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

Date of decision: 4th April, 2018

+ **ARB. A. (COMM.) 17/2018**

GREEN INFRA WIND ENERGY LIMITED Petitioner
Through **Mr.Amarjeet Singh Chandhok, Sr.**
Adv. with Mr.Kapil Arora and
Ms.Aditi Tambi, Advs.

versus

REGEN POWERTECH PRIVATE LIMITED Respondent
Through **Mr.Gopal Jain, Sr. Adv. with**
Mr.Jayant K.Mehta, Mr.Anush
Raajan and Mr.Rahul Kukreja, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

Cav.255/2018

Since the learned counsel for the respondent has appeared on advance notice, the Caveat stands discharged.

IA No.4353/2018 (Exemption)

Allowed, subject to all just exceptions.

ARB. A. (COMM.) 17/2018

1. This is an appeal challenging the order dated 15.03.2018 passed by the Arbitral Tribunal in Arbitration Case No.1 between the parties.
2. The Arbitral Tribunal by way of its Impugned Order has directed as under:

“17. The Tribunal directs that the FDR deposited with the Registrar General of the Hon'ble High Court of Delhi pursuant to the Order dated 22nd December, 2017 in Green Infra Wind Energy Limited v. Regen Infrastructure and Services Private Limited O.M.P. (I) COMM 485/2017, be released to the Claimant upon the following conditions being fulfilled by the Claimant:

- i. Handing over of the balance Original Sale Deeds in possession of the Claimant to the Arbitral Tribunal forthwith, to await further Orders that it may pass;*
- ii. The Claimant should file an undertaking that they will execute the documents securing the easement rights of the Respondent with respect to the Wind Power Project in Rojwas, and depositing them with the Arbitral Tribunal forthwith, to await further Orders that it may pass;*
- iii. In case the above condition is not complied with by the Claimant, the Tribunal may pass appropriate Orders, including bringing back the amount which is being released pursuant to this Order.*
- iv. Furnishing a Bank Guarantee to the Respondent securing the principal amount along with interest at a rate of 9% per annum, in the event that this Tribunal orders the encashment of the BG;*
- v. It is made clear that the Bank Guarantee is to be kept alive during the pendency of these proceedings and to be made over to the Respondent in the event that this Tribunal holds in its favour.”*

3. As a brief background, it may be noted that the parties have entered into certain contracts particularly the Operation and Management Agreement dated 12.08.2015 and the Maintenance Agreement dated

12.08.2015 with respect to the setting up and operation of 60MW Wind Farm Project comprising of 40 Wind Turbine Generators (WTGs) at Rojwas, District: Shajapur and Ujjain, in the State of Madhya Pradesh. The respondent, in terms of the Agreement(s) had given bank guarantee(s) to the appellant for a sum of Rs.26,75,70,000/-. Alleging defaults in their performance of the obligations under the Agreement(s), the appellant invoked and encashed the bank guarantee(s). On the other hand, the respondent claiming proprietary right over the Flash Cards removed the same from the site in a manner disabling the Wind Turbine. The respondent claimed that the Flash Cards were not removed in order to disable the Wind Turbine, but were removed for maintenance purposes and as disputes arose, the same were not returned. This led to the filing of the cross petitions under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') being OMP(I)(COMM) 485/2017 by the appellant and OMP(I)(COMM) 84/2017 by the respondent.

4. On 22.12.2017 an ad-interim arrangement was arrived at between the parties and the following order was passed with the consent of the parties:

“With the consent of the parties, the following directions are passed:-

The petitioner undertakes to deposit a sum of Rs.26,75,70,000/- in this Court in form of a Fixed Deposit in the name of Registrar General of this Court. The fixed deposit would be created on 26th December, 2017, however, as the Court would be closed for Vacation, the same will be deposited with the Registrar General on the immediate date of re-opening i.e. 2nd January, 2018.

On receipt of intimation of creation of such Fixed Deposit by the counsel for the respondent, the respondent would ensure that the flash cards required for operationalization of the WTGs are produced at the site on

*27th December, 2017. The WTGs will be made operational in front of the Local Commissioner i.e. **Mr.Sandeep Kumar, Advocate**, Mobile-8860492346, who shall make a report in this regard.*

The deposit of the amount and the delivery of the flash cards will be without prejudice to the rights and contentions of either of the parties and would abide by further directions in the present petition or as may be given in the arbitral proceedings that may be initiated between the parties.

The fee of the Local Commissioner is fixed at Rs.75,000/-, to be paid by the petitioner. The petitioner will also make the arrangement for his travel, stay and other expenses.

Upon such operationalization of the WTGs, the respondent will not interfere with the functioning of the WTGs in any manner till the next date of hearing.

The petitioner will ensure that the Intellectual Property Right of the respondent in the equipments and flash cards are fully protected and are not disclosed to any third party.

The petitioner will operate the WTGs strictly in accordance with the operating manual of the machines.”

5. Thereafter, by an order dated 22.02.2018, the Arbitral Tribunal was constituted and the petitions under Section 9 of the Act, pending before this Court, were ordered to be treated as an application under Section 17 of the Act before the Arbitral Tribunal. Interim arrangement arrived at between the parties on 22.12.2017 was ordered to be continued during the pendency of the applications under Section 17 of the Act.

6. The applications came up for hearing before the Arbitral Tribunal on 08.03.2018 when the following submission on behalf of the appellant was recorded by the Arbitral Tribunal:

“11. After some protracted arguments the Learned Counsel for the Respondent has submitted to the release of money to the Claimant on the following conditions :

- i. That the balance Original Sale Deeds in possession of the Claimant be released to it forthwith;*
- ii. That the Respondent's easement rights be secured by the Claimant; And*
- iii. That the Claimant will furnish a Bank Guarantee to the Respondent securing the principal amount along with interest at a rate higher than the applicable rate in the FDR, which rate may be determined by the Arbitral Tribunal. The Bank Guarantee is to be kept alive during the pendency of these proceedings and to be made over to the Respondent in the event that this Tribunal holds in its favour."*

7. The applications thereafter came before the Arbitral Tribunal on 15.03.2018 and have resulted in the Impugned Order. In paragraph 2 of the Impugned Order, the Arbitral Tribunal records the submissions of the learned counsel for the appellant that he had not consented to the release of the money deposited with the Registrar General of this Court to the claimant/respondent herein as mentioned in the order dated 08.03.2018. The Impugned Order further records the objection of the appellant to the release of the amount in favour of the respondent in paragraph 5 to the following effect:

"5. In Order No.1 dated 8th March, 2018 it had been mooted that the sum/monies amounting to Rs.26,75,70,000/- deposited in a FDR in the name of the Registrar General, Hon'ble High Court of Delhi, be released to the Applicant/Claimant conditional on it furnishing a Bank Guarantee ("BG") for the said sum of Rs. 26,75,70,000/- together with interest at a rate higher than the applicable rate in the FDR. The Learned Counsel for the Respondent relying on Section 14 (c) of the Insolvency and Bankruptcy Code, 2016 ("Code") has submitted that in the event of insolvency proceedings being invoked against the Claimant, the BG,

which is to furnished, will not be capable of being invoked. It is further submitted by the Learned Counsel for the Respondent that so as to secure the Respondent from such an eventuality, a clause may be added in the BG stipulating that the BG can be validly invoked even if a Moratorium is declared under Section 14 of the Code.”

8. The Arbitral Tribunal, after relying on various judgments of the Supreme Court relating to the Law of Bank Guarantee, concluded that even if insolvency proceedings are invoked against the respondent, encashment of the bank guarantee may not be stayed. The Arbitral Tribunal, as far as the balance of equity and interim arrangement between the parties is concerned, further concluded as under:

“16. Section 17 of the A & C, Act, 1996 bestows on the Arbitral Tribunal wide powers to make interim arrangements that are just and convenient. The arrangement as contemplated in paragraph 11 of Order No.8 dated 8th March, 2018 are indubitably beneficial to both parties. The Claimant will be able to secure its credit rating with its Banks. The Respondent will earn a higher interest than what is presently payable on the FDR deposited with the Registrar General. The Hon'ble High Court vide Order dated 22nd December, 2017 in O.M.P (I) COMM 488/2017 titled Green Infra Wind Energy Assets Limited v. ReGen Infrastructure and Services Private Limited, by way of consent of both parties, has allowed a similar prayer of the Claimant.”

9. One of the Arbitrators constituting the Arbitral Tribunal gave his separate reasons for affirming the directions issued by the Arbitral Tribunal, the relevant extracts of which are quoted below:

“Having said that, I must immediately refer to two distinct attendant circumstances which persuade me to go with the view expressed by brother Vikramjit Sen. The first and

foremost is that the amount covered by the bank guarantee was voluntarily deposited in the court by the respondent. That is evident from the consent Order passed by the High Court and extracted above. The second and an equally important circumstance is that the respondent has not prayed for return of the amount to it. While the deposit of the amount was subject to further orders that the High Court or the Arbitral Tribunal may have passed in the matter, nothing prevented the respondent from claiming the return of the amount on the principles stated earlier. Significantly however the respondent has made no application before us seeking return of the amount deposited by it. The net result therefore is that while the amount covered by the guarantees has gone out from the claimant, it has not in effect reached the respondent either. The amount is lying in deposit before the High Court; and is of no use to either party except that it is earning some interest as a term deposit with a bank. These two circumstances constitute a rather peculiar if not a unique situation in which this Tribunal may, while showing complete fidelity to the stated principles governing Bank Guarantees and the Court's and Arbitral Tribunal's power to interfere with their encashment, have to make an order that promotes the ends of justice. That is precisely what the order proposed by my esteemed brother Justice Sen aims to achieve."

10. Learned senior counsel for the appellant submits that merely because the appellant had not filed an application seeking release of the amount deposited with the Registrar General of this Court in its favour, it could not have been presumed by the Arbitral Tribunal that the appellant was not interested in the refund of the money and was satisfied with the said amount being kept deposited with the Registrar General of this Court. In my view, the order dated 08.03.2018 and the Impugned Order seem to indicate that no

arguments were raised before the Arbitral Tribunal by the appellant seeking release of the amount deposited with the Registrar General in its favour. The only arguments raised by the appellant before the Arbitral Tribunal seem to be that the respondent being in default of its obligation under the Agreement(s) was not entitled to the release of the amount in its favour and further that the interest of the appellant may be jeopardised in case any proceedings under the Insolvency and Bankruptcy Code, 2016 are initiated against the respondent. The Tribunal considered both the submissions.

11. As far as the first submission was concerned, the Tribunal found a balance in the form of directing the respondent to deposit the original Sale Deeds in relation to the land in question and also documents securing the easementary rights in favour of the appellant before the Arbitral Tribunal. It further directed that in case these documents are not deposited, the Tribunal may pass appropriate orders, including bringing back the amount which has been released pursuant to the said order.

12. As far as the apprehension of the appellant that in case the insolvency proceedings are initiated against the respondent, it would not be able to encash the bank guarantee as ordered by the Arbitral Tribunal, the Arbitral Tribunal holds that presently this is only a vague and unsubstantiated apprehension without any justification and in any case, the bank guarantee that would be furnished pursuant to the order of the Arbitral Tribunal shall be subject to its further orders. It further holds that in any case, the appellant would not be prejudiced if the money is kept deposited with the Registrar General of this Court or the money is converted and secured in form of a bank guarantee in favour of the appellant. The Arbitral Tribunal further balances the equity by directing the respondent to give the bank guarantee of

a higher amount, including the interest at a higher rate than the interest being earned in the fixed deposit.

13. In my view, the Arbitral Tribunal has balanced the equity between the parties and has considered the submissions made by the parties before the Arbitral Tribunal. This Court in exercise of its power under Section 37 of the Act cannot interfere with the order passed by the Arbitral Tribunal under Section 17 of the Act unless the discretion exercised by the Tribunal is found to be perverse or contrary to law. As an Appellate Court, the interference is not warranted merely because the Appellate Court in exercise of its discretion would have exercised the same otherwise.

14. In ***Wander Ltd. & Anr. v. Antox India P. Ltd.***, 1990 (Supp) SCC 727, the Supreme Court while dealing with the power of the Appellate Court under the Code of Civil Procedure, 1908 has held as under:

“13. On a consideration of the matter, we are afraid, the Appellate Bench fell into error on two important propositions. The first is a misdirection in regard to the very scope and nature of the appeals before it and the limitations on the powers of the Appellate Court to substitute its own discretion in an appeal preferred against a discretionary order. The second pertains to the infirmities in the ratiocinations as to the quality of Antox's alleged user of the trade-mark on which the passing-off action is founded. We shall deal with these two separately.

14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An

appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd. v. Pothan Joseph:(SCR 721)

“... These principles are well established, but as has been observed by Viscount Simon in Charles Oseption & Co. v. Jhanaton...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case.”

The appellate judgment does not seem to defer to this principle.”

15. Recently in **Ascot Hotels and Resorts Pvt. Ltd & Anr v. Connaught Plaza Restaurants Pvt. Ltd**, Arb.A.(Comm) 12/2017, this Court again reiterated the above mentioned principle.

16. This Court in **Bakshi Speedways v. Hindustan Petroleum Corporation**, 2009 SCC OnLine Del 2476, has held that the same principles will apply even in case of an appeal under Section 37(2)(b) of the Act. Paragraph 4 of the said judgment is quoted herein below:

“4. The principles applicable to an appeal under Section

37(2)(b) in my view ought to be the same as the principles in an appeal against an order under Order 39 Rules 1 and 2, CPC i.e., unless the discretion exercised by the Court against whose order the appeal is preferred is found to have been exercised perversely and contrary to law, the appellate Court ought not to interfere with the order merely because the appellate court in the exercise of its discretion would have exercised so otherwise. I had at the beginning of the hearing itself inquired from the senior counsel for the appellant as to what could be said to be perverse in the exercise of discretion by the Arbitral Tribunal in the exercise of powers under Section 17 of the Act and as to how the said interim measures granted by the Arbitral Tribunal could be said to be contrary to law; it was further pointed out that in the opinion of this court, on the perusal of the memorandum of appeal, the only ground which appeared to have some force was the ground taken in the memorandum of appeal of the arbitrator as on the date of making of the order having become functus officio.”

17. In view of the above, the Arbitral Tribunal having exercised its discretion and found a balance of equity between the parties, this Court in exercise of its power under Section 37(2)(b) of the Act would not interfere with the same unless it is shown that the discretion so exercised is perverse in any manner or contrary to the law. In the present case, no such exception has been made out by the appellant.

18. The appeal is accordingly dismissed with no order as to cost.

NAVIN CHAWLA, J

APRIL 04, 2018/Arya