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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 09.09.2015

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O.M.P. 473/2015

PTC INDIA LIMITED

..... Petitioner

Through: Mr. A.K. Ganguli, Sr. Advocate with Mr. Vishrov Mukerjee, Ms. Nishtha Kumar, Mr. Ravi Kishore and Mr. Prashant Mathur, Advs.

Versus

LANCO POWER LIMITED

..... Respondent

Through: Mr. Akhil Sibal with Mr. Deepak Khurana and Ms. Aditi Sharma and Mr. Jatin Mongia, Advs.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J.(Open Court)

1. This is a petition under Section 34 of the Arbitration & Conciliation Act, 1996 against the majority Arbitral Award and Order dated 23.05.2015 (collectively "*Impugned Award*"). Justice (Retd.) K. Ramamoorthy and Justice (Retd.) E. Padmanabham ruled against the petitioner by dismissing their Section 16 application and also dismissing their claim for setting aside of the termination of a 'Power Purchase Agreement' dated 19.05.2005. The third Arbitrator, Justice (Retd.) J.L. Gupta, however, decided in favour of the petitioner on both of the above counts.

2. The petitioner is impugning this award on the ground that, *inter-alia*, it is against public policy insofar as the Arbitral Tribunal ignored

the relevant provisions of the Electricity Act, 2003. Moreover, the *dicta* in various judgments of the Supreme Court, which state that disputes such as the one between the petitioner and the respondent can only be adjudicated by the appropriate Electricity Regulatory Commission or an arbitral tribunal constituted by such commission were ignored.

3. In support of this argument, the petitioner relies on judgments of the Hon'ble Supreme Court in the case of GUVNL v. Essar Power Ltd. (2008) 4 SCC 755:

“However, since the Electricity Act, 2003 has come into force w.e.f. 10-6-2003, after this date all adjudication of disputes between licensees and generating companies can only be done by the State Commission or the arbitrator (or arbitrators) appointed by it. After 10-6-2003 there can be no adjudication of dispute between licensees and generating companies by anyone other than the State Commission or the arbitrator (or arbitrators) nominated by it ...”

And *T.N. Generation & Distribution Corporation Ltd. Vs. PPN Power Generation Co. Pvt. Ltd.* (2014) 11 SCC 54:

“13. ...relying on the judgment of this Court in the case of Gujarat Urja Vikas Nigam Ltd. Vs. Essar Power Ltd., it is held that the State Commission has the discretion to decide as to whether the dispute should be adjudicated by itself or it should be referred to an arbitrator. The appellant cannot dictate that the State Commission ought to have referred the dispute to an arbitrator...

34. In our opinion, the issues raised by the appellant with regard to the constitution of the State Commission and its discretion to either adjudicate or refer a particular dispute to arbitration is no longer res integra.”

4. The petitioner argues that the Impugned Award proceeds on an erroneous premise that having withdrawn the Section 16 application, the petitioner had submitted to the jurisdiction of the Arbitral Tribunal and that it is settled law that where no jurisdiction exists, none can be vested by an agreement between the parties. To support this point, the petitioner relies, inter alia, on the judgment of the Hon'ble Court in *Jagmittar Sain Bhagat & Others v. Director, Health Services, Haryana and Others* (2003) 10 SCC 136:

“if a court/tribunal inherently lacks jurisdiction, acquiescence of party equally should not be permitted to perpetrate and perpetuate defeating of the legislative animation. The Court cannot derive jurisdiction apart from the statute.”

5. The petitioner in this instance was the claimant in the arbitration proceedings and after invoking arbitration and filing its statement of claim and complete pleadings, filed an application under Section 16 challenging the jurisdiction of the tribunal. This application was withdrawn on 07.01.2012, wherein the Arbitral Tribunal recorded in its order that:

“Mr Ravi Prakash, Ld. Counsel for the Claimant and Mr. Anuj Berry, Ld. Counsel for the Respondent, on instructions from their respective parties, submit that both parties agree that this arbitral tribunal has jurisdiction over the subject matter and the disputes between the parties will be decided on the merits. The ld. Counsel also submit that the pleadings filed by both the parties in the application under S.16 stand withdrawn. Therefore, the application under Sec. 16 of the Arbitration and Conciliation Act, 1996 is closed.”

Subsequent to this, in the midst of final arguments, the claimant filed an application dated 23.03.2015 for revival/restoration of the Section 16 application.

6. Mr.Akhil Sibal, the learned counsel for the respondent would contend that if the petitioner believed that the Tribunal lacked jurisdiction, its remedy was to withdraw the claim, however, the petitioner pursued an exercise in ‘legal absurdity’ by asking the Tribunal to decide that the Tribunal had no jurisdiction; that the ‘Doctrine of Election’ required that a litigant elect a legal remedy when faced with inconsistent remedies and that it was not legally permissible for the claimant to on one hand maintain and refuse to withdraw the same while at the same time contending that the Tribunal lacked jurisdiction to adjudicate the same. In *S.N. Malhotra & Sons v. Airport Authority of India*. 2008 (103) DRJ 196, a division bench of this Court, relying on the dicta of the Hon’ble Supreme Court, has held that:

“The respondent was all along aware of this non compliance and participated in the proceedings without demur. The award in respect of the same is not to its liking. The challenge now sought to be raised by the respondent flies in the face of its tacit approval of the matter being dealt with by the arbitrator. Allowing the responded to resile from his position at this stage without its laying any foundation for the challenge when it was free to raise the same would be inequitable to say the least”

7. This Court is of the opinion that when the petitioner first chose to invoke arbitral proceedings and again when it chose to withdraw its Section 16 application before the Tribunal, it acquiesced to the Tribunal’s jurisdiction and having done so, is now estopped from

claiming otherwise. The petitioner is deemed to have waived any objection to the jurisdiction of the Arbitral Tribunal when it participated in its constitution and also when it withdrew its application under Section 16 all the while it being fully aware of the provisions under the relevant sections of the Electricity Act, 2003. The petitioner, having waived its jurisdictional objection then, without reserving the right or being granted the liberty to raise it at a later stage, cannot be permitted to raise it now. To now allow the petitioner to raise the issue of jurisdiction, after the order of the Arbitral Tribunal having gone against it, would be wholly inequitable. It would deprive the respondent of the benefit of the majority decision of the Tribunal after a long drawn-out arbitral process and would render futile the time, money and energy expended in the entire process.

8. The appeal is without merit and is accordingly dismissed.

NAJMI WAZIRI, J.

SEPTEMBER 09, 2015/r