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

Date of decision: 13.05.2024

+ **O.M.P. (COMM) 219/2024, I.A. 10830/2024**

NHPC LTD

..... Petitioner

Through: Mr. Sapan K. Mishra, Ms. Mansi
Ajmani, Advs.

versus

APAAR INFRATECH PVT LTD

..... Respondent

Through: Mr. AK Singla, Sr. Adv. with Dr.
Chandra Shekhar, Adv.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

: **JASMEET SINGH, J (ORAL)**

I.A. 10831/2024

1. Exemption is granted subject to all just exceptions.
2. The petitioner shall file legible and clearer copies of exempted documents, compliant with practice rules before the next date of hearing.
3. The application is disposed of.

O.M.P. (COMM) 219/2024

1. This is a petition filed under section 34 of the Arbitration and Conciliation Act, 1996 seeking setting aside of the Arbitral Award dated 30.11.2023 and corrected on 29.01.2024 passed by the learned Sole Arbitrator.
2. The brief facts are that the petitioner is a Government of India enterprise incorporated with an objective to promote and organize an integrated and efficient development of Hydro Electric Power in all respects.



It has several power projects/stations all over the Country. Sewa-II Power Station (120 MW) is one such project of NHPC Ltd., located in District Kathua in the State of Jammu and Kashmir.

3. Petitioner floated a tender for “High Performance Concrete in Stilling Basin of Sewa-II Dam” located in District Kathua in the State of Jammu and Kashmir. On 14.03.2018, the respondent submitted its bid and was found to be L1 and hence a Letter of Award dated 08.06.2018 was issued in its favour. On 11.09.2018, a Pre-Contract Integrity Pact was executed between the petitioner and the respondent.

4. As per the petitioner, the respondent failed to perform its obligations under the contract within the time frame like necessary mobilization including installation of plant etc. for the work to be completed by 24.09.2028 and thereafter whole work was required to be completed within 144 days i.e. by 15.02.2019.

5. On 14.12.2018, the petitioner issued a show cause notice to the respondent on the breaches of the terms of the contract and after receipt of reply dated 17.12.2018, the petitioner in exercise of Clause 38 of the GCC, terminated the contract with the respondent on 16.03.2019.

6. Pursuant thereto, the respondent invoked the arbitration clause and the Court appointed the learned Sole Arbitrator *vide* order dated 23.04.2021. Thereafter, the learned Sole Arbitrator entered the reference and passed the impugned Award.

7. The learned Sole Arbitrator *vide* impugned Award dated 30.11.2023 allowed the claims of the respondent to the tune of Rs. 40,99,000 alongwith 10% from the date of reference of the case to the Arbitral Tribunal.

8. Mr. Mishra, learned counsel for the petitioner states that the learned



Arbitrator had no power to award interest as it was a specific condition of the contract namely condition 55.4 of GCC which states that no interest shall be payable by the employer on the disputed/claimed amount for the period up to determination and notification of the award by Arbitration Institution.

9. Mr. Singhla, learned senior counsel on instructions very fairly states that the said interest amount can be set aside from the date of reference till the date of award.

10. I am also of the view that the said portion is severable from the main Award and hence, it is directed that the amount of interest at the rate of 10% from the date of reference till the date of award is contrary to the terms of Clause 55.4 of GCC and consequently the said interest part is set aside.

11. It is further stated by Mr. Mishra, learned counsel for the petitioner that the award of claim No. 1 and claim No. 4 are also contrary to the terms of the contract, material available on record before the learned Arbitrator and hence need to be set aside.

12. Issue No. 1 reads as “whether the banning order dated 16.12.2019 is beyond the purview of arbitration proceedings in view of the contract dated 08.06.2018.” Placing reliance on Clause 10 of the Pre-Contract Integrity Pact, he states that the banning order cannot be subject matter of the dispute.

The said clause reads as under:

*“10.0 Law and Place of Jurisdiction: this Pact is subject to Indian Law. The place of performance and jurisdiction is the Registered Office of the Employer, i.e. Faridabad (Haryana).
The arbitration clause provided in the tender document/contract shall not be applicable for any issue/dispute arising under Integrity Pact.”*

13. It is apposite to refer to the findings recorded by the learned Arbitrator



which reads as under:

“This clause clearly provides that the arbitration clause provided in the tender document/contract shall not be applicable for any issue/dispute arising under the Integrity pact. Since the present dispute does not arise under the Integrity pact as such Clause 10.0 of the pre-Integrity Pact is not applicable in the present matter. Moreover, the arbitration clause 55.2.2 of the GCC was invoked by the Claimant by filing petition u/s 9 of the Act, 1996 in the Hon'ble High Court, which passed order dated 23.04.2021 as consent order and referred the dispute to arbitration tribunal through SCOPE. Hence the Termination of Contract Order dated 16.3.2019 and Banning order dated 16.12.2019 are within purview of arbitration proceedings. This issue is, therefore, decided against the Respondent.”

14. In addition to the finding recorded by the learned Arbitrator, as the contract was terminated for violation of the conditions of GCC (being part of the award letter) and subsequently, the respondent was banned in view of the termination, I am of the view that the defaults for which the respondent was banned were not arising out of Pre-Contract Integrity Pact but out of the Letter of Award dated 08.06.2018. Hence, there is no merit in the contention of the learned counsel for the petitioner in this aspect.

15. With regard to issue No. 4, Mr Mishra states that the learned Arbitrator has wrongly awarded damages towards loss of profit being 15% of the contract. Issue No. 4 reads as under:

“Whether the Claimant has suffered damage/loss due to order of Termination of Contract and consequent banning order? If so to what amount”

16. The learned Arbitrator has given his finding as under:

“In so far as the relief of loss of profit/damages is concerned the evidence and material available on record have made me to conclude that the said claim of amount of Rs. 99,000, as loss of fee



of N.I.T. Hamirpur and loss of profit of the execution of the work under contract to the tune of Rs. 40,00,000 (Rs. 40 Lacs Only) is allowed. It is ordered accordingly that the respondent shall pay to the Claimant Rs. 40,99,000 (Rs. 40 Lacs and Ninety- Nine Thousand Only) with interest @10% from the date of reference of the case to this arbitral tribunal. Parties are directed to bear their own cost.”

17. The learned Arbitrator has given a finding that the petitioner has wrongly terminated the contract, the learned Arbitrator has only relied on the law laid down by the Hon’ble Supreme Court in ***A.T. Brij Paul Singh vs State of Gujarat (1984) 4 SCC 59*** and ***Dwarka Dass vs State of M.P. (1999) 3 SCC 500*** as well as CPWD’s Office Memorandum dated 14.12.2007 to come to a finding that 15% of the Contract amount is reasonable for the loss of profit on account of illegal termination of the contract. Hence, the contention of the learned counsel for the petitioner is rejected.

18. For the said reasons, the Arbitral Award dated 30.11.2023 and corrected on 29.01.2024 is set aside only to the extent of the interest awarded.

19. In case the petitioner makes the payment of Rs. 40,99,000/- within 10 days from today, there will be no interest.

20. In case the amount is not paid within 10 days, the petitioner shall be liable to pay interest at the rate of 10% from the date of award till the date of payment.

21. With these directions, the petition is disposed of.

JASMEET SINGH, J

MAY 13, 2024/DM