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O.S.A.No. 306 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.07.2024

CORAM

THE HONOURABLE MR.JUSTICE M.SUNDAR

and

THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN

THILAKAVADI

O.S.A.No. 306 of 2019

M/s.SGS India Private Limited
4B, Adi Shankaracharya Marg.
Vikhroli (West)
Mumbai – 400 083

... Appellant

Vs.

M/s.Vedanta Limited
(Formerly M/s.Sesa Sterlite Limited)
Thoothukudi
Tamil Nadu – 628 002
Rep. By its General Manager- Legal

... Respondent

Original Side Appeal filed under Order XXXVI Rule 1 of Original Side Rules read with Clause 15 of the amended Letters Patent, 1865 read with Section 37 of the Arbitration and Conciliation Act and read with Section 13(1) of the Commercial Courts , Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018 to set aside the order dated 02.08.2019 made in O.P.No.1115 of 2018.



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For Petitioner : Mr.P.Giridharan

For Respondents : Mr.Rahul Balaji

ORDER

[Order of the Court was made by M.SUNDAR, J.,]

This intra-court appeal i.e., 'Original Side Appeal' ['OSA' for the sake of brevity] has been brought before this 'Commercial Appellate Division' ['CAD' for the sake of brevity and convenience] under Section 37 of 'The Arbitration and Conciliation Act, 1996 (Act No.26 of 1996)' [hereinafter 'A and C Act' for the sake of convenience and clarity] assailing an 'order dated 02.08.2019 made in O.P.No.1115 of 2018 and A.Nos.9660 of 2018 and 2220 of 2019 thereat' [hereinafter 'impugned order' for the sake of convenience] made by a Section 34 Court in the Commercial Division of this Court.

2. An 'arbitral award dated 12.05.2018' [hereinafter 'impugned arbitral award' for the sake of convenience] made by a three member 'Arbitral Tribunal' ['AT' for the sake of brevity] was assailed in the Section 34 Court successfully by the 'respondent' before the AT i.e., 'Vedanta Limited' [hereinafter 'Vedanta' for the sake of convenience]. To put it differently, the



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Section 34 Court interfered with the impugned arbitral award and set aside the impugned arbitral award which was made partly in favour of the appellant before us, namely 'SGS India Pvt. Ltd.,' [hereinafter 'SGS' for the sake of brevity and convenience] which was claimant before the AT.

3. Factual matrix in a nutshell or in other words short facts shorn of granular particulars i.e., short facts imperative for appreciating this order will suffice considering the limited legal perimeter within which a legal drill under Section 37 of A and C Act should perambulate.

4. Factual matrix in a nut shell is that the kernel of the *lis* is a contract dated 09.07.2012 [we are informed that it is Ex.R3 before AT] wherein and whereby SGS agreed to provide what is known as 'MSS' ['Mechanical Sampling System'] for determining the moisture content in copper concentrates which was being done by a manual sampling process for more than 15 years. This 09.07.2012 contract, which we are informed was marked as Ex.R3 before AT, is for a 10 year period from 01.09.2012 to 31.08.2022. The contract did not run its full course but it ran into rough weather resulting in termination of the same by Vedanta in and by a termination notice dated 20.03.2014 which we are informed was marked as



Ex.R25 before the AT.

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5. There is no dispute or disagreement between the parties that Ex.R3 contract contains an arbitration clause, the same is clause 24 with four sub-clauses and it reads as follows:

'24. ARBITRATION:

(i) Any dispute, differences or claims ("Disputes") arising between the parties out of or in relation to or in connection with this Agreement or the breach, termination, effect, validity, interpretation or application of this Agreement or to their rights, duties or liabilities hereunder, shall be settled by the parties by mutual consultation. If for any reason such Disputes cannot be resolved amicably by the parties, the same shall be referred to and settled by Arbitral Tribunal consisting of three arbitrators. The arbitration proceedings shall be held in accordance with the Indian Arbitration and Conciliation Act, 1996, or any statute, amendment or re-enactment thereof (the "Arbitration Act").

(ii) Each of the parties shall appoint an arbitrator within 30 days from the receipt of request by one party from the other party to initiate arbitration proceedings. The two arbitrators so appointed shall then jointly appoint a third arbitrator within 30 days from the date of appointment of second arbitrator, such third arbitrator shall act as the Presiding Arbitrator. Arbitrator not appointed within the time limit set forth herein above, shall be appointed in accordance with provisions of the Arbitration Act.



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The arbitral tribunal shall give a reasoned award that shall be final and binding upon the parties. The place of arbitration shall be Chennai as appropriate. Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator.

(iii) It is hereby agreed that the parties shall continue to perform their respective obligations under this Contract during the pendency of the arbitration proceedings except in so far as such obligations are the subject matter of the said arbitration proceedings and cannot possibly be continued until the decision of Arbitrator(s) is obtained.

(iv) Upon any or every such reference, the assessment of costs incidental to the reference and award respectively shall be at the discretion of the Arbitrator.'

6. The aforementioned Clause 24 of Ex.R3 serves as arbitration agreement between the parties i.e., between SGS and Vedanta being 'arbitration agreement' within the meaning of Section 2(1)(b) read with Section 7 of A and C Act.

7. SGS, which was aggrieved by the termination of Ex.R3 contract vide Ex.R25 termination notice dated 20.03.2014 triggered the aforementioned arbitration agreement and a three member Arbitral Tribunal



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i.e., AT was constituted. AT embarked upon the exercise of adjudicating the disputes as between the parties and rendered an award dated 12.05.2018 which is being referred to as 'impugned arbitral award' as alluded to supra for the sake of convenience.

8. In and by the impugned arbitral award, AT held that the termination vide termination notice dated 20.03.2014 (Ex.R25) is valid but nonetheless directed Vedanta to pay a sum of a little over Rs.1.13 Crores [Rs.1,13,79,130/- to be precise] with 10% interest per annum from 10.11.2016 till the date of realization in respect of one claim i.e., the claim of compensation being the cost of investment said to have been made by SGS to implement aforementioned MSS. As regards the two other claims being a claim of Rs.1 Crore towards business loss and costs, the same had been negated by the AT. To be noted, Vedanta has made a counter claim *inter alia* complaining of malfunctioning of certain machinery and this counter claim came to be rejected by AT. Both parties were left to bear their respective costs.

9. SGS did not assail the impugned arbitral award though only a part of the claim of SGS before AT was acceded to but Vedanta assailed the



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impugned arbitral award by resorting to Section 34 vide aforementioned

O.P.No.1115 of 2018. A careful perusal of Section 34 petition brings to light that it does not mention the clauses under which challenge to impugned arbitral award was laid. To be noted, there is only a generic reference to Section 34 with no specificity as regards sub-sections /clauses qua which challenge is predicated. Legal position is well settled that Section 34 is neither an appeal nor a revision and that it is not even a full-fledged judicial review but it is only a challenge to an arbitral award within 8 slots adumbrated therein and these 8 slots have been described as 'pigeon holes' in a long line of orders made in this Court. To put it differently, the pigeon hole under which the challenge to impugned arbitral award was laid by the protagonist of the Section 34 petition has not been set out much less set out with specificity.

10. Be that as it may, a careful perusal of the case file before us brings to light that the entire legal drill before the Section 34 Court was essentially on two points. One is territorial jurisdiction and the other is AT resorted to equity principles vide sub-section (2) of Section 28 when neither of the parties had authorised, much less expressly authorised the AT to do so. This



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means that the legal drill before Section 34 Court was predicated on Section 34(2)(a)(iv) of A and C Act, which in effect means that AT travelled beyond its remit and had dealt with the matter beyond the scope of submission to Arbitration. In any event, this would also fall under Clause (ii) of Explanation 1 of Section 34 (2)(b)(ii) in the light of *Associate Builders* case [*Associate Builders Vs. Delhi Development Authority* reported in (2015) 3 SCC 49] wherein in paragraph 42.1, Hon'ble Supreme Court had held that violation of any particular provision of the A and C Act would be death knell for the arbitral award. In the case on hand, Section 28(2) is a negative covenant as it is a bar qua any Arbitral Tribunal to apply 'right and good' / 'fair and equity without going by Rules' principles when the parties have not expressly authorized the AT to do so. Therefore, the complaint before the Section 34 Court was one under Section 34(2)(a)(iv) and a shade of Clause (ii) of Explanation 1 of Section 34(2)(b)(ii). To be noted, learned counsel for respondent before this Court, who was protagonist of the Section 34 petition, very fairly submitted that this is the position qua challenge to impugned arbitral award.

11. Mr.P.Giridharan, learned counsel for SGS, who is the appellant



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before us, submitted that the 34 Court took a approximation approach as

there is no disputation regarding certain sums of money having been



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expended by SGS. Learned counsel also vehemently contended that a AT in the light of Section 19 can evolve its own procedure and resort to 'right and good'/ 'fair and equity' without going by Rules'. Learned counsel emphatically submitted that 'right and good' / 'fair and equity without going by Rules' principles are not a forbidden principle qua an Arbitral Tribunal.

12. Learned counsel for respondent supported the order of the Section 34 Court and pointed out that it is nobody's case that either of the parties much less both the parties, namely Vedanta and SGS authorised much less expressly authorised the AT to resort to *ex aequo et bono* and/or *as amiable compositeur*.

13. As would be clear from allusion supra, a issue regarding territorial jurisdiction was raised but it was only faintly adverted to before this Section 37 Court. Nonetheless, we deem it appropriate to say that Section 34 Court was absolutely right in relying on ***Indus Mobile case law [Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited and Others*** reported in ***(2017) 7 SCC 678***] to come to the conclusion that going by the arbitration clause, Section 34 Court which made the impugned order is a supervisory Court qua AT and therefore, it has jurisdiction. We



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deem it appropriate to add for the purpose of clarity that **BGS SGS Soma** case law being **BGS SGS Soma JV vs NHPC Ltd.** reported in **2020 4 SCC 234** and paragraph 45 thereof adds specificity as the term '**place**' occurring in Section 20 in the three sub-sections thereof has been explained by Hon'ble Supreme Court and Hon'ble Supreme Court has said '**place**' occurring in sub-section (3) of Section 20 is '**venue**' and the same term '**place**' occurring in sub-sections (1) and (2) of Section 20 is '**seat**'. It is be noted that A and C Act does not use the terms '**seat**' or '**venue**' in the Statute but they are expressions which have been put in place by judicial pronouncements. It is in this context that the Hon'ble Supreme Court in **BGS SGS Soma** case law, more particularly paragraph 45 thereof clarified that the same term '**place**' occurring in sub-section (3) of Section 20 is '**venue**' and '**place**' occurring in sub-sections (1) and (2) of Section 20 is '**seat**'. Paragraph 45 of **BGS SGS Soma** case law reads as follows:

"45. It was not until this Court's judgment in Indus Mobile Distribution (P) Ltd. [Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd., (2017) 7 SCC 678 : (2017) 3 SCC (Civ) 760] that the provisions of Section 20 were properly analysed in the light of the 246th Report of the Law Commission of



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India titled, “Amendments to the Arbitration and Conciliation Act, 1996” (August, 2014) (hereinafter referred to as “the Law Commission Report, 2014”), under which Sections 20(1) and (2) would refer to the “seat” of the arbitration, and Section 20(3) would refer only to the “venue” of the arbitration. Given the fact that when parties, either by agreement or, in default of there being an agreement, where the Arbitral Tribunal determines a particular place as the seat of the arbitration under Section 31(4) of the Arbitration Act, 1996, it becomes clear that the parties having chosen the seat, or the Arbitral Tribunal having determined the seat, have also chosen the courts at the seat for the purpose of interim orders and challenges to the award.'

14. In any event, it is to be noted that ***Indus Mobile*** i.e., ***Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd.*** reported in ***(2017) 7 SCC 678*** which was relied on by Section 34 Court was affirmed in ***BGS SGS Soma.***

15. Though jurisdiction was really not argued emphatically before this Section 37 Court and was only faintly adverted to as a point canvassed before 34 Court, we deemed it appropriate to elucidate on the same for the purpose of clarity and specificity.

16. This takes us to the Section 28(2) of A and C Act.



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17. A careful perusal of Section 28(2) makes it clear that it is more in the nature of a negative covenant. The reason is, Section 28(2) of A and C Act reads as follows:

'28. Rules applicable to substance of dispute:-(1)

(a)....

(b).....

(i).....

(ii).....

(iii)

(2) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.'

18. A careful perusal of Section 28(2) of A and C Act will make it clear that it says that an AT shall resort to *ex aequo et bono* and/or act as *amiable compositeur*: 'only' if the parties are expressly authorised to do so. It is axiomatic or in other words, the corollary is, absent authorisation by the parties to the contract i.e., absent express authorisation by the parties to the contract, no Arbitral Tribunal can resort either to *ex aequo et bono* and/or as *amiable compositeur* principles. That is the reason why we have said Section 28(2) is more in the nature of a negative covenant. This means, with



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the greatest respect, we have no option other than saying that the AT has travelled beyond its remit as rightly held by Section 34 Court. In paragraph 30, AT has returned a categoric finding that Ex.R25 termination notice dated 20.03.2014 is not contrary to the terms of the contract. To be noted, paragraph 30 of the impugned arbitral award reads as follows:

'30. For the reasons stated above and findings recorded supra, the notice of termination dated 20.03.2014 cannot be said to be contrary to the terms of the contract, since the MSS installed by the Claimant has been found to be not qualitatively complying with the bias test which has been held to be a mandatory requirement for the successful completion of the project. Issue No.3 is answered accordingly.'

19. Thereafter in paragraph 32(A), AT after returning a categoric finding that the termination is valid has gone on to say that interest of justice and equity would be better served if at least 50% of the amount said to have been spent by the claimant (SGS) is awarded. To be noted, going by the terms of the contract if termination is valid, question of payment to SGS does not arise at all. This 50% also is by adopting a rough and ready thumb rule approach and there is no computation much less is it based on any



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empirical data. To be noted, there is no empirical data in this regard before the AT.

20. As regards *Associates Builders* case law, in paragraph 42.1 Hon'ble Supreme Court has held that breach of a particular provision/s of A and C Act would sound the death knell of any arbitral award. Paragraph 42.1 of *Associates Builders* case law reads as follows:

' 42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:

“28. Rules applicable to substance of dispute.—(1) Where the place of arbitration is situated in India—

(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India”

21. In the case on hand, in the light of the narrative, discussion and dispositive reasoning thus far, there is a clear breach of sub-section (2) of Section 28 of A and C Act and therefore, we have no hesitation in saying that



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the arbitral award deserves to be set aside and it deserves to be set aside in a Section 34 legal drill. The sequitur is, Section 34 Court is absolutely correct in interfering and setting aside the award by saying that absent authorisation more so express authorisation the AT should not have resorted to 'right and good' / 'fair and equity giving a go by to Rules' by acting amiable principles i.e., *ex aequo et bono* and/or *as amiable compositeur* principles and therefore, we find no shred of reason to interfere with the order of the Section 34 Court.

22. Ergo the sequitur is captioned OSA fails and the same is dismissed. There shall be no order as to costs.

(M.S.,J.) (K.G.T.,J.)
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