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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 20.11.2018

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**FAO(OS) (COMM) 265/2018, CAV.No.1058/2018 &
CM Nos.48089-92/2018**

OSWAL WOOLEN MILLS LTD

..... Appellant

Through : Mr. Sanjeev Puri, Sr. Adv. with
Mr. Sanjeev Mahajan, Adv.

versus

NTPC VIDYUT VYAPAR NIGAM LTD

..... Respondent

Through : Mr. Vikas Singh, Sr. Adv. with
Mr. Bharat Sangal, Ms.
Anindita Deka and Ms. Srishtee
Banerjee, Advs.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE PRATEEK JALAN

S.RAVINDRA BHAT, J. (ORAL)

CAV.No.1058/2018

As counsel for the caveator has put in appearance, the caveat stands discharged.

FAO(OS) (COMM) 265/2018 & CM Nos.48089-92/2018

1. The appellant impugns the judgment of the learned Single Judge which partly set aside an award rendered by the Arbitral Tribunal under the Arbitration and Conciliation Act, 1996 (hereafter referred to as “the Act”). The contract was entered into by the parties i.e. the appellant (hereafter referred to as “Oswal”) and the respondent

(hereafter referred to as “NTPC Vidyut”) pursuant to the launching of the Jawahar Lal Nehru National Solar Mission, which promised to establish India as a global leader of solar energy. NTPC Vidyut was designated as a nodal agency by the Central Government (Ministry of New and Renewable Energy), which issued guidelines for selection of grid connected solar power projects (hereafter referred to as “MNRE Guidelines”). Para 2.5(C) which has some bearing on the issue defined what was “connectivity with the grid” and stated *inter alia* that “the responsibility of constructing the transmission line from power plant up to 132/33 kv substation would be of STU”. NTPC Vidyut issued a request for selection (RFS) on 18.08.2010, which defined “connectivity with the grid” in a manner aligned with Clause 2.5(C) of the MNRE Guidelines. It stated that the “responsibility of constructing the transmission line from the power plant up to 132/33 kv substation would be of STU”.

2. The dispute arose between the parties on account of the amounts claimed by the Oswal from NTPC Vidyut, for laying down the infrastructure to the delivery point, which it alleged stood altered in the power purchase agreement, after the LOI was awarded. The claim was premised upon two important facts i.e. that RFS contained a standard power purchase agreement (PPA) which defined delivery point, and the term “interconnection facilities” in a manner that coincided with what was defined by the guidelines and Clause 1.7 of the RFS. The two terms “delivery point” and “interconnection facilities” were defined as follows :

““*Delivery Point*”

shall mean.....which is the commercial metering point at STU pooling station atkV [Insert voltage level which is either 33kV or above]

“Interconnection Facilities”

shall mean the facilities on SPD’s side of the Delivery Point for sending and metering the electrical output in accordance with this Agreement and which shall include, without limitation all other Transmission Lines and associated equipments, transformers, relay and switching equipment and protective devices, safety equipment and subject to Article 7, the Metering System required for supply of power as per the terms of this Agreement”

3. The eventual power purchase agreement, was signed after Oswal’s bid was found acceptable. A Letter of Interest (LOI) was issued on 11.12.2010. Oswal furnished a bank guarantee on 06.01.2011 for over Rs.9.13 crores. The parties then signed the power purchase agreement (PPA) on 10.01.2011.

4. The PPA in material terms departed in its definition of delivery point, from the guidelines, inasmuch as it stated – by Articles 3 and 4 that the successful contractor (called “SPD”) had to make adequate arrangements to connect the power project switchyard with the interconnection facilities at the delivery point. Articles 3 & 4 are reproduced below :

“10. Article 3.1(d) of the draft PPA is reproduced as under:-

"3 ARTICLE 3: CONDITIONS SUBSEQUENT

3.1 Satisfaction of conditions subsequent by the SPD.

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d) The SPD shall make adequate arrangements to connect the Power Project switchyard with the Interconnection Facilities at the Delivery Point."

11. Article 4.1.1 (d) of the draft PPA further provides as under:-

"4 ARTICLE 4: CONSTRUCTION & DEVELOPMENT OF THE PROJECT

4.1 SPD's Obligations

4.1.1 The SPD undertakes to be responsible at SPD's own cost and risk, for:

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d) connecting the Power Project switchyard with the Interconnection Facilities at the Delivery Point; and"

5. Sometime in January 2013, after the project was commissioned, Oswal made claims to the tune of Rs.1.82 crores and Rs.4.33 crores, on two specific heads i.e. reimbursement in its favour of the amount of bank guarantee which it alleged was wrongly invoked by NTPC Vidyut; and towards transmission line cost which accrued due to the shifting of onus of laying of the transmission line upon it. The sum of Rs.3.02 crores too was claimed towards loss of income on account of transmission line. NTPC Vidyut in its statement of defence urged *inter alia* that a clarification had been issued pursuant to the two pre-bid inquiries on 11.09.2010 – which is notified on the public domain, to the effect that the delivery point would be “the injection point” at which the generator will deliver the power to STU, the metering shall be done at this point of injection. All charges and losses up to the point of injection shall be borne by the solar power developer and after the point of injection, the demand charges and usage charges, as noted by the STU from time to time, shall be paid by NTPC Vidyut, even if it was paid by the SPD which will be recovered from the buying

utilities. It was stated that the SPD shall interconnect to the Pooling Substation of STU or the STU injection point at its own cost. It was also pointed out that the pre-bid clarification, however, is not produced during the course of the proceedings but rather at the time of the hearing. Oswal denied the pre-bid clarification and contended economic duress elaborating that the LOI essentially constituted the complete contract between the parties and that the PPA as far as it departed from the material particulars, sought to change the foundation of the contract by saddling larger cost upon it which were to be reimbursed.

6. The Tribunal by its award of 08.07.2015 accepted all Oswal's contentions and awarded the amounts claimed by it. NTPC Vidyut thereafter approached the learned Single Judge under Section 34. By the impugned judgment, the Single Judge reversed the award as far as the question of damages and reimbursement claims on account of changing in delivery point was concerned but confirmed the award vis-à-vis the refund of bank guarantee amount. It is not disputed by the parties as far as the last issue is concerned (refund of bank guarantee amount), NTPC Vidyut has preferred an appeal which is pending on the file of this court.

7. Mr. Sanjeev Puri, learned Senior Counsel made two-fold submissions on behalf of Oswal: firstly, that the Single Judge ought not to have relied upon the clarification since it was never produced appropriately. He reiterated that the LOI constituted the complete contract and that NTPC Vidyut, by changing the definition after the contract was accepted, sought to alter the bargain altogether. Since

according to the PPA, greater onus was placed upon Oswal in terms of the additional responsibility, the cost therefore, naturally had to be borne by the STU i.e. NTPC Vidyut. Learned counsel submitted that the circumstances under which Oswal was made to sign on the PPA clearly demonstrate economic duress. It was submitted in this regard that the bank guarantee for Rs.9.13 crores, had been furnished in accordance with the RFS, which NTPC Vidyut, was bound to encash had Oswal not signed on the dotted line. This single circumstance alone constituted economic duress, which entitled Oswal to disclaim its alleged responsibility, in the PPA vis-à-vis the extended delivery point and claim suitable damages in that regard.

8. It was secondly argued that the learned Single Judge in fact did not deal with the question of economic duress even though the impugned judgment noted it.

9. This Court is of the opinion that the submissions of Oswal with respect to the incorrectness of the impugned judgment are insubstantial. It is a matter of record that the clarification was issued on 11.09.2010; Oswal submitted its bid on 29.09.2010. It therefore, had adequate notice of what was meant by the term “delivery point” and “interconnection facilities”. In fact the LOI also contained the changed terms as it were, casting responsibility of laying physical infrastructure up to the point of delivery at the STU, rather than creating the onus on the STU to make it available at the last point. If one keeps these circumstances in the background, it would be clear that Oswal’s argument with respect to economic duress is opportunistic, if one may say so. Having been made aware of the

changed terminology, it had the choice of not entering into the contract i.e. not signing the PPA but rather than insisting that the changes departed from the guidelines which – according to it, bound NTPC Vidyut. Instead it weakly “protested” by a letter and subsequent representations and chose to accept the contract. Having worked the contract out completely, it then turned around and claimed reimbursement on the basis that it was forced to enter into the contract, the terms of which were not acceptable to it. The argument of economic duress, was considered by the learned Single Judge having regard to these facts. The impugned judgment in this regard discusses the aspect as follows :

“57. As noted above, there was no challenge made by the respondent to the final PPA. Even after the petitioner as also the MNRE had referred to the changed definition of 'Delivery Point' while rejecting the representations of the respondent, the respondent did not challenge the same by invoking Arbitration or otherwise. It quietly accepted the said position. After having done so, it was not entitled to challenge the terms of the PPA. The finding of the Arbitral Tribunal with regard to economic duress is therefore, not only in the face of absence of proper pleading to that effect, but also in absence of any evidence in support of the same being placed on record by the respondent and cannot be sustained.

58. It is no longer res Integra that a bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up such a plea, must establish the same by placing evidence in this regard.

Reference:

1. New India Assurance Company Ltd. v. Genus Power

Infrastructure Ltd., (2015) 2 SCC 424;

2. *ONGC Mangalore Petrochemicals Ltd v. ANS Constructions Ltd. & Anr.*, (2018) 3 SCC 373;

3. *Union of India and Ors. v. Master Construction Company*, (2011) 12 SCC 349.

59. In any case, this Court in *M/s Classic Motors Ltd. v Maruti Udyog Ltd.*, (1997) 65 DLT 166, relying upon the judgment of *North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd.* 1978 (3) All. E.R.170, has held that if the party complaining of an unfair contract does not do anything to avoid it and accepts it, then the complaining party cannot make a grievance of the contract. The present case shall clearly fall in this exception.”

10. Earlier the impugned judgment had noticed as follows :

“34. It was only on 11.09.2012 that the respondent invoked the Arbitration Agreement between the parties by nominating its Arbitrator.

35. Even in the Statement of Claim filed before the Arbitral Tribunal, as far as the change of definition of 'Delivery Point' and alleged coercion in execution of the PPA, only the following assertion can be found:

"11. It was only after receipt of the bid bond that PPA had been signed and as stated hereinabove Claimant had no other option but to sign and execute the said PPA. It was surprising for Claimant to note that the definition of the delivery point had been changed substantial in the following terms:

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"15. Subsequent to the said exchange of communications, wherein Respondent wrongly and in violation of the RERC Tariff Order dated 25th May 2010 exerted pressure on to Claimant to proceed further in the Project. It is stated that Claimant being under duress, both economical and otherwise had no other choice but to proceed with project.

By this time, Respondent had already taken delivery of PBGs worth 9,13,15,000 from Claimant."

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"22. Since as stated herein above. Claimant was under the duress it had no other option but to accept the arbitrariness of Respondent and utilized all its resources in order to meet its obligations under the PPA."

11. This Court is of the opinion that on both the grounds urged, the learned Single Judge cannot be faulted for setting aside the award. It is now too far well established that though the remit of the Court under Section 34 of the Act is limited, yet it extends to interdicting an award which plainly travels beyond the terms of a contract between the parties [referred under Section 28(3) and Section 34(2) of the Act]. In the present case, the ambiguous nature of the "protest", if weighed against the fact that the appellant/Oswal proceeded to sign the PPA and performed its obligations under it, in the opinion of this Court, precluded it from urging that it was a victim of economic duress. The learned Single Judge's findings therefore, are neither unreasonable nor contrary to the terms of the contract or beyond the pleadings.

12. This appeal being unmerited is therefore, dismissed. Pending applications also stand dismissed.

S. RAVINDRA BHAT, J

PRATEEK JALAN, J

NOVEMBER 20, 2018

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