

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 410 of 2012

GOYAL M.G GASES PRIVATE LIMITED Petitioner
Through: Mr. P.S. Bindra, Advocate
versus

NEPC INDIA LIMITED Respondent

✓O.M.P. 408 of 2012

MORGAN VENTURES PRIVATE LIMITED Petitioner
Through: Mr. P.S. Bindra, Advocate
versus

NEPC INDIA LIMITED Respondent

O.M.P. 409 of 2012

MORGAN VENTURES PRIVATE LIMITED Petitioner
Through: Mr. P.S. Bindra, Advocate
versus

NEPC INDIA LIMITED Respondent

O.M.P. 411 of 2012

GOYAL M.G GASES PRIVATE LIMITED Petitioner
Through: Mr. P.S. Bindra, Advocate
versus

NEPC INDIA LIMITED Respondent

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O.M.P. 419 of 2012

GOYAL M.G GASES PRIVATE LIMITED Petitioner
Through: Mr. P.S. Bindra, Advocate
versus

NEPC INDIA LIMITED Respondent

CORAM: JUSTICE S. MURALIDHAR

ORDER
01.05.2012

1. These are five petitions filed against five sets of Awards dated 3rd January 2012 by the Petitioners against the common Respondent in all the petitions i.e. NEPC India Limited ('NEPCIL') arising out of the same agreements in respect of the supply and performance of Wind Energy Generators ('WEGs'). Consequently, these are being disposed of by a common judgment.

2. The background to the present petitions is that M/s. Goyal M.G. Gases Private Limited, the Petitioner in OMP Nos.410 of 2012, 411 of 2012 and 419 of 2012, and M/s. Morgan Ventures Private Limited, the Petitioner in OMP Nos. 408 and 409 of 2012, entered into five agreements with the Respondent, NEPCIL on 7th October 2003 whereunder NEPCIL agreed to supply, install and commission on

turnkey basis 100 WEGs of 225 KW with 45/50 meters hub height. Each WEG was agreed to be sold for an all inclusive price of Rs. one crore aggregating to approximately Rs.100 crores for the said 100 WEGs. The electricity generated was to be sold to Tamil Nadu Electricity Board ('TNEB') including its successor and other buyers.

3. In terms of Clause 10 of each of the Agreement, NEPCIL agreed that shortfall in the minimum guaranteed generation would commence from 1st April 2005 and would be taken into consideration irrespective of whether all WEGs had been commissioned by 31st March 2005.

4. A separate tripartite agreement, was executed between the Petitioner(s), NEPCIL and M/s. Virgin Securities and Credits Private Limited ('VSCPL') on 8th January 2005 whereunder VSCPL undertook to pay the Petitioner for any shortfall in the minimum guaranteed generation between 5,50,000 KW and 6,75,000 KWH per units per WEG per annum for an amount equivalent to cover maximum shortfall envisaged under the Agreement dated 8th January 2005 for a period of 20 years. It was further agreed that NEPCIL would be liable to pay the Petitioner for any shortfall in the minimum

guaranteed generation of 5,50,000 KWH per year for each machine.

5. NEPCIL defaulted in the execution of the contract. Out of 100 WEGs, only 67 were installed. Since there was a shortfall in power generation, disputes arose between the parties and the Petitioner invoked the arbitration clause. The learned Arbitrator passed a common Award which was placed on the record of case No.1/32 (Goyal MG Gases Private Limited v. NEPCIL) arising out of the Agreement dated 7th October 2003 for setting up 32 Nos. of 255 KW each. In each of the cases, the Petitioner claimed an amount on account of shortfall of units payable at Rs.2.70 per unit between 5,50,000 units and the actual units generated for the period from 1st April 2005 to 31st March 2007 and a further sum for the period from 1st April 2007 to 31st March 2010 and also from 1st April 2010 till 6th October 2023, the date of expiry of the period being 20 years from the date of the execution of the Memorandum of Agreement ('MOA') dated 7th October 2003. As regards the WEGs not supplied, the Petitioner claimed similar amounts apart from directing the Respondent to refund the advance sum after adjustment of the sum in

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respect of the land for instalment of the non supplied WEGs.

6. The findings of the learned Arbitrator in respect of each petition were as follows:

(i) NEPCIL had failed to perform its obligation under the Agreement and the Petitioner was entitled to maintain the petition and to recover the amount.

(ii) The minimum guarantee clause made it obligatory for NEPCIL for the shortfall commencing from 1st April 2005 irrespective of whether or not the WEGs were commissioned by 31st March 2004.

(iii) The evidence produced by the Petitioners remained un rebutted. The rate at which the claims were made for the failure to supply the minimum guaranteed generation was duly proved by the Petitioner.

(iv) In those cases where WEG's were supplied, installed and commissioned, the Petitioner would be entitled to the amounts claimed. In addition to the amounts claimed for the period up to 31st March 2010, the Petitioner was also entitled to recover from NEPCIL compensation from 1st April 2010 to the date of expiry of the period of contract on account of the shortfall of Minimum Guaranteed Generation only for the difference of energy between 5.50 lakh units

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and the actual units generated as per the meter readings as recorded by TNEB. Based on such readings the Petitioner would raise and demand, as and when it felt due and call upon NEPCIL to pay the same; failing which the Petitioner would be entitled to recover from NEPCIL the amount becoming due with interest at 12% per annum from the due date till payment.

7. The learned Arbitrator dealt with the three cases under which 33 WEGs were not supplied or installed or commissioned. The learned Arbitrator interpreted Clause 10 to mean that in case the Petitioner had discharged its liability by making full payment towards the cost of the land, cost of machinery and other components and NEPCIL was unable to install or commission WEGs or there was a delay in commissioning, NEPCIL would be liable for the minimum guaranteed generation component. But, this clause would not apply or operate in those cases where the Petitioner had not parted with the full amount or paid full amount for procurement of the WEGs. Admittedly, some lands were transferred to the Petitioners and the Petitioner also paid some further amount which has rightly been debited by the Petitioners

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as advance paid to NEPCIL. The Arbitrator held that there could not be an award for specific performance against NEPCIL directing it to install WEGs on receipt of the balance amount from the Petitioner.

The learned Arbitrator proceeded to hold as under:

“Therefore, the Claimant in those cases where WEG’s were neither supplied nor installed or commissioned cannot be held entitled to minimum guaranteed generation compensation. Such compensation would be payable provided WEG’s were supplied, installed or commissioned”.

8. Consequently, the Petitioner’s claims to the extent of minimum guaranteed generation component on account of the shortfalls for the periods between 1st April 2005 till 31st March 2007, 1st April 2007 to 31st March 2010 and 1st April 2010 till 6th October 2023 was awarded together with interest at 12% p.a. from 1st December 2004 till the date of the filing of the claim petition and 12% p.a. interest *pendente lite* as well as post-Award interest till date of payment.

9. The grievance of the Petitioners in these petitions is that the learned Arbitrator ought not have rejected the Petitioner’s claim in

each petition for interest at 18% per annum compounded annually.

10. Having perused the impugned Award, this Court finds that the learned Arbitrator has given cogent reasons for allowing substantially the claims of the Petitioners. The direction to the Respondent to pay interest at 12% per annum was, in the circumstances of the case, justified. It cannot be said that the learned Arbitrator has committed any patent illegality in not allowing the Petitioner's prayer for award of interest at 18% per annum compounded annually. This is not a sufficient ground for interference under Section 34 of the Act.

11. Consequently, these petitions are dismissed but in the circumstances with no orders as to costs.



S.MURALIDHAR, J

MAY 01, 2012
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