Zynergy Solar Projects & Services Pvt Ltd *v* Phoenix Solar Pte Ltd [2017] SGHC 223

Case Number : Originating Summons No 209 of 2017

Decision Date : 13 September 2017

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : P Padman (KSCGP Juris LLP) and Dennis Liu, instructing solicitor (Infinitus Law Corporation) for the plaintiff; Chong Jia Hao and Sabrina Matthew (Legal Standard LLP) for the defendant.

Parties : Zynergy Solar Projects & Services Pvt Ltd — Phoenix Solar Pte Ltd

Arbitration – Award – Recourse against award – Setting aside

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 143 of 2017 was withdrawn.]

13 September 2017

Belinda Ang Saw Ean J:

1 The plaintiff applied under s 24(b) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA") to set aside an arbitral award made on 31 January 2017 between it and the defendant on grounds of breach of natural justice, namely that the arbitrator had failed to consider the plaintiff's arguments. In the arbitration, the defendant (as claimant) had succeeded in its claim against the plaintiff (as respondent) for the plaintiff's breach of its obligation under a debt settlement agreement to pay the defendant USD 500,000. I dismissed the application on 17 July 2017. The plaintiff has since appealed and I now furnish the reasons for dismissing the plaintiff's application.

Background and the arbitration

2 The plaintiff's subsidiary, Greatshine Holdings Pvt Ltd ("Greatshine"), and the defendant entered into a supply contract on 27 June 2011 for the development of a solar power plant in a village in India ("Supply Contract"). The defendant and Alcetrona Energy Pvt Ltd concurrently issued a letter of undertaking agreeing to be jointly and severally responsible to the plaintiff for the completion of the project ("Letter of Undertaking"). The project's superintending engineer issued a completion certificate for the power plant on 28 January 2012 but the power plant faced many problems, such as serious losses in power generation, discolouration and burn marks on thin film panels, and failing inverters. These problems remained unresolved.

3 On 1 August 2013, the defendant, Greatshine, and the plaintiff entered into a Debt Settlement Agreement ("the DSA") acknowledging that Greatshine owed USD 1,405,794.00 to the defendant as at March 2012 under the Supply Contract. The plaintiff agreed in the DSA to pay the defendant a "Residual Obligation" sum amounting to USD 500,000. The plaintiff argued that it entered into this contract in reliance on an express representation that the defendant would work to resolve the underlying problems with the power plant.

4 The DSA provided for disputes to be resolved by arbitration. On 27 May 2016, the defendant issued a notice of arbitration against the plaintiff. The defendant claimed a sum of USD 500,000,

being the plaintiff's Residual Obligation under the DSA, and the plaintiff counterclaimed for rescission of the DSA, and in the alternative, losses for substantial failures of performance of the solar power plant. On 31 January 2017, the sole arbitrator ("the Arbitrator") found for the defendant and awarded it the sum of USD 500,000 together with contractual interest at the rate of 9% per annum calculated daily starting from the first day of delay ("the Award").

The setting aside application

5 The plaintiff applied to set aside the Award on 28 February 2017 on grounds of breach of natural justice. Specifically, it argued that the Arbitrator had not given regard to the plaintiff's submissions and arguments. It filed one supporting affidavit dated 27 February 2017 ("the plaintiff's supporting affidavit") and tendered skeletal submissions. Both the plaintiff's supporting affidavit and the skeletal submissions were substantially the same. Paragraphs 17 to 23 of the plaintiff's supporting affidavit, forming the entirety of their arguments on the alleged breach of natural justice, state:

> 17. In the Award, the Sole Arbitrator concluded at paragraph [150] the following:
>
> *"In any event, whether the Parties to the Supply Contract and the Letter of Undertaking fully performed their obligations is not for the Sole Arbitrator to decide as she is not seized of a dispute under those contracts and the Parties do not allege that this question has any consequence of the Claimant's claim based on the Settlement Agreement "*
>
> (emphasis added)
>
> 18. The Plaintiff had however pleaded that but for the Defendant's express representation that the Defendant will perform its obligations under the Supply Contract and the Letter Of Undertaking by adequately addressing the problems and defects with the Power Plant, the Plaintiff would not have entered into the DAS.
>
> 19. Given that the Defendant has failed to honour its obligation, the Plaintiff pleaded that its liability under the DSA fell away.
>
> 20. In disregarding the Plaintiff's pleadings and submissions without considering their merits, the Sole Arbitrator has misdirected herself by concluding that Parties did not allege that the abovementioned question has any consequence on the Claimant's claim.
>
> 21. Indeed, the Plaintiff's principal argument was that the underlying defects and failure by the Defendant to honour its obligation had a direct and material impact on the Defendant's claim.
>
> 22. I verily believe that the Sole Arbitrator did not have regard to and did not try to understand the submissions and arguments from the Plaintiff. I am advised and verily believe that such conducts disregards the law and amounts to a breach of natural justice.
>
> (emphasis in original)

6 The plaintiff's case was that it was evident from paragraph [150] of the Award that the Arbitrator did not consider the impact of the defendant's fulfilment of its obligations under the Supply Contract and Letter of Undertaking on the plaintiff's obligations under the DSA. The Arbitrator did not do so because the parties "[did] not allege that this question [had] any consequence on the [plaintiff's] claim based on the [DSA]". The plaintiff argued that this was untrue as its position was that it would not have entered into the DSA without the defendant's express representations and

assurances that the defendant would perform its obligations under the Supply Contract and Letter of Undertaking by addressing the problems and defects with the power plant. The Arbitrator was thus wrong in stating that the plaintiff did not allege that the defendant's conduct under the Supply Contract and Letter of Undertaking had any consequence on the plaintiff's obligations under the DSA.

7 The defendant's general manager filed an affidavit in response to the plaintiff's supporting affidavit ("the defendant's reply affidavit") on 23 March 2017. The defendant's reply affidavit pointed to specific paragraphs in the Award dealing with the relevance of the defendant's alleged representations regarding the Supply Contract and Letter of Undertaking to the plaintiff's obligations under the DSA:

> 19. As set out in paragraph 129 to 131 of the Award, the Sole Arbitrator expressly considered the Plaintiff's position regarding the Alleged Representation. The Sole Arbitrator specifically noted the Plaintiff's defences of a breach of an oral collateral contract and, in the alternative, rescission/damages arising from misrepresentation.
>
> 20. I am advised and verily believe that the Sole Arbitrator rejected these arguments. The relevant extracts of the Award are as follows:
>
> *"144. … The Respondent submitted in substance the following defences to explain its failure to pay the Residual Obligation.*
>
> *…*
>
> *146. Second , the Respondent submits that the Power Plant was affected by many defects which were brought to the Claimant's attention on many occasions. Had the Claimant fulfilled its oral promises to support GSH to overcome the defects, GSH would have paid its due under the Supply Contract.*
>
> *147. Third , the Respondent alleges that it would not have entered into the Settlement Agreement save for the Claimant's express representation that it would assist in resolving the problems with the Power Plant. …*
>
> *148. Fourth and finally , the Respondent submits that the Parties entered into an oral collateral contract in parallel to the Settlement Agreement whereby the Claimant agreed to resolve the defects affecting the Power Plant. Given the Claimant's failure to honor the oral collateral contract the Respondent's liability under the Settlement Agreement falls way*.
>
> *149. The Sole Arbitrator considers that the first and second defences are irrelevant to the issues in dispute for the following reasons. The Respondent is not a party to the Supply Contract or the Letter of Undertaking. Hence, the reasons why GSH concluded those contracts have no impact on the Respondent's obligations under the Settlement Agreement. …there is nothing in the Supply Contract and the Letter of Undertaking that suggests that GHS' payment was condition upon the Claimant providing assistance in relation to the defects affecting the Power Plant.*
>
> *…*
>
> *151. Regarding the third defence, which relates to the alleged misrepresentation by the Claimant, the Sole Arbitrator notes the following: In accordance with the principles set out in Wee Chiaw Sek Anna v Ng Li-Ann Genevieve, fraudulent misrepresentation must be satisfied with*

a relatively high standard of proof. That standard is not fulfilled in the present case.

…

156. As regards the Respondent's fourth defence, i.e. the conclusion of an oral collateral contract by the Parties concurrently with the conclusion of the Settlement Agreement, the Sole Arbitrator finds that, for the same reasons set out above in paragraphs 151 to 155, there is no evidence on record of an oral collateral contract concluded by the Parties.

(emphasis in original)

8 The plaintiff did not file a reply affidavit. The defendant also tendered written submissions on 16 July 2017. During the hearing on 17 July 2017, the plaintiff's counsel stated that he would proceed on the written submissions as they stood without making any further oral submissions. He stated that the plaintiff was only trying to make a very narrow point, *ie*, that the Arbitrator had not considered that the DSA had been conditioned on an underlying collateral contract or certain representations made by the defendant. I pointed out that the defendant had, in the defendant's reply affidavit, referred to specific paragraphs in the Award that appeared to have dealt with the point the plaintiff was alleging that the Arbitrator had missed and asked if the plaintiff had any response. The plaintiff's counsel stated that he was aware of the defendant's reply affidavit but would not make any oral response to those paragraphs; he would be relying on the plaintiff's written submissions instead. Counsel for the defendant argued that paragraph [150] of the Award was taken out of context and the Arbitrator had clearly addressed her mind to the plaintiff's submissions and rejected them. After confirming that the plaintiff's position remained unchanged, I dismissed the application with costs.

The court's decision

9 A party challenging an arbitral award for breach of natural justice must establish the rule of natural justice that was breached, how it was breached, whether there was a causal link between the breach and the making of the arbitral award, and how the breached prejudiced its rights: *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2003] 3 SLR(R) 86 at [29], *AKN v ALC* [2015] 3 SLR 488 at [48] and *ASG v ASH* [2016] 5 SLR 54 at [53]. From its submissions, the plaintiff appeared to be relying on the Arbitrator's failure to consider an issue pleaded by the plaintiff, *ie*, the defendant's representations and its impact on the plaintiff's obligations under the DSA. The threshold for setting aside an arbitral award for breach of natural justice on the ground that the arbitrator had failed to consider an important pleaded issue is high. Such a conclusion can usually only be reached by inference, and such an inference is only drawn if it is "clear and virtually inescapable": see *AKN v ALC* at [46]. The plaintiff had to specifically show that the Arbitrator did not apply her mind at all to that particular submission; it would not be enough that she had rejected it, "whether implicitly or otherwise, whether rightly or wrongly, and whether or not as a result of its failure to comprehend the argument and so to appreciate its merits" (*AKN v ALC* at [47], followed in *ASG v ASH* at [62]).

10 As the plaintiff chose not to make any additional oral submissions during the hearing, the court's decision was based on both parties' affidavits and written submissions. It was clear that, far from failing to consider the argument, the Arbitrator had dealt with the defendant's alleged representation and its impact on the DSA comprehensively and had eventually rejected it. Certain paragraphs of the Award (reproduced in the defendant's reply affidavit, see [6] above) made it obvious that the Arbitrator had considered the significance of the defendant's alleged representation on the plaintiff's obligations under the DSA under various legal doctrines and principles:

(a) First, the Arbitrator considered the plaintiff's submission that Greatshine would have paid

its due under the Supply Contract had the defendant fulfilled its oral promises to support Greatshine to resolve the problems at the power plant. She rejected this because the plaintiff was not a party to the Supply Contract or Letter of Undertaking and the reasons for Greatshine's failure to perform its obligations under those contracts were irrelevant to the plaintiff's obligations under the DSA (at paragraph [149] of the Award);

(b) Second, the Arbitrator considered the plaintiff's submission that "it would not have entered into the [DSA] save for the [defendant's] express representation that it would assist in resolving the problems with the [power plant]". This is the specific issue that the plaintiff claimed the Arbitrator did not address. Not only did the Arbitrator expressly state the plaintiff's position (in paragraph [147] of the Award), she rejected it on the basis that the requirements for fraudulent misrepresentation were not made out (at paragraph [151] of the Award); and

(c) Third, the Arbitrator considered the plaintiff's submission that the parties had entered into an oral collateral contract in parallel to the DSA, whereby the defendant agreed to resolve the power plant defects. This was again an evaluation of the legal significance of the defendant's alleged representation. The Arbitrator found that there was no evidence of such an oral contract (at paragraph [156] of the Award).

11 Having considered the parties' submissions and the Award in more detail, it is clear that the Arbitrator's remarks at paragraph [150] that "[in] any event, whether the Parties to the Supply Contract and the Letter of Undertaking fully performed their obligations is not for the Sole Arbitrator to decide as she is not seized of a dispute under those contracts and the Parties do not allege that this question has any consequence on the [defendant's] claim based on the [DSA]" did not mean that she had not considered the legal effect of the defendant's alleged representations on the plaintiff's obligations under the DSA. In the preceding paragraphs, the Arbitrator had carefully examined and rejected the plaintiff's submissions in relation to this issue. I accept the defendant's submission that the Arbitrator may simply have been making the point that "the disputes under the Supply Contract and Letter of Undertaking did not by themselves have any consequence on the DSA save insofar as they supported a finding of collateral contract or misrepresentation". The preceding paragraphs demonstrated her attention to and disposal of these issues and there is no basis to draw the inference that she had failed to consider the plaintiff's submissions.

12 For completeness, I note that prejudice, the other element that has to be fulfilled for a setting aside application under s 24(b) of the IAA (see [9] above), was nothing more than a bare assertion in the plaintiff's written submissions.

13 Accordingly, I dismissed the plaintiff's application to set aside the Award on grounds of breach of natural justice, with costs fixed at $6,000.

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