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IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. (COMM) 120/2017

DALMIA SOLAR POWER LTD.

..... Petitioner

Through: Mr. Akhil Sibal with Mr.Dinesh
Goyal, Mr. Ankur Mahindro and Ms.
Smita Mohan, Advocates

versus

NTPC VIDYUT VYAPAR NIGAM LTD.

..... Respondent

CORAM: JUSTICE S. MURALIDHAR

ORDER

14.03.2017

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1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') filed by Dalmia Solar Power Ltd. challenges an arbitral Award dated 24th November, 2016 passed by the Arbitral Tribunal ('AT') in the disputes between the Petitioner and the Respondent, NTPC Vidyut Vyapar Nigam Ltd.

2. The facts in brief are that the Ministry of New and Renewable Energy, Government of India (hereafter 'Ministry') floated the Jawaharlal Nehru National Solar Mission, under which it proposed to purchase solar power and power from other non-conventional sources, through the Respondent, on a long term basis at a fixed tariff to be determined by the Central Electricity Regulatory Commission.

3. The Petitioner opted for the said scheme. It proposed to establish a solar power plant based on an innovative technology known as Solar Dish Starling Engine Based Technology, which was to be provided to it by a foreign collaborator- M/s Infinia Corporation, USA ('Infinia').

4. The Petitioner approached the Rajasthan Renewable Energy Corporation Ltd. ('RRECL') for a long term arrangement for supply from their intended power plant using Infinia technology. It is stated that in March, 2009, the RRECL empanelled the Petitioner for purchase of power by the Rajasthan Discoms Power Procurement Centre.

5. On 19th July, 2010, the Petitioner migrated to the Jawaharlal Nehru National Solar Mission with the consent of RRECL. The Petitioner entered into a Power Purchase Agreement ('PPA') with the Respondent and pursuant thereto, on 23rd July 2010, the Petitioner furnished to the Respondent two Performance Bank Guarantees ('PBGs') dated 23rd July, 2010 and 13th October, 2010 in the sum of Rs. 2.5 Crores each. Under the terms of said PPA, the Petitioner was obliged to commence power supply from their intended power plant by 15th February, 2013. The Respondent was under an obligation to purchase the power so generated @ Rs 15.31 per KWH for a period of 25 years.

6. The Petitioner states that Infinia faced problems in commercialization of the technology. Infinia ultimately went into bankruptcy without providing to the Petitioner the said commercialized technology and equipment support.

7. The Petitioner then apprised the Ministry about the above development and requested for permission to establish a plant based on photo-voltaic (PV) Technology instead of Infinia technology. Alternatively, by a letter dated 4th July, 2012, it sought extension of the date of commencing of the power supply. The Ministry, by its letter dated 28th August, 2012, declined the Petitioner's request for change in technology. As a result, the Petitioner

could not establish the plant and supply the power by the deadline of 15th February, 2013.

8. By a letter dated 13th March, 2013, the Petitioner requested the Respondent to withdraw the said PBGs. By a letter dated 14th March 2013, the Respondent informed the Petitioner that since it had failed to achieve the milestone contained in Clause 8 of the Migration Guidelines and Article 3.3.3 of the PPA, the PBGs had been encashed. By a letter dated 28th July 2015, the Petitioner asked the Respondent to refund the said amount of Rs. 5,00,00,000/- with interest @ 18% p.a. The Respondent, however, declined the said request.

9. In the above background, the disputes between the parties were referred to the AT. The Petitioner claimed from the Respondent the said sum of Rs. 5 crores together with interest @ 18% p.a. from 13th March, 2013, the date of encashment of PBGs, till the actual date of payment, apart from the costs of the arbitral proceedings.

10. In its statement of defence, the Respondent pointed out that the very object of specifying the amount of Rs. 5 crores as the quantum of the PBGs was to obviate the need to demonstrate the actual loss that might be incurred. It was contended that the precise extent of legal injury and loss, on account of the failure by the Petitioner to fulfil its obligation under the PPA, could not be quantified. It was further submitted that having taken the benefit of the scheme of the PPA, the Petitioner cannot at this stage, characterize the sum of Rs. 5 crores as being penal in nature or *in terrorem*. Without prejudice to the above contention, the Respondent submitted that the provision of such liquidated damages ('LD') was a necessity in case of a regulated industry such as the power sector. Considering the fact that it was difficult to prove the actual damages and the parties needed to be clear about

the quantum of damages, the provisions of Article 4.6.4 of the PPA had been adopted.

11. On the other hand, it was contended by the Petitioner that the question of pre-estimate of any loss or damages likely to be caused to the Respondent did not arise and it was illogical to consider the amount of PBGs as LD. It was submitted that it was well settled that proof of actual loss was a *sine qua non* for retention of money towards damages.

12. Considering the nature of the dispute, no oral evidence was adduced by the parties. The AT framed the following issues, by its order dated 20th July, 2015:

“(i) Whether the Respondent was in breach of the Power Purchase Agreement by not providing for the Letter of Credit/Payment Support Mechanism as provided in Article 10.4.2 and 10.4.9 and if so, to what effect?

(ii) Whether the Respondent is justified in declining the Claimant's request for extension of time or change in technology to set-up the power plant?

(iii) Whether the encashment of Performance Bank Guarantee issued by the Punjab National Bank in favour of the Respondents in absence of any notice given to the Claimant prior to the encashment was contrary to the Power Purchase Agreement dated 15.10.2010?

(iv) Whether the Claimant is entitled to recover the Bank Guarantee Amount or any part thereof from the Respondent?

(v) Whether the encashment of the Performance Bank Guarantee by the Respondent is penal in nature or an

act of terrorem as claimed by the Claimant, and if so, the effect thereof?

(vi) Whether the termination of Power Purchase Agreement by the Respondent is valid and in terms of the Power Purchase Agreement?

(vii) Whether the Claimant is entitled to interest on the amount found recoverable from the Respondent? If yes, at what rate and for what period?

(viii) Relief.

(ix) Cost."

13. In the impugned Award, the AT formulated a core question in para 45 as: "Did the Respondent commit any breach of the terms of the agreement?" The AT noted that "no provision in the PPA has been brought to this Tribunal's notice, which empowers the Respondent either to extend the time or to permit the Claimant to change the technology." Consequently, the AT held that the order of the Central Government contained in the Ministry's letter dated 28th August, 2012 declining to grant any extension of time for performance of the obligation under the PPA could not be said to be in breach of the terms of the PPA. Further, considering that the PBGs in question were unconditional, it was held that they could have been encashed any time by the Respondent without prior notice to the Petitioner.

14. Relying on the decisions in *Maula Bux v. Union of India AIR 1970 SC 1955* and *Fateh Chand v. Balkishan Das AIR 1963 SC 1405*, it was contended by the Petitioner before the AT that encashment of PBGs amounted to forfeiture of security for damages which might be suffered by the Respondent. If it was not to be considered as a security for damages, the

amount of the PBGs should be treated as “penalty”. Since the Respondent had not pleaded or proved that it has suffered any damages, no LD was to be paid and therefore, the PBGs could not have been encashed by the Respondent. Reliance was also placed on *Kailash Nath Associates v. Delhi Development Authority* (2015) 4 SCC 136; *Indian Oil Corporation v. Lloyds Steel Industries Ltd.* 2007 (4) Arb LR 84 (Del); and *Forbes Gokak Ltd. v. Central Warehousing Corporation* 2003 (1) Arb LR 279 (Del).

15. As regards Section 74 of the Indian Contract Act, 1872 (‘ICA’), the AT referred to the decisions in *Maula Bux* (*supra*) and *Fateh Chand* (*supra*) and held that the amount payable to a party to a contract, in the event of default of other party to perform its part of the contract within the stipulated time, “by itself cannot be held to be a penalty”. The AT then posed a question “whether the Respondent has suffered any damage/loss must be determined having regard to the entire facts and circumstances of the case.” The AT referred to *ONGC v. Saw Pipes Ltd.* (2003) 5 SCC 705, where it was held that if the amount of compensation set out in the contract is a genuine estimate of loss which the parties knew would likely to result from breach of contract, proving of loss by such party by leading evidence would not be necessary.

16. The AT also referred to the decision of *Construction & Design Services v. Delhi Development Authority* 2015 (1) CDR 153 (SC) 4 where the view of the learned Single Judge, holding that the delay in performance of the contract involving construction of a public utility service could itself be a ground for compensation without proving the actual loss, was set aside by the Division Bench. The AT then concluded that it could not be said in the facts and circumstances of the present case the mere difficulty in performance of the contract did not give rise to a case of frustration of

OMP (Comm) 120 of 2017

contract. Importantly, it was observed by the AT that on the issue of the amount specified being unreasonable, "the claimant has neither raised such a plea nor adduced any evidence in this behalf." Consequently, the Petitioner's claim was rejected by the AT.

17. Mr. Akhil Sibal, learned counsel for the Petitioner, placed considerable reliance on the decision in ***Construction & Design Services (supra)*** which held that where proving of actual loss may not be possible, the Court may proceed on 'guess work to some extent', as to the quantum of compensation that is to be allowed. Reliance was also placed on ***Saisudhir Energy Ltd. v. NTPC Vidyut Vyapar Nigam Ltd. 2016 (5) Arb LR 137 (Del)***.

18. It was submitted by Mr. Sibal that the AT completely failed to return any finding on whether the amount of the PBGs could be said to be "reasonable compensation" for the breach of contract by the Petitioner. The AT also failed to examine the specific plea of the Petitioner in this regard. Mr. Sibal also relied on the decisions in ***Fateh Chand (supra)*** and ***Maula Bux (supra)*** to urge that in the absence of any specific evidence of loss suffered by the Respondent, it was incumbent on the Court to determine what was 'reasonable compensation'. The AT could not have awarded the entire amount specified in the PPA as compensation to the Respondent.

19. What is unable to be disputed by Mr. Sibal is the factual finding in the impugned Award to the effect that the Petitioner did not adduce any evidence to show that the amount specified in the contract was not reasonable. The law in this regard, as explained in several decisions from ***Fateh Chand (supra)*** onwards is fairly well settled. In ***ONGC Ltd. v. Saw Pipes Ltd. (supra)*** the Court observed as under:

“64.Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach.”

20. The burden of proof being on the person committing breach to show that no loss was suffered by the other party or that the amount specified in the contract was not reasonable was reiterated in *Construction & Design Services v. DDA* (*supra*) as under:

“16. Once it is held that even in absence of specific evidence, the respondent could be held to have suffered loss on account of breach of contract, and it is entitled to compensation to the extent of loss suffered, it is for the appellant to show that stipulated damages are by way of penalty. In a given case, when highest limit is stipulated instead of a fixed sum, in absence of evidence of loss, part of it can be held to be reasonable, compensation and the remaining by way of penalty. The party complaining of breach can certainly be allowed reasonable compensation out of the said amount if not the entire amount. If the entire amount stipulated is genuine pre-estimate of loss, the actual loss need not be proved. Burden to prove that no loss was likely to be suffered is on party committing breach, as already observed.”

21. In the considered view of the Court, the AT could not have possibly determined whether the amount specified in the PPA is reasonable without

any evidence in that regard being led by the Petitioner. Mere pleadings without some supporting evidence was insufficient for that purpose. Although Mr. Sibal sought to draw a comparison with the relevant clauses in *ONGC Ltd. v. Saw Pipes Ltd.* (*supra*), the fact remains that no shred of evidence was, in fact, adduced by the Petitioner in the present case to show that the specified compensation amount was unreasonable.

22. In the above circumstances, the conclusion reached by the AT that the Petitioner was not entitled to any relief cannot be said to be perverse or opposed to fundamental policy of India within the scope of Section 34 (2)(d) (ii) of the Act. No grounds have been made to interfere with the impugned Award of the AT.

23. The petition is accordingly dismissed with no order as to costs.

MARCH 14, 2017
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S. MURALIDHAR, J