

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

Reserved on: 30.10.2012
Date of Decision: 07.11.2012

+ CM No. 14904/2012 IN FAO(OS) No. 372/2012

NATIONAL THERMAL POWER CORPORATION LTD Appellant

Through: Mr.Dushyant Dave, Sr.Adv. with
Ms.Sangeeta Bharti, Mr.Anukul Raj and
Ms.Shweta Mishra, Advs.

Versus

SIEMENS ATIENGESELLSCHAFT Respondent

Through: Mr.Dipankar Gupta, Sr.Adv. with
Mr.Anil Bhatnagar, Mr.Amit Dhingra
and Mr.Aman Leekha, Advs.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE VIPIN SANGHI

SANJAY KISHAN KAUL, J.

1. The dispute inter se the parties arises from the contract awarded by the appellant to the respondent for Gas Based Combined Cycle Power Project at Dadri, Uttar Pradesh on 30.09.1989 for which the contract was entered into on 06.12.1989. The project was to be constructed in two stages. The project was delayed by a period of 55 months.

2. It is the case of the respondent that there was delay on the part of the appellant in opening the letters of credit which in turn led to delay during

the execution of the first open cycle. There are also stated to be corresponding delays in subsequent stages of the project. The parties blamed each other.

3. In view of the disputes the matter was referred to an arbitral tribunal in accordance with the contract *inter se* the parties being an international arbitration under the International Court of Arbitration. A partial award was made on 31.07.2002 and a final awarded was made on 06.01.2009. In terms of the final award the respondent has been awarded a sum of Euros 17,158,557 on account of claim nos. C-2 to C-8 while rejecting claim no.C-9 and the appellant has been burdened with interest of Euros 7,604,296.38 calculated at the rate of 6% simple interest per annum on this amount from the period of 20.08.2001 till the date of the award i.e. 06.01.2009 and post award interest at 6% per annum along with cost of arbitration. These awards were challenged by filing the objections under Section 34 of the Arbitration and Conciliation Act, 1996 ('the said Act' for short) which have been dismissed by the impugned order dated 26.04.2012 of the learned single Judge. It may be noticed that as per the final award it appears that the amount which the appellant is liable to pay is approximately Rs.174 crores as set out in the impugned order.

4. Insofar as the present appeal is concerned, it pertains to the final award. We may, however, notice that the appellant had challenged the partial award under Section 37 (2) (a) of the said Act on the ground that the order passed by the Tribunal was virtually a decision under Section 16(2) of the said Act accepting the plea of lack of jurisdiction. This appeal registered as OMP No.464/2003 was dismissed right till the Supreme Court. The Supreme Court negated the plea of the appellants that the order was one under Section 16 (2) and 16 (3) of the said Act on the ground that it was a finding on merits of the claim of the appellant qua its counter claims. It is thus that the second OMP was filed by the appellant questioning rejection of

its counter claims by the partial award which was dismissed as barred by limitation. This, however, forms subject matter of the another connected appeal FAO (OS) No.371/1992 as the partial award was held to be a final award on two issues.

5. Insofar as the final award is concerned, the grievance of the appellant is that the issue of the nine months delay on the part of the appellant has not been examined in accordance with the terms of the contract which aspect is governed by clause 22 of the General Conditions of Contract (GCC). This clause deals with compensation for delays payable by the appellant to the respondent. The respondent had claimed that there was owner caused delay for 13.5 months during the initial stage for the first open cycle attributable to the appellant and that the appellant had accepted responsibility for nine months delay out of this period. There were subsequently delays attributable to the respondent in the later stages of the project for which appellant had invoked clause 21 of the GCC and had deducted the maximum liquidated damages from the running bills of the respondent.

For convenience of reference, we reproduce the relevant clauses as under:

“21.0 FORCE MAJEURE

21.1 Force majeure is herein defined as any cause which is beyond the control of the Contractor or the Owner as the case may be which they could not foresee or with a reasonable amount of diligence could not have foreseen and which substantially effect the performance of the Contract, such as:

- a) natural phenomena, including but not limited to floods, droughts, earthquakes and epidemics;
- b) acts of any Government, domestic or foreign, including but not limited to war, declared or undeclared, priorities, quarantines, embargoes.

Provided either party shall within fifteen (15) days from the occurrence of such a cause notify the other in the other in writing of such causes.

21.2 The contractor or the Owner shall not be liable for delays in performing his obligations resulting from any force majeure cause as referred to and/or defined above. The date of completion will, subject to hereinafter provided, be extended by a reasonable time even though such cause may occur after Contractor's performance of obligation has been delayed for other causes.

22.0 DELAYS BY OWNER OR HIS AUTHORISED AGENTS

22.1 In case the Contractor's performance is delayed due to any act of omission on the part of the Owner or his authorized agents, then the Contractor shall be given due extension of time for the completion of the works to the extent such omission on the part of the Owner has caused delay in the Contractor's performance of his work. Regarding reasonableness or otherwise of the extension of time, the decision of the Engineer shall be final.

22.2 In addition, the Contractor shall be entitled to claim demonstrable and reasonable compensation if such delays have resulted in any increase in the cost. The owner shall examine the justification for such a request for claim, and if satisfied, the extent of compensation shall be mutually agreed depending upon the circumstances at the time of such an occurrence."

6. This was not part of the arbitration proceedings. Since, according to the respondent, nine months period of delay came from the appellant itself, this was accepted by the respondent but as separate and distinct as compared to the overall delay of project as the method of calculation was not indicated. We had put to Mr.Dushant Dave, learned senior counsel for the appellant, at the inception itself that since we were admitting the appeal for hearing, the amount found due under the award as affirmed by the learned single Judge, should be volunteered to be deposited in the court and the appeal can be set down for hearing on a particular day couple of months down the line. However, the learned senior counsel insisted that as per his

instructions the interim stay application has to be pressed and that according to him the appellant is not required to deposit the decretal amount. In this process, we heard learned senior counsel for almost about an hour while learned senior counsel for the respondent made its submissions in about 20 minutes. Since we are not deciding the appeal, it would not be appropriate to go into details in the merits of the controversy. However, we have to weigh as to whether the operation of the decree following the dismissal of the objections vide the impugned order is liable to be stayed and if so on what terms and conditions.

7. Learned senior counsel for the appellant during his elaborate submissions took us through the impugned award and the order of the learned single Judge read along with the spiral volumes of contract and documents filed in support thereof. It may be noticed that the learned single Judge has again penned down an elaborate opinion in which he has examined the very same aspects, albeit not favourably, qua the appellant. This is also the correspondence and documents referred to by the arbitral tribunal. The sum and substance of the learned senior counsel's arguments is as under:

- 1) If there was a 55 months delay in the project, and at various stages, when the schedule under the contract and the actual completion dates are compared, then at best the nine months period of delay at the inception by the appellant could have been adjusted against the same to come to an aggregate of 46 months delay. Thus the appellant having realized the liquidated damages which were much less, the respondent could not be given the benefit of a huge amount for the delay of nine months on the part of the appellant.
- 2) The arbitral tribunal and the learned single Judge have not correctly interpreted the clauses of the contract.
- 3) The arbitral tribunal and the learned single Judge have failed to read

and appreciate the evidence properly to an extent that admissions of the witnesses of the respondent have been ignored which borders on perversity.

4) The appellant being a public sector enterprise could not run away and thus ultimately whatever amounts are found due to the respondent would be paid by the appellant, if any.

8. On the other hand Mr.Dipankar Gupta, leaned senior counsel for the respondent sought to canvass the proposition for non-grant of stay in the following terms:

1. The appellant is a cash-rich company and it is not the case of the appellant that they are unable to pay the amount. As per their audited accounts published recently, bank deposits and cash itself amounted to Rs.18,600 crores.
2. There were six generating streams which were completed at different stages of time between 1992-97 and the entire electricity was being sold and thus the appellant had realized monies from the same.
3. The full liquidated damages as would be admissible for any alleged delays on part of the respondent had been realized by the appellant.
4. There were two separate clauses providing for consequences of delay – one qua the appellant and one qua the respondent.
5. The amount awarded to the respondent was a result of the delay on the part of the appellant while on account of delay on the part of the respondent the appellant had already realized the full amount.
6. The respondent was claiming that the appellant had delayed by 13.5 months in completing all its obligations but the stand of the appellant was that it was 9 months. There was thus no

question of any dispute over the period once the appellant admitted nine months delay and that was the basis of the award. The finding in this behalf has been given in para 48 of the impugned order.

7. The challenge laid by the appellant to the partial award had delayed the arbitration proceedings by almost five years.
8. The ultimate concurrent findings have been that the partial award was in fact a final award qua the counter claims of the appellant being inadmissible and the respondent's claim not being barred by time. No challenge was laid to the partial award within the parameters of Section 34 of the said Act.
9. The present proceedings are almost in the nature of second appeal and not first appeal and that too within the restrictive parameters under the said Act as the first challenge was by filing objections under Section 34 of the said Act and the present is a second challenge.

9. We may notice that learned senior counsel for the appellant has relied upon the observations of the Supreme Court in Sihor Nagar Palika Bureau v. BhabhlubhaiVirabhai& Co. ; (2005) 4 SCC 1 to contend that court while considering the issue of grant of interim stay under Order 41 Rule 1(3) and Rule 5(5), CPC, is within its rights to direct furnishing of security instead of deposit of the decretal amount. The relevant observations made in para 6 are as under:

“6.. Order 41 Rule 1(3) CPC provides that in an appeal against a decree for payment of amount the appellant shall, within the time permitted by the appellate court, deposit the amount disputed in the appeal or furnish such security in respect thereof as the court may think fit. Under Order 41 Rule 5(5), a deposit or security, as abovesaid, is a condition precedent for an order by the appellate court staying the execution of the decree. A bare reading of the two provisions referred to hereinabove,

shows a discretion having been conferred on the appellate court to direct either deposit of the amount disputed in the appeal or to permit such security in respect thereof being furnished as the appellate court may think fit. Needless to say that the discretion is to be exercised judicially and not arbitrarily depending on the facts and circumstances of a given case. Ordinarily, execution of a money decree is not stayed inasmuch as satisfaction of money decree does not amount to irreparable injury and in the event of the appeal being allowed, the remedy of restitution is always available to the successful party. Still the power is there, of course a discretionary power, and is meant to be exercised in appropriate cases.”

10. Learned senior counsel for the respondent while referring to the same judgment has emphasized that such discretion is to be exercised judicially and not arbitrarily and the Supreme Court itself has opined that ordinarily execution of money decree is not stayed inasmuch as satisfaction of money decree does not amount to irreparable injury and in the event of the appeal being allowed, the remedy of restitution is always available to the successful party.

11. On giving our thought to the matter, we find that there are no such exceptional circumstances as to adopt a different course of action than is the normal course i.e. deposit of the complete decretal amount.

12. We have to keep in mind that the present appeal is not even a Regular First Appeal where both matters of fact and law have to be examined. The said Act gives only a limited scope for intervention of the court under Section 34 of the said Act. The objections thus must fall within those parameters. The learned single Judge has analyzed the objections apparently within those parameters while dismissing the same. This is thus really a third scrutiny of the controversy under Section 37 of the said Act.

13. The submissions of the learned senior counsel for the appellant really border on an endeavor to persuade us to re-appreciate the evidence on record, derive different conclusions than what were drawn by the arbitrator

and the learned single Judge, re-interpret clauses of the contract as per his submissions and not accept the interpretation as made by the arbitral tribunal and the learned single Judge. It is very doubtful whether such a course of action would at all be permissible in analyzing objections to an award. Prima facie, the view of the arbitral tribunal as accepted by the learned single Judge is based on the separate clauses of the contract whereby the consequences of initial delay on the part of the appellant have been treated separately from the subsequent delays on part of the respondent – consequences being also different. Apparently, the respondent has suffered the consequences as the appellant recovered the maximum liquidated damages. It is in these circumstances that the appellant has been held liable for the quantified amount of damages for the delay attributable to it for the initial period.

14. We hasten to add that this is only a prima facie view of the matter and we have been called upon to discuss at least to this extent the matter in view of findings invited by learned senior counsel for the appellant and we thus clarify that these observations are only for purposes of disposal of this application and would not in any manner prejudice the decision in appeal.

15. Learned senior counsel for the appellant fairly conceded that he is not pleading his case on the basis of inability of the appellant to pay/deposit the amount specially in view of the fact that the appellant is a cash rich public sector enterprise. Thus it is not a case where grave prejudice would be caused to the appellant on account of any inability to pay/deposit. As observed in Sihor Nagar's case (supra), the ordinary course is to direct the decretal amount to be deposited as that would not amount to irreparable injury and if the appellant succeeds, restitution is available to it. We are also inclined to secure the amount to be deposited and released to the respondent by an appropriate direction for release of this amount to the respondent only on furnishing of security for restitution. We are thus not

inclined to unconditionally stay the amount payable under the decree or to substitute any other security instead of payment of the amount. If we were to do so, it would mean that the respondent having succeeded initially on the partial award right till the Supreme Court and thereafter qua the final award both before the arbitral tribunal and the learned single Judge, would be completely deprived of the benefit of the amount.

16. We thus direct that no execution proceedings would be initiated by the respondent so long as the appellant deposits the complete decretal amount inclusive of interest and costs before this court within a period of one month from today. The amount would be initially kept in an FDR for 91 days to be kept renewed. The amount is however permitted to be withdrawn by the respondent on furnishing a solvent security for restitution to the satisfaction of the Registrar General of this court.

17. The application accordingly stands disposed of. Since we are not granting unconditional stay for which elaborate arguments were addressed, we consider it appropriate to even burden the appellant with costs quantified at Rs.30,000/- payable to the respondent.

SANJAY KISHAN KAUL, J.

November 07, 2012
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VIPIN SANGHI, J.