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

\+ **FAO(OS) (COMM) 62/2019**

HIMACHAL SORANG POWER PVT LTD & ANR .... Appellants

Through: Mr. Rajiv Nayar, Senior Advocate with Mr. Sitesh Mukherjee, Mr. Ketan Gaur, Ms. Padmaja Kaul and Mr. Aishwarya Chaudhary, Advocates.

versus

NCC INFRASTRUCTURE HOLDING LTD ..... Respondents

Through: Mr. Nakul Dewan, Advocate with Dr. Amit George, Mr. Jai Sahai Endlaw, Ms. Nooreen Sarna and Mr. Amol Acharya, Advocates.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE I.S.MEHTA

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

% **29.03.2019**

<u>CM APPL. 14164/2019 (for exemption)</u>

1. Allowed, subject to all just exceptions.

<u>FAO(OS) (COMM) 62/2019 & CM APPL. 14163/2019 (for interim injunction)</u>

2. This is an appeal by the Himachal Sorang Power Pvt. Ltd. (‘HSPPL’) and TAQA India Power Ventures Pvt. Ltd. (‘TAQA’) against the order dated 13th March 2019 passed by the learned Single Judge in IA No. 291 of 2019 in CS (COMM) 12 of 2019.

3. The aforementioned suit was filed by the Appellants on 9th January 2019 in this Court for a permanent injunction to restrain the Respondent NCC Infrastructure Holdings Ltd. ('NIHL') from commencing and/or continuing arbitration proceedings against the Appellants for its claim for incentive payment by way of its notice of arbitration dated 28th December 2018. Along with the suit the Appellants filed IA No. 291 of 2019 for an interim injunction to restrain NIHL from proceeding with the second arbitration.

4. NCC Ltd. ('NCC') the parent company of NIHL established HSPPL as a Special Purpose Vehicle (SPV) in 2004 "to build, owned, operate and transfer back to the Government of Himachal Pradesh (at the end of the concession period) a hydroelectric power plant on the Sorang Tributary of the Satluj River in Kinnaur district Himachal Pradesh, India with a generation capacity of 100 MW (hereafter referred to as 'the project')."

5. TAQA was established as a SPV by the Abu Dhabi National Energy Company PJSC (the majority shares of which are owned by the Government of Abu Dhabi) to undertake the business of generation, transmission and distribution of power in India.

6. TAQA entered into a Share Purchase Agreement ('SPA') with the then shareholders of HSPL viz., NCC and IL&FS Energy Development Company Ltd. ('IEDCL') in terms of which TAQA agreed to purchase the entire share capital and debentures of HSPPL from NCC and IEDCL. During this time the project was still under construction. The acquisition of the share capital of HSPPL from NCC and IEDCL was subject to the undertaking that NCC

(being the majority shareholder of HSPPL and also being in the management and construction and commissioning of the project) would hand over the fully functional operational project by 31st March 2013, which was defined as the 'Wet Commissioning Date' ('WCD') and further that all costs for completion of the project would be borne by NCC alone.

7. As part of the SPA it had been agreed that if the WCD was achieved by 31st March 2013 and after achievement of final completion date if the project generated more than 400 million KWH, NIHL would be entitled to 'incentive payment' under a formula provided by the SPA. This of course is a matter for contestation by NIHL and for which it has initiated the second arbitration proceedings.

8. According to the Appellants with NIHL failing to fulfil its obligations under the SPA, TAQA was constrained to take over control of the construction and commissioning of the project on 5th March 2014 serving notice to the Respondent. Reference is made to clause 9.10 of the SPA which required NIHL to any or all expenses incurred by HSPPL and/or IEDCL to complete the project.

9. Clause 14 of the SPA contained the arbitration clause. The Appellants served NIHL a pre-arbitration notice on 4th July 2014 to which NCC replied on 2nd August 2014 raising counter claims. This was repudiated by the Appellants vide a letter dated 15th September 2014. Thereafter, by way of notice of arbitration dated 31st December 2014 the Appellants invoked and commenced arbitration proceedings against NIHL before the Singapore

International Arbitration Centre ('SIAC') in terms of clause 14 of the SPA.

10. On 24th January 2018 a unanimous Award was passed by the Arbitral Tribunal ('Tribunal'). Against the total claim of the Appellants of Rs.671,42,90,000 under five heads of claim, the Tribunal partially allowed claims under two heads to HSPPL amounting to Rs.161,34,98,685. After adjusting the amounts already received by the Appellants, the net amount awarded to HSPPL was Rs. 119,14,98,685. Interest on the said amount was also awarded to the Appellants. Against NIHL's total counter-claim of Rs.78.502 crores under six heads of claim. The Tribunal allowed one counter-claim of Rs. 9 crores and also awarded interest thereon.

11. It is stated that an enforcement petition OMP (EFA) (Comm) 1 of 2018 was filed by the Appellants for enforcement of the above Award which is pending in this Court. Meanwhile, the Appellants challenged the said Award before the High Court of the Republic of Singapore seeking enhancement of the amounts awarded in their favour. NIHL also filed a separate petition before the Singapore High Court challenging the Award. By an order dated 28th January 2019 the Singapore High Court negatived both challenges.

12. By a letter dated 1st October 2018 NIHL sought to commence second arbitration proceedings under the SPA in regard to its claim for incentive payment. The Appellants by their letter dated 12th October 2018 resisted the claim *inter alia* on the ground it was barred by '*res judicata,* waiver and abandonment'. Additionally, it was claimed that even under the SPA the claim for incentive payment was not maintainable.

13. A notice of arbitration for the incentive payment was issued by NIHL on 28th December 2018 under clause 14 of the SPA and was filed by the SIDC. SIAC sent a letter on 8th January 2019 to the Appellants stating that the second arbitration proceedings are deemed to have commenced on 30th December 2018. This letter lead to the filing of the suit seeking the reliefs mentioned.

14. In the impugned order dated 13th March 2019 the learned Single Judge has rejected the prayer restraining NIHL from proceeding with the second arbitration. The learned Single Judge *inter alia* was of the view that the question whether the claim of NIHL for incentive payment was barred by *res judicata* as well as other legal claims of the Appellants with regard thereto could be examined conveniently by the second Arbitral Tribunal. It is further held that the contention of the Appellants that the second arbitration proceedings were an abuse of process of law was "a mixed question of law and fact and would require trial" and that even this could be adjudicated upon by the second Arbitral Tribunal. Accordingly, it was held that no case was made out for injuncting the second arbitral proceedings.

15. Mr. Rajiv Nayar, learned Senior Counsel appearing for the Appellants first referred to the decision of the Supreme Court in ***Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. (2013) 1 SCC 641*** and in particular para 131.1 thereof which reads as under:

> "131.1**.** To illustratively demonstrate it, we may give an example. Where party 'A' is seeking reference to arbitration and party 'B' raises objections going to the very root of the matter that the arbitration agreement is null and void,

inoperative and incapable of being performed, such objections, if left open and not decided finally at the threshold itself may result in not only parties being compelled to pursue arbitration proceedings by spending time, money and efforts but even the Arbitral Tribunal would have to spend valuable time in adjudicating the complex issues relating to the dispute between the parties, that may finally prove to be in vain and futile. Such adjudication by the Arbitral Tribunal may be rendered ineffective or even a nullity in the event the courts upon filing of an award and at execution stage hold that the agreement between the parties was null and void inoperative and incapable of being performed. The Court may also hold that the Arbitral Tribunal had no jurisdiction to entertain and decide the issues between the parties."

16. In the present case, the learned Single Judge has examined the issue whether the claim for incentive payment can be raised in a second arbitration. For detailed reasons explained in the impugned judgment the learned Single Judge has left the issue to be decided by the second Arbitral Tribunal itself.

17. The central plank of the submission of Mr. Nayar was that in the reply to the notice sent by the Appellants, NIHL had mentioned in the schedule to its counter-claim the incentive payment but when actually filing the counter-claim it had not raised any such issue. According to him this should be construed as NIHL having given up its claim for incentive payment altogether. He also referred to the amended counter-claim where a reference was made to the withholding of the Seller's Subordinate loan amount which according to NIHL became payable on the achievement of the WCD. He pointed out that the same event viz., the achievement of the WCD was also

the trigger for the incentive payments. The fact that NIHL maintained its counter-claim only for the Seller's subordinate loan meant that it gave up its claim for the incentive payment.

18. Mr. Nakul Dewan, learned counsel appearing for NIHL submitted that in the first arbitration a finding was returned by the Tribunal that the WCD could have been achieved "by April 2014 or at the most by June 2014 and on that basis NCCL was entitled to claim incentive payment." As pointed out by the learned Single Judge it is NIHL's case that since it was unaware of the actual data with regard to water flow there was no occasion for it to waive or abandon its claim at that stage. This Court concurs with the learned Single Judge that the above plea of NIHL *prima facie* does have merit.

19. The Court is unable to agree with Mr. Nayar that the arbitration agreement has, after the conclusion of the first arbitration, been rendered null and void or incapable of being performed or that the principles of *res judicata* waiver and acquiescence would preclude NIHL from maintaining its claim for incentive payments in the second arbitration.

20. At the same time, this Court agrees with the learned Single Judge that the question whether the claim for incentive payment in second arbitration itself is an abuse of process and not maintainable in fact and in law should be left for determination by the second Arbitral Tribunal. All the observations of the learned Single Judge should be construed as having been made in the context of determining whether any *prima facie* case is made out by the present Appellants for grant of injunction restraining the NIHL

from proceeding with the second arbitration.

21. The appeal is accordingly dismissed but no order as to costs. The pending applications are also disposed of.

S.MURALIDHAR, J.

I.S.MEHTA, J.

MARCH 29, 2019
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