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

+ **O.M.P. 589/2011**

LARSEN & TOUBRO LTD. AND ANR. Petitioners
Through Mr Rajiv Nayar, Sr. Adv. with
Mr Ananya Kumar and
Mr. Dharendra Negi, Adv.

versus

NTPC LTD. Respondent
Through Mr S.K. Taneja, Sr. Adv. with
Mr Puneet Taneja, Adv. with
Mr Amrit Anand, Adv.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

ORDER
% **09.11.2011**
MANMOHAN SINGH, J. (Oral)

1. The petitioners have filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 praying that the interim injunction against the respondent be passed from deducting any amount from the running accounts of bills of the petitioners on the ground of import duty benefits or interest thereon till such time as final decision is taken on the question of examination of duty by the custom authorities.

2. The prayer of the petitioners is strongly opposed by the respondent. The case of the respondent is that it had invited bids for the “Construction of Head Race Tunnel” Package vide IFB No.CS-5505-908(R)-2 dated 31.06.2006 wherein under Clause No.12 of ITB (Instructions to Bidders) of Volume-1 of Bidding Documents, the provision for benefits with respect to Mega Power Project and other policies of Government of India were provided which reads as under:

“12.0 Non availability of benefits under mega power project policy and other relevant policies of Govt. of India :

Tapovan Vishnugad HEP (4X130 MW) has been declared a Mega Power Project by Ministry of Power, Govt. of India.

However, Bidders may note that none of the Item(s)/Material(s)/Equipment(s) (including Construction Equipments) included under the scope of this package are eligible for benefits under Mega Power Projects Policy, Project Import and/or Deemed Export Benefit and therefore NTPC shall not issue any Certificate/Document for imports under Mega Power Project Policy, Project Import and/or Deemed Export Benefits for any Item(s)/Material(s)/Equipment(s) (including Construction Equipments).

In case the Mega Power Project Benefits/Project Import/Deemed Export benefits for any Item(s)/Material(s)/Equipment(s) (including

Construction Equipments) etc. or any other benefits for Power Project becomes applicable in future based on the Notification by the concerned Government Authorities, the matter shall be discussed and finalized with the bidder/contractor including price reduction to NTPC.” (emphasis supplied)

3. It is further contended by the respondent that subject package was awarded by NTPC to Joint Venture of Larsen & Toubro Ltd. and Alpine Bau Gmbh vide Letter of Acceptance (LOA) No. CS(OS) No.-5505-908(R)-2-CS(OS) No.-LOA-4784 dated 28.11.2006 and a Contact Agreement Ref. No. CS(OS) No.-555-908(R)-2-CS(OS) No.-COA-4784 dated 19.01.2007 was signed between the parties i.e. NTPC Ltd. and L&T-AM Joint Venture. Further, Joint Venture of Larsen & Toubro Ltd. and Alpine Bau Gmbh by accepting the LOA and signing the agreement, not only unequivocally accepted the said clause, but also confirmed the acceptance of the above provisions by giving a declaration in terms of the said clause along with their bid and also stated that “we further confirm that we shall not raise any dispute or prefer any dispute or prefer any claim whatsoever at a later date in this regard for availing of benefits.

4. The last contention of the respondent is that from the above

said provisions specified in the Bidding Documents for the subject package that at the time of invitation of the Bids Tapovan Vishnugad Hydroelectric Project was having status of Mega Power Project as declared by Ministry of Power (MOP), Government of India. However, no custom duty benefits/exemption were available for import of Construction Equipment till the time contract was awarded to Joint Venture of Larsen & Toubro Ltd. and Alpine Bau Gmbh. Accordingly, all the Bidders, including Joint Venture of Larsen & Toubro Ltd. and Alpine Bau Gmbh quoted their prices, i.e., inclusive of custom duty component to be paid by them at the time of import of Construction Equipment for the subject package and the said cost is being recovered from NTPC in the cost price of the contract.

5. The contention of the respondent has been refuted by the petitioner in its rejoinder.

6. Both the parties had addressed their submissions and after some time, the learned counsel for the respondent sought time to take instructions from the respondent regarding the issue of benefit and interest being recovered thereon for deferred recovery of

principal amount of benefit, if on the final assessment the benefit is refused/reduced by the custom authorities and if the matter could be disposed of.

7. After instructions from the respondent, Mr Mukum Gautam, DGM of the respondent, has filed an affidavit dated 12.10.2011.

Paras 6 to 11 of the said affidavit read as under:

“6. Accordingly L&T-AM after discussions with the respondent availed import duty benefit of Rs.21,94,47,045/- from Custom Authorities which benefit was to be passed on to NTPC in terms of clause 12.0.

7. Therefore, the respondent started the recovery of import duty benefit on pro-rata basis from the running bills of the contractor in similar manner as adopted in case of recovery of other advances (mobilization & equipment advances).

8. Though the respondent is entitled to recover the benefit at one go but as a considerate measure, the respondent is recovering the amount from the contractor on a pro-rata basis in line with the request made by the contractor vide letter dated 25.06.2009, for which the respondent is recovering the interest for such staggered recovery of principle amount of benefit.

9. As L&T-AM JV expressed their apprehension that the benefit availed is on the basis of provisional assessment and on final assessment, the same benefit may not be available. NTPC vide letter No.TVHPP/5505/CCD/HRT/E-1190 dated 11.11.2009

clarified to the contractor that “in case there is some difference on import duty in future based on the final assessment, the same shall be dealt accordingly.”

10. By virtue of the present affidavit, the respondent wishes to further clarify its stand that, if the benefit arising upon final assessment is lesser than Rs.21,94,47,045/- or is withdrawn, the differential shall be reimbursed/refunded with the recovered interest to M/s L&T-AM JV.

11. However, in case any further import duty benefit is availed by the contractor beyond Rs.21,94,47,045/-, the same will be passed on to NTPC in the same line as adopted in the past.”

8. The learned counsel for the petitioner needed more clarification from the respondent. When the matter is taken up today by this Court, the learned counsel for the petitioner has made a statement that the petitioner is agreeable if the present petition is disposed of with the following terms and conditions:

- a. That the respondent will continue deducting the amounts on account of custom duty paid upto Rs.21.64 crores in the same manner as has been done till date.
- b. In case any demand is raised by the custom, the respondent will pay such demand within such time upto the amount deducted by the respondent so as to enable

the petitioner to deposit the duty within the time stipulated by the custom department.

9. Though the suggestion given by the petitioner's counsel are acceptable but Mr. Taneja, learned Senior counsel for the respondent has clarified that the respondent shall only pay the amount which has been deducted by the respondent within such time.

The learned counsel for the petitioner submits that the order passed by this Court and agreed by the petitioner would be without prejudice to the rights of the petitioner to claim any amount from the respondent arising in relation to the issue of custom duty.

10. Ordered accordingly.

11. The present petition stands disposed of. No cost.

MANMOHAN SINGH, J.

NOVEMBER 09, 2011

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