arbitration in a summary and hasty manner adopting the Expedited Procedure and not had given an opportunity to the respondent to put across their case.

7. He would submit that Rule 5.1 contemplates the conduct of the arbitral proceedings through an Expedited Procedure on the satisfaction of the following criteria:

- 5.1. a) the amount in dispute does not exceed the equivalent amount of S\$5,000,000, representing the aggregate of the claim, counter claim and any set-off defence.*
- b) the parties so agree; or*
- c) in cases of exceptional urgency.*

It is the contention of the counsel that none of these criteria applies to the instant case.

8. He would further contend that the entire arbitral proceedings is hit by the provisions of 48(1)(b) in as much as the respondent was not able to put across his contention. The witness was not able to approach the arbitral tribunal on account of his surgery and on account of the death of the former

Chief Minister of the State which had brought normal life to a stand still in the State. Therefore, he would submit that without giving the respondent an opportunity of being heard the award has been passed. In response to this contention, Mr. Thriyambak Kannan, learned counsel would draw the attention of this Court to paragraph Nos. 61 to 65 of the Award of the sole arbitrator which is extracted hereinbelow:

"61. On 2 December 2016, the respondent filed its "Skeletal Submissions" and the Claimant filed its "Bundle of Legal Exhibits" for use during the evidential hearing. The claimant also provided the sole Arbitrator with clean "Bundle of Pleadings and Witness Statements" and "Bundle of Factual Exhibits" for use at the hearing in hard copy.

62. By email of the same date, the sole arbitrator acknowledged receipt of the parties'

submission.

63. By email of 5 December 2016, the respondent informed the Sole Arbitrator that his witness, Mr. Rabindernath, was unable to come to Singapore and attend the hearing due to his medical condition. The respondent attached a medical certificate to its email. The respondent further indicated that it had asked the Claimant's counsel whether its witness was able to attend the hearing on 6 December 2016 (instead of 7 December 2016)

64. By email of the same date, the Sole Arbitrator took note of the fact that Mr. Rabindernath would not be examined at the hearing of 6 December 2016 and invited the parties to liaise and propose an updated schedule for the hearing. The Sole Arbitrator also invited

the respondent to indicate that he be examined at a later date.

65. On the same date, the respondent replied that it no longer requested the examination of Mr.Rabindernath."

9. He would submit that the respondents have given up their right to be examined and having done so the respondent cannot now contend that he has not been given an opportunity to make his submissions. The counsel would further submit that all these allegations that are now made have already been considered in great detail by the SIAC and this Court cannot now reappreciate the evidence. Therefore, this Court may please pass a judgment in terms of the Award dated 31.01.2017 passed by SIAC and direct the respondent to pay the amount awarded.

10. Heard the counsels and perused the papers.

11. The limited issue which is placed for my consideration is whether there has been violation of the provisions Section 48 (1) (b) and (d) of the Act, by reason of which, the Award passed by the Arbitrator constituted under the SIAC Rule cannot be deemed to be a decree and enforced as such.

12. The respondent's contention is that they have not been given an opportunity of being heard and their evidence has not been taken on record, for which, the respondent would rely on a trail of emails starting from 04.10.2016.

13. A perusal of the same would clearly indicate that it was the respondent herein who had sought to have the hearing postponed to 5th and 6th of December 2016, since the witness was to undergo a surgery in middle of November, 2016 by email dated 06.10.2016. The learned counsel for the respondent has informed the Arbitrator that the respondent required an evidentiary hearing and that the hearing could take place on 5th and 6th of December, 2016.

14. Though the said request was objected to by the claimant, as evident from the email dated 06.10.2016, the Arbitrator had however fixed the hearing date on 5th and 6th of December, 2016. There also appears to be a letter addressed by the respondent's counsel to the respondent informing him that the respondent has to consider submitting himself for cross examination through video -conferencing and had informed him as follows:

"Please confirm in line with your decision on non-attendance, that you do not wish to participate further in the Hearing or make yourself available for cross-examination

The consequence is that Tribunal may exclude your witness statement and dispense with your presence and rule accordingly. "

15. On receipt of this letter from his counsel, the respondent has sent

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a reply stating as follows:

" Dear Dennis,

*Tamilnadu is going through a terrible
political crisis and all offices are shut. I m afraid
that a video conference will not be possible."*

16. The letter does not touch upon the query regarding the decision on non-attendance and further participating in the hearing or making himself available for cross examination. In fact, the arbitrator in her Mail dated 05.12.2016, after receiving the mail from the counsel for the respondent, had kept the issue of cross examination of the witness open till the next date at the arbitral hearing. Another point that has been taken note of is that in the Appeal filed by the respondent before the High Court of Singapore the respondent has not raised this as a ground at all. On the contrary, the respondent's contention is extracted in paragraph 150 of the Award which reads as follows:

"150. In any event, whether the parties to

the Supply Contract and the Letter of Undertaking fully performed their obligations is not for the Sole Arbitrator to decide as she is not seized of a dispute under those contracts and the parties do not allege that this question has any consequence on the claimant's claim based on the Settlement Agreement. Finally, while the respondent submits that the negotiations for the Supply Contract were conducted by the representatives of the respondent, there is no mention of the respondent in the Supply Contract or the Letter of Undertaking and there is no contemporary evidence supporting this fact."

The High Court of Singapore has considered this argument and rejected the same.

17. A perusal of paragraph 150 would indicate that the learned Arbitrator has concluded that she would not be able to consider whether the parties to the Supply Contract and the Letter of Undertaking had performed this obligations since those issues were not the subject matter of dispute before her. The parties who had originally entered into the Supply Contract had on 01.08.2013 entered into a Debt Settlement Agreement wherein they had acknowledged that they owed USD 1,405,794.00 to the claimant is the subject matter of the dispute before the Arbitral Tribunal. Therefore the earlier agreement had been novated into this Debt Settlement Agreement.

18. A reading of the Debt Settlement Agreement would clearly show that the respondent had undertaken to repay the sum of Rs. 3.03 crores as final settlement of the obligations under the terms of the Debt Settlement Agreement . The amounts which were due from Zynergy Solar Projects & Services Private Limited to the tune of Rs.303 crores to the petitioner was transferred to the respondent which was under the obligation to pay the said sum to the petitioner. Since the payments had not been made the arbitral

proceedings had been initiated. The Arbitrator has also dealt with the same in paragraph No.155 of the Award, which reads as follows:

"155. The Sole Arbitrator also finds that the respondent did not prove that the claimant made any oral promise or that the respondent's payment was conditioned to the Performance of such promise. To the contrary, as has been demonstrated by the claimant, at the time of the conclusion of the Settlement Agreement, the Respondent had never mentioned the defects, let alone conditioned the conclusion of the Settlement Agreement to the claimant's undertaking to resolve-or assist in revolving- the alleged defects to the Power Plant. Mr. Robindernath's written statement to the contrary, which is the only evidence brought by the respondent to that effect, is not sufficient in light

of the clear terms of the Settlement Agreement and the high standard of proof required to prove fraudulent misrepresentation. As a result, the Sole Arbitrator find that the claimant did not make any "express representation" as regards the defects upon which the respondent relied when entering into the Settlement Agreement."

19. On the conspectus of the above, it is clear that the respondent has come out with this defense that they were not given an opportunity for the first time before this Court. This defense has not been made in the appeal challenging the award. Except for this defense the respondent has not made out any case to oppose the petition moved by the petitioner. Therefore, the petition is ordered as follows:

a) The award dated 31.01.2017 made and published by SIAC is deemed to be a decree of this Court;

b) that the respondent shall pay to the petitioner a sum of US \$ 6,26,254.07 along with interest @ 9 % per annum morefully set out in Paragraph 25 of the petition in O.P.No.484 of 2017.

c) that the respondent shall pay costs to the petitioner.

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Index : Yes/No

Speaking order/non-speaking order



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