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

Date of Decision: 23rd July, 2018

+ **FAO(OS)(COMM) 150/2018**

M/S NTPC VIDYUT VYAPAR NIGAM LTD.Appellant

Through Mr. Bharat Sangal, Ms. Anandita
Deka, Ms. Isha Gupta, Advocates

versus

M/S CCCL INFRASTRUCTURE LTD.Respondent

Through None.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J

1. This is an appeal filed under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') read with Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015(hereinafter referred to as the 'Commercial Courts Act') and Section 10 of Delhi High Court Act, 1966. The appellant challenges the order dated 17.05.2018 passed by the learned Single Judge whereby the learned Single Judge upheld the Arbitral Award dated 30.12.2017.
2. Before the rival submissions of the learned Counsel appearing for the appellant can be considered, we deem it appropriate to set out basic facts which led to the dispute between the parties.

3. Some necessary facts are that NTPC Vidyut Vyapar Nigam Ltd/Appellant (hereinafter referred as 'NVVN') is a Government concern which has been identified by the Government of India as Nodal Agency for facilitating purchase and sale of solar PV power under the Jawaharlal Nehru National Solar Mission (JNNSM) of the Government of India. Solar Power Developer/Respondent(hereinafter referred as 'SPD') is a Company incorporated under the Companies Act, 1956 who is engaged in the business of power generation. The respondent, after fulfilling the minimum criteria, for selection in terms of Request for Selection (RFS) issued by NVVN for setting up Solar Photo Voltaic Projects, entered into a Power Purchase Agreement(PPA) dated 10.01.2011 with the appellant for procurement of 5 MW Solar Power. The respondent furnished three Performance Bank Guarantee(s)(hereinafter referred as 'BGs') in favour of the appellant as per the agreement. It was agreed between the parties that the original Scheduled Commissioning date of the project was to be 09.01.2012. However, the respondent vide its letter dated 07.01.2012, informed the appellant about the progress of work and also requested for extension of time as the completion of the project work was delayed on account of an unusual excessive heavy rainfall at the site area. The appellant vide its reply dated 12.01.2012 rejected the request, for extension of the scheduled date of Commissioning on the ground that there is no provision

of extension of time provided in NVVN Scheme. On account of failure on part of the respondent to commence the project on 09.01.2012, the appellant encashed the three PBG(s), furnished by the respondent, as per Article 4.6.1. of the PPA. Aggrieved thereby, the respondent filed a claim petition before the learned Arbitrator on the ground that the appellant/NVVN had wrongly encashed the PBG in breach of the conditions of the PPA dated 10.01.2011. The learned Arbitrator passed an award dated 30.12.2017 in favour of the respondent by holding that the PBG was rightly encashed as per Article 4.6.1 but also directed to refund the 50% of the amount of third bank guarantee to the respondent on account that the project was commissioned on 29.03.2012 and the period upto three months as provided for in Article 4.6.1 would expire on 09.04.2012. The appellant filed a petition under Section 34 of the Act challenging the said Award but the same was dismissed by the learned Single Judge by an order dated 17.05.2018. Hence, the present petition was filed by the appellant.

4. Mr. Bharat Sangal, learned counsel for the appellant contends that the Award dated 30.12.2017 is flawed as the learned Arbitrator has committed an error in partially allowing the claim of the respondent and that such findings were based more on hypothetical assumption of vital and necessary facts, based on mere conjecture and surmises; that the respondent was not entitled to any extension of time under Article 4.6.1(c) of the

PPA; that the bank guarantees were encashed as per PPA and Article 4.6.1(c) stipulates that in case of delay of more than two months whether the delay is of two months one day or two months fifteen days or three months, the appellant is entitled as per the PPA to encash the remaining 40% of the bank guarantee; that due to delay in commencement of supply of power, the loss was suffered and it is neither practical nor possible to compute damages for all tangible/intangible losses with reference to public utilities; that the amount of damages provided for in the agreement is the genuine pre-estimate of loss suffered by the appellant; that the learned Single Judge inadvertently held that the invocation of the third Bank Guarantee on 27.03.2012 was unfair and unjust as the same was done as per PPA ; that the respondent was obliged to finish the project work on its own risk and cost, no later than the Schedule Commissioning date; that as per the Arbitral award dated 30.12.2017 and the impugned order dated 17.05.2018, whereby the appellant was ordered to refund 50% of the third bank guarantee was *ipso facto* wrong as the same was invoked as per clause 4.6.1 of the PPA. In order to substantiate his argument, he relied on various judgements namely in the case of **ONGC v. Saw Pipes** reported in **2003(5) SCC 705**, **BSNL v. Reliance Communications Ltd.** reported in **2011 (1) SCC 394**, **Kailash Nath Associates v. DDE** reported in **2015 (4)SCC 136**, **Raymond Ltd. v. MP Electricity Board** reported in **2001 (1) SCC 534**.

5. We have heard the learned Counsel and perused the material on record.
6. The main issue which require adjudication in the facts and circumstances of the present case is that whether the appellant was right in invoking second and third BGs on 27.03.2018, when the project was commissioned by the respondent on 29.03.2018.
7. The dispute in the present case arose from the delay caused by CCCL/respondent in commissioning the project, which was fixed between the parties under an agreement. The scheduled commissioning date of the project was 09.01.2012, while the project was commissioned by the respondent on 29.03.2012. The reason as stated by the respondent before the learned arbitrator for delay in commencement of the project on time was due to heavy rains in the region which made the installation of the civil work in the region impossible on account of loose black soil conditions and claimed the benefit of clause 4.5.1 and Article 11.3.1 of PPA. It was further claimed that on the basis of such unforeseen event, the respondent is entitled to extension of time.
8. Due to failure on part of the respondent in commencing the project as per the scheduled date i.e. on 09.01.2012, the appellant encashed all the three PBG(s), in terms of Article 4.6.1 of the PPA. The encashment of the third PBG two days prior to the date of commencing of the project was strongly opposed by the respondent on the ground that the recovering of the full amount as liquidated damages was unjust and unfair. The respondent had furnished BGs amounting to Rs. 9,25,65,000/- in

favour of the appellant as a mandatory condition precedent under PPA. It is important to rummage through Clause 4.6 of the PPA that provides for pre estimated liquidated damages, which is produced herein below:

“If the SPD is unable to commence supply of the power to NVVN by the scheduled 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 dispatched 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 upto three months-** NVVN will encash the remaining Performance Bank Guarantee.”

9. It is apparent that clause 4.6.1 of the PPA provides for the pre-estimate of damages, as agreed between the parties, to be paid by the respondent to NVVN in case of any delay in supply of Solar Power as per the terms of the contract and provides for the methodology for genuine pre-estimate of damages. In the present case, the scheduled commissioning date of the project was 09.01.2012 but the same was commissioned on 29.03.2012, therefore, there was a delay of more than two months. It has been stipulated in clause 4.6 of PPA that if the delay caused by

the respondent is upto one month, then 20% of the total BG may be encashed by the appellant. Further, if there is a delay upto two months, 40% of the total BG may be encashed and for the delay of more than two months and upto three months, the remaining BG could be encashed by the appellant. In the present case, the appellant encashed 20% of the total BG on 17.02.2012 after the delay of one month, which amounted to Rs. 1,85,13,000/-. On account of delay of more than two months but less than three months, the appellant encashed both the second and the third BG on 27.03.2012 amounting to Rs. 3,70,26,000/- each, although the period of three months delay was to end on 09.04.2012. The project was commissioned by the respondent on 29.03.2012. Therefore, there was a delay of more than two months and less than three months in commissioning the project. The second and the third BG was encashed by the appellant two days prior to the commencement of the project by the respondent which means that the appellant has not suffered any loss of supply of solar power for the entire month. Admittedly, the solar power is utility service and it is difficult to assess the actual loss suffered by the appellant and no evidence has been led by the appellant to prove the actual loss suffered. It is settled proposition of law that if the highest limit is stipulated instead of a fixed sum, in absence of evidence of loss, part of it can be held to be reasonable, compensation and the remaining by way of penalty.

10. In the facts and circumstances of the present case, it can be inferred that the liquidated damages as provided for in Clause 4.6.1 of the PPA is only the higher limit of liquidated damages provided in case of delay and as the appellant has not suffered loss of solar power for the entire month, the learned Arbitrator as well as the learned Single Judge has rightly held refund of 50% of the amount of third Bank Guarantee by awarding reasonable compensation as per settled proposition of law.
11. The position of law stands crystallized today, that findings, of fact as well as of law, of the arbitrator/Arbitral Tribunal are ordinarily not amenable to interference either under Sections 34 or Section 37 of the Act. The scope of interference is only where the finding of the tribunal is either contrary to the terms of the contract between the parties, or, ex facie, perverse, that interference, by this Court, is absolutely necessary. The Arbitrator/ Tribunal is the final arbitrator on facts as well as in law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Act. This Court in the case of **P.C.L Suncon (JV) v N.H.A.I., 2015 SCC Online Del 13192**, in para 24 stated that :

“24. As a postscript, this Court believes that it is imperative to sound a word of caution. Notwithstanding the considerable jurisprudence advising the Courts to remain circumspect in denying the enforcement of arbitral awards, interference with the awards challenged in the

petitions before them has become a matter of routine, imperceptibly but surely erasing the distinction between arbitral tribunals and courts. Section 34 jurisdiction calls for judicial restraint and an awareness that the process is removed from appellate review. Arbitration as a form of alternate dispute resolution, running parallel to the judicial system, attempts to avoid the prolix and lengthy process of the courts and presupposes parties consciously agreeing to submit a potential dispute to arbitration with the object of actively avoiding a confrontation in the precincts of the judicial system. If a court is allowed to review the decision of the arbitral tribunal on the law or on the merits, the speed and, above all, the efficacy of the arbitral process is lost.”

12. The scope of judicial scrutiny and interference by an appellate court under Section 37 of the Act is even more restricted. The Hon’ble Supreme Court in the case of **McDermott International Inc. v. Burn Standard Co. Ltd. and Ors, (2006)11SCC181** held as under:

*"52.The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. **The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired.** So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious*

decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

13. It has been repeatedly held that while entertaining appeals under Section 37 of the Act, the Court is not actually sitting as a Court of appeal over the award of the Arbitral Tribunal and therefore, the Court would not re-appreciate or re-assess the evidence. In the case of ***State Trading Corporation of India Ltd. v. Toepfer International Asia Pte. Ltd.***, reported at **2014(144) DRJ 220(DB)**, in para 16 it has been held as under:

"16. The senior counsel for the respondent has in this regard rightly argued that the scope of appeal under Section 37 is even more restricted. It has been so held by the Division Benches of this Court in Thyssen Krupp Werkstoffe Vs. Steel Authority of India and Shree Vinayaka Cement Clearing Agency Vs. Cement Corporation of India 147 (2007) DLT 385. It is also the contention of the senior counsel for the respondent that the argument made by the appellant before the learned Single Judge and being made before this Court, that the particular clause in the contract is a contract of indemnification, was not even raised before the Arbitral Tribunal and did not form the ground in the OMP filed under Section 34 of the Act and was raised for the first time in the arguments."

14. In the case of ***Steel Authority of India v. Gupta Brothers Steel Tubes Limited***, reported in **(2009) 10 SCC 63**, the Supreme Court has laid down that an error relatable to interpretations of the contract by an Arbitrator is an error within his jurisdiction and such

error is not amenable to correction by Courts as such error is not an error on the face of the award. The Supreme Court has further laid down that the Arbitrator having been made the final arbitrator of resolution of disputes between the parties, the award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion. The courts do not interfere with the conclusion of the Arbitrator even with regard to the construction of contract, if it is a plausible view of the matter.

15. The Apex Court in **J.G. Engineers (P) Ltd. v. Union of India**, reported at (2011) 5 SCC 758, demarcated the boundary while explaining the ambit of section 34(2) of the Act. The Court in the aforesaid judgement relied upon the pronouncement of ONGC Ltd. Vs. Saw Pipes , in paragraph 19 , held as under:-

“27. Interpreting the said provisions, this Court in ONGC Ltd. v. Saw Pipes Ltd.(2003) 5 SCC 705] held that a court can set aside an award Under Section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or

(d) patently illegal. This Court explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy.”

16. In **Associate Builders vs. Delhi Development Authority**, reported at (2015) 3 SCC 49, the Supreme Court while further explaining the scope of judicial intervention under the appeal in the Act held as under:-

“It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score¹. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares and Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. (2012) 1 SCC 594, this Court held:

21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second Respondent and the Appellant are liable. The case as put forward by the first Respondent has been accepted. Even the minority view was that the second Respondent was liable as claimed by the first Respondent, but the Appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the

majority is that the Appellant did the transaction in the name of the second Respondent and is therefore, liable along with the second Respondent. Therefore, in the absence of any ground Under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at.”

17. This Court, time and again has emphasized on the narrow scope of section 37. In the case of ***MTNL Vs. Fujitsu India Private Limited***, reported at **2015(2)ARBLR332(Delhi)**, the division bench held as under:

“The law is settled that where the Arbitrator has assessed the material and evidence placed before him in detail, the court while considering the objections under Section 34 of the said Act does not sit as a court of appeal and is not expected to re-appreciate the entire evidence and reassess the case of the parties. The jurisdiction under section 34 is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, another view is possible. The duty of the court in these circumstances is to see whether the view taken by the Arbitrator is a plausible view on the facts, pleadings and evidence before the Arbitrator. Even if on the assessment of material, the court while considering the objections under section 34 is of the view that there are two views possible and the Arbitral Tribunal has taken one of the possible views which could have been taken on the material before it, the court would be reluctant to interfere. The court is not to substitute its view with the view of the Arbitrator if the view taken by the Arbitrator is reasonable and plausible Jhang Cooperative

Group Housing Society v. P.T Munshi Ram & Associates Private limited: 202(2013) DLT 218.

The extent of judicial scrutiny under section 34 of the Act is limited and scope of interference is narrow. Under section 37, the extent of judicial scrutiny and scope of interference is further narrower. An appeal under section 37 is like a second appeal, the first appeal being to the court by way of objections under section 34. Where there are concurrent findings of facts and law, first by the Arbitral Tribunal which are then confirmed by the court while dealing with objections under section 34, in an appeal under section 37, the Appellate Court would be very cautious and reluctant to interfere in the findings returned in the award by the Arbitral Tribunal and confirmed by the court under section 34.”

18. The abovementioned view was further upheld by the division bench in **Mahanagar Telephone Nigam Ltd. vs Finolex Cables Limited** **FAO(OS) 227/2017** reported at 2017(166)DRJ1, stated as follows:-

“It is apparent, therefore, that, while interference by court, with arbitral awards, is of it being injudicious, contrary to the law settled by the Supreme limited and circumscribed, an award which is patently illegal, on account Court, or vitiated by an apparently untenable interpretation of the terms of the contract, requires to be eviscerated. In view thereof, the decision of the Id. Single Judge that reasoning of the arbitral award in this regard was based on no material and was contrary to the contract, cannot be said to be deserving of any interference at our hands under Section 37 of the

Act. In a pronouncement reported at MTNL v. Fujitsu India Pvt. Ltd. (FAO(OS) No. 63/2015), the Division Bench of this court has held that "an appeal under Section 37 is like a second appeal, the first appeal being to the court by way of objections under Section 34". Being in the nature of a second appeal, this court would be hesitant to interfere, with the decision of the learned Single Judge, unless it is shown to be palpably erroneous on facts or in law, or manifestly perverse."

19. Having regard to the law laid down by this Court as well as the Apex Court in number of decisions rendered and applying the law laid down to the facts of the present case, we do not find any merit in the appeal. Hence, no grounds are made out to interfere in the impugned order passed by learned Single Judge under Section 34(2) of the Arbitration and Conciliation Act, 1996. Resultantly, the appeal is dismissed.

SANGITA DHINGRA SEHGAL, J.

G.S.SISTANI, J.

JULY 23, 2018//gr