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

\+ **O.M.P.(COMM.) 493/2018**

Date of Decision : 10th December, 2018

GPR POWER TUBES & TAPES PVT. LTD THROUGH: AUTHORISED REPRESENTATIVE ..... Petitioner

Through: Mr.Sumit Kumar, Adv.

versus

HIRANMAYE ENERGY LTD. (FORMERLY KNOWN AS INDIA POWER COPORATION (HALDIA) LTD ...... Respondent

Through: None

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

I.A. No.16817/2018 (Delay)

This is an application seeking condonation of 39 days delay in re-filing of the petition.

For the reason stated in the application, the delay is condoned and the application stands allowed.

I.A. No.16816/2018 (Exemption)

Allowed, subject to all just exceptions.

O.M.P. (COMM) 493/2018

1. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Arbitral Award dated 27.07.2018 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the Letter of Award for supply of complete LP Piping System Packages (2nd Part) for 3X 150 MW TPP IPC(H)L Haldia Project dated 08.05.2015 placed by the respondent on the petitioner, as amended from time to time.

2. Though, the initial period of making the supply was till 08.05.2015, which the Arbitrator observed is clearly incorrect as the Letter of Award itself is dated 08.05.2015, there is no dispute that the same was extended till 30.03.2016.

3. It is not disputed by the petitioner that by 30.03.2016 the petitioner was unable to complete the supply in terms of the Letter of Award. Before the Arbitrator it was contended by the petitioner that some part of the supply had been made by the petitioner to the respondent under Invoice dated 30.03.2016, however, the said supply could not be effected due to refusal of the respondent to issue Road Permit. It was further contended by the petitioner before the Arbitrator that further supply was made by the petitioner to the respondent on 30.06.2016, which again could not be given effect to for

fault of the respondent as the respondent failed to release the payment in spite of repeated requests from the petitioner.

4. The Arbitrator has disbelieved the above stand of the petitioner and has held as under:

> *"30. There is no document on record to show that the Claimant was unable to deliver the goods for want of Road Permit. As stated earlier, the Statement of Claim or other pleadings do not specifically speak about individual invoices or their transportation or delivery. There is no plea that the goods under this particular invoice could not be delivered for want of Road Permit. The forwarding letter dated 30.06.2016 (Exhibit C1-10) mentions MDCC for NaOH Skid and say that MDCC for NaOH skid had been requested for on 20.06.2016 and that the Claimant was yet to receive the same to enable it to ask for Road Permit. Such Road Permit was requested for NaOH skid only. There is no mention in this letter that Road Permit is absent for material handed over to transporter on 31.03.2016. In Statement of Claim, there is only a vague allegation that the value of supplies made till 21.06.2016 was to the tune of Rs.2,95,85,025/- to the extent of 98.12% and that the pending supplies are waiting MDCC and Road Permit. As per C1-4, Rs. 2,95,85,025/- is the total of values of all the invoices including the 3 in question and the freight charges for which debit notes were issued between 20.12.2015 and 31.03.2016. The plea further goes on to say that supplies beyond these are awaiting MDCC and Road Permit. Thus, according to the pleading, all the invoices mentioned in C1-4 stand delivered and balance yet to be delivered is awaiting MDCC and Road Permit. To this extent there is contradiction*

between C1-4 and para 3.9 of amended Statement of Claim.

31. Be that as it may, one can now proceed to examine whether even documents on record establish that the consignment under the invoice dated 31.03.2016 was not delivered for want of Road Permit. It was only stated in arguments that the goods reached the West Bengal border but could not enter the State for want of Road Permit. This is not correct statement of facts as it appears from statement of reconciliation dated 30.06.2016 that the material namely 5 Plate Heat Exchangers were in the transporter's godown awaiting payment:

> *"………*
>
> *Dispatched 9Nos. 4Nos delivered, 5Nos at transporter godown waiting for payment."*

32. Even in the forwarding letter dated 31.03.2016 (Now marked as 'Cx'), the Claimant has not asked for a Road Permit but has only asked for payment. There is no plea at what specific time the Road Permit is generally issued. It appears from the forwarding letter of 30.06.2016 that MDCC and Road Permit are applied for together. The MDCC for Plate Heat Exchanger may have been issued earlier although the dispatch of goods was done later. The documents on record as explained above, do not suggest at all that the Claimant was handicapped in delivering the goods under invoice dated 31.03.2016 for want of a Road Permit. On the other hand it shows that goods had been detained in transporter's godown awaiting payment. The Statement of material reconciliation is forwarded on 30.06.2016, and which show that even *on 30.06.2016 the goods were allegedly lying in the transporter's godown. Interestingly, there is no mention about location of transporter's godown. The receipt issued by the transport shows that the goods were handed over to the transporter at Pune. There is nothing on record to show that transporter's godown was somewhere near to West Bengal border. Apparently the Claimant was holding over the goods locking for payment. The learned counsel for Claimant said in arguments that Road Permit was to be asked for after payment of value of the goods which further proves that goods were awaiting payment.*

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36. Coming to the 2 other invoices dated 30.06.2016, clearly the goods were not ready for dispatch on the day the Bank Guarantees were invoked and even on the day the workers of the Claimant were debarred from entering the premises of Respondent. The Claimant has provided the covering letter (Exhibit C1-10) with which the 2 invoices were sent to the Respondent. The relevant part of the letter is as under:

> *"We herewith attach the Material Reconciliation Statement in Annexure-1 showing the materials dispatched/supplied in respect to the amended BBU quantity and the Balance material short/excess for your information.*
>
> *We had requested for MDCC on 20.06.2016 for NaOH skid and we are yet to receive the same enabling us to forward to road permit request. Materials received and ready for dispatch at Chennai for a*

total value of Rs.43,91,318/- (Invoices and MDCC Request Mail attached).”

Thus it is clear that for these 2 consignments in respect of NaOH skid even the MDCC was requested for only on 20.06.2016 i.e. 5 days after the Bank Guarantees had been invoked. Admittedly as per the settled procedure, the invoice could be raised only after the MDCC was issued i.e. after the goods had been approved of by the Respondent. Without the MDCC, the Claimant could not have dispatched the goods or ask for any payment or Road Permit.

37. The Claimant alone is responsible for non supply and non delivery of the goods under the 2 invoices dated 30.06.2016 as also under the invoice dated 31.03.2016.”

5. The above being a finding of fact recorded by the Arbitrator after considering the evidence led by the parties before her, cannot be interfered with by this Court.

6. Counsel for the petitioner has even otherwise being unable to show how the above finding of the Arbitrator can be said to be incorrect or perverse in any manner.

7. The main contention of the counsel for the petitioner is that the time for performance of the work having expired on 30.03.2016 and the petitioner having been allowed to continue with the work even thereafter without any notice of imposition of liquidated damages, the respondent was not entitled to levy such liquidated damages and encash the Bank Guarantee submitted by the petitioner with the

respondent towards recovery of the same. Relying upon Section 55 of the Indian Contract Act, 1872, he submits that when the promisee accepts the performance of the work beyond the period stipulated in the contract, unless at the time of such acceptance he gives notice to the promissor of its intention to levy liquidated damages, no such liquidated damages can be levied. He submits that in the present case, as there was no prior notice from the respondent of levy of liquidated damages, the respondent should not have been permitted to levy or recover the same retrospectively. He further relies upon the judgment of the Supreme Court in ***J.G. Engineering Pvt.Ltd. v. Union of India and Anr.,*** (2011) 5 SCC 758.

8. I have considered the submission made by the counsel for the petitioner, however, find no merit in the same.

9. The Arbitrator in the Impugned Award has held that the petitioner was unable to complete the supply and erection contract by 30.03.2016. The time having expired and the respondent having permitted the petitioner to continue the work, the work had to be completed within a reasonable time. As far as the question of reasonable time is concerned, the Arbitrator relying upon the conduct of the parties held that the petitioner was unable to perform the contract within the reasonable time and till the respondent permitted the petitioner to perform such work. The respondent, therefore, called off the contract on 15.06.2016 by encashing the Bank Guarantees with a view to recover the liquidated damages on account of petitioner's failure to perform the contract in question. The Arbitrator further held

that the liquidated damages have been imposed by the respondent not for the delay in supplies but for the failure of the petitioner to make the supplies within the stipulated time and even within reasonable period thereafter.

10. Clause 14 of the General Commercial Terms and Conditions of the Letter of Award provides for imposition of liquidated damages on account of failure of the petitioner to deliver and perform the work within the stipulated period. Once the finding of the Arbitrator that the petitioner has failed to perform the work not only within the stipulated period but also even thereafter till the termination of the contract by the respondent, is accepted, the imposition of liquidated damages by the respondent cannot be faulted.

11. In the present case, as has been mentioned in the letter dated 15.02.2016, even the prior extension of time was granted by the respondent without prejudice to its right to levy liquidated damages. Even thereafter, the respondent wrote e-mails dated 20.04.2016, 21.05.2016, 03.06.2016 and 06.06.2016 requesting the petitioner to complete the work in an expeditious manner. The petitioner having failed to perform the work, cannot be heard to complain of imposition of liquidated damages by the respondent.

12. The Arbitrator has also held that the recovery of the liquidated damages by the respondent was reasonable in the facts and circumstances of the case. This finding again cannot be faulted.

13. In my view therefore, the petitioner has been unable to make out any ground for this Court to interfere with the Impugned Award in exercise of its power under Section 34 of the Act.

14. The petition is, therefore, dismissed with no order as to cost.

NAVIN CHAWLA, J

DECEMBER 10, 2018/Arya