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

% *Date of Decision: 26th July, 2023*

+ O.M.P.(I) (COMM.) 149/2023

SUZLON ENERGY LIMITED

..... Petitioner

Through: Mr. Shashank Garg, Mr. Aman Gupta and Ms. Nishtha Jain, Advocates.

versus

INDIAN OIL CORPORATION
LIMITED

..... Respondent

Through: Mr. Abhinav Vasisht, Senior Advocate with Ms. Astha Sharma, Mr. Karan Jaiswal, Mr. Shubham Hasija and Ms. Akshita Sachdeva, Advocates.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J. (ORAL)

1. With the consent of learned counsel for the Petitioner and learned Senior Counsel for the Respondent, petition is taken up for hearing.

2. Present petition has been filed by the Petitioner under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the '1996 Act') seeking directions in favour of the Petitioner and against the Respondent for release of original 4 Performance Bank Guarantees (PBGs) bearing Nos.0479116BG1000596, 0479116BG1000597, 0479116BG1000593 and 0479116BG1000595 for an amount of Rs. 12,24,00,000/-, Rs. 3,24,88,239/-, Rs. 12,21,00,000/- and Rs. 3,58,59,367/- which were valid till 30.06.2023 when the present petition was filed. In the alternative, it is prayed that



Respondent be restrained from invoking/encashing the PBGs and/or issuing any communication to the Petitioner or Petitioner's Bank for extending the validity of the PBGs beyond 30.06.2023.

3. Dispute between the parties relates to a Tender issued on 29.06.2015 for setting up wind farms of minimum 25 MW($\pm 10\%$) capacity or in multiple thereof at single or multiple sites totalling upto 100 MW($\pm 10\%$) anywhere in the States of Rajasthan, Madhya Pradesh, Gujarat, Karnataka and Andhra Pradesh in India on lump sum turnkey basis. On 04.03.2016, four letters of acceptance (LoAs) were issued by the Respondent, the details of which are as follows:-

- a) Work Order for 25.2 MW wind farm at Bhopalgarh, Rajasthan;
- b) Work Order for 23.1 MW wind farm at Kaladungar, Rajasthan;
- c) Work Order for 25.2 MW wind farm at Bhopalgarh, Rajasthan;
- d) Work Order for 23.1 MW wind farm at Kaladungar, Rajasthan.

4. The total value of the work under the 04 LoAs was to the tune of Rs.3,706,387,215.10 (Three Hundred Seventy Crores Sixty Three Lacs Eighty Seven Thousand Two Hundred Fifteen and Ten Paise). As per Clause 2.0 of the LoAs, Petitioner was required to deposit/furnish PBGs from a Nationalized Bank to secure the performance. PBGs as originally submitted were valid from 18.03.2016 to 30.06.2019.

5. Thereafter, disputes arose between the parties and there being an arbitration agreement, notice of invocation was issued by the Petitioner on 23.05.2020. An Arbitral Tribunal was thereafter constituted which pronounced the award on 25.02.2023. It is a common case between the parties that as far as PBGs are concerned both majority and minority awards unanimously allowed the claim of



the Petitioner for release of PBGs, holding the Defect Liability Notice and withholding of PBGs by the Respondent to be illegal and in violation of the contract between the parties. Armed with the award, Petitioner vide letter dated 10.03.2023 called upon the Respondent to comply with the award dated 25.02.2023 and release the PBGs within 10 days from the receipt of the letter. Getting no response, Petitioner was constrained to file the present petition. It may be mentioned that both parties had approached the Arbitral Tribunal under Section 33 of the 1996 Act for correction of the award, on which an order has been passed on 10.07.2023, whereby corrections have been carried out by the Tribunal.

6. Mr. Shashank Garg, learned counsel for the Petitioner submits that the learned Arbitral Tribunal has held that the withholding of the PBGs beyond 16.03.2019 was unlawful and in violation of the expressed terms of the contract between the parties and directed the release of PBGs. Both the majority and minority award dated 25.02.2023 are unanimous on the point that the performance against which the PBGs were furnished was complete and Petitioner is entitled to return of the PBGs as well as refund of charges spent on undue extensions at the instance of the Respondent. The contention of the Respondent with respect to a positive finding in its favour on the issue of IRR compensation does not come in the way of the grant of relief sought in the present petition since the Arbitral Tribunal has consciously ordered return of all 04 PBGs despite a declaration in favour of the Respondent on the IRR aspect.

7. It is also submitted that the contract between the parties pertained to erection, commissioning and providing O&M services for



wind farms to be set up for supply of electricity in the State of Rajasthan. The time period for completion of erection and commissioning upto stabilization was 12 months from the date of issue of LoAs while the time period for O&M part of the contract was 20 years from the date of stabilization of the wind farms. As per Clause 2.3.0 of the Special Conditions of Contract, PBGs were issued in respect of erection and commissioning part of the contract only and as per Clause 2.3.4, PBGs were to be returned after 03 months from expiry of defect liability period. The said period expired for Bhopalgarh wind farm on 16.03.2019 and for Kaladungar wind farm on 18.03.2019. Thus under the contract Petitioner became entitled for return of PBGs on 16.06.2019 and 18.06.2019 respectively and there is no justifiable cause or plausible reason for the Respondent to withhold the PBGs.

8. Mr. Garg submits that the award is unchallenged as of today and there is no valid reason why the PBGs should not be returned to the Petitioner and/or not invoked and encashed. As the arbitral award stands presently with respect to the Respondent's claim for securing the IRR, there is no determined or quantified liability fixed on the Petitioner and this issue is pending before the High Court of Rajasthan. In any event, it is impossible to quantify the liability with respect to IRR until a decision is taken on the APPC rates finally. Be that as it may, even assuming that Respondent is advised to challenge the award, Respondent is secured even after the PBGs are released to the Petitioner inasmuch as the State Bank of India has categorically stated in its letter dated 27.07.2023 that PBGs have a claim period till 31.07.2024 even though they are expiring on 31.07.2023 and can be



invoked till 31.07.2024.

9. Mr. Abhinav Vasisht, learned Senior Counsel appearing on behalf of the Respondent submits that the reliefs claimed in the present petition cannot be granted as they are in the nature of enforcement of the award *albeit* Petitioner may have a separate remedy to seek enforcement. It is submitted that law is settled that there cannot be a restraint on invocation/encashment of unconditional bank guarantees as PBGs are independent contracts and the Bank is under an obligation to honour the claims of the beneficiary on a mere demand, without any protest and irrespective of the disputes between the parties. Petitioner had made a similar request as an interim measure under Section 17 of the 1996 Act but the Arbitral Tribunal vide order dated 21.12.2021 declined to pass a direction to the Respondent to release the PBGs.

10. It is further contended that when Clauses 1.13.2 of Notice Inviting Tender, 1.0.14.0 of '*General Conditions of Lumpsum Turnkey (LSTK) Contract*' and 6 of the LoA are read conjointly, it can lead to only one conclusion that 'contract' means totality of the agreements entered into between the parties as also that the contract documents are not severable and separate work orders form part of a single contract. PBGs were therefore given under the contract as a whole and for the entire period of 20 years and shall remain in force during the entire period taken for performance of the contract and until the claims of the Respondent are satisfied and/or discharged.

11. Respondent has taken a decision to challenge the award and therefore the interest of the Respondent is required to be protected by permitting the invocation/encashment of the PBGs. It is emphasised



that if PBGs are released/returned and their validity expires on 31.07.2023, Respondent will be unable to invoke them and an irreparable harm shall be caused even if the Respondent was to succeed in its challenge to the award passed by the Arbitral Tribunal. Mr. Vasisht contends that the Arbitral Tribunal had framed 03 questions which as per them were crucial to decide the claims and counter claims and all the three questions have been answered and issues have been decided in favour of the Respondent. In fact, all counter claims raised by the Respondent have been allowed, save and except, for the quantification of one of the counter claims, which was deferred on account of pendency of the proceedings before the Rajasthan High Court and therefore even at this stage it cannot be said that the award is against the Respondent.

12. I have heard the learned counsel for the Petitioner and learned Senior Counsel for the Respondent.

13. Having given my thoughtful consideration, I am of the view that both parties are partially correct. Mr. Garg is right in contending that the learned Arbitral Tribunal has categorically negated the contention of the Respondent that the money under the PBGs can be utilized by the Respondent against the IRR liability of the Petitioner and held that retention of the PBGs by the Respondent beyond 02 years from the stabilization period i.e. beyond 16.03.2019 is unjustified and illegal. In view of this finding, direction was issued to the Respondent to forthwith return all the original PBGs. It is undisputed that the award is not under challenge presently *albeit* it was stated on behalf of the Respondent that steps have been initiated to challenge the award. Therefore, it is rightly urged by Mr. Garg that



Respondent has no right to withhold the PBGs and/or insist on their validation beyond 31.07.2023 to the prejudice of the Petitioner, who has an award in its favour on this issue.

14. On the other hand, there is merit in the contention of the Respondent that the disputes between the parties have not attained finality and the award has not been accepted by the Respondent and in fact Respondent is in the process of challenging the award. Mr. Vasisht is also right in submitting that if the validity of the PBGs is not extended beyond 31.07.2023, Respondent will not be able to invoke the PBGs beyond the said date.

15. In view of the submissions by the respective parties and to balance the equities, the petition is disposed of by leaving it open to the Respondent to invoke the PBGs, as aforementioned, within the validity period, if so advised, but by restraining the Respondent from encashing the same. Needless to state that this direction shall be operative until any further order or direction that may be passed by the appropriate Court in proceedings preferred by any of the parties in accordance with law in respect of the arbitral award dated 25.02.2023.

16. It is made clear that this Court has not expressed any opinion on the merits of the disputes between the parties and/or the arbitral award. All rights and contentions of the parties are left open to be decided in appropriate proceedings.

JYOTI SINGH, J

JULY 26, 2023/shivam