

CWP-7950 of 2024

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IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

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CWP-7950 of 2024
Reserved on:08.04.2024
Pronounced on:29.04.2024

Talwandi Sabo Power Limited ...Petitioner

Versus

Punjab State Power Corporation Limited ...Respondent

CORAM: HON'BLE MR. JUSTICE SUVIR SEHGAL

Present: Mr.Chetan Mittal, Senior Advocate with
Mr. Kunal Mulwani, Advocate,
Mr. Nitin Kaushal, Advocate and
Mr. Ritvik Garg, Advocate for the petitioner.

Mr. Gurminder Singh, Senior Advocate with
Mr. Jatinder Singh Gill, Advocate for the caveator-respondent.

SUVIR SEHGAL, J.

1. By way of present writ petition filed under Article 226/227 of the Constitution of India, petitioner has approached this Court *inter alia* for issuance of a writ in the nature of certiorari for quashing orders dated 11.02.2024, 29.02.2024 and 02.04.2024, Annexures P-1, P-2 and P-2/A, respectively, passed by the learned Arbitral Tribunal, whereby amendment, rectification as well as clarificatory/modification applications, Annexures P-19, P-22 and P-26, respectively, have been disposed of.

2. Facts, leading to the filing of the petition, are that a Power Purchase Agreement (PPA) dated 01.09.2008, Annexure P-3, was executed

between the petitioner and the respondent for supply of 100% power from petitioner's thermal power plant at District Mansa. A petition under Section 86 (1) (f) of the Electricity Act, 2003, was filed by the petitioner before the Punjab State Electricity Regulatory Commission (for short "PSERC"), Annexure P-5, raising some claims, which was contested by the respondent by filing a reply. By reference order dated 06.11.2015, Annexure P-8, PSERC referred the matter for arbitration and by order dated 17.12.2015, Annexure P-9, it constituted an Arbitral Tribunal comprising of three members. Petitioner appeared before the Tribunal and submitted its statement of claim dated 19.02.2016, Annexure P-10, and the respondent submitted its statement of defence and counter-claim, Annexure P-12. Pleadings were completed before the Tribunal and by order dated 30.11.2016, Annexure P-15, the Tribunal framed issues for adjudication. Since, the period for conclusion of the arbitration proceedings expired, petitioner filed an application under Section 29-A (5) of the Arbitration and Conciliation Act, 1996 (for short "the Act of 1996"), for extension of time, which was rejected by the District Court. Petitioner approached this Court by way of a revision petition and this Court by order dated 05.10.2023 remanded the matter to the District Court for fresh decision. A fresh order dated 10.11.2023 was passed by the District Court allowing the application and extending the time for conclusion of arbitration proceedings by six months. Revision petition filed by respondent was dismissed by this Court by order dated 14.12.2023, Annexure P-16. In SLP filed by the respondent, Supreme Court by order dated 05.01.2024, Annexure P-17, re-constituted the Arbitral Tribunal and extended the time schedule for conclusion of the

arbitration proceedings till 31.07.2024. Petitioner filed an application dated 20.01.2024, Annexure P-19, for amendment of the statement of the claim, which was contested by the respondent by filing a reply. Written submissions were submitted by the parties and by impugned order dated 11.02.2024, Annexure P-1, application was disposed of. Another application dated 21.02.2024, Annexure P-22, was filed by the petitioner for rectification of the order before the Tribunal, which after contest by the respondent, was disposed of by the Tribunal by impugned order dated 29.02.2024, Annexure P-2. Assailing both the orders, petitioner approached this Court and by order dated 20.03.2024, Annexure P-25, writ petition was permitted to be withdrawn with liberty to move an application before the Tribunal seeking clarification. An application dated 24.03.2024, Annexure P-26, was moved by the petitioner to which the respondent submitted reply dated 30.03.2024, Annexure P-27, and by impugned order dated 02.04.2024, Annexure P-2/A, Tribunal disposed of the applications by modifying its order dated 29.02.2024, Annexure P-2. Petitioner is before this Court in the above background.

3. While making a reference to the orders, Annexures P-11 and P-18, passed by the Appellate Tribunal under the Electricity Act, 2003, (for short “the Appellate Tribunal”), learned senior counsel representing the petitioner has urged that these orders, which have been passed during the pendency of arbitration proceedings, have brought about a material change in the circumstances. He contends that this has necessitated the amendment of the claim statement, which being formal, should have been permitted by the Arbitral Tribunal. Relying on **Pankaja and another Versus Yellappa**

(Dead) By LRs and others (2004) 6 SCC 415, he submits that granting amendment will subserve the ultimate cause of justice and avoid further litigation.

4. Opposing the petition, learned senior counsel for the respondent, who is on caveat, has asserted that as the matter was referred to arbitration under Section 86 (1) (f) of the Electricity Act, 2003, by the PSERC, the Arbitral Tribunal cannot go beyond the reference order. It is his argument that allowing the amendment would enlarge the scope of reference, which is impermissible. He has relied upon **Gujarat Urja Vikas Nigam Ltd. Versus Essar Power Ltd. (2008) 4 SCC 755** and **MSK Projects India (JV) Limited Versus State of Rajasthan and another (2011) 10 SCC 573**.

5. I have heard counsel for the parties at length and considered their respective submissions.

6. In order to appreciate the contentions of the parties, it is necessary to examine the relief sought by the petitioner in its petition, Annexure P-5, filed before the PSERC. The prayer made by the petitioner is reproduced hereunder:-

“44. In the light of the aforesaid facts and circumstances, the Petitioner therefore most humbly and respectfully prays that this Hon’ble Commission be pleased to:-

(a) Declare that the floods at the plant site, non-availability of domestic MCL linkage coal and continuing insufficiency of domestic MCL linkage coal are Force Majeure events in terms of the PPA;

(b) Direct the Respondent to release short payments of INR 179,26,10,153 (Rupees One seventy

nine crores twenty six lacs ten thousand and one hundred fifty three only) for the period from 5 July 2014 to 31 October 2014 being withheld by the Respondent arbitrarily and without any legal and contractual basis along with applicable surcharge as per PPA terms and to which the Petitioner is entitled on account of Force Majeure events;

(c) Approve the claim of the Petitioner for Deemed capacity of 109.66 Million units and direct the Respondent to pay Capacity charges (approximately Rs.3,20,00,000/-) for the period from 3 December 2014 to 25 December 2014 for the said deemed capacity, and

(d) Allow the Petitioner to claim further Capacity charges (based on normative availability) for period after December 2014 on account of increased cumulative availability, subject to approval of above claims/prayers.

(e) Permanently restrain the Respondent from penalizing the Petitioner on account of availability of the Power Plant below 75% for reasons of Force Majeure events;

(f) Stay the imposition/levy of any penalty by Respondent on account of availability of the Petitioner being less than 75% during the FY 2014-15.

(g) Pass any such other and further reliefs as this Hon'ble Commission deems just and proper in the nature and circumstances of the present case."

7. By its order dated 06.11.2015, Annexure P-8, PSERC, found that the decision can only be taken after considering the oral and documentary evidence, which can be better carried out through the medium of arbitration. It was, therefore, decided to refer the matter to arbitration and by a subsequent order, Annexure P-9, it constituted an Arbitral Tribunal comprising of three members. During the pendency of the arbitral

proceedings, some appeals filed by petitioner came to be decided by the Appellate Tribunal. By its judgment dated 07.04.2016, Annexure P-11, the Appellate Tribunal held that respondent is under obligation to sign the Fuel Supply Agreement with the supplier, namely, Mahanadi Coalfields Limited and it cannot be absolved of its obligation to supply fuel to the petitioner for its power generation agreement. By a subsequent decision dated 19.07.2021, Annexure P-18, in a different set of appeals, Appellate Tribunal directed respondent to make payment of differential amount as sought in Appeal No.220 of 2019 alongwith late payment of surcharge from the date of billing for the period from June, 2017 to September, 2017, and also directed it to pay cost of alternate/imported coal incurred by the petitioner alongwith late payment surcharge and deemed capacity charges from October, 2017 onwards. Petitioner moved an application, Annexure P-19, for amendment of the statement of claim and sought additions in the statement of claim pursuant to above judgments, as also to add additional paragraphs in the prayer clause. The additional prayers sought to be included by the petitioner are reproduced hereunder:-

“B. After prayer (c) in the SoC, the following prayers to be added:-

“(d) Direct the Respondent to pay Deemed Capacity Charges to the Claimant amounting to Rs.184.30 Crores for the period 06.07.2014 to 04.10.2014 and 03.12.2014 to 25.12.2014 as compensation/damages as claimed under paragraph 56A to 56N above;

(e) Award to the Claimant pre-suit interest at the rate of 18% per annum on the aforesaid amounts or at the rate of Late Payment Surcharge prescribed under the

PPA, from the date on which the respective causes of action arose;

(f) Award to the Claimant pendente lite and future interest @ 18% per annum or at the rate of Late Payment Surcharge prescribed under the PPA, from the date of filing of the Statement of Claim until the passing of the award;

(g) Direct the Respondent to pay the costs of the present arbitration;

(h) Direct the Respondent to refund the amount of rebate illegally availed while making part payment of the Invoices for the since July 2014 and/or”

8. The application was disposed of by the Arbitral Tribunal vide order, Annexure P-1, by permitting the petitioner to introduce additional grounds, however, the additional reliefs sought to be introduced were declined holding that they were already covered in the reliefs prayed. Tribunal was of the view that it was not necessary for the petitioner to seek introduction of any new relief and it did not have the jurisdiction to alter/amend the reference made by the PSERC.

9. As noticed above, the dispute was referred to the Arbitral Tribunal by the PSERC under Section 86 (1)(f) of the Electricity Act, 2003, which came up for interpretation before the Supreme Court in ***Gujarat Urja Vikas Nigam's Case Limited (supra)***. On a harmonious construction of the provisions of the Electricity Act and the Act of 1996, Supreme Court held that whenever there is a dispute between a licensee and a generating company, only the Electricity Regulatory Commission or Arbitrator(s) nominated by it can resolve such a dispute, whereas all other disputes would be decided in accordance with Section 11 of the Act of 1996. It was clarified

by the Supreme Court that all disputes, not merely those pertaining to the matters referred to in Section 86 (1) between the licensee and generating company, can be resolved by the Commission or an Arbitrator appointed by it as there is no restriction in this Section regarding the nature of the disputes. Supreme Court has held that the word “and” in Section 86 (1) (f) has to be read as “or” since the Electricity Commission cannot resolve the dispute itself as also refer it to Arbitration.

10. An examination of the reliefs sought by the petitioner in its petition, Annexure P-5, before the PSERC, reproduced above, shows that there was a dispute between the parties and the petitioner had demanded payments withheld by the respondent alongwith applicable surcharge as per the PPA and also claimed Deemed Capacity Charges. This dispute was referred by the PSERC to the Arbitrator vide order, Annexure P-8. Now by moving an application for amendment, Annexure P-19, the petitioner is seeking to broaden the scope of the relief sought by it. An Arbitral Tribunal is bound to act and decide the dispute within the terms of the reference made to it. It can neither add nor incorporate a new prayer in the claim, without reference by the PSERC.

11. An Arbitral Tribunal cannot go outside the reference order and cannot widen its jurisdiction by dealing with disputes not referred to it. It has been held by the Supreme Court in ***MSK Project's case (supra)*** that Arbitral Tribunal being a special Tribunal, gets its jurisdiction to proceed with the case only from the reference made to it and it is impermissible for it to surpass the terms of the reference. Supreme Court observed that if the dispute is not within the scope of the arbitration clause, it is not within in the

jurisdiction of the Tribunal to entertain it. By the addition of the new prayers, petitioner is seeking to enlarge and change the reference made to the Arbitral Tribunal, which is not permissible. This Court is, therefore, of the view that the orders, Annexures P-1, P-2 and P-2/A, passed by the learned Arbitral Tribunal do not call for any interference.

12. Finding no merit in the writ petition, it is hereby dismissed.

29.04.2024
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(SUVIR SEHGAL)
JUDGE

Whether Speaking/reasoned	Yes/No
Whether Reportable	Yes/No