

\$~6 (2020)

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

Date of Decision: 04th August, 2021

+ **O.M.P. (COMM.) 568/2020 & I.A. 11325/2020.**

TECHNOFAB ENGINEERING LTD. Petitioner

Through: Mr. Pallav Kumar, Advocate.

versus

TESLA TRANSFORMERS LTD. Respondent

Through: Mr. Devmani Bansal, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J. (Oral):

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (in short 'the Act') assails the award dated 22nd May, 2020 whereby the learned Sole Arbitrator, has *inter alia* rejected all the counter-claims of the Petitioner- Technofab Engineering Limited (in short 'TEL') and awarded an amount of Rs. 1,87,17,280/-, along with pre-reference, *pendente-lite* and future interest @ 9% towards the refund of unlawfully encashed Contract Performance Bank Guarantees (in short 'CPBGs'), in favour of the Respondent- Tesla Transformers Limited (in short 'TTL').

The Dispute

2. The brief facts, which led the parties to arbitration are as follows:

2.1. TEL entered into five separate contracts with the Power Grid Corporation of India Limited ('PGCIL') for installation, commissioning, assembling, running, operating and maintaining electricity substations in the State of Tripura. For this purpose, TEL needed transformers for running the substations. In order to meet a part of their requirement, negotiations were held and eventually three purchase orders were placed on TTL for the supply of 5 MVA and 7.5 MVA power transformers and 100 KVA station transformers in the month of June, 2017.

2.2. As per the agreed delivery schedule, TTL was to deliver the transformers on or before 30th September, 2018. It was provided in the terms of supply that in the event of any unforeseen circumstances, the time period for supply could be extended upto 3rd/4th quarter of the financial year 2018-19.

2.3. In July, 2017, TEL granted manufacturing clearance to TTL. TTL did not make much progress till November, 2017 and as on 26th March, 2018, only 11 5 MVA transformers, out of 43, were supplied to TEL. In these circumstances, TEL terminated the contract *vide* letter dated 1st October, 2018 and also expressed its intent to invoke the CPBGs. TEL claimed that it was constrained to engage another supplier for supply of the balance undelivered quantity and invoked three CPBGs to mitigate the losses.

2.4. Accordingly, TTL *vide* notice dated 26th October, 2018 invoked

arbitration and sought adjudication of the disputes. Mr. Kuldeep Singh (Retd.), former Additional District Judge was appointed as the Sole Arbitrator.

2.5. Before the Arbitrator, the parties filed their respective claims.

TTL prayed for the following reliefs:

“(i). Pass an award in favour of Claimant by declaring the invocation and encashment of Bank Guarantee(s) bearing no.1920188G0000020; 1920188G0000026; 1920188G0000027 by Respondent as illegal and null and void.

(ii). Pass and award in favour of Claimant by declaring the termination of Purchase Orders by Respondent vide letter dated 01.10.2018 as illegal and null and void.

(iii). Pass and award in favour of Claimant and against the Respondent for a sum of Rs. 187,17,280/- towards illegal encashment of bank Guarantee(s).

(iv). Pass and award in favour Claimant and against the Respondent for a sum of Rs. 9,07,787/- (being interest @ 18% per annum from the 01.10.2018 i.e., date of encashment of Bank Guarantee(s) till the date of filing of claim, on Rs. 187,17,280/-).

(v). Pass an award in favour of Claimant and against the Respondent for a sum of Rs. 58,40,000/- towards the cost of two transformers of 5MVA/33/11KV, which were ready and offered by Claimant were not accepted by Respondent.

(vi). Pass and award in favour of the Claimant and against the Respondent for a sum of Rs. 3,24,120/- (being interest @ 18% per annum from the 15.09.2018 i.e. date of inspection call for two transformers till the date of filing of claim, on Rs. 58,40,000/-).

(vii). Pass an award towards pendente lite and future interest @ 18% per annum on the amount claimed in Prayer (ii) and (iii) from the date of filing of the present claim petition till actual date of realization.

(viii). Pass an award for a sum of Rs. 1,28,77,280/- towards business loss.

(ix). Pass an award for an amount of Rs. 15,00,000/- towards cost of litigation.

(x). Grant any other relief which this Hon’ble Tribunal may deems fit and proper in the facts and circumstances of the case.”

2.6. TEL controverted the claims and instead filed counter-claims to the following effect:

- “i. Pass an award in favour of the Respondent/ Counter Claimant and against the Claimant in sum of Rs. 1,89,52,200.00 (Rupees one crore eighty nine lacs fifty two thousand and two hundred only) in respect of the additional costs incurred by the Respondent/ Counter Claimant in procuring the balance quantity of Transformers from M/s Toshiba Transmission and Distribution Systems (India) Private Limited along with interest @ Rs. 18% per annum on the said sum of Rs.1,89,52,200.00 from 01.10.2018 till realization,*
- ii. Pass an award in favour of the Respondent/ Counter Claimant and against the Claimant in the sum of Rs. 93,58,640.00 (Rupees ninety three lacs fifty eight thousand six hundred and forty only) in terms of clause 11 of the Commercial terms and Conditions of the Purchase Orders, which is 50% of the total order value, in respect of the delay caused by the Claimant in supplying even the marginal quantities i.e.18 units of the MVA Transformers out of the total 78 unit of the transformer stipulated to be supplied by the Claimant to the Respondent/ Counter Claimant as per the time schedule of the Purchase Orders,*
- iii. Pass an award for a sum of Rs. 3,51,81,974.00 in favour of the Respondent/ counter Claimant and against the Claimant because of the loss, in respect of the establishment costs incurred by the Respondent Counter Claimant at its PGCIL projects for the period from 21.06.2017 to 30.09.2018, caused by the Claimant to the Respondent/ Counter Claimant by wrongfully and intentionally refusing to deliver the balance quantities of the transformers, which sum of money after adjustment of the encashed bank guarantee of Rs. 1,87,17,280.00 comes to Rs. 1,66,64,694.00 (Rupees one crore sixty four lacs sixty four thousand six hundred and ninety four thousand only), along with interest @ 18% per annum from 01.10.2018 till realization, pass an award for a sum of Rs. 30,00,000.00 (Rupees thirty lacs only) in favour of the Respondent/ Counter Claimant and against the Claimant in respect of the litigation costs,*
- iv. Pass an award in favour of the Respondent Counter Claimant and against the Claimant granting interest @ 18% per annum on claims i. to iv. Above in terms of Section 31 of the Arbitration and Conciliation Act, 1996,*
- v. The Claimant is liable to pay to the Respondent/ counter Claimant the liquidated damages, if any, imposed by M/s Power Grid Corporation of India Limited on the Respondent/ Counter Claimant for the delay in completion of the projects caused by the mala fide refusal on the part of the Claimant in supplying the balance quantities of the transformers and delayed supplies of the transformers. At present the Respondent/ Counter Claimant is not claiming the said liquidated damages from the Claimant but the*

Respondent/ Counter Claimant reserves its right to claim the same from the Claimant as and when such damages are imposed on it by M/s Power Grid Corporation of India Limited.

vi. Pass any further order/s or direction/s in favour of the Respondent/ Counter Claimant and against the Claimant as deemed fit and proper in the facts and circumstances of the present case.”

3. After considering the contentions of the parties and on examination of the material on record, the learned Arbitrator passed the impugned award holding TTL to be entitled to refund of the amount of CPBGs. All the counter-claims of TEL were rejected.

4. Aggrieved with the aforesaid award, TEL has filed the present petition.

Petitioner's contentions

5. Mr. Pallav Kumar, counsel for TEL submits that the impugned award suffers from patent illegality and is liable to be set-aside on the following grounds:

5.1. Despite observing that the termination of the contract dated 1st October, 2018 was valid, the learned Arbitrator perversely allowed the claim of TTL towards return of the amounts received by way of encashed CPBGs. In this behalf, reliance is placed on the findings of the learned Arbitrator which notes that “*the bank guarantee is only for the purpose to secure the losses incurred for non-performance of the contract i.e. non-supply/short-supply. Since there is a specific provision as per clause 15 of the terms and conditions, in case of non-supply/ short-supply the counter claimant/respondent could purchase material from any other agency at the risk and cost of claimant and adjust the same against the bank guarantee*”. On the basis of the above, it is argued that once the termination was held to be valid, TEL was within its rights under the

terms of the CPBGs, as well as the purchase orders, to invoke and encash the bank guarantees as a result of default of TTL.

5.2. Despite there being sufficient evidence on record [purchase orders with Toshiba Transmissions and Distributions Systems ('Toshiba')] in support of the counter claim of TEL, the learned Arbitrator did not render any finding that TEL has not suffered any loss. Yet, he has perversely allowed claim no. 1 of TTL for return of the amounts encashed by TEL under the CPBGs.

5.3 The learned Arbitrator while deciding the claim towards the refund of CPBGs amount had to necessarily return his findings on issue no. 1 i.e., whether the invocation of CPBGs by TEL is vitiated by *mala fide* and fraudulent intent. A perusal of the impugned award in respect of issue nos. 1,3 and 5 would show that the adjudication of the afore-noted issues is dependent on adjudication of issue no. 1. Thus, without deciding issue no. 1, which was a vital and material issue, issue no. 5 could not have been decided. The learned Arbitrator without returning any finding on issue no. 1, declared the encashment of CPBGs to be illegal and void. This finding is absolutely perverse. The learned Arbitrator has also ignored the fact that supply was not complete, and TEL was forced to procure transformers from a third-party resulting in costs being incurred, entitling TEL to encash the CPBGs.

5.4. The learned Arbitrator ignored the fact that purchase orders issued to Toshiba were sufficient evidence to prove risk and cost and therefore, TEL was entitled to encash CPBGs to mitigate its losses.

5.5 The purpose of the CPBGs was solely to secure the interest of

TEL in the event of loss and if the same is not allowed, the whole purpose for which the CPBGs are taken, would be defeated. Besides, by rejecting the counter-claims, the learned Arbitrator has closed the right of TEL to recover risk and cost. Thus, the award on this account is patently illegal which goes to the root of the matter. The learned Arbitrator never returned a finding of ‘no loss’ on TEL’s part, for granting the refund of the CPBGs. Reliance in this regard is placed on the judgment of this Court in ***Dhoot Developers Pvt. Ltd. (JV) M/s Bengal Silver Spring Project Ltd. v. Totem Infrastructure Ltd.***¹.

5.6. The learned Arbitrator has committed patent illegality, having failed to take into consideration vital evidence produced before him to prove losses, which remained unrebutted. The learned Arbitrator ignored the letter dated 11th June, 2018 whereby TTL itself sought cancellation of the purchase orders. Further, as a result of this, TEL was constrained to enter into negotiations with Toshiba for completion of balance work. The learned Arbitrator has brushed this aside, by suggesting that the balance work awarded to Toshiba was marred by bias or prior selection. Furthermore, the learned Arbitrator arrived at a conclusion, based on conjecture and surmises, that ‘*the deal with Toshiba was shady and tainted*’. In the absence of challenge to the legality or validity of the orders placed upon Toshiba, the learned Arbitrator could not have commented on the same and arrived at a farfetched conclusion that the ‘*deal with Toshiba was shady and tainted*’ that too without there being any evidence on record. (See: ***India Yamaha Motor Pvt. Ltd. v. Divya***

¹ Judgment dated 17th November, 2020 in O.M.P.(COMM.) 256/2017.

*Ashish Jamwal*²). The finding of the learned Arbitrator is, therefore, perverse which goes to the root of the matter.

5.7. While rejecting the counter-claim for liquidated damages, the learned Arbitrator completely ignored a key piece of evidence on record i.e., email dated 17th May, 2018 wherein TEL stated that delivery should have been completed in 3-4 months from manufacturing clearance and also the email sent by TTL on 17th May, 2018, whereby TTL accepted that delay has occurred. Once delay has been admitted by TTL, TEL would be entitled to liquidated damages under Clause 11 of the commercial terms and conditions annexed to the purchase orders. The learned Arbitrator has not even referred to the aforesaid letter(s) in the impugned award. Reliance is placed upon the judgment of the Supreme Court in *Ssangyong Engineering & Construction Co. Ltd. v. NHAI*³ to buttress the above submission.

5.8. There are inherent contradictions in the impugned award. On one hand, the learned Arbitrator observes that there is a specific provision where TEL can purchase material at risk and cost of TTL and adjust the same against the CPBGs and in the very next line, he contradicts the said finding by observing that encashment of CPBGs cannot be used as a penalty clause for non-performance of the contract on the ground of non-supply/short supply. In this regard, reliance is placed on the decision in *Airport Authority of India v. Virender Khanna & Associates*⁴.

² (2019) SCC OnLine Del 6912.

³ (2019) 15 SCC 131.

⁴ 2018 SCC OnLine Del 9851.

5.9. The impugned award suffers from patent illegality on account of contradictory and incongruous findings and reasonings given by the learned Arbitrator.

5.10. The learned Arbitrator ignored Clause 7 of the purchase orders which stipulated that after completion of supply, the CPBGs were to be extended to cover guarantee period of 36 months from the date of dispatch. This approach is completely irrational, and no reasonable person would have done the same. In support of the submissions, Mr. Kumar relied upon the judgment of the Supreme Court in *Patel Engineering Ltd. v. North-Eastern Electric Power Corporation Ltd. (NEEPCO)*⁵.

Respondent's contentions

6. Mr. Devmani Bansal, counsel for TTL, on the other hand defended the impugned award and argued as follows:

6.1. There is no ground for interference within the limited scope of interference under Section 34 of the Act.

6.2. The learned Arbitrator has rendered findings on consideration of the material placed on record and on the basis of evidence led by the parties which cannot be re-appreciated while exercising jurisdiction under Section 34 of the Act.

6.3. The CPBGs were provided only as a security to ensure compliance and fulfilment of the obligations, and this is evident from the terms thereof. The guarantees were to be converted into warranty

⁵ 2020 SCC OnLine SC 466.

guarantees and, therefore, once there was a partial supply, to that extent the performance stood complied by TTL and the CPBGs should not have been invoked for the entire amount. In these circumstances, the findings of the learned Arbitrator are reasonable.

6.4. It is not the case of TEL that it invoked the CPBGs to cover the differential amount or other administrative costs. The CPBGs were invoked for the non-supply/ short-supply.

6.5. The counter-claim towards additional cost incurred by TEL to complete balance work has been rejected as TEL failed to prove the same. As a matter of fact, no transformers were supplied by Toshiba to TEL after termination of the contract. This fact was confirmed in the RTI reply of PGCIL dated 25th July, 2019 in response to query raised by TTL. Since no transformer was procured from any third-party, there is no question of any differential cost. Consequently, if there is no differential cost or excess cost incurred by TEL, the CPBGs could not have been invoked.

6.6. During the term of the purchase orders, TEL never asked for the extension of the CPBGs to cover the warranty period and instead took a rash decision to encash the CPBGs. The purchase orders provided for penalty and liquidated damages in the event of delay to the extent of maximum of 5% of the order value. The Supreme Court in several judgments starting from *Maula Bux v. Union of India*⁶, *Union of India v. Rampur Distillery and Chemical Co.*⁷ and *Kailash Nath Associates*

⁶ (1969) 2 SCC 554.

⁷ (1973) 1 SCC 649.

v. Delhi Development Authority ⁸ held that where a contract provides for liquidated damages, the same would only be payable in a situation where loss cannot be determined and if it was a genuine pre-estimate of damages. Ordinarily the party claiming compensation must prove the loss suffered by it. Clause 11 of the terms and conditions annexed to the purchase orders contemplates that any delay in supply would attract liquidated damages which would be deducted from TTL's running bills. The same was not done and all the bills were fully paid, except for two bills which are the subject matter of another dispute. Since TEL has not exercised its right to liquidated damages in accordance with the contractual scheme, it cannot be permitted to invoke the CPBGs as a penalty. Thus, the counter-claims have been rightly rejected.

Analysis and findings

7. The Court has heard the counsel for the parties at length. The facts noted above, by and large, are not in controversy and therefore the dispute lies in a narrow compass.

8. TEL placed 3 purchase orders on TTL for supply of 5 MVA and 7.5 MVA power transformers and 100 KVA station transformers. TTL did not adhere to the delivery schedule and started the supply in February, 2018 as opposed to completing the supplies, as scheduled, in November 2017. As a result, the order quantity was not delivered within time. *Vide* letter dated 11th June, 2018, TTL sought cancellation of the purchase orders. This led to termination of the contract on 1st October, 2018. During this period, TEL

⁸ (2015) 4 SCC 136.

allegedly negotiated and placed purchase orders on a third-party vendor, Toshiba, at the risk and cost of TTL and invoked the CPBGs.

9. The learned Arbitrator first went into the question of the termination of the contract and observed that since TTL had itself abandoned the contract, TEL was within its right to issue the termination letter dated 1st October, 2018. Finding no invalidity in the said termination, the learned Arbitrator decided the issue framed in that regard, in favour of TEL (issue no. 6). Thereafter, the learned Arbitrator proceeded to determine the question as to whether the delay in supply of transformers was due to some unforeseen circumstances that entitled them to an extension. On this issue as well, the learned Arbitrator observed that TTL had failed to prove any satisfactory unforeseen circumstances which resulted in a delay in making supplies, that entitled them to an extension of time.

10. The learned Arbitrator then proceeded to decide the main issue as to whether TEL was entitled to invoke the CPBGs which were furnished against the three purchase orders. On this issue, the learned Arbitrator concluded that TTL had supplied 18 5 MVA transformers and delivery of some of the transformers had also been accepted beyond 11th June, 2018 (the date of abandonment of contract). The learned Arbitrator held that TEL was not entitled to encash the CPBGs, especially in view of the admitted position that it had received several transformers after 11th June, 2018 and had put them to use. Under partial performance of the contract, TEL could not have invoked the CPBGs for the entire amount. In absence of TEL's right to invoke the CPBGs for the entire amount, the invocation was held to be illegal. The Court finds no reason to interfere with this reasoning of the learned Arbitrator.

11. Since the mainstay of TEL's argument is centred around mitigation of loss, as a ground for invoking the CPBGs, the learned Arbitrator examined the conditions of the purchase orders and commercial terms and conditions annexed thereto. He concluded that as per Clause 15 of the commercial terms and conditions, on account of non-supply and short-supply, TEL could purchase the balance supplies from other agencies at TTL's risk and cost. However, he did not find any provision that would entitle TEL to encash the CPBGs for such non-supply/ short-supply. The learned Arbitrator thus held that the encashment of CPBGs could not be used as a penal clause for non-performance of contract. This view is also found to be reasonable and in consonance with the terms of the CPBGs which were furnished as a security to secure compliance of fulfilment of the obligations under the purchase orders. The relevant conditions of the CPBGs, read as under:

"2. It has been stipulated by you in the Contract / Purchase Order that the Supplier shall furnish you with a Performance Bank Guarantee of the sum specified therein, in a form and from a Bank acceptable to you, as and by way of security to secure compliance / fulfillment by the Supplier of its obligations under the Contract / Purchase Order; and

3. We, the Bank / Guarantor (as hereinafter defined / described) have agreed to furnish the Performance Bank Guarantee for the Guaranteed Amount (as hereinafter defined / described), as security for compliance/ fulfillment by the Supplier of its obligations undertaken under the Contract / Purchase Order."

12. As regards sufferance of loss, the learned Arbitrator considered the evidence placed on record. The purchase orders with Toshiba for supply of balance quantity of transformers, relied upon by TEL was disbelieved as a proof of loss. The learned Arbitrator referred to the reply received under RTI from PGCIL dated 25th July, 2019, wherein it was revealed that TEL had not

received any transformers from Toshiba. Further, the learned Arbitrator observes that the deal is otherwise ‘shady in nature’ on the basis of evidence and material placed before him wherein it came to fore that the negotiations with Toshiba started in the month of July, 2018. The learned Arbitrator did not find the same credible since TEL had terminated the contract on 1st October, 2018 and found it rather strange, that without terminating the contract, TEL had started negotiations with Toshiba. This reasoning does not call for any interference. Merely placing a contract on a third party cannot amount to proof of loss. Further, the sufficiency and relevance of evidence falls within the domain of the learned Arbitrator and cannot be reappreciated in the present proceedings. TEL had to necessarily prove the loss, which it has failed to do.

13. As regards TEL’s justification for invocation for claiming the differential amount and other administrative costs, the learned Arbitrator has rejected the counter-claim on the premise that TEL had failed to prove its claim. The entire transaction between TEL and Toshiba was found to be fictitious, for the reason that no transformers were received by TEL after the termination of the contract. Thus, the learned Arbitrator observes that there could not be any question of differential cost or excess cost incurred by TEL for which the CPBGs could have been invoked. In addition to lack of entitlement of TEL to the above discussed counter-claim, the learned Arbitrator has also not found any ground to allow establishment cost/ expenses, due to lack of evidence.

14. The afore-said findings are factual, based on the evidence and material placed on record before the learned Arbitrator and cannot be interfered with

by this Court under Section 34 of the Act. Further, construction and interpretation of the terms of the contract is primarily for the Arbitrator to decide and the legal position with respect to the exercise of jurisdiction under Section 34 of the Act, is now well established. This Court cannot merely on an erroneous application of law, re-appreciate the evidence as it would be an encroachment upon the domain of the learned Arbitrator. The Supreme Court has also repeatedly observed that the scope of interference under Section 34 of the Act is extremely narrow, and the Court must be circumspect whilst dealing with cases thereunder. (*See: MMTC Ltd. v. Vedanta Ltd.*⁹ and *Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd.*¹⁰).

15. The judgments cited by TEL are distinguishable on facts. TEL has placed reliance on the judgment of this Court in *Dhoot Developers* (*supra*) [para 45] to state that despite not returning a finding of ‘no loss’ on part of TEL, the learned Arbitrator allowed the claim of TTL for return of amount encashed by TEL under CPBGs. In the said case, there was a complete abandonment of work by the sub-contractor which caused losses to the Petitioner therein. Particularly, the loss or damage suffered due to non-performance of the Respondent had been specifically brought out in the evidence. In the present scenario, TTL called upon TEL to cancel the contract on 11th June, 2018 but continued to supply transformers till September, 2018 and the same were accepted by TEL and ultimately the contract was terminated on 1st October, 2018. Pertinently, there was no convincing evidence of any loss.

⁹ (2019) 4 SCC 163.

¹⁰ 2020 (5) SCJ 501.

16. Next, TEL's reliance on the judgment of this Court in ***India Yamaha Ltd. (supra)*** to assail the finding of the learned Arbitrator on the aspect of TEL's orders on Toshiba being 'shady' and 'tainted', is also misplaced. In ***India Yamaha Ltd. (supra)***, [paras 10 and 16] it has been held that the Arbitral Tribunal cannot go beyond the terms of the agreement between the parties and comment upon the 'human relationships' underlying the commercial contract, based upon conjectures and surmises. The Arbitral Tribunal therein made far-reaching assumptions and general statements about the 'behavioural character' of the parties without there being any occasion to do so as the agreement in between the parties was not under challenge. It was thus held that it was inappropriate for the Arbitral Tribunal to make overreaching observations to the effect that the 'contract is one-sided' or one party is the 'dominant party'. None of this is applicable to the present case as the observations made by the learned Arbitrator are borne out from the record. He finds the transactions with Toshiba to be somewhat strange on two counts: (a) while the purchase orders with TTL were terminated on 1st October, 2018, TEL entered into negotiations in July, 2018 itself and (b) as per the RTI reply from PGCIL dated 25th July, 2019 there has been no supply/receipt of any transformers from Toshiba. Since, the procurement from Toshiba was the primary justification for invoking the CPBGs, to recover the costs incurred, it was necessary for the learned Arbitrator to take into consideration the transaction between TEL and Toshiba. Observations made in this regard are germane to the present controversy.

17. TEL also cited the order of the Division Bench of this Court in ***Virender Khanna (supra)*** [paras 8,9 and 14] to highlight that the findings of the learned

Arbitrator in para 58 of the impugned award are contradictory and incongruous. The factual scenario in *Virender Khanna (supra)* was entirely different. The Appellant therein had encashed the bank guarantee furnished by the Respondent for one project (Ranchi Airport) to recover the dues of another project (Kolkata Airport). While this was found to be untenable by the Arbitral Tribunal, it did not direct the refund of the said amount stating that disputes regarding the Kolkata Airport project were *sub-judice* and the Arbitral Tribunal adjudicating the said disputes would deal with the recovery of the encashed bank guarantee. Further, the Arbitral Tribunal, after recording that interest was to be awarded from the date the cause of action arose, instead awarded interest from the date the request for appointment of arbitrator was made. The learned Single Judge found these findings to be unsustainable and accordingly set them aside. That view has been confirmed by the Division Bench on the ground that the findings of the Arbitral Tribunal were contradictory and incongruous.

18. In the present case, the Court does not also find any patent illegality appearing on the face of the record which would go to the root of the matter. TEL has drawn the attention of the Court to para 58 of the impugned award to highlight the contradiction made by the learned Arbitrator. The relevant portion reads as under:

“58. The bank guarantee is only for the purpose to secure the losses incurred for non-performance of the contract i.e. non-supply/ short-supply. Since there is a specific provision as per clause 15 of the terms and conditions, in case of non-supply/ short-supply the counter claimant/respondent could purchase material from any other agency at the risk and cost of claimant and adjust the same against the bank guarantee. Encashment of bank guarantee cannot, be used as penal clause for non-performance of the contract i.e. for non-supply/ short-supply of the material. since there is a special procedure provided in the terms and conditions in

case of non-supply and short supply the respondent cannot resort to encashment of bank guarantee by way of penalty. Respondent has to adhere to clause 15 only.”

19. The above observations made by the learned Arbitrator, do not exhibit any inconsistency. They are reasoned findings which decide the issues in terms of Section 31(3) of the Act. Besides, the award has to be read in its entirety to understand the reasoning of the learned Arbitrator. Once TEL had terminated the contract, it could have proceeded under Clause 15 of the commercial terms and conditions and procured the balance goods from a third party at the risk and cost of TTL. Unfortunately, it has not been able to prove this loss. In para 58 extracted above, the learned Arbitrator has held that TEL is entitled to adjust the losses towards risk and cost from the amount of CPBGs, but not as a penalty. The *raison d’etre* behind the above finding is that without procuring the balance transformers from Toshiba, TEL could not prove losses towards adjustment of BG amount. The CPBGs were only to secure the non-performance of the contract. The contract has a specific clause which deals with the eventuality of a non-supply/short-supply by TTL, i.e. Clause 11 of the commercial terms and conditions which provides for liquidated damages. Thus, there is no contradiction or ambiguity in the learned Arbitrator’s findings.

20. As regards TEL’s contention that the learned Arbitrator ignored Clause 7 of the purchase orders, we must first take note of the said clause which reads as under:-

“1. The materials are to be guaranteed by SUPPLIER against defective design, material and workmanship for a period of 24 Months from Commissioning or 36 Months from Dispatch whichever is earlier. Contract Performance Bank Guarantee of 10% order value will be submitted by SELLER. Performa of CPBG is as per annexure-IV.

2. After the completion of supply CPBG shall be extended to cover guarantee period as applicable for above package (DMS-01). ”

In terms of the afore-noted clause, after completion of supply, the CPBGs were to be extended to cover guarantee period of 36 months from dispatch. Here, it must be noted that, at no point did TEL ask for the extension of the CPBGs to cover the warranty period. Instead, they took the decision to encash the CPBGs. Therefore, this contention, which is now sought to be urged, is untenable.

21. To conclude, while TTL has been held to be in breach, this does not *ipso facto* lead to the conclusion that TEL had suffered losses. The Petitioner had to necessarily prove the losses to justify encashment of the CPBGs. The invocation of the CPBGs would only be permissible in accordance with their terms. Since it was to secure the losses incurred on account of non-performance of the contract, it was imperative for TEL to have pleaded and proved losses. It cannot be permitted to secure the losses on the basis of conjectures and surmises. In terms of the judgment in ***Kailash Nath*** (*supra*), which was also relied upon by the learned Arbitrator, the legal position on the aspect of damages, is now well settled. It has been held in the said judgment that it is only in cases where damage or loss is difficult or impossible to prove, the liquidated amount named in the contract, if it is a genuine pre-estimate of damage or loss, can be awarded. Where it is possible to prove actual damage or loss, such proof is not dispensed with. It was thus essential for TEL to demonstrate and establish that it in fact suffered a loss, in order to be entitled to any compensation. The findings rendered by the learned Arbitrator, cannot be held to be perverse or inadequate or unintelligible. Rather they are found to be reasonable and in consonance with the law on the subject. Therefore, the

impugned award does not warrant any interference under Section 34 of the Act.

22. In view of the above, the present petition along with the pending application is dismissed.

SANJEEV NARULA, J

AUGUST 04, 2021

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(corrected and released on 04th September, 2021)

