

\$~12, 14 to 16

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

Date of Decision: 27th February, 2019

12

+

O.M.P. (COMM) 182/2016

BSES RAJDHANI POWER LTD.

..... Petitioner

Through: Mr. Manish Srivastava, Ms. Deboshree Mukherjee and Mr. Rahul Gupta, Advocates. (M:9971635549)

versus

M/S KANO HAR ELECTRICALS LTD. & ANR. Respondents

Through: Mr. Bhuvan Gugnani, Mr. S. C. Sharma, Mr. Saurabh Soni, Mr. Kshitiz Rao, Mr. Mannat Singh, Ms. Mythili Srinivasamurhty and Mr. Aditya Shrotriya, Advocates for R-1. (M:9810126664 & 9599248485)

WITH

14

+

O.M.P. (COMM) 267/2016

BSES YAMUNA POWER LIMITED

..... Petitioner

Through: Appearance not given.

versus

KANO HAR ELECTRICALS LIMITED & ORS. Respondents

Through: Mr. Bhuvan Gugnani, Mr. S. C. Sharma, Mr. Saurabh Soni, Mr. Kshitiz Rao, Mr. Mannat Singh, Ms. Mythili Srinivasamurhty and Mr. Aditya Shrotriya, Advocates for R-1. Mr. Harsh Kumar, Advocate for Mr. Prashant Mehta, Advocate for R-2 & 3. (M:9999590003)

WITH

15

+

O.M.P. (COMM) 268/2016

BSES RAJDHANI POWER LIMITED

..... Petitioner

Through: Mr. Manish Srivastava, Ms. Deboshree Mukherjee and Mr. Rahul Gupta, Advocates.

versus

KANO HAR ELECTRICALS LIMITED & ORS. Respondents

Through: Mr. Bhuvan Gugnani, Mr. S. C. Sharma, Mr. Saurabh Soni, Mr. Kshitiz Rao, Mr. Mannat Singh, Ms. Mythili Srinivasamurthy and Mr. Aditya Shrotriya, Advocates for R-1. Mr. Harsh Kumar, Advocate for Mr. Prashant Mehta, Advocate for R-2 & 3.

AND

16
+

O.M.P. (COMM) 300/2016

TATA POWER DELHI DISTRIBUTION LIMITED (EARLIER KNOWN AS NORTH DELHI POWER LIMITED) Petitioner

Through: Mr. Sudhir Nandrajog, Senior Advocate with Mr. Ashish Verma, Advocate. (M:9871603434)

versus

M/S. KANO HAR ELECTRICALS LIMITED & ORS.

..... Respondents

Through: Mr. Bhuvan Gugnani, Mr. S. C. Sharma, Mr. Saurabh Soni, Mr. Kshitiz Rao, Mr. Mannat Singh, Ms. Mythili Srinivasamurthy and Mr. Aditya Shrotriya, Advocates for R-1. Mr. Harsh Kumar, Advocate for Mr. Prashant Mehta, Advocate for R-2 & 3.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. BSES Rajdhani filed a petition under Section 34 of the Arbitration

and Conciliation Act, 1996 (*hereinafter the 'Act'*) challenging one of the impugned awards dated 6th April, 2010. The petition was heard by a Ld. Single Judge of this Court on 23rd July, 2010, on which date the petitions were adjourned *sine die* with the following observations:

“Accordingly, the present petition is adjourned sine die to enable the learned arbitrator to resume the proceedings and to take such action as in the opinion of the arbitral tribunal will eliminate the aforesaid ground for setting aside the arbitral award raised by the petitioner.

A copy of the order be communicated to the learned arbitrator.”

2. Further to the above order, the Ld. Arbitrator recommenced the arbitration proceedings and has rendered supplementary findings dated 29th January, 2016. These findings are impugned in OMP(COMM) 267/2016, OMP(COMM) 268/2016, and OMP(COMM) 300/2016 filed by the respective power distribution companies.

3. The brief background of the petitions is that M/s Kanohar Electricals Ltd. (*hereinafter, 'Contractor'*) was awarded a contract for repairing of transformers vide purchase order dated 23rd March, 1998. The price for repairs was mentioned in the purchase order. The total amount contracted for was a sum of Rs.3,46,24,188/-. Work was executed by the Contractor between 23rd March, 1998 to 10th April, 2000.

4. While making payments, various amounts were withheld by the Delhi Vidyut Board (*hereinafter 'DVB'*) in the nature of penalties and hence disputes arose between the parties.

5. The DVB, which had placed the contract with the Contractor, was re-organized and six companies were formed between the year 2000 to 2002.

The holding company was known as the Delhi Power Company Limited (*hereinafter*, 'DPCL'), the transmission company was called Delhi Transco Limited (*hereinafter*, 'DTL'), the electricity generation company i.e. the GENCO was called the Indraprastha Power Generation Company Ltd. (*hereinafter*, 'IPGCL') and the three distribution companies which were formed were called BSES Rajdhani Power Limited (*hereinafter* 'BSES Rajdhani'), BSES Yamuna Limited (*hereinafter* 'BSES Yamuna') and North Delhi Power Ltd., now known as Tata Power Delhi Distribution Limited (*hereinafter* 'Tata Power'). This unbundling of DVB's activities was implemented under the Delhi Electricity Reforms Act, 2000 on 3rd November, 2000. Thereafter, the reorganization of DVB took place under the Delhi Electricity Reforms (Transfer Scheme) Rules, 2001 (*hereinafter*, 'Transfer Scheme of 2001'). It is not in dispute that the entire reorganization came into effect with effect from 1st July, 2002.

6. The Contractor had executed the entire work prior to the reorganization of DVB coming into effect. The Contractor had various grievances in respect of short payments as also penalties which were imposed and accordingly, invoked the arbitration clause on 3rd January, 2003. Since no Arbitrator was appointed, the Contractor filed an application under Section 11 of the Act. In the said petition, the Contractor impleaded DPCL, Delhi Power Supply Company Limited (*hereinafter*, 'DPSCL'), which did not exist, DTL and BSES Rajdhani, as four Respondents. Vide order dated 16th March, 2005, a Ld. Single Judge of this Court appointed Ld. Sole Arbitrator Justice A. K. Srivastava (retd.) to adjudicate the disputes between the parties. In the said petition, BSES Rajdhani was *ex-parte*.

7. The Contractor filed its claim petition before the Ld. Arbitrator. In the

claim petition, it impleaded DPCL, DPSCL, DTL and BSES Rajdhani. During the course of arbitration proceedings, BSES Rajdhani moved an application under Order I Rule 10 CPC, seeking impleadment of the other two distribution companies i.e. BSES Yamuna and Tata Power. The said application under Order I Rule 10 CPC was opposed by the Contractor and vide order dated 22nd August, 2008, the said application was rejected. The order is relevant and set out herein below:

“Heard Ld. Counsel for the applicant. He submitted that as per the provisions of the Delhi Reforms Act, 2000 and the rules made thereunder, the liability of the alleged claim lies on NDPL and BSES Yamuna Power Ltd. He further says that the applicant i.e. Opposite Party No.4 is not liable for any claim made by the Claimant in its claim petition. Be it that, it is for the Opposite Party No.4 to establish its plea and in case it is found that the liability cannot be fastened on Opposite Party No.4, then what is worry of the Opposite Party No.4 to get the stranger to these arbitration proceedings be made an Opposite Party for passing of award against that Opposite Party.

In view of the written opposition made by the Claimant against this application and in view of the observations made above, I am not inclined to allow this application to implead NDPL and BSES Yamuna Power Ltd. as Opposite Parties.

The application is accordingly disposed of.”

8. The Ld. Arbitrator thereafter proceeded to hear the matter and passed the first impugned award dated 6th April, 2010 under which the Contractor's claims were allowed in the following terms.

“In view of the findings given above, the claimant is awarded the following:-

- (i) Refund of Rs.43,55,296/-.*
- (ii) Refund of Rs.4,20,572.08*
- (iii) Interest @ 16.50% per annum on the amounts*

at (i) and (ii) above with effect from the respective dates of their deduction upto 30.4.2005.

(iv) *Costs of arbitration:-*

a. *Fee and expenses paid Rs.2,74,757/-
to Arbitrator (including the
payments made on Behalf
of the opposite parties)*

b. *Legal fee Rs.1,00,000/-*

The above amount is awarded to the claimant against opposite party no.3 i.e. M/s BSES.

The claimant will further be entitled to interest from opposite party no.3 @ 12% per annum simple on the total amount awarded at item (i), (ii) and (iii) only w.e.f. 1.5.2005 till actual payment is received by it from opposite party no.3 (M/s. BSES).

The opposite parties shall bear their own costs of this arbitration case.

Claim against opposite parties no.1 and 2 i.e. Delhi Power Company Ltd. and Delhi Transco Ltd. is rejected. Since Delhi Power Supply Company has been deleted from the array of the parties, this award does not cover it.

This award is made and signed by me on this 6th day of April, 2010.”

9. BSES Rajdhani, thereafter, filed OMP(COMM) 182/2016 challenging the above award and also disputed its liability on the ground that not all the transformers, which were repaired by the Contractor, had fallen in its share and that various transformers, which were repaired had been distributed between the three distribution companies. In view of the said challenge, the Ld. Single Judge of this Court passed order dated 23rd July, 2010, directing that the matter be listed again before the Ld. Arbitrator to eliminate the grounds raised by the BSES Rajdhani. The said order reads as under:

“The submission of Mr. Datta is that the learned arbitrator did not go into the issue of extent of liability of the petitioner, particularly in the light of the petitioner’s assertion that only 71 transformers out of 198 transformers had fallen to the petitioner’s share.

Learned counsel for the respondents has also been heard on this aspect and learned counsel for the respondent is agreeable if the present petition is adjourned to grant of opportunity to the learned arbitrator to resume the arbitral proceedings and to take action which would eliminate the aforesaid ground raised by the petitioner to seek the setting aside of the award. The petitioner is agreeable to this course being adopted.

Accordingly, the present petition is adjourned sine die to enable the learned arbitrator to resume the proceedings and to take such action as in the opinion of the arbitral tribunal will eliminate the aforesaid ground for setting aside the arbitral award raised by the petitioner.

A copy of the order be communicated to the learned arbitrator.”

10. In the second round before the Ld. Arbitrator, an application was filed by BSES Rajdhani and the Contractor seeking impleadment of BSES Yamuna and Tata Power. The said application was considered by the Ld. Arbitrator and was allowed on 27th November, 2010. Thereafter, BSES Yamuna and Tata Power were allowed to file their pleadings. The said companies also led their evidence in the matter. Finally, on 29th January, 2016, the Ld. Arbitrator passed the supplementary findings and concluded as under:

“FINDINGS

In view of what is stated and discussed above, my finding is that out of the subject 198 transformers, 74 transformers were in the location of OP3, 55 were in

the location of OP4 and 69 were in the location of OP5. Therefore, if the award amount is to be bifurcated amongst OP3, OP4 and OP5 then the same should be on the basis of their respective repair charges and deductions there from. The details of transformers are already there in the list given by the witness of OP3. Since OP3, OP4 and OP5 are statutory successors of DVB with regard to the subject transformers, the liability of repair amount on the repaired 198 transformers shall be joint and several against OP3, OP4 and OP5.

Since as per the order of the Hon'ble High Court my brief was limited, I have not entered into the other pleas taken by OP3, OP4 or OP5 in these proceedings."

11. OMPs (COMM) 267/2016 and 300/2016 have accordingly been filed by BSES Yamuna and Tata Power, challenging only the supplementary findings dated 29th January, 2016. BSES Rajdhani has challenged the supplementary findings in OMP (COMM) 268/2016. Thus, BSES Rajdhani has challenged the original award and the supplementary findings whereas the other two power companies have challenged only the supplementary findings. Submissions on behalf of the three power companies are as under:

- (a) BSES Rajdhani submits that as per the supplementary findings, its liability had to be restricted to 74 transformers, which fell in its share. Thus, the final award fastening liability only on BSES Rajdhani, qua all the 198 transformers was patently incorrect. BSES Rajdhani has no objection if the liability of only 74 transformers is to be borne by it.
- (b) BSES Yamuna, on the other hand, challenges the findings of liability imposed on it under the supplementary findings, mainly on the ground that the claims against BSES Yamuna were barred by limitation. The

submission is that under Section 21 of the Limitation Act, 1963, in respect of any party, which is newly added in the proceedings, the proceedings are deemed to have been instituted against the said party only from the date when the impleadment takes place. Since the impleadment in the present case took place only in the year 2010, admittedly, the cause of action having arisen in 2003, when arbitration was invoked, BSES Yamuna argues that the claims are barred by limitation. It is further submitted by BSES Yamuna that the Ld. Arbitrator did not have the mandate to implead third parties as per the order of this Court passed on 23rd July, 2010. Ld. Arbitrator, according to Ld. counsels, could have merely determined the liability of BSES Rajdhani, and could not have expanded the scope of proceedings by impleading the two other third parties, i.e., BSES Yamuna and Tata Power. It is further submitted that the Contractor itself having been notified of the unbundling and the creation of the three different power companies, which had come in existence and having opposed their impleadment earlier, had clearly abandoned its claims against the said two power companies. The reply filed by the Contractor to the application under Order I Rule 10 CPC is referred to and relied upon.

- (c) Similar submissions are made on behalf of Tata Power. Tata Power, in addition, argues that while BSES Rajdhani and BSES Yamuna may be group companies, but Tata Power is a complete third party, which had no knowledge of the proceedings till 2010 when it was impleaded.

12. On the other hand, it is submitted on behalf of Ld. counsel for the

Contractor, that the affidavits filed by the two witnesses, who appeared on behalf of BSES Rajdhani and BSES Yamuna show that the repair of transformers were, in fact, carried out by the Contractor in the Central Okhla Store, which had fallen in the share of BSES Rajdhani. The fact that the transformers were allotted to a different power company from the said store is not a matter, which was within the knowledge of the Claimant/Contractor company. Moreover, the work having been executed by the Contractor, while the DVB was in existence, the three power companies, which succeeded even to the liabilities of DVB have to be held to be liable. Specific reliance has been placed on paragraphs 3 to 6 of the affidavit filed on behalf of BSES Rajdhani and paragraphs 2 & 3 of the affidavit filed on behalf of BSES Yamuna.

Analysis and Findings

13. Though the issues in all the four petitions are overlapping, in view of the fact that each of the power companies has a distinct and separate stand in respect of their liability, the findings in each of the OMPs are being given separately.

OMP (COMM) 182/2016 & 268/2016

14. These two OMPs have been preferred by BSES Rajdhani. OMP (COMM) 182/2016 challenges the award dated 6th April, 2010. Grievance in the said OMP was that the entire liability of repair of all the 198 transformers could not have been saddled on it. The liability could be fastened on BSES Rajdhani only to the extent of the transformers that were allotted to it and being utilised by it. This grievance has been sufficiently addressed in the order dated 23rd July, 2010, wherein this Court had directed the Ld. Arbitrator to take action, which would eliminate the aforesaid

ground. Pursuant to the said order of the High Court, the Ld. Arbitrator has given supplementary findings and has held that BSES Rajdhani would be responsible for 74 transformers, which were allotted to it. OMP (Comm) 268/2016 has been filed against the supplementary findings.

15. In the arbitral proceedings, the power companies were directed to submit the basis of calculation of penalty, however, they failed to do so. In view thereof, the Ld. Arbitrator held that the penalties, which were deducted by DVB, were liable to be awarded in favour of the Contractor. The findings of the Ld. Arbitral tribunal warrant no interference.

16. Accordingly, the liability of BSES Rajdhani is restricted to 74 transformers in the first award. The breakup of the said amount is as under:

Particular(s)	Total
Refund of amount deducted as penalty for delayed delivery of transformers	= Rs.43,55,296/- (A)
Refund of amount deducted as chargeable Excise Duty	= Rs.4,20,572.08/- (B)
A + B	= Rs.47,75,868.08/- (C)
Total number of transformers	= 198
Amount payable for one transformer [C ÷ 198]	= Rs.24,120.545/- (D)
Amount payable for 74 transformers [D x 74]	= Rs.17,84,920.40/-

17. BSES Rajdhani would, accordingly, be liable to pay a sum of Rs.17,84,920.40/-. With these observations, both these OMPs are disposed of.

OMP (COMM) 267/2016

18. BSES Yamuna is a group company of BSES Rajdhani. The main issue raised by BSES Yamuna is that the claims against it are barred by limitation, as it was impleaded in the arbitral proceedings only in 2010. There is no doubt that since the unbundling of electricity companies had taken place in 2002, the liabilities of the DVB are taken over by the three distribution companies. The Contractor ought to have made BSES Yamuna as a party at that stage. A perusal of the provisions of the Delhi Electricity Reforms Act, 2000 shows that under Section 15, the rights and liabilities prior to the effective date, vested in the Government and thereafter the Government transferred the same to the distribution companies under the Transfer Scheme of 2001. Section 15 of the Delhi Electricity Reforms Act, 2000 reads as under:

“Section 15. Reorganisation of Delhi Vidyut Board and Transfer of Properties, Functions and Duties Thereof.

- (1) With effect from the date on which a transfer scheme prepared by the government to give effect to the objects and purposes of this Act, is published or such further date as may be specified by the government (hereinafter referred to as “the effective date”), any property, interest in property, rights and liabilities which immediately before the effective date belonged to the Board shall vest in the government.*
- (2) The government may transfer such property, interest in property, rights and liabilities to any company or companies established under Section 14 for the purpose in accordance with the transfer scheme prepared therefor.*
- (3) Such of the rights and powers to be exercise by the Board under the Electricity (Supply) Act, 1948*

(Central Act 54 of 1948) as the government may, by notification in the Official Gazette, specify, shall be exercisable by a company or companies established as the case may be, under Section 14, for the purpose of discharge of the functions and duties with which it is entrusted.

(4) Notwithstanding anything contained in this section or any other Act, where

(a) the transfer scheme involves the transfer of any property or rights to any person or undertaking not wholly owned by the government, the scheme shall give effect to the transfer only after asset valuation,

(b) any transaction of any description is effected in pursuance of a transfer scheme, it shall be binding on all persons including third parties, even if such persons have not consented to it.

(5) The government may require any transmitting or distributing company established under the provisions of sub-section (1) of Section 14 (hereinafter referred to as “the transferor licensee”), or any generating company to draw up a transfer scheme to vest in a further licensee or licensees (“the transferee licensee or licensee”), or any generating company, any property, interest in property, rights and liabilities which have been vested in the transferor licensee or generating company, as the case may be, under this section and publish the same in the Official Gazette. The transfer scheme to be notified under this sub-section shall have the same effect as a transfer scheme under sub-section (2).

(6) A transfer scheme may –

(a) provide for the formation of subsidiaries, joint venture companies or other schemes of division, amalgamation, merger, reconstruction or arrangements;

(b) define the property, interest in property, rights and liabilities to be allocated –

(i) by specifying or describing the property, rights and liabilities in question,

(ii) by referring to all the property, interest in property, rights and liabilities comprised in a specified part of the transferor's undertaking, or

(iii) partly in the one way and partly in the other:

Provided that the property, interest in property, rights and liabilities shall be subject to such further transfer as the government may specify;

(c) provide that any rights or liabilities specified or described in the scheme shall be enforceable by or against the transferor or the transferee;

(d) impose on any licensee an obligation to enter into such written agreements with, or execute such other instruments in favour of any other subsequent licensee as may be specified in the scheme;

(e) make such supplemental, incidental and consequential provisions as the transferor, licensee considers appropriate including provision specifying the order in which any transfer or transaction is to be regarded as taking effect;

(f) provide that the transfer shall be provisional subject to the provisions of Section 18.

(7) All debts and obligations incurred, all contracts entered into and all matters and things done by, with or for the Board, or a company or companies established as the case may be, under Section 14 or generating company or distribution company or companies before a transfer scheme becomes effective shall, to the extent specified in the relevant

transfer scheme, be deemed to have been incurred, entered into or done by, with or for the government or the transferee and all suits or other legal proceedings instituted by or against the Board or transferor, as the case may be, may be continued or instituted by or against the government or concerned transferee, as the case may be.

- (8) *In the event a licensee is required to vest any part of its undertakings in another licensee pursuant to sub-section (5), the government shall amend the transferee license in accordance with Section 24 or revoke its license in accordance with Section 23.*
- (9) *The Board shall cease to exist, with the transfer of functions and duties specified and with the transfer of assets as on the effective date.*
- (10) *The exercise by a licensee of any Board's rights and powers may be made on such conditions as shall be specified in the transfer scheme including a condition that such rights and powers shall be exercised by the licensee only with the approval of the Commission/Government."*

This has been clearly considered by the Ld. Arbitrator.

19. Further, a perusal of the affidavit filed on behalf of BSES Yamuna shows that BSES Yamuna did not have any records in respect of the repaired transformers, however, the same were issued from the centralized Okhla store, which was under the control of DVB and was thereafter taken over by BSES Rajdhani. The Contractor, who repaired the transformers at the centralized Okhla store, under the control of BSES Rajdhani could not have had knowledge as to how many transformers were distributed to BSES Yamuna, and if so, to what location.

20. There is no doubt that in the first stage when the impleadment of BSES Yamuna was sought, the Contractor ought to have readily agreed.

The opposition to the said impleadment was a misadventure. The order of the Ld. Arbitrator refusing impleadment of BSES Yamuna and Tata Power, at that stage, is also not sustainable. In fact, the Ld. Arbitrator at that stage itself, ought to have impleaded the said two companies. In BSES Rajdhani's petition, the plea taken is that DPCL was liable. Thus, it is clear that some confusion prevailed as to the unbundling and actual control of the transformers, which were taken over by the various distribution companies.

21. Moreover, after the order of the Delhi High Court, sending the matter back to the Ld. Arbitrator on 23rd July, 2010, both the Contractor and BSES Rajdhani sought impleadment of BSES Yamuna and Tata Power. The said impleadment was allowed. Evidence was led by the parties. Thereafter, the Ld. Arbitrator has come to the conclusion that BSES Yamuna would be liable for payment for repair of 55 transformers, which were shifted to its locations. The affidavit of BSES Yamuna is extracted herein after.

“2. I say that the BSESYPL store is not maintaining any record in respect of the transformers issued from the then Centralized Okhla Store of erstwhile DVB which was supplying the transformers to all the areas of Delhi. The record of transformers issuance is maintained by the Okhla Store which is falls in the area of BSESRPL and we are having no record with us.

3. I say that we have received the information from the Okhla store that 55 numbers of transformers were issued/consumed in the area of BSESYPL during the period of erstwhile DVB.”

22. Arbitration was invoked on 24th February, 2003 and the said date would be considered as the date of commencement of arbitral proceedings. Since the cause of action arose sometime in 2002 and the arbitration was

invoked in February, 2003, the claims are within limitation. The distinction that BSES Yamuna urges that it was a different company altogether and ought to have been impleaded, though appealing at the first blush, would not be tenable in view of the peculiar facts in this case. The Contractor had impleaded DTL, DPCL and BSES Rajdhani, under the presumption that the stores were under control of the BSES Rajdhani and the other two companies were not liable. The unbundling of DVB was a long and tedious affair and third party Contractors could not have had knowledge of the various allocations/distributions amongst the power distribution companies. Moreover, the Okhla Store where the repairs were carried out were under the control of BSES Rajdhani. Liabilities of DVB have been transferred to BSES Yamuna. Thus, the claims are held to be within limitation. The liability of BSES Yamuna is restricted to 55 transformers and is as under:

Particular(s)		
Refund of amount deducted as penalty for delayed delivery of transformers	=	Rs.43,55,296/- (A)
Refund of amount deducted as chargeable Excise Duty	=	Rs.4,20,572.08/- (B)
A + B	=	Rs.47,75,868.08/- (C)
Total number of transformers	=	198
Amount payable for one transformer [C ÷ 198]	=	Rs.24,120.545/- (D)
Amount payable for 55 transformers [D x 55]	=	Rs.13,26,630.02/-

Thus, BSES Yamuna is liable to pay a sum of Rs.13,26,630.02/-. With these
O.M.P. (COMM) 182/2016, 267/2016, 268/2016 & 300/2016

observations, the OMP is disposed of.

OMP (COMM) 300/2016

23. Insofar as Tata Power is concerned, though it is not a group company of BSES Rajdhani, the same reasoning as applicable to BSES Yamuna would apply. Tata Power also appeared in the second round before the Ld. Arbitrator and had also filed its pleadings and evidence in the matter. It has been heard fully and it has taken a position that out of 69 transformers, it was able to identify only 35 transformers allotted to it. Since the identification number used by the Contractor were those provided by DVB, the witness was unable to match the said transformers. At the end, the witness concludes in his affidavit as under:

“6. The transformers forming part of the present dispute are subject matter of the writ petition and also that as much as 147 out of 3148 inspected by RITES are of Kanohar make and serial no. of many such transformers, are unreadable there is all the possibility that the transformers forming part of the present arbitration proceedings forms significant part of that population of distribution transformers under dispute in the writ petition no.9581 of 2005. The Hon’ble High Court has yet to adjudicate on the ownership towards repairable, non repairable transformers between Discoms and DTL. In the absence of a decision of the said matter, it is not possible to state with certainty as to on whom liability if any would lie with respect to the repaired transformers, non-repairable transformers and scrap proceeds of the transformers and the matter in which the transformers would finally be divided.”

24. Unfortunately, in the present case, DVB no longer exists and none of the other companies are prepared to take responsibility.

25. Since there was no consistency in the evidence given by Tata Power, the Ld. Arbitrator went by the evidence given by the witness of BSES Rajdhani, whose witness stated as under:

“2. I say that the claimant has filed a claim for recovery and claimed amount on account of penalty deducted, interest on delayed payment and interest on penalty amount, excise deducted and interest on excise by the erstwhile D.V.B. on account of repair of transformer during the D.V.B. period. The said claim amount is alleged to be forfeited by D.V.B. on account of penalty imposed.

3. I say that the claimant has done work and submitted the bills with erstwhile D.V.B. and the date of work is also prior to unbundling with the erstwhile D.V.B. and the Opposite Party No. 3 has no records of the work done by the claimant and the alleged bills if any submitted by him. Hence in the absence of any evidence or papers or agreement with regards to the work done by the claimant, the Opposite Party No. 3 is not in a position to even verify the authenticity of the claim submitted by the claimant.

4. I say that there were certain matters like stores, repair and maintenance, capital works, billing systems, medical facilities etc. which could not be divided across various entities effectively on the effective date of transfer provided in the Transfer Scheme and were shared as per the items specified in the schedule as per the ‘Shared Facilities Agreement’. The share facility agreement dated 27/06/2002 is Exb. OP-3/1

5. I say that as per the transfer scheme admittedly the three distribution companies namely (i) BSES Rajdhani Power Limited, (ii) BSES Yamuna Power Limited and (iii) North Delhi Power Limited have their respective areas for distribution of electricity in the National Capital Territory of Delhi w.e.f. 01/07/2002 as per the transfer scheme and share facility agreement. All the above said three companies have 1/3rd share each in

respect of the assets of stores as per share facility agreement dated 27/06/2002 which is already Exb. OP-5/1. The claimant has claimed the amount on account of the transformer repairs, penalty imposed by the erstwhile D.V.B. on account of 198 transformers, which as per record had already been issued/consumed by the erstwhile D.V.B. in the respective areas before unbundling of erstwhile D.V.B.

6. I say that the details of lifting of transformers could not be verified by the deponent as the same were lifted from the different sites at the relevant D.V.B. period/and from the transformer repair workshop (at Okhla) which is now in the control of D.P.C.L. and the transformers were not lifted from the stores and the records of the same is not handed over to us by the D.V.B. The deponent had filed a chart before the Court after verifying from the stock/material issue register, the details of delivery of the transformers in Okhla store and as per list, 74 transformers have been issued to the area of BSES Rajdhani Power Limited, 55 transformers have been issued to the area of BSES Yamuna Power Limited, and 69 transformers have been issued to the area of North Delhi Power Limited (TATA POWER DELHI DISTRIBUTION LTD). I say that after verifying the record the above transformers have already been consumed/issued to the respective areas during the D.V.B. period. The summery detail of the 198 transformers is Exb. OP-3/2, the summery detail is prepared by me from the transformers issue dockets which is duly stamped and bears my signatures.

7. I say that the details of 74 transformers issued/consumed in the area of BSES Rajdhani Power Ltd. is being filed alongwith the affidavit, same is Exb. OP3/3. The details such as transformer Sr. number, date of delivery, date of issuance, docket numbers issued to the particular division and the location of the transformers for which it was issued at the relevant

period is being prepared from the record of transformers issue dockets, copy of those transformers issue dockets are enclosed with the affidavit and are Exb. OP3/4 (colly 70 pages). Vide material docket at Sr. No. 48, 49, 53 and 64 two transformers were issued in those dockets. I have brought the original transformers issue dockets which were duly signed by the Junior Engineers, Asst. Engineer of the respective area, Ex. Engineers and also signed by the store keeper while issuing the transformers. The details of the order wise 74 transformers i.e. bill amount, other deductions, excuse deduction, amount paid, date of payment as mentioned at Sr. No. 6, 11 to 14 and 8 in Exb. OP3/3 are mentioned on the basis of chart provided by the claimant.

8. I say that the details of 55 transformers issued/consumed in the area of BSES Yamuna Power Ltd. is being filed alongwith the affidavit, same is Exb. OP3/5. The details such as transformer Sr. number, date of delivery, date of issuance, docket numbers issued to the particular division and the location of the transformers for which it was issued at the relevant period is being prepared from the record of transformers issue dockets, copy of those transformers issue dockets are enclosed with the affidavit and are Exb. OP3/6 (colly 50 pages). Vide material docket at Sr. No. 3, 5, 16, 42 and 48 two transformers were issued in those dockets. I have brought the original transformers issue dockets which were duly signed by thhe Junior Engineers, Asst. Engineer of the respective area, Ex. Engineer and also signed by the store keeper while issuing the transformers. The details of the order wise 55 transformers i.e. bill amount, other deductions, excise deduction, amount paid, date of payment as mentioned at Sr. No. 6, 11 to 14 and 8 in Exb. OP3/5, showing the total bill amount are mentioned on the basis of chart provided by the claimant.

9. I say that the details of 60 transformers

issued/consumed in the area of North Delhi Power Ltd. (presently Tata Power Delhi Distribution Ltd.) is being filed alongwith the affidavit, same is Exb. OP3/7. The details such as transformer Sr. Number, date of delivery, date of issuance, docket numbers issued to the particular division and the location of the transformers for which it was issued at the relevant period is being prepared fro the record of transformers issue dockets, copy of those transformers issue dockets are enclosed with the affidavit and are Exb. OP3/8 (colly 60 pages). Vide material docket at Sr. No. 31, 33, 39, 53, 55, 58 two transformers each and against material docket at Sr. No. 36 three transformers were issued in those dockets. I have brought the original transformers issue dockets which were duly signed by the Junior Engineer, Asst. Engineer of the respective areas, Ex. Engineers and also signed by the store keeper while issuing the transformers. The details of the order wise 69 transformers i.e. bill amount, other deductions, excise deduction, amount paid, date of payment as mentioned at Sr. No. 6, 11 to 14 and 8 in Exb. OP3/7 are mentioned on the basis of chart provided by the claimant.

10. I say that the Okhla store maintaining the record of repaired transformers receipt and issue register, the photo copy of the said register is already filed on record as Annexure SR-1 and is being Exb. OP3/9 (colly 43 pages). The said photocopies duly stamped and signed by me. I also brought the original register for kind perusal of the Hon'ble court."

26. The Ld. Arbitrator has, after analysing the evidence given by Tata Power, observed as under:

"OP 3 has filed EX OP3/3 which gives the location of 198 transformers repaired by the Claimants. This chart had been prepared on the basis of dockets. The originals dockets were placed at the time of cross examination of the witness of OP3. These dockets as

well as EX OP3/3 go unchallenged by OP4 and OP5. Moreover, OP4 and OP5 do not have any documentary evidence to controvert the said dockets and EX OP3/3. The witness of OP5 admits that whatever he has stated is on the basis of the RITES Report. He also admitted that whilst giving its report RITES had given its own identification numbers on the transformers. Therefore, it is not understandable as to how the witness of OP5 could locate the subject repaired 198 transformers from the RITES Report. Further, it is to be found that OP 5 has been taking different stands at different time. First it said it had 22 subject transformers, thereafter it said that it had 29 subject transformers and ultimately it admitted having 35 subject transformers. In such a wavering stands taken by OP 5 and it having no records of its own, I am unable to rely on the evidence of OP 5. Moreover, since the affidavit filed on behalf of OP 5 is based on the Report of RITES wherein identification marks on the transformers inspected by RITES were of RITES, the affidavit has no value as against the allocation/receipt of the subject 198 transformers proved by records filed in these proceedings.

In view of the entire discussion made above; as against the evidence given by OP 5 the evidence given by OP 3 is to be believed. Consequently, I come to the conclusion that at the time of unbundling of DVB, out of 198 subject transformers repaired by the claimants, 74 were in the location of OP3, 55 were in the location of OP4 and 69 were in the location of OP 5.”

Thus, Tata Power would be liable to pay the awarded amount in respect of 69 transformers. The break up of the amounts payable by Tata Power is as under:

Particular(s)	
Refund of amount deducted as penalty for	= Rs.43,55,296/-

delayed delivery of transformers	(A)	
Refund of amount deducted as chargeable Excise Duty	=	Rs.4,20,572.08/- (B)
A + B	=	Rs.47,75,868.08/- (C)
Total number of transformers	=	198
Amount payable for one transformer [C ÷ 198]	=	Rs.24,120.545/- (D)
Amount payable for 69 transformers [D x 69]	=	Rs.16,64,317.66/-

Thus, Tata Power is liable to pay a sum of Rs.16,64,317.66/-. With these observations, the OMP is disposed of.

27. Apart from the above issue of limitation, the actual amounts and the computation thereof has not been challenged or questioned before this Court. Accordingly, considering the fact that the petitions have been pending before this Court for some time, the award is upheld with the rate of interest being modified to simple interest at 6% per annum. The amount be paid in terms of the award read along with the modifications herein, within a period of three months failing which interest on the entire awarded amount would be liable to be paid @ 8% per annum till the date of payment.

PRATHIBA M. SINGH
JUDGE

FEBRUARY 27, 2019/dk
(Corrected and Released on 7th March, 2019)