

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

Present :

Hon'ble Justice Moushumi Bhattacharya

IA No: GA 1 of 2022

In

A.P.- COM 281 of 2024

SRMB Srijan Limited

Vs.

Great Eastern Energy Corporation Limited

For the petitioner : Mr. Jishnu Saha, Sr. Adv.
Mr. Sakya Sen, Adv.
Mr. Arnab Das, Adv.
Mr. Amritam Mandal, Adv.
Ms. Akansha Yadav, Adv.
Ms. Syeda Romana Sultan, Adv.

For the respondent : Mr. Ratnanko Banerji, Sr. Adv.
Mr. Sarvapriya Mukherjee, Adv.
Mr. Kanishk Kejriwal, Adv.
Mr. Shounak Mitra, Adv.
Mr. Kaushik Chakravortty, Adv.

Last heard on : 26.02.2024

Delivered on : 29.02.2024.

Moushumi Bhattacharya, J.

1. The petitioner/award-debtor seeks unconditional stay of an Arbitral Award dated 21.6.2022 under the second *proviso* to section 36(3) of The Arbitration and Conciliation Act, 1996.

2. The respondent invoked arbitration proceedings after the petitioner terminated the contract, seeking specific performance of the Gas Supply and the Purchase Agreement (GSPA) and damages. The Arbitral Tribunal held the termination of the GSPA to be wrongful and illegal and awarded a sum of Rs. 58,50,45,169/- to the respondent along with damages. The respondent presently claims an amount of Rs. 101,39,93,149/- as the outstanding amount due to the respondent/award-holder.

3. The petitioner prays for unconditional stay on the ground that the Arbitration Agreement was induced by fraud.

4. Learned counsel appearing for the petitioner/award-debtor makes the argument under 2 heads, namely, that the Agreement dated 11.5.2011 was executed in violation of the order passed by the Petroleum and Natural Gas Regulatory Board (PNGRB) and an order dated 25.3.2011 passed by the Delhi High Court. Counsel submits that any act done in violation of order of Court is *non est*. The second argument is that the GSPA is vitiated by fraud and misrepresentation as the respondent/award-holder deliberately failed to disclose show-cause notices of 3.12.2010 and 15.12.2010 which were issued to the respondent to stop any incremental activity with immediate effect till the matter was decided by the PNGRB. Counsel submits that the petitioner

was hence fraudulently induced to enter into the GSPA with the respondent which was clearly voidable on the ground of fraud. It is also submitted that fraud cannot be put into any straight jacket definition and that the facts of the present case must be seen in the context of the order passed by the PNGRB and the Delhi High Court.

5. Learned counsel appearing for the respondent/award-holder places the relevant facts to deny that there was any violation of the PNGRB or the Delhi High Court orders or fraud in the form of suppression or otherwise on the part of the respondent. Counsel submits that one of the witnesses of the petitioner had himself relied upon the respondent's Balance Sheets for the relevant financial years which disclosed the orders passed by PNGRB and the Delhi High Court. Counsel submits that the orders were in the public domain i.e on the website of the respondent.

6. The brief facts which are undisputed and relevant to the matter are narrated below.

7. The question of the Arbitration Agreement being induced or effected by fraud rides on the orders passed by the PNGRB and the Delhi High Court. Therefore, both these issues are being dealt with together.

8. The petitioner/award-debtor's case is that the petitioner was induced into executing the Agreement and proceeding with the same without any knowledge of the orders passed by the PNGRB and the Delhi High Court, by which, according to the petitioner, the respondent was restrained from

laying the pipelines for supply of the gas under the terms of the agreement. The questions which hence become germane are whether

(i) there was any restraint on the respondent, at the material point of time, to execute the agreement with the petitioner or proceed with the same, and

(ii) If yes, whether the respondent suppressed the orders of the PNGRB or the Delhi High Court for the purpose of inducing the petitioner to execute the Agreement?

Did the respondent act in contravention of any order?

9. With regard to the first point, the records show that the initial show-cause notice of PNGRB dated 3.12.2010, which directed the respondent to stop incremental activity, was challenged before the Delhi High Court. The Delhi High Court passed the final order dated 21.1.2011 directing PNGRB to hear the parties and the reply of the respondent. PNGRB passed an order dated 18.3.2011, whereby the respondent was not restrained from supplying or selling Coal Bed Methane (CBM) gas to its customers. The said order only imposed a monetary penalty on the respondent.

10. The order of PNGRB was set aside by the Delhi High Court on 11.11.2013 with a direction on PNGRB to hear the matter afresh. There was no order on the respondent to stop supply of CBM to its customers including the petitioner.

11. The parties executed the GSPA on 11.5.2011 in the meantime whereby the respondent was to supply CBM to the petitioner for 25 years till

May, 2036. Admittedly, as on the date of execution of the agreement, the penalty imposed by PNGRB by the order dated 18.3.2011 was stayed by the Delhi High Court on 25.3.2011. There was no other direction on the respondent to stop supply of CBM or remove CBM supply line except a monetary penalty which the respondent complied with by depositing Rs. 50 lakhs. The later orders of the Delhi High Court also did not prohibit the respondent either from entering into CBM supply agreements or supply CBM to its customers including the petitioner. It is relevant to mention that the petitioner obtained CBM from the respondent and also paid for the same during the period of the contract i.e. from 11.5.2011 till the date when the petitioner terminated the Agreement on 7.7.2014.

12. It is also relevant that the subsequent order of PNGRB dated 31.3.2014 continued to allow the respondent without any restraint from supplying CBM to its customers and only imposed a monetary penalty. Moreover, the respondent filed a writ petition challenging the aforesaid order of the PNGRB and the Delhi High Court stayed the said order on 28.4.2014. The Delhi High Court restrained PNGRB from taking any coercive steps and allowed the respondent to continue supply CBM through the pipeline as it existed on that date. By a later order dated 1.8.2014, the Delhi High Court noted that CBM is a valuable natural resource and allowed the respondent to replace certain pipelines of its customers. The order of 28.4.2014 was made absolute on 22.9.2014 till disposal of the writ petition. The writ petition is pending as on date.

13. The above sequence of orders indicates that there was no restraint on the respondent, at any point of time, either by PNGRB or by the Delhi High Court, to stop supply of CBM to its customers or remove CBM supply lines for performing the respondent's contractual obligations.

The Petitioner, in any event, was all along aware of the Orders

14. Apart from the above, the material placed before the Court further shows that the petitioner/award-debtor was aware of and had knowledge of the orders of the PNGRB as well as of the Delhi High Court. The fact of the petitioner's knowledge would be relevant since the petitioner mounts its argument on fraud and suppression / lack of disclosure on the part of the respondent.

15. The records show that the respondent disclosed the orders passed by the PNGRB and the Delhi High Court in its Financial Statements which were available on the respondent's website and were also filed with the Ministry of Corporate Affairs. The disclosures were in fact the part of the respondent's Balance Sheets from 2010-2011 onwards which forms part of the respondent's affidavit-in-opposition in the present proceeding. Moreover, the director of the petitioner, one Mr. Ashish Beriwal, one of the 4 witnesses in the arbitration proceeding, disclosed and relied upon the respondent's Balance Sheets for the financial year 2014-15 in his affidavit of evidence filed before Arbitral Tribunal. Mr. Beriwal's affidavit also states that he obtained the Balance Sheets from the website of the respondent. The concerned Balance Sheets disclose the orders of the PNGRB as well as Delhi High Court.

16. Hence, the orders of the PNGRB and the Delhi High Court were not only in the public domain, i.e., on the respondent's website, but were also part of the Balance Sheets of the respondent which were in possession of the petitioner at least in 2017.

17. For a contract to be treated as voidable at the option of one of the parties to the contract, it must be shown that the consent to the agreement was obtained by coercion, fraud or misrepresentation. The exception to section 19 of The Contract Act, 1872 would apply where the party alleging fraud had the means of discovering the truth with ordinary diligence. Since the orders of the Delhi High Court and the PNGRB were in the public domain and were also disclosed by the respondent in its Balance Sheets and the petitioner had itself relied on through its witness, the case of the petitioner would fall (also as in collapse) within the exception to section 19 of the Contract Act, 1872.

18. The petitioner's argument of the Arbitration Agreement being induced or effected by fraud is hence without substance and is accordingly rejected.

The second proviso to section 36(3) of the 1996 Act requires a *prima facie* case for fraud

19. The second *proviso* to section 36(3) of The Arbitration and Conciliation Act, 1996, inserted into the Act in 2021 with retrospective effect from 23.10.2015, provides that an award shall be unconditionally stayed pending disposal of the challenge to the award under section 36 of the Act, where the

arbitration agreement or contract, which forms the basis of the award or the making of the award was induced or effected by fraud or corruption.

20. The petitioner/award-debtor has only argued fraud and the Arbitration Agreement being vitiated by the fraudulent inducement thereof.

21. The second *proviso* to section 36(3) requires the Court to be satisfied of a *prima facie* case of the arbitration agreement being vitiated thus. The words "*prima facie*" as a part of the requirement of the Court's finding contemplates a finding of fraud on the face of the record, that is to say from a first-blush look of the arbitration agreement or the award. "*Prima facie*" does not require the Court to delve into the merits of the dispute or unravel the records by way of a detailed consideration. The inducement to the complaining party to enter into the arbitration agreement or the making of the award being tainted by fraud must be plain and ready to be discovered even without a detailed enquiry into the facts.

22. Section 17 of the Contract Act, 1872 defines "Fraud" as including any of the acts committed by a party to a contract or with his connivance or with his agent to deceive another party or to induce him to enter into the contract where the suggestion of a fact is made which the party making it knows to be untrue. Fraud also takes within its fold active concealment of a fact by the party having knowledge of the fact or a promise made without the intention of performing it or any other act which is fitted to deceive. An act or omission which the law specifically declares to be fraudulent (sub-sections (1) – (5) of section 17) is also covered by section 17.

23. The Explanation to the sub-sections to section 17 further clarifies that mere silence as to the facts likely to affect the willingness of a person to enter into a contract is not fraud unless the circumstances of the case are such that it is the duty of the person keeping silence to speak or unless the silence is in itself equivalent to speech. It is relevant that section 17(2) contemplates “active concealment” which points to deliberate non-disclosure with a pre-meditated intention to deceive the other party or induce him to enter into the contract.

24. In the present case, the petitioner seeks to make out a case of fraud on the part of the respondent on account of the respondent’s alleged non-disclosure of the orders passed by the PNGRB and the Delhi High Court at the relevant point of time. The presumption is that the petitioner would not have entered into the agreement with the respondent had the respondent disclosed these orders. The case argued is that the petitioner was induced into executing the Arbitration Agreement/GSPA with the respondent on the fraudulent misrepresentation that the respondent was free to supply CBM gas to the petitioner for 25 years.

Conclusion

25. To sum up, the series of orders passed by the PNGRB and the Delhi High Court shows that first, there was, in fact, no restraint on the respondent at any point of time, material or otherwise, to perform or continue to perform the Agreement in the terms thereof. Second, the petitioner was all along aware of the orders of the PNGRB and the Delhi High Court from 2010-11 onwards as would appear from the respondent’s

Balance Sheets for relevant years. Even if it is assumed that the petitioner / or its witness did not check the particular pages in the Balance Sheets disclosing the orders, such oversight would fall within the exception to section 19 of the Contract Act which sets the standard to “ordinary diligence” of the party who complains, that the truth could easily have been discovered.

26. Fraud has to be spelt out and must be obvious to the eye, at least for the purposes of unconditional stay of an award. Fraud must also be reprehensible or unconscionable conduct with the active intention of deceiving another where the outcome of the award or the execution of an agreement would altogether have been different if the fraud had been discovered : *Elektirm SA vs. Vivendi Universal SA*; (2007) EWHC 11 (Comm).

27. In any event, the petitioner has made vague and omnibus allegations without any particulars of the fraud committed on the part of the respondent.

28. In *Elektrim SA* the Queen’s Bench Division considered the omission to disclose a document and held that negligence or an error of judgment is not fraud and conduct by the party concerned should have contributed in a substantial way to obtaining an award in that party’s favour. In *Double K. Oil Products 1996 Limited v. Neste Oil OYJ*; (2009) EWHC 3380 (Comm); the Queen’s Bench Division relied on *Elektrim SA* and held that where the allegation is fraud in the production of evidence, the onus is on the applicant to make good the allegation by cogent evidence where the applicant must show that the new evidence relied upon to demonstrate the

fraud was not available at the time of arbitration and would have had an important influence on the result. In *The West Bengal Small Industries Development Corporation Limited WBSIDC v. Kaushalya Infrastructure Development Corporation Limited KIDCO*; AP 174 of 2022, this Court dwelt on the meaning of fraud, as commonly understood, to have the potential to vitiate and undo all attendant and consequent happenings and is plain and indefensible on the face of the record. In that case, the Court found that complaint of the petitioner/award-debtor with regard to non-disclosure of a note-sheet did not clear the threshold for the award to be unconditionally stayed on the ground of fraud or corruption.

29. In *Omprakash Verma v. State of Andhra Pradesh*; (2010) 13 SCC 158, the Supreme Court held that once a decision of a Court is set aside, it ceases to exist. The same view was expressed by the Bombay High Court in *Ganesh Benzoplast Ltd. v. Union of India*; 2021(2) Mh.L.J 213, i.e that when an order is set aside by a superior authority it is erased from the record book as if it was never passed. These decisions are relevant in the context of the Delhi High Court setting aside the order of the PNGRB on 11.11.2013 whereby the PNGRB had imposed a monetary penalty on the respondent.

30. The decisions cited on behalf of the petitioner are required to be dealt with. *Martin Burn Ltd. v. R. N. Banerjee*; AIR 1958 SC 79 is distinguishable on facts since *prima facie*, there is no case of non-disclosure against the respondent.

31. *Surjit Singh v. Harbans Singh*; (1995) 6 SCC 50, *Bijali Naskar v. Amalendu Saha*; (1999) 2 CHN 704 were concerned with transfer of interest

in a property to a suit in the teeth of a subsisting order of restraint and specific performance of a transfer of property, respectively. These decisions lose relevance in view of the specific finding of the Court that there was no order of restraint on the respondent from performing the terms of the agreement. *Venture Global Engineering v. Satyam Computer Services Limited*; (2010) 8 SCC 660 involved unearthing of a fraud subsequent to passing of the award while in the present case, the respondent/award-holder disclosed the orders on its website and the said disclosures were also in the possession of the award-debtor.

32. It is evident from the records that the petitioner's only intention for filing the present application is to avoid making any deposit for securing the award. This would also be clear from the prayer in the application GA 1 of 2022. The respondent/award-holder has been deprived of the fruits despite the award being of 21.6.2022. The Court, hence, sees no impediment for the respondent to execute the award unless the petitioner secures the award on appropriate terms.

33. The awarded amount was Rs. 58,50,45,169/- along with interest as on 21.6.2022. The accrued interest and the amount payable along with principal sum as on 13.9.2022 is approximately Rs. 89.71 crores. The respondent has calculated the outstanding amount of Rs. 101,39,93,149/- till 23.2.2024. Since the Court has recorded its lack of satisfaction on the *prima facie* case made out by the petitioner/award-debtor on the Arbitration Agreement being induced / effected by fraud, the prayer for unconditional stay of the award is rejected.

34. GA 1 of 2022 in AP 883 of 2022 is dismissed.

35. The petitioner/award-debtor is therefore directed to have the award stayed on appropriate terms. The petitioner shall secure Rs. 70 crores, 50% of which i.e Rs. 35 crores shall be deposited by way of a Bank guarantee and the remaining 50% by way of cash to the Registrar, Original Side of this Court. The Registrar, Original Side shall invest the cash component in an interest-bearing account with a nationalised bank.

36. The petitioner shall secure Rs. 70 crores in the manner directed within 5 weeks from the date of pronouncement of this judgment that is by 2.4.2024 (the petitioner may be saved from the 1st of April). The respondent will be at liberty of executing the award on and from 3.4.2024 if the petitioner defaults on these directions.

37. The parties shall be at liberty of mentioning AP 883 of 2022 for listing.

Urgent photostat certified copies of this order, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)