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O.P.No.799 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.10.2022

CORAM

THE HONOURABLE **MR.JUSTICE SENTHILKUMAR RAMAMOORTHY**

O.P.No.799 of 2019

and

A.No.7623 of 2019

Bharat Heavy Electricals Limited,
690, Anna Salai, EVR Periyar Building,
Nandanam, Chennai - 600 035.

... Petitioner

VS.

Capco Water Solutions Private Limited,
Having its Office at 15AJ, Laxmi indl Estate,
Link Road, Andheri West, Mumbai - 400 053.
(Amended as per order dated 30.09.2021
in A.No.3418 of 2021)

... Respondent

PRAYER: Original Petition filed under Section 34 2(b)(ii) of the Arbitration and Conciliation Act, pleaded to set aside the Award dated May 5, 2019 to the extent that it directs the petitioner to pay Rs.1,40,86,270/- payable with interest at 12% per annum from 01.01.2014 on Rs.1,07,95,570/- and further interest at 18% per annum thereof from the

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date of the award till payment and to set aside the rejection of counter claims made by the petitioner and for costs.

For Petitioner : Mr.Krishna Srinivasan
for M/s.S.Ramasubramaniam Associates

For Respondent : Mr.Satish Parasaran, senior counsel,
for Ms.Priti Mohan,
Ms.R.S.Poornima and
Ms.Anisha Chandrakumar

ORDER

An arbitral award dated 05.05.2019 (the Award) is assailed by the petitioner under Section 34 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act).

2. A contract was awarded by the Tamil Nadu Generation and Distribution Corporation (TANGEDCO) to the petitioner in relation to its power projects. A part of the work under the said contract was awarded by the petitioner to the respondent pursuant to two letters of intent for supply, and erection and commissioning, respectively. Pursuant thereto, purchase order dated 27.10.2012 was issued in relation to the supply of material and work order dated 27.12.2012 in respect of erection and commissioning. The contract provided for a time schedule in respect of supply and erection and

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commissioning. It also provided for the imposition of liquidated damages for delay and risk purchase by the petitioner. Clause 23 and 24 deal with cancellation / termination of the contract under the contingencies specified therein.

3. A dispute arose between the parties with regard to the performance of obligations under the contract and correspondence was exchanged in relation thereto. Eventually, by communication dated 19.12.2013, the petitioner terminated the purchase order and work order issued to the respondent by citing clauses 13 and 23 of the general conditions of contract. Thereafter, the petitioner made a call on and encashed the performance bank guarantee.

4. In these circumstances, the respondent invoked the arbitration clause in the contract and, upon constitution of the arbitral tribunal, submitted a statement of claim by which an aggregate sum of Rs.1,08,38,802/- was claimed. The said claims included: a claim for the total value of custom made material procured or produced for supply to the



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petitioner and which the petitioner allegedly fail to take delivery of; total value of materials allegedly retained by and lying at the site of the respondent; monies payable in respect of the call made on the performance bank guarantee with interest thereon; loss of profit due to termination; loss of reputation and goodwill; and differential tax payable in view of non submission of C-Forms. The petitioner filed a statement of defence and refuted all the claims. Upon completion of pleadings, the arbitral tribunal framed ten issues for consideration which are set out at paragraph 6 of the Award. The claimant adduced evidence by examining C.W.1 and C.W.2 as its witnesses. Through the said witnesses, Exs.C1 to C85 were exhibited. The petitioner herein examined one witness, R.W.1, and exhibited 123 documents as Exs.R1 to R123. Each witness was cross examined by learned counsel for the counter party. Upon considering the pleadings, evidence and submissions of parties, the arbitral tribunal rejected the two claims relating to value of materials, the claim for loss of profit, and the claim for loss of reputation and goodwill. The arbitral tribunal concluded that the termination of the contract by the petitioner was invalid, and the only claims that were allowed were in respect of the call made on the bank



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guarantee and for payment of differential tax. The Award is assailed by the petitioner herein as regards the aspects that were held in favour of the respondent. Although several claims of the respondent were rejected, the respondent has not challenged the Award.

5. Oral submissions were made on behalf of the petitioner by Mr.Krishna Srinivasan, learned counsel, and on behalf of the respondent by Mr.Satish Parasaran, learned senior counsel.

6. The first submission of Mr.Krishna Srinivasan was that the arbitral tribunal examined the events of delay and entered the finding at paragraph 13.18 of the Award that both parties failed to perform their respective obligations under the contract. In spite of concluding that both parties failed to perform their respective obligations, he submitted that the arbitral tribunal committed the patent illegality of importing principles of natural justice into a commercial contract and thereby holding that the termination was not justified. By placing reliance on the judgment of the Hon'ble Supreme Court in *State of Gujarat and others v. Meghji Pethraj Shah*



Charitable Trust and others, 1994(3) SCC 552, particularly paragraph 22

thereof, he contended that principles of natural justice are not applicable in the context of a contract since the said principles relate to public and not private law. On this issue, he placed the judgment in *Nagarjuna Construction Company Limited v. Government of Andhra Pradesh and others, (2008) 16 SCC 276*, so as to distinguish the same on the ground that interference in the said case was largely on the basis that materials that were relied upon by the public sector enterprise (the employer therein) had not been made available to the contractor. Therefore, he submitted that the principle laid down in the said decision is inapplicable to the case at hand.

7. The next contention of learned counsel was that the arbitral tribunal failed to take into account the communications that preceded the termination notice. By drawing reference to the communication dated 21.09.2013 from the petitioner to the respondent, the communication dated 19.10.2013 from the petitioner to the respondent and, in particular, the reply dated 19.10.2013 from the respondent to the petitioner, he pointed out that the respondent acknowledged acceptance of the content of the letter dated



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19.10.2013. Once such admission was made by the respondent, he submitted that no prior notice was required before the termination of the contract. In effect, learned counsel contended that importing principles of natural justice into a commercial contract violates the fundamental policy of Indian law and is even otherwise patently illegal.

8. These contentions were refuted by Mr.Satish Parasaran, learned senior counsel. Mr.Satish Parasaran opened his submissions by stating that the role of the respondent in the larger contract awarded by TANGEDCO to the petitioner was limited. Therefore, the supply contract was for a total value of about Rs.9.1 crore and the erection and commissioning contract for a total value of about Rs.1.66 crores. Although about 50% of the work was completed at the time of termination, he stated that the respondent was paid only about Rs.47 lakhs. In addition, the performance bank guarantee for a sum of about Rs.1.07 crore was called on and encashed. After pointing out that the claims of the respondent before the arbitral tribunal were rejected except for the claims relating to the bank guarantee and differential tax, he turned to the findings of the arbitral tribunal on delay.



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9. By drawing reference to paragraphs 13.1 to 13.18 of the Award, he pointed out that the arbitral tribunal dealt with the delay events under four heads. With regard to non availability of work front, he referred to the finding at paragraph 13.4 of the Award that the work front had not been made available by the petitioner because even the external foundation had not been completed during the last week of April 2013. With reference to the delay in fixing dosing point, he referred to the finding at paragraph 13.9 to the effect that the petitioner herein caused delay of nearly six months. He also pointed out that the arbitral tribunal held that the delay in inspection calls and approvals could not be attributed to the petitioner herein. On considering the delay events cumulatively, he pointed out that the tribunal recorded the conclusion at paragraph 13.18 that both parties failed to perform their respective obligations under the contract.

10. According to learned senior counsel, the conclusions in paragraph 14 of the Award should be read in the context of the conclusions in paragraph 13 and, if so read, it is evident that the arbitral tribunal proceeded to consider the other reasons set out in the termination notice in light of the



findings in paragraph 13. By advertng to the alleged non-involvement of the technology partner, Severn Trent, he pointed out that the arbitral tribunal recorded reasons such as the absence of reference to the technology partner in the letters of intent, supply and work order as the basis to reject that ground for termination. Similarly, he submitted that in paragraphs 14.3 and 14.4, the other reasons cited in the termination notice were considered and rejected for reasons set out therein. In these circumstances, he contended that the conclusion that the termination was not justified does not call for interference under any of the grounds contained in Section 34 of the Arbitration Act.

11. In light of the contentions of the contesting parties, the first aspect that requires examination is the finding of the arbitral tribunal with regard to delay. As adverted to earlier, both parties adduced oral and documentary evidence. In paragraph 7 of the Award, the arbitral tribunal set out details of the evidence placed before the said tribunal. In response to a query, it was admitted that neither party placed evidence of the critical path nor provided analysis in respect thereof. In that situation, upon considering the pleadings,



same work was not completed till 22.10.2013, the Claimant sent a reminder to the Respondent on 22.10.2013. From the said Emails dated and 22.10.2013 and 15.12.2013, it can be seen that even after completion date, the Civil works were not completed by the Respondent."

12. The delay in fixing dosing was dealt with at paragraph 13.9, in relevant part, as under:

"Ultimately, only on in 03.07.2013, the Respondent finally marked the position of the Dosing Point and informed the same to the Claimant. Due to the changes made in fixing the intake Dosing Point by the Respondent which was finalized only on 03.07.2013, it cannot be denied that the Claimant could not place Orders for the required pipes before the date. Such a delay, due to the above facts, is to be attributable only to the Respondent. The Learned counsel for the Respondent tried to put the blame on the Claimant in not proceeding with 4 Bay Dosing Point. But, by saying that, the Respondent cannot escape



from its obligation. So the delay caused by the Respondent, for nearly 6 months, would have been affected the progress of the work and such delay is to be attributable, only to the Respondent."

13. On the contrary, with regard to delay in approval by the petitioner herein, the following finding was recorded in paragraph 13.12 in favour of the petitioner:

"Though the Claimant has come forward with the case that the Piping Layout and the Diffuser installation was submitted to the Respondent on six occasions, it was approved only after one year, it is not pointed out, as to why such reviews were required for six occasions. If it is for the valid reasons, the Respondent cannot be blamed."

14. Similarly, as regards the delay in making inspection calls, the finding at paragraph 13.16 is in favour of the petitioner. The said finding is set out below:



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"No reason is given by the Claimant as to why the assembly of Electrolytes Skid could not be done at site. The difficulty arose only because of the Claimant's conduct in having assembled at its factory without doing it at site, though sufficient materials had already been delivered at site. Though the Inspection Agency had inspected, as mentioned above, and as per Ex.R90, the report was cancelled, as void due to the reasons mentioned therein. So it cannot be said that the Respondent caused the delay regarding Inspection Calls. The delay was only due to the Claimant's decision to assemble the Electrolytes Skid, outside the site and make the Inspection Agency to inspect, without informing the fact of cancellation of Inspection Call by the Respondent."

15. Based on the above findings on specific delay events, it was recorded at paragraph 13.18 that both parties failed to perform their respective obligations under the contract. Therefore, it was held that the



delay cannot be solely attributed to the respondent herein. The above findings of the arbitral tribunal were entered in the context of absence of evidence or analysis of the critical path from either party. When seen in context, it is a reasonable appraisal of the evidence on record. The arbitral tribunal is undoubtedly the final arbiter of facts and the conclusions drawn in the Award in respect of delay do not call for interference under Section 34 of the Arbitration Act either on the ground of disregard of vital evidence or any other reason.

16. Turning to the question of termination of the contract, as correctly pointed out by learned senior counsel for the respondent, the conclusions on termination cannot be viewed in isolation. The said conclusions should be seen in the context of the findings entered in respect of the delay events that were dealt with under paragraph 13. Against that backdrop, the validity of termination was dealt with in paragraphs 14.1 to 14.8. The findings on termination were assailed by learned counsel for the petitioner primarily on the ground that principles of natural justice cannot be read into a commercial contract. Without doubt, the said contention is meritorious and liable to be accepted. However, an arbitral award cannot be interfered with



merely on account of one erroneous finding unless such finding goes to the root of the matter and vitiates the award. Whether this finding vitiates the Award is examined next by turning to the clauses on termination.

17. Clause 23.1 is relevant for purposes of termination. The said clause is set out below:

"If the Seller / Contractor fails to deliver the goods or materials or any installment thereof within the period(s) fixed for such delivery or delivers goods or materials not of the contracted quality and failing to adhere to the contract specifications or at any time repudiates or otherwise abandons the contract before expiry of such period or refuses or is unable to supply goods or materials covered by the Order / Contract either in whole or in part or otherwise fails to perform the Order / Contract or commits any breach of the Order / Contract not herein specifically provided for or in the event of the death of insanity or if the Seller / Contractor being an individual or if a firm on a partnership thereof, shall at any time, be adjudged insolvent or shall



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have a receiving order for administration of his estate made against him or shall take any proceeding for composition under any Insolvency Act for the time being in force or make any assignment of the Order / Contract or enter or if the firm dissolved under the Partnership Act or if the Seller / Contractor being a company is would up voluntarily or by order of a Court or a Receiver, Liquidator or Manager on behalf of the debenture holders and creditors is appointed or circumstances shall have arisen which entitles the Court of debenture holder and creditors to appoint a receiver, liquidator or manager, the purchaser without prejudice to his right to recover any expenses, losses or damages to which the purchaser may be put to incur or sustain by reason of the Seller / Contractor's default or breach of Order / Contract shall be entitled to cancel the Order / Contract either in whole or portion thereof without compensation to the Seller / Contractor and if the purchaser so desires, he may procure upon such terms and in such manner as he deems appropriate, stores not so delivered or others of a similar description where stores exactly complying



with particulars are not, in the opinion of the purchaser, which shall be final, readily procurable, at the risk and cost of the Seller / Contractor and the Seller / Contractor shall be liable to the purchaser for any excess costs provided that the Seller / Contractor shall continue the performance of the Order / Contract to the extent not cancelled under the provisions of this clause. The Seller / Contractor shall on no account be entitled to any gain on such repurchases."

18. On perusal of the above clause, it is evident that the petitioner is entitled to cancel or terminate the contract only in the event of breach by the respondent. Put differently, the contract does not provide for “no fault” or “without reason” termination. In this contractual context, the arbitral tribunal was certainly entitled to examine the reasons cited for termination by the petitioner and determine whether the said reasons are sustainable. This is precisely what the arbitral tribunal did in the various sub-paragraphs of paragraph 14.



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19. Learned counsel for the petitioner contended that the termination notice should not be seen in isolation in as much as it references prior communications between the parties including the letter dated 19.10.2013 from the respondent herein to the petitioner. The said contention is valid but there is no reason to assume that the arbitral tribunal did not take into consideration the communication dated 19.10.2013 or the other evidence on record. As dilated upon earlier, the findings on the various delay events were entered after taking into consideration both oral and documentary evidence. Apart from the alleged delay by the respondent, the termination notice refers to at least three other reasons to justify the termination. The first of these reasons relates to the alleged misrepresentation by the respondent that it had a joint venture with M/s. Severn Trent, USA. With regard to this reason, the arbitral tribunal recorded that the LOI, the bid, the purchase order and the work order did not make reference to M/s. Severn Trent, USA. On that basis, the said ground of termination was held to be unsustainable. The other reason cited in the termination notice was the alleged import of electrolyser by the respondent from China. As regards this reason, the arbitral tribunal concurred with the submission of learned



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counsel for the claimant before the tribunal that no material had been produced by the petitioner to corroborate the said statement. In addition, the tribunal recorded that all materials were to be deployed in the project only after inspection and acceptance by the petitioner herein. The third reason, excluding delay, cited in the termination letter is the delay in execution of the Gas Chlorination System of the North Chennai project by the respondent herein. As regards this reason, the tribunal recording the finding that the Gas Chlorination System is an independent project which is unconnected with the project forming the subject of the dispute. After recording all these reasons, the arbitral tribunal held that the termination was not justified because it was not preceded by a show cause notice and because the reasons set out therein are unsustainable.

20. As stated earlier, an arbitral award cannot be interfered with merely because it contains an erroneous finding. There should be a patent illegality which goes to the root of the matter. In the case at hand, even if the non-issuance of a show cause notice is held to be irrelevant in the context of a commercial contract, the conclusion that the termination is unjustified does not call for interference in the light of other reasons set out



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in paragraphs 13 and 14. The contention, in this regard, of learned counsel for the petitioner that importing principles of natural justice into a commercial contract amounts to violation of the fundamental policy of Indian law is ambitious, to say the least, and completely untenable.

21. While clause 7.4 of the contract enabled the petitioner to make a call on the bank guarantee, such call was to made only in the event of default, failure or neglect on the part of the respondent in fulfillment of performance obligations under the contract. In light of the conclusions that the termination of the contract was unjustified, the logical corollary was to direct the petitioner to refund monies appropriated by making a call on and encashing the bank guarantee. There is no infirmity in the award as regards the differential tax claim also.

22. In the result, the Award does not call for interference on any of the grounds canvassed by the petitioner. Hence, O.P.No.799 of 2019 is dismissed without any order as to costs. Consequently, A.No.7623 of 2019 is closed.

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