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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Decided on: 18th April, 2022

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FAO(OS) (COMM) 84/2022

SATLUJ JAL VIDYUT NIGAM LTD.

.....Appellant

Represented by: Mr. Anil Nag & Mr. Arun Singh,
Advocates.

versus

JAIPRAKASH HYUNDAI CONSORTIUM (JHC)

..... Respondent

Represented by: Appearance not given.

CORAM:**HON'BLE MS. JUSTICE MUKTA GUPTA****HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA****NEENA BANSAL KRISHNA, J. (ORAL)****CM APPL. 18527/2022 (Exemption)**

1. Allowed, subject to all just exceptions.
2. Application is disposed of.

FAO(OS) (COMM) 84/2022 & CM APPL. 18526/2022 (stay)

1. An appeal under Section 37 1(c) of the Arbitration and Conciliation Action, 1996(*hereinafter referred to as the Act, 1996*) read with Section 13 of the Commercial Courts Act, 2015 has been filed to challenge the judgment dated 24th December, 2021 of the learned Single Judge dismissing the objections filed by the appellant challenging the award granting ₹ 2,21,32,831/- and interest to the respondent.
2. The facts in brief are that the respondent Jaiprakash Hyundai Consortium (*hereinafter referred to as "JHC"*) which is a consortium



between M/s Jaiprakash Associates Limited, a Company registered under Companies Act, 1956 and M/s Hyundai Engineering & Construction Company Ltd., a Company registered under the laws of South Korea, submitted its bid in response to the invitation to bid by the appellant in 1992, for various works including civil work of pressure shaft and Power House complex relating to Naph Jhakri Hydroelectric Project (*hereinafter referred to as "the project"*). The respondent emerged as the successful bidder and the Letter of Award 26th May, 1993 was issued for a total value of ₹475.01 crores which was followed by the Agreement dated 24th June, 1993. The date of commencement of the project was 1st July, 1993 and was expected to complete power shafts within a period of fifty seven months and the power house complex within sixty three months from the date of commencement of the project. Resultantly, the scheduled dates of completion were 31st March, 1998 and 30th September, 1998 respectively.

3. The dispute arose between the parties regarding the appellant's failure to perform its obligations under the Agreement. According to the respondent, in terms of sub clause 4.5(i) of Chapter IV of Additional Conditions of Contract (ACC) which was included as an integral part of the Agreement, the appellant was obligated to provide the respondent with AC 3 phase 50 cycle, 440/400 V construction power at various work sites, colonies and offices. However, appellant failed to provide the requisite construction power causing the respondent to incur additional expenses for stepping down and stepping up the power for distribution and consumption at the site. A meeting was held on 9th July, 1993 between the parties wherein the appellant undertook to provide 22 KV construction power at various sites even though this was not in conformity with the terms of Agreement.



The respondent by its letter dated 3rd September, 1993 disputed it as not being in conformity with the contract and claimed that as per the terms of the Agreement, appellant was obligated to provide construction power at 440/400 V instead of 22 KV. The appellant reiterated its stand to supply the construction power at 22 KV in various meetings subsequently held between the parties between 9th October, 1993 to 12th October, 1993.

4. JHC, the respondent vide its letter dated 23rd December, 1993 communicated to the appellant that it required construction power at 440/400 V at five points stated therein. The construction power was admittedly provided only at two points; viz. one point in the power house complex and at one point near Butter Valve House. The respondent claimed that it had incurred additional expenditure since it had to install a large number of transformers and other gadgets for stepping down the construction power from 22 KV to 440/400 V.

5. The additional expenses incurred by the respondent were submitted to the Engineer-In-Charge vide letter dated 16th March, 1997 and were updated by letters dated 18th November 1998 and 1st June, 1999. The claim of the respondent was rejected by Engineer-In-charge on 5th April, 2000 by holding that the claim for additional expenditure was not tenable. The respondent sought a review of the decision but the same was declined by Engineer-In-Charge on 29th May, 2001.

6. The respondent appealed to the Chairman-cum- Managing Director, SJVNL for approval of the reimbursement of the additional expenses incurred by it, but the claim was rejected on 16th April, 2002 by holding that in terms of schedule of tariff of HPSCCL and abridged conditions as applicable to the contract in question, the supply of power above 11 KVA



was to be provided at the option of the supplier (HPSCL) and the claim of respondent was not tenable.

7. The respondent filed its claim before Dispute Review Board (*hereinafter "DRB"*) which after considering the response filed by the appellant, gave majority decision dated 13th January, 2005 in favour of the respondent.

8. The appellant invoked the arbitration clause and the Arbitral Tribunal was constituted. JHC, the respondent was treated as claimant while the appellant was treated as the respondent before the Arbitral Tribunal. The Arbitral Tribunal considered the rival contentions raised by both the parties and awarded an amount of ₹2,21,32,831/- along with interest for pre reference period up to 27th December, 2005 @ 10% per annum amounting to ₹1,35,67,750 and *pendente lite* interest from 28th December, 2005 to the date of award @ 10% per annum quantified at ₹40,57,700/- in favour of the respondent. Aggrieved by the Arbitral Award, objections under Section 34 of the Act, 1996 were filed by the appellant.

9. The learned Single Judge vide impugned order dated 24th December, 2021 considered the contentions of the appellant in detail and found that the impugned award was well reasoned and suffered from no patent illegality and dismissed the objections under Section 34 of the Act, 1996. Aggrieved by the dismissal, the appeal under Section 37 of the Act, 1996 has been filed.

10. The main grounds agitated are that the award of the Arbitral Tribunal was contrary to the provisions of the contract. Sub clause (i), (ii) and (iii) of Clause 4.5 of the Additional Conditions of the Contract (ACC) clearly mentioned that the HPSEB had the discretion to supply power at 11 KV or



above and the conclusion that this stipulation did not form part of the agreed terms of the contract, is totally untenable. Moreover, clause 2.3.8 of Chapter II Technical Specification provided that it was for the contractor to install, operate and maintain electrical distribution system which shall include transformers, circuit braker disconnecting and safety switches, voltage regulators and other equipments necessary for power distribution throughout the site and temporary facilities beyond the supply established by NJPC/ HPSEB. Furthermore, Arbitral Tribunal did not take into account the fact that the respondent availed a rebate of 7.5% on tariff charges specifically for supply of power at 440/400 V under the Schedule of Tariff of HPSEB and yet submitted the claim for actual supply of power having been made at 22 KV which again amounts to a patent illegality.

11. It is claimed by the appellant that a clarification during the Pre-Bid meeting dated 21st April, 1992 was given that construction power would be supplied at 22 KV. The respondent being aware of supply of power at 11 KV in the light of the Minutes of Pre - Bid Meeting held on 21st April, 1992 and the HPSEB schedule of tariff, it planned its bid accordingly by making provision for eight step down transformers and it had accounted for the expenditure that was likely to be incurred in the event of power being supplied at 11 KV as per schedule of tariff. The conclusions of the Arbitral Award that the clarification given in pre-bid meeting did not affect the proposal of the appellant to supply power at 440/400 V was untenable as the Tribunal failed to take into consideration the relevant material and the terms of ACC.

12. Moreover, if the terms of modified clause 67 (1) and the decision to supply power at 22 KV was not acceptable to the respondent, it failed to



raise any dispute as contemplated under Clause 67 of General Conditions of Contract (hereinafter 'GCC'). The learned Judge fell in error in affirming the findings of the Tribunal on the question of limitation and in the process overlooked that respondent contractor himself had taken the plea that the Appellant took unilateral decision to supply power at 22 KV in the meeting held on 9th July, 1993 with the representatives of the Contractor but as such the claim was raised for the first time by the respondent before the Engineer-in-Charge on 16th March, 1997 i.e. beyond three years, which was liable to be dismissed on the ground of limitation. Moreover, the timeline envisaged under Clause 67 of the contract was required to be complied in letter and spirit and the failure on the part of the respondent to notify the appellant about his intention to raise the dispute, would not give fresh lease of period of limitation.

13. Further, the respondent had reduced its claim from ₹2,71,95,687/- to ₹1,51,80,733/- during the deliberations before DRB on account of interest free equipment advance availed by the contractor despite which the Arbitral Tribunal declined to note the same and it was also not appreciated by the learned Single Judge even though it amounted to patent illegality.

14. The Appellant has submitted that the Arbitral Award suffers from patent illegality in holding that clause 4.5 (i) ACC was in the nature of proposal when in fact on its acceptance by the respondent/contractor, it became a binding contract. The error in law committed by the Arbitral Tribunal goes to the root of the matter since bidding documents are always in the nature of invitation to offer which may or may not be accepted by the Company inviting the bids. A prayer is made that the order of learned Single Judge dated 24th December, 2021 be set aside.



15. Submissions heard.

16. At the outset, before embarking on the merits of the appeal, it would be pertinent to discuss the scope of interference in an appeal under Section 34 and Section 37 of the Act, 1996.

17. Section 34 of the Act makes provision for the supervisory role of courts for review of arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, when *an award is in conflict with the public policy of India*, which includes cases of fraud, breach of fundamental policy of Indian law and breach of public morality. The other ground provided under Section 34 is **patent illegality**. It specifically provides that an award cannot be set aside on the ground of erroneous application of law or on re-appreciation of fact. In the decision of McDermott International Inc. Vs. Burn Standard Co. Ltd. (2006) 11 SCC 181, a reference was made to the decision of U.P. State Handloom Corpn. Ltd. Vs. Asha Lata Talwar 2009 SCC OnLine All 624 and observed that under Section 34 of the Act of 1996 there is a departure from the scheme of Section 16 in the 1940 Act where perhaps the court was given wider amplitude of powers. The Apex Court interpreted the scope of interference under Section 34 and observed that the court cannot correct errors of the arbitrators. The scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it. The court shall decline to decide the claim that had been rejected even if wrongly by the learned Arbitrator.

18 In the decision of Dyna Technologies (P) Ltd. Vs. Crompton Greaves



Ltd. (2019) 20 SCC 1, the Supreme Court noted that only when there is complete perversity in the reasoning then it can be challenged under the provisions of Section 34 of the Act. In recent decision of National Highway Authority of India vs. M. Hakeem (2021) 9 SCC 1, the three Judges Bench of the Apex Court observed that the position of law stands crystallized today. The findings of facts as well as of law, of the Arbitrator/ Arbitral Tribunal are ordinarily not amenable to interference either under Section 34 or Section 37 of the Act. The scope of interference is only where the finding of the Tribunal is either contrary to the terms of the contract between the parties, or ex facie, perverse, that interference by this Court is absolutely necessary. The Arbitrator/ Tribunal is the final arbiter on facts as well as in law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Act.

19 It the light of the limited scope of this appeal, it needs to be ascertained if the award of the arbitral Tribunal suffered from any breach of public policy or patent illegality.

20 The basic dispute between the parties is whether the power supply was to be made by the appellant at 22 KV instead of 440/400 V. The first contention raised in support of its assertion by the appellant is that in the pre-bid meeting held on 21st April, 1992 a question regarding supply of construction power was raised and the appellant had informed that construction power would be supplied at 22 KV which amounted to modification of terms of contract. However, as rightly observed by the Learned Single Judge, mere possibility of supply construction power at 22 KV was indicated in pre-bid meeting in response to a query raised by one of the bidders. The query did not amount to an unequivocal clarification and



modification of the terms of the contract that the power supply would be only at 22 KV. Whatever be the response of the appellant, the Minutes of Pre Bid Meeting cannot be construed to over ride or amend the express terms of the Agreement to assert that the power supply was to be made by the appellant at 22 KV instead of 440/400 V. Since no amendment was made to the Agreement in regard to the supply of power, the claim of the appellant for supply of power at 22 KV was totally untenable, as rightly held by the learned Single Judge.

21 The other contention raised was that the conclusions arrived were contrary to Clause 4.5 of the ACC, and to Clause 2.3.8.1 of the Technical Specifications which obliged the appellant to provide power as stipulated there under. The relevant clauses read as under:

"4.5 Power for construction and for other purposes

(i) It is proposed that AC 3 phase, 50 Cycle, 440/400 Volts construction power to various sites, colonies, offices etc of Naptha Jhakri Hydroelectric Project will be provided to the Contractor. The electrical energy consumed by the Contractor shall be measured by a suitable meter installed at the point of supply, which shall be sealed in the presence of the Contractor or his authorized representative and read every month for determining the construction of electricity. Each supply point shall be treated as separate connection. Arrangements for further distribution of power to the Contractor's sites, constructional plant, equipment, colonies, offices etc. from the point of supply shall be made by the Contractor at his own cost. The electrical installation plan shall be approved by the Engineer-In-Charge.

(ii) Before the release of the connection, NJPC will require the Contractor to make advance consumption deposit at the prevalent rates. The present rate is



Rs.150.00 per KW or part thereof of the connected load. In addition, the Contractor shall have to deposit Service Connection Charges at the prevalent rate towards the capital cost to be incurred by the HPSEB to make the required power available. The energy consumed as above shall be charged as per 'Schedule B.S. Bulk Supply' of the Schedule of Tariff of HPSEB given at Annexure-XII. The Bulk supply energy rate is 100 paise per KWh with monthly minimum charges of Rs.40.00 per KW or part thereof of the connected load. In addition to the energy charges, the Contractor shall pay electricity duty as levied by the HP Govt. at the rate of 6 paise per KWh. Any changes in the energy rate and the electricity duty thereon during the tenure of the contract in respect of the energy consumed for the execution of permanent Work and Temporary Works will be to the account of the NJPC. Adjustment on this account will be carried out every quarter. However, any change in the rate of advance consumption deposit, Service Connection charges etc during the tenure of the contract shall be borne by the Contractor without any cost to NJPC. All changes in the schedule of Tariff (Annex-XII) in respect of supply of energy to the Contractor's residential colonies, street lighting, offices etc shall be borne by the Contractor without any extra cost to the NJPC."

"Clause 2.3.8 Power Supply and illumination - Chapter -II of Technical Specification (Document-V) (Appendix-7)

2.3.8.1 Power supply provided by NJPC

Provisions for supply of power for construction and other purposes by the NJPC to the Contractor as stipulated in Para 4.5 of Chapter IV Vol.(i) of these documents shall apply.

2.3.8.2 Power supply and illumination provided by the Contractor

(i) The contractor shall install, operate and maintain



electrical distribution system which shall include transformers, circuit breakers, disconnecting and safety switches, voltage regulators, lines poles, hardware, conductors, meters and other equipment necessary for power distribution throughout the site and temporary facilities beyond established by the NJPC/HPSEB."

22 Clause 4.5(i) of ACC clearly stipulates that the power supply was to be made by the appellant at 440/400 V and not 22 KV as asserted by it. Sub-clause (ii) provides that the charges of electricity connection and the consumption shall be borne by the contractor. The reference to the Schedule of Tariff of HPSEB was in the context of payment and did not concern about the nature of power supply. Clause 2.3.8.1 of the Technical Specifications also reiterates that the power supply is according to Clause 4.5 of ACC.

23 Clause 2.3.8.2 merely obliged the respondent to provide the infrastructure for distribution of the electricity within the site. The claim for supply of construction power at 440/400 V was at certain points and not for the distribution of electricity throughout the site for which arrangement had to be made by the respondent in terms of clause 2.3.8.2.

24 The Learned Single Judge's conclusion that the decision of the Appellate Tribunal to award the respondent's claim for compensation on account of non-supply of power as per contractual terms, is based on appreciation of facts and does not warrant any interference on the ground of patent illegality.

25 The appellant had also challenged the finding of the learned Single Judge on the point of limitation by claiming that the objection for the first time in regard to the supply of electricity @ 22 KV was raised in 1993 while



the claim was quantified and filed before the Engineer In-charge on 16th March, 1997 and has been agitated before the Arbitrator vide his claim dated 22nd June, 2006. The claim raised in the arbitration proceedings was clearly beyond three years from the date when the issue arose for the first time in 1993 and was clearly barred by limitation. The process of construction, maintenance and consumption of power was a continuous one and the claim in this regard was quantified by JHC on 16th March, 1997 before the Engineer In-charge in terms of the contract conditions which was rejected by him on 5th April, 2020. The learned Single Judge observed that the period of limitation would stop running once the respondent had made its claim before the Engineer In-charge in accordance with the terms of agreement. The respondent had continued to incur cost for operation and maintenance throughout the period of contract and it has been rightly concluded by the Arbitral Tribunal that the claim was within limitation and this conclusion was held to have been substantiated by ample material and did not call for interference by learned Single Judge.

26 The appellant under Section 37 has not been able to show that the impugned Arbitral Award suffers from any patent illegality. The appeal is, therefore, dismissed.

(NEENA BANSAL KRISHNA)
JUDGE

(MUKTA GUPTA)
JUDGE

APRIL 18, 2022/va