



Arb.O.P(Com.Div). No.81 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	02.08.2024
Pronounced on	30.08.2024

CORAM

THE HON'BLE Mr. JUSTICE KRISHNAN RAMASAMY

Arb.O.P(Com.Div). No.81 of 2021
& A.No.2773 of 2021

1.Mr.S.Alagappan
2.Ms.A.Visalakshi

..Petitioners

Vs.

1.SOL India Pvt. Ltd.,
Rep. by its Director, Mr.S.V.Venkatesan
No.3, Tarapore Towers,
826, Anna Salai, Chennai – 600002.

(***Amended as per order dt. 12.12.2022 in
A.No.5489 of 2022 & time extended as per order
dated 31.01.2023)

2.SICGILSOL Gases Pvt. Ltd.,
Formerly known as Seva Gases Pvt. Ltd.,
SF. No.29, Trichy, Tanjore Main Road,
Pudukkudi Tanjore – 613 402.

(***R-2 is not in existence as it has merged with R-
1 and dissolved, pursuant to the order of Regional
Director, SR, Chennai dated 13.01.2022 confirming
the Scheme of Amalgamation in
C.P.No.19/S.233/2021-22.



Arb.O.P(Com.Div). No.81 of 2021

(***Amended as per order dated 18.04.2023 in
A.No.2266 of 2023)

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3.DBS Bank Ltd.,
3rd Floor, Fort House, 221,
Dr.D.N.Road, Fort, Mumbai- 400 001.

...Respondents

Prayer:

Arbitration Original Petition is filed under Section 34 (2) (b) (ii) read with explanation (ii) and (iii) and 34 (2A) of the Arbitration and Conciliation Act, 1996 seeking to set aside the arbitration award passed by the learned Sole Arbitrator dated 12.10.2020 in respect of the claims awarded against the petitioners.

For Petitioners : Mr.R.Murari, Senior Counsel
for M/s.Hema Srinivasan
and Ms.N.Umayalparvathi

For Respondents : Mr.P.S.Raman Senior Counsel
for M/s.T.K.Bhaskar, for R1

ORDER

This Arbitration Original Petition is preferred by the petitioners challenging the award passed by the learned Arbitrator dated 12.10.2020.

2. The petitioners 1 and 2 herein are the contesting respondents 1 and 2 before the Arbitral Tribunal and first respondent herein is the claimant therein. For the sake of narrative convenience, the petitioners



shall be referred to as such and the first respondent herein is hereinafter

referred to as 'the claimant' throughout this judgement and order.

3. The facts of the case in a nutshell are as follows:-

i) Both the first and second petitioners were Directors of the second respondent-Company with 85% and 15% shareholdings respectively. The claimant had purchased 100% shareholdings in the second respondent- Company from petitioners vide Share Purchase Agreement (hereinafter, referred to as 'SPA') dated 15.10.2014.

ii) As per SPA, the management accounts of the second respondent- Company as on 29.11.2014 was shared with the claimant and passed at the Board Meeting of the second respondent-Company, in which, the claimant's representatives were present. In the said Board Meeting, the first petitioner vacated the Office as the Director and the claimant's representatives were appointed to the Board of the second respondent- Company as Additional Directors. On the even date, the first petitioner lent 17.48 crore as loan to the claimant to pay off the term loan with SBI, which was actually part of the consideration payable in terms of SPA. The second respondent-Company also availed an inter corporate loan for a sum



Arb.O.P(Com.Div). No.81 of 2021

of Rs.2.15 crore from the claimant at the time of closing, as reflected in the minutes of the Board Meeting.

iii) At the time of closing, the petitioners 1 and 2 received a sale consideration of Rs.41,57,43,923/- and Rs.7,33,66,575/- respectively. Further, in terms of SPA dated 15.10.2014 and Escrow Agreement dated 27.11.2014. 5% of the consideration payable to the petitioners to an extent of Rs.2,57,42,659/- was deposited in the Escrow account.

iv) Post the takeover of the second respondent-Company, the claimant raised certain claims for statutory liabilities with the petitioners and the petitioners duly released the payments from Escrow account. Thereafter, the claimant failed to adhere to and fulfill its obligation under SPA and also resorted to make untenable claims against the petitioners, which led to the dispute between the parties, resulting in invocation of arbitration proceedings in terms of arbitral Clause contained in SPA, viz., clause 14.3 and one Mrs.Justice Chitra Venkataraman, was appointed as the sole Arbitrator to deal with the issue.

v) The learned Arbitrator, based on the submissions made by the



Arb.O.P(Com.Div). No.81 of 2021

learned counsel for both the parties and documents adduced, framed 31 issues. however, during the course of hearing, the parties filed a Memo dated 27.12.2019, whereby, some of the claims and the counter claims made by both the claimant and petitioners were withdrawn and some were settled.

vi) Thereafter, the learned Arbitrator dealt with remaining 23 issues and gave her findings in respect of each issue followed by a summary and passed an award. Aggrieved against the said award, the present Arbitration Original Petition is filed

4. Mr.R.Murari, learned Senior Counsel appearing for the petitioners would submit that the learned Arbitrator, while dealing with the aforesaid 23 issues, had primarily proceeded on two premises; firstly, that purchase price for the transaction, i.e. acquisition of the second respondent- Company was fixed on the basis of the management accounts, i.e. unaudited accounts provided as on 29.11.2014 (five days prior to the closing) when SPA was entered into between the parties as early as on 15.10.2014; secondly, that there was fraud and misrepresentation on the part of the petitioners, whereby, the turnover was overstated, inventory



Arb.O.P(Com.Div). No.81 of 2021

position was overstated, the electricity bill for the month of November, 2014 was not disclosed as a contingency item in the management accounts, etc.

4.1 The learned Senior Counsel would submit that the petitioners were shareholders in the second respondent-Company, their shareholding being 85% and 15% respectively; that the claimant approached the first petitioner on 25.05.2012 to buy a plant from China, but subsequently, to acquire the second respondent-Company; that the petitioners entered into Heads of Agreement dated 16.11.2013, whereby, the claimant agreed to purchase the second respondent-Company from the petitioners and in terms of said HOA, SPA was to be executed on 11.01.2014; that, in pursuant thereof, the claimant started due diligence process of the second respondent-Company and since the due diligence was taking a lot of time, the first petitioner sent a reminder dated 06.01.2024, to the claimant, indicating that there are only five more days left to meet the deadline for signing SPA on 11.01.2014, and subsequently, at the request of claimant, the first petitioner agreed to postpone the execution of SPA on 18.01.2014; that in the meantime, Due Diligence Report (DD Report) was prepared by M/s.Manohar Chowdhry and Associates and shared by the claimant with



the petitioners, based on the same, the parties met to consider the issues raised in the Due Diligence Report and it was mutually agreed that these issues would be taken into account while arriving at the consideration, that after discussion, based on the DD report, there was an adjustment to the purchase price; that on 29.01.2014, Mr.Renato Imeri of Sol Spa, joint venture partners of the claimant sent an e-mail seeking for break-up of the sales, wherein, inter branch transfer was indicated for the period upto November, and these details were provided on the same date by the first petitioner, that Mr.Renato Imeri of Sol Spa in reply thereto, sought for further clarification on the inter branch transfer on 29.01.2014, which was duly provided by the petitioners.

4.2 The learned Senior Counsel would further submit that the claimant, during May, 2014, approached the petitioners to resume on the discussion on the acquisition of the second respondent-Company, for which, the first petitioner expressed his willingness but stated that the sale consideration could not remain the same, in reply, Mr.Renato Imeri, on 22.05.2014, sent email stating that the claimant was waiting for 2013-14 balance sheet of the second respondent-Company in order to review the same and fix the final meeting to discuss after updated financial were



sought, upon the financial of 2013-14, stock statement/inventory, purchase and long-term loan details as on 31.03.2014 in respect of the second respondent-Company was sent to the claimant by the first petitioner vide e-mail dated 14.06.2014; that on 05.09.2014, the petitioner sent email not agreeing to the claimant's team proposal to change the consideration unilaterally to enterprise value method at 2.5 times the turnover, for which, there was a reply from 08.09.2014 from the claimant's representative that the parties had agreed upon enterprise value; that thereafter, a final discussion on the price was between Mr. Danielle and the first petitioner, as a lump sum consideration of Rs.75 crore for the transfer of 100% shareholding in the second respondent-Company.

4.3 The learned Senior Counsel further submitted that the claimant had purchased 100% shareholdings in the second respondent-Company from petitioners vide Share Purchase Agreement (hereinafter, referred to as 'SPA') dated 15.10.2014; that in terms of SPA, purchase price was to be decided based on the reference accounts as on 31.03.2014; that as per clause 2.2.1 of SPA, the purchase price was an aggregate sum of Rs.51,48,53,156/-, which is subject to reduction only on account of any increase in the debts of the second respondent-Company and the said fact



was even admitted by the claimant themselves, in their re-joinder at para

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No.15, wherein, it is stated that the purchase price to be decided based on

the audited accounts as of 31.03.2014. Therefore, it is contended that the

findings of the Arbitrator that the purchase price of the second respondent-

Company was on the basis of the management accounts as on 29.11.2014

is contrary to the terms of SPA. Further, the learned Senior Counsel would

submit that the learned Arbitrator has completely ignored the Due

Diligence conducted by the claimant, and merely by relying on a pre-SPA

letter dated 05.09.2014, has given a flawed finding that the purchase price

is two times the project turnover for the year 2014-15 and that when the

petitioners were not agreeable to the claimant's proposal made in pre-SPA

letter dated 05.09.2014, the learned Arbitrator ought not to have taken into

consideration the letter dated 05.09.2014, especially, when clause 8.5 of

SPA clearly provides that "SPA replaces any written or verbal agreement

previously concluded between the purchaser(claimant) and any or all of the

sellers (petitioners) on the same subject.

4.4 Further, learned Senior Counsel would submit that the claim made towards damages on account of misstatement of turnover by inclusion in inter-unit stock transfer in the management accounts dated



Arb.O.P(Com.Div). No.81 of 2021

29.11.2014 for a sum of Rs. 7,85,26,696/- and the claim made towards

falsification of inventory figures in the reference accounts for a sum of Rs.

1,75,06,632/- are unconnected to each other, however, the learned Arbitrator clubbed both the claims together, as if, both relates to the turnover as provided in the management accounts dated 29.11.2014 and passed an award, as if, both the claims are not one and the same by assuming that claim for sum of Rs.7,85,26,696/- towards damages for alleged misstatement of turnover was in respect of the management accounts dated 29.11.2014 and the claim made towards damages for alleged overstatement of inventory for a sum of Rs. 1,67,14,695/- was in respect of the reference accounts as on 31.03.2014. The learned Senior Counsel contended that in fact, the distinction between the two claims is ex facie evident on a plain reading of the Statement of Claim filed by the claimant, whereas, the learned Arbitrator treated the said issues as one and the same, therefore, the award passed in respect of aforesaid two claims in favour of the claimant is completely flawed, without any basis and that the learned Arbitrator rendered a new findings in the award, which was neither pleaded nor argued by both the parties, not even supported by any documentary evidence and the said aberrations would show that the learned Arbitrator has completely misinterpreted the submissions of the



claimant on a wrong premise.

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4.5 The learned Senior Counsel for the petitioners would contend that the learned Arbitrator had completely erred in awarding the claim for November electricity charges to an extent of Rs.1,46,99,665/- as the same is contractually not payable or indemnifiable by the petitioners. The learned Senior Counsel contended that it was never the case of the claimant that the petitioners did not provide a clear picture of the net worth of the second respondent-Company, in any case, the purchase price was also not based on the net worth of the second respondent-Company, as provided in the management accounts dated 29.11.2014, when that being so, the learned Arbitrator ought not to have rendered findings that the second respondent-Company should have disclosed the November Bills to give a clear picture on the net worth of the second respondent-Company. The learned Senior Counsel contended that as per Clause 2.6(j) of Schedule 1 of SPA, the petitioners are only to ensure that there are no contingent or off-balance sheet obligations, liabilities or commitments (other than those set out in the management account) and that the results shown in the management accounts have not been affected by any extraordinary, exceptional or non-recurring item or by any other



circumstances, which is not in the normal course of business, making such results unusually high, thus, the disclosure is only in respect of non-recurring and extraordinary items contemplated and there is no obligation on the second respondent- Company to disclose any recurring expenses that are incurred in its normal course of business, that in fact, the claimant at para No.60 conceded that electricity charges are recurring expenses.

4.6 Therefore, the learned Senior Counsel contended that there was no obligation, whatsoever, under the terms of SPA existed for these petitioners to disclose the electricity bill for November, 2014. The learned Arbitrator, however, without any application of mind at para No.99, has erred by completely ignoring the second part of clause 2.6(j) of Schedule 1 of SPA and equated recurring expenses with contingent or off-balance sheet obligations, liabilities and commitments and held that the petitioners should also reflect recurring expenses in the management account. Therefore, the learned Senior Counsel contended that the learned Arbitrator has clearly ignored SPA and has rendered findings that are in grossly conflict with the terms of SPA.

4.7 Further, the learned Senior Counsel for the petitioner would



Arb.O.P(Com.Div). No.81 of 2021

submit that the learned Arbitrator, while passing award in respect of the aforesaid claims and other claims arrived at a wrong conclusion that there was fraud and misrepresentation made by the petitioners with an intent to take unfair advantage in the matter of management accounts presented, misrepresented the profit and true working capital position of the second respondent-Company through wrong projection of the turnover, overstatement of the turnover, while completely ignoring the fact that the petitioners has disclosed all informations, which were sought for by the claimant periodically during due diligence conducted by the claimant; such disclosures were made in the SPA and updated at closing date and during such point of time, there was no demur raised by the claimant; and that in the absence of no pleadings in the arbitration as regards fraud or misstatement of turnover or overstatement of inventory or even that the purchase price had been paid by the claimant in excess, and that when there is no document or letters that were ever written by the claimant prior to the arbitration, the learned Arbitrator ought not to have held that the petitioners had committed a fraud. Further, it is contended that none of the witnesses, who were examined on the side of the claimant have deposed that any of the informations that they had sought, were not provided by the petitioners, on the contrary, they have specifically acknowledged that the



information was provided by the petitioners. The learned Senior Counsel also contended that the claimant has never raised the issue on fraud in January. 2015, after they conducted an unilateral post acquisition due diligence, after March, 2015 when the audit of the second respondent-Company was conducted, not even in the Section 9 proceedings, but, when an argument with regard to damages was raised by the petitioners, the claimant raised this issue in their rejoinder and all the statement was made by its witnessed for the first time in the arbitration.

4.8 Therefore, it is contended that the learned Arbitrator has thus rendered an award that is totally unfounded and contrary to the terms of SPA, by means of which the award is contrary to the Public Policy of India and also patently illegal, inasmuch as, it is in contravention with the fundamental policy and in conflict with the basic notions of morality and justice. Therefore, the learned Senior Counsel in support of his contentions that, "If the award passed by the Arbitral Tribunal is in contravention of provisions of the Act or any other substantive law governing the parties or is against the terms of the contract, or if it is against the public policy of India, that is to say, if it is contrary to: (a) fundamental policy of Indian law, (b) the interest of India, or (c) justice or morality, or that the award



Arb.O.P(Com.Div). No.81 of 2021

could be set aside if it is patently illegal, he relied upon the following

judgements of the Hon'ble Supreme Court in support of his contention:-

i) Delhi Metro Rail Corporation Vs. Delhi Airport Metro Express Pvt. Ltd. reported in 2024 SCC Online SC 522;

ii) State of Chhattisgarh Vs. Sal Udyog reported in 2022 2 SCC 275 reported in 2022 2 SCC 275:

iii) PSA Sical Terminals Pvt. Ltd., Vs. Board of Trustess, VO Chidambaranar Port Trust, Tuticorin (2021) SCC Online SC 508;

iv) NLC India Ltd. Vs. Metro Machinery Traders and another reported in (2024) SCC Online Mad 802.

5. Per contra, Mr.P.S.Raman, learned Senior Counsel for the first respondent/claimant would submit that the claimant-Company is engaged in the business of production, marketing and sale of industrial, pure gases and medical gases including Oxygen, Nitrogen and Argon; that the claimant's Company is a Joint Venture Company with M/s Sicgil India Ltd., and SOL S.P.A. Italy, holding 50% shareholdings respectively, that discussion on the sale of the second respondent-Company started around



August, 2013; that on 22.09.2013, the claimant received an e-mail from the first petitioner seeking a sum of Rs.55.35 crores for the plan based on the net profit of the second respondent-Company as on 31.03.2014, subsequently, communications were exchanged between the claimant and the petitioners debating the valuation for the purchase price, in any case, the price was fixed as a multiple of EBIDTA and was based on the balance sheet and the figures, which were reported by the first petitioner, that, HOAs of Agreement was finalized around November, 2013 and a mail was addressed by the claimant to the petitioners' representative stating that the purchase price would be subject to adjustments, which are not in line with the auditor results upto March, 2013 and that the purchase price was related to the analysis of the audited information verified during the due diligence of the audited data; that subsequently, said HoAs were entered into between the claimant and petitioners on 16.11.2013 for the sale and purchase of shares of the second respondent-Company.

5.1 The learned Senior Counsel would further submit that the parties agreed that the consideration for the sales would be Rs.41.90 crores, excluding the debts and that the transaction should take place by means of a definitive SPA on or before 11.01.2014, however, this did not materialize



and subsequent to this agreement, the first petitioner negotiated with the claimant for a higher purchase price for the shares based on turnover, that the petitioner first vide mail dated 05.09.2014 suggested that the Enterprise value would be determined at 2.5 times the projected turnover and also assured that the project turnover of the second respondent-Company for the year ended on 31.03.2015 would be around 37-38 crores.; that after various negotiations, it was agreed between the parties that such enterprise value of the second respondent- Company would be determined at 2 times the project turnover of the said Company;; that based on the assurance given by the first petitioner with respect to turnover, the enterprise value was negotiated and determined at Rs.75 crore; that the enterprise value less the loan balance as of 04.12.2024 i.e. around 22.30 crores represented the purchase price of Rs.52.70 crores, however, the said price was subject to adjustment, if there was any increase in the debt of the second respondent- Company as on the actual closing date.

5.2 It is further submitted that the petitioners, claimant and the second respondent thereafter, entered into a SPA dated 15.10.2014, wherein, the claimant agreed to purchase all shares of the petitioners in the



Arb.O.P(Com.Div). No.81 of 2021

second respondent-Company together with all rights, powers, authority, privileges and interest relating to such shares representing 100% of the total share capital of the second respondent-Company for a purchase price of Rs.52,70,16,789/- (Rs.75,00,00,000/- Rs.22,29,83,211/-, as per Schedule 11 of SPA; that the petitioners agreed to sell all the shares owned by them to the claimant, subject to the terms and conditions as set out in the SPA; that pursuant to the SPA, sale and purchase of 100% of the shares of the second respondent-Company was completed on 04.12.2014 which was the closing date; that in terms of SPA, claimant and the petitioners also entered into an Escrow Agreement dated 27.11.2014 with the Escrow Agent, viz., the third respondent-DBS Bank; that as per the Escrow Agreement, the claimant had to remit a sum of Rs.2,57,42,658/- into the Escrow Account during the Escrow Period; that the parties also agreed that the Escrow amount would be available for draw down by the claimant in respect of any indemnification claim under SPA or towards adjustment for outstanding invoices as detailed in SPA, during the escrow period, in the manner as provided under the Escrow Agreement.

5.3 The learned Senior Counsel further contended that pursuant to SPA, the claimant conducted a Post-acquisition due diligence through



Arb.O.P(Com.Div). No.81 of 2021

Manohar Chowdhary and Associates, Chartered Accountant in the month

of January, 2015, further finalized its accounts in March, 2015; that during

the Board Meeting conducted on 02.09.2015, the Board of the claimant

authorized Mr. V.N. Vijayakumar or Mr.Nauzer F. Dadabhoy, as Directors

to invoke the rights of the claimant based on the Auditor's Report and the

post-acquisition Due Diligence Report and made certain claims as against

the petitioners, that though the petitioners released certain claims, however,

insofar as claims made by the claimant in pursuance of Escrow Agreement

towards the amount due in connection with the outstanding receivables

from the debtors as well as towards certain indemnification claims, even

after repeated reminders sent to the petitioners, the claimant did not receive

the monies from the Escrow Accounts towards the said claims; that since

the petitioners were unwilling to cooperate in releasing the legitimate

claims of the claimant from the Escrow Account in spite of several

correspondences that were exchanged between the claimant and the

petitioners, and thereby, attempted to delay the settlements and waited for

the expiry of the term period of the Escrow account so as to defeat the

rights accrued to the claimant under the terms of SPA, thereby, defeating

the very purpose of creation of the Escrow account, the claimant is

constrained to make the present claim as against the petitioners both by



way of recovery of the balance amounts lying with the escrow agent and for a direction against the petitioners to compensate the claimant in respect of the balance amounts determined to be due on account of the breaches committed by them.

5.4 The learned Senior Counsel would submit that as regards the claim made by the claimant for a sum of Rs.7,85,26,696/- towards damages on account of misstatement/overstatement of the turnover by the inclusion of inter- unit stock transfers to the extent of Rs.3,92,63,348/- in the management accounts as of 29.11.2014 is concerned, the learned Senior Counsel would submit that on the basis of the post-acquisition due diligence conducted by the claimant-Company, subsequent to the takeover of the second respondent- Company, it was noticed that the petitioners had, with a view to inflate the turnover of the second respondent-Company in the management accounts, included inter-unit stock transfers in the turnover, that as per clause 2.6 (f) of Schedule 1 of SPA, the petitioners have represented and warranted to the claimant that management accounts shall be prepared in accordance with and comply with the accounting standards and the requirements of all applicable law and shall not be misleading and give a true and fair view of the financial situation, the



assets, liabilities, cash flows, and profits and losses of the Company.

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5.5 The learned Senior Counsel contended that the management accounts were prepared upto 29.11.2014; that the accounts were placed before the Board on 04.12.2014, the date of takeover, in the normal course, the accounts would reflect a true and fair view of the state of affairs of the Company, but the turnover that was reflected in the management accounts was inflated to increase the purchase price of the shares; that actual turnover upto 29.11.2014 was only Rs.23,00,04,915/-, the basis on which, the petitioners stated that the second respondent-Company would achieve a turnover of Rs.38 crores turned out to be a false projection as the turnover for the year ended on 31.03.2015 was only Rs.30,81,46,000/- as per the audited accounts, therefore, the enterprise value, which was based on false representation that the second respondent-Company would earn Rs.37 to Rs.38 crores turned out to be incorrect; that as a consequence of false projection, the purchase price was inflated by almost Rs.15 crores, besides, the second respondent-Company by including the inter-unit stock transfers as part of the turnover in the management accounts clearly acted in a mala fide and fraudulent manner in order to mislead the claimant as regards the financial health as well the prospects of the Company, therefore, the



Arb.O.P(Com.Div). No.81 of 2021

claimant is entitled to an amount of Rs.7,85,26,696/- from the petitioners, being two time the inflated turnover reflected in the management accounts by inclusion of inter-unit stock transfers.

5.6 The learned Senior Counsel for the claimant as regards the claim for sum of Rs.1,75,06,632/- towards the falsification of the inventory figures in the reference accounts of the Company as of 31.03.2014, is concerned would submit that the reference accounts dated 31.03.2014, reflected inventories of Rs.2,15,85,890/- as at 31.03.2014, however, in the management accounts, the inventories was reflected as Rs.19,38,502/- as at 29.11.2014. The learned Senior Counsel would submit that there were no sales of the inventories between 01.04.2014 and 29.11.2014 to such a large extent barring some marginal quantities; that the balance sheet as on 31.03.2014 did not have details of inventories including quantitative details as contemplated under the Companies Act; that the claimant discovered that there was no sales of such large quantities of inventories during the period from 01.04.2014 to 29.11.2014 when the management accounts were prepared, that the amount of Rs.2.15,85,590/- reflected as inventories in the reference accounts was fictitious and misrepresentation of facts to inflate the profitability of the Company and that the accounts



Arb.O.P(Com.Div). No.81 of 2021

did not reflect a true and fair view of the inventory position as on

31.03.2014, as warranted by the petitioners under clause 2.6 (a) and (e) of

Schedule 1 of SPA. Therefore, it is apparent that the petitioners had resorted to fabricating the inventory numbers in their accounts for the year ended on 31.03.2014, and hence, liable to make good the loss between the inventories as reflected in the reference accounts and the actual inventories as per Excise returns filed with the Department to an extent of Rs. 1,75,06,632/-. Further, the learned Senior Counsel contended that the claim made towards falsification of inventories in the reference accounts of the Company as on 31.03.2014, and towards damages on account of misstatement of the turnover by inclusion of inter-unit stock transfer in the management account as on 29.11.2014 are two different, which has been rightly dealt with by the learned Arbitrator in an individual manners, and not one and the same, as contended by the petitioner.

5.7 The learned Senior Counsel for the claimant in regard to the non-disclosure of electricity charges for November, 2014 would submit that immediately after the closing date, ie, on 04.12.2014, the claimant noticed that there was a claim from Tamil Nadu Generation and



Arb.O.P(Com.Div). No.81 of 2021

Distribution Corporation Limited, Thanjavur, dated 01.12.2014 towards

electricity charges for Pudukkudi Unit for the month of November, 2014,

which fact was not disclosed to the claimant at the time of closing nor provided in the books as on 29.11.2014. the date upto which the management accounts were prepared by the claimant; that the amount of electricity charges that was not paid nor provided in the management accounts was Rs.1,46,99,665/- and the second respondent- Company paid the said amount on 05.12.2014, as per SPA, this constituted an undisclosed liability attributable to the period prior to closing date that ought to have been disclosed in the accounts as of the closing date; that the failure to disclose the same affected the true and fair view of the said management accounts, which was only handed over on the closing date. Therefore, the learned Senior Counsel would contend that the petitioners, by not providing the liability in the books, though such liability has accrued in the period prior to closing, the true and fair nature of the management accounts has been distorted and the profitability was deliberately overstated so as to give a distorted view of the Company as on the closing date. Therefore, the learned Senior Counsel would contend that the learned Arbitrator, has being master of facts and evidence has gone into entire facts of the matter and rendered a specific findings on each issues, particularly, with regard to



Arb.O.P(Com.Div). No.81 of 2021

the claims, which were at issue herein, and passed an award, and the same need not be interfered with.

5.8 The learned Senior Counsel for the claimant/first respondent also in support of his contentions that the Arbitrator is the master of facts and evidence and when the arbitrator on the basis of record and materials which are placed before her/him renders specific finding, the award is not open to challenge, and that the Court cannot sit on appeal on the views of the Arbitrator, relied upon the following judgements of the Hon'ble Supreme Court:-

i) Associate Builders Vs. Delhi Development Authority reported in (2015) 3 SCC 49;

ii) Hindustan Petroleum Corporation Ltd., Vs. Banu Constructions reported in (2021) 2 Mad LJ 285;

iii) Medermott Internation Inc. Vs. Burn Standard Co.Ltd., & others reported in (2006) 11 SCC 181.

6. I have given due considerations to the submissions made by the learned Senior Counsel on either side and perused the materials placed on



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7. This Arbitration Original Petition has been filed by the petitioners seeking to set aside the arbitral award dated 12.10.2020, passed by the learned Sole Arbitrator in the arbitration proceedings relating to disputes arising out of Share Purchase Agreement dated 15.10.2014.

7.1 A Share Purchase Agreement was entered into between the petitioners (sellers) and the claimant (purchaser) and the second respondent (Company) dated 15.10.2014, whereby, the claimant agreed to purchase all of the shares owned by the petitioners in the second respondent-Company together with all rights, powers, authority, privileges and interests relating to such shares representing 100% of the total share capital of the second respondent-Company. The petitioners also agreed to sell the shares owned by them to the claimant subject to the terms and conditions as set out in SPA. Pursuant to the SPA, sale and purchase of 100% of the shares of the second respondent-Company was completed on 04.12.2014, which was the closing date; that in terms of SPA, claimant and the petitioners also entered into an Escrow Agreement dated 27.11.2014 with the Escrow Agent, viz., the third respondent-DBS Bank; that as per the Escrow Agreement, the



claimant had to remit a sum of Rs.2,57,42,658/- into the Escrow Account during the Escrow Period; that the parties also agreed that the Escrow amount would be available for draw down by the claimant In respect of any indemnification claim under SPA or towards adjustment for outstanding invoices as detailed in SPA, during the escrow period, in the manner as provided under the Escrow Agreement.

7.2 Pursuant to SPA, the claimant conducted a Post-acquisition due diligence through Manohar Chowdhary and Associates, Chartered Accountant in the month of January, 2015, finalized its accounts in March, 2015; that during the Board Meeting conducted on 02.09.2015, the Board of the claimant authorized Mr. V.N. Vijayakumar or Mr.Nauzer F. Dadabhoy, as Directors to invoke the rights of the claimant based on the Auditor's Report and the post- acquisition Due Diligence Report and made certain claims as against the petitioners, that though the petitioners released certain claims, however, insofar as claims made by the claimant in pursuance of Escrow Agreement towards the amount due in connection with the outstanding receivables from the debtors as well as towards certain indemnification claims, even after repeated reminders sent to the petitioners, the claimant did not receive the monies from the Escrow



Accounts towards the said claims; that since the petitioners were unwilling to cooperate in releasing the legitimate claims of the claimant from the Escrow Account in spite of several correspondences that were exchanged between the claimant and the petitioners, and thereby, attempted to delay the settlements and waited for the expiry of the term period of the Escrow account so as to defeat the rights accrued to the claimant under the terms of SPA, thereby, defeating the very purpose of creation of the Escrow account, the claimant is constrained to make the present claim as against the petitioners both by way of recovery of the balance amounts lying with the escrow agent and for a direction against the petitioners to compensate the claimant in respect of the balance amounts determined to be due on account of the breaches committed by them. Thus, the claimant has instituted the present Arbitral Claim to recover monies to an extent of Rs. 19,81,80,558/- from the petitioners.

7.3 As per the Dispute Resolution Clause (viz., clause 14.3) set out in SPA dated 15.10.2014 entered into between the parties (petitioners and the first respondent/claimant), the dispute between the petitioners and the claimant was referred before a Sole Arbitrator; that before the learned Arbitrator, 31 issues were framed for consideration; that pursuant to the



Arb.O.P(Com.Div). No.81 of 2021

Memo of Compromise filed by both the parties dated 27.12.2019, some of the claims raised by the claimant and the counter claims by the petitioners were withdrawn and some of the issues were settled by the parties and the learned Arbitrator gave her findings in respect of remaining 23 issues, whereby, most of the claims made by the claimant to an extent of Rs. 11,20,10,886/- were allowed and the counter claims of the petitioners and second respondent, were rejected except to an extent of Rs.6,52,650, and challenging the said award, the present Arbitration Original Petition is filed. However, during the course of arguments, the learned Senior Counsel for the petitioner assailed the award insofar as it relates to the claim awarded in favour of the claimant with respect to three issues and advanced their arguments touching upon the three issues, which are as follows:-

i) Whether the claimant is entitled to an amount of Rs.1,75,06,632/- towards the falsification of the inventory figures in the reference accounts of the Company as on 31.03.2014 thereby, committed a breach of its representations in relation to the reference accounts under SPA?



ii) Whether the claimant is entitled to an amount of Rs.7,85,26,696/- towards damages on account of misstatement of the turnover by the inclusion of inter-unit stock transfers to the extent of Rs.3,92,63,348/- in the management accounts as of 29.11.2014?

iii) Whether the claimant is entitled to an amount of Rs.1,46,99,665/- towards the undisclosed liability of the electricity charges paid by the claimant for the month of November, 2014 after closing?

A Issue No.i)

8. As far as the 1st issue, i.e., the claim towards the falsification of inventory to the extent of a sum of Rs.1,67,14,695/- is concerned, the learned Arbitrator had extensively gone into the facts of the case and thoroughly analyzed the Ex.C93/balance sheet as on 31.03.2014, Ex.C94/ER1 Statement and other Exhibits, viz., Exs.C95, C96, C97 and C98 and arrived at a conclusion that there was a mis-statement and falsification of inventory/turn over to the tune of a sum of Rs.1,67,14,695/-



WEB COPY 8.1 The learned Arbitrator has compared the turnover and the stock mentioned in Central Excise Records and the turnover mentioned in the balance sheet as on 31.03.2014, and rightly came to the conclusion that there was falsification of inventories to the tune of Rs.1,67,14,695-, though the said figure was Rs.1,67,14,695/-, due to clerical error, it was wrongly mentioned as Rs.1,75,06,632/-, and accordingly, the award was passed only to the extent of Rs.1,67,14,695/-. Therefore, all these aspects were well considered after taking into consideration of the documents, and this Court is not inclined to interfere with the award passed on the said aspect of falsification of inventories to an extent of Rs.1,67,14,695/-, (which was wrongly mentioned as Rs.1,75,06,632/-) and the same stands confirmed. Accordingly, the first issue is answered in favour of the claimant.

B. Issue No.ii)

9. So far as the second issue, viz., the claim made towards damages on account of misstatement of the turnover by inclusion of inter-unit stock transfers is concerned, though it is the contention of the petitioners that the management accounts of the second respondent-Company as on 29.11.2014 was shared with the claimant and passed at the Board Meeting



Arb.O.P(Com.Div). No.81 of 2021

of the second respondent-Company, in which, the claimant's representatives were present, that in the said Board Meeting, the first petitioner vacated the Office as the Director and the claimant's representatives were appointed to the Board of the second respondent-Company as Additional Directors, therefore, the claimant was already aware of the mode of maintaining of stocks by the second respondent-Company from the earlier balance sheet of 2012-13 and also from the extensive due diligence conducted by it, therefore, they cannot plead ignorance.

9.1 A perusal of records would show that the “inter-unit stock transfers” has been shown as “turn over” in the Management Account. With regard to the said aspect, it was submitted by the Appellant that though the stocks was shown as “turn over” in the management account, it will only be considered as “inter-unit stock transfers” while preparing the final account. The said exercise may be the practice of the Appellant to reconcile the stock transfers while preparing the final account, however, the significance of the preparation of Management Account is to show the true and fair figures of the account as on the date of preparation and thus, the petitioner should have reflected the said figures as “inter-unit stock



transfers” instead of “turn over”.

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9.2 In the case on hand, the Appellant was well aware of the fact that the entire “inter-unit stock transfers” were shown as “turn over”. This Court is of the view that if the stocks were reflected in the Management Account as “inter-unit stock transfers” instead of “turn over”, both the turn over and profit would have been reduced. However, contrary to the said aspect, since the “inter-unit stock transfers” were shown as “turn over” and both the turn over as well as the profit were overstated so as to give a distorted view of the Company as on the closing date

9.3 Further, if the true and fair figures of “turn over”, “inter-unit stock transfers” and “profit” were reflected in the Management account, the Appellant would had an opportunity to pull out from the transaction as per the Share Purchase Agreement, however, due to the mis-statement, they had lost the said opportunity to take appropriate decision in time based on the “turn over”, “inter-unit stock transfers” and “profit” since the said aspects came to the knowledge of the claimant subsequently.

9.4 In the light of all the above aspects, the learned Arbitrator had



Arb.O.P(Com.Div). No.81 of 2021

considered all these aspects and rightly awarded the compensation for a sum of Rs.7,85,26,696/-, i.e., twice the amount of “inter-unit stock transfers” (Rs.3,92,53,348/-), which was shown as “turn over” in the Management Account as on 29.04.2014, by taking into consideration of the method of fixing the Share Price Agreement. Therefore, I do not find any error in the award passed by the learned Arbitrator and hence, this Court is not inclined to interfere with the award passed by the learned Arbitrator on this aspect.

C. Issue No.iii):-

10. As regards the non-disclosure of electricity charges for November 2014 by the petitioners, it is seen that after the closing date, i.e., on 04.12.2014, the claimant noticed that there was a claim from the Tamil Nadu Generation and Distribution Corporation Limited, Thanjavur, dated 01.12.2014 towards electricity charges for Pudukkudi Unit for the month of November, 2014, which fact was not disclosed to the claimant at the time of closing nor provided in the books of accounts as on 29.11.2014, the date upto which the management accounts were prepared by the claimant; that the amount of electricity charges that was not paid nor provided in the management accounts was Rs.1,46,99,665/- and the second respondent-



Arb.O.P(Com.Div). No.81 of 2021

Company paid the said amount on 05.12.2014, as per SPA, this constituted an undisclosed liability attributable to the period prior to closing date, which the petitioners had astutely not disclosed in the accounts as of the closing date.

10.1 Further, when EB Bill for the month of November was in respect of the period prior to the date of closing in terms of the accounts, as per the terms set out in SPA, it is the bounden duty of the petitioners to disclose the electricity bill as on the date of closing, since they had been operating the second respondent-Company till the date of closing, and therefore, they aware of the entire activity in the second respondent-Company on the electricity, but, by not providing as liability in the books, though such liability has accrued in the period prior to closing, the true and fair nature of the management accounts has been distorted and the profitability was deliberately overstated so as to give a distorted view of the Company as on the closing date.

10.2 Therefore, by non disclosure of electricity charges to the extent of Rs.1,46,99,665/- would itself as provisionally to the extent profit was overstated. The respondent/claimant has not been furnished with such



particulars, since there was falsification of amount even towards electricity

charges. It is not the issue, as to who is going to pay the electricity bills

subsequent to the take over of the second respondent-Company, the issue is

as to what prevented the petitioners from disclosing the electricity charges

prior to the date of closing, when the petitioners are fully aware of the EB

consumption upto the date of closing for the month of November.

Therefore, the learned Arbitrator has rightly come to the conclusion that

the petitioners had deliberately not disclosed the electricity charges with an

intention to overstate the profit, which is against the terms and conditions

of the contract as agreed, hence, this Court does not find any substance in

the submissions made by the petitioners that the disclosure is only in

respect of non-recurring and extraordinary items contemplated and there is

no obligation on the petitioners to disclose any recurring expenses that are

incurred in its normal course of business. Thus, contention of the claimant

that the petitioners are bound to make the payment to the tune of

Rs.1,46,99,665/ is correct. Accordingly, the Arbitrator has applied her

mind and awarded damages towards non-disclosure of electricity bill.

11. An argument was also made by the learned counsel for the Appellant with regard to the restraining of liability to an extent of 5%



based on the Schedule II to SPA, which reads as follows:-

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" Aggregate Indemnity Liability

The aggregate liability of the sellers (including the tax gross-up pursuant to Clause 7.3) in respect of this Agreement and the Escrow Agreement and all indemnifiable losses relating thereto shall be limited to 5% of the purchase price and be subject to such protections as specified in this schedule".

12. The learned Arbitrator, as being not only creature of the agreement, but also as a Master of facts and evidence, rightly gone into all those aspects and passed an award in respect of aforesaid three claims, which this Court does not find any infirmity to interfere with the same. Further, this Court would like to point out here that the petitioners, by resorting to fabrication of documents and concoction of evidence, have committed breach of SPA, whereby, the Contract/SPA would per se is liable to be terminated, resulting in the petitioners to compensate the claimant in respect of all their claims, in which case, the Schedule II to SPA will not come into rescue to the petitioner.

13. Therefore, having regard to the summary of the facts given by



Arb.O.P(Com.Div). No.81 of 2021

the learned Arbitrator, before passing the award, it cannot be stated that

Arbitrator has exceeded her power or there is error, apparent on the face of record and the Court cannot sit on appeal on the award and cannot re-appraise the evidence and come to a different conclusion, when the view of the Arbitrator is plausible. Further, this Court does not find any patent illegality and that illegality must go into the root of the matter and if the illegality is of trivial in nature, it cannot be held that the award is against the public policy. As stated supra, this Court is not inclined to set aside award in respect of aforesaid three claims, for the reason that the findings of the learned Arbitrator is fair and reasonable and does not shocks the conscience of the Court. Hence, this Petition fails and has to be dismissed. In view of the above findings, the authorities cited by the learned Senior Counsel for the petitioners is of no assistance, since, the yardstick that was applied by the learned Arbitrator in the present case can no longer be questioned, as the learned Arbitrator has applied her mind, gone into the entire crux of the issue, examined the documents and rendered parawar findings coupled with summary of facts with respect to all issues, including the three issues, as discussed above.

14. In view of the above findings, it may not be necessary for this



Arb.O.P(Com.Div). No.81 of 2021

Court to consider the very many case laws referred by both the learned
counsel as it will not provide any assistance to the facts of the case.

15. In the result, the Arbitration Original Petition is dismissed. No costs. Consequently, connected application is closed.

30.08.2024

sd/nsa

Index ;Yes/No

Speaking Order/Non speaking order



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Arb.O.P(Com.Div). No.81 of 2021

Krishnan Ramasamy,J.,

sd/nsa

Pre-delivery judgment
in
Arb.O.P(Com.Div). No.81 of 2021
&
A.No.2773 of 2021

30.08.2024