NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

M.A. Diary No.20972 of 2021

In

Civil Appeal No.9847 of 2014

INDIA POWER CORPORATION LTD. ...APPELLANT

VERSUS

EASTERN COALFIELDS LIMITED RESPONDENT/ APPLICANT

J U D G M E N T

VIKRAM NATH, J.

1 Civil Appeal No.9847 of 2014 was allowed vide order dated 17.10.2014 whereby Justice S.S. Nijjar, a former Judge of this Court was appointed as sole Arbitrator to arbitrate upon the disputes between the parties. The said order is reproduced below: -

> " Leave granted.
>
> Heard Mr. Kapil Sibal, learned senior counsel appearing for the petitioner and Mr. Anupam Lal Das, learned counsel for respondent no.1.
>
> In the course of hearing, learned counsel for the parties very fairly submitted that they have no objection if a former

Judge of this Court is appointed as a Sole Arbitrator to arbitrate upon the disputes that have arisen in respect of the contract.

Regard being had to the aforesaid submission, we appoint Justice S.S. Nijjar, a former Judge of this Court as the Sole Arbitrator to arbitrate upon the disputes. The learned arbitrator shall decide the terms and conditions after deliberating with the parties.

Registry is directed to forward a copy of this order to the learned Arbitrator.

The appeal is allowed on above terms. There shall be no order as to costs."

2. The sole Arbitrator gave the award dated 15.02.2021, after considering the claims and counter claims of the parties. The operative portion of the award as contained in paragraph 162 is reproduced below: -

"162. In view of the aforesaid conclusions the following award is made:

(a) The Respondent shall pay to the Claimant a sum of Rs.24.7256 Crores as WDV.

(b) The aforesaid amount shall be paid with interest @9% with effect from 06.10.2016 till payment of the amount.

(c) The Claimant shall pay to the Respondent a sum of Rs.18,66,86,521/-

(d) The aforesaid amount shall be paid with interest @9% with effect from 06.10.2016 till payment of the amount.

(e) All other Claims and Counter-Claims are hereby dismissed.

COSTS:

In the peculiar facts and circumstances of this arbitration, both the parties shall bear their own costs.

This Award is being issued on a stamp paper of Rs.200/-. The Claimant shall pay the differential stamp duty in accordance with law."

3. M.A. No. 20972 of 2021 has been filed by the respondent 'Eastern Coalfields Limited' (hereinafter referred to as the "ECL") with a prayer to appoint a sole arbitrator to examine the issue pertaining to the report submitted by MECON as mentioned in paragraph 160 of the award. The relief claimed by means of this application is reproduced below: -

> "**PRAYER**
>
> In view of the facts and circumstances of the case, your Lordship may graciously be pleased to:
>
> a) Appoint a Sole Arbitrator to examine the issue pertaining to the report submitted by MECON more particularly mentioned in paragraph No.160 of the Award which was not adjudicated by the Hon'ble Tribunal;
>
> b) Pass any other order/orders which this Hon'ble Court may deem fit."

4. The only ground raised for seeking a fresh appointment of Arbitrator is to the contents of paragraph 160 of the award. It is for this reason that the present application has been filed for appointment of Sole Arbitrator.

5. According to the respondent-applicant, the learned Arbitrator could not adjudicate upon the MECON report, as it required further evidence to be recorded, and soon after delivering the award, on 15.02.2021, the learned Arbitrator died on 26.03.2021.

6. Learned Counsel for the applicant, ECL during the course of the arguments not only requested for appointment of Arbitrator with respect to the contents of the paragraph 160 of the award but raised a

further issue relating to Section 33 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the 1996 Act') for requiring correction in the computation of the rent payable to the applicant ECL for the period March 2016 till October 2016 which was inadvertently left out by the learned Arbitrator while giving the award. Reference was made to paragraphs 126 to 130 and 132 of the award. It is also submitted that although limitation for moving an application under Section 33 is 30 days but in the present case as the limitation has stopped running and stood extended by the orders passed by this Court in the *suo moto* petition, the applicant would have a right to maintain an application under Section 33 for correction of the award for which the present application has been filed on 2nd September, 2021.

7. On the other hand, learned counsel for the appellant 'India Power Corporation Limited' (hereinafter referred to as the "IPCL") vehemently opposed the application and made the following submissions:

i) Paragraph 160 of the award may not be read in isolation. The background for the same should also be read as recorded in the preceding and succeeding paragraphs. Paragraphs 157 to 161 of the award may be read as a whole. The same will completely clarify the position.

ii) In the part covering paragraphs 157 to 161, the learned Arbitrator was dealing with amendment of counter claim filed by the respondent-applicant i.e. ECL. After considering all aspects of the matter, the application for amendment was dismissed as it would not serve any useful purpose in determining the real question in controversy. Reference may be had to paragraph 161 of the award.

iii) The contents of paragraph 160 of the award records the submission advanced by the counsel for the claimant i.e. the appellant IPCL. If paragraph 160 is examined carefully, the submissions advanced by the counsel for the respondent-applicant may not have much substance.

iv) Award dated 15.02.2021 was a final award and not an interim award; The learned arbitrator had not left anything for further deliberation but had settled the claim and the counter claim between the parties *in toto*.

v) The remedy available to the respondent-applicant was to file objections under Section 34 of the 1996 Act against the award, if it had any grievance.

vi) Further, the objection under Section 34 of the 1996 Act were filed before the Delhi High Court which was registered as **O.M.P.(COMM) 328/2021, CAV 49/2021, I.A. Nos. 14204-14207/2021, Eastern**

Coalfields Limited vs. India Power Corporation Limited. The said objection has since been decided by the Delhi High Court vide judgment dated 29.10.2021 and the same has been dismissed. A copy of the judgment of Delhi High Court dated 29.10.2021 has been filed by the respondent-applicant along with I.A.No.154735 of 2021.

vii) The issue relating to Section 33 of the 1996 Act with respect to correct computation of rent cannot be considered for several reasons. There is not a whisper in the application for direction regarding the issue raised under Section 33. Such a plea cannot be raised during the course of the arguments by way of oral or written submissions.

viii) Even otherwise no correction as raised was required inasmuch as no computation was undertaken by the learned Arbitrator and the amount awarded as rent was the same as claimed by the applicant ECL. Even on merits such plea was not tenable.

8. Having considered the submissions, we now proceed to analyse both the contentions of the applicant.

9. Paragraph 160 of the award cannot be read in isolation. It was a part of the award dealing with the "**Application for amendment of counter claim**" filed by respondent-ECL. The award carried the above sub-title before paragraph 157. Paragraph 160 contains mere submissions advanced on behalf of the appellant/claimant. MECON report was called with respect to the amendment of the counter claim regarding expenses required for putting the plant into running condition. After deliberating upon the said amendment, at the end of paragraph 161, the conclusion was that the application for amendment stood dismissed. Thus, the paragraphs 157 to 161 will have to be read as a whole to understand as to how the award proceeds to deal with the amendment to the counter claim. Paragraphs 157 to 161 of the award being relevant are reproduced hereunder: -

> "157. At this stage it may be noticed that the Respondent filed an application dated 20.11.2019 seeking permission of the Tribunal to amend the Counter-claim. Claimant was permitted to file reply to the same on or before 22.11.2019. Claimant has filed the reply on 20.11.2019. Thereafter arguments in Rejoinder were heard on 27.11.2019 and 02.12.2019. However, no oral submissions were made on the application by either party. I have considered the application on the basis of the pleadings. It has been noticed earlier that Respondent had issued a Notice inviting Tender on 16.01.2012 for "…(a) Replacement of Existing twenty (20 year old 3X10 MW stoker-fired boilers by 3X10 MW Fluidised bed combustion (FBC) boilers, wherein the successful bidder will made his own investment for replacement of existing stoker fired boilers by FBC Boilers and associated other plant and machineries including the civil works and enter into Lease Agreement with ECL for running of the power plant….". Therefore, it appears that the run down condition of the existing stoker-fires boilers had become irrelevant. The

application for amendment of the counter-claim can be dismissed at this stage only.

158. Even from the evidence on record it is evident that the plant was in running condition at the time when the lease expired by efflux of time. The Respondent was fully aware that the plant being in running condition was wholly irrelevant, yet the controversy continued even after the issuance of the NIT. The NIT clearly indicates in clause 1(b) that the Power Plant is offered for lease "on as is where is basis''. Clause 1(c) further makes it clear that "the existing plant is in operating condition. The plant is to be operated as a Captive Power Plant of ECL". In view of the above clauses, the Respondent cannot now be permitted to raise a further Claim on the ground that the Power Plant had to be put into running condition.

159. Had the possession been taken before issuing the NIT, undoubtedly, the Plant was operating and therefore clearly cannot be said to be not in running condition. It appears that the deterioration, if any, occurred when the Claimant failed to handover the possession as there was no agreement on the determination of WDV of the Plant. It has come in evidence that in four year's time the Plant and machinery had deteriorated considerably as the Plant was lying idle. In view of the detailed submissions made in this regard, on behalf of the Claimant, which are noted at paragraphs 84 to 99 and the reply thereto on behalf of the Respondent, which are noted in paragraphs 104 till 112, it would not be possible to hold that the Claimant is solely responsible for the delayed delivery of possession to the Respondent. On the one hand Claimant was insisting on the basis of the Clause III(a) for the determination and payment of the WDV simultaneously to delivery of possession. On the other hand, Respondent had demanded delivery of possession much prior to the determination of the WDV. Even when the WDV was determined by the Respondent, it was at such a variance to the amount determined by the Claimant, making it impossible for the parties to reach a consensus on the WDV to be paid. In fact, as noticed earlier the Claimant had filed a Writ Petition No.20948 of 2012. In the Calcutta High Court seeking payment of WDV and handing over possession of the Plant. This Petition was disposed of by the High Court on 19.03.2013. The Learned Single Judge noticed "...that there is a subsisting dispute as regards computation of written down value in respect of the additions and alterations made by the writ petitioners in relation to the said generating station. It is for this reason the dispute still remains unresolved. The petitioners continue to remain in possession of the generating station and the respondent coal company has also not taken any legal step to recover possession of the station...". It is noticed by the Learned Single Judge that the main prayer in the Writ Petition is "to prevent the respondents from obtaining recovery of

possession of the generating station without releasing the written down value of the added assets, as per computation of the petitioners." It is also noticed that in spite of orders passed by the Court on 12.10.2012 that "…steps ought to be taken by the committee to not only physically verify the plant and machinery but also other assets of the plant by ascertaining the book value thereof…". no steps were taken. This exercise was to be completed by 12.12.2012. Since, the exercise was not completed by that time, the time was extended till 08.01.2013. At the time of final disposal of the Writ Petition the Learned Single Judge observed that the dispute does not seem to be resolvable by the committee set up by the respondent. It is noticed that the issues involved are also highly disputed factual issues. The matter was therefore referred to arbitration under the relevant clause of the lease deed. In appeal the Division Bench upheld the order of the Learned Single Judge on 19.03.2014. As noticed earlier the Supreme Court referred the matter to the Sole Arbitrator by order October 17, 2014, with the observation that the Sole Arbitrator is "to arbitrate upon the disputes". From the above, it seems apparent that the reference to arbitration is not limited to disputes that existed prior to the passing of the order by the Supreme Court. Therefore, it cannot be accepted that the reference to arbitration would not cover the Counter-Claims.

160. It must also be noticed here that the Claimant has raised a preliminary objection on the ground that the application for amendment suffers from delay and laches. Therefore, seeks it's dismissal on this short ground. It is submitted that Claimant has already filed its objection to the MECON report and also filed a report submitted by M/s AKB Power Consultants Pvt. Ltd. For consideration of these two reports, further evidence will have to be recorded on behalf of both the parties.

161. It is matter of record that the application for amendment was filed at the time when the Respondent was to commence its arguments. In my opinion that the application cannot be allowed at this stage. The amendment must be necessary for the purpose of determining the real question in controversy. As noticed above, the issuance of the NIT clearly demonstrates the intention of the respondent was to replace the old machinery and plant to Stoker Fired Boilers by Fluidised bed Combustion Boilers. Therefore, the condition of the old machinery as well as the question of plant being in a running condition had become irrelevant. For the reasons stated above, the application for amendment is dismissed as it will serve no useful purpose in determining the real questions in controversy between the parties."

10. By means of the said amendment, the ECL had claimed that the power plant should be put into running condition before handing over its possession. The learned Arbitrator deals with the issue in detail and after considering the pleadings of the parties as also the order passed by the Calcutta High Court found that the counter claim sought to be raised by the said amendment regarding the plant being in a running condition was irrelevant in view of the dispute raised.

11. The MECON report and the M/s AKB Power Consultants Pvt. Ltd. report, both related to the expenses sought to be incurred in bringing back the plant into running condition. Parties had filed their objections to both the reports as there was substantial difference in the figures indicated in the two reports. But once the Arbitrator found that the amendment in the Counter-claim itself was not relevant for the adjudication, there was no question of proceeding any further in inviting evidence etc. with respect to the reports. The submission therefore, that there is requirement of the appointment of Arbitrator to carry out the exercise as per paragraph 160 of the award is therefore completely untenable. The submission is based upon the misreading and misrepresentation of the said paragraph, in isolation bereft of preceding and succeeding paragraphs. The same is accordingly rejected.

12. A bare perusal of the award, in particular paragraph 162, which is the operative portion, does not in any manner indicate any kind of it being an interim award or that any aspect of the matter was to be further considered. In any case, the learned arbitrator did not record any further observation that for leading of further evidence any date has to be fixed or the parties were given opportunity to produce their evidence. It was a mere submission that consideration of MECON report would require further evidence but was not found to be necessary by implication.

13. The next submission relating to the applicability of Section 33 of the 1996 Act also has to fail for two reasons. Firstly, that the same is neither pleaded nor prayed in the application and secondly, once the Arbitrator, while awarding rent as counter claim had accepted the figures as quoted by the ECL, no issue of any error on the part of the Arbitrator in not correctly calculating the rent could be raised. The figure as claimed by the ECL is quoted in paragraph 73(1)(ii) of the award which has been accepted by the Arbitrator in the award.

14. There is another aspect of the matter which disentitles the applicant from any relief in this application. A perusal of the judgment of the Delhi High Court in Section 34 of the 1996 Act proceedings clearly reveals that the point which is being raised here was raised before the Delhi High Court. The Delhi High Court also did

not agree with the submission of the respondent-applicant after considering paragraphs 157 to 161 and proceeded to hold that the observations made in paragraph 160 do not render the impugned order to be interim in nature, and that the award finally decided the dispute which was subject matter of the reference.

15. For all the reasons recorded above, the application deserves to be rejected and is accordingly rejected.

.....J.
[VIKRAM NATH]

.....J.
[M.M. SUNDRESH]

NEW DELHI
MARCH 15, 2022.