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

Judgment Reserved on 28.11.2018

% *Judgment Pronounced on 24.07.2019*

\+ **ARB.A. (COMM.) No.39/2016 & I.A.No. 14153/2016**

INDEEN BIO POWER LIMITED ..... Appellant

Through: Mr. Hiroo Advani with Mr. Shashank Garg, Mr. Tariq Khan, and Mr.Dbeojyoti Sengupta, Advocates.

versus

M/S. EFS FACILITIES SERVICE (INDIA) PVT. LTD... Respondent

Through: Mr. Dayan Krishnan, Sr. Advocate with Mr. Vasanth Rajasekaran, Mr.Sukrit Seth and Mr. Saurabh Babulkar, Advocates.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J:

Preface

1. This appeal preferred under section 37 the Arbitration and Conciliation Act, 1996 (in short '1996 Act') is directed against the order dated 15.09.2016, passed by the arbitral tribunal. The arbitral tribunal via the impugned order has held for the reasons given therein that it has no jurisdiction to adjudicate the disputes obtaining between the parties.

2. It would be relevant to note that the constitution of the arbitral tribunal was brought about by a petition moved under Section 11 of the 1996 Act by the appellant i.e. Indeen Bio Power Ltd. (hereafter referred to as 'Indeen').

2.1. This petition was numbered as Arb.P. No.184/2012 and disposed of by this Court on 21.01.2013. The Court, however, appointed a sole arbitrator as against an arbitral tribunal consisting of three (3) arbitrators as provided in the arbitration agreement, which stood incorporated in Clause 13.2 of the Synchronization and Co-ordination Agreement (in short 'SCA'). The learned judge was persuaded to appoint a sole arbitrator for the following reasons. First, there was no procedure prescribed for the constitution of the arbitral tribunal. Second, the appointment of a sole arbitrator would result in saving costs and time.

2.2. A direction was issued that the arbitral tribunal so constituted would adjudicate upon the claims and counterclaims of parties and also consider objections of the then avatar of the respondent i.e. Dalkia India Pvt. Ltd. (hereafter referred to as 'DIPL'), with regard to the existence of arbitration agreement as and when they are raised.

3. Importantly, even prior to this court passing the order dated 21.01.2013, via a Share Purchase Agreement dated 29.03.2012 (in short 'SPA'), the holding company of DIPL i.e. Dalkia International S.A. (in short 'DIS') (which held nearly 100 percent shares in DIPL) sold its equity to EFS Facilities Services Mauritius Ltd. EFS Facilities Services Mauritius Ltd. had the name of DIPL changed to EFS Facilities Services (India) Pvt. Ltd. (hereafter referred to as 'EFS'). EFS, as is seen from the cause title, is arrayed as the respondent before this Court.

4. Pertinently, in consonance with the observations made in the order dated 21.01.2013, EFS applied under Section 16 of the 1996 Act, on 05.04.2013. The arbitral tribunal after allowing Indeen to file a reply, which

it did on 10.05.2013, disposed of the Section 16 application based on an agreed order dated 09.07.2013.

4.1. The learned arbitrator in his order of 09.07.2013 indicated that the issue raised in the Section 16 application would be disposed of as the "first issue", *albeit*, as part of the final award. Via the very same order, a time schedule was fixed for completion of the pleadings.

4.2. It is after pleadings were complete and oral evidence had been led by parties that the arbitral tribunal, as indicated in the order dated 09.07.2013, ruled on the preliminary issue framed, which is, whether an arbitration agreement existed between the parties?

5. Since the arbitral tribunal has ruled that an arbitration agreement does not exist between the parties, for the reasons given in the impugned order and, therefore, it does not have jurisdiction to decide the disputes obtaining between the parties on merits, Indeen has chosen to prefer this appeal, as indicated above, under Section 37 of the 1996 Act.

6. I may also indicate that before this court EFS had taken a preliminary objection as regards the maintainability of the instant appeal. It was the stand of EFS that the impugned order was an award and, hence, could be challenged only by way of a petition under Section 34 of the 1996 Act. The order on the preliminary objection raised by EFS was reserved by the coordinate bench on 17.08.2017. The coordinate bench via an order dated 26.04.2018 rejected the objection raised by EFS. This order, it appears, has not been assailed by EFS.

Backdrop

7. Before I deal with the contentions advanced for and against the appeal, in my view, it would be relevant to notice the broad contours of the case.

8. Indeen being interested in setting up an 8MW Mustard residue Biomass Plant at Chandli, Tehsil Devli, District Tonk, Rajasthan, India (hereafter referred to as 'plant') engaged in negotiations with DIPL, a member of Veolia Environment Group and a wholly-owned subsidiary of DIS. The interest shown by Indeen led DIPL to make a written presentation concerning setting up and development of the plant on 12.03.2010.

9. Consequent thereto, on 02.05.2010, Indeen and DIPL entered into a Project Development Agreement (in short 'PDA'). The PDA, *inter alia*, was premised on the following understanding arrived at between the parties:

(i) First, DSCL Energy Services Company Limited (‘DSCL’) which was a subsidiary of DIPL would be retained as a technical consultant for setting up and development of the plant.

(ii) Second, DIPL in conjunction with DSCL would provide Indeen with an EPC Agreement and would thereafter conclude a guaranteed performance Operation and Maintenance Agreement (‘O&M Agreement’) with Indeen pursuant to which DIPL would furnish an undertaking to the effect that the plant would meet certain operating cost and technical performance targets.

(iii) Third, that a Reference Business Plan had been prepared by DIPL based, *inter alia*, on its Detailed Project Report (DPR) which stood appended as Annexure C to the PDA.

(iv) Fourth, DIPL would assist Indeen in securing finance for setting up and development of the plant which was to be pivoted on the EPC Agreement and the O&M Agreement.

9.1. The aforementioned understanding arrived at between parties forms part of the recitals contained in the PDA.

9.2. This understanding was also reflected in Article 1.1[1] of the PDA, whereby DIPL, *inter alia*, was required to submit a firm and a binding financial proposal both for an EPC Agreement and an O&M Agreement and to replace the Reference Business Plan with a Final Business Plan.

9.3. Importantly, in Article 1.2[2], a leeway was given to Indeen to extend the timeframe by a further period of two months beyond the cut-off date of 02.08.2010 given in Article 1.1.

9.4. Under Article 3.1[3] it was provided that unless the PDA was terminated at an earlier point in time in consonance with the provisions of

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[1] ARTICLE 1 - SERVICES

1.1 Dalkia will engage in preparing and providing Indeen by August 2, 2010 with:

(i) a firm and binding financial proposal for an EPC Agreement pursuant to which Dalkia would be retained to perform the detailed engineering, procurement and construction of the Plant and under which Dalkia would undertake to procure that the Plant would be completed on the basis of a guaranteed cost, completion date, and performance standard substantially on the terms set out in the EPC Agreement term sheet attached hereto as Annex A;

(ii) a firm and binding financial proposal for an O&M Agreement pursuant to which Dalkia would be retained to operate the Plant following its construction and under which Dalkia would undertake to procure that the Plant meets certain agreed key technical performance indicators ("KPIs") including availability and heat rate, substantially on the terms set out in the O&M Agreement term sheet attached hereto as Annex B;

(iii) a final business plan (the "**Final Business Plan**") built by replacing the indicative performance guarantees and budgetary EPC & O&M estimates of the Reference Business Plan, by the firm and binding prices and performances of the EPC and O&M Agreements, and giving as a result a final return on equity, calculated as an Internal Rate of Return (IRR) on the equity investment made by Indeen as compared to the free cash flow generated by the Project, in accordance with the assumptions and methodology used in the Reference Business Plan (refer to cell C44 in the "Budgetary Proposal" tab).

[2] 1.2 Should Dalkia not be in a position to finalize the above mentioned activities by 2 August, 2010, the Parties will negotiate in good faith a reasonable extension of time for Dalkia to complete the above. However, in no event shall Indeen be required to extend the time for a period longer than two (2) month from such date.

Article 3, the PDA would remain in force till 02.08.2010 or until the execution of the EPC Agreement and O&M Agreement whichever eventuality arose earlier.

10. Interestingly, on record is a document which purports to indicate that the EPC Agreement had been finalized between the parties as on 18.01.2011. This document, ostensibly, is an e-mail which apparently was sent by, one, Mr. Paramdeep, an employee of DIPL, to, one, Mr. Mahesh Indru Mansukhani, Managing Director of Indeen. Since the contents of the document are brief and crucial for the appellant, the same are extracted hereafter:

> *"...I have accepted all the changes as per[the]last document sent by Kshitij. I have called this EPC agreement and no more a draft. Hope this is ok with you all.*
>
> *This can be now given to [the]bank or any other FII.*
>
> *All the best..."*

11. The record shows that on 27.01.2011, DIPL, at the behest of Indeen, wrote to the State Bank India ('SBI') that it was interested in investing in the equity share capital of the latter i.e. Indeen, in connection with the plant proposed to be set up in Rajasthan up to an amount equivalent to Rs. 3.80 crores.

11.1. Notably, while indicating its interest in wanting to invest via the equity route in Indeen, DIPL entered two caveats:

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[3] 3.1 Unless earlier terminated in accordance with this Article 3, the term of the PDA will begin on the date hereof and shall continue in force till (a) August 2, 2010; or (b) until the execution of the agreements mentioned in EPC Agreement and O&M Agreement, whichever is earlier.

(i) First, Indeen and DIPL can agree upon and sign a mutually acceptable EPC Agreement and O&M Agreement;

(ii) Second, DIPL receives appropriate internal authorizations for making the investment.

12. The record shows that on 02.03.2011, the Managing Directors of the parties i.e. Indeen and DIPL had executed a confidential annexure to be appended with the Supply Contract, to which, I would be making a reference hereafter. This document has set out the terms and conditions for supplying the equipment. Essentially, what the document did was to flesh out "***the invoicing milestones***". Notably, in the document a provision is made for quantification of damages in the event DIPL failed to deliver the plant on the commercial operational date which had to be agreed upon between the parties and for liquidated damages upon failure of the plant to meet the agreed specified performance levels during the defect liability period.

13. On 10.03.2011, payment terms were forwarded to SBI by DIPL. In this communication, apart from DIPL conveying to SBI its credentials as the world's leading provider in the field of energy services, it made the following representations:

> "2. *The legal draft of the EPC contract is with our lawyers in Paris for final vetting before document can be signed. The draft is attached for your reference.*
>
> *3. The estimated contract value has been finalized as Rs.4385.71 Lacs, inclusive of taxes & duties, both for supply and services portion. The taxes would be at actual and would be to the account of Indeen Bio Power Limited. Depending on legal advice, we may propose to split the contract in [sic:into] two portions. First for supply and second for services. The tentative breakup values are as under:*

	Basic value	*Taxes & Duties*	*Total*
Supplies	*3254.05*	*222.87*	*3476.92*
Services	*855.20*	*53.59*	*908.79*
	Grand Total		*4385.71*

4. The payment terms have been agreed and signed copy is enclosed."

13.1 Furthermore, a clause was provided, *albeit,* in the invoicing milestones which accompanied this communication conferring on Indeen the power to reject the plant in case DIPL failed to achieve efficiencies sufficient to allow commercial operation of the plant on account of a defect in the plant, materials, design or workmanship.

14. On 06.09.2011, DIPL wrote to Indeen whereby it communicated to Indeen that since they were in the process of finalizing negotiations *qua* the EPC Agreement, they would be shortly filling what was referred to as the SCA which, *inter alia*, would entail the following:

(i) Execution of three separate agreements covering DIPL's activities *vis-a-vis* the project i.e. (a) Service Contract, (b) Supply Contract and (c) Civil Works Contract (hereafter collectively referred to as 'Contract Agreements').

(ii) The commencement date of DIPL's activities qua the project, as envisaged under the aforementioned Contract Agreements, will be the date on which Indeen would issue a Notice to Proceed (NTP).

(iii) The consolidated contract price payable under the Contract Agreements would be a sum of Rs. 43,35,71,000/- inclusive of taxes and duties.

14.1 The communication went on to state that DIPL would execute the SCA only if Indeen confirmed the following in writing:

> *"1. That Indeen shall not issue a Notice to Proceed under the Service, Supply or Works Contracts nor make any payment to Dalkia under the four agreements, until the expiry of a period equal to sixty days from the date of signature of the Synchronisation and Co-ordination Agreement.*
>
> *2. Dalkia has the option terminate all four agreements within the sixty day period referred to in item 1 should it be reasonably unable to execute the Project for a sum which is less than or equal to the Price.*
>
> *3. Dalkia and lndeen will during the sixty day period referred to in item 1, negotiate the Service, Supply and Works contracts and in so doing will use all reasonable endeavours to revise the Price downwards in accordance with the Price Revision Principles set out below. Indeen shall then use all reasonable endeavours to approve the Service, Supply and Works contracts with its shareholders and financiers and Dalkia and lndeen will accordingly revise the consolidated contract price in the Co-ordination and Synchronisation Agreement."*

14.2 Furthermore, the document also recorded the principles on which price revisions would take place.

14.3 Importantly, this communication not only bears the signatures of the Managing Director of DIPL but also that of the Managing Director of Indeen as a sign of acceptance.

15. It is in this background that on 08.09.2011 the SCA was executed between DIPL and Indeen. As alluded to hereinabove, the SCA made provision for the fact that Indeen and DIPL would be entering into Contract Agreements comprising three separate agreements for supply of equipment to the concerned site, provision of services for erection and commissioning,

and lastly, for execution of civil works for commissioning of the plant and completion of the project.

15.1. The SCA makes provision qua several aspects pertaining to setting up and development of the plant and execution of the project. However, for adjudication, I would be extracting only those clauses which would be relevant qua the issue at hand.

> *1.1 "Commencement Date" shall mean the date as indicated by Indeen in the notices to proceed to be issued under the Contract Agreements.*
>
> *1.2 "Contract Agreements" shall mean Works Contract Agreement, Service Contract Agreement and Supply Contract Agreement proposed to be executed between Indeen and Dalkia in a mutually agreed form.*
>
> *1.3 "Consolidated Contract Price" shall have the same meaning ascribed thereto in Clause 4.2.*
>
> *1.16 "Time for Completion" means the period of time of eighteen months (18) for completing the Works and achieving Tests on Completion, which period of time starts on the Commencement Date.*
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> ***2. CONTRACT AGREEMENTS***
>
> *2.1 Indeen has agreed to procure and Dalkia has agreed to provide services in relation to the Project inter-alia including the erection and commissioning of Power Plant and the design and execution of related works. Dalkia shall provide, perform, carry out and complete these services on such terms and conditions as mentioned in the Service contract Agreement to be executed between the Parties **("Service Contract Agreement").***

*4.2 The consolidated contract price payable by Indeen to Dalkia is Rs.43,35,71,000 (Indian Rupees forty three crores thirty five lakhs seventy one thousand only) inclusive of all taxes and duties ("**Consolidated Contract Price**"). The Parties acknowledge that the Consolidated Contract Price is the aggregate of the consideration which shall be mentioned in the respective Contract Agreements.*

5. ASSIGNMENT OF THIS AGREEMENT AND THE CONTRACT AGREEMENTS

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5.3 Subject to Clauses 5.1 and 5.2 above, it is agreed between the Parties that Dalkia shall have the right to assign the Supply Contract to Supply Co. without the prior approval of Indeen (but with prior information to Indeen), to the condition that (i) Supply Co. be and always remain under the direct or indirect ownership and management control of Dalkia International (assignment of the Supply Contract under conditions that are different to the conditions mentioned above is not allowed) and (ii) the assignment takes place no later than the date of issuance of the notices to proceed to be issued under the Contract Agreements. Should Dalkia wish to assign the Supply Contract to Supply Co. after issuance of the notices to proceed to be issued under the Contract Agreements, such an assignment shall be subject to the issuance of new advance payment bank guarantees by Supply Co. in lieu of those initially issued by Dalkia, to the satisfaction of Indeen and the Lenders. Indeen shall, if required, assist Dalkia to seek the Lenders confirmation on the new advance payment bank guarantees and such assignment. It is understood by the Parties that if the Lenders require any documents/information pertaining to the assignment in either (i) or (ii) above. Dalkia shall provide the same. Indeen shall endeavour to assist Dalkia in providing such documents/information.

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5.6 Dalkia expressly agrees that it shall not be entitled to assign this Agreement, for any reasons whatsoever, either in whole or in part to any party which is not a Dalkia Entity. Assignment of this Agreement by Dalkia, either in whole or in part to any Dalkia Entity shall be subject to the prior written consent of:

(a) Indeen (which consent shall not be unreasonably withheld by Indeen): as also

(b) the Lenders (which consent Indeen shall endeavour to expeditiously obtain).

In the event the Lenders reject/disapprove the proposed assignment by Dalkia under the Clause, Indeen shall ensure that the Lenders provide their explanation for such rejection/disapproval.

7.2 The Contract Agreements shall be effective from the Commencement Date and the term of the Contract Agreements shall be co-extensive. Notwithstanding anything contained in the Contract Agreements, in the event either of the Contract Agreement is terminated for any reasons whatsoever, it shall automatically entail the termination of the other Contract Agreements and the consequences of termination, including but not limiting to liquidated damages and rejection (if applicable) of the Power Plant shall follow.

13. MISCELLANEOUS

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13.2 ***Dispute Resolution****: All disputes, controversies, claims or counter claims resulting from the Contract Agreement or relating to the Contract Agreement or to a breach of this Agreement, to its rescission or its invalidity shall be settled by arbitration in accordance with the (Indian) Arbitration and Conciliation Act, 1996 as amended from time to time. There shall be three arbitrators. The seat of arbitration shall be New Delhi, India. The language used for the* *arbitration procedure shall be English. The Contract Agreement shall be governed by the laws of India.*

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*13.6 **Survival:** The provisions of this Agreement, which by their nature require survival after termination of this Agreement shall survive expiry or termination of this Agreement.*

16. Indeen having entered into an SCA with DIPL, on 09.09.2011, wrote to SBI to process its request for sanctioning a term loan as well as a working capital loan for setting up the proposed plant. In this letter, SBI referred to DIPL's letter dated 10.03.2011. Besides this, Indeen conveyed the following to SBI:

*"...2) The estimate price as mentioned in the above letter was Rs. 4385.71 lacs inclusive of taxes and duties. There has been a change in the scope of work 'Non Power Block' with an area of * feet at an approx cost of Rs. 1000/per sq foot has been removed from then and added to our scope of work. Based on this the new price as mentioned in the agreement is Rs. 4335.71 lacs…"*

16.1 Importantly, a copy of the PDA was enclosed with the letter. A copy of this letter was forwarded by Indeen to DIPL via an e-mail dated 12.09.2011.

17. Admittedly, even according to EFS, the Contract Agreements comprising the Supply Agreement, the Services Agreement, and the Civil Works Agreement were initialled on 16.03.2012 subject to their finalization and final execution.

18. In and about 20.03.2012, the then Managing Director of DIPL, one, Mr. Mike Rundle conveyed to Indeen that DIPL intended to cease operations and exit from business ventures in India.

19. Given the fact that Indeen had placed its faith in DIPL and, in turn, DIS and its affiliate entities that they would remain involved in the setting up and the development of the project which included the plant, Indeen construed this action of DIPL as an act of renunciation and/or repudiation of the agreement arrived at between them.

20. Accordingly, via communication dated 28.03.2012 Indeen triggered the arbitration agreement obtaining between the parties which stood incorporated in Clause 13.2 of the SCA. This communication, which was sent via the advocates of Indeen, was sent to DIPL as well as DIS. In this communication, on behalf of Indeen, it was conveyed that Indeen had been informed about DIPL's and/or DIS's decision to pull out of India and that to achieve this end they would either sell the company (i.e. DIPL) or, in any event, cease its operations in India.

20.1 The communication goes on to state that Indeen always intended to enter into a contract with the addressees (i.e. DIPL and/or DIS) as they were part of the Veolia Group, which was a global leader in the energy services industry. It was emphasized that Indeen was not agreeable, under any circumstances, to enter into a contract with a new party.

20.2 Furthermore, it was added that execution of the SCA was recognition of the fact that the original EPC Agreement was final and that, in any event, the Contract Agreements which followed had been finalized and initialled.

20.3 With this preface, Indeen indicated the name of its nominee-arbitrator as per the provisions of Clause 13.2 of the SCA. The addressees were given 30 days to appoint their nominee-arbitrator in terms of the 1996 Act. This apart, Indeen also put the addressees to notice that it had suffered losses to the tune of Rs 25 crores and that it retained the right to enhance its claim after a more detailed calculation is made in that behalf, in case its losses exceeded the sum of Rs.25 crores.

21. In response thereto, on 23.04.2012, DIPL via its advocates sent its reply to the notice to arbitrate sent by Indeen. In the reply, the stand taken on behalf of DIPL was, broadly, as follows:

(i) The PDA had expired as far back as on 02.08.2010;

(ii) The SCA had not become effective as NTP under the Contract Agreements had not been issued. This is because the Contract Agreements comprising the Supply Agreement, the Services Agreement, and the Works Agreement had not been executed as no agreement had been reached between the parties.

21.1 Thus, in sum, it was sought to be conveyed to Indeen that there was, in effect, no agreement obtaining between the parties and, therefore, the invocation of the arbitration under clause 13.2 of the SCA and appointment of a nominee-arbitrator by Indeen was not tenable.

22. As would be evident from the narration of events, in the interregnum i.e. between issuance of notice to arbitrate on 28.03.2012 and its reply sent on behalf of DIPL on 23.04.2012, DIS via the SPA had sold its entire equity stake in DIPL in favor of EFS Facilities Services Mauritius Ltd.

22.1 A perusal of the SPA would show, something which the learned arbitrator has recorded in the impugned order, that DIS had received an offer letter for purchase of its shares in DIPL as far back as on 03.01.2012 despite which, as noted above, (which is also something qua which a finding of fact has been returned by the learned arbitrator) the Contract Agreements were initialled on 16.03.2012 without DIPL giving any clue to Indeen with regard to this development.

22.2 This for Indeen had significance as under Clause 5.6 of the SCA, DIPL could not have assigned the SCA without the prior consent of Indeen and the lenders.

22.3 The fact that DIPL employed a methodology of share transfer to get over Clause 5.6 of the SCA has been severely criticized by the arbitral tribunal in paragraphs 102 and 103 of the impugned order.

23. It is in this background that Indeen approached this court which led to the constitution of the arbitral tribunal and, subsequently, the passing of the impugned order.

Submissions of the counsel

24. The impugned order was assailed on behalf of the appellant by Mr. Hiroo Advani instructed by Mr. Shashank Garg. On the other hand, in support of the order, arguments were advanced by Mr. Dayan Krishnan, senior advocate, instructed by Mr. Vasanth Rajasekaran.

25. Mr. Advani's arguments can be, broadly, paraphrased as follows:

25.1 The PDA was executed between the parties to explore the feasibility of execution of the project. The PDA envisaged that upon the project being found feasible, parties will execute an EPC Agreement for setting up and development of the plant. Once the plant was set up and developed, DIPL would be retained to operate and maintain the plant to ensure the flow of guaranteed power at a specified rate.

25.2 DIPL after an intense and exhaustive study concluded that the project was viable and would provide a return, making it feasible to move to the next stage which was to construct and operate the plant. Therefore, looking at the purpose and construct of the PDA, contrary to what the learned arbitrator has concluded, it would make little difference as to whether or not the PDA had been extended by the conduct of parties or expired by efflux of time.

25.3 The EPC Agreement which adopts the FIDIC General Conditions and contains several Special Conditions was arrived at after extensive negotiations. This document, *inter alia*, contains clauses which are demonstrative of the fact that parties had agreed to the following essential terms i.e. the price, the tenure for construction, liquidated damages for delay, circumstances under which the timeframe for execution of the project could be extended, the extent to which power had to be generated, a provision for advance guarantee payments and guarantees as also for performance guarantees, and besides this, circumstances under which the right of rejection could be triggered.

25.4 Since FIDIC General Conditions were agreed to, the format for furnishing a guarantee was also provided.

25.5 The e-mail sent by, one, Mr. Paramjeet, an employee of DIPL, to Mr. Kshitij, a partner at Advani & Co., would establish that the negotiations conducted *vis-à-vis* the EPC Agreement had attained finality. The fact that the arbitral tribunal held that this e-mail had not been proved as it was not accompanied by a certificate issued under Section 65B of the Indian Evidence Act, 1872 (in short 'Evidence Act') would be neither here nor there given the contents of the letter dated 10.03.2011. A perusal of this communication would show that the EPC Agreement was submitted by DIPL to SBI to persuade SBI to accord sanction for a term loan and a working capital loan to Indeen, *albeit*, with a caveat that the document was being vetted by its lawyers in Paris.

25.6 The position which emerges is that since the main ingredients which are necessary for seeking enforcement of an agreement were available, the absence of a few formalities ought not to have led the arbitral tribunal to come to a contrary conclusion.

25.7 Furthermore, since the SCA had been executed, it would only demonstrate that the subsidiary document had been drafted, signed and agreed upon between the parties. The SCA would not have been executed had the EPC Agreement not been arrived at between the parties. A perusal of the SCA would show that the following ingredients which would constitute an enforceable agreement are contained therein:

(i) A consolidated price which enveloped the Contract Agreements.

(ii) Timeframe for completion of the Contract Agreements.

(iii) Payment terms and schedule for payments qua the Contract Agreements.

(iv) Events giving rise to and how the application for extension of time would be made.

(v) The provision for imposition of liquidated damages based on the consolidated price.

(vi) Advance payments and guarantees.

(vii) Performance specifications and guarantees.

(viii) The provision for a right of rejection of the plant.

(ix) Lastly, the provision for arbitration in respect of disputes pertaining to any of the Contract Agreements.

25.8 There is no doubt that the SCA stands executed between the parties with an arbitration clause incorporated in it. The arbitral tribunal could not have concluded that there was no valid arbitration agreement obtaining between the parties and, therefore, it was not vested with the jurisdiction to decide the disputes on merits.

25.9 The Contract Agreements had been initialled, *albeit*, with blanks particularly that which pertained to price as these were elements to be decided by DIPL's tax lawyers to ensure that DIPL obtained a maximum tax benefit. Therefore, necessarily, advance payment amounts and the relevant guarantees and performance guarantees amounts could not be frozen till such time individual pricing was frozen for each agreement.

26. Mr. Mike Rundle, the Managing Director of DIPL, would not have initialled the Contract Agreements had he not been satisfied that the agreements were final. The inclusion of price in the Contract Agreements was an aspect which DIPL had to examine. Indeen had no role to play in freezing the price to be included in the Contract Agreements.

26.1 The learned arbitrator, while assuming that the Contract Agreements had been finalized, rejected the case set up by Indeen primarily on the ground that no life has been infused in the Contract Agreements as NTP has not been issued.

26.2 The negotiations concerning the Contract Agreements had gone on for two years and neither EFS nor the arbitral tribunal have pointed out a single issue on which parties were not *ad idem*. While there are some blanks in the Contract Agreements, DIPL has not been able to answer as to why its Managing Director had initialled the Contract Agreements. This, thus establishes that all that which was required to be done i.e. insofar as filling of blanks was concerned, was to be done at DIPL's end with no further reference to Indeen.

26.3 The learned arbitrator's conclusion that the Contract Agreements were ineffective given the provisions contained in Clauses 1.1 and 1.2 of the SCA about the commencement date was manifestly erroneous because of the proviso to Clause 5 of the Contract Agreements.

26.4 Clause 5 of the Contract Agreements contains a provision for Conditions Precedent. The proviso to Clause 5 gives a leeway of 90 (ninety) days to achieve the Conditions Precedent from the date of execution of the concerned contract agreement. As has been found by the learned arbitrator, the Contract Agreements were initialled on 16.03.2012. Thus, as per the proviso, Indeen had time till 15.06.2012 to comply with the Conditions Precedent including the issuance of NTP after making advance payments to DIPL.

26.5 There is evidence to the effect on record that not only an entity by the name of Praefinium Energy Investments Pte. (in short 'Praefinium') had invested a sum of Rs. 9 crores in Indeen but that Indeen's promoters had also arranged funds for infusing their share as part of equity capital of Indeen.

26.6 It was, *inter alia*, in this background that SBI had agreed in-principle to advance loan to Indeen. SBI's decision to come on board was largely based on the credit rating and experience of the Dalkia group and the fact that DIPL, in particular, had agreed to construct the plant backed with a guaranteed output.

26.7 It is an admitted position that sometime after 16.03.2012, the Managing Director of DIPL informed his counterpart in Indeen that DIPL and DIS were exiting from India. This aspect which is also noted in paragraph 102 of the impugned order; an event which formed the basis for triggering the arbitration agreement as DIPL had put itself in a position whereby it had disabled itself from discharging its obligations under the contract arrived at between the parties.

26.8 The evidence which emerged during the arbitration proceedings established that DIS had offloaded its equity stake in DIPL by transferring its shares to EFS Facilities Services Mauritius Limited. Section 39 of the Contract Act, which envisages such a situation, confers a right on the aggrieved party, in this case Indeen, to put an end to a contract where the other party to the contract has either refused to perform its obligations or disabled itself from performing its promise in its entirety.

26.9 Clause 5[4] of the SCA provides that only a Dalkia entity could discharge obligations which were undertaken by DIPL. The arbitral tribunal

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[4] 5 ASSIGNMENT OF THIS AGREEMENT AND THE CONTRACT AGREEMENTS

5.1 Dalkia can assign the whole or any part of the Contract Agreements to a Dalkia Entity only after obtaining the prior written consent of Indeen (which consent shall not be unreasonably withheld by Indeen) as also the approval of the Lenders for such assignment. No such assignment shall be valid and binding unless Indeen and the Lenders have provided their written consents in this behalf. It is clarified that Dalkia shall not be entitled to assign the Contract Agreements for any reasons whatsoever, either in whole or in part, to any party which is not a Dalkia Entity, without the prior written approval of Indeen and its Lenders.

5.2 It is understood by the Parties that whilst the assignment of the Contract Agreements as envisaged in Clause 5.1 above shall, in addition to the consent of Indeen, be subject to the consent of the Lenders. Indeen shall ensure that such consent is provided by the Lenders expeditiously and the same is not unreasonably withheld. Dalkia undertakes to co-operate with Indeen and provide all such documents/information as required by the Lenders for obtaining the consent for such assignment.

5.3 Subject to Clauses 5.1 and 5.2 above, it is agreed between the Parties that Dalkia shall have the right to assign the Supply Contract to Supply Co without the prior approval of Indeen (but with prior information to Indeen), to the condition that (i) Supply Co be and always remain under the direct or indirect ownership and management control of Dalkia International (assignment of the Supply Contract under conditions that are different to the conditions mentioned above is not allowed) and (ii) the assignment takes place no later than the date of issuance of the notices to proceed to be issued under the Contract Agreements. Should Dalkia wish to assign the Supply Contract to Supply Co after issuance of the notices to proceed to be issued under the Contract Agreements, such an assignment shall be subject to the issuance of new advance payment bank guarantees by Supply Co in lieu of those initially issued by Dalkia, to the satisfaction of Indeen and the Lenders. Indeen shall, if required, assist Dalkia to seek the Lenders confirmation on the new advance payment bank guarantees and such assignment. It is understood by the Parties that if the Lenders require any documents/ information pertaining to the assignment in either (i) or (ii) has returned a finding that DIS by selling its shares in DIPL had disabled itself from performing its obligations under the contract.

27. In a nutshell, the contention advanced on behalf of Indeen was that the view taken by the arbitral tribunal with regard to its jurisdiction was erroneous and hence deserved to be reversed.

28. On the other hand, Mr. Dayan Krishnan, who appeared on behalf of EFS, broadly, made the following submissions:

28.1 The arbitral tribunal had correctly proceeded to decide the issue concerning jurisdiction in the first instance and, therefore, Indeen cannot quarrel, on that score, with the impugned order. In this behalf, reliance was placed on the order passed by this court on 21.01.2013 and the order of the arbitral tribunal dated 09.07.2013.

28.2 The SCA was a wrap agreement which was dependent on the execution of the underlying Contract Agreements. The underlying Contract

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above. Dalkia shall provide the same. Indeen shall endeavour to assist Dalkia in providing such documents/ information.

5.4 Dalkia expressly agrees and acknowledges that:

(a) Indeen shall have the right to assign this Agreement and the Contract Agreements in favour of the Lenders. Dalkia further agrees that subsequent to such assignment by Indeen in favour of the Lenders, the Lenders shall have the right to further assign this Agreement and the Contract Agreements to any third party ("Third Party Assignee") as the Lenders deem fit and proper and such Third Party Assignee shall assume the roles and responsibilities of Indeen as contemplated under this Agreement and the Contract Agreements.

(b) Furthermore, Dalkia shall at all times for the purposes of this Agreement and the Contract Agreements recognize such Third Party Assignee in place of Indeen and shall be obligated to such Third Party Assignee towards the discharge of its duties under this Agreement and the Contract Agreements.

(c) As an exception of the principles set forth under paragraphs (a) and (b) above, Dalkia shall have the right to refuse the assignment of this Agreement and the Contract Agreements (i) should the Third Party Assignee be a competitor of Dalkia or (ii) if the Third Party Assignee shows low financial and/or technical strengths that would materially affect Dalkia's interests under the Project.

5.5 Dalkia expressly agrees that in the event either of the Contract Agreements are assigned to any of Dalkia Entity in terms of the Agreement and respective Contract Agreements, Dalkia shall be treated as a single party for the purposes of this Agreement, including for the purposes of making/ enforcing any claims by Indeen against Dalkia.

Agreements had not been finalized and hence not executed and, therefore, could not come into force.

28.3 This submission was sought to be supported by relying upon on Clauses 1.2, 2, 3.2, 4.1, 4.2 and 13.4[5] of the SCA.

28.4 By adverting to these clauses in the SCA the contention sought to be raised was that the Contract Agreements which consisted of Supply Agreement, Services Agreement and Civil Works Agreement had to be executed in future which, in turn, depended on agreement as to price in respect of these agreements notwithstanding the agreement between the parties with regard to the consolidated contract price which was pegged at Rs. 43,35,71,000/-.

28.5 The argument was that the SCA along with the Contract Agreements would constitute the entire agreement between the parties and thus a full complement of *inter se* rights and liabilities.

28.6 To drive home the aforementioned submission, reference was made to each of the Contract Agreements to demonstrate that there were blanks concerning crucial aspects of the matter. In particular, in each of the three agreements i.e. Supply Agreement, Services Agreement, and Civil Works Agreement, there was unfilled information about the date of execution, the contract price, and blank spaces in Schedules A to D.

28.7 Reference was also made to the testimony of Mr. Mansukhani (CW-1) and Mr. Sohanlal Datta (CW-2) to demonstrate the following:

(i) Consolidated price had to be bifurcated and incorporated in the Contract Agreements.

(ii) No fee was paid by Indeen under the SCA or the initialled Contract Agreements.

(iii) The Contract Agreements had only been initialled and not executed.

28.8 Furthermore, it was argued that the SCA was a contingent contract which required an NTP to be issued for it to come into force.

28.9 For this purpose, my attention was drawn to the definition of "Commencement Date" contained in Clause 1.1 of the SCA.

29. It was submitted that the obligations of EFS to coordinate and monitor the activities which formed part of the Contract Agreements would be triggered only from the Commencement Date which, in turn, was dependent on the issuance of the NTP.

29.1 Furthermore, it was argued that the NTP could only be issued upon completion of Conditions Precedent. For this purpose, my attention was drawn to Clauses 1.6.1 and 1.1.5.9 of the Service Agreement. This apart, the definition of "Commencement Date" contained in Clause 1.1.3.2 of the Service Agreement, which was identical to Clause 1.2 of the SCA, was also relied upon.

29.2 Notably, reliance was also placed on behalf of EFS on Clause 1.1.3.10 of the Service Agreement which, *inter alia,* provided that the NTP would be issued by the employer subject to achievement of the Conditions Precedent.

29.3 Likewise, reference was made to clauses in the Supply Agreement and Civil Works Agreement to emphasize the point that issuance of an NTP was a *sine qua non* for triggering DIPL's obligations under the Contract Agreements.

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[5] 13.4 **Entire Agreement**: Contract Agreements along with this Agreement constitutes the entire agreement between the Parties and sets out a full statement of the contractual rights and liabilities of Indeen

29.4 To demonstrate that neither the Conditions Precedent were fulfilled nor was an NTP issued, reliance was placed once again on the testimonies of CW-1 and CW-2 to establish the following:

(i) No funds were sanctioned by SBI qua the project as the underlying Contract Agreements were not executed.

(ii) No NTP had been issued by Indeen under the Contract Agreements.

(iii) No supply orders had been placed by Indeen under the Supply Agreement.

(iv) Indeen had not handed over the site to DIPL in furtherance of the Contract Agreements.

(v) SBI had not sanctioned the loan in favour of Indeen as it was awaiting execution of the underlying Contract Agreements.

29.5 In support of his submission, Mr. Krishnan relied upon the findings returned by the learned arbitrator in paragraph(s) 59, 61-63 and 82-83 of the impugned order.

29.6 Based on the findings returned by the learned arbitrator, it was argued that the option to issue NTP was a unilateral right of Indeen and therefore strict compliance with this condition would be required for the Contract Agreements to come into force.

29.7 Reliance was also placed on the observation of the learned arbitrator to the effect that the Conditions Precedent, as laid down in the Contract Agreements, had not been complied with as parties knew that the Contract Agreements had not become effective as NTP had not been issued.

29.8 The PDA having expired on 2.08.2010 was no longer in force and therefore not relevant. In any event, Indeen has taken recourse to the

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and Dalkia.

arbitration clause contained in the SCA and, therefore, the status of PDA to that extent is not of much relevance.

29.9 To emphasize this point, my attention was drawn to Indeen's notice dated 28.03.2012 whereby arbitration was triggered under Clause 13.2 of the SCA.

30. It was further argued that the PDA required DIPL to provide Indeen with a firm and binding proposal for an EPC Agreement, O&M Agreement and the Final Business Plan by 02.08.2010.

30.1 The PDA also provided that Indeen could extend the time by a further period of two months in case DIPL was not in a position to finalize the aforementioned agreements by 02.08.2010. Reliance in this behalf was placed on Articles 1.1 and 1.2 of the PDA.

30.2 The fact that PDA would remain in force till 02.08.2010 or until the execution of the EPC Agreement and the O&M Agreement whichever is earlier was sought to be demonstrated by relying upon Article 3.1 of the PDA.

30.3 The fact that the PDA had expired by lapse of time was sought to be established by relying upon the observations made by the arbitral tribunal in paragraph 52 of the impugned order.

30.4 It was argued, the fact that the EPC Agreement was not finalized could be ascertained by perusing the following documents:

(i) The purported e-mail of Mr. Paramjeet, an employee of DIPL, which simply said that the attached documents would be referred to as EPC Agreement and no more as a draft, was a communication which was not circulated by Mr. Paramjeet to any other employees of DIPL. Mr. Paramjeet, in any event, was not authorized to execute the EPC

Agreement. As found by the learned arbitrator, this communication was not supported by a certificate issued under Section 65B of the Evidence Act and hence not proved.

(ii) DIPL's letter dated 27.01.2011 to SBI whereby it only expressed an interest in investing funds in the form of equity up to an amount of Rs. 3.8 crores subject to the caveat that parties were able to sign a mutually acceptable EPC Agreement and a long term O&M Agreement. This document, if accepted, would dent the claim of Indeen that EPC stood executed on 18.01.2011.

(iii) DIPL's letter dated 10.03.2011 addressed to SBI which enclosed initialled annexures dated 02.03.2011 concerning to the Services and Supply Agreement recorded that the EPC Agreement was in the process of being vetted by their lawyers in Paris for finalization. Further, the communication also recorded that the consolidated contract price would be bifurcated into two parts relatable to supply and services depending on the legal advice received qua the same.

(iv) DIPL's letter to SBI dated 13.04.2011 which, *inter alia,* adverted to the fact that there had been a slight delay in drafting the final EPC Agreement as a decision had been taken to bifurcate the same into Services and Supply Agreements— this established the fact that the final draft was under review.

30.5 The submission was that the EPC Agreement even as per the contents of the aforementioned document established that EPC Agreement was not finalized.

30.6 This contention was sought to be established by referring to the answers given by CW-1 to question nos. 84 and 135 and CW-2 to question nos. 37, 42-44. Based on the answers elicited from CW-1 and CW-2, it was contended that even according to Indeen's witnesses the EPC Agreement which was in circulation was only a signature-ready version which had not been signed and executed.

30.7 Lastly, it was contended that the investment made by Praefinium had no relevance to the disputes obtaining between the parties. The equity investment took place *dehors* the arrangement obtaining between the parties. The fact that DIPL was not a party to the investment agreement arrived at between Indeen and Prefinium and that DIPL's obligation to invest which was a condition precedent had been waived was sought to be demonstrated by relying upon CW-1’s answers to question nos. 80 and 82.

30.8 It was contended that the negotiations qua investments commenced between Indeen and Prefinium in 2008 while DIPL got involved with Indeen only in May 2010.

30.9 In sum, the argument was that the investment by Prefinium in Indeen could not be tied with the arrangement arrived at between Indeen and DIPL. Given the aforesaid submissions, it was contended that the impugned order deserved to be sustained.

Analysis and reasons

31. I have heard the learned counsel for parties and perused the record in some detail. To my mind, the moot question which arose for consideration before the arbitral tribunal was: whether or not an arbitration agreement obtained between the parties.

31.1 The arbitral tribunal has concluded that since NTP was not issued, as required under the SCA, the Commencement Date under the SCA was not triggered and hence it had lost its efficacy.

31.2 Insofar as the Contract Agreements are concerned, which contained a similar definition concerning Commencement Date, a similar view was taken by the arbitral tribunal based on the premise that the initialled Contract Agreements required further formalization and/or finalization.

31.3 The learned arbitrator has also returned a finding of fact that the Conditions Precedent contained in the Contract Agreements had not been fulfilled as Indeen was aware of the fact that NTP had not been issued.

31.4 On the other hand, shorn of verbiage, Indeen's stand is that in and about the time the Contract Agreements were initialled, Mr. Mike Rundle, the then Managing Director of DIPL, had conveyed to his counterpart in Indeen that Dalkia group was exiting from India. This fact, which, according to Indeen, stands established with the execution of the SPA between DIS and EFS Facilities Services Mauritius Ltd., was an act of renunciation and thus, impelled Indeen to trigger the arbitration agreement contained in Clause 13.2 of the SCA on 28.03.2012.

31.5. According to Indeen, since the Contract Agreements had been initialled on 16.03.2012, it had 90(ninety) days from that date to fulfil the Conditions Precedent provided under the Contract Agreements and furthermore under the very same agreements, an NTP was required to be issued after fulfillment of the Conditions Precedent.

32. Given the backdrop of the case and submissions made before me, I shall proceed to examine the tenability of the arguments advanced on behalf of the parties. Before I do so, let me touch upon certain facts qua which there can be no dispute.

33. The PDA, which was executed on 02.05.2010, provided a broad framework for setting up and development of the project which included the

plant. The PDA obliged DIPL to prepare and provide, broadly, the following three things:

(i) firstly, a firm and binding financial proposal for an EPC Agreement;

(ii) secondly, a firm and binding financial proposal for an O&M Agreement; and

(iii) lastly, a Final Business Plan.

33.1 The record shows that between January and April 2011 parties had agreed upon the broad terms on which they would proceed further. These aspects emerge upon the perusal of the letters dated 27.01.2011 and 10.03.2011 addressed by DIPL to SBI. As a matter of fact, in the letter dated 27.01.2011, DIPL made a pitch for Indeen by indicating that it was considering investing in Indeen's equity share capital upto a sum of Rs. 3.8 crores. The fact that it was a project worth funding was sought to be conveyed to SBI by not only by indicating that it was willing to invest its own money in the project but also by projecting its achievement as a world leader in the energy sector.

33.2 Undoubtedly, the letter dated 27.01.2011 had a caveat inserted in it which was that Indeen and DIPL should be able to agree upon and sign a mutually acceptable EPC Agreement.

33.3 The second communication on the point, once again, adverted to the fact (while making out a case on behalf of Indeen for sanctioning of the loan) that the EPC Agreement was lying with its lawyers in Paris for final vetting before it could be signed. This time around, though, the draft of the EPC Agreement was enclosed by DIPL.

33.4 Interestingly, as noted hereinabove, DIPL adverted not only to the estimated contract value, which according to it had been "finalized" and therefore pegged at Rs. 4385.71 lakhs (inclusive of taxes and duties) but also gave a breakup, in monetary terms, of the supplies and services portion of the contract.

33.5 This letter, admittedly, was accompanied by the "***invoicing milestones***" which detailed out the stages at which payments had to be made, the manner in which billing had to be done for major and minor packages, damages which could be imposed on account of delay, liquidated damages which could be imposed if the plant did not meet certain agreed performance levels during the defect liability period. The document also contained a rejection clause. This document which, admittedly, bears the signature of the Managing Directors of Indeen and DIPL is dated 02.03.2011. The document dated 02.03.2011 sets forth in no uncertain terms that it was intended to be appended to the supply and services agreement.

33.6 The aforesaid two communications sent by DIPL to SBI was followed by a third communication dated 13.04.2011 which is indicative of the fact, at least, *prima facie,* that while parties had agreed on the fundamental terms, the finalization of the EPC Agreement had been delayed as there was a need to enter into a Service and a Supply Agreements according to advice received by DIPL from its tax advisors. This letter was addressed to SBI by a person no less than the Managing Director of DIPL.

33.7 It is in this background that on 06.09.2011 a letter was issued on behalf of DIPL to Indeen which adverted to the fact that an SCA would be executed which would establish the finalization of three separate agreements covering DIPL's activities in relation to the plant which involved supplies, provisioning of services and execution of civil works. Pertinently, in this communication DIPL moved away from the expression estimated contract price to consolidated contract price which was pegged at Rs. 43,35,71,000/- inclusive of all taxes and duties. It may be relevant to note that DIPL did indicate that the price could be revised based on the principles outlined in the letter. Indeen was called upon to accept the conditions contained in the letter by signing a duplicate copy of the letter before embarking upon the execution of the SCA.

33.8 Concededly, Indeen accepted the terms and conditions contained in the letter dated 06.09.2011 by having its Managing Director append his signature on the counter part of the letter sent by DIPL.

33.9 It is in this background that on 08.09.2011 DIPL and Indeen executed the SCA. As agreed on 06.09.2011, the SCA in Clause 1.2 defined the Contract Agreements to mean the Supply Contract Agreement, the Service Contract Agreement and the Works Contract Agreement "proposed" to be executed.

34. Furthermore, in Clause 4.2 a reference was made to the Consolidated Contract Price which, as indicated in the letter dated 06.09.2011, was pegged at Rs. 43,35,71,000.

34.1 Since a major part of the argument advanced before me veered around on the use of the expression "proposed" incorporated in Clause 1.2 of the SCA, for the sake of convenience, let me set down the relevant clauses to portray the intent of parties which comes to fore after reading these clauses.

> *1.2 "Contract Agreements" shall mean Works Contract Agreement, Service Contract Agreement and Supply Contract Agreement proposed to be executed between Indeen and Dalkia in a **mutually agreed form**.*
>
> *1.3 "Consolidated Contract Price" shall have the same meaning ascribed thereto in Clause 4.2.*

4.1 The Parties agree that the consideration payable by Indeen to Dalkia for executing the civil works, providing services in relation to the Project and supplying plant, equipment, machinery and materials for the Power Plant shall be as specifically mentioned in the respective Contract Agreements i.e. Works Contract Agreement, Service Contract Agreement and Supply Contract Agreement.

4.2 The consolidated contract price payable by Indeen to Dalkia is Rs.43,35,71,000 (Indian Rupees forty three crores thirty five lakhs seventy one thousand only) inclusive of all taxes and duties ("Consolidated Contract Price"). The Parties acknowledge that the Consolidated Contract Price is the aggregate of the consideration which shall be mentioned in the respective Contract Agreements.

(emphasis is mine)

34.2 A careful reading of Clause 1.2 would show that parties had agreed to segregate the services into three components which had to be executed at a later point in time in a "mutually agreed form". The object appeared to be to bifurcate the Consolidated Contract Price amounting to Rs. 43,35,71,000/- over three activities which DIPL was obliged to undertake.

34.3 The intent of the parties to spread the consolidated price over the three activities comes to fore upon perusal of the following part of Clause 4.2:

"... The parties acknowledge that the consolidated contract price is the aggregate of the consideration which shall be mentioned in the respective contract agreements. ..."

34.4 Besides this, the SCA mentioned a time span of 18 months which according to parties was required for execution of the plant. The time span of 18 months which, in turn, encompassed completion of works and achieving Tests on Completion of works, was to begin from the Commencement Date. These aspects emerge upon reading of Clauses 1.16, 1.17[6], 1.18,[7] 2[8] and 3[9] of the SCA. The provisions with regard to assignment and, in particular, the prohibition on assignment of the contract to a non-Dalkia entity are contained in Clause 5 and its sub-clauses.

34.5 Likewise, the provision for termination of the Contract Agreements and the SCA is provided for in Clause 7[10], while provision for damages for

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[6] 1.17 "**Works**" shall have the same meaning ascribed thereto in Recital C.

[7] 1.18 "**Works Contract Agreement**" shall have the same meaning ascribed thereto in Clause 2.2.

[8] 2 **CONTRACT AGREEMENTS**

2.1 Indeen has agreed agreed to procure and Dalkia has agreed to provide services in relation to the Project inter-alia including the erection and commissioning of Power Plant and the design and execution of related works. Dalkia shall provide, perform, carry out and complete these services on such terms and conditions as mentioned in the Service Contract Agreement to be executed between the Parties.("Service Contract Agreement").

2.2 Indeen has appointed Dalkia for carrying-out, executing and completing all civil works for the Power Plant. Daikia shall execute such civil works in accordance with the terms and conditions mentioned in the Works Contract Agreement to be executed between the parties (Works Contract Agreement").

2.3 Indeen has agreed to purchase and Dalkia has agreed to supply the plant equipment, machinery and materials for the Power Plant. Dalkia shall carry out the supply on such terms and conditions as mentioned in the Supply Contract Agreement to be executed between the Parties ("**Supply Contract Agreement**"). It is understood by the Parties that upon the establishment of the Supply Co., the Supply Contract Agreement shall be assigned by Dalkia to Supply Co. in terms of the provisions of this Agreement.

[9] 3 **SCOPE**

3.1 On and from the Commencement Date, Dalkia shall be responsible for co-ordinating and monitoring all the activities specifically forming part or the Contract Agreements.

3.2 Dalkia expressly agrees and acknowledges that the contract price mentioned in the contract Agreements is fair and sufficient consideration for the activities Contemplated for the Project and that there shall be no separate consideration payable under this Agreement.

[10] 7. **TERMINATION OF CONTRACT AGREEMENTS AND THIS AGREEMENT**

7.1 The Parties expressly agree that the Contract Agreements form the entire scope of activities agreed between the Parties for setting up and developing the Power Plant.

7.2 The Contract Agreements shall be effective from the Commencement Date and the term of the Contract Agreements shall be co-extensive. Notwithstanding anything contained in the Contract Agreements, in the event either of the Contract Agreement is terminated for any reasons whatsoever, it shall automatically entail the termination of the other Contract Agreements and the consequences of termination, including but not limiting to liquidated damages and rejection (if applicable) of the Power Plant shall follow.

7.3 After termination of the Contract Agreements for any reasons whatsoever, Indeen may arrange for any other entities to provide for execution of the scope of works as contemplated under the respective Contract Agreements, and Dalkia shall be liable to pay to Indeen any damages, losses or costs on any account whatsoever. Indeen and these other entities may then use any Dalkia's documents and any other documents in relation to the scope of works made by or on behalf of Dalkia. Indeen's election to terminate the Contract Agreements shall not prejudice any other rights of Indeen, under the Contract Agreements or otherwise.

delay, liquidated damages and tests for completion is provided under Clause 8[11]. The SCA also makes provisions for bonus in Clause 9[12], compensation

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7.4 The Parties agree that in the event the purpose of any of the Contract Agreements is achieved, such Contract Agreement shall not terminate and shall still be in full effect and force till the determination of the last of the Contract Agreements.

7.5 It is clarified that this Agreement and the Contract Agreements, taken together, constitute the final agreement between the Parties. Wherever there is any conflict between this Agreement and the respective Contract Agreements for provisions mentioned herein, the provisions of this Agreement are paramount and shall prevail over the Contract Agreements.

7.6 The Parties agree and acknowledge that upon the execution of the Contract Agreements, this agreement cannot be terminated for any reasons whatsoever, unless the contract agreements are terminated.

[11] **8. Damages**

8.1 Delay Damages

8.1.1 If Dalkia fails to comply with the time for completion as per the Contract Agreements, Dalkia, shall pay delay damages to Indeen for this default. Indeen shall be entitled to levy liquidated damages at the rate of 0.5% of the Consolidated Contract Price (excluding taxes and duties) per week of delay subject to a maximum of 5% of the Consolidated Contract Price (excluding taxes and duties).

8.1.2 These delay damages shall be the only damages due from Dalkia for such default, other than in the event of termination as per the relevant clauses under the Contract Agreements for Termination by Indeen, prior to completion of the scope thereof. These damages shall not relieve Dalkia from his obligation to complete the scope of works, or from any other duties, obligations or responsibilities which it may have under the Contract Agreements.

8.2 **Liquidated damages for short fall in performance**

8.2.1 Dalkia shall guarantee that the Power Plant will meet the Guaranteed Performances at the Time of Completion. In cases where the Power Plant fails to meet the Guaranteed Performances without entitling Indeen to reject the Power Plant, Liquidated Damages for short fall of performance shall be due as follows:

(a) Net Plant heat rate 1 % of Consolidated Contract Price (excluding taxes and duties) for every 2 % shortfall in net plant heat rate;

(b) Net Plant power output 1 % of Consolidated Contract Price (excluding taxes and duties) for every 2 % shortfall in net Plant power output.

8.2.2 Notwithstanding any other clause in the Contract Agreements the total amount of the aggregate liquidated damages for shortfall in performances payable by Dalkia shall not exceed 5 % of the Consolidated Contract Price (excluding taxes and duties).

8.3. **Tests on Completion**

8.3.1 The Contract Agreements provide that Indeen shall be responsible to provide the fuel and utilities (such as raw water and power) required by Dalkia to carry out the Guaranteed Performance Tests and shall furnish fuel specification test certificate and take over operations in a timely manner and the quality of the fuel shall be of such specified standards to carry out such tests and be fit for the intended purpose. However the Parties expressly agree that in the event any retesting is required to be conducted subsequent to the failure of the Guaranteed Performance Tests, Dalkia shall be solely responsible towards (a) the procurement of fuel; and (b) expenses towards the procurement of such fuel. It is clarified that Indeen shall neither be responsible nor be liable to bear the expenses towards the procurement of the fuel in the event any retesting is required to be conducted.

8.3.2 Notwithstanding the provisions of the Contract Agreements, it is agreed that:

(a) Indeen shall be liable to pay to Dalkia liquidated damages at the rate of 0.5% of Consolidated Contract Price (exclusive of taxes and duties) per week in case of any delay by for suspension of work in Clause 10[13], limitation of liability in Clause 11[14], *force majeure* in Clause 12[15] and provision for other miscellaneous aspects

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Indeen to provide fuel in a timely manner and as per the conditions as agreed between Indeen and Dalkia in the Contract Agreements; and

(b) the total amount of the aggregate liquidated damages as per Clause 8.3.2(a) shall however not exceed 5 % of the Consolidated Contract Price (excluding taxes and duties).

8.3.3 Indeen shall supply such fuel which is in accordance with the quality specifications mutually approved by the Parties in writing.

8.3.4 In the event Indeen supplies such fuel which is inferior to the quality specifications approved by the Parties and is not fit for the intended purpose, Indeen shall be liable to pay liquidated damages to Dalkia at the rate of 0.5 % of Consolidated Contract Price (excluding taxes and duties) per week as well as any loss to the Power Plant. However, the total amount of the aggregate liquidated damages in relation to this Clause 8.3.4 shall not exceed 5 % of the Consolidated Contract Price (excluding taxes and duties).

8.4 **Overall Liquidated Damages Liability**

The total amount of the aggregate liquidated damages payable by Dalkia under this Section 8 shall not exceed 10 % of the Consolidated Contract Price (excluding taxes and duties).

The liquidated damages under this Section 8 shall be the only damages due from Dalkia for delay in delivery or shortfall in performances. These liquidated damages shall not relieve Dalkia from any other duties, obligations or responsibilities which he may have under the Contract Agreements.

[12] 9 **BONUS**

9.1 **Bonus for early commissioning**

Subject to the provisions of this Clause 9, Dalkia shall be eligible to claim a bonus of 0.5 % of Consolidated Contract Price (excluding taxes and duties) per week for commissioning of the Power Plant earlier than Time for Completion. This bonus Clause is deemed to be applicable, even in cases where Dalkia is ready as scheduled for commissioning, but necessary inputs like fuel, start-up power; statutory clearances etc. were not made available by Indeen to Dalkia.

9.2 **Time for Completion- Extension**

For the purposes of bonus, it is understood by the Parties that:

(a) in case of an extension in the Time for Completion pursuant to the provisions of the Contract Agreements, the period of Extension shall be counted for calculation of bonus only in the event such Extension has been granted for delays, breaches or reasons solely attributable to Indeen or on account of Force Majeure Events.

(b) Dalkia shall not be entitled for any bonus for the Extension granted by Indeen at Dalkia's request and wherein the delays are not attributable to Indeen.

9.3 **Overall Bonus Liability**

Notwithstanding anything contained in the Contract Agreements, the total amount of the aggregate bonus payable by Indeen shall not exceed 5% of the Consolidated Contract Price (excluding taxes and duties). This would be paid through operation cash flow in six (6) equal installments with three (3) months as grace period.

[13] 10. **COMPENSATION FOR SUSPENSION OF WORK**

10.1 Upon suspension or interruption of the scope of work under the Contract Agreements for reasons attributed to Indeen or actions of labour of Indeen or other contractors except such contractors who are included under the Contract Agreements and are directly engaged by Dalkia or generally beyond Dalkia's control and/or Indeen's control, resulting in idling or suspension of execution work under the Contract Agreements, Dalkia shall claim a compensation of Rs.0.5 Million per day from Indeen, subject to Clause 11.3 herein below.

[14] 11. **LIMITATION OF LIABILITY**

11.1 Neither Party shall be liable to the other Party for loss of use of any Works, loss of production, loss of profits, loss of revenue, loss of any contract or for any indirect or consequential loss or damage as well as any special, exemplary, punitive or incidental which may be incurred or suffered by the other Party in connection with the Contract.

11.2 The total liability of Dalkia to Indeen in respect of the Power Plant, under or, in connection with the Contract Agreements shall not exceed 10 % of Consolidated Contract Price save and except in case of rejection of the Power Plant by Indeen (as per the conditions stipulated herein) in which case Indeen shall be entitled to draw the 20% bank guarantees as mentioned in Clause 6.6.

11.3 The total liability of Indeen to Dalkia in respect of the Power Plant, under or, in connection with the Contract Agreements shall not exceed 5% of Consolidated Contract Price (excluding taxes and duties).

1.4 This Sub-Clause shall not limit liability in any case of fraud, deliberate default or reckless misconduct by the defaulting party.

[15] 12. **FORCE MAJEURE**

12.1 **Definition of Force Majeure**

In this Clause, "Force Majeure" means an exceptional event or circumstances:

a) Which is beyond a Party's control.

b) Which such Party could not reasonably have provided against before entering into the Agreement,

c) Which, having arisen, such Party could not reasonably have avoided or overcome, and

d) Which is not substantially attributable to the other Party.

Force majeure may include, but is not limited to exceptional events or circumstances of the kind listed below, so long as conditions (a) to (d) above are satisfied:

(i) War, hostilities (whether war be declared or not) invasion act of foreign enemies,

(ii) Rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war,

(iii) riot, commotion, disorder, strike or lockout by persons other than the Supplier's Personnel and other employees of the Supplier,

(iv) Munitions of war, explosive Materials, fire, ionizing radiation or contamination by radio-activity, except as may be attributable to the Supplier's use of such munitions, explosives, radiation or radio-activity, and

(v) Natural catastrophes such as earthquake hurricane, typhoon, volcanic activity, floods or epidemics.

(vi) Acts of God or acts of Governmental action in its sovereign capacity, restriction on shipping which prevents or impedes due performance of the Contract Agreement.

12.2 **Notice of Force Majeure**

If party is or will be prevented from performing any of its obligations under the Agreement by Force Majeure, then it shall give notice to the other Party of the event or circumstances constituting the Force Majeure and shall specify the obligations, the performance of which is or will be prevented. The notice shall be given within 14 days after the Party became aware or should have become aware, of the relevant event or circumstances constituting Force Majeure.

The Party shall having given notice, be excused performance of such obligations for so long as such Force Majeure prevents it from performing them. The party affected by a Force Majeure event shall be entitled to an extension of time shall be required to properly reflect any delay to any part of the Works caused by the circumstances of Force Majeure.

The Party affected by the Force Majeure shall make all reasonable efforts to remedy expeditiously the circumstances constituting the Force Majeure (if practicable) and to mitigate the adverse effects of the Force Majeure to the other party.

Notwithstanding any other provision of this Clause. Force Majeure shall not apply to obligations of either Party to make payments to the other Party under the Contract Agreement.

in Clause 13 which includes sub-clause 13.2 which is the dispute resolution mechanism clause.

35. Therefore, the overall sense that one gets on reading the aforementioned documents is that with the execution of the SCA, the fundamental terms of the contract stood crystallized and what was required to be done was that parties had to formally execute the Contract Agreements (which, even according to the arbitral tribunal, had been initialled) after certain details with regard to the date of execution, the bifurcated contract price and guarantees were filled up. Therefore, what was required to be ascertained by the arbitral tribunal was, would the fundamental terms agreed to between the parties give an enforceable right to Indeen to claim performance from EFS. In my view, a formal execution of the contract agreement was in substance neither a condition precedent nor a term of the bargain between the parties but was a decision taken solely for the benefit of EFS to enable it to take certain tax benefits. The principle of law qua this aspect is enunciated pithily in the following judgment rendered by *Parker, J.* in ***Von Hatzfeldt-Wildenburg v. Alexander,*** (1912) 1CH 284 288. The judgment in ***Von Hatzfeldt-Wildenburg*** has been cited with approval by the Supreme Court in ***Kollipara Sriramulu (Dead) By His Legal Representative (In Both The Appeals) v. T. Aswatha Narayana (dead) By His Legal Representatives & Ors.,*** (1968) 3 SCR 387. As a matter of fact, in ***Kollipara*** case, the Supreme Court cited the judgment of Privy Council in ***Currimbhoy & Co. Ltd. v. L.A. Creet & Ors.,*** AIR 1933 PC 29 wherein it is held that the principle of English law which was summarized in ***Parker J's*** judgment was applicable in India. It is on that basis that in ***Kollipara's*** case, the Supreme Court examined the issue, along with connected issue, as to

whether an oral agreement became ineffective because the mode of payment of consideration was not agreed upon. In this context, the Supreme Court made the following observations:

> *"3. ... The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of a binding contract. There are, however, cases where the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. The question depends upon the intention of the parties and the special circumstances of each particular case. As observed by the Lord Chancellor (Lord Cranworth) in Ridgway v. Wharton [6 HLC 238, 63] , the fact of a subsequent agreement being prepared may be evidence that the previous negotiations did not amount to a concluded agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement. In Von Hatzfeldt Wildenburg v. Alexander [(1912) 1 CH 284, 288] it was stated by Parker, J. as follows:*
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> > *"It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contact is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."*
>
> *4…. The question in the present appeals is whether the execution of a formal agreement was intended to be a condition of the bargain dated July 6, 1952 or whether it was a mere expression of the desire of the parties for a formal agreement which can be*

ignored. The evidence adduced on behalf of Respondent 1 does not show that the drawing up of a written agreement was a pre-requisite to the coming into effect of the oral agreement. It is therefore not possible to accept the contention of the appellant that the oral agreement was ineffective in law because there is no execution of any formal written document. As regards the other point, it is true that there is no specific agreement with regard to the mode of payment but this does not necessarily make the agreement ineffective. The mere omission to settle the mode of payment does not affect the completeness of the contract because the vital terms of the contract like the price and area of the land and the time for completion of the sale were all fixed. We accordingly hold that Mr Gokhale is unable to make good his argument on this aspect of the case…"

35.1 The arbitral tribunal while noticing the judgment of the Supreme Court in ***Kollipara*** has distinguished the same on the ground that Articles 3.1, 3.3[16] and 5.2[17] of the PDA speak about finalization of EPC and O&M agreements. Likewise, the arbitral tribunal has also referred to Article 1.2 of the SCA to distinguish the judgment once again on the ground that it speaks of formal execution of the Contract Agreements relating to supplies, services

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[16] 3.3 Notwithstanding any other provision of this Article 3, either party may terminate this PDA with immediate effect by written notice to the other party:

(i) in the event the parties are unable to finalise and execute the EPC Agreement and O&M Agreement within the time frame specified in Article 5.2;

(ii) if the return on equity of the Final Business Plan is lower than the target return on equity of the Reference Business Plan (i.e. less than 23.44%)

[17] 5.2 – If the final return on equity of the Final Business Plan is equal to or higher than the target return on equity of the Reference Business Plan (namely 23.44%), attached as Annex C hereto, the Parties shall negotiate and finalize the EPC Agreement and O&M Agreement based on the preliminary drafts provided as part of the Dalkia PDA Deliverables and endeavour, on a reasonable commercial efforts basis, to execute the same within 45 (forty five) days from the date of receipt by Indeen of the last draft of the EPC and O&M agreements from Dalkia, or such other time as may be mutually agreed between the Parties. It is clarified that in the event the EPC Agreement and Fees shall not be separately payable by Indeen. Should such contracts not be signed for any reason whatsoever within such time frame, Indeen shall pay Dalkia the Project Development Fee (and any sales, VAT or similar taxes due in respect of such payment) within thirty (30) days of a request for payment therefore by Dalkia. For the avoidance of doubt, neither Party shall be under any obligation to enter into a definitive EPC Agreement or O&M Agreement.

and civil works. In the same way, the arbitral tribunal adverts to Article 2.1[18] of the SCA. Furthermore, the arbitral tribunal goes on to state that it was not necessary to dwell on this aspect of the matter as it has been assumed that the Contract Agreements were executed.

35.2 To my mind, it was important for the arbitral tribunal to come to a conclusion, one way or the other, as to whether given the facts the parties had agreed to fundamental terms in the contract obtaining between them gave rise to an enforceable obligation. As noticed above, the main plank of the arbitral tribunal's reasoning instead was that the contract agreements had no force in law as Indeen had failed to issue the NTP. In a sense, in my opinion, after noticing the aforesated aspect, the arbitral tribunal decided not to test Indeen's stand on the ***Von Hatzfeldt*** principle, which in my view, was crucial.

36. Therefore, let me test the argument advanced on behalf of DIPL, something which the arbitral tribunal has accepted, that since NTP was not issued, the Contract Agreements had lost their efficacy. This argument, as noticed above, is pivoted on the definition of the Commencement Date contained in Clause 1.1 of the SCA and Clause 1.1.3.2 of Conditions of Contract Agreement which, to my mind, are more or less similar in all three agreements i.e. the Services Agreement, the Supply Agreement and the Civil Works Agreement.

[18] 2.1 Indeen has agreed to procure and Dalkia has agreed to provide services in relation to the Project inter-alia including the erection and commissioning of Power Plant and the design and execution of related works. Dalkia shall provide perform, carry out and complete these services on such terms and conditions as mentioned in the Service Contract Agreement to be executed between the parties.

36.1 To appreciate the submission of DIPL on this score, let me cull out, for the sake of convenience, the relevant clauses given under the heading "Conditions of Contract Agreement":

CONDITIONS OF CONTRACT AGREEMENT

1.1.3.2 "Commencement Date" shall mean the date of issuance of the Notice to Proceed.

1.1.3.10 "Notice to Proceed" shall mean the notice to proceed as issued by the Employer subject to achievement of the Conditions Precedent instructing the Contractor to commence performance of its obligations stipulated herein.

1.1.5.9 "Conditions Precedent" shall have the meaning ascribed to such term in Clause 1.6 in the Conditions of Contract Agreement.

1.6 Contract Agreement

1.6.1 The Contract Agreement shall come into full force and effect on the date on which all the following conditions precedent ("Conditions Precedent") are fulfilled between the Parties:

(a) Securing of the necessary financing by the Employer to undertake the Project and attainment of the conditions precedent under the financing documents for drawdown of funds by the Employer (in case such financing documents also stipulate effectiveness of the Contract Agreement as a condition precedent, then in such a case, all conditions other than effectiveness of Contract Agreement).

(b) Execution of the Contract Agreement after obtaining all necessary internal approvals, consents and authorizations by Contractor and the Employer.

(c) Issuance of necessary permits and authorisations by the Employer (other than those to be obtained by Contractor).

(d) Payment of the Advance Amount by the Employer to the Contractor in accordance with the payment terms as set out in the Contract Agreement, and

(e) Handover of the Site by the Employer to the Contractor within 5 (five) days of the payment of the Advance Amount by the Employer to the Contractor for the purposes of this Contract Agreement.

1.6.2 Each Party shall update the other Party In writing at regular Intervals (but no fewer than weekly) as to its progress towards satisfying all the Conditions Precedent for which it is responsible. When a Party has satisfied all the Conditions Precedent for which it is responsible, it must give the other Party written notice confirming the date upon which all its Conditions Precedent have been satisfied. <u>The Employer shall pursuant to fulfilment of the Conditions Precedent issue the Notice to Proceed to the Contractor instructing the Contractor to commence performance of its obligations stipulated herein</u>.

1.6.3 <u>The above stated Conditions Precedents must be attained by the Parties within 90 (Ninety) days of the execution date of the Contract Agreement. In case of failure to attain the Conditions Precedent within 90 (ninety) days of the execution of the Contract Agreement, this period shall automatically stand further extended for period of forty five (45) days. However, in the event the Conditions Precedent are not fulfilled within such further extended period of forty five (45) days, the Parties shall mutually discuss and agree a suitable period of extension, however in the event the Conditions Precedent are not fulfilled within such further extended period or the Parties failing to agree for a suitable further extension, the Contractor shall have the right to terminate the Contract Agreement</u>.

The costs of stamp duties and similar charges (if any) imposed by law in connection with execution of the Contract Agreement shall be borne by the Employer.

(emphasis is mine)

36.2. A perusal of the definition of the Commencement Date both in the SCA and Conditions of Contract Agreement would show that while in the former i.e. SCA, it is the date indicated by Indeen in the NTP to be issued under the Contract Agreements, in the latter i.e. the Conditions of Contract Agreement, the date of issuance of NTP. Notably, Clause 1.1.3.10 of the Conditions of Contract Agreements provides that NTP is that notice whereby the employer, in this case, Indeen, would instruct the contractor i.e. DIPL, to commence performance of its obligations subject to achievement of the Conditions Precedent.

36.3. Clause 1.6.1 provides that the Contract Agreement shall come into force and effect on the date on which the Conditions Precedent are fulfilled.

36.4 The Conditions Precedent are set out in sub-clause 1.6.1(a) to (e). Clause 1.6.2 requires each party to inform in writing at regular intervals the progress made in satisfying the Conditions Precedent. This clause goes on to state explicitly that the employer i.e. Indeen, shall issue an NTP only on fulfillment of Conditions Precedent.

36.5 One of the conditions precedent provided in Clauses 1.6.1(b) is the execution of the Contract Agreement after all necessary internal approvals, consent and authorization are obtained by both the contractor/DIPL and the employer/Indeen.

36.6 Furthermore, sub-clause 1.6.3 gives a 90(ninety) days leeway for attainment of Conditions Precedent after the execution of the Contract Agreements.

36.7 Thus, clearly, in order of priority, fulfillment of Conditions Precedent was to precede the issuance of NTP. Besides this, as indicated above, the parties had a leeway of 90(ninety) days from the date of execution of the

Contract Agreements for fulfillment of Conditions Precedent which could be further extended, *albeit,* automatically by a period of 45 days.

36.8 Therefore, if one were to accept that the Contract Agreements had been finalized after they were initialled on 16.03.2012, a period of 90(ninety) days (without the extension) would come to an end on 15.06.2012.

36.9 As correctly argued by Mr. Advani, Indeen had 90(ninety) days to fulfil the Conditions Precedent and therefore the obligation to issue NTP would arise only on fulfillment of the Conditions Precedent. The arbitral tribunal appears to have ruled otherwise, *albeit,* contrary to the plain terms of the provisions referred to hereinabove.

37. There is a similar clause i.e. Clause 5[19], in the Service Agreement. In the proviso to Clause 5 of the Service Agreement, parties have been given 90(ninety) days from the date of execution of the Contract Agreements for fulfillment of the Conditions Precedent. Therefore, for the arbitral tribunal to rule that the NTP had not been issued which led to the Contract Agreements

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[19] 5 - The Contract Agreement shall come into full force and effect on the date when the following conditions are satisfied ("**Conditions Precedent**"):

(a) Securing of the necessary financing by the Employer to undertake the Project and attainment of the conditions precedent under the financing documents for drawdown of funds by the Employer (in case such financing documents also stipulate effectiveness of the Contract Agreement as a condition precedent, then in such a case, other than effectiveness of Contract Agreement),

(b) Execution of the Contract Agreement after obtaining all necessary internal approvals, consents and authorizations by the Employer and the Contractor;

(c) Issuance of necessary permits and authorisations by the Employer (other than those to be obtained by the Contractor);

(d) Payment of the Advance Amount by the Employer to the Contractor in accordance with the payment terms as set out in the Contract Agreement; and

(e) Handover of the Site by the Employer to the Contractor within 5 (five) days of the payment of the Advance Amount by the Employer to the Contractor for the purposes of this Contract Agreement.

The afore-stated Conditions Precedent have to be achieved within 90 days of the execution of the Contract Agreement. Failure to achieve the Conditions Precedent within the afore-stated time period shall attract such consequences as set out in the Conditions of Contract Agreement.

becoming inefficacious, to my mind, does not align with the provisions agreed to between the parties if the assumption set up by the arbitral tribunal is taken to be correct, which is, that the Contract Agreements were in fact executed.

37.1 In my opinion, the matter can be looked at from another angle, which is, that there is no dispute as regards the execution of the SCA and, therefore, as to whether issuance of NTP was necessary for the survival of the SCA. Given the fact that DIS had already indicated its intention to exit from India, it was a dispute which had to be tried on merits by taking recourse to the arbitration mechanism.

37.2 In other words, the arbitration clause in the duly executed SCA, in my view, contrary to, in effect, the conclusion of the arbitral tribunal, would stand apart and not perish with the SCA by virtue of the mere fact that an NTP was not issued by Indeen. The SCA was not a document which was a product of fraud, duress, undue influence or obtained illegally or even *void ab initio*. If that was not the position, as it was not, the agreement, in my view, would survive. (See observations in ***Khardah Company Ltd. vs. Raymon & Co. (India) Private Ltd.***, (1963) 2 SCR 183 and ***Waverly Jute Mills Co. Ltd. Raymon & Co. (India) Private Ltd.,*** (1963) 3 SCR 209). Besides this, the provisions of Section 16(1)(b) of the 1996 Act bring to fore the principle enunciated in the following judgments of the Supreme Court rendered both prior to and after the enactment of 1996 Act. (See observations in ***Union of India* v *Kishori Lal Gupta & Bros.,*** AIR 1959 SC 1362[20] and ***National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.,***

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[20] "…. **10.** The following principles relevant to the present case emerge from the aforesaid discussion: (*1*) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but

(2009) 1 SCC 267 at para 16).

38. The observation of the arbitral tribunal that Indeen had not adverted to the renunciation of the contract in its pleadings appears to be *sensu stricto* correct if one were to adhere to the rigid rules of pleadings as applicable to a suit action. That being said, courts have held that even in a suit action, form cannot trump substance. In this context, the observations made in ***Bhagwati Prasad v. Chandramaul,*** (1966) 2 SCR 286:AIR 1966 SC 735 being apposite are extracted hereafter:

> ***"10.*** *... <u>If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead</u>*

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nonetheless it is an integral part of it; (*2*) however comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation; it perishes with the contract; (*3*) the contract may be non est in the sense that it never came legally into existence or it was void ab initio; (*4*) though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities thereunder; (*5*) in the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void; in the latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it; and (*6*) between the two falls many categories of disputes in connection with a contract, such as the question of repudiation, frustration, breach etc. In those cases it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. As the contract subsists for certain purposes, the arbitration clause operates in respect of these purposes…."

evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another."

(emphasis is mine)

38.1. The aforementioned principle enunciated in ***Bhagwati Prasad*** would apply with greater force in arbitration actions. In this case, the record shows that there is a reference, both in the notice to arbitrate dated 28.03.2012, and in the pleadings about the information given by DIPL's Managing Director, Mr. Mike Rundle to his counterpart in Indeen that Dalkia group intended to exit from India. This expression of intent was taken by Indeen as an act of renunciation/repudiation of the contract as it followed it up with notice to arbitrate dated 28.03.2012. Paragraph 4 of this notice adverts to this conversation. For the sake of convenience, the relevant part is extracted hereafter:

"...4. We have suddenly been informed that you have now taken a global decision to pull out of India and are either selling the company or in any event ceasing operations. In the event you are selling the company please note that our client always intended to contract with you as part of the Veolia Group being a global leader in industry and does not agree under any circumstances to contract with any new party you have decided to sell to. The act of entering into the Synchronisation and Coordination Agreement was a recognition that the original EPC contract was final. In any event the three contracts had subsequently been finalized and initialled. ..."

38.2 In paragraph 102 of the impugned order, this very paragraph has been noticed by the arbitral tribunal. As noted in my narration of events hereinabove, the arbitral tribunal has commented severely on the conduct of DIS/DIPL in not disclosing the factum of transfer of shares in favour of EFS Facilities Services Mauritius Ltd. even though negotiations *qua* the same had commenced on 03.01.2012 i.e. prior to the Contract Agreements being initialled on 16.03.2012. As noticed by me hereinabove, the SPA between DIS and EFS Facilities Services Mauritius Ltd. was executed within less than two weeks of the Contract Agreements being initialled i.e. on 29.03.2012.

39. Therefore, for the foregoing reasons, I am unable to persuade myself to agree with the conclusion reached by the arbitral tribunal that Clause 13.2 of the SPA could not operate for the want of issuance of NTP. Thus I must respectfully disagree with by the arbitral tribunal's conclusion that it had no jurisdiction to adjudicate upon on the merits of the disputes obtaining between the parties. In view of what is stated hereinabove, I am inclined to allow the appeal. It is ordered accordingly. The impugned order is set aside. Parties will approach the arbitral tribunal for fixing an early date to take the matter further. Consequently, I.A. No. 14153/2016 shall stand closed. The parties shall, however, bear their own costs.

(RAJIV SHAKDHER)
JUDGE

JULY 24, 2019/pmc