IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 25.04.2022

\+ **O.M.P. (COMM) 8/2021**

HARYANA VIDYUT PRASARAN NIGAM LIMITED (HVPNL) ..... Petitioner

Versus

M/S COBRA INSTALACIONES Y. SERVICES, S.A. & M/S SHYAM INDUS POWER SOLUTION PVT. LTD. (JV) ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Ms Iti Agrawal, Mr Praful Shukla, Advocates

For the Respondent : Mr Pankaj Kumar Singh, Advocate.

AND

\+ **O.M.P. (COMM) 597/2020**

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Advocates who appeared in this case:

For the Petitioner : Mr Pankaj Kumar Singh, Advocate

For the Respondent : Ms Iti Agrawal, Mr Praful Shukla, Advocates.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The parties have filed these cross petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter the **'A&C Act**') impugning an Arbitral Award dated 29.07.2020 (hereinafter the '**impugned award**') rendered by the Arbitral Tribunal comprising of a former Judge of this Court as the Sole Arbitrator (hereinafter '**the Arbitral Tribunal**').

Factual Context

2. Haryana Vidyut Prasaran Nigam Limited (hereinafter '**HVPNL**'), is a company, *inter alia*, engaged in the business of maintenance and supply of electricity within the state of Haryana.

3. M/s Cobra Instalaciones Y. Services, S.A. and M/s Shyam Indus Power Solution Pvt. Ltd. JV is a Joint Venture between the said entities (hereinafter '**Cobra**') formed to supply materials and execute the works relating to erection of infrastructure and transmission of electricity

4. The Government of India received a loan from the International Bank for Reconstruction and Development (IBRD) for the Haryana Power System Improvement Project.

5. On 26.05.2011, HVPNL issued an Invitation for Bids (IFB) (being IFB no WB/2008/G-09) for the works regarding "*procurement of plant, design, supply and installation of Package G-09"* (hereinafter '**the Project**'), on the terms and conditions stipulated therein.

6. Pursuant to the said IFB, Cobra submitted its bid for executing the Project on 06.08.2011. Cobra's bid was accepted and thereafter, HVPNL issued two Letters of Acceptance dated 29.02.2012 (hereinafter the '**LoAs**') in relation to the two contracts, in favour of Cobra. In terms of the LoAs, Cobra was required to furnish Performance Security equivalent to 10% of the value of the contracts within a period of twenty eight days, in accordance with Clause 13.3.1 of the General Conditions of Contract (hereinafter the '**GCC**').

7. Thereafter, on 26.03.2012, two Contract Agreements (hereinafter collectively referred as the '**Agreements**') were signed between the parties. The details of the Agreements are set out below:-

Contract Agreement [No. WB-28&29/G-09/XEN/WB] (hereinafter referred to as '**First Contract**) -For a contract price of **USD 10,07,137.96/-** for plant and mandatory spare parts supplied from abroad, **INR 57,54,47,672.20/-** for the plant and mandatory spare parts supplied from India and taxes of **INR 75,91,655**	Ex-Works supply and CIP Entry Border Point/CIF Indian Port of Entry of all Plant and Equipment including mandatory spares and design services for the complete execution for procurement of plant, design, supply and installation of 220 kV & 66 Kv sub-stations and 220 kV & 66 Kv bays on Turnkey basis against package G-09
Contract Agreement [No. WB-28&29/G-09/XEN/WB] (hereinafter referred to as '**Second Contract'**)	Providing all services, that are, port handling and custom clearance of plant and equipment including mandatory spares to be

-For a contract price of INR 6,72,15,345.12	supplied from abroad and loading, inland transportation for delivery at site, insurance, unloading, storage, handling at site, installation, testing and commissioning including performance testing in respect of all the plant and equipment supplied under the "First Contract" and any other services except design services including in the "First Contract" for complete execution of procurement of plant, design, supply and installation of 220 Kv & 66 kV sub-stations and 220 kV & 66 Kv bays on Turnkey basis against package G-09.

8. The work entailed setting up of three sub-stations and six bays. The effective date of commencement of the Project was stipulated as 04.04.2012, and the works were to be completed within a period of four hundred and fifty (450) days, that is, on or before 27.06.2013.

9. On 09.04.2012, the contract for feeding line/transmission line was awarded to one M/s Hythro Power Corporation Limited (hereinafter '**Hythro**') by HVPNL. It is averred that Hythro could not complete the aforesaid work and was subsequently, blacklisted. Thereafter, the said work was awarded to other companies.

10. In the year 2012-2013, by various communications, HVPNL requested Cobra to expedite the work and also stated that it would impose Liquidated Damages on Cobra, in case the work was not completed prior to the scheduled completion date.

11. Thereafter, by its letter dated 20.06.2013, Cobra requested HVPNL to grant provisional extension of time and defer the imposition of Liquidated Damages till 31.12.2013. Cobra also agreed to accept the interest rate calculated at the rate of 3% above the State Bank of India Base Rate of interest "*provided that LD becomes leviable upon us after finalisation of EOT case*". Cobra also undertook to complete the balance works by 31.12.2013.

12. Admittedly, the works stipulated under the Agreements were not completed by the scheduled completion date, that is, on or before 27.06.2013.

13. HVPNL responded by its letter dated 26.07.2013 and conditionally accepted Cobra's request, *albeit* subject to certain conditions. It decided to defer 80% of the Liquidated Damages till 31.12.2013 and further, clarified that such deferment should not be considered as extending the time for completion and the same would be considered on merits after completion of the works. HVPNL further stipulated that the deferred Liquidated Damages would be recovered from Cobra along with interest at the rate of 3% above the State Bank of India Base Rate of interest on the date of release of payment.

14. On 24.09.2013, Cobra submitted the completion status for certain works as on 03.07.2013 and stated that the delay in completion of the Project works were caused, *inter alia*, due to non-availability of soil; delay in opening of LC; late vendor approval; late issuance of Dispatch Instructions; slow progress at site due to rainfall; late approval of civil and electrical drawings amongst others. And, requested HVPNL to grant extension of time for a period of seven months, that is, till 31.01.2014.

15. Thereafter, on 31.12.2013, HVPNL informed Cobra that since the works could not be completed within the said period, HVPNL deducted Liquidated Damages from the Running Bills of Cobra at the rate of 0.5% of the contract price per week, in terms of Clause 26.2 of the GCC, and charged interest on the deferred amount.

16. Cobra, by its letter dated 03.11.2014, stated that the delay was for various reasons beyond the control of either parties. And, since no loss had occurred to HVPNL, it requested HVPNL to grant extension of time without any financial implications. Cobra further requested for reimbursement of Sales Tax/VAT on bought out items

17. On 12.02.2015, Cobra, once again, requested HVPNL to grant extension of time for completion of works without any financial implications as the delay in executing the Project works was not attributable to it. Cobra referred to Section 73 of the Indian Contract Act, 1872 and stated that "*LDs are no different from ordinary damages and therefore, if there is no loss to HVPNL, the same may not be levied*".

18. Thereafter, on 06.08.2015, Cobra referred to various issues concerning the various projects executed between Cobra and HVPNL. With respect to Package G-09, Cobra requested HVPNL to release the retention money as delay in commissioning of works was not attributable to it. Further, it reiterated its request not to levy penalty as no loss was caused. Cobra also requested HVPNL for reimbursement of Sales Tax/VAT payable on bought out items. Similar letters were sent by Cobra to HVPNL on 08.09.2015 and 10.03.2016.

19. By a communication 05.09.2016, Cobra, once again, sought reimbursement of Sales Tax/VAT payable on bought out items from HVPNL.

20. Thereafter, by a letter dated 10.09.2016, Cobra withdrew its requests for extension of time on the ground that there were more facts to be submitted by it, in support of its request regarding extension of time. HVPNL states that it did not receive any fresh requests for extension of time from Cobra and, by its letters dated 05.10.2016 and 08.01.2017, it requested Cobra to resubmit its request for extension of time latest by 25.01.2017.

21. In view of the disputes between the parties, Cobra issued a notice dated 04.11.2016 invoking the agreement to refer the disputes to arbitration, as contained in Clause 46.5(b) of the GCC read with Clause 46.5 of the Particular Conditions (hereinafter '**PC**') and sought reference of the disputes to arbitration. Thereafter, HVPNL responded to the aforesaid notice by its letters dated 02.02.2017 and 24.11.2017.

HVPNL requested Cobra to give its consent for the 'Appointment of Sole Arbitrator by Managing Director, HVPNL'. The same was not acceptable to Cobra.

22. By letters dated 24.04.2018, Cobra submitted requests for extension of time for completion of works relating to various sub-stations and stated that the delay caused in executing the Project works was not attributable to it. Cobra further requested HVPNL to grant extension of time without imposition of Liquidated Damages.

23. Thereafter, Cobra approached this Court by way of a petition under Section 11 of the A&C Act for the appointment of an arbitrator. This Court, by an order dated 25.10.2018, appointed the learned Sole Arbitrator to adjudicate the disputes between the parties.

Arbitral Proceedings

24. Before the Arbitral Tribunal, Cobra filed its Statement of Claims. A tabular statement stating the claims made by Cobra in its Statement of Claims are summarised below:

Claim no.1	A sum of ₹7,25,01,510 on account of deduction of LD along with interest at the rate of 13% per annum amounting to ₹4,54,99,421/- as on 04.01.2019, totalling to ₹11,80,00,931/-
Claim no. 2	A sum of ₹22,86,559/- on account of refund of deferment charges inclusive of interest thereon at the rate of 13% per annum as on 04.01.2019.

Claim no. 3	A sum of ₹9,00,939/- inclusive of interest at the rate of 13% per annum as on 04.01.2019 on account of keeping the Bank Guarantee alive beyond the defect liability period.
Claim no. 4	A sum of ₹1,21,63,455/- inclusive of interest at the rate of 13% per annum as on 04.01.2019 on account of expenses incurred for watch and ward and insurance of project site beyond the date of completion of the facilities
Claim no. 5	A sum of ₹75,91,655/- being the tax component of the Contract Price as detailed in Article 2.1 of the Contract Agreement.

25. HVPNL filed its Statement of Defence disputing Cobra's claims, however, it did not raise any counter claims.

26. Before the Arbitral Tribunal, Cobra contended that the sub-stations at Sonta, Hukmawali and Naneola could not be commissioned due to non-availability of feeding line. The contract for executing the work regarding the feeding lines was awarded to Hythro on 09.04.2012, however, due to non-performance of work, Hythro was blacklisted and subsequently, another contractor was engaged in its place. According to Cobra, HVPNL had not suffered any losses, which were attributable to it, on account of non-completion of the Project works within the stipulated period of four hundred and fifty (450) days as the testing and commissioning of the Project depended on the contracts awarded to the third parties. Thus, Cobra contended that the imposition of Liquidated Damages or deferment charges by HVPNL, is erroneous.

27. The Arbitral Tribunal, considering the evidence on record, found that fifty percent of the Liquidated Damages as stipulated in the Agreements was reasonable.

28. The Arbitral Tribunal held that that HVPNL condoned the delay attributable to it before the scheduled date of completion and also the delay attributable to it after the deemed date of commissioning. The Arbitral Tribunal rejected Cobra's contention that it was not responsible for delay in actual commissioning and it did not cause any loss to HVPNL. Accordingly, the Arbitral Tribunal held that HVPNL was entitled to levy and recover only 50% of the Liquidated Damages as stipulated in the Agreements, that is, a sum of ₹3,62,50,755/-

29. The Arbitral Tribunal found that there was no agreement between the parties to not charge interest and in terms of Clause 12.3 of the GCC read with Appendix I of the Agreement, Cobra was entitled to interest as per SBI's Prime Lending Rate, if the payment in respect of any invoice submitted by Cobra was not made by HVPNL within a period of forty-five days of such submission. The Arbitral Tribunal reasoned that since HVPNL itself had charged interest at the rate of 13% per annum from Cobra, it would also award interest at the rate of 13% per annum.

30. Accordingly, the Arbitral Tribunal awarded interest at the rate of 13% per annum from the date the Liquidated Damages were deducted (on 50% of the Liquidated Damages allowed to be refunded). As per the Statement of Claims, the calculation of interest amounted to

₹4,54,99,421/- on the full amount of Liquidated Damages, which amounted to ₹7,25,01,510/-. The said computation was not refuted by HVPNL. Since the Arbitral Tribunal had held that Cobra was entitled to refund of 50% of the Liquidated Damages (that is, ₹3,62,50,755/-), it would be entitled to interest at the rate of 13% per annum on the said amount. Thus, the Arbitral Tribunal awarded a sum of ₹2,27,49,710/-, in favour of Cobra.

31. The Arbitral Tribunal found that Cobra was not entitled to refund of deferment charges or any interest on account of two reasons. First, there was an independent contract between the parties to levy the deferment charges to postpone the recovery of the Liquidated Damages and the Liquidated Damages have held to be recoverable. Thus, Cobra cannot go behind the said agreement. Second, even on calculation of 50% of the Liquidated Damages, the component of deferment charges in the shape of interest at the rate of 13% per annum was much more than what was actually charged by HVPNL. Thus, the Arbitral Tribunal held that Cobra was not entitled to refund of the deferment charges of ₹14,07,497/- and interest amounting to ₹8,79,062/-.

32. The Arbitral Tribunal referred to Clauses 13.3.1 and 13.3.3 of the GCC and held that since the defect liability period was not extended and the Operational Acceptance of the Facilities occurred much later, therefore, Cobra was entitled to keep the Bank Guarantee alive only for a period of 540 days after the date of completion of Facilities. Accordingly, the Arbitral Tribunal awarded a sum of ₹9,09,939/-, in favour of Cobra (₹6,48,244/- towards extension of the Bank Guarantee

plus ₹2,06,519/- as interest at the rate of 13% per annum on the aforesaid amount till date of filing of the Statement of Claims).

33. The Arbitral Tribunal held that Cobra had not placed any documentary evidence on record to show how the amount of ₹90,78,690/- was incurred by it on account of watch, ward and insurance. Further, neither the break-up of charges incurred on watch and ward nor the receipt of the amount spent on insurance was submitted by Cobra. However, the Arbitral Tribunal referred to a notification issued by the Labour Commissioner, Government of Haryana, which stipulated the minimum wages of a security guard as ₹9,238/- per month. On the basis of the said notification, the Arbitral Tribunal calculated the amount to be awarded to Cobra in the case of two security guards being posted during day and night time. Accordingly, the Arbitral Tribunal awarded an amount of ₹7,44,280/-, in favour of Cobra (₹5,54,280/- as charges for security guards for a period of 5 months plus ₹1,90,000/- as interest).

34. The Arbitral Tribunal held that HVPNL was not liable to pay the Sales Tax amounting to ₹75,91,655/- and thus, no interest on the same could be awarded to Cobra on the aforesaid amount as well.

35. The Arbitral Tribunal awarded *pendente lite* and future interest at the rate of 9% per annum.

36. Aggrieved by the impugned award, the parties have filed these petitions.

Reasons and Conclusion

Re: Liquidated Damages

37. Both the parties have assailed the impugned award. HVPNL assails the impugned award inasmuch as, it disallows levy of Liquidated Damages to the extent of 50% of the Liquidated Damages levied on account of delay in execution of the contracts in question and further, directs the same to be refunded with interest. In addition, HVPNL also assails the impugned award to the extent that it allows Cobra's claim for Bank Guarantee charges along with interest, as well as watch and ward charges.

38. Cobra also assails the impugned award to the extent that the Arbitral Tribunal has (i) sustained the levy of 50% of Liquidated Damages imposed by HVPNL; and, (ii) rejected Cobra's claim for reimbursement of taxes, which it claims was payable in addition to the quoted rates.

39. As noted above, the principal dispute between the parties relates to the levy of Liquidated Damages and both the parties are aggrieved by the impugned award in this respect.

40. It is Cobra's case that it was not liable to pay any Liquidated Damages as HVPNL had not suffered any loss on account of delay in performance of the Agreements. The scope of work under Package G-09, entailed design, supply, installation, testing and commissioning of three sub-stations and six bays. Cobra was responsible for mechanical completion of installation of the power equipment, which was required

to be used by HVPNL for wheeling of electricity primarily to utility distribution companies and other consumers with whom HVPNL would enter into separate agreements. The commissioning of the entire Project was dependent on the construction of the transmission line, as admittedly, without the construction of such transmission lines, HVPNL would not be in a position to wheel electricity or supply the same from the equipment installed by Cobra. In this context, Cobra submitted that the contract for installation of the transmission lines was awarded to another contractor (Hythro), who had failed to discharge its obligations within the stipulated period. The contract with Hythro was terminated and a new contractor was engaged by HVPNL for completion of construction of transmission lines.

41. The Project was inordinately delayed and, admittedly, was commissioned much after Cobra had completed its obligation for installation of sub-stations and bays. Cobra contended that the delay in commissioning of the entire Project was not on account of delay on its part but on account of Hythro in setting up the transmission lines. This, according to Cobra, established that HVPNL had not suffered any loss on account of delay on the part of Cobra to perform the Agreements and therefore, no damages were payable by it.

42. Next, it was submitted that the Arbitral Tribunal had grossly erred in not appreciating the above. It had, further, erred in relying on the decisions of the Supreme Court in ***ONGC Ltd. v. Saw Pipes Ltd.: (2003) 5 SCC 705*** and ***Construction and Design Services v. Delhi Development Authority: (2015) 14 SCC 263*** to sustain the levy of

Liquidated Damages on the ground that HVPNL was a public utility entity and therefore, it was not easy to quantify the damages suffered by it on account of delay. It was further submitted on behalf of Cobra that the Arbitral Tribunal had erred in overlooking the evidence on record. In particular, the Arbitral Tribunal had failed to consider the recommendations of the Superintendent Engineer, Transmission System issued on 17.08.2016 as well as those made by the Project Manager and Assistant Project Manager on 17.05.2018 and 01.06.2018. All of the said officers had recommended that Liquidated Damages should not be levied as no loss was suffered by HVPNL on account of Cobra.

43. Lastly, it was submitted that HVPNL had listed out the heads on which it had suffered losses. However, it had not quantified any claim. It was submitted that the said losses were quantifiable and therefore, HVPNL could not recover any damages without establishing the exact loss suffered by it. The Arbitral Tribunal also found fault with HVPNL as it did not quantify the losses suffered by it. It was submitted that the affidavits of evidence furnished by witnesses for HVPNL also did not mention the quantum of loss suffered under those heads. Further, the said loss was not informed to Cobra at any prior point of time.

44. HVPNL also assails the decision of the Arbitral Tribunal to restrict its claim for Liquidated Damages to only 50% of the Liquidated Damages, as agreed under the Agreements. The Arbitral Tribunal rejected Cobra's contention that no loss had occurred on account of delay on its part to perform the obligations under the Agreements. It

accepted that HVPNL was engaged in the activity of providing utilities and the loss on account of delay in this regard was not quantifiable. The Arbitral Tribunal accepted that the decision of the Supreme Court in ***Construction and Design Services v. Delhi Development Authority*** (*supra*) was applicable to the facts of the present case and therefore, quantum of such damages were not required to be proved. However, inconsistent with this view, the Arbitral Tribunal faulted HVPNL for not indicating the losses suffered on account of foreign exchange variation and/or the loss caused due to tariff fixation. The Arbitral Tribunal held that certain rudimentary calculations or formula for fixation of tariff ought to have been submitted by HVPNL. HVPNL submitted that this was inconsistent with its earlier finding that HVPNL was not required to prove the loss suffered by it. The Arbitral Tribunal had thereafter, proceeded to reduce the Liquidated Damages to 50% on "guess work".

45. In view of the above, it would be relevant to refer to the findings of the Arbitral Tribunal in regard to levy of Liquidated Damages to evaluate whether the same are inconsistent, as contended on behalf of HVPNL or are patently illegal, as contended on behalf of Cobra.

46. In terms of Clause 26 of the GCC, HVPNL was entitled to deduct Liquidated Damages as specified in the Particular Conditions (PC). Clause 26.2 of the PC provided for levy of Liquidated Damages at the rate of 0.5% of the contract price for every week or part thereof, in completion of the contract. This was subject to a maximum of 10% of the contract price.

47. The Arbitral Tribunal found that there was delay on the part of Cobra in completing its obligations. The Arbitral Tribunal also found that commissioning of the Project was dependent on construction of transmission lines and the work for the same was awarded to another contractor, that is, Hythro. The said contractor had not commenced the work awarded to it and consequently, HVPNL terminated the contract with Hythro and blacklisted the said contractor on 17.02.2014. Thereafter, the contract for construction of transmission lines was awarded to other contractors (Isolux and K. Rama Rao). As noted above, according to Cobra, the Project could not be commissioned on account of delays in construction of the transmission lines, and therefore the delay caused by Cobra in installing the sub-station and bays was of no relevance. In this regard, the Arbitral Tribunal observed as under:

> "**36.** The question for consideration is where several parts of a project have been awarded to two or more contractors, can it be said that the Contractor who had completed his part of the work after delay although before completion of the work by the other Contractor(s), would not be liable to pay any damages to the Employer although there is loss to the Employer on account of the delayed completion of the work. In other words, whether it would be only the Contractor who has completed his work in the end liable to compensate the Employer for the loss even though there is delay in completion of the work assigned to the other Contractor(s) as well. The simple answer to the question would be plain "No". In my opinion, each of the Contractors would be liable to compensate the Employer pro-rata in

> terms of the Contract provided the Employer has really suffered some loss….."

48. This Court does not find any infirmity with this view. Even though a contract may comprise of separate components, which may be awarded to different contractors, it may be inapposite to blame the contractor that is last in completing the works for the loss suffered on account of delay in completing the project. Since it is not disputed that Cobra had delayed the performance of its obligations, which were a vital part of the works to be executed for commissioning the Project, it cannot be absolved of its liability for the delay on the ground that some other contractor had also delayed execution of the works. The fallacy of this contention would be apparent if it is considered that the other contractor could contend on the same lines that it was not responsible for the delay because even if it had executed its component of the contract awarded in time, the works would not be commissioned on account of the delay on the part of Cobra. It may not be apposite to mathematically determine, which of the contractors' work was, in essence, the vital link that had resulted in overall delay in commissioning the Project. The Arbitral Tribunal's view that Cobra cannot be absolved of its liability for compensating the loss suffered by HVPNL resulting on account of delay in execution of the works, is certainly a plausible view, if not the correct one.

49. The Arbitral Tribunal also found that, in fact, HVPNL had suffered a huge loss on account of the delay caused by Cobra. And, that

the exact quantification of the losses attributable to it, was not possible. The relevant extract of the impugned order is set out below:-

> "65. As far as quantification of the loss suffered by the Respondent is concerned, according to the Respondent, it suffered huge losses on account of the delay caused by the Claimant up to the date of deemed commissioning. In para 7.2.6 of the Statement of Defence, the Respondent gave the details of the losses suffered by it as under:
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> 7.2.6. Losses suffered by the Respondent on account of the delay caused by the Claimant in completion of the facilities under the Contracts:
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> a. It is most respectfully submitted that notwithstanding the non commissioning of the transmission lines under the G-09 Project, the Respondent suffered huge losses on account of the delay caused by the Claimant upto the date of deemed commissioning. It is submitted that the Respondent suffered losses in various forms, including but not limited to, cost over run as IDC (Interest during construction), loss due to foreign exchange variation (in terms of foreign currency loan), loss in the form of reduced tariff allowed by the HERC due to non-allowance of depreciation and return on equity. The detailed explanation for these losses is as follows:
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> i. FERV Loss:

The price for C&R Panels quoted by the Claimant was USD 1007137.96. As per the PERT chart under the Contracts, the material was to be supplied by March, 2013, however the Claimant delayed the same till February, 2014. As such, Respondent faced a loss on account of increase in USD prices as the payment, which was to be made in March, 2013 was actually made in February, 2014.

ii. Loss of foreign exchange variation was disallowed by HERC in tariff:

The Claimant delayed the execution of G-09 Project by almost one year, during which period the value of Rupee (INR) was depreciated by approximately 5.25% As such, the depreciated cost of Rupee (i.e. foreign exchange variation) was capitalized to the cost of the project. Hence, Respondent was deprived of the FERV benefit in the tariff causing a direct revenue loss to them.

iii. Interest During Construction Period: As the project was delayed for one year, HVPNL had to suffer interest for such construction period. The

same was capitalized on the cost of asset instead of charging to revenue head. Due to capitalization of interest on project, HVPNL could not recover the amount of interest through tariff allowed by the HERC in Annual Revenue Requirement.

iv. Non-allowance of depreciation in tariff by HERC due to delay in capitalization of Project:

The capitalization of this project was denied for one year due to which HVPNL could not get the benefit of depreciation during that year. Accordingly, the same could not be recovered through tariff (which is fixed by HERC) in ARR.

v. Besides the above, HVPNL also was deprived to get the benefit of depreciation under the Income Tax Act also.

b. In addition to the above, the Respondent suffered costs in the shape of proportionate salary/administrative expenditure of the staff deployed to monitor the project, vehicle-running expenses for monitoring the projects and the loss of goodwill that comes along with such state projects that are run

for the benefit of the general public. Pertinently, G-09 Project was planned and required on the basis of the load projections/requirements received from from. TS wing/DISCOMs for evacuation of power from the Bays/Sub-stations in the corresponding areas of Haryana state. The setting up of Bays/Sub-stations was required to mitigate overloading issues of the corresponding areas and to provide reliability & system strengthening for providing quality power supply to the consumers....."

66. These averments were refuted by the Claimant in the rejoinder by stating that these heads of losses were never communicated by the Respondent to the Claimant; no document was placed on record in support of the losses with the Statement of Defence. With regard to foreign exchange variation losses, it was denied that the entire amount quoted in USD was to be paid to the Claimant before commissioning of the project. It was stated that 5% of total or pro-rata EXW amount was to be paid on issuance of completion certificate and another 5% on issuance of operational acceptance certificate for the plant and equipment supplied from abroad. The Respondent took up the plea that supply of C&R panels was delayed on account of unfriendly weather in China (at supplier's end) and unrest at Nabha Port. Thus, admittedly there was loss on account of foreign exchange variation as 90% of the payment was to be made as per the running bills. The Claimant further took up the plea that the losses pointed out by the Respondent would come into play only after completion of the project. The claimant

emphasized that the project was commissioned after a delay of 1 to 2 years after the deemed date of commissioning and thus the delay if any attributable to the Claimant did not cause any actual loss to the Respondent.

67. It is true that the losses pointed out by the Respondent were result of the delayed commissioning of the project G-09. I have already held above that if two or more contractors were assigned different legs of a project and all of them cause some delay in completion of their respective parts of the project resulting in loss to the employer, all the contractors would be responsible to pro-rata compensate the employer for the delay attributable to them. Of course, the Respondent has not given the calculation of the actual loss which could be attributed to the Claimant alone. In the Statement of Defence as well as in the Affidavit by way of Evidence of RW-1, the Respondent stated that the damages recovered were a genuine pre-estimate of the losses which would be suffered by the Respondent on account of the delay. It appears that the exact quantification of the loss attributable to each of the contractor in respect of the losses as stated in para 7.2.6(a)(i) to (v) and 7.2.6(b) was not possible. Since major losses were on account of loss of foreign exchange variation dis-allowed by HERC in tariff, non-allowance of depreciation in tariff due to delay in capitalisation of project and the Respondent being deprived of to get benefit of depreciation under the Income Tax Act, 1961, which losses were quite difficult to be calculated particularly in view of the fact that there were other contractor/s involved for delay in the project G-09 as well. Yet, it goes without saying that these were substantial losses. In addition, there were also losses on account of foreign exchange rate

> variation and loss on account of proportionate expenses in the shape of salary of the staff deployed to monitor the project, vehicle running expenses for monitoring the project for which perhaps a rough estimate could have been trade by the Respondent. In addition, there was loss of goodwill of the Respondent and miseries faced by the consumers which again is difficult to measure in terms of money. The only objection taken by the Claimant to the details of the losses was that these losses would have taken place only on completion of the project. Claimant's thrust, therefore, was that since the Claimant was not responsible for delay in actual commissioning, it cannot be said to have caused any loss to the Respondent. This plea of the Claimant is totally misconceived for the reasons which have been stated hereinbefore.
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> 68. It is established that the Respondent did suffer substantial losses under the heads which have been stated hereinbefore."

50. Undoubtedly, the contract in question was to augment the infrastructure for distribution of electricity – a vital utility – and the loss caused due to the delay in augmenting utilities is a loss, which is impossible to compute in precise monetary terms. In addition to the above, HVPNL had also indicated certain heads of consequential losses suffered by it. These were, increase in the value of foreign exchange; interest during the construction period; non-allowance of depreciation and foreign exchange; and, variation in tariff. The Arbitral Tribunal accepted that HVPNL had suffered such losses.

51. The aforesaid decision of the Arbitral Tribunal is a plausible one and warrants no interference. However, the Arbitral Tribunal did not conclude the matter with the above decision; it proceeded to hold that even though HVPNL had suffered substantial losses, it had not submitted any details of the same. According to the Arbitral Tribunal, HVPNL could have given details of losses on account of foreign exchange variation as well as a rough estimate of the losses suffered on account of administrative expenses. It referred to the decision of the Supreme Court in ***Construction and Design Services v. Delhi Development Authority*** (*supra*), and reduced the quantum of Liquidated Damages to 50%. The relevant extract of the decision is set out below:

> "70….The Claimant has not led any evidence that the Respondent would not have suffered losses under various heads pointed out by the Respondent in its Statement of Defence and in the evidence of RW-1. The Claimant, as stated hereinabove, did not dispute the loss caused to the Respondent on account of various heads as stated in para 7.26 of the Statement of Defence. On the other hand, CW 1 in his affidavit of evidence simply stated that these were notional losses on account of fixation of tariff. But the Claimant failed to give the details of these losses. There is no gain saying that these were substantial losses. But, at the same time, the Respondent could have given details of the losses under foreign exchange rate variation (FERV) as well as some rough estimate of the losses suffered on account of administrative expenses and supervision of the project for the delay period. The Respondent could have given at least the formula for fixation of tariff by HERC on account of non-allowance of FERV loss, loss in the form of reduced tariff allowed by the HERC (Haryana

> Electricity Regulatory Commission), loss due to non-allowance of depreciation and return on equity and the loss on account of being deprived of benefit of depreciation under The Income Tax Act, 1961. At the same time, the Respondent being a public utility entity and the project being for the benefit of the consumers, there were miseries suffered by the consumers and the wrath faced by the Respondent from the them. Taking all the facts and circumstances into consideration, it cannot be said that the liquidated damages named in the contract were the reasonable amount of compensation. Thus, I am not inclined to allow the entire 10% of the cost of the project towards liquidated damages in spite of this sum being named in the contract between the parties. In view of the facts narrated above and relying on *Construction & Design Services* (supra), I would tend to make a guess work and allow 50% of the LD levied as the reasonable compensation."

52. Clearly, there is an inconsistency in the finding of the Arbitral Tribunal. After having found that the losses were incapable of being determined with any precision and that HVPNL was entitled to the same, there was no reason for the Arbitral Tribunal to have reduced the levy of Liquidated Damages to 50%. There was no material on record for the Arbitral Tribunal to assess the damages as half of the stipulated damages. HVPNL had contended that the Liquidated Damages were a genuine pre-estimate of damages.

53. There is a substantial dispute between the parties whether HVPNL had suffered any loss on account of delay on the part of Cobra to execute the Project works. However, the Arbitral Tribunal, having accepted that HVPNL was entitled to damages, was required to determine whether the Liquidated Damages were a genuine pre-

estimate of the losses as contended on behalf of HVPNL and whether it was possible for HVPNL to establish the same. If the Arbitral Tribunal found that the stipulated damages were a genuine pre-estimate of damages, it was not open for the Arbitral Tribunal to reduce the same on "guess work", after having concluded that it was not possible for HVPNL to quantify the damages suffered by it.

54. In ***Construction and Design Services v. Delhi Development Authority*** (*supra*), the Supreme Court was of the view that in that case awarding half of the damages would be fair. The said decision is plainly in exercise of power under Article 142 of the Constitution of India. The same is not an authority for the proposition that the Arbitral Tribunal can award damages on "guess work", where there is no material to assess the same. The Arbitral Tribunal cannot reduce the Liquidated Damages on 'guess work' if it finds that it is a genuine pre-estimate of damages and it is not possible to prove the quantum.

55. The Arbitral Tribunal found fault with HVPNL in not quantifying the damages under certain heads as the same could have been quantified. However, that would be of little relevance if the Arbitral Tribunal was of the view that there were substantial damages, which were not quantifiable.

56. It is contended on behalf of Cobra that the finding of the Arbitral Tribunal that the damages could have been quantified, militates against the Arbitral Tribunal's view that HVPNL is entitled to Liquidated Damages without proving the quantum of damages. There

is merit in Cobra's contention that no damages would be payable if the same could be reasonably quantified and, HVPNL had failed to quantify the same. There is inconsistency in the impugned award, in this regard.

57. In addition to the above, there is also merit in Cobra's contention that the Arbitral Tribunal has not taken into account other similar contracts between the parties where HVPNL had not levied any Liquidated Damages by accepting Cobra's contention that it was not responsible for the delay in commissioning of the project(s).

58. This Court also finds it difficult to sustain the award of damages based on "guess work", particularly as there is no material on record to make any educated guesses as to the quantum of damages payable. Making an *ad hoc* assessment of damages at 50% of the Liquidated damages, is arbitrary and plainly erroneous.

59. In view of the above, this Court considers it apposite that the decision of the Arbitral Tribunal in respect of levy of Liquidated Damages, be set aside and the parties may be relegated to agitate the said dispute afresh.

Re: Bank Guarantee charges

60. The next question to be examined is whether the decision of the Arbitral Tribunal to award Bank Guarantee charges, in favour of Cobra, is patently illegal. It is contended on behalf of HVPNL that Cobra is not entitled to any cost for keeping the Bank Guarantee alive

as it was contractually obliged to do so. According to HVPNL, the defect liability period would commence from the date of commissioning of the project and in terms of Clause 27.2 of the GCC read with Clause 13.3 of the GCC, Cobra was obliged to keep the Bank Guarantee alive for a period of five hundred and forty (540) days from the date of Completion of the Facilities or one year from the date of Operational Acceptance, whichever occurred first. According to HVPNL, the date of Completion of the Facilities would be the date on which the Project was commissioned.

61. At this stage, it would be relevant to refer to Clause 13.3.3 of the GCC. The same is set out below:-

> "13.3.3 Unless otherwise specified in the PC, the security shall be reduced by half on the date of the Operational Acceptance. The Security shall become null and void, or shall be reduced pro rata to the Contract Price of a part of the Facilities for which a separate Time for Completion is provided, five hundred and forty (540) days after Completion of the Facilities or three hundred and sixty five (365) days after Operational Acceptance of the Facilities, whichever occurs first; provided, however, that if the Defects Liability Period has been extended on any part of the Facilities pursuant to GC Sub-Clause 27.8 hereof, the Contractor shall issue an additional security in an amount proportionate to the Contract Price of that part. The security shall be returned to the Contractor immediately after its expiration, provided, however, that if the Contractor, pursuant to GC Sub-Clause 27.10. is liable for an extended defect liability obligation,

> the performance security shall be extended for the period specified in the PC pursuant to GC Sub-Clause 27.10 and up to the amount specified in the PC."

62. In terms of the Clause 13.3.3 of the GCC, the Performance Security was required to be released 540 days after Completion of the Facilities or 365 days after the Operational Acceptance of the Facilities. The Arbitral Tribunal also referred to Clause 27.2 of the GCC.

63. In view of the contractual provisions, the Arbitral Tribunal held that the Bank Guarantee was required to be kept alive for a period of 540 days after Completion of the Facilities or 365 days after the Operational Acceptance of the Facilities, whichever occurred first. The Performance Security was liable to be extended if the defect liability period was extended in respect of any of the Facilities. But, in this case, the defect liability period was not extended in terms of Clause 27.8 of GCC and therefore, the Bank Guarantee ought to have been released 540 days after completion of Facilities.

64. HVPNL contends that the period of 540 days was required to be reckoned from the date of commissioning of the Project as the defect liability period commenced from that date.

65. This Court finds no infirmity with the decision of the Arbitral Tribunal as in terms of Clause 27.2 of the GCC, Cobra was obliged to keep the Bank Guarantee alive for a period of 540 days from the date of Completion of the Facilities. Since the same were operationalized subsequently on account of the delay in commissioning of the

transmission lines, Cobra's liability of keeping the Bank Guarantee alive would not extend automatically. The reference to extension of the defect liability period under Clause 13.3.3 of the GCC, was extension in terms of Clause 27.8 of the GCC, which stipulated extension of the defect liability period on account of defect in the work executed by the contractor (Cobra). Admittedly, there was no extension of the defect liability period on account of any defect or rectification of defect by Cobra after the facilities were completed. HVPNL's contention that the award of charges for keeping the Bank Guarantee alive during the extended period is contrary to the terms of the Agreements is, accordingly, rejected.

Re: Watch and Ward Expenses

66. This Court also finds no ground to interfere with the decision of the Arbitral Tribunal to award watch and ward expenses calculated on the basis of the bare minimum number of guards (two in number) deployed per sub-station for a period of five months on the minimum wages as notified by the Labour Commissioner, Government of Haryana. The Arbitral Tribunal found that there was a gap of approximately five months from the date of deemed commissioning and the date of taking over and Cobra would have incurred expenses for providing security during the said period. Although Cobra had claimed a sum of ₹90,78,690/-, the Arbitral Tribunal did not accept the same and awarded a sum of ₹5,54,280/- as the bare minimum charges that would have been incurred by Cobra.

67. Given the limited scope of interference under Section 34 of the A&C Act, no interference is warranted in this regard with the impugned award.

Re: Award of Interest

68. HVPNL had also assailed the decision of the Arbitral Tribunal to award interest on various amounts on the ground that same were proscribed under Clause 30.1 of the GCC. The relevant extract of said clause reads as under:

> "30. Limitation of Liability
>
> 30.1 Except in cases of criminal negligence or willful misconduct,
>
> a) neither Party shall be liable to the other Party, whether in contract, tort, or otherwise, for any indirect or consequential loss or damage, loss of use, loss of production, or loss of profits or interest costs, which may be suffered by the other Party in connection with the Contract, other than specifically provided as any obligation of the Party in the Contract, and
>
> b) the aggregate liability of the Contractor to the Employer....."

69. The Arbitral Tribunal examined the said clause and found that the same did not proscribe award of interest. The Arbitral Tribunal held that the said clause only proscribed payment of interest suffered by a party in connection with the contract other than what was specifically provided under the contract and excludes the liability in the case of

criminal negligence or willful misconduct. Clause 12.3 of the GCC expressly provided for payment of interest in respect of any payment due to the contractor.

70. Admittedly, the language of Clause 30.1 of the GCC does not clearly proscribe payment of interest on any claim or any amount found payable. However, it does restrict the liability for "*interest costs, which may be suffered*" by the other party. The Arbitral Tribunal interpreted Clause 30.1 of the GCC and found that the same did not proscribe payment of interest on the amount found due and payable to Cobra. The Arbitral Tribunal also referred to Clause 12.3 of the GCC, which expressly provided for payment of interest on the amounts withheld. The Arbitral Tribunal was of the view that on a conjoint reading, Clause 30.1(a) of the GCC proscribed claims for interest paid to third parties in connection with the contract and not on payments withheld.

71. It is well settled that the question of construction of a contract is within the jurisdiction of the Arbitral Tribunal and the same would warrant no interference in proceedings under Section 34 of the A&C Act unless it is, *ex facie*, perverse or a view that no reasonable person would accept. This Court is unable to accept that the Arbitral Tribunal's interpretation of Clause 30.1 of the GCC falls foul of the requisite standards required to interfere with an arbitral award.

Re: Reimbursement of Sales Tax

72. The last question to be examined is whether the impugned award is vitiated by patent illegality insofar as it rejects Cobra's claim for

reimbursement of the Sales Tax on bought out items. Cobra relies on Clause 35.5 of the Instructions to Bidders (hereinafter '**ITB**'), which expressly required the contractors to state the taxes payable, separately. It also provided that the evaluation of the bid would exclude and not take into account the taxes. Clause 35.5 of the ITB is relevant and set out below:-

> "35.5. The Purchaser's evaluation of a bid will exclude and not take into account:
>
> (a) In the case of Plant manufactured in the Purchaser's Country, sales and other similar taxes, which will be payable on the goods if a contract is awarded to the Bidder:
>
> (b) in the case of Plant manufactured outside the Purchaser's Country to be imported, customs duties and other import taxes levied on the imported Plant, sales and other similar taxes, which will be payable on the Plant if the contract is awarded to the Bidder:
>
> (c) any allowance for price adjustment during the period of execution of the contract, if provided in the bid."

73. The Arbitral Tribunal examined the said clause and held that the same could not be read in isolation and was required to be read in conjunction with the other relevant clauses, including Clause 17.5(b)(i) of the ITB. Clause 17.5(b)(i) of the ITB reads as under:

> "17.5(b)(i) Plant and equipment manufactured or fabricated within the Employer's country (Schedule No.2) shall be quoted on an EXW Incoterms 2010 (ex-factory, ex works, ex warehouse or off-the-shelf, as applicable)

> basis, and shall be inclusive of all costs as well as duties and taxes paid or payable on components and raw material incorporated or to be incorporated in the facilities"
>
> (underlined for emphasis)

74. The Arbitral Tribunal considered the above and observed that Clause 17.5(b)(i) of the ITB was unambiguous and the prices for plant and equipment to be manufactured or fabricated within the Employer's country (in this case, India) was to be inclusive of all costs as well as duties and taxes paid or payable on components and raw materials incorporated or to be incorporated in the facilities.

75. The Arbitral Tribunal also noted that Clause 17.5(b)(ii) of the ITB was amended and Clause 17.5(b)(iii) of the ITB, which required the bidders to give the total amount, was deleted. The aforesaid two sub-clauses prior to amendment/deletion required the bidders to state the taxes and the total amount. With Clause 17.5(b)(i) of the ITB, being amended to provide for a consolidated price, the said two sub-clauses were required to be correspondingly modified or deleted.

76. In addition to the evidence led by the parties, the Arbitral Tribunal also examined the correspondence exchanged with the World Bank for ascertaining the background. The Arbitral Tribunal held that although the said correspondence was not binding on Cobra but it was important to understand the purpose for amendment to the ITB. The Arbitral Tribunal observed that once the bidders were aware that they

have to incorporate all costs, duties and taxes in their bid, there was no scope for the bidders to assume that any component was excluded for the purpose of Sales Tax. The Arbitral Tribunal also rejected the contention that in terms of Clause 14.2, 14.3 and 14.4 of the GCC, HVPNL was liable to pay the Sales Tax, in addition to the bid amount. The Arbitral Tribunal held that in terms of Clause 14.2 of the GCC, HVPNL was liable to pay the Sales Tax but that was required to be included in the price bid by the bidders. Accordingly, the Arbitral Tribunal rejected Cobra's claim for payment of Sales Tax on certain items.

77. The impugned award rests on interpretation of certain clauses of the Agreements executed between the parties. As noted above, the question of construction of a contract falls squarely within the jurisdiction of the Arbitral Tribunal. The same cannot be interfered with unless the same is found to be patently illegal or an interpretation that no reasonable person would accept. Clearly, the Arbitral Tribunal's interpretation of the relevant clauses of the Agreements, is a plausible one. Thus, it would be impermissible for this Court to interfere with the same in these proceedings.

78. In view of the above, the impugned award to the extent that it relates to the award of Liquidated Damages and the interest payable thereon, is set aside. The parties are at liberty to seek a fresh reference to arbitration, in respect of the said disputes.

79. The petitions are, accordingly, disposed of in the aforesaid terms. All pending applications are also disposed of.

VIBHU BAKHRU, J

APRIL 25, 2022
RK/v