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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **W.P.(C) 2705/2024, CM APPL. 11029/2024, CM APPL. 11031/2024,**
CM APPL. 26145/2024
SIEMENS GAMESA RENEWABLE POWER PRIVATE LIMITED

.....Petitioner

Through: Mr. Rajiv Nayar, Senior Advocate
with Mr. Ajay Bhargava, Mr.
Abhishar Bairagi and Mr. Milind
Sharma, Advocates.

versus

INDIAN OIL CORPORATION LIMITEDRespondent
Through: Mr. Rajat Navet, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER
21.08.2024

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1. The Petitioner was awarded the tender by the Respondent to set up wind farm for setting up of 24 MW wind farm at Devikot, State of Rajasthan. In relation to the same, the parties have executed the following different contracts:

- i) Design, Manufacture & Supply dated 22nd March 2016;
- ii) Installation, Erection & Commissioning dated –22nd March 2016;¹
- iii) Operation & Maintenance dated 28th March, 2016 of 24 MW wind farm at Devikot, State of Rajasthan, for the Project.²

2. The Project Contracts include the General Conditions of Contract and Special Conditions of Contract, as were provided in the tender by reference,

¹ inadvertently mentioned as 30th December, 2016 in the instant writ Petition

² hereinafter collectively referred as “Project Contracts”



which provides for a dispute resolution mechanism through arbitration. The arbitration clause³ reads as under:

“ARBITRATION

9.0.0.0 ARBITRATION

9.1.0.0. Subject to the provisions of Clauses 6.7.1.0, 6.7.2.0 and 9.1.1.0. hereof, any dispute arising out of a Notified Claim of the CONTRACTOR included in the Final Bill of the CONTRACTOR in accordance with the provisions of Clause 6.6.3.0 hereof, if the CONTRACTOR has not opted for the Alternative Dispute Resolution Machinery referred to in Clause 9.2.0.0 in respect thereof, and any dispute arising out of an amount claimed by the OWNER against the CONTRACTOR shall be referred to the arbitration by an Arbitral Tribunal comprised of 3 (three) arbitrators selected in accordance with the provisions of the Arbitration & Conciliation Act, 1996. It is specifically agreed that the OWNER may prefer its Claim(s) against the CONTRACTOR. as counter-claim(s). The CONTRACTOR shall not, however, be entitled to raise as a set-off, defence or counter-claim any claim which is not a Notified Claim included in the CONTRACTOR's Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof.

9.1.1.0 The provisions of the Indian Arbitration & Conciliation Act, 1996 and any re-enactment(s) and/or modification(s) thereof and of the Rules framed thereunder shall apply to arbitration proceedings pursuant hereto subject to the following conditions:

- a) The Arbitrator shall give his Award separately in respect of each Claim and Counter- Claim; and*
- b) The Arbitrator shall take into account any decision, opinion or determination howsoever expressed which is stated to be final and binding to the CONTRACTOR in terms of the contract documents in judging any issue or dispute.*

9.1.2.0 The venue of the arbitration shall be New Delhi, provided that the Arbitrators may with the consent of the OWNER and the CONTRACTOR agree upon any other venue.”

3. Disputes have arisen between the parties leading to Respondent issuing a demand notice dated 1st September, 2023.⁴ The Petitioner seeks setting aside of the demand notice and also a direction to the Respondent to

³ “arbitration clause”

⁴ “demand notice”



release all of their outstanding payments under the Project Contracts in a timely manner. As regards the afore-noted arbitration clause, they contend that same is unreasonable and inequitable and runs foul of Article 14 of the Constitution of India. In such Circumstances, they have invoked this Court's jurisdiction under Article 226 of the Constitution of India, seeking the following prayers:

- “a) Issue a writ of mandamus or any other appropriate writ, order, or direction for setting aside / quashing the Impugned Demand Notice dated 1 September 2023 [Annexure P-1] along with other notices that contemplate similar action against the Petitioner;*
- b) Issue a writ of mandamus or any other appropriate writ, order, or direction for the Respondent to release all the pending dues of the Petitioner under the Project Contracts amounting to INR 33,06,42,647 (Indian Rupees Thirty-Three Crore Six Lakh Forty- Two Thousand Six Hundred and Forty-Seven Only) as on 23 January 2024;*
- c) Issue a writ of mandamus or any other appropriate writ, order, or direction for the Respondent to release all the payments as due on time under the Project Contracts;*
- d) Issue a writ of Mandamus or any other appropriate writ, order or direction declaring the arbitration clause (Clause 9.1.0.0 to 9.1.2.0 of GCC-Annexure-P-16) as ultra vires to the principles of the Constitution of India;*
- e) Issue a writ of mandamus or any other appropriate writ, order or direction directing the Respondent to drop all further proceedings against the Petitioner with respect to the alleged claims as noted in the Demand Notice;”*

4. In the above background, this Court through order dated 22nd February, 2024, directed the Respondent to not take any coercive action in pursuance of the demand notice dated 1st September, 2023. At the same time, the Petitioner was directed to extend the validity of Performance Bank Guarantee⁵ for a period of two months. The PBG has already been extended.

5. In such circumstances, after making some submissions, Mr. Rajiv Nayar, Senior Counsel for the Petitioner, on instructions states that the



Petitioner is agreeable to the disputes being referred to arbitration in terms of the arbitration clause. He prays that that all objections and contentions urged in the present petition be permitted to be raised before the arbitral tribunal. In order to expedite the arbitration process, Mr. Nayar requests this Court to appoint the Arbitral Tribunal. Furthermore, Mr. Nayar submits that since the Petitioner shall be seeking reliefs under the Arbitration mechanism, they shall also be pursuing interim measures under Section 17 of the Arbitration and Conciliation Act, 1996⁶. In such circumstances he prays that interim protection granted on 22nd February, 2024 be extended till such time, the interim application is taken up for consideration by the arbitral tribunal.

6. Mr. Rajat Navet, counsel for the Respondent, is also agreeable for the parties to be referred to arbitration and consents to this Court making an appointment. He, however, submits that all jurisdictional objections should be left open for consideration by the Arbitral Tribunal.

7. The Court has considered the afore-noted submissions. The arbitration clause, as worded, provides for a panel of three arbitrators. However, both counsels, on instructions, agree that given the respective claim amounts and the desire to keep arbitration costs reasonable, they are amenable to referring the arbitration to a Sole Arbitrator appointed by this Court. Although the present proceedings are initiated under Article 226 of the Constitution of India, however, since there is a consensus between the parties to be referred to arbitration and they jointly request this Court to appoint a Sole Arbitrator, the prayer is accepted.

8. Accordingly, Hon'ble Mr. Justice S. Ravindra Bhat (Retd.), is

⁵ "PBG"

⁶ "Arbitration Act"



appointed as the Sole Arbitrator⁷ to adjudicate the disputes that have arisen between the parties in respect of the Project Contracts in terms of aforementioned arbitration clause. The Arbitrator shall also consider all objections including those relating to their jurisdiction. This is subject to the Arbitrator making necessary disclosure(s) under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

9. With the consent of the parties, it directed that the Arbitrator shall conduct the arbitration proceedings under the aegis of Delhi International Arbitration Centre⁸ and the fees of the Arbitrator shall be in accordance with the DIAC Rules.

10. The parties are directed to appear before the Sole Arbitrator as and when notified.

11. The direction to the Respondent in terms of order dated 22nd February, 2024 to not take any coercive action in terms of demand notice dated 1st September, 2023 is extended, till such time, the Arbitral Tribunal enters upon reference and takes up the Petitioner's application under Section 17 of the Act. The Petitioner shall file the said application within four weeks from date of acceptance of the appointment by the Arbitrator. Considering the fact the bank guarantee in question, is due to expire, it is directed that the same be renewed for a period of six months from today. It is clarified that the extension of the interim measure is purely to facilitate the Petitioner to avail the legal remedies and shall not be construed or interpreted as the Court's opinion on the merits of the case. To this effect all rights and contentions of the parties are left open.

⁷ Hereinafter referred to as "Arbitrator"

⁸ "DIAC"



12. With the above directions, the petition is disposed of along with pending applications.

SANJEEV NARULA, J

AUGUST 21, 2024

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