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

Date of Decision : 08.08.2019

+ OMP(COMM) 98/2017

NTPC

..... Petitioner

Through: Mr.Bharat Sangal, Sr. Adv.
with Mr.Ashim Vachher,
Ms.Babita Kushwaha,
Ms.Laimon Rani Boro,
Mr.Vaibhav Dabas, Advs.
alongwith Ms.Preeti Bhardwaj,
Law Officer.

versus

WPIL

..... Respondent

Through: Mr.T.K.Ganju, Sr. Adv. with
Mr.Munindra Dvivedi,
Ms.Divya Bhalla, Ms.Aathira
Pillai, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 25.07.2015 passed by the Arbitral Tribunal adjudicating the disputes that have arisen between the parties in relation to the Contract Agreements dated 30.06.2005 executed between the parties for the CW System Package for Sipat Super Thermal Power Project Stage -I

(3 X 660 MW) COA NO.:CS-9518-133-2-FC-COA-4575 and COA No.:CS-9518-133-2-SC-COA-4576.

2. By the Impugned Award the Arbitral Tribunal has awarded Rs.2.35 crores as damages to the petitioner against a claim of Rs.10.062 crores. The present petition challenges the denial of full claim of the petitioner.

3. It is the case of the petitioner that the petitioner had issued a Notice Inviting Bids for the above work, Clauses 7.1A and 7.1B whereof laid down the qualifying requirements for the bidder. In Clause 7.2A and 7.2B, it was further provided that in case the bidder does not himself meet the qualifying requirements, it can submit a bid alongwith an associate who shall furnish an undertaking jointly with the bidder for the satisfactory performance of the work. As far as Clause 7.1B is concerned, the associate was also required to furnish on demand Bank Guarantee for 1% of the contract price in addition to the Contract Performance Security by the bidder. As far as the associate for meeting the eligibility criteria mentioned in Clause 7.1A is concerned, apart from the Joint Deed of Undertaking, the associate was to furnish on demand Bank Guarantee of 4% of the contract price in addition to the Contract Performance Security by the bidder.

4. The respondent had declared M/s Alstom Fluides et Mecanique, a Company incorporated under relevant laws of France (hereinafter referred to as M/s Alstom), as an associate as far as the eligibility criteria under Clause 7.1B is concerned. The respondent had further declared M/s Simplex Concrete Piles (India) Ltd. as an associate as far

as the qualifying criteria under Clause 7.1A was concerned. These two associates had submitted separate Deeds of Joint Undertaking as required in Clause 7.2A and 7.2B.

5. Based on the above documents, the respondent was declared successful and was awarded the Contract(s) by the letter dated 31.05.2005 and thereafter the Agreement(s) were signed between the parties on 30.06.2005.

6. As the respondent did not furnish the Bank Guarantee(s) as required under Clause 7.2A and did not commence the work, the petitioner on 27.09.2005 invoked the Bank Guarantee submitted by the respondent.

7. The respondent filed a suit before this Court being CS(OS) 1363/2005 seeking permanent and mandatory injunction and declaration against the encashment of the Bank Guarantee. The High Court vide order dated 28.09.2005 directed the parties to maintain status quo with respect to the Bank Guarantee. However, the Bank Guarantee already stood invoked and encashed by the petitioner.

8. The petitioner thereafter by a letter dated 21.12.2005 issued a notice of termination to the respondent and by the subsequent letter dated 10.01.2006 terminated the Agreement for the above default of the respondent.

9. In the suit filed by the respondent, the petitioner filed an application under Section 8 of the Act, which was allowed by the

Court by an order dated 16.01.2009 and the parties were referred to arbitration.

10. Before the Arbitral Tribunal, the petitioner had *inter alia* made a claim of Rs.10.06 crores being the differential price of the Contract awarded to the respondent and those awarded to one M/s KBL Ltd. and Indian Institute of Science, Bangalore for the same work. As noted hereinabove, the Arbitral Tribunal has awarded this claim only for an amount of Rs.2.35 crores, which was the Bank Guarantee amount that had been encashed by the petitioner.

11. Learned senior counsel for the petitioner submits that the Arbitral Tribunal has erred in restricting the claim of the petitioner to Rs.2.35 crores on the ground that the petitioner had wrongly terminated the Contract and not granted an opportunity to the respondent to perform the work by incorporating M/s Mitsubishi Heavy Industries Ltd.(hereinafter referred to as M/s Mitsubishi) as an associate in place of M/s Alstom. He submits that the respondent by the letter dated 19.08.2005 had informed the petitioner that due to non fulfillment of contract conditions by M/s Alstom, the respondent would not be in a position to proceed with the execution of the project. Further, by the letter dated 11.11.2005, though the respondent offered to associate M/s Mitsubishi Heavy Industries Ltd. as an associate for completion of the work, as the bid of the respondent had been accepted with M/s Alstom as an associate, this offer of the respondent could not have been accepted by the petitioner and was rightly refused by the letter dated 15.12.2005. He further submits that from the

documents produced by the respondent itself before the Arbitral Tribunal, it was apparent that the respondent had disputes with M/s Alstom even prior to the award of Contract in its favour. These disputes were intentionally withheld from the petitioner and award of Contract was accepted by the respondent knowing fully well that it was not in a position to execute the Contract(s). He submits that therefore, the finding of the Arbitral Tribunal is perverse and cannot be sustained.

12. On the other hand, the learned senior counsel for the respondent defends the Award by submitting that there was no prohibition in the bid or the Contract on the respondent from changing the associate in case of any difficulty being faced by it during the execution of the work. The respondent had, therefore, offered to complete the work by associating M/s Mitsubishi as an associate. The petitioner, however, wrongfully rejected such permission to the respondent and thereafter proceeded to terminate the Contract. He submits that the Arbitral Tribunal has therefore, rightly held that the termination to be invalid.

13. In my opinion, the Arbitral Tribunal has in fact given contradictory findings on the issue of termination. While answering issue no.(d) which was whether the Contract was illegally terminated by the petitioner, held the same in favour of the respondent, however, at the same time, while deciding on the issue nos. (e)(f) and (g) has held the respondent to be in breach of its contractual obligation.

14. Be that as it may, it is evident from the record that the respondent had disputes with M/s Alstom even prior to the

Notification of Award of Contract by the petitioner. This is evident from the letter dated 09.08.2005 addressed by M/s Alstom to the respondent, which highlights such disputes. It is further evident that though the Contract(s) was signed on 30.06.2005, the respondent was not in a position to obtain the Bank Guarantee from M/s Alstom in terms of Clause 7.2A of the Invitation to Bid document. It did not even commence the execution of the work. Most importantly, the respondent by its letter dated 19.08.2005 clearly expressed its inability to perform the work in absence of M/s Alstom.

15. As far as the letter dated 11.11.2005 is concerned, the respondent did offer completion of the work by associating M/s Mitsubishi in place of M/s Alstom, however, as contended by the learned senior counsel for the petitioner, the respondent did not produce any document from M/s Mitsubishi which would show that M/s Mitsubishi was also interested in joining in the project as an associate of the respondent. Maybe the stage for this never arose as the petitioner rejected the offer at the inception by its letter dated 15.12.2005.

16. Be that as it may, as the respondent was admittedly in default of the contractual terms, the termination of the Contract(s) cannot be said to be illegal.

17. As far as the monetary claim of the petitioner arising out of such termination of the Agreement is concerned, the Arbitral Tribunal has held that the petitioner has not filed any document to establish the amounts actually paid to the subsequent contractors, namely M/s KBL

Ltd. and Indian Institute of Science. It has held that there was no evidence on record to show that the said contractors completed the work within time and the entire amount under their respective Contracts was actually paid by the petitioner. The Arbitral Tribunal has further held that when the respondent had already offered to complete the work under its original Contract(s), the petitioner ought not to have awarded the Contract(s) to third parties at the risk of the respondent without giving an opportunity to the respondent to complete the work with the other associate.

18. Learned senior counsel for the petitioner submits that as far as the proof of damages is concerned, the petitioner had placed before the Arbitral Tribunal the Contracts executed between the petitioner and M/s KBL Ltd. The petitioner had also produced in evidence the testimony of Mr. S.K.Patel, its DGM (Civil) who stated in his Affidavit of evidence that majority of the work awarded to M/s KBL Ltd. had been completed in regard to the civil works except for minor works like painting of buildings, construction of toilets, etc. and as far as supply, installation and commissioning of the equipment is concerned, the same was complete, however, only the commissioning of the last main CW pump covered by the Contract was pending. He had further stated that 90% of the contractual price had been paid to M/s KBL Ltd. Learned senior counsel for the petitioner submits that in presence of such evidence, the Arbitral Tribunal has erred in holding that the petitioner did not prove its claim for damages.

19. On the other hand, the learned senior counsel for the respondent places reliance on Clause 42.2.6 of the General Conditions of Contract (GCC) which authorizes the petitioner to get the work completed through the third party contractor at the cost of the respondent. He submits that for justifying such a claim, the cost incurred by the petitioner in getting the work completed should not only be reasonable but must also have been shown to have been actually incurred by it. He submits that in the present case, barring producing the Agreements executed between the petitioner and the third party contractor, namely M/s KBL Ltd., the petitioner did not produce any document evidencing any payment to M/s KBL Ltd. under those Contracts. As far as the testimony of the petitioner's witness is concerned, he draws my attention to the cross examination of the witness to submit that the witness had only deposed of payment of approximately Rs.64 crores to M/s KBL Ltd. This was far below the amount that was payable under the Contract to the respondent. He submits that infact, if Clause 42.2.6 of the GCC was worked out, the respondent was entitled to claim the differential from the petitioner.

20. I have considered the submissions made by the learned senior counsels for the parties. At the outset, it must be noted that for the award of damages, the claimant has to show that it took all reasonable steps to mitigate its losses. In the present case, though the respondent was in default of the contractual terms, once it had offered to complete the work by authorising M/s Mitsubishi as an associate at the same contractual price, the petitioner should have at least considered this

offer to mitigate its losses. However, the petitioner chose to shoot down this offer at the very inception. The fact that the respondent did not produce any document from M/s Mitsubishi is also not relevant inasmuch as the petitioner never let that stage come.

21. The Arbitral Tribunal in my opinion is, therefore, right in holding that the respondent should have been granted an opportunity to complete the work by authorizing M/s Mitsubishi, at least as a form of mitigation of losses by the petitioner.

22. Equally, in absence of the proof of actual payment made by the petitioner to M/s KBL, it cannot be held that the finding of the Arbitral Tribunal that there was no evidence of the actual loss suffered by the petitioner due to getting the work completed through a third party contractor was completely perverse or unreasonable. This being a matter of appreciation of evidence by the Arbitral Tribunal, this Court cannot interfere with the same unless the same is found to be completely perverse or unreasonable, which test in my opinion has not been satisfied by the petitioner in the facts of the present case.

23. I therefore, find no merit in the present petition and the same is dismissed. There shall be no order as to costs.

NAVIN CHAWLA, J

AUGUST 08, 2019/Arya