IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.09.2021

CORAM :

THE HON'BLE MR.SANJIB BANERJEE, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE P.D.AUDIKESAVALU

OSA (CAD) No.83 of 2021

Kothari Industrial Corporation Limited,
rep. by its Chairman Pradip D.Kothari,
No.114, Nungambakkam High Road,
Kothari Building, 4th Floor,
Chennai – 600 034. ... Appellant

Vs.

1.M/s.Southern Petrochemicals Industries
Corporation Limited,
rep. by its General Manager (Legal)
R.Venkata Krishnan,
No.88, Mount Road, Guindy,
Chennai – 600 032.

2.The Sole Arbitrator,
Justice F.M.Ibrahim Kalifulla,
Former Judge, Supreme Court of India,
No.141, Eldams Road, Flat No.4,
Ground Floor, Chennai – 600 018. ... Respondents

(*Respondent No.2 deleted from the array of parties as per this judgment*)

Prayer: Appeal filed under Section 13(1) of Commercial Courts Act, 2015 read with Order XXXVI Rule 1 of the Original Side Rules and under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 against the order dated 23.02.2021 passed in O.P.No.361 of 2018.

For Appellant : Mr.S.Sivaraman

For Respondent : Ms.Nalini Chidambaram
Senior Counsel
for Ms.C.Uma

JUDGMENT

(Delivered by *the Hon'ble Chief Justice*)

This appeal is in complete abuse of the process and a dishonest attempt by the appellant to wriggle out of its obligation.

2. For a start, the name of the second respondent is deleted from the array of parties. It is a pernicious practice in this court to implead arbitrators or arbitral tribunals when there is no need to do so. Often, arbitrators are embarrassed upon receipt of notice. It is only in a rare case when a personal allegation is made against an arbitrator may such arbitrator be impleaded. Just as in case of a revision or an appeal the lower forum or the Judge manning the

lower forum is not impleaded as a party, in proceedings under Section 34 of the Arbitration and Conciliation Act, 1996, the arbitrator or the members of the arbitral tribunal are utterly unnecessary parties unless specific personal allegations are levelled against them that would require such persons to answer the allegations.

3. The appeal arises out of an order dated February 23, 2021 passed on the appellant's petition under Section 34 of the said Act. The order impugned refers to the nature of the challenge canvassed and notices that by an order of January 6, 2017, the then Hon'ble Chief Justice of this court was pleased to appoint an arbitrator following a request under Section 11(6) of the said Act. Indeed, the order of the Chief Justice had dwelt on the aspect of limitation which was later canvassed by the appellant before the arbitrator and which has also been taken as a ground in the present appeal.

4. At paragraph 11 of the impugned judgment, the principal grounds of challenge fashioned before the arbitration court were

recorded. The first ground was that the arbitral proceedings were not maintainable since the arbitration clause was incorporated in an agreement of sale of 1987 which had come to an end upon the execution of the sale deed in the year 1989. The second ground was that the claim ought to have been made within three years from the demand made on December 24, 2001. Incidentally, the claim was made on account of electricity dues by Tamil Nadu Electricity Board in respect of a unit that was formerly owned and controlled by the appellant herein and, by the sale completed in the year 1989, such unit stood transferred to the respondent herein. The third ground was that there was no agreement for grant of interest and, as such, the award of interest by the arbitrator was flawed.

5. The most important ground appears not to have been recorded in the judgment impugned. It is the contention of the appellant herein that the liability that had arisen pertained to the unit that had been transferred by the appellant to the respondent and the respondent had issued a letter of undertaking to TNEB to

take responsibility for discharging the debt which was the subject-matter of a challenge by way of a writ petition. The writ petition had been filed by the appellant herein upon a demand for a sum of about Rs.82,77,622.88 being made on account of withdrawal of tariff concession. The respondent herein got impleaded in the writ petition and undertook in writing to discharge the liability on such account. The writ appeal finally failed. The liability had to be discharged by the respondent by virtue of the undertaking furnished in court or made available to the electricity authorities.

6. A claim was subsequently made on the appellant herein on the ground that it was the appellant herein which was liable for the payment to the electricity authorities and the fact that the respondent had discharged the liability entitled the respondent to seek refund of the entire amount from the appellant herein. It may also be noticed that by the time the writ appeal failed, the total amount due to the licensee was swelled to over Rs.2 crore and the entirety of the liability was discharged by the respondent by payment to the appropriate authorities.

7. In the award rendered by the arbitrator on September 30, 2017, the matter has been discussed in great detail. The discussion begins from paragraph 25 of the award and at paragraph 51 thereof, the arbitrator holds as follows:

> "(51) It is true that the said payment was made by TPL on 18.09.2002. On behalf of the Respondent it was pointed out that there was an undertaking executed by the Claimant in favour of the Electricity Board on 01.07.1991, wherein the Claimant with its eyes wide open undertook not to claim any relief as against the Electricity Board arising out of the Writ Petitions filed by the Respondent and that even if ultimately some impediment was created for the Board to recover the said sum, the Claimant would discharge the liability of the belated payment surcharge. The learned counsel would, therefore, contend that the said undertaking, namely Ex.C-9 would preclude the Claimant from making a claim as against the Respondent. The said submission is absolutely without any substance. In my humble opinion, it was an undertaking executed by the Claimant in favour of the Electricity Board and the Respondent was not a party to the said undertaking. The said undertaking came to be executed by the

> Claimant to and in favour of the Electricity Board to the effect that it would not claim any benefit even if the litigations preferred by the Respondent went against the Electricity Board. There is no specific undertaking in the said document that the Claimant gave up its rights even as against the Respondent. Therefore, I do not find any scope to use the said document Ex.C-9 to deprive the Claimant of its entitlement as against the Respondent herein."

8. What is recorded at the paragraph quoted above is only the culmination of the discussion and the finding pertaining to the relevant documents rendered by the arbitrator. Over at least the previous 18 pages of the award, the aspect of limitation, the aspect of liability and of the appellant herein having taken the benefit of the concession were referred to in great detail.

9. In the judgment and order impugned, the arbitration court noticed, inter alia, at paragraphs 14 to 16 thereof that the arbitrator had discussed the issue at length and had come to the conclusion that the claim was not barred by limitation. The court noticed that

there was no dispute between the parties at the relevant point of time, since both the parties had challenged the demand of TNEB. The arbitration court also referred to the examination of the evidence by the arbitrator and indicated that in the limited scope of interference available under Section 34 of the said Act, the court was required to ascertain whether the impugned award suffered from any patent illegality. Indeed, in the previous paragraphs of the impugned judgment, the arbitration court noticed how the reference was born and how the aspect of limitation that had been urged even at the stage of Section 11 of the said Act had been dealt with by the Hon'ble Chief Justice.

10. The scope of interference under Section 34 of the said Act is limited. The court does not sit in appeal over an award which has been challenged before it. The court does not re-appreciate the evidence and it is judicially accepted that the arbitrator is the final authority as to both the quality and the quantity of the evidence. The order impugned appropriately reads the award, finds that the arbitrator had applied his mind to the matters in issue and dealt

with all three aspects that were urged by the appellant before the arbitration court, namely that the claim was not maintainable, that the claim was barred by limitation and that no amount was payable by the appellant herein, including the interest that has been awarded. The arbitration court found adequate reasons having been furnished by the arbitrator in the impugned award.

11. Once the appropriate tests are applied at the stage of Section 34 of the said Act, there is very little room for an appellate court to interfere with the order. Litigants appear to be taking a chance by not accepting the finality of an award and questioning the same on specious grounds by invoking Section 34 of the Act and, even thereafter, pursuing worthless challenges in appeal from the order of dismissal of the petition under Section 34 of the said Act. One of the principal ways how litigants are encouraged to adopt this procedure and clog up courts with undeserving matters is the reluctance on the part of the courts to award appropriate costs. In this case, both the petition under Section 34 of the said Act and this worthless appeal were a complete waste of time. The

contention of the appellant that the arbitrator did not look into the matter flies in the face of at least 20 pages of discussion in the award.

12. For the aforesaid reasons, the judgment and order impugned dated February 23, 2021 does not call for any interference. The arbitral award dated September 30, 2017 appears to be perfectly justified and in order. For the appellant's inglorious efforts in this court, the appellant will pay costs assessed at Rs.50,000/- to the respondent herein and further costs assessed at Rs.50,000/- to the Tamil Nadu State Legal Services Authority. Such costs need to be tendered within a month from date.

OSA (CAD) No.83 of 2021 is dismissed as above. C.M.P.No.16099 of 2021 is closed.

(S.B., CJ.) (P.D.A., J.)
29.09.2021

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To:
The Sub Assistant Registrar
Original Side
High Court, Madras.

THE HON'BLE CHIEF JUSTICE
AND
P.D.AUDIKESAVALU, J.

(sasi)

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