M.P.Power Generation Co.Ltd.. And Anr vs Ansaldo Energia Spa And Anr on 16 April, 2018

Equivalent citations: AIRONLINE 2018 SC 1345

Author: L. Nageswara Rao

Bench: L. Nageswara Rao, S.A. Bobde

Non-Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 3804 of 2018
(Arising out of S.L.P. (Civil) No. 39067 of 2013)

M.P. POWER GENERATION CO. LTD. & ANR.
.... Appellants

Versus

ANSALDO ENERGIA SPA & ANR.
….Respondents

JUDGMENT

L. NAGESWARA RAO, J.

Leave granted.

1. M.P. Power Generation Co. Ltd. formerly known as Madhya Pradesh Electricity Board (hereinafter referred to as 'the Board') invited proposals for refurbishment of Units 3 and 4 of the Thermal Power Plants at Amarkantak having the capacity of 120 MW by a notice inviting tender dated 24th October, 1996. A provisional Letter of Intent for refurbishment of Thermal Power Plant of 2 x 120 MW Phase–II was issued by the Board to Respondent No.1, ANSALDO Energia SPA (for short 'the Claimant') on 11th May, 1999. Thereafter, on 24th August, 1999 four Agreements were signed between the Claimants and the Board viz Overall Coordination Agreement, Offshore Supply Contract, Onshore Supply Contract and Onshore Services Contract.

2. A Bank Guarantee dated 22 nd February, 2000 was furnished by the Claimants as per Clause 9.2 (a) of the Onshore Supply Contract for Rs. 9,29,20,000/- (10 per cent of the Onshore Supply Contract price). Another Bank Guarantee was furnished by the Claimants on 23rd February, 2000 as per the stipulation in Clause 9.2(a) of the Offshore Supply Agreement for US $ 1,708,100/-. The

above Bank Guarantees were given towards advance payment that was to be made by the Board. On 24 th February, 2000, a Performance Bond was executed by the ANZ Grindlays Bank Limited on behalf of the Claimants for Rs.18,48,00,000/- (10 per cent of the total Contract price) pursuant to Clause 4.1 of the Overall Coordination Agreement. The Board subsequently made advance payments of the amounts equivalent to the two Bank Guarantees dated 22nd February, 2000 and 23rd February, 2000 given by the Claimant.

3. The Zero Date (i.e. effective date of Contract) as per Clause 7 of the Overall Coordination Agreement is as follows:

> "7. Notice to Proceed 7.1 Zero Date (Effective Date of Contract) The zero date of the Contract shall mean the date on which the all the following conditions are fulfilled:
>
> (i) Signature of the Contract
> (ii) Receipt by ANSALDO of the Notice to Proceed
> (iii) Receipt by MPEB the Bank Guarantee from
>
> ANSALDO for the Advance Payment (10% of the Contract Price)
>
> (iv) Receipt by ANSALDO of the Advance Payment
>
> (v) Receipt by ANSALDO of the Letter of Credit for the Offshore Supply and Letter of Comfort/ Support for Onshore Supply and Onshore Services
>
> (vi) Financial tie-up of PFC loans 7.2 If the Start Date has not occurred on or before six (6) months after the date hereof, then the Contract will automatically expire, without any liability on either side and the price will cease to be valid and will be subject to renegotiation.

7.3 MPEB may not issue a Notice to Proceed under any of the Refurbishment Contracts without issuing a Notice to Proceed under all of the Contracts."

4. It was agreed between the parties that the Zero Date would be 9th March, 2000. Thereafter, there was exchange of correspondence and several meetings held between the Claimant and the Board for resolution of certain issues. In response to a letter written by the Board on 15 th June, 2001, the Claimant wrote to the Board on 21 st June, 2001 to treat the Agreement as expired. The Claimant stated in the said letter that it was suspending the performance of the Agreement. There was a reference to violation of a fundamental condition of the Contract i.e. non-furnishing of a Letter of Comfort from the Power Finance Corporation as provided in Clause 5.6 of the Onshore Supply Contract. The Claimant further complained of a misrepresentation of the warranty contained in Clause 19.2 (vii) of both the Onshore and Offshore Supply Contracts and Clause 20.2 of the Onshore Services Contract.

5. The Board invoked the three Bank Guarantees on 23rd June, 2001. Thereafter, the Board proceeded to issue a notice for default as provided in Clause 16.3 of the Offshore and Onshore

Supply Contracts and Clause 17.3 of Onshore Services Contracts on 29 th August, 2001. The Board complained of substantial breach of Agreement on the part of the Claimant. The Claimant was given 30 days' time for curing the defaults. The Claimant responded by submitting a representation on 8th January, 2000. Not satisfied with the explanation given by the Claimant, the Board terminated the contract. The Claimant raised a dispute which was referred to Arbitration. The Arbitral Tribunal passed an award in favour of the Claimant on 23rd September, 2004 in the following terms:

"1) It is declared that:

```
      a)     The three Bank Guarantees were
      wrongfully       invoked and encashed by
      the Respondent.
      b)     The agreements were wrongfully
      terminated       by the Respondent.
      c)     The agreements are voidable at the
      option      of the Claimants and have been
      avoided by       them.
2)    The Respondent shall pay to the Claimants:
      i)     the sum of Rs 39,80,98,429/- with
```

interest thereon at the rate of 12% per annum from 5th July, 2001 till the date of the Award and thereafter until payment or realization.

ii) the sum of Rs.11,14,55,042/- with interest thereon at the rate of 12% per annum from 29th July, 2002, being the date of the claim, till the date of the Award and thereafter until payment or realization.

iii) The respondent shall pay to the Claimants the sum of Rs.2000000 as and by way of costs, including the costs of the arbitration proceedings."

6. The Petition filed by the Board under Section 34 of the Arbitration and Conciliation Act, 1996 (for short "the Act") was allowed by the learned 7 th Additional District Judge, Jabalpur and the award dated 23 rd September, 2004 of the Arbitral Tribunal set aside. The learned Additional District Judge upheld the findings of the Arbitral Tribunal on Issues No.1 to 7. Breach of contract by the Board in view of (a) violation of a fundamental condition of the contract i.e., not furnishing Letter of Comfort from Power Finance Corporation and, (b) misrepresentation by the Board in Clause 19.2 (vii) of the agreements as concluded by the Arbitral Tribunal were approved by the learned Additional District Judge. However, the Learned Additional District Judge found fault with the award pertaining to Bank Guarantees and the amounts specified in Exhibit- GG of the Claim Petition. On the basis of the opinion that the Arbitral Tribunal had acted in excess of its jurisdiction in granting relief to the Claimant under the above heads, the learned Additional District Judge set aside the award.

7. Aggrieved by the rejection of Issue No.13 by the Arbitral Tribunal which pertains to amounts mentioned in Exhibit- HH to the Statement of Claim(Damages for the wrongful breach of Contract), the Claimant preferred an application under Section 34 of the Act. The said application was

dismissed by the learned Additional District Judge. The Appeal filed by the Claimant against the judgment of the learned Additional District Judge was later withdrawn and the dismissal has attained finality. We are not concerned with the said claim in this case.

8. The Claimant filed an appeal before the High Court challenging the judgment of the Additional District Judge by which the Award of the Arbitral Tribunal was set aside. The High Court set aside the judgment of the learned Additional District Judge and restored the award of the Arbitral Tribunal. The High Court held that the Additional District Judge committed a serious error in interfering with the finding of the Arbitral Tribunal on Issues 9 to 12 after upholding the award in respect of Issues 1 to 7. The High Court observed that Bank Guarantees are independent contracts between the Bank and the beneficiary. Relying upon the conditions in the Bank Guarantees which related to the invocation only on the 'non-fulfillment of contractual obligations', the High Court approved the findings of the Arbitral Tribunal that the Board could not have invoked the Bank Guarantees without proving breach of contractual obligations on the part of the Claimant. Aggrieved by the judgment of the High Court, the Board has filed the above Appeal.

The Agreements

9. As stated above, the Contract between the Claimant and the Board pertains to refurbishment of Units 3 and 4 of the Amarkantak Thermal Power Station located in Shadol District of Madhya Pradesh. Four Agreements in all were entered into between the Claimant and the Board. An Overall Coordination Agreement was executed on 24th August, 1999 which provided for three other Agreements which are :

(i) Offshore Supply Contract,

(ii) Onshore Supply Contract,

(iii) Onshore Services Contract.

10. It is necessary to refer to the relevant provisions of the Agreements for a better understanding of the issues involved in this case. As per the Agreements, the target completion period for the first and the second Unit was 18 ½ months and 22 ½ months from the issuance of notice to proceed respectively.

11. Clause 4 of the Overall Coordination Agreement which deals with Performance Guarantees is as follows:

> "4. Performance Guarantees 4.1 ANSALDO shall deliver to MPEB within fifteen days from the Zero Date, as defined in Clause 3 of each of the Offshore Supply Contract, the Onshore Supply Contract and the Onshore Services Contract, a performance bond (as per attachment to this Co-ordination Agreement) in the sum of ten per cent (10%) of the total Contract Price which may be drawn against only in the event that ANSALDO does not perform the activities towards faithful fulfillment of all the terms

and conditions of this Agreement except for the fulfillment of the Guaranteed Parameters, which are covered in clauses 4.2 and 4.3 herein. The validity of the Bank Guarantee shall expire upon the earlier of

(i) the Completion Date plus six (6) months towards Claim Period;

(ii) the date of termination of this Agreement pursuant to Clause 17 of the Offshore Supply and Onshore Supply Contract or Clause 18 of the Onshore Services Contract plus six (6) months towards Claim Period provided the termination is not due to breach of Contract on part of ANSALDO;

(iii) upon submission of Guarantee Bond as per clause 4.3 of this Agreement.

4.2 ANSALDO shall deliver to MPEB a Bank Guarantee (as per attachment to this Co-ordination Agreement in the sum of twelve and one half per cent (12 ½ %) of the Total Contract Price to guarantee the successful achievement of the Guarantee Parameters (Indemnity Bank Guarantee). Such Bank Guarantee shall be delivered to MPEB on the date ANSALDO submits its initial monthly invoice for payment to MPEB. The validity of such Bank Guarantee shall expire on the earlier of:

(i) Completion Date plus six (6) months towards Claim Period;

(ii) the date of termination of this Agreement pursuant to Clause 17 of the Offshore Supply and Onshore Supply Contract or Clause 18 of the Onshore Services Contract plus six (6) months towards Claim Period provided the termination is not due to breach of Contract on part of ANSALDO.

For the sake of administration of the Indemnity Bank Guarantee, the following will apply:

(i) Tolerances for the various guaranteed parameters, will be as per the International Standards (BS, ASME, DIN, Japanese and Russian)

(ii) If there are any shortfalls beyond the tolerances, ANSALDO will be provided reasonable time for rectifying the defects, with no financial implications to MPEB. Such reasonable periods will not be considered for computation of the Contractual Delivery Period.

(iii) Beyond the occurrence of item (i) and (ii) above, the Indemnity Bank Guarantee can be drawn.

4.3 ANSLDO shall deliver to MPEB a Bank Guarantee (as per attachment to this Co-ordination Agreement) in the sum of 15% of the Total Contract Price no later than the First Unit Completion Date which may be drawn only in the event the Guarantee Parameters for Three Years are not met, with respect to each of Unit No.3 and Unit No.4 during the applicable Guaranteed Period for Three Years. The validity of such Bank Guarantee shall expire at the end of the third year after the date of the Second Unit Completion Date." Clause 9.2 of the Offshore and Onshore Supply Contracts which

provides for issuance of Bank Guarantee against submission of advance payment, reads as under:

> OFFSHORE SUPPLY CONTRACT "9 Contract Price and Terms of Payment 9.1 As payment for ANSALDO'S performance of the supplies and obligations under this Contract, MPEB shall pay to ANSALDO an amount of Seventeen Million Eighty One Thousand (17.081 Million) US Dollars, as per the price breakdown furnished in the Sixth Schedule.
>
> 9.2 TERMS OF PAYMENT
>
> a) MPEB shall pay to ANSALDO an interest free advance payment "the Advance Payment") equal to ten per cent (10 %) of the Contract Price on the date on which MPEB issues the Notice to Proceed Against submission of Advance Payment Bank Guarantee on declining basis, of equivalent value, valid upto the date of completion of the last supplies." ONSHORE SUPPLY CONTRACT "9. Contract Price and Terms of Payment 9.1 As payment for ANSALDO'S performance of the supplies and obligations under this Contract, MPEB shall pay to ANSALDO an amount of Rs. Nine Hundred Twenty Nine Million Two Hundred thousand (929.20 Million Rs.), as per the price breakdown furnished in the Sixth Schedule.
>
> 9.2 TERMS OF PAYMENT
>
> a) MPEB shall pay to ANSALDO an interest free advance payment "the Advance Payment") equal to ten per cent (10 %) of the Contract Price on the date on which MPEB issues the Notice to Proceed Against submission of Advance Payment Bank Guarantee on declining basis, of equivalent value, valid upto the date of completion of the last supplies." Clause 16.3 of the Offshore Supply Contract requires a written notice to be issued to the defaulting party in case of a substantial breach of the Agreement. A cure period of 30 days is provided in Clause 16.4 to the defaulting party after receipt of the notice under Clause 16.3. Termination of the agreement as per Clause 17 is in the following terms:
>
> "17. Termination 17.1 If (i) a substantial breach specified in a notice under clause 16.3 is not remedied within the Cure Period; or (ii) a Force Majeure has occurred and has continued as indicated in Clause 15.5; then the non-Defaulting Party in the circumstances of sub-Clause (i), and either party, in the circumstances of sub-clause (ii), may without prejudice to any other right or remedy in respect of any pre-existing breach, terminate this agreement by further notice in writing to the Defaulting Party.
>
> 17.2 Upon termination of this Agreement, MPEB shall pay to ANSALDO, in full the following:
>
> (i) the value of the Equipment supplied and any other work performed up to the date of termination which was not previously paid by MPEB;

(ii) any cost incurred by ANSALDO after the date of termination incurred as a result of the termination due to fault of MPEB;

17.3 Upon termination of this Agreement, any remaining Equipment for which payment has been received by ANSALDO in the performance of its obligations or delays its performance under this agreement." Representations and warranties on the part of the Board are dealt with in Clause 19.2. Clause 19.2 (vii) which is relevant for the purpose of this case reads as under:

"19.2 MPEB represents and warrants to ANSALDO that:

....

....

(vii) Each of Unit No.3 and Unit No.4 was designed and constructed to achieve the Operating Parameters, and did in fact operate at 120 MW when operating in accordance with Good Industry Practice." Similar provisions relating to default notice, termination and warranties in the Offshore Supply Contract are there in the Onshore Supply and Onshore Services Contracts as well.

Award of the Arbitral Tribunal

12. The Arbitral Tribunal framed the following issues for determination of the dispute raised by the Claimant:

"1. Whether the Respondent had supplied the technical documents and information to the Claimants as required by Clause 5.8 (iv) of the Onshore Services Agreement?

2. Whether the Claimants had waived the production of the Letter of Comfort of the Power Finance Corporation as required by Clause 5.6 of the Onshore Supply Contract and Schedule 7?

3. Thereto and Clause 5.14 of the Onshore Services Contract and Schedule 7 thereto?

4. Whether the issuance of the Letter Comfort/ Support by Power Finance Corporation to Asia Power Projects Pvt. Ltd. (Claimant No.2) ("ASPL") was a fundamental condition of the contract agreements?

5. Whether Units 3 and 4 of the Amarkantak Power Station did in fact operate at a capacity of 120 MW when they were first installed in 1997 when operating in accordance with Good Industry Practice as warranted by the Respondent in Clause 19.2 (vii) of the conditions of contract for Offshore and Onshore Supplies and Clause 20.2

(vii) of the conditions of contract for Onshore Services?

6. Whether the Respondent co-operated with the Claimants in carrying out the RLA tests?

7. Whether the Respondent's insistence on approving the Claimants' vendors was legal?

8. Whether the unilateral amendment by the Respondent of the Letter of Credit without the consent in writing of ANSALDO Energia S.P.A. – Claimant No.1 ("ANSALDO") was wrongful and whether such amendment required the consent of ANSALDO and of its bankers?

9. Whether the invocation and encashment by the Respondent of the Bank Guarantees was wrongful, premature, illegal and fraudulent?

10. Whether the termination of the Contract Agreements by the Respondent was wrongful?

11. Whether the Claimants are entitled to the amount claimed in Exhibit FF to the Statement of Claim?

12. Whether the Claimants are entitled to the amount claimed in Exhibit GG to the Statement of Claim?

13. Whether the Claimants are entitled to the amount claimed in Exhibit HH to the Statement of Claim?

14. Whether the Respondent is entitled to any of the amounts/ claimed by it in its Counter Claim?

15. Whether the Tribunal should award the continuation of the Interim Order of the Jabalpur District Court dated July 6 and 7, 2001?

16. What order should the Tribunal pronounce for costs? "

13. The Arbitral Tribunal held that there was misrepresentation on the part of the Board in respect of the capacity of the Plant as well as its operating parameters and breach of a fundamental condition of the contract relating to Letter of Comfort not being furnished. Termination of the contract was found to be bad in law. Issues No.1 and 4 were answered as follows:

"Dealing with Issue No.4 first, the terms of the representation and warranty clause needs to be noted. The Respondent "represents and warrants" to the Claimants that "each of Unit Nos.3 and 4 was designed and constructed to achieve the operating

parameters and, in fact, operated at 120 MW when operated in accordance with good industry practice". The representation that the Respondent made and warranted was twofold; first, in respect of the operating parameters that the Units were designed and constructed to achieve and, secondly that the Units did, in fact, operate at 120 MW, when operating in accordance with good industry practice.

It would appear from the evidence of the Respondent's witness Saxena that the first representation and warranty was made only of the strength of the manufacturer's plaque attached to the Units, but this representation and warranty is of far less import than the representation and warranty that the Units had, in fact, operated at 120 MW when operated in accordance with good industry practice. It is an admitted position that no performance test upon commissioning of the Units had been carried out. It is clear upon the evidence that the only record which the Respondent had which showed that the Units had in fact operated at 120 MW were the log sheets of February 23,26, 27, 1983 for Unit Nos.3 and December 29, 30 and 31, 1982 and February 24, 25, 26 and 27, 1983 for Unit No.4. In the first place, these do not show and it is not the case that they show that the operation of the Units at those times was in accordance with good industry practice. Moreover, even if one were to ignore the inconsistencies pointed by the Claimants' witnesses in the log sheets, a representation and warranty of this magnitude was unwarranted for the language of the representation and warranty suggests that the Units were operated over a span of time, of about 25 years, to produce 120 MW when operated in accordance with good industry practice. The inconsistencies cannot, however, be ignored for they suggest that what was recorded in the concerned log sheet was not, in fact, the production of 120 MW. When, for the same hour of the same day, the production is measured at 120 MW at one spot and 115 MW at another, it cannot be said with any confidence that the production was in fact 120 MW. The representation and warranty given to the Respondent as aforesaid, must, therefore, be held to be a positive assertion in a manner not warranted by the information of the Respondent, of that which was not true, though the Respondent might believe it to be true. In other words, the representation and warranty was a misrepresentation as defined by Section 18 of the Contract Act. The evidence of the Claimant's witness Richetti is that the Claimants entered into the contracts only because of this representation and warranty and his evidence to that effect has not been dented in cross examination. Under Section 19 of the Contract Act, when consent to an agreement is caused by misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. The Claimants desire to avoid the contracts and we think that, in the circumstances they are entitled to do so.

In so far as Issue No.1 is concerned, the Respondent contracted to make available to the Claimants, free of charge, "all relevant records of the power station and the existing Operations and Maintenance Manual of the power station." Mr. Agnihotri submitted that the words "relevant records" meant such records as were in the possession of the Respondent. We do not find this interpretation acceptable. "All

> relevant records of the power station" covers each and every record relating to the power station that is relevant for the purpose of the refurbishment thereof. The phraseology used leads to the conclusion that the Respondent was stating that it had in its possession all the relevant records and would make them available to the Claimants, along with the operations and maintenance manual. The evidence on record shows clearly that the Respondent possessed very few of the relevant records of the Units. The failure of the Respondent to supply to the Claimants the relevant records of the Units was very likely to have a material adverse effect on the ability of the Claimants to perform their obligations under the contract and, as such, was a substantial breach by the Respondent of the contract."

14. The Arbitral Tribunal determined Issues 2 and 3 in favour of the Claimant by observing that there was no waiver on the part of the Claimant regarding production of the Letter of Comfort. The production of the Letter of Comfort was a fundamental condition of the Agreements and the failure to produce the same was a breach on the part of the Board. The invocation of Bank Guarantees by the Board was found to be improper by the Arbitral Tribunal in its findings on Issues 8 and 9. According to the Tribunal, the Contract could have been terminated only after expiry of 30 days' cure period. The invocation of Bank Guarantees in this case was done on 23rd June, 2001 which was prior to the issuance of the notice of default on 29 th August, 2001. The termination of the Agreement by the Board was found to be bad in law. Exhibit–FF annexed to the Statement of Claim sought for by the Claimant pertains to the return of the amounts for which Bank Guarantees were given by the Claimant and invoked by the Board, along with interest. Exhibit- GG to the Statement of Claim includes amount spent by the Claimant towards the Residual Life Assessment (R.L.A.) Study and other material procured including electric drum level indicator, UPS system– 20 KVA, boiler pressure parts, etc. After a detailed scrutiny of the evidence on record, the Arbitral Tribunal awarded the Claimant amounts mentioned in Exhibits- FF and GG appended to the Statement of Claim. Issue No. 13 was answered against the Claimant. Claim forming part of Ex. HH (damages for wrongful termination of contract) to the statement of claim was rejected.

Submissions

15. We have heard Shri Dushyant Dave, learned Senior Counsel for the Appellants and Shri S.U. Kamdar, learned Senior Counsel for the Respondents. Shri Dave submitted that the award of the Arbitral Tribunal suffers from fundamental flaws and requires interference. He relied upon the judgments of this Court to contend that the award is perverse and is vitiated due to patent illegality. He found fault with the finding of the Arbitral Tribunal that there was misrepresentation on the part of the Board. He submitted that the plant was manufactured by BHEL in the year 1972 which certified that the Units have the capacity of 120 MW. Commenting on the representation and warranties found in Clause 19.2 (vii) of the Agreements, he stated that it cannot be said that there was any misrepresentation on the part of the Board. He placed reliance on the log sheets to show that the plant was running to its capacity of 120 MW. He further submitted that there were about 13 inspections conducted by experts from the Claimants' side and it is inconceivable that they did not know about the capacity and performance of the plant. He argued that all the available records were furnished to the Claimant. According to him, the Claimant had full knowledge about the capacity

and the performance of the plant in spite of which they did not perform their part of the Contract for reasons best known to them. Shri Dave proceeded to submit that after a series of meetings and exchange of letters, the Claimant agreed for the Zero Date as 9 th March, 2000. After such agreement, the Claimant is said to have waived its right of claiming the Letter of Comfort from the Power Finance Corporation. According to him, the Letter of Comfort was not a fundamental condition of the Contract and it had no bearing on the performance of the obligation on the part of the Claimant. He further stated that the Claimant was aware of the fact that the amounts advanced to the Claimant were given by the Power Finance Corporation to the Board. He found fault with the finding of the Arbitral Tribunal that the termination of the Contract by the Board was illegal.

16. Shri Dave highlighted the error committed by Arbitral Tribunal in treating all the Bank Guarantees as furnished in pursuance of Clause 4 of the Overall Coordination Agreement. The conclusion of the Arbitral Tribunal that the invocation of the Bank Guarantee was not proper as it was done prior to the termination of the Contract was challenged by Shri Dave. He further urged that the award towards Issue No.12 deserves to be set aside as the Claimant has been awarded compensation for the goods which were not supplied. According to Shri Dave, the Claimant neither supplied nor commenced any work according to the Contract in spite of which the Arbitral Tribunal has allowed these claims. There is a lack of judicial approach on the part of arbitral Tribunal for which reason Shri Dave urged that the award deserves to be set aside.

17. Shri S.U. Kamdar, learned Senior Counsel contended that the award of the Arbitral Tribunal is well reasoned after taking into account the entire material on record and it does not suffer from any infirmity. He submitted that the parameters for exercise of power by the Courts under Section 34 of the Act are well settled. Applying the principles laid down by this Court in several judgments, Shri Kamdar contended that this Appeal should not be entertained. He further submitted that a plain reading of the Clause 19.2 (vii) pertaining to the representation and warranties would show that there was a misrepresentation on the part of the Board. The Clause which was added after deliberations between the parties is to the effect that both Units 3 and 4 operated at 120 MW when operating in accordance with good industry practice. He referred to the evidence on record before the Tribunal to argue that there is no material to show that the plant operated at 120 MW. He stated that the incomplete log sheets that were filed by the Board also suffer from internal discrepancies as rightly held by the Arbitral Tribunal. Shri Kamdar further submitted that the Arbitral Tribunal correctly found furnishing a Letter of Comfort by Power Finance Corporation to be a fundamental condition which was breached by the Board. He relied upon Clause 22 of both the Supply Contracts to submit that the counsel for the Board was not right in arguing that there was a waiver on the part of the Claimant. He further argued that there is voluminous oral and documentary evidence on record to demonstrate that material was procured and equipment was manufactured for supply as per the terms of the contract. He also stated that the equipment which was specially designed for the Thermal Plants at Amarkantak will be of no use to any other plant. It was only due to the breach on the part of the Board that the supply did not take place. Concluding his submissions, Shri Kamdar submitted that the appeal deserves to be dismissed.

Section 34 of the Act - ‘Public Policy’

18. It is necessary to refer to the settled law on the scope of Sections 34 of the Act. In this case we are concerned with the point as to whether an arbitral award can be set aside for being in conflict with the public policy of India. An arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law, or (b) the interest of India, or (c) justice or morality. (Renusagar Power Co. Ltd. v. General Electric Co.1) Patent illegality was added to the above three grounds in ONGC v. Saw Pipes Ltd.2. Illegality must go to the root of the matter and incase the illegality is of trivial nature it cannot be held that the award is against the public policy. It was further observed in the said judgment (ONGC v. Saw Pipes (supra)) that an award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. In Delhi Development Authority v. M/s. R.S. Sharma & 1 (1994) Supp.1 SCC 644 2 (2003) 5 SCC 705 Co.3 it was held that an award can be interfered with by the Court under Section 34 of the Act when it is contrary to :

a) substantive provisions of law; or

b) provisions of the 1996 Act; or

c) against the terms of the respective contract; or

d) patently illegal; or

e) prejudicial to the rights of the parties The fundamental policy of India was explained in ONGC Ltd. v. Western Geco International Co. Ltd.4 as including all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. It was held inter alia, that a duty is cast on every tribunal or authority exercising powers that affect the rights or obligations of the parties to show a 'judicial approach'. It was further held that judicial approach ensures that an authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and its decision is not actuated by any extraneous considerations.

It was also held that the requirement of application of mind on the part of the adjudicatory authority is so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law. This Court further 3 (2008) 13 SCC 80 4 (2014) 9 SCC 263 observed that the award of the Arbitral Tribunal is open to challenge when the arbitrators fail to draw an inference which ought to be drawn or if they had drawn an inference which on the face of it is untenable resulting in miscarriage of justice. The Court has the power to modify the offending part of the award in case it is severable from the rest according to the said judgment (Western Geco ltd. (supra)).

19. The limit of exercise of power by Courts under Section 34 of the Act has been comprehensively dealt with by Justice R.F. Nariman in the case of Associate Builders v. Delhi Development Authority5. Lack of judicial approach, violation of principles of natural justice, perversity and patent illegality have been identified as grounds for interference with an award of the Arbitrator. The restrictions placed on the exercise of power of a Court under Section 34 of the Act have been analyzed and enumerated in Associated Builders (supra) which are as follows:

5 (2015) 3 SCC 49

a) The Court under Section 34(2) of the Act, does not act as a Court of appeal while applying the ground of "public policy" to an arbitral award and consequently errors of fact cannot be corrected.

b) A possible view by the arbitrator on facts has necessarily to pass muster as the Arbitrator is the sole judge of the quantity and quality of the evidence.

c) Insufficiency of evidence cannot be a ground for interference by the Court. Re-examination of the facts to find out whether a different decision can be arrived at is impermissible under Section 34 (2) of the Act.

d) An award can be set aside only if it shocks the conscience of the Court.

e) Illegality must go to the root of the matter and cannot be of a trivial nature for interference by a Court. A reasonable construction of the terms of the contract by the arbitrator cannot be interfered with by the Court. Error of construction is within the jurisdiction of the Arbitrator. Hence, no interference is warranted.

f) If there are two possible interpretations of the terms of the contract, the arbitrator's interpretation has to be accepted and the Court under Section 34 cannot substitute its opinion over the Arbitrator's view. Application of the Law

20. The Arbitral Tribunal held that the termination of the contract by the Board on 08.01.2002 was illegal. This finding was on the basis that the Board committed a breach of the contract. The breach of the contract on the part of the Board was due to the failure in furnishing Letter of Comfort from the Power Finance Corporation, non-supply of the technical documents and information as required by Clause 5.8 (iv) of the Onshore Service Agreement and misrepresentation.

Letter of Comfort and Waiver

21. Clause 5.14 of the Onshore Services Contract and Clause 5.6 of the Onshore Supply Contract provide for an irrevocable Letter of Comfort to be issued by the Power Finance Corporation in favour of the Claimant, on the date of issuance of the Notice to Proceed by the Board. There is a further requirement in the said Clauses that the Board shall ensure that the Letter of Comfort is maintained in full force and effect throughout the term of the agreements. The Claimant's contention before the Arbitral Tribunal was that the production of the Letter of Comfort was a fundamental condition of the agreements and the failure to produce it was a breach of the contract. The Board's response to such contention was that the Claimant is deemed to have waived the production of the Letter of Comfort. Waiver was pleaded by the Board on the basis of a letter dated 10.03.2000 written by the Claimant accepting the Zero Date as 09.03.2000 and the oral concession made by Sh. G. Ravindran, a representative of the Claimant.

22. The Arbitral Tribunal opined that the production of Letter of Comfort was a fundamental condition of the agreements and the Claimant cannot be said to have waived the production of Letter of Comfort. The contention of oral concession made by Sh.G.Ravindran was considered by the Arbitral Tribunal with reference to the evidence on record. The oral evidence of Sh. Saxena, Superintending Engineer and Sh.Shrivastava, Additional Superintending Engineer of the Board was referred to by the Arbitral Tribunal to hold that they admitted to the fact that there was no waiver to the production of Letter of Comfort in writing by the Claimants. Sh.Saxena, Superintending Engineer of the Board stated in his evidence that Sh.G.Ravinderan made a concession of waiver of production of the Letter of Comfort in a meeting. However, the details of the meeting could not be given by Sh.Saxena. The Arbitral Tribunal refused to accept the point canvassed by the Board relating to waiver on the basis of the evidence of Sh.Saxena. The contents of the letter dated 10.03.2000, written by the Claimant to the Board were examined by the Arbitral Tribunal to conclude that there was no waiver of production of the Letter of Comfort. According to the Arbitral Tribunal, the Claimant did not insist on the Letter of Comfort to be produced as a pre-condition to the Zero Date, which did not preclude to their seeking the same at a later date as per Clause 16.5 of the Overall Co-ordination Agreement and Clause 22 & 23 of the Supply and Services Contracts respectively. The production of the Letter of Comfort was a fundamental condition of the agreements and the failure to produce the same was a breach by the Board. The above findings on the Letter of Comfort are on appreciation of evidence. We do not see any reason to differ with the said findings.

Non-Supply of Documents and Misrepresentation

23. The evidence of Sh. Cesare Ricchetti, Electrical Engineer working with the Claimant is to the effect that he took part in the negotiations which led to the signing of the contract. He deposed that he requested for information from the Station Director of the Board at Amarkantak and Sh. B.S. Chouhan, Member Generation, as to whether Units 3 and 4 were originally designed and constructed to achieve a capacity of 120 MW. The Station Director responded to the query and confirmed that the Units had been designed and constructed to achieve a capacity of 120 MW. Sh.Ricchetti further stated that it was not possible on a visual inspection to assess the originally installed capacity. The capacity could have been assessed by examining the parameters and methods used during the original design, the operational log data and the original performance test. These records were not furnished to the Claimants despite repeated requests by the Claimants. As the Claimants were not satisfied with the material, they insisted on a formal warranty, which was included in Clause 19.2 (vii) of the Onshore Supply Agreement, Clause 19.2(vii) reads as follows:

> "19.2 MPEB represents and warrants to ANSALDO that:
>
> .....
>
> (vii) each of Unit No.3 and Unit No.4 was designed and constructed to achieve the operating parameters, and did in fact operate at 120 MW when operating in accordance with good industry practice."

24. Sh. Ricchetti categorically stated in his evidence that Claimants would not have signed the contracts without the above warranty. Sh.Saxena, Additional Superintending Engineer deposed before the Arbitral Tribunal that the warranty was made on the strength of the manufacturer's plaque attached to the Units. He stated that the Units had, in fact, operated at 120 MW when the performance was in accordance with good industrial practice. The Arbitral Tribunal took note of the fact that no performance test was carried out upon commissioning of the Units. Considering the log sheets that were filed on behalf of the Board for three days in December, 1982 and four days in February, 1983, the Arbitral Tribunal was of the opinion that the said records do not show that the Units operated at 120 MW was in accordance with good industrial practice. Moreover, the Tribunal found that there were inconsistencies in the readings recorded in the log sheets. The Arbitral Tribunal concluded that the positive averment by the Board that the Units were, in fact, operating at 120 MW for over a period of 25 years was clearly a misrepresentation. According to the Arbitral Tribunal, the Claimant was entitled to avoid the contract as the consent to the contract was obtained by a misrepresentation.

25. Sh. Dave submitted that the Arbitral Tribunal committed a serious error in concluding that there was misrepresentation on the part of the Board. He also criticized the findings of the Arbitral Tribunal on Section 19 of the contract by relying upon illustration (b) therein. It will be useful to reproduce Sections 18 and 19 of the Indian Contract Act, 1872 which read as under:

> "18. "Misrepresentation" defined "Misrepresentation" means and includes-
>
> (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; (2) any breach of duty which, without an intent to deceive, gains and advantage to the person committing it, or any one claiming under him; by misleading another to his prejudice, or to the prejudice of any one claiming under him;
>
> (3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement.

19. Voidability of agreements without free consent When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put on the position in which he would have been if the representations made had been true.

Exception: If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation: A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practiced, or to whom such misrepresentation was made, does not render a contract voidable.

Illustrations

(a) .....

(b) A, by a misrepresentation, leads B erroneously to believe that five hundred mounds of indigo are made annually at A's factory. B examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation."

26. On appreciation of the oral and documentary evidence produced by the parties, the assertion made by the Board that the Units were achieving a capacity of 120 MW when operating in accordance with the good industrial practice, was found to be incorrect by the Arbitral Tribunal. We do not intend to take a different view on the findings of the fact recorded by the Arbitral Tribunal.

27. Even if the Board believed that Units 3 and 4 were in fact designed for a capacity of 120 MW and operated at 120 MW, if it was found later that the assertion relating to the said capacity and functioning was not true, a clear case of misrepresentation, as per Section 18 of the Contract Act was made out.

28. Mr.Dave relied upon the exception to Section 19.

According to the exception, a contract is not voidable if the party whose consent was taken had the means of discovering the truth with ordinary diligence, even if the consent was caused by misrepresentation. He also relied upon illustration

(b), which deals with sale of a factory by B on the representation of A that 500 mounds of Indigo are made annually in the factory belonging to A. As B purchased the factory after examining the accounts of the factory, the contract was not voidable on account of A's misrepresentation. Sh. Dave relied upon a judgment of the Full Bench of the Judicial Commissioner's Court, Nagpur, in (Hazi) Mahomad Hazi Wali Mahomad v. Ramappa 6. In that case, the Defendant in the suit represented to the Plaintiff that the value of the property was about Rs.9,000/-. Jackson A.J.C. held that even if such a statement was made by the Defendant, the Plaintiff was not entitled for a decree on the ground that it was impossible to believe that the Plaintiffs solely relied upon the 6 AIR 1929 Nagpur 254 statement of the Defendant as to the value of the property. It was further held that the Plaintiff could have obtained the value of the property without much trouble. In view of the above facts, the Judicial Commission observed as follows:

> "Under S.19, Contract Act, the rights given to a party who has entered into a contract under fraud or misrepresentation, are to avoid the contract or to insist on the contract being performed. The section does not entitle the party to insist on an

entirely different contract being performed. Moreover, the rights given by S.19 are given only to a party whose consent to the contract was, in fact, caused by the fraud or misrepresentation." The said judgment has no application to the facts of this case. Similarly, Ganga Retreat & Towers Ltd. v.

State of Rajasthan7 relied upon by Sh.Dave would not be of any assistance to him.

29. As discussed earlier, the evidence on record discloses that the Claimants could not ascertain the actual capacity and the functioning of the Units in spite of their best efforts. The relevant records were not furnished by the Board to enable the Claimants to ascertain the actual facts. The evidence on record supports the contention of the Claimants that it was not possible to ascertain the capacity and

7 (2003) 12 SCC 91 functioning of the Units only on the basis of visual inspections. We are afraid that we cannot agree with the submission of Sh.Dave on the point of misrepresentation as we find no good reason to differ from the view taken by the Arbitral Tribunal. Ext.GG- Value of the Equipments Supplied and Works Performed

30. An amount of Rs.11,14,55,042/- with interest was claimed towards the value of the RLA study and the performance of work relating to drum level system, UPA system, pressure parts and engineering drawings which could not be supplied due to the termination of the agreements. A detailed affidavit was filed by Sh.Fabio Rolla in lieu of his examination-in-chief. Voluminous evidence was produced to show the actual expenditure towards the above works. There was no meaningful cross-examination of Sh. Fabio Rolla on behalf of the Board. The determination of Issue No.12 by the Arbitral Tribunal holding that the Claimants are entitled to the amounts claimed in Ex.GG annexed to the statement of claim i.e. Rs.11,14,55,042/- is on the basis of appreciation of evidence. We have no hesitation in approving the said finding of fact of the Arbitral Tribunal.

Ext. FF- Refund of amounts of Bank Guarantees

31. The Claimants furnished three Bank Guarantees. Two Bank Guarantees dated 22.02.2000 and 23.02.2000 were for Rs.9.29 crores and US $ 1,708,100/- towards the advance payment to be paid by the Board. The third Bank Guarantee was given by ANZ Grindlays Bank, New Delhi on behalf of the Claimant for Rs.18.48 crores which was towards performance guarantee under Clause 4.1 of the Overall Coordination Agreement. The Bank Guarantees dated 22.02.2000 and 23.02.2000 were in terms of Clause 9.2 of the Onshore and Offshore Supply Contracts respectively. All the three Bank Guarantees were invoked by the Board on 23.06.2001. The Bank Guarantees given on 22.02.2000 and 23.02.2000 were conditional. The condition for invocation of such Bank Guarantees was 'non-fulfillment of the contractual obligations by the debtor'. The third Bank Guarantee of 24.02.2000 was an unconditional Bank Guarantee. The Arbitral Tribunal was of the opinion that the invocation of the Bank Guarantee was improper as it was not preceded by a Notice of Default as contemplated in Clause 16.3 of the Supply Contracts and a subsequent notice of termination under Clause 17.1 of the Supply Contracts. In view of the finding of the Arbitral Tribunal that the Board committed a serious breach of the contract and wrongfully terminated the contract, the Claimant

was held to be entitled to return of the amounts for which the Bank Guarantees were given.

32. The Bank Guarantee given on 24.02.2000 was a Performance Bank Guarantee and the Claimant is entitled for return of the amount for which the Bank Guarantee was given. The Arbitral Tribunal, however, failed to take notice of the fact that the other two Bank Guarantees were given for the amounts to be advanced by the Board. In fact, the Board had advanced the said amounts to the Claimants. We are of the opinion that the Claimant is not entitled for return of the amounts involved in the Bank Guarantees dated 22.02.2000 and 23.02.2000 as they were towards the amounts advanced by the Board. The rejection of the claim pertaining to the damages mentioned in Ex. HH of the statement of claim which includes loss of profit, over-heads and loss of commercial opportunities clearly indicates that the Arbitral Tribunal never intended to grant any damages to the Claimant. The claims allowed by the Arbitral Tribunal pertained only to the return of the Claimants' money involved in the Bank Guarantees and the amounts actually spent by the Claimants.

Conclusion

33. We uphold the award of the Arbitral Tribunal with the modification that the Claimants are not entitled for the amounts involved in the Bank Guarantees dated 22.02.2000 and 23.02.2000 given by the Claimants.

34. To avoid confusion, the Award of Rs.11,14,55,042/-, with interest at the rate of 12% per annum from 29th July, 2002 until payment or realization towards the claim in Ex.GG and Rs.18,48,00,000/- with interest thereon at the rate of 12% per annum from 5th July, 2001 until payment or realization, which is the amount pertaining to the Performance Bank Guarantee, is affirmed.

35. For the afore-stated reasons, the appeals are dismissed with the above modification.

.....J. [S.A. BOBDE] .....J. [L. NAGESWARA RAO] New Delhi, April 16, 2018