$~2

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

% *Date of Decision: 6th July, 2022*

\+ **FAO(OS) (COMM) 143/2022 & CM APPL. 26216/2022, CM APPL. 26217/2022, CM APPL. 26218/2022, CM APPL. 26219/2022, CM APPL. 26220/2022.**

EASTERN COALFIELDS LIMITED ..... Appellant

Through: Mr. Anupam Lal Das, Sr. Adv. with Mr. Parijat Kishore, Mr. Anirudh Singh, Mr. Krishanu Bavaru & Mr. Saurabh Tanwar, Advs.

Versus

INDIA POWER CORPORATION LTD. (FORMERLY KNOWN AS DPSC LIMITED) ..... Respondent

Through: Mr. Anirban Bhattacharya and Mr. Rajeev Chowdhary, Advs.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J. ***(ORAL)***

1. Eastern Coalfields Limited (hereinafter '**ECL**') has filed the present appeal under Section 37(1)(c) of the Arbitration and Conciliation Act (hereinafter '**the A&C Act**') impugning an order dated 29.10.2021 (hereinafter '**the impugned order**') passed by the learned Single Judge, whereby ECL's application under Section 34 of the A&C Act, seeking to set aside an arbitral award dated 15.02.2021 (hereinafter '**the impugned award**'), was rejected

FACTUAL BACKGROUND

2. On 30.03.1987, ECL entered into an agreement (hereinafter '**the Agreement**') with the respondent (hereinafter '**IPCL**'), for construction, erection and successful commissioning of a 2x10 MW Thermal Power Plant at Chinakuri Mining Complex (hereinafter '**the Power Plant**'). Subsequently, on 31.03.1993, the parties entered into a lease deed (hereinafter '**the Lease Deed**') for a period of twenty years commencing from 01.04.1991 for lease of the Power Plant along with land, buildings and quarters, plant and machinery. In terms of the Agreement, IPCL was entitled to the written down value (hereinafter '**WDV**') of the assets upon handing over the Power Plant in a good running condition to ECL on expiry of the Lease Deed.

3. After execution of the Lease Deed, IPCL commissioned an additional power plant of 1x10 MW capacity.

4. On 31.03.2011, as the Lease Deed expired by efflux of time, IPCL made a request for renewal of the said Lease Deed for a further period of twenty years, however, ECL extended the Lease Deed for a period of one year, that is, till 31.03.2012.

5. On expiry of the Lease Deed on 31.03.2012, IPCL claimed that it was entitled to the WDV of the assets including additions and alterations made by it to the Power Plant, quantified at ₹24.7256 crores. ECL requested IPCL for possession of the Power Plant and claimed that handing over possession of the Power Plant was not conditional upon payment of the WDV. Further, ECL also requested IPCL to supply corroborative material to substantiate its claim against the WDV.

6. Disputes arose between the parties in connection with the Agreement dated 30.03.1987. IPCL filed a Writ Petition under Article 226 of the Constitution of India seeking directions be passed to ECL to pay the WDV. The said petition was disposed of by the Calcutta High Court on 19.03.2013.

7. Thereafter, IPCL filed a Special Leave Petition before the Supreme Court against the aforesaid order. The Supreme Court, by an order dated 17.10.2014, appointed the learned Sole Arbitrator to adjudicate the said disputes between the parties.

ARBITRATION

8. Before the Arbitral Tribunal, IPCL claimed an amount of ₹24.7256 crores on account of the WDV; and, an amount of ₹25.81 crores towards additional expenditure for operating and maintaining the Power Plant. IPCL further claimed interest on the aforesaid amounts at the rate of 18% per annum from 01.04.2012 till the date of payment.

9. ECL contested the claims raised by IPCL. ECL claimed that payment of the WDV was not a pre-condition to deliver peaceful possession of the Power Plant. ECL further claimed that IPCL had not submitted sufficient proof for the WDV, as actual receipts regarding the purchase of plant and machinery were not produced. ECL also raised several counter-claims. It claimed an amount of ₹26,11,94,323/- on account of the rent due; an amount of ₹57.32 crores on account of illegal enhanced tariff towards the coal price; an amount of ₹2,49,56,138.95/-

towards the outstanding coal bill; an amount of ₹305.38 crores towards compensation; and, an amount of ₹9,18,76,046/- towards the security deposit.

10. By the impugned award, the Arbitral Tribunal allowed the claim of IPCL for an amount of ₹24.7256 crores along with interest at the rate of 9% per annum from 06.10.2016 till the date of payment, on account of the WDV. The Arbitral Tribunal further allowed the counter-claim of ECL for an amount of ₹18,66,86,521/- along with interest at the rate of 9% per annum from 06.10.2016 till the date of payment, on account of the rent due.

SECTION 34 OF A&C ACT

11. ECL challenged the impugned award by filing an application under Section 34 of the A&C Act [being OMP (COMM) no. 328/2021 captioned ***Eastern Coalfields Ltd. v. India Power Corporation Ltd.***]. ECL assailed the impugned award on, essentially, two fronts. First, it claimed that the dispute regarding the investment required to bring the Power Plant to an operational state was required to be adjudicated. ECL's application seeking amendment of its counter-claims in this regard was rejected by the Arbitral Tribunal and ECL had preferred an application before the Supreme Court seeking appointment of an Arbitrator to adjudicate the said dispute.

12. Second, it submitted that the impugned award is patently illegal as it was not based on any material. IPCL had not produced any

corroborative documents to establish its claim regarding the WDV. It had merely relied upon the reports of two Chartered Accountant firms – Lodha & Company and M/s De and Bose. However, none were examined on behalf of Lodha & Company and the report of M/s De and Bose was merely a reproduction of the report of Lodha & Company.

13. The learned Single Judge examined the said contentions of ECL and found the same to be unmerited. The learned Single Judge found that the impugned award was final as the Arbitral Tribunal had rejected ECL's application for amendment of its counter-claims on the ground of delay and laches. ECL's right to raise any further dispute was thus, closed.

14. Insofar as ECL's challenge to the quantification of the amount of the WDV is concerned, the learned Single Judge found that the Arbitral Tribunal's decision was based on evaluation of the material available on record and the said decision required no intervention.

REASONS AND CONCLUSION

15. Mr. Das, learned senior counsel appearing for ECL, at the outset, submitted that ECL's challenge to the impugned award on the ground that it was not final, did not survive. He stated that ECL had filed an application before the Supreme Court for appointment of an Arbitrator to adjudicate further disputes, however, the said application [M.A. Diary No. 20972/2021 in Civil Appeal No.9847/2014 captioned ***India Power Corporation Ltd. v. Eastern Coalfields Ltd.***] was rejected by the

Supreme Court in terms of the order dated 15.03.2022. He confined the present appeal to the dispute relating to quantification of the WDV and the decision of the learned Single Judge to reject ECL's challenge in this regard.

16. Mr. Das referred to the cross examination of Mr. Subrata De [Constituent Partner of M/s De and Bose], who was examined as CW-2. He drew the attention of this Court to CW-2's response to Question no. 24 and pointed out that CW-2 had accepted the suggestion that the figures in the report furnished by M/s De and Bose, were a replica of the earlier report [that is, the report submitted by Lodha & Company]. He contended that, therefore, there was no credible material on record to substantiate IPCL's claim regarding quantification of the WDV; and therefore, the impugned award was liable to be set aside. He contended that the learned Single Judge had erred in not appreciating that the impugned award was based on no material and therefore, was vitiated by patent illegality.

17. There is no dispute that IPCL would be entitled to the WDV of the plant and machinery. The principal dispute between the parties relates to the quantification of the said amount. In the arbitral proceedings, IPCL had referred to voluminous correspondences as well as the respective reports furnished by two firms of Chartered Accountants – Lodha & Company and M/s De and Bose. Insofar as improvements, additions and alterations are concerned, IPCL had also produced, on record, certain invoices.

18. The Arbitral Tribunal noted that both the parties had set up two Committees to evaluate the WDV of additional equipment and machinery and had proceeded to consider the same. The amount of the WDV, as claimed by IPCL, was duly certified by the statutory auditors. In addition, it was also supported by a report prepared by M/s De and Bose. IPCL's witness (CW-1) had placed the audited balance sheet of Chinakuri Mining Complex on record. He was extensively cross-examined.

19. The impugned award indicates that the Arbitral Tribunal had evaluated the affidavits and documents tendered by him as well as his responses to the questions put to him in cross-examination. The Arbitral Tribunal had also considered the testimony of CW-2. As stated above, CW-2 was a constituent partner of M/s De and Bose and the said firm had furnished a report, in support of IPCL's claim. CW-2 affirmed that he had prepared the report in question. He was specifically asked whether he had prepared the report by examining all the supporting documents and he responded in the affirmative. He was also asked whether he had the benefit of the report submitted by another Chartered Accountant firm [M/s Lodha & Company] at the time of preparation of his report and he responded in the negative. He also stated in unequivocal terms that he had computed the amounts on the basis of the record made available to him.

20. The Arbitral Tribunal had, after assessing the material on record, concluded that ECL was not justified in seeking further proof for the

amount claimed by IPCL as WDV as the said claim was supported by the reports of Chartered Accountants.

21. In view of the above, the contention that the impugned award is based on no material is, *ex facie*, unmerited. Concededly, IPCL's claim for the WDV was supported by the reports submitted by the Chartered Accountants. It is also apparent that the said material was duly evaluated by the Arbitral Tribunal.

22. It is settled law that the Arbitrator is the final adjudicator of questions of fact. His findings on questions of fact are not amenable to judicial review unless it is established that it is virtually impossible to arrive at such findings on the basis of the material on record; such findings strike at the root of the disputes; and, vitiate the arbitral award on the ground of patent illegality.

23. In the case of ***Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49***, the Supreme Court had held that "*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*." Similarly, in ***Dyna Technologies Private Limited v. Crompton Greaves Limited: (2019) 20 SCC 1***, the Supreme Court held that courts would not interfere merely because an alternative view on facts exists.

24. In ***Ssangyong Engineering and Construction Co. Ltd. v. N.H.A.I.: (2019) 15 SCC 131***, the Supreme Court had, *inter alia*,

observed that a Court under Section 34 cannot re-appreciate evidence, even on the ground of patent illegality.

25. In the present case, there is ample material on record to support IPCL's claim for the WDV. The Arbitral Tribunal has rendered its decision after evaluating and appreciating the evidence on record and it is impermissible for the Court to re-evaluate and re-appreciate the same. And, supplant its opinion in place of that of the Arbitral Tribunal.

26. This Court finds no infirmity with the decision of the learned Single Judge in rejecting ECL's challenge to the impugned award.

27. The present appeal is unmerited and is, accordingly, dismissed. All pending applications are also dismissed.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

JULY 6, 2022
'gsr'