

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **OMP No. 31/2002**

13th January, 2010

M/S.WIND POWER LTD.

...Petitioner

Through: Mr. Bishwajit Dubey and
Mr. Tamel Mandal, Advocates

VERSUS

M/S GOYAL MG GASES LIMITED

....Respondent

Through: Mr. Sudhir Makkar and Ms. Meenakshi
Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

% **JUDGMENT (ORAL)**

VALMIKI J.MEHTA, J

1. By this petition under Section 34 of the Arbitration and Conciliation Act, 1996, the petitioner seeks to challenge the Award dated 7.01.2002 passed by the sole Arbitrator.

The disputes between the parties arose with regard to a Wind Power Project which had to be supplied, commissioned, erected and maintained by the petitioner for the respondent.

2. The facts of the case are that the respondent placed a contract dated 1.2.1996 with the petitioner for supply, erection and commissioning of a Wind Farm having 15 machines of a specified model, for which the price was fixed at Rs.1.5 crores per machine and the total price of the contract was Rs.22.5 crores. It was the obligation of the petitioner to also acquire and transfer the requisite land on which the machines were to be installed for generating electricity by use of Wind Power. The petitioner was also to take the requisite permissions from the concerned authorities and had also to synchronize the Wind Power Project with the grid of Tamil Nadu Electricity Board. The Arbitrator has crisply narrated these factual aspects in the Award as under:-

“M/s Goel Gases Limited (now named as M/s Goyal M.G.Gases Limited) (hereinafter to be referred as the respondent) was keen in setting up a wind farm in the State of Tamil Nadu. After due negotiations a contract dated 1.2.1996 was arrived at between the parties. The salient features of this contract were as follows:-

(i) Supply, erection and commissioning of Wind Farm having 15 Machines Hansa 329 Model Each of 330 KW together with all the electrical equipments as per annexure A-1 on turn key basis.

(ii) The price fixed was Rs.150 lakhs per machine and total price was Rs.2250 lakhs.

(iii) The claimant was to acquire the requisite land and get it registered in name of the respondent and also get all approvals from Government agencies including Tamil Nadu Electricity Board.

(iv) The claimant was to supply land about 100 acres with suitable wind velocity in order to having minimum of generation of 20 lakhs KWH units of power per MW per annum.

(v) The claimant was to get the wind energy projects duly installed connected with Grid and in operating condition before 29.2.1996 and furnish proof that TNEB had started purchasing power from the said project latest by 15.3.1996.

(vi) All infrastructures with electrical equipments, transformers, vacuum circuit breakers with automatic computer control system and centralised control room with computer having necessary software were to be supplied by the claimant.

(vii) Approach Roads, latest system to communication, Telephone, office, fax, data control, latest safety system, alarm etc. were to be supplied by the claimant.

(viii) Two years warranty period was fixed in which the claimant was to provide after sale service and replace all defective parts if any free of cost and supply lubrication, grease and other consumables.

(ix) A Bank guarantee of Rs.24.25 lakhs per MW was to be given by the claimant for initial period of 3 years and to be extended for a further period of two years for ensuring minimum of 20 lakhs KWH units of power per MW per annum and any short fall in power or generation between guaranteed figure and TNEB records showing extent of power generation was to be payable in accordance with the rate per unit as available from TNEB at that time to the respondent by the claimant.

(x) The claimant was to pay Rs.11.25 crores to the respondent as income-tax liability in case the claimant was to fail to perform its obligations resulting in non-availability of depreciation to the respondent as on 31.3.1996.

(xi) The payment of price was to be as follows:-

(a) Rs.one crore as advance with the order.

(b) Rs.3 crores on furnishing of Bank guarantee and on registration/transfer of land in the respondent's name.

(c) Rs.18.50 crores on handing over the project or on disbursement of loan whichever was later.

3. The claimant had duly commissioned the project before 31.3.1996 as confirmed by the respondent in its letter dated 2.4.1996. The respondent has claimed 50% depreciation in the subsequent financial year in respect of the project."

3. Before the Arbitrator, the disputes inter alia, which were crystallized between the parties for decision were as under:-

(i) The entitlement of the price by the petitioner with respect to the performance under the subject contract and the project, which was completed on time.

(ii) The defence of the respondent as to the disentitlement of the petitioner for the contracted price on account of, inter alia, failure of the machines to produce the requisite power output, failure of the petitioner to

provide the necessary maintenance for the machines and rectify the defects which occurred in the warranty period, failure to provide for the complete land of 100 acres and the petitioner instead only having provided 65 acres of the lands for the Wind Power Project.

(iii) The entitlement of the respondent for its claim towards the cost incurred by it for maintenance charges and repair of the defective equipment, and which cost it had to incur on account of failure of the petitioner to comply with its obligations to do so under the contract.

An incidental issue with regard to the point No. (i) above was also as to whether the amount payable to the petitioner for the machinery/equipment supplied and the work done by it under the contract, was liable to be reduced by a sum of Rs.6.6 crores which sum according to the respondent it had paid to its sister concern M/s Peacock Chemicals Pvt. Ltd. on the instructions of the petitioner by virtue of an undated letter of the petitioner to the respondent.

4. The Arbitrator in the Award has arrived at the following conclusions:-

(i) The Wind Power Turbines/Machines which were supplied by the petitioner to the respondent were not found up to the mark and were found not to generate the contractually promised output. For this purpose, the Arbitrator has relied upon an undisputed chart of the energy generation/units of electricity

and which is the chart on the basis on which Tamil Nadu Electricity Board made payments for the electricity received by it from the respondent.

(ii) The petitioner was also found guilty of not maintaining the equipment in terms of the warranty clause and also its failure to rectify the defects when so pointed out by the respondent to the petitioner.

(iii) The respondent has been held not guilty of any delay in making payments to the petitioner inasmuch as under the terms of the contract, the petitioner had specifically agreed to receive the balance payment from the respondent on loan being sanctioned to the respondent. The Arbitrator has also held that there is no unreasonable delay for the payments made.

(iv) The Arbitrator has arrived at a conclusion that M/s Peacock Chemicals Pvt. Ltd. was in fact paid a sum of Rs.6.6 crores by the respondent. I note that the respondent before the Arbitrator had filed certificate of M/s Peacock Chemicals Pvt. Ltd. of having received the amount, as also a Chartered Accountant's certificates of the respondent showing that payment of the sum of Rs.6.6 crores to the said M/s Peacock Chemicals Pvt. Ltd.

(v) The Arbitrator has after arriving at the conclusion of the lesser output from the subject turbines, on the application of the principles of *quantum meruit*, has awarded a lesser price to the petitioner than the contracted price.

(vi) The Arbitrator has dismissed other claims and counter-claims of both the parties towards alleged losses caused to them.

5. The scope for interference by this Court while hearing objections under Section 34 is now sufficiently pronounced upon as per the judgments both of this Court as well as of the Supreme Court. This Court can interfere with an Award only if it is shown that the Award is illegal or violative of the contractual provisions, or that the findings/conclusions, arrived at by the Arbitrator are perverse which shocks the judicial conscience. Keeping in view the aforesaid parameters of law, I have examined the arguments as raised by the counsel or the petitioner.

6. So far as the argument on the issue as to whether turbines/machineries which were supplied were defective, not much argument with any conviction could be raised by the counsel for the petitioner in view of the admitted chart which showed that the power generated from the machines were not as per the contractual requirement.

7. As regards the issue that the respondent was restricting claim for damages only to the sum of Rs.24.25 lakhs, the figure for which a bank guarantee was to be given by the petitioner to the respondent, I am of the opinion that this argument has no legs to stand upon because the contract does not provide at all for any figure of liquidated damages in terms of a specific clause to this effect. Therefore, the Arbitrator has granted damages on the

principles of Section 73 of the Contract Act, 1872. This is a correct approach, and in my opinion, the Award in this regard cannot be faulted with.

8. The next argument which was urged by the counsel for the petitioner was that the figure of the balance price entitlement of the petitioner has been wrongly determined by the Arbitrator. Once again, this argument in my opinion is clearly not sustainable. What the Arbitrator has done is that he has on one hand taken the contractual figure of the power generation and the contractual price and on the other hand, has taken, the actual figures of power generation and thereafter, proportionately reduced the contractual price to the figures of energy actually generated. In doing so, the Arbitrator has, made an assessment on the basis of the material as was available before him. Once an Arbitrator makes an assessment on the basis of materials before him, unless and until this assessment and the figure of balance price is shown to be in any manner perverse, this Court cannot interfere with such a finding. An Arbitrator is surely entitled to arrive at a finding of fact and which he has done. In fact, even this court, if it was called upon, to undertake such an exercise, this Court would also have applied similar principles as the Arbitrator has done in proportionately reducing the price by taking into account the proportionately reduced output and as compared to the contractual output required.

9. That only leaves me with the issue with regard to the fact whether the respondent was entitled to and in fact whether it did make any payment to

M/s Peacock Chemicals Pvt. Limited of a sum of Rs.6.6 crores. What the counsel for the petitioner urged, and indeed very strenuously, is that the petitioner had revoked the letter whereby the respondent was directed not to make any payment to M/s Peacock Chemicals Pvt. Ltd. I in fact fail to understand this argument because I do not see as to how it can be argued that a simple revocation letter can alter the obligation of the parties under an earlier agreement to the contrary. At this stage, I may refer to a portion of the affidavit by way of evidence filed by the respondent along with the documents to show that payment in fact was made to M/s Peacock Chemicals Pvt. Limited. The relevant para in this regard is para 9 of the affidavit by way of evidence filed by one Mr. P.K.Gupta on behalf of the respondent before the Arbitrator runs as under:-

“9. I say that the claimant had directed the respondent to pay Rs.6.6 crores to M/s Peacock Chemicals Pvt. Ltd. as commission. The said letter and its reminder sent by the claimant are collectively exhibited as RW1/5 and are filed at serial Nos.1 and 7 of the respondent’s additional documents. This was acknowledged by the claimant in its letter dated 3rd April, 1996 and 11th April, 1996 when it admitted that the respondent had to still pay Rs.11.9 crores only towards balance payment. The copies of the letters dated 3.4.1996 and 11.4.1996 are exhibited as RW1/5 and are filed at serial Nos.5 and 7 of the respondent’s documents. As per the claimant’s instructions the respondent paid between March, 1996 to July, 1996 Rs.6.6 crores to M/s Peacock Chemicals Pvt. Limited. Copies of Chartered Accountant’s Certificate dated 7.7.1999 and acknowledgements by Peacock Chemicals Pvt. Ltd. are annexed herewith as **Annexure –A Colly.** and exhibited as RW-1/7. These documents are received by the respondent in the ordinary course of business.”

In fact, the counsel for the respondent rightly pointed out that it was not open to the petitioner to raise this contention before the Court that M/s Peacock Chemicals Pvt. Ltd. has not been paid, inasmuch as there is no such objection raised by the petitioner in its objection petition, and which I find to be correct. Not only this, it has nowhere been urged in the grounds that M/s Peacock Chemicals Pvt. Ltd. was not entitled to be paid for any reason that the transaction in question was not in any manner justified or the amount was not payable. As already stated by me above, the only defence was that in view of the revocation letter, the respondent ought not to have paid an amount of Rs.6.6 crores to M/s Peacock Chemicals Pvt. Ltd. This argument I have already considered and rejected above.

10. I was during the dictation of this judgment tempted to reproduce the substantial portions of the Award because the learned Arbitrator, Justice P.K.Bahri (Retd.) has chronologically, logically, exhaustively and systematically stated all the facts of the case, the respective contentions of the parties, the decision on each issue with appropriate reasons by referring to the necessary documents when so required and so on. However, this would make this judgment bulky and consequently, I have summarised the findings and conclusions as arrived at by the Arbitrator.

11. In view of the aforesaid discussion, I do not find any basis to interfere with the Award dated 7.01.2002 of the learned Arbitrator. The objections are therefore dismissed leaving the parties to bear their own costs.

VALMIKI J.MEHTA, J

January 13, 2010

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