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

Date of decision: 10th April, 2018

+ **ARB. A. (COMM.) 19/2018**

NTPC LIMITED

..... Petitioner

Through: Mr.R.P. Bhatt, Sr. Adv. with Ms.Bani
Dikshit & Mr.Nikita Chonkse, Advs.

versus

JINDAL ITF LIMITED & ANR.

..... Respondents

Through: Mr.Manoj K. Singh & Mr.Nilava
Bandyopadhyay, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

CAV 295/2018

As the learned counsel for the respondent enters appearance on advance notice, the caveat stands discharged.

IA No. 4672-4673/2018(Exemptions)

Allowed, subject to all just exceptions.

ARB. A. (COMM.) 19/2018 & IA No. 4671/2018

1. Issue notice. Notice is accepted by Mr.Manoj K. Singh, Advocate on behalf of the respondent.
2. By way of the present appeal under Section 37 of the Arbitration and Conciliation Act, 1996, the appellant seeks to challenge the order dated 20.12.2017 passed by the Arbitral Tribunal in arbitration proceedings between the parties insofar as it directs the appellant to make a payment corresponding to second annual Minimum Guaranteed Quantity (MGQ) within sixty days from the receipt of the order subject to the

respondent/claimant furnishing bank guarantees of equivalent amount as stipulated in the contract. The learned senior counsel for the appellant submits that the above direction could not have been passed as an interim order as the same amounts to grant of final relief claimed by the respondent in its Statement of Claim before the Arbitral Tribunal. He further draws my attention to Clause 7.3 of the contract to contend that the MGQ is to be calculated for each completed year. He submits that in the present case, due to certain *force majeure* condition, the second year could not be treated to have been completed and therefore, the direction passed by the Arbitral Tribunal is even otherwise incorrect and premature. He further submits that though in Clause 7.3 of the agreement the MGQ is prescribed as 3MMT per annum of coal, the Ministry of Environment and Forest has given a clearance of only 1.5 MMT per annum in favour of the appellant and therefore, the MGQ as provided in Clause 7.3 of the agreement has to be revised accordingly. He further submits that the contract between the parties was terminated by the appellant by its notice dated 24.07.2017 and if the *force majeure* condition is taken into account, the termination would have been effected in the second year of operation and accordingly the respondent would not be entitled to the MGQ as provided in Clause 7.3 of the agreement.

3. I have considered the submissions made by the learned senior counsel for the appellant, however, I am unable to agree with the same. One of the important aspects of this case is that for the first year of operation the respondent has made a similar plea for release of MGQ in its favour. The same was granted by the Arbitral Tribunal in favour of the respondent on a similar condition of furnishing a bank guarantee by its order dated

15.07.2017. The appellant, being aggrieved of the same, challenged the order before this Court by way of ARP. A. (COMM.) 28/2017. The same was dismissed by this Court by its order dated 25.10.2017. The appellant thereafter, challenged the said order before the Supreme Court by way of Special Leave Petition to Appeal (c) No. 35103/2017, however, the same was also dismissed by order dated 09.01.2018. In my opinion, the plea raised by the learned senior counsel for the appellant is an attempt to have a second bite of the cherry. All pleas raised by the appellant have already been considered by the Arbitral Tribunal, by this Court and even by the Supreme Court in its earlier orders. The appellant cannot be allowed to re-agitate the same issues second time over.

4. As far as the plea of *force majeure* is concerned, Clause 7.3 of the agreement, which has been relied upon even in the earlier orders passed by the Arbitral Tribunal and by this Court, clearly provides that no dispute raised by the appellant would be valid until the appellant has made the payment of the MGQ pursuant to the sub-Clause(c) of Clause 7.3 of the agreement, that is the entire MGQ amount. It is also noted that the appellant is fully secured against the said payment by way of bank guarantees provided by the respondent in terms of Clause 7.3 itself.

5. As far as the plea of termination of the agreement is concerned, the second year of operation, as pointed out by the counsel for the respondent ended on 14.06.2017. The termination notice is issued on 24.07.2017. Whether the *force majeure* condition can have the effect of extension of the second year of operation or not, will be a question to be determined by the Arbitral Tribunal and cannot be considered today to scuttle the effect of Clause 7.3 of the agreement. This would be one of the disputes that the

appellant can raise in terms of Clause 7.3 of the agreement itself, however, only after paying the MGQ amount in terms of the said Clause.

6. As far as the reliance of the appellant on the order passed by the Ministry of Environment and Forest is concerned, I may only note that a similar plea raised by the appellant in relation to the first year of operation has been rejected by the Arbitral Tribunal and also by this Court by detailed order(s) and an SLP challenging the same also stands rejected by the Supreme Court. In my opinion, the appellant cannot be allowed to raise the said plea repeatedly only because the order now passed relates to the second year of operation.

7. The learned senior counsel for the appellant submits that the appellant would be separately challenging the order passed by the Arbitral Tribunal insofar as the Impugned Order has granted a stay on the termination notice issued by the appellant. Both the parties would be at liberty to raise all submissions and contentions in this regard as and when such appeal is filed.

8. In view of the above, I find no merit in the present appeal and the same is accordingly dismissed, with no order as to costs.

NAVIN CHAWLA, J

APRIL 10, 2018/rv