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

\+ **<u>W.P.(C) 770/2017</u>**

GAMA INFRAPROP. PVT. LTD. ..... Petitioner

Through: Mr T. Srinivasa Murthy, Mr Piyush Joshi, Ms Aditi and Mr Telma Raju, Advocates.

versus

UNION OF INDIA & ANR ..... Respondents

Through: Mr Anil Soni, CGSC for UOI. Mr Sridharan Ram Kumar, Advocate for R-2.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% **17.07.2019**

1. The petitioner has filed the present petition, *inter alia*, impugning a letter dated 02.09.2016 issued by respondent no. 1 (hereafter the 'impugned letter'), whereby it has levied a penalty of ₹1,47,75,623/- on the petitioner for not producing the requisite amount of electricity as contemplated under the Power System Development Fund Support Agreement executed on 24.09.2015, between the petitioner and respondent no. 1.

2. The petitioner submits that the imposition of the said penalty is liable to be aside, as respondent no. 1 did not provide the petitioner an opportunity of being heard and based its decision solely on the submissions of respondent no. 2 (Gas Authority of India Ltd.). Further, the petitioner has challenged the levy on the ground that it is beyond the scope of the '*Tender*

Document for PSDF Support to Stranded Gas Based Plants – Phase II' dated 31.08.2015.

3. Respondent no. 1 issued an Office Memorandum (bearing no. 4/2/2015-th-1) to introduce the '*Scheme for Utilisation of Gas Based Power Generation Capacity*' for the financial years 2015-2016 and 2016-2017.

4. The petitioner is a company incorporated under the Companies Act, 1956 and is the owner of a gas-based plant. The petitioner's gas-based power plant situated at Mahua Khera Ganj, Kashipur, Uttarakhand is a 'stranded gas-based plant' under the provisions of the said scheme.

5. The petitioner participated in a reverse auction process for availing support out of the 'Power System Development Fund' (PSDF) pursuant to the '*Tender Document for PSDF Support to Stranded Gas Based Plants – Phase II*' dated 31.08.2015. The petitioner submitted its technical bid on 10.09.2015 and its financial bid on 15.09.2015.

6. The petitioner was declared as a successful bidder vide a letter dated 17.09.2015. Thereafter, the petitioner and respondent no. 1 executed the Power System Development Funds Support Agreement on 24.09.2015 (hereafter 'the Agreement'). Under the Agreement, the petitioner agreed to generate and supply to the relevant discom, increment electricity at 13,00,00,012 kWh, for which it would receive PSDF support at ₹1.42 per KWh. The petitioner also submitted a PSDF performance security by way of a bank guarantee of ₹1,84,60,002/- dated 21.09.2015. Further, the Government of Uttarakhand issued a notification on 17.12.2015, whereby it allowed full rebate of Value Added Tax to sellers of RLNG to gas-based power plants for consumption in power generation.

7. On 21.12.2015, the petitioner entered into an 'E-Bid RLNG Sale Agreement' with respondent no. 2 (Gas Authority of India Ltd.), whereby respondent no. 2 was obligated to supply RLNG to the said gas-based power plant. Thereafter, the petitioner submits that it addressed a letter to respondent no. 2 dated 26.12.2015, requesting allocation of gas from 20.01.2016 to 30.03.2016, in accordance with the tender documents.

8. The petitioner submits, however, that its attempts to generate the requisite levels of incremental electricity were hampered due to reasons such as, *inter alia*, inappropriate e-bid RLNG gas temperature, quality of e-bid RLNG, delays in approvals and clearances, e-bid RLNG sale agreement being belatedly executed and non-exemption from value added tax. Due to delays such as the aforementioned, the petitioner submits that it could only provide 2,37,51,00 KWh of total incremental electricity as on 31.03.2016. Thereafter, the petitioner raised a PSDF support claim of ₹3,37,26,420/-.

9. The petitioner submits that it raised the aforementioned issues with the respondents on various occasions, vide letters dated 06.02.2016, 03.05.2016, 03.06.2015 and 27.07.2016. However, vide the impugned letter dated 02.09.2015, respondent no. 1 levied a penalty of ₹1,47,75,623/- for generating less than 70% of the contractual target. The same was levied as a form of a deduction from the total amount of PSDF support payable to the petitioner. On 16.05.2016, respondent no. 1 issued a letter to the petitioner's banker, requesting it to extend the performance bank guarantee dated 21.09.2015 for a further period of ninety days. The same was done by the petitioner's banker on 27.05.2016 and the said bank guarantee was extended till 28.08.2016.

10. The petitioner submits that respondent no.1 is not entitled to impose any penalty. Further, assuming (but not admitting) that any such penalty could be levied, the same could be recovered only by encashing the performance security and not by way of a setoff under a separate obligation.

11. Mr Anil Soni, learned counsel appearing on behalf of the respondent, submitted that the dispute raised by the petitioner falls within the scope of the arbitration clause under the Agreement. He submitted that respondent no. 1 was entitled to levy penalty on account of shortfall in generation and supply of electricity. He stated that the same could have been recovered by invoking the performance security but that did not preclude respondent no.1 from otherwise recovering the same. He submitted that if the petitioner was aggrieved by such recovery, it was open for the petitioner to take recourse to invoke the arbitration clause for adjudication of the said disputes.

12. Mr T. Srinivasa Murthy, learned counsel appearing for the petitioner, countered the aforesaid submission. He submitted that it was well settled that respondent no.1 could not claim set-off of any unadjudicated claim against amounts payable under a separate contract. He also submitted that the disputes involved in the present petition related to the non-payment of amount due under the PSDF Scheme and not under the Agreement. He submitted that respondent no.1 had not taken any steps for recovery of any amount under the Agreement and therefore, the deductions made from the payments due under the PSDF Scheme could not be considered as amounts recovered under the agreement.

13. It is apparent from the above that the disputes involved in the present petition are covered within the scope of the arbitration clause as contained in the Agreement, as is rightly contended by Mr Soni. It is not necessary to

decide the question whether respondent no.1 was entitled to recover the amounts claimed by it under the Agreement by deducting the same from payments otherwise due. The fact that respondent no.1 claims that penalty can be levied under the Agreement gives rise to a dispute that falls within the scope of the arbitration clause.

14. In view of the above, this Court does not consider it apposite to entertain this petition. The same is disposed of with liberty to the petitioner to invoke the arbitration clause and take steps for reference of the disputes to arbitration. The learned counsel appearing for the parties agree that the time spent by the petitioner before this Court would be excluded for calculating the period of limitation for invoking the arbitration clause.

15. The petition is disposed of with the aforesaid observations.

VIBHU BAKHRU, J

JULY 17, 2019

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