IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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CWP No.9460 of 2013
Date of Decision:- 28.04.2016

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Era Infra Engineering Ltd.

.....Petitioner

Vs.

Haryana Vidyut Prasaran Nigam Ltd. and others

..... Respondents

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CORAM : HON'BLE MR. JUSTICE RAKESH KUMAR JAIN

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Present: - Mr.Sanjiv Bansal, Advocate,
for the petitioner.

Mr.P.S. Poonia, Advocate,
for the respondents.

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RAKESH KUMAR JAIN, J. (ORAL)

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The Haryana Vidyut Prasaran Nigam Ltd. [for short 'the Nigam'] came out with a bidding document bearing No.REC-098 for "Supply Erection and Commissioning of 400 KV Line from 400 KV Sub Station at Daulatabad (Gurgaon) to 400 KV Sub station at Section 72, Gurgaon with Quad Moose Conductor". The total length of the work line was 23.35 Kilometers. Pursuant to the NIT dated 13.8.2009, the petitioner entered into a joint venture and was awarded the contract by the High Powered Purchase Committee constituted by the Government of Haryana and ultimately the Letter of Award [for short 'LOA'] dated 26.3.2010 was issued by respondent No.2. The Contract period was of 9 months from the date of issue of LOA and the petitioner was required to furnish a performance security in the shape of bank guarantee for 10% of the contract price valid upto 90 days after the end of warranty period. Consequently, two separate LOAs were issued, one for erection and the other for supply of material. The petitioner submitted two bank guarantees, one bank guarantee dated 30.3.2010 for an amount of ₹3,05,79,371/- valid upto 27.3.2010 and the other bank guarantee for an amount of ₹34,20,630/-. In terms of the provisions of the LOAs, two contract agreements, one each with respect to the LOA was executed on 12.4.2010. As per the LOA, the petitioner was required to ensure the testing and commissioning of the transmission line within 9 months from the date of issue of the LOA. The petitioner was also released the mobilization advance of ₹3,40,00,000/- against both the work orders. The petitioner made all the requisite arrangements to start the supply and erection of the line. Since, it was the work of providing the electricity line for an area of 23 Kilometers, the responsibility to provide “Right of Way” was on the part of the Nigam. The issue of providing “Right of Way” could not be resolved by the Nigam and vide letter dated 26.4.2010, the petitioner requested respondent No.2 to immediately take remedial measures for getting the route corridor finalized but despite the request, no effective steps were taken and as a result thereof, the work could not start. The petitioner made another request on 11.5.2010 and in the meantime, the petitioner had started the process of placing the purchase orders for the supply of material and had submitted the requisite details with the Nigam seeking their approval. No approval was ever granted or at least conveyed by the Nigam to the petitioner. After several rounds of correspondence, the petitioner was shocked to have received memo dated 14.9.2010 whereby he was accused of having delayed the execution. The petitioner was given a *show cause notice* as to why action be not taken for their negligence.

The petitioner ultimately approached this Court by way of CWP No.16569 of 2012, which was disposed of by this Court relegating the petitioner to avail its remedy of Arbitration. Accordingly, the matter was taken up before the Arbitral Tribunal, which was comprised of Er.R.K. Aggarwal, Er. P.C. Arora and Er. Rajesh Gupta (by designation as Chief Engineer System Operation & Commercial HVPNL). While the arbitration proceedings were pending, the respondents deducted liquidated damages to the tune of ₹1,41,21,040/- and on an enquiry made by the petitioner under the RTI Act, they came to know that the liquidated damages were recovered by the respondents from another contract, namely, REC-101, which came into being in 2010. The petitioner thus challenged the said intimation dated 25.4.2013 and has prayed that the action on the part of the respondents, recovering LD of REC-098 from the bills of REC-101 be declared as illegal and also prayed that the amount recovered by the respondents as LD of ₹1,41,21,040/- of REC-098 may be refunded.

Learned counsel for the petitioner has submitted that in this writ petition, at the time of issuance of notice, the respondents were restrained from further deducting LD from the account of REC-101 or any other contract other than REC-098. It is also submitted that during the pendency of this writ petition, Arbitral award has been announced on 05.01.2016 in which it is concluded by the Arbitral Tribunal that *"as per conclusions in paras 5.04.01 to 5.04.04 above, the respondent has been held responsible for non-execution of the work & there is no breach of contract on the part of contractor. Hence, there is no question of award of any legal/arbitration costs to the respondent".* He has further pointed out that the Arbitral Tribunal did not decide about the recovery of LD upto 25.4.2013 from due payments on the ground that this case was pending in this Court. It is, *inter alia,* submitted that firstly the petitioner has not been found remiss in the execution of the contract because the Nigam has failed to provide "Right of Way" for the purpose of installation of the transmission lines and secondly the LD could not have been recovered from the other account of the petitioner namely, REC-101.

In support of his submission, learned counsel for the petitioner has relied upon a decision of this Court rendered in ***CWP No.13285 of 2012*** titled as ***"SECL Industries Limited (Formerly known as Singla Engineers and Contractors Pvt. Ltd.)*** Vs. ***The State of Haryana and others"*** dated 09.10.2012 in which it has been categorically held that *"what follows from the aforesaid is, merely by imposing penalty/liquidated damages, the respondents cannot be allowed to recover the same from other contracts being executed".* It is further observed therein *"matter would have been different, if adjustment of this amount was made from the same contract."*

It is not disputed by the learned counsel for the respondents/Nigam that the LD has been charged or deducted from the other account namely, REC-101 of the Contract REC-098 and has not cited any judgment, contrary to the judgment relied by the petitioner, in the case of ***SECL Industries Limited (Supra)*** to contest the contention raised by learned counsel for the petitioner. Moreover, it is not disputed that the Arbitral Tribunal has already decided this issue as to who was negligent for the breach of contract.

Thus in view of the totality of the facts and circumstances mentioned hereinabove coupled with the law laid down by the Division Bench of this Court in the case of ***SECL Industries Limited (Supra)*** in which it has been held that LD cannot be deducted from any other account and at the most adjustments can be made from the same contract, the present petition is hereby allowed. The letter of intimation to the petitioner of deduction of LD of REC-098 from the bills of REC-101 of an amount of ₹14121010/- is set aside and direction is issued to the Nigam to refund the amount of ₹14121010/- to the petitioner within a period of 30 days from the date of presentation of the certified copy of the order along with 9% simple interest.

(RAKESH KUMAR JAIN)
28.04.2016 **JUDGE**
Vivek