

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 09.08.2021

+ **O.M.P. (COMM.) 164/2021 & IA No. 5828/2021**

NTPC VIDYUT VYAPAR NIGAM LIMITED Petitioner

versus

**SYMPHONY VYAPAR PRIVATE LIMITED
& ANR.** Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Rituraj Biswas and Mr Rituraj
Choudhary, Advocates.

For the Respondents : Ms Mamta Tiwari, Ms Swati Sinha, Ms
Taruna A. Prasad and Mr Aman Bhatnagar,
Advocates.

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J

1. NTPC Vidyut Vyapar Nigam Limited (hereinafter 'NVTNL') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter the 'A&C Act') impugning an arbitral award dated 20.11.2020 (hereinafter 'the impugned award') rendered by an Arbitral Tribunal comprising of Justice (Retired) V.N. Khare, former Chief Justice of India, Mr Ambarish Dave and Justice (Retired) D.P. Wadhwa, former Judge of the Supreme Court of India as the Presiding Arbitrator.

2. The impugned award was rendered in the context of disputes that had arisen between NVVNL and respondent no.1 (hereinafter ‘Symphony’) in connection with a Power Purchase Agreement (hereinafter the ‘PPA’) entered into between NVVNL and Symphony.

3. Essentially, the dispute between NVVNL and Symphony are centered around the question whether NVVNL is entitled to recover liquidated damages from Symphony in terms of clause 4.6 of the PPA. NVVNL claims that it is entitled to recover ₹2,87,77,000/- (Rupees Two Crores, Eighty-Seven Lakhs, Seventy-Seven Thousand only) as liquidated damages being 10% of the Performance Bank Guarantee furnished by Symphony, as according to NVVNL, Symphony had failed to commission the solar power plant for generating 10 MW capacity on or before the Scheduled Commissioning Date.

4. According to NVVNL, Symphony had commissioned 5 MW capacity on or before 26.02.2013 (the Scheduled Commissioning Date) and commissioned the balance 5 MW on 27.02.2013. NVVNL claimed that it was thus, entitled to recover half of 20% of the Performance Bank Guarantee in terms of Clause 4.6 of the PPA. Symphony disputed the aforesaid claim as according to Symphony, it had commissioned the Solar Power Generating project before the Scheduled Commissioning Date. It claimed that it had completed and installed 10 MW of solar power generating capacity on 21.02.2013.

5. The Arbitral Tribunal held in favour of Symphony and accepted its contention that it had completed and installed the solar power plant

with 10 MW capacity on or before the Scheduled Commissioning Date of 26.02.2013. Accordingly, the Tribunal held that NVVNL was not entitled to recover any liquidated damages. The Arbitral Tribunal further held, in any event, NVVNL could not recover damages under clause 4.6 of the PPA without establishing that it had suffered any loss.

6. Accordingly, the Arbitral Tribunal directed that the Performance Bank Guarantee furnished by Symphony be discharged. It also awarded costs of ₹1,08,66,000/- (Rupees One Crore Eight Lacs and Sixty-Six Thousand only) in favour of Symphony.

7. It is contended on behalf of NVVNL that the impugned award is patently erroneous as it is contrary to the terms of the PPA. It is contended on behalf of NVVNL that the impugned award disregards the Minutes of the Meeting of Commissioning Committee of 25.02.2013/26.02.2013 – which recorded that Symphony had electrically connected only 7.04 MW capacity as on 25.02.2013 – and therefore, the impugned award is patently illegal and is liable to be set aside.

Factual Background

8. The Government of India launched the Jawaharlal Nehru National Solar Mission (hereinafter ‘JNNSM’) with the objective to establish India as a global leader in solar energy. The Government of India through the Ministry of New and Renewable Energy (hereinafter

‘MNRE’) designated NVVNL as a Nodal Agency for Phase-I of JNNSM.

9. NVVNL was required to purchase solar power from Solar Power Developers (SPDs); bundle it with the power available from coal based plants of NTPC Ltd; and sell the bundled power to various Distribution Utilities.

10. On 24.08.2011, NVVNL invited proposals for setting up of Grid Connected Solar PV Project under Phase-I Batch-II of JNNSM and supply of power. NVVNL issued a Request for Selection (RfS) inviting bids for setting up capacity of 350 MW of solar power. The bidders were to be selected in decreasing order of the discount offered by them over the tariff approved by the Central Electricity Regulatory Commission (CERC).

11. Symphony submitted its response to the said RfS. Thereafter, it was issued a Request for Proposal (RfP) form. Symphony submitted the same to NVVNL quoting a discount of 691 paisa per KWh over the CERC applicable tariff.

12. Symphony was selected as one of the successful bidders and NVVNL issued a Letter of Intent (LOI) dated 28.12.2011 accepting Symphony’s bid and further, confirmed its intent to purchase the power generated by Symphony pursuant to its proposal.

13. In terms of the LOI, Symphony was required to furnish Bank Guarantee(s) in terms of Article 3.19 of the RfS before signing of the

PPA. The Bank Guarantees were required to be valid for a period of sixteen months from the effective date of the PPA. Symphony complied with the said condition and furnished Bank Guarantees aggregating a total sum of ₹28,77,70,000/- (Rupees Twenty-Eight Crores, Seventy-Seven Lacs and Seventy Thousand only) for securing due performance of its obligations.

14. Thereafter, NVVNL and Symphony entered into the PPA on 27.01.2012. Under the PPA, the location of the power project was initially at a village in Jaisalmer. The PPA was subsequently amended to change the location of the power project to Village Manchitiya, District Jodhpur, Rajasthan.

15. In terms of the PPA, Symphony agreed to set up, install and commission a 10 MW capacity grid connected Solar PV Power Project using photo voltaic technology at Village Manchitiya in Jodhpur District of Rajasthan. The power project was required to be designed, constructed, erected and commissioned within a period of thirteen months from the effective date, that is, on or before 26.02.2013 (the Scheduled Commissioning Date).

16. It is relevant to note that in terms of the PPA, the 'Commercial Operation Date' of the project was defined to mean the "*actual commissioning date of respective units of power project whereupon SPD starts injecting power from the power projects to the delivery point*".

17. Symphony claims that it installed, completed and initialized a

solar power plant of 10 MW capacity on 21.02.2013. It also claims that its solar power plant was connected to the grid and was successfully generating electricity from 21.02.2013, that is, prior to the Scheduled Commissioning Date.

18. The Commissioning Committee constituted by respondent no.2 inspected Symphony's solar power plant on 25.02.2013. It verified that Symphony had set up modules of 10.004 MW capacity. However, it also noted in the Minutes of the Meeting prepared on that date, that 30% of the modules/strings had not been electrically connected. According to the Commissioning Committee, only 7.04 MW capacity had been electrically connected.

19. According to Symphony, the observations made by the Commissioning Committee were erroneous and it had installed a power plant which was completed in all respects of a capacity of 10 MW. Symphony claimed that notwithstanding the above, it connected the balance modules and on 26.02.2013, requested the Commissioning Committee to inspect the same. Symphony claimed that although the members of the Commissioning Committee were present at site, they declined to accede to its request of re-inspecting the plant. Thereafter, Symphony sent an email as well as a FAX to respondent no.2; and it also served a copy of the same to the members of the Commissioning Committee requesting for an immediate re-inspection on the plant site on 26.02.2013. Symphony claims that notwithstanding that the conclusion of the Commissioning Committee was erroneous, it had addressed the observations made by the Commissioning Committee.

20. It is stated that the Commissioning Committee did not re-inspect the plant site on 26.02.2013 but undertook the inspection on 02.03.2013, that is, after three days and found that Symphony's Solar Plant was complete in all respects

21. There is no controversy that as on 27.02.2013, Symphony had completed its obligations of setting up a solar power plant of 10 MW capacity. NVVNL prepared a report dated 25.04.2013 to the effect that only 5 MW capacity had been commissioned by Symphony on 26.02.2013 and the remaining 5 MW capacity was commissioned on 27.02.2013. Thus, according to NVVNL, Symphony had defaulted in performance of its obligations inasmuch as it had completed the establishment of 50% of the contracted capacity (50% of 10 MW) after the Scheduled Commissioning Date, that is 26.02.2013.

22. According to NVVNL, it is entitled to claim liquidated damages in terms of Article 4.6 of the PPA and it sought to recover the same by invoking the Performance Bank Guarantees furnished by Symphony.

23. In the aforesaid backdrop, Symphony filed a petition under Section 9 of the A&C Act (OMP No. 461/2013) seeking an injunction against NVVNL from invoking the Bank Guarantees furnished by it.

24. This Court by an order dated 07.05.2013 passed an *ad interim* order restraining NVVNL from invoking the Bank Guarantees and further directed that *status quo* be maintained.

25. Since NVVNL's limited case was that Symphony had delayed

completion of the project to the extent of 5 MW, the damages payable under Article 4.6.1 of the PPA could in any event, not exceed 10% of the total Bank Guarantee amount (being in proportion of the capacity that was delayed, that is 50%, of the 20% of the bank guarantee amount that could be enforced for the delay). Accordingly, this Court by an order dated 24.05.2013 directed that the interim order passed earlier (order dated 07.05.2013) interdicting NVVNL from invoking the Bank Guarantee would continue subject to NVVNL keeping alive the Bank Guarantee to the extent of 10% of the total Bank Guarantee amount.

26. In terms of the aforesaid order, Symphony amended the original Bank Guarantees furnished by it by reducing the amount to ₹2,87,77,000/- (Rupees Two Crores Eight-Seven Lacs and Seventy-Seven Thousand only). The said amended Performance Bank Guarantee (Performance Bank Guarantee No. 05731LG001412 dated 27.05.2013 for a sum of ₹2,87,77,000/- issued by Punjab National Bank, Park Street, Kolkata) was kept alive by Symphony during the arbitral proceedings.

27. Symphony's petition under Section 9 of the A&C Act (OMP No. 461/2013) was disposed of by this Court by an order dated 16.10.2014 directing NVVNL to give at least three days clear notice if it chose to invoke the Bank Guarantee.

28. Thereafter on 20.10.2014, NVVNL issued a letter seeking to invoke the Bank Guarantee. This led Symphony to approach the

Arbitral Tribunal for seeking interim measures of protection under Section 17 of the A&C Act. The Arbitral Tribunal passed an order dated 30.10.2014 restraining NVVNL from invoking the Bank Guarantee and the said order was extended from time to time.

29. In the aforesaid context, Symphony filed its Statement of Claims before the Arbitral Tribunal, *inter alia*, praying for a declaration that its solar power plant was commissioned on 26.02.2013 and seeking a direction to respondent no.2 to issue a Commissioning Certificate certifying 26.02.2013 as the date of commissioning of its plant (Claim Nos. 1 and 2). Symphony further prayed that a direction be issued to NVVNL for release of its Bank Guarantee (Claim No. 3). Symphony also sought reimbursement of expenses incurred in keeping the Performance Bank Guarantee alive for the period beyond 16.05.2014, which it quantified at ₹2,99,206/- (Claim No.4). In addition, Symphony also claimed ₹20,11,952/- as litigation expenses incurred by it in pursuing OMP No. 461/2013 before this Court (Claim No.5) and costs of the arbitral proceedings (Claim No.6). It also sought *pendente lite* and future interest at the rate of 18% per annum on the amounts claimed.

30. The Arbitral Tribunal considered the rival contentions; evaluated the material placed before it; and delivered the impugned award directing release of the Bank Guarantee. Further, the Arbitral tribunal also awarded costs quantified at ₹1,08,66,000/- in favour of Symphony. The Arbitral Tribunal directed NVVNL to pay the awarded amount to Symphony within a period of four weeks from the

receipt of the impugned award failing which it would also be liable pay interest at the rate of 9% after the four weeks period till realization of the amount by Symphony.

Submissions

31. Mr Biswas, learned counsel appearing for NVVNL has assailed the impugned award on, essentially, three fronts. First, he referred to Clause 4.1.1 of the PPA and emphasized that Symphony was obliged to commence supply of power up to the contracted capacity to NVVNL no later than the Schedule Commissioning Date. He referred to the Minutes of the Meeting of the Commissioning Committee dated 25.02.2013 - 26.02.2013, whereby the Commissioning Committee had observed that *“Modules of only 7.04 mw capacity were electrically connected ...”*. He submitted that in view of the said report, the decision of the Arbitral Tribunal that Symphony had performed its obligation by installing and commissioning a 10 MW solar power plant on or before the Schedule Commissioning Date of 26.02.2013, is patently illegal. He also submitted that Symphony’s witness had admitted that *“few of the strings were not electronically connected on 25.02.2013”* and therefore, the observations made by the Commissioning Committee could not be faulted.

32. Second, he submitted that the Arbitral Tribunal had also grossly erred in holding that liquidated damages were not a matter of right and NVVNL was required to prove that it had suffered a loss. He submitted that electrical power was a public utility and therefore, it

was not necessary for NVVNL to prove the quantum of damages suffered by it with any precision. He referred to the decision of the Supreme Court in *Construction and Design Services v. Delhi Development Authority: (2015) 14 SCC 263* and the decisions of this Court in *NTPC Vidyut Vyapar Nigam Limited v. Saisudhir Energy Limited: FAO (OS) 275 and 281 of 2016, decided on 18.01.2018* and *NTPC Vidyut Vyapar Nigam Ltd v. Precision Technik Pvt. Ltd.: 2018 SCC OnLine Del 13102*.

33. Third, he submitted that the award of cost of ₹1,08,66,000/- in favour of Symphony is without any basis or any material and therefore, it is liable to be set aside.

34. Ms Mamta Tiwari, learned counsel appearing for Symphony countered the aforesaid submissions. She also referred to an affidavit filed in this Court affirming that on 06.12.2019, Symphony had forwarded the details of payment made to the Arbitral Tribunal. This was in context of the costs of the arbitral proceedings claimed by Symphony. Thereafter, a hard copy of the Statement of Costs was also handed over to the Arbitral Tribunal at the hearing on 21.12.2019. Symphony claimed that it had incurred costs of ₹1,08,66,600/- as on that date which included arbitration fees of ₹77,50,000/-; travelling expenses of ₹4,91,425/- and legal and consultancy fees of ₹26,25,175/-. She stated that on that date, the Arbitral Tribunal passed an order directing the parties to make payments for further four hearings and Symphony had incurred further costs of ₹8,00,000/- as fees to be paid to the Arbitral Tribunal. She submitted that the Arbitral

Tribunal had awarded costs on the basis of the statement handed over on 21.12.2019 and had ignored the fee paid for subsequent hearings. She also pointed out that the total fees was twice the amount, but had been split between two matters which were being pursued simultaneously.

Reasons and Conclusion

35. The Arbitral Tribunal had considered the pleadings and had framed the following issues for consideration:

- “1. Whether Rajasthan Renewable Energy Corporation Limited (Respondent No.2) is party to the Arbitration?
2. Whether the Solar Power Project was fully completed in all aspects on/before 26.02.2013?
3. Whether Respondent No.1 has rightly invoked the bank guarantee or should he be directed to release the same?
4. Whether any actual loss was suffered by Respondent No.1?
5. Whether Article 4.6 of the PPA is penal or not?
6. Whether the claimant can be held liable for delay caused due to acts of a third Party?
7. Whether the Claimant is entitled to receive any amounts as mentioned in its claims?
8. Whether either Party is entitled to costs of the present Arbitration?”

36. The disputes between the parties are centered around the question whether Symphony had completed the solar power project in

all respects on or before 26.02.2013 (the Scheduled Commissioning Date). Symphony claimed before the Arbitral Tribunal that it had, in fact, commissioned the solar power project to its full capacity before 26.02.2013 and was not liable to pay any damages. Concededly, if the project had been completed as asserted, NVVNL would have no ground to levy any damages. According to NVVNL, Symphony had commissioned only 5MW capacity as on 26.02.2013 and had commissioned the balance 5MW on the next date, that is on 27.02.2013. NVVNL claimed that on account of the said delay, it was entitled to claim damages to the extent of ₹2,87,77,000/- in terms of Article 4.6.1 of the PPA.

37. The Arbitral Tribunal evaluated the evidence and material on record and found in favour of Symphony that it had fully commissioned its plant before 26.02.2013. The Arbitral Tribunal relied on the connectivity report dated 21.02.2013 and found that Symphony's solar plant had generated electricity and was connected to the grid on 21.02.2013. The relevant extract of the impugned award reads as under:

“21. We have carefully considered submissions of both the parties and decide as follows:

It is evident from the connectivity report dated 21.02.2013 that the Solar Plant was generating electricity and was connected to the grid. Even if the alleged incorrect observation by the Commission Committee that 30% of the modules are not connected is deemed to be correct, in order to avoid any confusion and to remove any and all

doubts, the modules were once again strung and connected by the Claimant on 26.02.2013. The delay in certifying on the commissioning date is not attributable to the Claimant but to the Commissioning Committee, of which the officers of Respondent No 1 were a part, which refused to re-inspect the plant on 26.02.2013 despite being present on the site, as admitted by the Respondent No. 1. The decision of the Commission Committee of not re-inspecting the Plant, even though they were still at the plant, at the requests of the Claimant was wrong and without any valid ground.

22. Hence, we are deciding this issue in favour of the Claimant and we are, therefore, holding that the solar power plant was complete in all respects, in terms of the PPA, on 26.02.2013 and hereby direct Respondent No. 2 to issue the Commissioning Certificate, certifying 26.02.13 as the date of commissioning of the Solar Power Plant of the Claimant.”

38. Mr Biswas contended that the finding of the Arbitral Tribunal is erroneous and the impugned award was liable to be set aside. The said contention is unmerited. Without going into the question of whether the finding is erroneous, it is well settled that a challenge to the Arbitral Tribunal’s finding of fact as erroneous, is not the ground for setting aside an arbitral award. The scope of challenge under Section 34 of the A&C Act is narrow and unless it is found that the arbitral award is “*vitiated by patent illegality appearing on the face of award*” or that it is in “*conflict with the public policy of India*”; it cannot be interfered with. In the present case, there is no controversy that the claim made by Symphony was arbitrable; and the Arbitral Tribunal

was duly constituted; and had the jurisdiction to adjudicate the claim.

39. In *Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49*, the Supreme Court had authoritatively held that:

“It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.”

40. In *Dyna Technologies Private Limited v. Crompton Greaves Limited: (2019) 20 SCC 1*, the Supreme Court had held that the courts would not interfere “*unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award*”.

41. In view of the above, the Arbitral Tribunal’s decision to enter an award for release of the Bank Guarantee, sought to be encashed by NVVNL to recover liquidated damages in terms of Article 4.6 of the PPA, cannot be faulted.

42. The Arbitral Tribunal also held that in the present case, NVVNL had suffered no loss and therefore, was not entitled to recover any damages. In view of the conclusion that there was no breach on the part of Symphony, the question of levying any damages does not arise. In this view, the question whether the levy of damages as contemplated under Article 4.6 of the PPA is in the nature of penalty or a genuine pre-estimate of damages is academic.

43. The Arbitral Tribunal also concluded that NVVNL had not suffered any actual damages or losses as the State Transmission Utility (STU) was not ready to transmit 40 megawatts – which was the cumulative power contracted to be generated from the Symphony’s power plant and three other similarly placed power plants – as the second transformer necessary to transmit the said electricity was not set up till 13.03.2013.

44. Mr Biswas referred to the decision of the Supreme Court in *M/s Construction and Design Services v. Delhi Development Authority* (*supra*) and on the strength of the said decision, contended that it was not necessary for NVVNL to prove actual damages since the contract was for provision of a public utility. It is well settled that in case of contracts pertaining to public utilities, it is difficult to quantify the damages with any precision and therefore, it may not be necessary for the same to be proved. In such cases, it is assumed that a breach on the part of a party contracted to execute works in respect of such utilities results in a loss. However, this presumption is rebuttable and does not preclude the party against whom claim of damages is

made from establishing that no loss had been caused on account of its acts. In the present case, NVVNL does not dispute that the STU was not in a position to transmit the electricity as contracted from the four solar power plants in the region as there was some delay in setting up the second transformer (which was set up on 13.03.2013). And, even according to NVVNL, Symphony had established and commissioned the power plant on 27.02.2013.

45. The contention that the award of cost is without any basis, is also unmerited. The Arbitral Tribunal had examined the claims of Symphony as well as claims of Lexicon Vanijya Private Limited (Lexicon) which were the subject matter of separate reference. Both the arbitration proceedings (one relating to disputes raised by Symphony and the other raised by Lexicon) were conducted simultaneously.

46. The claims on behalf of Symphony and Lexicon were pursued by the same set of counsel and it is not disputed that an affidavit was furnished to the Arbitral Tribunal setting out the cost incurred and allocating them equally amongst the two cases. Admittedly, a sum of ₹1,55,00,000/- had been paid to the Arbitral Tribunal as on 21.12.2019 by the claimants (Symphony and Lexicon). The said fees were, accordingly, split between both the cases. Thus, the cost awarded to Symphony includes ₹77,50,000/- paid as fees to the Arbitral Tribunal. Similarly, the travelling expenses and legal consultancy fees were also split and the cost awarded to Symphony includes ₹4,91,425/- as travelling expenses and ₹26,25,175/- as legal and consultancy fees

incurred by it.

47. Indisputably, the said fees are reasonable and this Court finds no ground to interfere with the award of cost.

48. The questions raised by NVVNL in this petition are identical to the questions raised by NVVNL in *OMP(COMM) 163/2021; NTPC Vidyut Vyapar Nigam Limited v. Lexicon Vanijya Private Limited*, which was dismissed by this Court on 02.08.2021. The impugned award is also similarly worded as the one impugned in that case and the decision in that case squarely covers all contentions raised in the present petition.

49. In view of the above, the petition is dismissed. The pending application is also disposed of.

VIBHU BAKHRU, J

**AUGUST 09, 2021
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