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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMM ARBITRATION APPLICATION NO. 85 OF 2020

Sai Guru Mega Solar Park Pvt Ltd & Anr ...Applicants

Versus

Union of India, Through the Ministry of New and Renewable Energy & Anr ...Respondents

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Mr Shashank Garg, *with Mr D Lahoti, Mr Navdeep Dahiya, Mr Rahul Maheshwari and Ms V Mehra, i/b Advani & Co, for the Applicant.*

Mr Anil C Singh, Addl Solicitor General of India, *with Mr Aditya Thakkar, Mr NC Walimbe and Mr Anil D Yadav, for Respondent No.1.*

CORAM: G.S. PATEL, J
(Through Video Conference)
DATED: 26th October 2020

PC:-

1. Heard through video conferencing.

2. This is a Section 11 Application. The parties are arrayed like this. The 1st Applicant ("**Sai Guru**") is a private limited company based in Mumbai. It was incorporated as a special purpose vehicle or SPV by the 2nd Applicant ("**PAUL**"), a company based in Dhar-

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Pithampur, Madhya Pradesh. The 1st Respondent is the Union of India through the Ministry of New and Renewable Energy ("**MNRE**"), represented by the learned Additional Solicitor General, Mr Anil Singh. The 2nd Respondent is the Maharashtra Energy Development Agency ("**MEDA**"), a Government of Maharashtra Undertaking. The 3rd Respondent is the Solar Energy Corporation of India ("**SECI**"), a Government of India Enterprise.

3. By its letter dated 29th September 2015, MNRE appointed PAUL as the implementing agency to develop a 500 megawatt **(MW)** solar park at Sakri, District Dhule, Nagpur Division, Maharashtra. This was under a Scheme of Development of Solar Parks and Ultra Mega Solar Power Projects. A copy of the Scheme is annexed. This contains the arbitration clause 18, which says that any dispute arising from any provision of the Scheme is to be referred to an arbitrator appointed by the Ministry, i.e., MNRE. The implementing agency is called the Solar Power Park Developer of "**SPPD**". The Scheme is part of the "Guidelines for Development of Solar Parks" under the Jawaharlal Nehru National Solar Mission. The local State Government is, under these Guidelines, to identify the land and appointed a SPPD.

4. The obligations of the SPPD are many. They include acquiring the land (meaning actually purchasing it, and this, it is common ground, is not a reference to any statutory land acquisition process), obtaining permissions and clearances, allocating plots or zones for individual projects, developing internal transmission systems, arranging for connections to the grid, providing drainage, water supply, road connectivity and so on. The SPPD is entitled to a subsidy (called "Central Financial Aid"). This subsidy — in terms of both timing and percentage amounts — is milestone-based and runs to roughly Rs 20 lakhs per MW. Apparently, the subsidy process runs like this: SECI must confirm that the required milestone has been met. It then makes a request to MNRE to sanction a grant to SECI (corresponding to the milestone percentage). When that grant is received, SECI releases it (again, linked to the milestone achieved) to the state authority, which in turn passes it on to the SPPD.

5. On 14th March 2016, PAUL told MNRE, MEDA and SECI (i.e., all three Respondents) that it had set up Sai Guru as a SPV to develop the park to secure investors' interest, and for legal compliance and accounting. It sought a release of funds from MNRE for various items. PAUL/Sai Guru's estimate for this projects was about Rs. 375 crores. Two days later, on 16th March 2016, PAUL requested MNRE to allow Sai Guru to implement the project. MNRE recommended this proposal a few days later, on 23rd March 2016; and on 29th June 2016, MNRE approved it. It also released some amount for forwarding to Sai Guru.

6. There then followed some correspondence regarding the progress of the project, matters with which I am not, in this Section 11 application, immediately concerned. Further amounts were released periodically under the Scheme.

7. By November 2017, trouble was brewing. Sai Guru complained that the Respondents were not fulfilling certain mandatory conditions, resulting in delays; were also demanding a return of the subsidy or Central Financial Aid; and were refusing to release any further amounts. There was another dispute about the date of the administrative approval, and the Respondents, for their part, contended that little or no progress had been made.

8. On 2nd July 2018, Sai Guru invoked arbitration in its notice of that date. MNRE rejected the request for appointment of an arbitrator by its reply of 17th July 2018.

9. On 6th June 2019, MNRE sent Sai Guru a notice, asking it to show cause why it should not be blacklisted. It said that though two-and-a-half years had passed, the park had not been developed. The CFA or subsidy (of Rs. 4.10 crores) had not been returned with interest as demanded. No proof had been provided of any land having been acquired. A site visit showed no site office, no physical progress and no initiative. It seems that, in parallel, MNRE complained to the Economic Offences Wing, Delhi. A First Information Report was registered against PAUL's directors for non-refund, alleging criminal breach of trust.

10. Sai Guru and PAUL say this is a purely civil dispute sought to be given a criminal colour by MNRE filing a FIR and launching a proceeding. Mr Garg submits that if this is to be taken as a valid reason for opposing a Section 11 application, then every single public project is likely to suffer the same fate; all that a public authority has to do is to file a criminal complaint, and thus defeat a binding contractual provision for arbitration. That is not, he submits, the intent or purpose of arbitration law, whether it be read from the statute or decisions of various courts.

11. Mr Singh, learned Additional Solicitor-General, submits that the Petition and its narrative are a gross over-simplification. There can be no doubt, he says, that there has been a gigantic fraud. Between them, Sai Guru and PAUL induced the government to enter into a contract they had not the slightest intention of performing. Nothing at all has been done under the contract. All the subsidy or CFA received has been diverted into paying off lenders and creditors, with nothing at all from the subsidy deployed into the project itself. Had the Respondents known that this was the intention of the Applicants, the Respondents would never have entered into any contract with the Applicants. Therefore, the submission is, the entire contract is vitiated by fraud and is rendered a nullity.

12. Mr Singh relies on the decision of the Supreme Court in *Rashid Raza v Sadaf Akhtar*.[1] There, the Supreme Court considered its earlier decision in *A Ayyasamy v A Paramasivam.*[2] It extracted the relevant portion, paragraph 25. It then held that mere allegations of fraud would not be sufficient to oust an arbitration agreement. Where there are serious allegations of forgery or fabrication of documents in support of the plea of fraud, or where fraud is alleged against the arbitration provision itself or is of such a nature that it permeates the entire contract including the agreement to arbitrate, i.e. that it goes to the validity of the contract itself then there may be no reference to

1 (2019) 8 SCC 710.

2 (2016) 10 SCC 386.

arbitration. In paragraph 5 of *Rashid Raza*, the Supreme Court set out the two working tests. *First*, does the plea permeate the entire contract and above all the agreement to arbitrate? Or, *second*, do the allegations of fraud touch upon the internal affairs of the parties with no implication in the public domain? If the matter falls within the first, then arbitration is excluded. If, on the other hand, the case is covered by the second test, then arbitration must proceed.

13. The *Rashid Raza* decision was one of several considered by the Supreme Court in its later decision in *Avitel Post Studioz Ltd v HSBC PI Holdings (Mauritius) Limited*, relied on by Mr Garg.[3] In paragraph 42, having considered all the previous law, the Supreme Court held that the same set of facts may well lead to both civil and criminal proceedings. Where it is clear that the civil dispute involves question of fraud, misrepresentation etc which can be the subject matter of a proceeding under Section 17 of the Contract Act, or the tort of deceit, the mere fact that criminal proceedings can or have been instituted would not lead to the conclusion that a dispute that is otherwise arbitrable ceases to be so. On the facts of that case, in paragraph 58, the Supreme Court also found that the fact that there were separate criminal proceedings sought to have been initiated was totally inconsequential.

14. Applying these principles to the facts of the case at hand, leaves me to believe that the mere fact that there is an allegation of siphoning off speaks more to an allegation by the Respondents of the Applicants' failure to perform but does not reach the question of

3 2020 SCC OnLine SC 656.

invalidity on the ground of fraud of the underlying agreement or the arbitration clause so as to render it a nullity. The Respondents have filed no proceedings to have the agreement declared void. They have only alleged, in their parallel criminal proceedings, that the Applicants are guilty of criminal breach of trust. That does not, to my mind, suffice to invalidate the contract or the arbitration agreement itself.

15. This is not to be construed as an affirmative finding on my part that the dispute is purely civil nor is it to be used in any present or future criminal proceedings by the Applicants in answer to any action that the Respondents may lodge. My decision only addresses the case placed by the learned Additional Solicitor-General that the entire contract is null and void.

16. Indeed, it is perfectly possible to suppose — and equally reasonable to expect — that the Respondents may well have a significant counter-claim in arbitration for recovery of the CFA and interest.

17. My attention is invited by the learned Additional Solicitor-General not only to the provisions of the Scheme itself to demonstrate a milestone, but also to a chart showing the manner in which funds were allegedly diverted. These are factual aspects that may well require to be considered both in the criminal proceedings as also in any arbitral proceedings. It would be improper on my part to make any observations in that regard at this stage. I leave those contentions open.

18. The Applicants have on 25th July 2020 suggested the names of six Arbitrators, all previous Judges of High Courts or of the Supreme Court.

19. Subject to his consent, I am inclined to nominate the Hon'ble Mr Justice Kailash Gambhir, former Judge of the Delhi Court as the sole Arbitrator to decide the disputes and differences between the parties arising from the appointment of the 1st/2nd Applicants as the implementing agency for the Solar Power Project in question and governed by the scheme at Exhibit "A" to the Petition. Mr Justice Gambhir's contact details are:

W-67, Greater Kailash - I
New Delhi 110 048
Mobile: +91 98713 00033

20. Of necessity, this order requesting the Hon'ble Mr Justice Kailash Gambhir to accept the appointment will not be governed by the provisions of the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.

21. Communication of order to learned Sole Arbitrator: Within one week of this order being uploaded, the advocates for the applicants will forward a digitally signed copy of this order to the learned Sole Arbitrator, with a copy to the advocates for the Respondents.

22. Disclosure: At his earliest convenience, the learned Sole Arbitrator is requested to forward his statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration Act to the

Advocates for the Applicants, who will then arrange to have that disclosure statement filed in this Court. That statement will be retained by the Prothonotary & Senior Master on the file of this application. The Advocates for the Applicants will send a copy to the Advocates for the Respondents.

23. Appearance before the Arbitrator: Parties will appear before the learned Sole Arbitrator on such date and at such place as he nominates to obtain appropriate directions in regard to fixing a schedule for completing pleadings, etc.

24. Contact/communication information of the parties: Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator within one week of this order being uploaded. The information is to include valid and functional email addresses.

25. Section 16 application: The respondent is at liberty to raise all questions of jurisdiction within the meaning of section 16 of the Arbitration Act. All contentions are left open.

26. Interim Application/s:

(a) Liberty to both sides parties to make an interim application or interim applications including (but not limited to) interim applications under Section 17 of the Arbitration & Conciliation Act, 1996 before the learned Sole Arbitrator. Any such application will be decided in such manner and within such time as the learned Sole Arbitrator deems fit.

(b) The learned Sole Arbitrator is requested to dispose of all interim applications at the earliest.

27. **Consent to an extension if thought necessary**. Parties immediately consent to a further extension of up to six months to complete the arbitration should the learned Sole Arbitrator find it necessary.

28. The Arbitration Application is disposed of in these terms. There will be no order as to costs.

29. This order will be digitally signed by the Private Secretary of this Court. All concerned will act on production of a digitally signed copy of this order.

(G. S. PATEL, J)