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

\+ O.M.P. (COMM) 214/2018

NTPC VIDYUT VYAPAR NIGAM LTD. ..... Petitioner
Through Mr.Bharat Sangal and Ms.Amindita Dekha, Advs.

versus

CCCL INFRASTRUCTURE LTD ..... Respondent
Through None.

**CORAM:**
**HON'BLE MR. JUSTICE NAVIN CHAWLA**

**<u>O R D E R</u>**

% **17.05.2018**

**<u>IA Nos.6885-86/2018 (Exemption)</u>**

Allowed, subject to all just exceptions.

**<u>O.M.P. (COMM) 214/2018 & I.A. No.6884/2018</u>**

This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 30.12.2017 passed by the Arbitral Tribunal adjudicating the disputes that have arisen between the parties in relation to the Power Project Agreement dated 10.01.2011.

The limited challenge to the Award is that the Arbitral Tribunal having found that the Bank Guarantees in question had been rightly invoked and encashed in terms of the Clause 4.6.1 of the Agreement, the Arbitral Tribunal erred in ordering the refund of 50% of the third bank guarantee on the premise that since the period of three months from the stipulated date of completion was to expire on 09.04.2012, while the project was completed and commissioned on 29.03.2012, the petitioner had not suffered a full month's loss on the supply of solar power and is therefore, not entitled to retain the full amount of the third bank guarantee.

Learned counsel for the petitioner submits that once the Arbitral Tribunal found that Clause 4.6.1 of the Agreement provides for genuine pre-estimate of damages that may be suffered by the petitioner due to any delay in commissioning of the project, the Arbitral Tribunal did not have the power to order the refund of any amount.

I have considered the submissions made by the learned counsel for the petitioner. Clause 4.6.1 of the Agreement is reproduced herein below:

> *"4.6.1 If the SPD is unable to commence supply of Power to NVVN by the Schedule Commissioning Date other 'than for the reasons specified in Article 4.5.1, the SPD shall pay to NVVN Liquidated Damages for the delay in such commencement of supply of power and making the Contracted Capacity available for dispatch by the Scheduled Commissioning Date as per the following:*
>
> *a. Delay upto one (1) month - NVVN will encash 20% of total Performance Bank Guarantee.*
>
> *b. Delay of more than one (1) month and upto two months - NVVN will encash another 40% of the total Performance Bank Guarantee.*
>
> *c. Delay of more than two and unto three months – NVVN will encash the remaining Performance Bank Guarantee."*

A reading of the above would show that encashment of the bank guarantees and imposition of the liquidated damages is dependent upon the period of delay in completion of the project. The period is to be reckoned in months. For the period of delay between two to three months, the entire

Performance Bank Guarantee is liable to be encashed and appropriated towards liquidated damages.

Clause 4.6.2 of the Agreement is reproduced herein below:

> *"4.6.2. In case the commissioning of Power Project is delayed beyond three (3) months, the SPD shall pay to NVVN, the Liquidated Damages at rate of Rs.1,00,000/- per MW per day of delay for the delay in such commissioning. Provided that the SPD shall be required to make such payments to NVVN in advance on a week to week basis for the period of delay."*

A reading of the above clause would show that if the period of delay is beyond three months, the liquidated damages are to be levied on "per day" basis.

The Arbitral Tribunal has found, and it is not contested before this Court, that the project was commissioned on 29.03.2012 that is within the period covered by Clause 4.6.1(c) of the Agreement. The period of three months would have expired on 09.04.2012. The Arbitral Tribunal having found that in such a situation the petitioner would not be entitled to keep the entire bank guarantee amount, the said finding cannot be said to be unreasonable or perverse.

In its judgment dated 18.01.2018 in FAO(OS) No.275/2016, ***NTPC Vidyut Vyapar Nigam Limited v. M/s Saisudhir Engergy Limtied,*** this Court had analysed the provisions of a similar Power Project Agreement and held that there is a need to balance equities and compute a fair and reasonable amount to be awarded as damages. In the said case the Court awarded damages @ Rs.1,00,000/- per megawatt per day for the period of the delay.

In any case, as held by the Supreme Court in ***Associate Builders vs. DDA*** (2015) 3 SCC 49, this Court is not to act as a Court of appeal while hearing a challenge to the Arbitral Award under Section 34 of the Act. Once the Arbitral Tribunal has considered the damages to be awarded, unless and until the said award found to be so perverse so as to shock the conscience of this Court, this Court is to refrain from any interference. As I do not find any perversity or unreasonability in the Impugned Award, I do not see any merit in the present petition and the same is dismissed with no order as to cost.

**NAVIN CHAWLA, J**

**MAY 17, 2018/Arya**