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IN THE HIGH COURT OF ORISSA AT CUTTACK

M.A. No. 307 of 2002

Grid Corporation of Orissa Ltd.

Appellant

-versus-

***The Tata Hydro Electric Power
Supply Company Ltd. and others***

Respondents

Advocates appeared in the cases:

For Appellant :

Ms. Somaleen Pattnaik
Advocate

For Respondents :

None

**CORAM:
THE CHIEF JUSTICE**

JUDGMENT
25.11.2022

Dr. S. Muralidhar, CJ.

1. This appeal under Section 37(1) (b) of the Arbitration and Conciliation Act, 1996 (Act) is against an order dated 16th February, 2002 passed by the learned District Judge, Khurda at Bhubaneswar in Arbitration Misc. Case No.304 of 2001. By the said order, the learned District Judge dismissed the challenge laid by the Petitioner under Section 34 of the Act to an arbitral Award dated 10th April, 2001 whereby a 3-Member Arbitral Tribunal directed the present Appellant- Grid Corporation of Orissa Ltd. (GRIDCO) to pay the Respondent-claimants a sum of Rs.5 Crores by 31st July, 2001 failing which, it was to pay interest on the said sum @18% till payment or realization, whichever was earlier.

2. In the present appeal, an order was passed on 3rd May, 2002 and while admitting it was stated that subject to the Appellant paying the Respondents the principal sum of Rs.5 crores within a period of six weeks, there shall be a stay of execution of the Award.

3. The facts in brief are that the Government of Orissa as part of initiating power sector reforms, invited unconditional bids for sale of 51% of the 100% equity shares held by the GRIDCO in four distribution companies, vis., Central Electricity Supply Company of Orissa Limited (CESCO), Western Electricity Supply Company of Orissa Limited (WESCO), Southern Electricity Supply Company of Orissa Limited (SOUTHCO) and North Eastern Electricity Supply Company of Orissa Limited (NESCO) along with the management control in the said four companies. GRIDCO issued the bid documents (Request for Proposal - RFP) including the draft agreement. The bid documents issued by GRIDCO included the format of a Bank Guarantee (BG) to be furnished by the Bidders as earnest money to participate in the bid and if selected, acquire 51% equity shares in the distribution companies. The bidders were also required to execute an Earnest Money Guarantee Agreement (EMGA) in support of the above BG.

4. Since there was no bid for CESCO either by the Respondents or by any other party, GRIDCO decided to keep the bids for other distribution companies, viz., WESCO, SOUTHCO and NESCO in

abeyance. GRIDCO re-invited bids for the sale of 51% shares in CESCO from the aforementioned prequalified companies/consortia on the same terms and conditions as provided in the RFP except that the bidders were permitted, if they considered necessary, to stipulate conditions.

5. Pursuant to the said invitation, vide a letter dated 23rd February, 1999 the Respondents submitted a conditional bid in respect of CESCO setting out various conditions such as discount on bulk supply payments, proposal to have no ESCROW agreement, funding of loss by GRIDCO etc.

6. After negotiations, by letter dated 10th March, 1999 the Respondents clarified that the conditions listed by them in their letter dated 23rd February, 1999 were withdrawn except and subject to the condition included in paras 1.2 and 1.3 of their letter dated 10th March, 1999. In the concluding paragraph of this letter, the Respondents stated as under:

“In conclusion we would like to thank the Committee members for the detailed discussions and since the issues concerning ESCROW Agreement for CESCO and final draft to Shareholders agreement, etc are to be addressed at an appropriate later stage, we will take them up in due course in the light of our earlier discussions.

We look forward to your favourable decision and thank you for your active co-operation in the important task of the Orissa Electricity distribution privatization.”

7. Certain further clarifications were issued by the Respondents in their letters dated 13th and 15th March, 1999 with the stipulation that they were to be read in conjunction with paras 2 and 3 of the earlier letter dated 10th March, 1999. By a letter dated 27th March 1999, GRIDCO informed the Respondents that they had been selected as purchasers for the acquisition of 51% of the shares of CESCO. GRIDCO called upon them to send their authorized representative to Bhubaneswar to finalize the documents and also arrange to pay the bid amount of Rs. 41 Crores by 31st March, 1999.

8. On 30th March, 1999 the Respondents replied stating that they proposed to hold discussions either on 12th and 13th April or 15th and 16th April in Bhubaneswar to make further progress in the matter. By a letter dated 30th March, 1999 GRIDCO informed the Respondents that the transactions relating to CESCO had to be completed by 1st April, 1999 and it was not appropriate to delay the matter. The Respondents were asked to visit Bhubaneswar immediately to execute the documents as per the draft agreement.

9. On 31st March, 1999 the Respondents informed GRIDCO that it was practically not feasible to complete the process by 1st April, 1999. It was stated that the Respondents would “arrange for negotiation of the final legal documentation commencing 12th April, 1999.” It was mentioned that the delay was quashed by GRIDCO and related merely to ‘transfer of shares of CESCO from GRIDCO to the investor and negotiation of legal

documentation' and that it would not have any impact on the transfer scheme and/or valuation.

10. In a separate letter dated 1st April, 1999 addressed to the Chairman & Managing Director, GRIDCO, the Director of the Respondent Nos.1, 2 and 3 *inter alia* mentioned that their commitment to take over CESCO was "in line with our conditional bid and clarifications resting with our letter of 15th March, 1999."

11. In the letter addressed to the Respondents dated 6th April, 1999 GRIDCO expressed surprise at the Respondents turning their bid to be 'conditional'. GRIDCO understood the bid to be unconditional since the earlier conditions stipulated had been withdrawn.

12. On 12th April, 1999 the Respondents recapitulated the salient features of their proposal as under:

"1. CESCO should be given a clean credit of 180 business days for payment for purchase of energy from GRIDCO.

2. CESCO should be freed from its obligation to enter into an ESCROW agreement with GRIDCO.

3. GRIDCO should approach OERC on a best efforts basis for a BST which is lower than at present for the reasons already discussed and peculiar to CESCO."

13. Further, the Respondents pointed out as under:

“It transpired during the meeting that GRIDCO was not able to immediately respond to these proposals with their counter proposals. We also noted GRIDCO’s expressed difficulty in complying with 3 above. GRIDCO may be in a position as a Licensee to carry forward to later years the shortfall as allowed by OERC and as such a deferral in BST over the existing levels for first three years should be possible for GRIDCO to consider.

We would, in the circumstances, in the spirit of co-operation which has prevailed during the deliberations request GRIDCO to revert to us with their concrete proposals which will best achieve the common objectives of the parties to mitigate the conditions 1.2 and 1.3 of our letter dated 10 March 1999.”

14. The letter acknowledged that the Respondents had attended the office of GRIDCO on that very date for further discussions. It was clear that at the meeting, there was a failure of the negotiations as was evident from a letter dated 12th April, 1999 written by GRIDCO to the Respondents, whereupon the Respondents were called upon to sign and deliver the Share Acquisition Agreement, pay the consideration amount and furnish the Board Resolution of the Respondents forthwith and in any event not later than 4.00 pm on 13th April, 1999.

15. More correspondence was exchanged between the parties on 13th April, 1999. In a letter dated 14th April, 1999 addressed to GRIDCO, the Respondents pointed out that most of the issues had been settled “except some crucial issues including one relating to provision of LC for BST payments.” On 15th April, 1999 the Respondents wrote to the State Bank of India seeking financial

assistance for CESCO's renovation/restructuring/modernisation which was expected to be in the tune of Rs.300 Crores. Similar letter was also addressed on 20th April, 1999 to the International Finance Corporation, USA.

16. On 1st July, 1999 GRIDCO sent a long letter setting out its version of what had transpired and provided one last opportunity to the Respondents to make payment of the bid amount, to furnish the requisite Board Resolution and to sign the Share Acquisition Agreement by 4.00 pm on 9th July, 1999. In reply to this letter, on 9th July, 1999 the Respondents wrote to the GRIDCO pointing out that the above request was "totally unacceptable as it not only does not accord with reality but is also contrary to the facts on record". It was pointed out *inter alia* that on 20th May, 1999 the Respondents had informed GRIDCO that the bankers had expressed their inability to fund the project on the existing basis. On 23rd June, 1999 the Respondents had expressed their commitment to work towards successful completion of the project and that they were prepared to receive a proposal from GRIDCO "which would be bankable and also satisfy the preconditions of our letter of 10th/15th March, 1999."

17. On 19th July, 1999 the Respondents wrote to GRIDCO requesting it to cancel the BG, i.e., in terms of the EMGA and return the original BG.

18. On 31st July, 1999 GRIDCO invoked the said BG and wrote to the Respondents that they were not entitled to ask for its cancellation. Nevertheless, since the BG having been encashed, the disputes raised by the Respondents were referred to an Arbitral Tribunal of three Members. It is the aforementioned claim of Rs.5 Crores raised by the Respondents which came to be allowed by the Tribunal by the award dated 10th April, 2001 together with the stipulation that if it was not paid on or before 31st July, 2001 it would attract interest @18% till the date of payment or realization, whichever was earlier.

19. As it transpired, each of the Members of the Tribunal gave their separate reasons. Justice V.D. Tulzapurkar, the Presiding Arbitrator held that the BG dated 13th January, 1999 read with the EMGA dated 22nd January, 1999 did not cover the bid submitted for CESCO; that there was no concluded contract in relation to the conditional bid submitted by the Respondents for CESCO and, therefore, the Respondents had not committed any breach of the alleged contract.

20. Justice M.H. Kania, one of the Arbitrators, while agreeing with the findings of Justice Tulzapurkar that there was no concluded agreement between the parties pertaining to the CESCO bid, observed that the parties were never ad-idem on the terms and conditions on which 51% shares of GRIDCO in CESCO would be purchased. He observed as under:

“...It further appears that the parties were not ad-idem as to what was really a pre-condition irrespective of

how it was called or described. It does however appear that the parties had never come to a definite agreement regarding terms of the shareholders agreement...”

21. Justice S. Ranganathan, the 3rd Arbitrator held that the EMGA and BG should be widely construed so as to cover the financial bid for CESCO as well. However, he observed that the relevant documents could have been drawn up more precisely and the correspondence, drafted less ambiguously. In the concluded portion of his separate award, he observed as under:

“Having given my anxious and careful thought to all aspects, I would, without intending to detract in the least from my interpretation of the documents in the case, prefer a result that will render equity and justice to both the parties. Actuated solely by this consideration, I concur in the conclusion of the other two arbitrators that GRIDCO be directed to return to the claimants the principal amount of Rs.5 Crores but without any interest and that the parties should bear their own costs of this arbitration. However, if the amount is not paid on or before 31.7.2001 GRIDCO shall pay the claimants interest thereon at 18% per annum till date of repayment. I make my award accordingly.”

22. Before the learned District Judge, in the application being Arbitration Misc. Case No.304 of 2001 under Section 34 of the Act, it was sought to be argued that the Award was in conflict with the public policy of India inasmuch as the untenable stand taken by the Respondents had led GRIDCO to believe that the contract was a concluded one and that the BG furnished by the Respondents on 13th January, 1999 also extended to the subsequent bid for CESCO. According to GRIDCO, this amounted to a misrepresentation under Section 18(3) of the Indian

Contract Act, 1872 (IC Act); that in directing the refund of the encashed BG amount, the Tribunal had not followed the law of the land, namely, Section 18(3) of the IC Act. It was further argued that releasing the Respondents from forfeiture of the earnest money would be in conflict with the public policy of India.

23. The learned District Judge, in the impugned judgment dated 16th February, 2002 observed that the observations of Justice Kania and Justice Ranganathan could not be construed as a finding of misrepresentation on the part of the Respondents. Moreover, the Court would not sit in appeal over the Arbitral Award. Further, there was no express contract that the BG furnished on 13th January, 1999 by the Respondents would also cover the conditional bid for CESCO. Clauses 1.2 and 1.3 of the letter dated 15th March, 1999 of the Respondents, though clarified “was not waived and as such remained as preconditions. The parties understood the position in their own way and as such there was no misrepresentation within the mischief of sub-section (3) of Section 18 of the Indian Contract Act.”

24. Before this Court, it is sought to be argued that the findings of fact by two or three Arbitrators was in favour of the present Appellant, i.e., GRIDCO to the effect that there was a concluded contract between the parties. In particular, reference is made to the following observations in the award of Justice Ranganathan:

“(Reference Page 193, Para 18 of the award) “In my view, a conjoint reading of the three letters of the

claimants leaves the doubt that as on 15.3.1999, there was no longer any preconditions attached to their bid....

(Reference Page 201 Para 25 of the award) “On my interpretation of the correspondence and events, the claim in the present proceedings should stand dismissed with costs.”

25. Reference is also made to the following observations in the Award of Justice Kania as under:

“(Reference from Pages 189 to 194)... Although claimants did not specify that these were preconditions and left the matter vague, these really amount to pre-conditions”

In these circumstances, it appears that no concluded agreement was entered into by the claimant’s letter dated 15th March 1999, although it must be observed that the claimants have taken an ambivalent stand which could have misled the respondent who was anxious to complete the sale of CESCO’s shares

The parties were, therefore, never ad idem. It is possible that the respondent misunderstood the position on account of the somewhat ambivalent stand taken by the claimants regarding the question whether they were certain pre-conditions insisted upon by the claimants or not.”

26. It is sought to be contended that the above observations actually would lead to the position that it is the Respondent who misled the Appellant, thus answering the definition of ‘misrepresentation’ under Section 18(3) of the IC Act and the condition of voidability of agreement without free consent under Section 19 of the IC Act.

27. The difficulty in the above submission is that the Appellant is trying to interpret the letters written by the Respondents to be 'deeds/documents' and advancing the proposition that "if two interpretations are possible, the words creating uncertainty in the documents can be ignored"

28. The Court is unable to accept the interpretations placed by the Appellant on the aforementioned passages from the separate Awards of Justice Ranganathan and Justice Kania. It must be recalled that Justice Ranganathan in the concluding portion acknowledges that he would prefer the result which renders equity and justice to both the parties. He expressed a view that the relevant documents could have been drawn up more precisely and the correspondence drafted less ambiguously. In saying so, in Para-25 of the separate Award, he did not lay the responsibility for the vagueness only on the Respondents. On the other hand, he states very clearly in Para-25 of his Award as under:

"(i)... As they stand, there is room for differing opinions on their precise import and effect and two conflicting views can be reasonably entertained...."

29. After setting out the two possible views in which GRIDCO should be asked not to return the earnest money but also pay interest in cost and the other that GRIDCO is not entitled to forfeit the earnest money, he then concludes as under:

"(i)... However, it seems to me, the strict adoption of either view will not be justified in a case of present type, where there could be a genuine difference of opinion on the import of the documents."

30. Interestingly, Justice Ranganathan also notes in a separate award that having encashed the BG on 31st July, 1999 GRIDCO has had the use of money for about 2 years which had compensated GRIDCO for the problems created by the Respondent's withdrawal and further that GRIDCO had subsequently been able to dispose of CESCO without financial loss. In that context, the following observations were made by him:

“(iii) Considering that GRIDCO has subsequently been able to dispose of CESCO without financial loss, it will not be inequitable to direct the refund of the earnest money. A decision which will promote substantial justice between the parties should be preferred in arbitration proceedings where the emphasis should be in fairness and equity rather than on purely legal considerations.”

31. Consequently, it is not possible for the Court to accept the submissions of the Appellant that the separate award of Justice Ranganathan supports the plea of the Appellant that the Respondents had misrepresented to the Appellant.

32. Even Justice Kania in his separate Award states that it is possible that GRIDCO “misunderstood the position on account of the somewhat ambivalent stand taken by the Respondents...” but this does not even remotely suggest that the Respondents had made any misrepresentation.

33. The whole basis of the argument of the Appellant about the award being contrary to Public Policy, premised on there having

been a misrepresentation, attracting Section 18(3) of the IC Act which has been found by the learned District Judge not to exist.

34. This Court, having carefully considered the submissions of learned counsel for the Appellant, is unable to come to any different conclusion.

35. Consequently, there is no merit in the present appeal and it is dismissed as such.

36. The interim order is hereby vacated. Consequently, with the GRIDCO already having paid the principal amount of Rs.5 Crores to the Respondents by virtue of the interim order of this Court, it is now required to pay the Respondents in terms of the Award that has been upheld, interest at 18% on the principal amount awarded after the date of payment.

(S. Muralidhar)
Chief Justice

S. Behera/ Jr. Steno.