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

Reserved on: 22.09.2017

% Pronounced on: 25.10.2017

\+ ARB. A. (COMM.) 28/2017

NTPC LIMITED ..... Petitioner

Through Mr.Vikas Singh, Sr.Adv. with Ms.Bani Dikshit, Ms.Nikita, Ms.Srishti Banerjee and Mr.KapishSeth, Advs.

versus

JINDAL ITF LIMITED & ANR ..... Respondent

Through Mr.Manoj K.Singh, Ms.Gunita Pahwa and Mr.Raj Dutt Shekhar Singh, Advs.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. This appeal is filed under section 37(2) (b) of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as 'the Act')* seeking to impugn the order dated 15.7.2017 passed by the learned Arbitral Tribunal (*hereinafter referred to as 'The AT'*) in exercise of powers under section 17 of the Act. The appellant entered into an MOU with respondent No.2/Inland Waterways Authority of India on 24.9.2008 pursuant to which it released a Request for Proposal dated 12.1.2011 for the selection of an operator for transportation of coal through waterways for the Farakka TPP. Respondent No.1 vide letter dated 26.7.2011 was selected as the Operator for transportation of the coal through waterways for the said Farakka TPP, on a Design Build Finance Operate and Transfer (DBFOT)

basis. The appellant, respondent and IWAI/ respondent No.2 entered into a Tripartite Agreement on 11.8.2011.

2. The dispute between the parties centers around article 7.1(a) of the Agreement which states that a Minimum Quantity of 3MMT (MGQ) per annum of coal during the period will be transported through Inland Waterways Transport (IWT) to the Farakka Thermal Power Plant. Article 7.3 of the Agreement provides the Minimum Guarantee Coal Obligation whereby NTPC assures that it shall during each year utilize 3MMT of coal and further it shall pay the operator for the transportation of 90% of the Minimum Guaranteed Quantity, if the actual coal quantity made available is less than that of 90%.

3. It is the case of the appellant that though it was for the respondent in terms of the Tripartite Agreement to obtain requisite environmental clearance the appellant made the application to the Ministry of Environment and Forest for necessary permission. The permission was granted for 1.5 MMT coal only and hence it is urged that the Minimum Guaranteed Quantity stood reduced.

4. Disputes having arisen between the parties, the AT was constituted. Respondent No.1 moved an application under section 17 of the Act for ad interim order directing the appellant to make payment of MGQ amount of Rs.158.50 crores to the respondent prior to filing of its statement of defence. By the impugned order dated 15.7.2017 the AT has directed the appellant to make payments according to the MGQ as stated in the Agreement within 60 days from receipt of the order subject to the respondent No.1 furnishing bank guarantees of the equivalent amount as stipulated in the Agreement. The appellant contends that in terms of the said order an amount of Rs.158.50

crore has to be paid to the respondent on the respondent's furnishing the required bank guarantee. Hence, the present petition has been filed impugning the said order of the learned Arbitral Tribunal.

5. I have heard learned counsel for the parties. Learned senior counsel appearing for the appellant submits that the order of the AT is liable to be set aside. He has made the following submissions:-

(i) It is urged that Article 7.3 of the Agreement dated 11.8.2011 stipulates the Minimum Guaranteed Quantity to be Rs.3 MMT per annum. However, he submits that the Ministry of Environment and Forest has only accorded permission for clearance of 1.5 MMT per annum.

He relies upon definitions contained in Article 1.1 of the Agreement dated 11.8.2011 including the definitions of "applicable laws" and "change in law". Based on this he submits that on account of the Ministry of Environment and Forest giving clearance for 1.5 MMT of coal that becomes the applicable quantity in terms of the Agreement dated 11.8.2011. Hence, he submits that the Minimum Guaranteed Quantity automatically by operation of law stood modified and the liability of the appellant to pay under Article 7.3 automatically stood reduced to 90% of 1.5 MMT per annum and not 90% of 3 MMT per annum.

Reliance is also placed on Clause 3.1 (c) of the Agreement to contend that it was the duty of the respondent to procure all applicable terms/licenses/clearance unconditionally. Hence, he submits that any follow up with Ministry of Environment and Forest was the responsibility of the respondent and inability of the respondent to get necessary clearance for the full quantity cannot imply liability on the petitioner.

(ii) He further submits that there were serious disputes on the failure of the respondent to transport coal as several vessels loaded with coal had to idle around as no unloading of the coal was done.

(iii) He also submits that AT has wrongly exercised powers under section 17 of the Act by passing a mandatory injunction. He submits that the appellant is a reputed Public Sector Undertaking. There was no occasion for the AT to exercise powers and saddle the appellant with huge liability especially as the financial viability of the appellant is not in dispute.

(iv) Learned senior counsel has also relied upon judgment of the Supreme Court in ***Assistant Collector of Central Excise, Chandan Nagar, West Bengal vs. Dunlop India Ltd. And Others (1985) 1 SCC 260*** to contend that the Supreme Court has held that no governmental business or for any matter no business can be run on bank guarantees and liquid cash is necessary for running of a government.

6. Learned counsel for the respondent has, however, submitted as follows:-

(i) He submits that the respondent has on the assurances of the appellant invested more than Rs.650 crores on purchase of a transhipper and 30 barges. It has also invested to create necessary infrastructure for which completion certificate was issued on 9.8.2015. He submits that all this was done on the strength of the assurances of the appellant about Minimum Guaranteed Quantity being 3MMT per annum. He relies upon the Minutes of a Pre bid meeting dated 31.1.2011 where a specific query was posed to the appellant as to the quantity of coal imported by the appellant through the Paradip port for the financial year 2008-09 and 2010. The comment given by the appellant was that as the appellant is providing a guarantee of 3 MMT of

coal hence the query for the past period is not relevant. He stresses that the appellant cannot be allowed to back track from its representations and obligations as stated in Agreement dated 11.8.2011.

(ii) He further submits that it was never the responsibility or liability of the respondent to get necessary environmental clearance. The coal belongs to the appellant and it was the responsibility of the appellant to get the necessary clearances. Admittedly, the appellant has made the application for the environmental clearance. He relied upon minutes of the 38th Meeting of the Expert Appraisal Committee (EAC) on Environment Impact, Assessment of Thermal and Coal Mining Projects dated 26 June 2015 to note that the committee had recommended permission for transport of 1.5 MMT coal for one year i.e. till 30.7.2016. The NTPC/appellant was to submit findings of a stated study and the committee was to review the findings. He submits that NTPC/appellant took no steps to carry out the necessary studies and go back to the committee for enhancement of the quantity of coal for transport.

(iii) Learned counsel also relies upon judgment of this court in Arbitration Appeal (COMM.) 17/2017 dated 19.7.2017 to contend that this court has already held that the AT has powers to mould its relief under section 17 of the Act including powers to make mandatory orders.

7. A perusal of the impugned order would show that the AT noted that the issues raised by the appellant with respect to annual statement submitted by the respondent and determination of negligence/fault of the parties resulting in shortfall are matters which have to be proved by the parties. Based on the covenants in the agreements alone which at the present stage will have to be given weightage, the AT would determine as to whether a prima facie case is made out. The AT concludes that relying upon the

judgment of the Madras High Court in ***Soundaraja Mills Limited and Ors. vs. GAIL (India) Limited, 2016 (1) CTC 351*** the respondent has made out a prima facie case for grant of interim order. On a reading of the agreement the AT notes that MGQ is 3MMTPA which has not been revised or modified in writing. It also notes that no irretrievable injury shall be caused to the appellant if MGQ amount is released as the appellant is secured with proper bank guarantees of equal amount. On the other hand irreparable injury would be caused to the respondent as the nature of business of the respondent requires inflow of cash which appears to be the raisen d'etre for the MGQ Clause. Hence, necessary directions have been issued to the appellant.

8. The relevant article of the Agreement reads as follows:-

> "**7.1 Obligation**
>
> ….
>
> **(a) Obligation of NTPC**
>
> (i) …
> (ii) Guarantee minimum quantity of 3MMTper annum of coal during Operation Period to be transported through Inland Waterways Transport (IWT) from Transfer Point to coal stack yard of Farakka Thermal Power Plant in accordance with the terms of this agreement.
>
> xxx
>
> **Article 7.3: NTPC's Minimum Guaranteed Coal Obligations: -**
>
> NTPC hereby assures and represents to the Operator that it shall during each year of the Operation Period, utilize the project for transportation of a minimum quantity of 3 MMT per annum of Coal (such quantity being referred to as " Minimum Guaranteed

Quantity"MGQ) and further that it shall pay the Operator for the Transportation of the 90% of Minimum Guaranteed Quantity, if the actual coal quantity made available by NTPC for the project in a year is less that 90% of Minimum Guarantees Quantity in accordance with the provisions of this Article For avoidance of doubt, the provision of Minimum Guaranteed Quantity shall not be in effect during Material handling System-Phase-1, period.

Within three (3) weeks of the end of each period of twelve months of operations of the Project, the Operator shall submit to NTPC a statement ("Annual Statement") providing.

(a) Computation of the total quantity of coal supplied to Farakka
TPP using the Project in the preceding twelve month period.

(b) "Shortfall Quantity" because of NTPC's default. (Difference between the quantity actually made available by NTPC for Project during the respective 12 month period and 90% of MGQ)

(c) Computation of "Excess Quantity" (Difference between the quantity actually made available by NTPC for Project during the respective 12 month period and MGQ)

(d) Computation of the "MGQ Amount" payable to operator, in case of Shortfall Quantity. It shall be calculated by multiplying the Shortfall Quantity with the 75% of Project Rate applicable on the last day of the period of the Annual Statement in which respective Shortfall quantity is reported.

The Annual Statement would be submitted to NTPC together with the supporting documentation and calculations. The MGQ Amount will be paid to Operator directly by NTPC. The MGQ Amount will be payable on submission of a Bank Guarantee of equivalent value by the Operator in the format to be provided by NTPC. NTPC shall, within a period of thirty (30) days, make

payment of the MGQ Amount as specified in the Annual Statement.

Provided however, NTPC is allowed to adjust MGQ Amount already paid/payable in any year under this provision of the agreement against the excess quantity of coal provided above MGQ (3 MMTPA) in any subsequent/ earlier years of operations during the tenure of this agreement.

The Excess Quantity shall be adjustable against the shortfall quantity during the tenure of the project. The operator shall refund the MGQ amount, if paid earlier, proportionate to the Excess Quantity OR adjust Excess Quantity accrued earlier with the Shortfall Quantity, as the case may be. For refund purposes, the rates shall be same at which MGQ amount was paid to the operator. The refund shall be made by the operator to NTPC within 30 days of approval of Annual Statement by NTPC and on receipt of such refund NTPC shall allow the Operator to reduce the value of Bank Guarantee by the amount of refund.

The Bank Guarantee shall be returned by NTPC after the settlement of last Annual Statement at the end of the Term of Agreement.

Provided however, in the event that NTPC raises and objection to the determination of the MGQ Amount as specified in the Annual Statement it shall, within a period of three weeks from the submission of the Annual Statement:

(a) notify the Operator of its dispute to the MGQ amount,

(b) within a period of one week from such dispute notice, submit a written submission of its dispute to Operator providing the specific grounds and calculations and documents relating to the dispute being raised and;
(c) make the payment of the entire MGQ Amount to the Operator, under the condition that if the dispute is resolved in favour of NTPC, then the Operator would refund the said

amount together with interest applicable at the then prevailing SBI base rate plus 6.75% (six and three quarters percent).

It is clarified that no dispute raised by NTPC would be valid until NTPC has made the payment of the MGQ Amount pursuant to this sub-clause (c).

It is clarified that if NTPC fails to notify a dispute on the MGQ Amount within three weeks of receipt of the Annual Statement, it shall be deemed to have accepted the same and no disputes thereafter in relation to an Annual Statement would be valid under this Agreement."

9. A perusal of Article 7.1(a) of the Agreement between the parties makes it quite clear that the Guaranteed Minimum Quantity is 3MMT of coal per annum. Under Article 7.3 the appellant has also held out that he shall pay the operator/respondent for transportation 90% of Minimum Guarantee Quantity when the actual coal quantity is less than the minimum guaranteed quantity. The Minimum Guaranteed Quantity amount is payable on submission of a bank guarantee of equivalent value by the respondent within 30 days. Adjustments are to be made as stated in the Agreement during the tenure of the project. Where the appellant raises an objection as to determination of the MGQ amount the procedure to resolve the dispute is prescribed but the appellant continues to be liable to pay the entire MGQ amount to the operator. If the dispute is resolved in favour of the appellant then the operator will refund the said amount together with applicable interest rates. Clause 7.3 further clarifies the liability of the appellant stating that no dispute raised by the appellant would be valid until the appellant makes the payment of MGQ amount. Clearly, the impugned order has only enforced conditions of the agreement and no more.

10. As rightly pointed out by the respondent, this condition regarding payment was inserted in the tender floated by the appellant to attract bidding as any bidder would need some assurance about guaranteed returns on the investment as it had to invest heavily for the purpose of building infrastructure to meet its obligations under the contract. The respondent has pointed out that it has already expanded a sum of Rs. 650 crores for procurement of assets and creating infrastructure to fulfill the contract. There would be other expression also.

11. The plea of the appellant that the MGQ amount stood reduced on the account of statutory clearances being received only of 1.5 MMTPA is a highly disputed fact. Same is the position on the issue whether it was the responsibility of the appellant or the respondent to get the environmental clearance and its consequences.

12. The plea has been strongly raised by the learned senior counsel for the appellant that it was the responsibility of the respondent to procure the necessary environmental clearances and it failed to get the clearances for the minimum MGQ amount of 3MMTPA and hence the MGQ amount stood reduced. Reliance is placed on clause 3.1(c) (ii) of the Agreement which reads as follows:-

> "(c) **Condition precedent of Operator**
>
> The Conditions Precedent required to be satisfied by the Operator shall be deemed to have been fulfilled when the Operator shall have:
>
> (i) ....
>
> (ii) procured all the Applicable Permits/Licenses/Clearances unconditionally or if subject to condition then all such conditions shall have been satisfied in full and such Applicable

Permits/Licenses/Clearances are kept in full force and effect during the construction and operation of the project.

(iii) ....."

13. The admitted fact is that it is the appellant who has applied for permission for the environmental clearances. The concerned Committee, namely, the Expert Appraisal Committee on Environmental Impact Assessment of Thermal Power and Coal Mining Projects in its meeting held on 25th and 26th June, 2015 recommended continuation of the permission for transport of maximum 1.5 MMT coal per year. It also directed the appellant to after a period of six months submit and present the findings of various studies relating to various aspects to enable the Committee to review the findings. These aspects include issues like impacts of noise generated, energy conservation, impact on economically important fish species, etc. due to the transfer of coal.

14. It has been pleaded by the respondent that no such studies as directed by the Committee were carried out. In fact no such plea has been made by the appellant on the said direction to get the studies done.

15. I need not go in further detail on this controversy as to who is responsible for getting the necessary environment clearances. Save to say that the appellant was not able to make a prima facie case in this aspect in its favour.

16. I may note that the AT has not gone into this issue at this stage in view of the terms and conditions of the agreement. In my opinion, the AT has rightly not accepted this plea of the appellant keeping in mind the stringent condition placed in clause 7.3 of the Agreement which apart from others

specifically states that no dispute raised by the appellant would be valid until the appellant has made payment of MGQ amount.

17. Regarding the plea of the learned senior counsel for the appellant about mishandling and unloading of coal by the respondent on this plea no sufficient arguments were made.

18. As far as power of the AT under section 17 is concerned, I may quote from earlier order passed by this court in Arbitration Appeal (Comm.) 17/2017 in ***Delhi State Industrial & Infrastructure vs. PNC Delhi Industrial Infra Private Limited*** dated 19.7.2017 which read as follows:-

> "9.Section 17 of the Act reads as follows:-
>
> "**17. Interim measures ordered by arbitral tribunal**
>
> (1) A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to the arbitral tribunal—
>
> (i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
>
> (ii) for an interim measure of protection in respect of any of the following matters, namely:—
>
> (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
>
> (b) securing the amount in dispute in the arbitration;
>
> (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or

experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court."

10. The Division Bench in ***Ajay Singh vs. Kal Airways Private Limited and Ors, 2017 (4) Arb.LR 186 (Delhi)*** held as follows:-

"26. Though apparently, there seem to be two divergent strands of thought, in judicial thinking, this court is of the opinion that the matter is one of the weight to be given to the materials on record, a fact dependent exercise, rather than of principle. That Section 9 grants wide powers to the courts in fashioning an appropriate interim order, is apparent from its text. Nevertheless, what the authorities stress is that the exercise of such power should be principled, premised on some known guidelines - therefore, the analogy of Orders 38 and 39. Equally, the court should not find itself unduly bound by the text of those provisions rather it is to follow the underlying principles. In this regard, the observations of Lord Hoffman in *Films Rover International Ltd. v. Cannon Film Sales Ltd.(1986) 3 All ER 772* are fitting:

"But I think it is important in this area to distinguish between fundamental principles and what are sometimes described as 'guidelines', i.e. useful generalizations about the way to deal with the normal run of cases falling within a particular category. The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle."

27. It was observed later, in the same judgment that:

"The question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction. The second point is that in cases in which there can be no dispute about the use of the term 'mandatory' to describe the injunction, the same question of substance will determine whether the case is 'normal' and therefore within the guideline or 'exceptional' and therefore requiring special treatment. If it appears to the court that, exceptionally, the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it even though the court does not feel a 'high degree of assurance' about the plaintiff's chances of establishing his right, there cannot be any rational basis for withholding the injunction."

18. Hence, in view of the above judgments, it is clear that the court has wide powers to fashion appropriate interim order including mandatory

interlocutory injunction. Such powers could also be exercised under Section 17(1)(e) of the Act by the arbitrator. As noted above, exercise of power for grant of interim orders is a fact dependent exercise.

19. The AT has rightly held that a prima facie case is made out. It has rightly concluded that balance of convenience is in favour of the respondent who has invested large amounts on the assurances and representation of the appellant and has created an infrastructure/equipment to carry out the project.

20. Accordingly, there is no merit in the present appeal. Same is dismissed. All pending applications, if any, also stand disposed of.

(JAYANT NATH)
JUDGE

OCTOBER 25, 2017/n