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

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O.M.P. 344/2015 & I.A. 12618/2015

PUBLIC JOINT STOCK COMPANY POWER MACHINES -ZTL,
LMZ, ELECTROSILA, ENERGOMACHEXPORT Petitioner
Through: Mr Vidur Bhatia with Mr Akshaya
Dhaundiyal, Advs.

versus

BHARAT HEAVY ELECTRICALS LIMITED Respondent
Through: Mr Ciccu Mukhopadhaya, Sr. Adv. with
Mr Abhijeet Sinha, Mr Saurav Agrawal, Ms
Rashmi Gogoi, Mr Aditya Shukla and Mr
Sidhharth Naidu, Advs.

And

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O.M.P. (COMM) 316/2016 & IA 8210/2016

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CORAM: JUSTICE S. MURALIDHAR

ORDER

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06.02.2017

1. These two petitions have been filed by the Petitioner, Public Joint Stock

Company Power Machines - Ztl, Lmz, Electrosila, Energomachexport under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act'). The challenge in OMP No.344/2015 is to the partial Award dated 18th February, 2015 passed by the three-member Arbitral Tribunal ('AT') and the challenge in OMP (Comm.) No. 316/2016 is to the final Award dated 12th April, 2016 whereby the costs to be paid by the Petitioner to the Respondent, Bharat Heavy Electricals Limited ('BHEL'), were determined.

2. At the outset, it required to be noticed that the predecessor-in-interest of the Petitioner was M/s OJSC Power Machines and it was substituted by the Petitioner on 3rd February, 2017.

Relevant facts

3. The Uttar Pradesh Rajya Vidyut Utpadan Nigam Limited ('UPRVUNL') is the owner of the Obra Thermal Power Station. UPRVUNL approached BHEL to undertake modernization, refurbishment and upgrading of the units. BHEL in turn approached PM. OJSC Power Machines ('PM') entered into a 'principal to principal' contract with BHEL on 28 August, 2006 for the supply of imported portion for R & M and U of 5x200 MW units of the Obra Thermal Power Plant (Units 9 to 13) located in Uttar Pradesh, India.

4. The provisions of the Contract relevant to the present petition provided that:

- (i) BHEL would pay a fixed lump sum contract price of US\$ 46,643,968.
- (ii) Advance Payment in the sum of 10% of the contract price was payable by BHEL.
- (iii) 60% of the contract price was payable by BHEL upon shipment of the

equipment. For this payment, BHEL was required to open a letter of credit (L/C) two months before the shipment. The L/C was to remain valid for one month after the completion of supply.

- (iv) 20% of the contract price was to be paid by BHEL on submission of invoice and Delivery Receipt Certificate issued by BHEL. For this payment, a separate L/C was required to be opened two months before receipt of material at the site and valid until one month after completion of supply at site.
- (v) 5% of the contract price was payable by BHEL against submission of invoice and Take-over Certificate issued by BHEL after completion of commissioning.
- (vi) The remaining 5% was payable against submission of invoice and completion certificate to be issued by BHEL after successful completion and acceptance of PG Test.
- (vii) The PM was required to provide an Advance Payment Bank Guarantee (APBG) and a Performance Bank Guarantee (PBG), each for 10% of the contract price.
- (viii) For Units 9 to 11, in the event of delay in completion of commissioning due to the fault of PM, it was required to pay 0.5% of delayed unit price value per full week of delay with a limit of 10% of delayed unit price value. For Units 12 and 13, in the event of delay in delivery due to PM's fault, PM was required to pay 0.5% of delayed unit price per full week of delay with limit of 10% of delayed unit price value. The maximum liability of PM for liquidated damages (LD) could not exceed 15% of the contract value.

5. Further, BHEL was required to provide certain basic engineering documents to PM pursuant to Appendix 6B of the Contract. These included *inter alia* the site plan, the general plant layout, operational history and steam, oil and cooling water analyses. PM was also required to provide certain basic engineering documents to BHEL under Appendix 6 of the Contract.

6. Disputes arose between the parties. BHEL invoked the BGs and subsequently, by letter dated 6th August, 2009, PM terminated the Contract.

7. Article 12.7 stated that the Contract was governed by Indian law. Article 14 of the Contract provided for resolution of disputes by arbitration under the Act. The seat of the arbitration was New Delhi. By letter dated 7th September 2010, PM invoked the arbitration clause.

Claims and Counter-Claims

8. PM's case was that BHEL failed to effect timely delivery of the Appendix 6B Documents; failed to make full payment for the deliveries effected by PM; failed to extend the L/Cs; wrongfully invoked the BGs. Further, there was material discrepancy between the Contract and the site in the starting up system of turbines. BHEL was in repudiatory breach of the Contract, which entitled PM to terminate the Contract.

9. PM filed a Statement of Claim seeking:

- (i) US\$ 5,740,284.20 plus interest towards the call under the BG;
- (ii) US\$ 2,980,831.92 plus interest in respect of payment for goods delivered;

- (iii) US\$ 3,596,842.16 plus interest towards loss of profit;
- (iv) US\$ 498,788.44 plus interest towards costs relating to import of condenser tubes to Russia and associated freight charges;
- (v) US\$ 58,337.81 plus interest towards additional expenses in relation to BG; and
- (vi) US\$ 47,700,000 plus interest towards loss of business and reputation.

10. BHEL filed a counter-claim which was premised on PM's delay in performance of its obligations under the Contract. BHEL sought:

- (i) LD for delay under Article 11 of the Contract;
- (ii) General damages (amounts UPRVUNL deducted by way of LD under BHEL's contract with UPRVUNL);
- (iii) Rs. 147,582,755.20 towards cost of purchasing condenser tubes for Units 9-13;
- (iv) Rs. 66,919,600 towards cost of purchasing replacement Electro Hydraulic Governor ('EHG') for Unit 9;
- (v) Rs. 52,018,310.34 for cost of purchasing "risk items" for Unit 9;
- (vi) Rs. 391,312,019 towards loss of profit; and
- (vii) Rs. 1,000 million towards loss of business opportunity.

11. The parties agreed that the AT should record its decision in the form of a First Partial Award, reserving any order as to the costs of the proceedings to a further Award.

12. By the First Partial Award dated 18th February 2015, the AT partly allowed PM's claim relating to non-payment of goods delivered to the extent

of US\$ 1,913,277.27 (i.e., 20% balance for three shipments) and rejected the claim for non-payment to the extent of the balance 10% payment for five shipments due to non-fulfilment of commissioning and performance guarantee tests. The AT also rejected the other claims raised by PM. It held that:

- (i) BHEL effected timely delivery of the Appendix 6B documents;
- (ii) PM failed to effect timely delivery of the Appendix 6 Engineering Documents;
- (iii) There was a material discrepancy between the work specified in the Contract and that which was to be done in respect to the start up system to be used for Units 12 and 13;
- (iv) The delay in carrying out PM's obligations was attributable to PM's default;
- (v) BHEL was in breach of the contract in not extending the L/Cs after expiry. BHEL failed to make timely payment for equipment supplied by PM.
- (vi) BHEL was not in repudiatory breach of the Contract. PM was not entitled to terminate the Contract on 6th August, 2009.

13. As regards the counter-claim, the AT allowed BHEL's claim for LD in the sum of US\$ 4,972,634.40 (10% of the enhanced contract price) since PM was responsible for the delay. The AT also allowed BHEL's claims towards the cost of purchasing condenser tubes for Units 9-13, replacement Electro Hydraulic Governor and risk items for Unit 9. The AT rejected BHEL's claim for the amounts that UPRVUNL deducted by way of LD under UPRVUNL's contract with BHEL and for loss of profit and loss of business

opportunity.

14. After setting off the amount awarded to PM and the amount already recovered by BHEL under the BGs, the AT held that PM should pay BHEL the principal sum of Rs. 13,38,64,496.39 and interest in the sum of Rs. 4.29,51, 305.35 calculated up to the date of the Award and thereafter at a daily rate of Rs. 44,017.46 until the date of payment.

Applicability of the Act as amended

15. The Court has heard Mr Vidur Bhatia, learned counsel for the Petitioner and Mr Ciccu Mukhopadhaya, learned senior counsel appearing for the Respondent, BHEL.

16. Mr Vidur Bhatia, learned counsel for the Petitioner, first submitted that although Article 15 of the Contract between the parties stated that the provisions of the Act and the re-enactment thereof and rules framed thereunder from time to time would apply, as far as the present case is concerned, it is only the Act as it stood prior to the amendment with effect from 23rd October, 2015 that would continue to apply. In this context, he sought to place reliance on the decision in *N. S. Nayak & Sons v. State of Goa (2003) 6 SCC 56*.

17. The Court, however, does not propose to examine this issue since even if this submission were to be accepted, the result would be that the scope of challenge to the impugned Award would be as it was prior to the amendment to Section 34 of the Act with effect from 23rd October, 2015. Since the Court in any event proposes to examine all the grounds of challenge of the

Petitioner not restricted to those permissible under Section 34 of the Act as amended with effect from 23rd October, 2015, this question is left open for decision in an appropriate case.

Challenge to the Award on merits

18. On merits, Mr Bhatia first submitted that the impugned First Partial Award is contrary to the provisions of the contract and the statutory provisions. Mr Bhatia submitted that the AT provided no reasons for awarding BHEL Rs. 4,73,63,004.15 towards additional costs for risk purchases. The AT, According to him, failed to consider whether the purchases:

- (i) were made at an inflated price;
- (ii) were part of the scope of work under the contract between PM and BHEL;
- (iii) were made towards supplies already made;
- (iv) were required;
- (v) were made for units which had not been commissioned; and
- (vi) were under contracts which were more favourable to BHEL.

19. Reliance is placed on the decision in ***Flowmore Private Ltd. v. NTPC (2009) 113 DRJ 589***. Further, Mr Bhatia submitted that BHEL had a duty to mitigate its loss, an aspect that the AT completely ignored. He submitted that the impugned Award was contrary to public policy and deserved to be set aside under Section 34 (2) (b) (ii) of the Act. Reliance is placed on the decisions in ***ONGC v. Western Geco International Limited (2014) 9 SCC 263*** and ***Managing Director, Army Welfare Housing Organisation v.***

Sumangal Services (P) Ltd. (2004) 9 SCC 619.

20. Mr. Bhatia drew the attention of the Court to the transcript of the deposition of Mr. Garg, the witness appearing on behalf of BHEL. There were 3 distinct items in respect of which risk purchases were made and claims raised. One was the condenser tubes, the other was EHG and the third various other items. In relation to the condenser tubes for Unit-9, Mr. Garg was asked if BHEL had any procurement policy, rules or standards. The answer was in the affirmative. When asked to explain what the said policy, rules and standards were, Mr. Garg answered that they were dealt with by the Purchase Department which was a different department from the Commercial Department. Likewise, he stated that he was not aware of the policy issues for such risk purchases because he was not in the Purchase Department. Mr Bhatia submitted that from the above answers, it appeared that BHEL was unable to provide any satisfactory proof of the risk purchases having been undertaken at the requisite price and being necessary for the contract in question.

21. In reply, it is submitted by Mr Mukhopadhyaya, learned Senior Counsel for BHEL, that a very detailed discussion of the issue was undertaken by the AT with reference to the evidence on record and in particular to the depositions of the witnesses. He submitted that the scope of judicial review of an arbitral Award under Section 34 of the Act does not extend to re-appreciating the evidence and seeking to substitute the Award only because a different view is possible. He submitted that the Petitioner has failed to meet the high threshold of demonstrating that the findings of the AT are

perverse or contrary to any provisions of law or the terms of the contract.

Analysis and reasons

22. However, the Court finds that the answer to the submissions is found in the transcript itself. The following exchange between the witness and counsel for the Petitioner makes this clear:

Q. Did you carry out any exercise relating the risk purchases to PM's scope of supplies under the contract?

A. Yes, the risk purchase was based on the feedback from the site, based on which the supplies were made.

Q. Feedback from the site? Was it based on the contract?

A. Supplies made, feedback from the site and engineering also.

Q. Was it based on the contract?

A. Yes, it was based on the contractual requirements.

Q. Did you personally verify that each of the risk purchases, each item mentioned in the risk purchases relates back to PM's scope of supplies under contract?

A. Yes, it was based on the feedback from – it was based on the feedback only.

Q. Did you personally verify the details of risk purchases and their relation to PM's scope of supply under the contract?

A. Yes it was like that.

23. Whatever doubts may have been created by this witness earlier were clarified with the above answers. The assertion of this witness that the risk purchase was based on the contract was elicited by the counsel for the

Petitioner himself. It is obvious that the evidence of the said witness could not be discarded on the above crucial aspect. Consequently, the Court is unable to agree with the submissions of Mr. Bhatia that the Award of the AT in this respect is contrary to the contractual provisions or the evidence on record.

24. The next ground of attack was that in terms of Section 19(2) of the Act, the AT was required to ensure that the procedure in terms of the contract was followed by it in conducting its proceedings. It is submitted that after granting permission to PM to file certain documents relating to risk purchases to which there was no objection by BHEL, the AT proceeded not to consider such documents. It is, accordingly, submitted that PM was, therefore, unable to present its case and the Award should be set aside under Section 34 (2) (a) (iii). In this context, reliance is placed on the decision in **ONGC v. Western Geco International Limited** (*supra*).

25. Reliance is also placed on the decision in **Managing Director, Army Welfare Housing Organization v Sumangal Services (P) Ltd.** (*supra*), where it was observed that the Court should interfere when relevant facts are ignored or irrelevant facts not germane to deciding the disputes are taken into consideration. The decision in **Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan (1999) 5 SCC 651** and **Union of India v. Daisy Trading Corporation 2006 (89) DRJ 24** which was upheld by this Court in the order dated 15th September, 2006 passed in FAO (OS) No. 570/2006. Additionally, reference was made to the decision of Division Bench of this Court in **Flowmore Private Limited v. NTPC** (*supra*) and **Pragati MGFR**

and Suppliers v UOI (2009) 113 DRJ 868.

26. At the outset, the Court would like to observe that unless the Award is so perverse so as to shock the judicial conscience, no interference is called for. Further, on the interpretation of the contract by the AT, cannot be interfered with only because more than one interpretation is possible to be placed on the provision.

27. Dealing with the Award, the Court finds that the AT has in fact discussed Appendix-12 in paragraph 270 of the Award. Appendix-12 described the Risk Purchase Analysis to establish the vagueness etc. of BHEL's related claim. In paragraph 271, the AT has in fact reviewed remarks set out in Appendix-12 acknowledging that they relate variously to the condenser tubes, EHG and to the Risk Purchases for Unit 9. The reasons for PM's rejection of the said purchases were also noted. The AT in paragraph 271 observed as under:

"Having reviewed the remarks set out in Appendix 12, the Tribunal has noted that they relate variously to the Condenser Tubes, to the EHG and to the Risk Purchases for Unit 9. Typical is the second row of the spreadsheet which relates to a lifting beam apparently acquired by BHEL for use in connection with the Condenser Tubes. Against this item, PM has indicated the following reasons for rejection:

"1B. Risk Purchase doesn't comply with contractual scope (technical specification).

1C. If Risk Purchase does not comply with contractual scope (technical specification) then its necessity shall be proved.

1D. Supplies/services to be provided as per Contracts No. 2-4, transportation agreement shall be excluded.

2B. [Reasonability of scope put in issue]"

In the "Remarks" column, the following entry appears against this item:

"Tools are not included in the original scope of supply, PM should have supplied [Condenser Tubes] in containers, unloading is within the scope of PMIL service contract (Appendix 4)".

From these reasons and remarks, it is apparent that the main point which PM wishes to advance is that the lifting beam did not form any part of PM's scope of supply under the Contract. In the Tribunal's view, this is a matter which should have been - but was not - taken up in cross-examination of Mr. Garg, if not before. The same goes for numerous other items in Appendix 12. The Tribunal cannot be expected to research the validity or otherwise of these points on its own. The Tribunal has come to the conclusion that these points are raised too late in the proceedings and it declines to entertain them."

28. A discussion was also undertaken for the EHG and the remarks in Appendix-12 in that regard. Therefore, Mr Bhatia is not right in submitting that the AT has acted contrary to Section 19(2) of the Act by rejecting Appendix-12 after permitting it to be placed on record.

29. None of the decisions cited by Mr Bhatia come to his aid. It is not a case where there was any denial of opportunity to the Petitioner to present and defend its case before the AT.

30. The next ground of challenge was regarding production of documents by the AT to BHEL and vice versa. In particular, it was submitted that the finding of the AT that the PM failed to effect documents of Appendix-6 Engineering Documents has been reached without any application of mind by the AT. Likewise, the finding of the AT that PM never complained about the lack of documents to BHEL is contrary to the record. By its email dated 28th November, 2006, PM asked BHEL to provide to it a number of drawings listed in a 3-page schedule for design work. BHEL replied to the said mail on 7th December, 2006 stating that certain documents were not available. It is submitted that there is inconsistency in the impugned Award where the AT referred to the above documents but still concluded that PM never complained about the lack of documents till July, 2008.

31. Having perused the impugned Award, the Court finds that the AT has analyzed the documents as well as the submissions of both the sides. The AT did discuss the submission of PM that BHEL was in breach of the contract in failing to provide the basic Engineering Documents identified in Appendix-6B to the Contract. The important question according to the AT was whether sufficient information was supplied to enable the PM to proceed with its design and manufacture. In that context the AT held that “the tribunal is in no doubt that that question falls to be answered in the affirmative”. These are factual findings which the Court is unable to find to be suffering from any legal infirmity.

32. The evidence of Mr Gupta in regard to the handing over of the documents was accepted by the AT. The Court, therefore, rejects the

challenge by the Petitioner to this part of the Award.

33. As regards the failure by the Petitioner to complain about the lack of documents, the Court does not find any inconsistency as is sought to be urged by Mr Bhatia. The AT has in fact referred to and relied upon the documents referred to by Mr. Bhatia. The view of the AT is a plausible one and does not suffer from any perversity as alleged.

34. In view of the aforesaid, the Court finds that no case is made out to interfere with the impugned First Partial Award dated 18th February 2015.

Challenge to the Costs Award

35. O.M.P. (Comm.) 316 of 2016 challenges the Final Award, which is the Costs Award. By the said Costs Award, the AT awarded BHEL an aggregate sum of Rs. 802,42,525/- as costs under Section 31(8) of the Act and interest of Rs. 2,06,03,561/- up to 12th April, 2016 i.e., the date of the Award and thereafter at a daily rate of Rs. 26,382 until the date of payment. Interest thereon was calculated @ 12 % per annum.

36. Mr Bhatia submitted that the cost as awarded by the AT was exorbitant in relation to the total awarded sum. This was despite BHEL not having succeeded on all issues. It is submitted that the AT's Costs Award is contrary to the legal position explained in *Union of India v. M/s. Singh Builders Syndicate* 2009 (4) SCC 523; *Ariba India Private Ltd. v. Ispat Industries Ltd.* 2011 (125) DRJ 91; *MMTC Ltd. v. Anglo American Metallurgical Coal Pty. Ltd.* (2005) 221 DLT 421. He also relied on the decisions in *Pure Helium India (P) Ltd. v. ONGC* (2003) 8 SCC 593; *Mukand Ltd. v.*

Hindustan Petroleum Corp. Ltd. (2006) 9 SCC 383 and McDermott International Inc. v. Burn Standard Co. Ltd. (2006) 11 SCC 181.

37. The Costs Award has been carefully perused by the Court. At the outset it must be recalled that the Court is not sitting in appeal over the Costs Award. The question of re-appreciating the evidence that there was before the AT, on the basis of which it determined and awarded costs, does not arise. The Court cannot be expected to re-assess the bills submitted by BHEL in support of its claims for costs and fees. Secondly, the question whether a certain figure of fees and costs, in the absence of any statutory norm, can be reduced to an exercise of subjective assessment. For instance, in ***Ariba India Private Ltd. v. Ispat Industries Ltd. (supra)***, a learned Single Judge of this Court took the view that fees and expenses that constituted over 5% of the claim was excessive. This also explains why in the cases cited by the counsel for PM varying approaches have been adopted by the Courts to the issue of costs and fees. In some of the decisions, like for e.g., ***Union of India v. M/s. Singh Builders Syndicate (supra)***, the observations in that regard appear to be of a general nature, and cannot be said to be a binding legal precedent. In particular, these decisions do not help in discerning any objective judicial manageable standard by which to assess an Award of costs and fees in arbitration proceedings.

38. Secondly, it must also be borne in mind that in the context of international commercial arbitration, depending on the complexity of the issue involved, it is not unusual for experts from across the world to participate in the arbitration proceedings as witnesses. The fees of such

experts might indeed be high. Can an AT, and much less a Court, possibly determine that the fees charged by such an expert is 'excessive'? This will necessarily entail a case-by-case approach to the issue of costs and fees. Thirdly, the carriage of proceedings principle does entitle the successful party to insist that the costs be borne by the losing party, as long as proper proof of the incurring of such expenditure is furnished. Increasingly in commercial matters, the legislative trend is to encourage courts to award actual costs to the successful party. The recent legislation governing commercial courts is one instance. The other option is for parties agree at the outset to limit the fees and costs. Which explains the opening words of Section 31 (8) of the Act: "Unless the parties otherwise agree..." As observed in *Dolphin Drilling v. ONGC (2010) 1 SCC 671*: "The issue of financial burden caused by the arbitration proceedings is indeed a legitimate concern but the problem can only be remedied by suitably amending the arbitration clause."

39. In the present case, the AT accepted that BHEL's claim of legal fees was unreasonable to some extent. Even the costs claimed in respect of one expert was reduced by the AT. It is, therefore, not as if the AT has simply accepted all the claims of BHEL as regards costs and fees. The assessment of the AT as what constituted reasonable fees and costs in the circumstances of the case cannot be held to be perverse or contrary to the fundamental policy of Indian law. It is difficult for the Court to substitute its viewpoint in that regard unless the evidence available on record unmistakably points to the perversity of the AT's determination. That is not the case here. should be the

40. As regards the rate of interest, 12% simple interest per annum can hardly be said to be excessive.

41. The Court finds that no grounds have been made out to interfere with the impugned Costs Award as well.

42. Both the petitions are, accordingly, dismissed but in the facts and circumstances of the case, with no order as to costs.

43. Pending IAs also stand disposed of.

FEBRUARY 06, 2017
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S.MURALIDHAR, J