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

DECIDED ON : 12th JULY , 2017

+ **FAO(OS) (COMM) 138/2017 & CM APPL. 24041/2017**

DALMIA SOLAR POWER LTD Appellant

Through : Mr.Dinesh Goyal, Advocate with
Mr.Rupesh Goyal & Ms.Smita Mohan, Advocate.

Versus

NTPC VIDYUT VYAPAR NIGAM LTD Respondent

Through : Mr.M.G.Ramachandran, Advocate
with Mr.Pulkit Agarwal & Ms.Anushree Bardhan,
Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE S.P.GARG

S. RAVINDRA BHAT, J. (OPEN COURT)

1. This appeal is directed against an order of the learned Single Judge rejecting the petition under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred as 'The Act'). The appellant had challenged the legality of the award of the Tribunal dated 24.11.2016.

2. The appellant entered into an agreement with the respondent (hereinafter referred as 'NVVN') pursuant to the scheme of the Union Ministry of New and Renewable Energy which had floated the Jawaharlal Nehru National Solar Mission. The mission proposed to purchase solar power and power from other non-conventional sources - the NVVN was to enter into long term agreements at a fixed tariff to be determined by the Central Electricity Regulatory Commission. The appellant proposed to set up a solar power plant based on an innovative technology known as Solar

Dish Sterling Engine Based Technology to be provided to it by a foreign collaborator - M/s. Infinia Corporation, USA. The appellant approached the Rajasthan Renewable Energy Corporation Ltd. for a long term arrangement for supply from their intended power plant using Infinia technology. It is stated that the corporation empanelled the appellant for purchase of the power. The appellant opted for the National Solar Mission under the Jawaharlal Nehru Solar Mission with the consent of the Rajasthan Corporation and entered into a Power Purchase Agreement with NVVN on 23.07.2010. As a part of the obligations under that Power Purchase Agreement, the appellant furnished two Performance Bank Guarantees for ₹2.5 crores each on 23.07.2010 and 13.10.2010. Under the terms of the Power Purchase Agreement, the appellant was obliged to commence power supply from their intended power plant by 15.02.2013; NVVN was under an obligation to purchase the power so generated @ ₹15.31 per KWH for 25 years. Citing insurmountable barriers in ensuring compliance with the terms of the agreement due to commercialization of technology, the appellant requested for permission to establish a plant based on Photo-Voltaic (PV) Technology. It sought – as an alternative, extension of the date of commencing of the power supply – in July 2012 and pushing the agreed date of 15.02.2013 to later date. This request was declined by the Central Government on 28.08.2012. The appellant could not therefore establish the power plant and supply the power within the time agreed. The appellant requested for withdrawal of the Performance Bank Guarantees by NVVN. However, on 14.03.2013 NVVN stated that there was breach and failure by the appellant in the performance of its obligations under the agreement and proceeded to encash the bank guarantees.

3. These developments occasioned a claim to arbitration by the appellant. It sought for a direction / award – which in fact amounted to a

claim for the return of ₹5 crores encashed by NVVN with interest at 18 % per annum from 13.03.2013 till actual date of payment. The NVVN's defence was that ₹5 crores forming part of the two Performance Bank Guarantees was a genuine pre-estimation of loss likely to be incurred in the event of appellant's non-compliance with the supply of the power under the agreement. It was also urged that having benefited from the Power Purchase Agreement and the underlying benefits of the scheme, the appellant cannot characterize the encashment of ₹5 crores as penal. The NVVN in other words stated that the concerned clauses enabling to encash the bank guarantees were not penal clauses but a reasonable pre-assessment of loss likely to be incurred in the event of breach. The award of the tribunal, accepted the NVVN's contentions and rejected the claim for refund of an amount of ₹5 crores with interest.

4. Before the learned Single Judge under Section 34, the appellant had advanced two fold contentions – one that without proof of actual damage or loss, the NVVN could not have legitimately encashed the bank guarantees and that the concerned contractual terms i.e. clause 3.2.2 was in fact penal in nature. It was further contended that the appellant also set up the plea of impossibility – which was rejected even though no suitable pleadings were made nor was any evidence in that regard led.

5. It is contended by Mr.Goyal, learned counsel for the appellant – based upon the grounds urged in the appeal, that the learned Single Judge fell into grave error in ignoring the binding decisions of the Supreme Court in *Maula Bux vs. Union of India*, AIR 1970 SC 1955 and *Fateh Chand vs. Balkishan Das*, AIR 1963 SC 1405. He also relied upon *Kailash Nath Associates vs. Delhi Development Authority*, 2015 (4) SCC 136. It was submitted that so far as the issue of impossibility / frustration is concerned, there was no denial that Infinia technology was unavailable at the time of

appellant's claim – which ought to have led the Tribunal to return such a finding.

6. Consideration of the impugned order would show that the learned Single Judge took note of all the decisions that are cited today i.e. *Maula Bux*, *Fateh Chand* and *Kailash Nath* etc. (*supra*). *Fateh Chand* and other decisions specially *Kailash Nath* (*supra*), differentiate between two clauses of liquidated damages in the agreement. One is of a category where the injured party is in position to lead evidence : in such cases, subject to the evidence led, the monetary limit or the formula to determine it, shall be the outer cap for the damages - i.e. 'reasonable damage' not exceeding the amount stipulated. In the other category, the Courts acknowledge that the injured party would not be in a position to lead evidence having regard to inherent difficulties, which the parties recognized at the time of entering into contract. In such cases, the requirement of proof is dispensed with. Both the tribunal and the learned Single Judge were unanimous on this issue that the condition i.e. clause 3.2.2 in the present case, fell into the second category where there was no need for proof of damages or actual damages. Thus, NVVN's determination that there was no compliance with the terms of the agreement inasmuch as the power could not be supplied by the date agreed, *ipso facto* resulted in an event that enabled it to encash the Bank Guarantees, which denoted the agreed damages. This finding is one based upon the interpretation of the contract and having regard to the surrounding circumstances, the Court finds no error in the award.

7. So far as the plea of impossibility is concerned, the award would show that actual submission in this regard was made by the appellant through its counsel. Concededly, the plea of impossibility was not set up in the statement of claim so as to afford the respondent NVVN a chance to reflect or apply to it. In these circumstances, the appellant's plea that the

parties were aware of the fact that the Infinia technology was no longer available, is of no avail. Here again, the Court is conscious of the fact that impossibility like other circumstances, has to be proved through objective evidence and cannot be based upon a mere plea in the contents of the pleadings or arguments in the proceedings. There is no error of law in the award.

8. In view of the above findings, the Court is of the opinion that there is no merit in the appeal and it is dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

**S.P.GARG
(JUDGE)**

JULY 12, 2017 / *tr*