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

Date of Decision: 29th October, 2021

\+ **O.M.P. (COMM) 328/2021, CAV 49/2021, I.A. Nos. 14204-14207/2021.**

EASTERN COALFIELDS LIMITED ..... Petitioner

Through: Mr. Anupam L. Das, Senior Advocate with Mr. Parijat Kishore, Advocate.

versus

INDIA POWER CORPORATION LTD. (FORMERLY KNOWN AS DPSC LIMITED) ..... Respondent

Through: None.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA HYBRID MODE]

SANJEEV NARULA, J. (Oral):

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 [hereinafter, as ***'the Act'***] is directed against the arbitral award dated 15th February, 2021 passed by the learned Sole Arbitrator, whereby the claim of the Respondent – India Power Corporation Ltd. (Claimant during the arbitral proceedings) [*hereinafter,* ***'IPCL'***] for Rs. 24.7256 Crores has been allowed with interest payable at 9% w.e.f. 6th October, 2016 till the date of payment; and further, the counter-claim of the Petitioner – Eastern Coalfields Ltd. (Counter-claimant during the arbitral proceedings) [*hereinafter,* ***'Eastern Coalfields'***] was allowed for an amount

of Rs. 18,66,86,521/- with interest payable at 9% from the aforenoted date.

2. The facts, briefly put, are that IPCL was engaged for the construction, erection and successful commissioning of a thermal power station in Chinakuri Power Plant [*hereinafter,* ***'CPP'***] having 2x10 MW capacity. Subsequently, IPCL made an addition of 1x10 MW capacity and the Agreement between the parties stipulated that IPCL would be entitled to a written down value [*hereinafter,* ***'WDV'***] upon handing over the plant in good running condition to Eastern Coalfields – on expiry or sooner determination of the Lease Deed dated 31st March, 1993, which expired on 31st March, 2011. The parties mutually extended the Lease Deed for one year – which came to an end on 31st March, 2012, subsequent to which, Eastern Coalfields requested for the plant to be handed over to them in good running condition. Further, a request was also made to IPCL to supply corroborative documents to enable it to substantiate its claim for a WDV of Rs. 24.7256 Crores.

3. When disputes arose between the parties, it led to appointment of the learned Arbitrator by the Supreme Court *vide* order dated 17th October, 2014. IPCL raised a claim of Rs 24.7256 Crores for WDV, additional expenses in the sum of Rs 25.81 Crores and interest payable at 18% from 1st April, 2012 till payment. Eastern Coalfields raised counter-claims for various amounts under several heads such as rent due; excess payment in lieu of higher coal price; payment of coal price; handing over of possession, etc.

4. The learned Arbitrator, after consideration of the material placed before him by both the parties and the oral evidence, passed the impugned award.

5. Mr. Anupam L. Das, Senior Counsel for the Petitioner submitted that the challenge of Eastern Coalfields to the impugned award is limited to the WDV and the rejection of their counter-claim. He makes a two-fold submission, impugning the award. The same is as follows:

(i) It is contended that the award is not final in nature. He argues that during the course of arbitration proceedings, the Arbitrator *vide* order dated 22nd July 2017, appointed MECON. Ltd. [*hereinafter, **'MECON'***] to survey, examine and assess working condition and value of the plant and machinery. To support the submissions, the attention of this Court has been drawn to paragraph no. 160 of the impugned award, wherein the learned Arbitrator noted as follows:

> *"It must also be noticed here that the Claimant has raised a preliminary objection on the ground that the application for amendment suffers from delay and laches. Therefore, seeks it's dismissal on this short ground. It is submitted that Claimant has already filed its objection to the MECON report and also filed a report submitted by M/s AKB Power Consultants Pvt. Ltd. for consideration of these two reports, further evidence will have to be recorded on behalf of both the parties."*

Mr. Das, submits that as per MECON's report, an investment of Rs. 16 Crores would be required to bring the plant from 'idle' to 'running' condition. He further submits that this entitlement of IPCL is still required to be adjudicated, and the directions given *vide* the impugned award cannot be considered to be final. Further, he submits that IPCL has in fact filed an application before the Supreme Court seeking appointment of an arbitrator to adjudicate the dispute in relation to quantum of monies required to bring the plant back to good running condition.

(ii) Next, Mr. Das further submits that Eastern Coalfields had called upon IPCL to supply corroborative documents to enable it to

substantiate its claim for the WDV of Rs. 24.7256 Crores. IPCL, however, did not produce any documents to justify its claim and instead maintained that calculation arrived at by the statutory auditor viz. Lodha & Company is sacrosanct. Despite various letters written requesting IPCL to furnish corroborative documents, the same were not provided. During the course of arbitration, IPCL only relied upon the said auditor's report to justify its claim. IPCL did not examine anyone from Lodha & Company to prove the veracity of the said report, and in fact, another Chartered Accountancy firm viz. M/s De and Bose were examined as CW-2. The said witness during the examination, admitted that the entire report was in fact, a 'cut, copy and paste' of the Lodha & Company report. This also becomes evident from the testimony of the witness and their response to questions no. 23 and 24 put during cross-examination. The report of M/s De and Bose was prepared without examining the supporting documents as same were admittedly unavailable. Thus, the report is meaningless as it is not based on documentary evidence. In these circumstances, Mr. Das submits that, in absence of any corroborative material to support the WDV calculation, findings of the learned Arbitrator are without evidence, and therefore, the award is liable to be set aside on this ground.

6. The Court has considered the aforenoted contentions. Insofar as the first objection is concerned, the Court finds the award to be final in nature to the extent it adjudicates the disputes that were referred to the Arbitral Tribunal. Eastern Coalfields had filed an application for amendment of counter-claim. While considering the said application at the final stage, the

Arbitrator held that from the evidence on record it is evident that the plant was in a running condition at the time when the lease expired by afflux of time. Referring to Clauses of the Notice Inviting Tender [*hereinafter,* ***"NIT"***], it was observed that Eastern Coalfield could not be permitted to raise a further claim on the ground that the plant had to be put into running condition. [para 158 of the impugned award]. Therefore, the Arbitrator held that if the possession of the plant had been taken before issuing the NIT (since the plant at that stage was operating), it could not be contended that it was not in a running condition. Deterioration, if any, occurred when IPCL failed to handover the possession as there was no agreement on determination of WDV of the plant. [para 159 of the impugned award]. In these circumstances, the Arbitrator taking note of the preliminary objection of IPCL that the application for amendment suffered from delay and laches, rejected the application finding the proposed amendment to be unnecessary for determining the real question in controversy – in light of the finding(s) rendered in paragraphs 158 and 159 of the impugned award. In this behalf, the observations made in paragraph 161 are germane, which reads as follows:

> *"161. It is matter of record that the application for amendment was filed at the time when the Respondent was to commence its arguments. In my opinion that the application cannot be allowed at this stage. The amendment must be necessary for the purpose of determining the real question in controversy. As noticed above, the issuance of the NIT clearly demonstrates the intention of the respondent was to replace the old machinery and plant to Stoker Fired Boilers by Fluidised bed Combustion Boilers. Therefore, the condition of the old machinery as well as the question of plant being in a running condition had become irrelevant. For the reason stated above, the application for amendment is dismissed as it will serve no useful purpose in determining the real question in controversy between the parties."*

7. In view of the above, it becomes clear that the issues sought to be raised by the amendment application was not the subject matter of reference. Then, the challenge on the first ground urged by Mr. Das, is therefore, not sustainable.

8. Further, the operative portion of the award makes things absolutely clear. The award has been passed in favour of IPCL to the extent of Rs. 24.7256 Crores, and likewise, the counter-claim of Eastern Coalfields stands allowed for an amount of Rs. 18,66,86,521/-. Eastern Coalfields is already seeking independent adjudication of dispute *qua* the expenses for bringing the plant in running condition by appointment of an arbitral tribunal. In the event an arbitrator is appointed and Eastern Coalfields raises such a claim, the same would be adjudicated on its own merits. Therefore, the observations made in paragraph 160 do not render the impugned award to be interim in nature. The award finally decides the disputes that were subject matter of reference.

9. With respect to the second contention, regarding the findings of the Arbitrator accepting IPCL's claim regarding WDV, it would be apposite to take note of the findings of the learned Arbitrator on this issue. This can be found in paragraph no. 144, which is reproduced as below:

> *"144. Mr. Subrata De; CW-2, has stated that he did not have the benefit of the report prepared by Lodha & Company at the time of the preparation of the report by De & Bose. He denied the suggestion put to him that 'the figures with regard to plant and equipment, building, furniture and equipment, vehicle and all the other heads are exactly the same in your report as well as the earlier report." (Q.23). He however accepts the suggestion that 'the figures therein and analysis are exact replica of the earlier report." He however, clarified in the answer to question no.24 that he had not seen the earlier report and had computed the WDV on the basis of the records made available to him. I do not see any particular reason to discard the evidence of this witness also. I accept the WDV as shown in the report prepared by "De & Bose" Chartered Accountants."*

It is, therefore, clear that the learned Arbitrator has found the report to be

credible. The response of the witness to both questions No. 23 and 24 were also considered by the learned Arbitrator, however, he did not find the same to be in any way having a bearing on the view of the expert on the computation of WDV – which was done on the basis of the record available. The quantity and the quality of the evidence, is an aspect that lies in the exclusive domain of the Arbitrator and requires no intervention of the Court. Besides, Eastern Coalfields' insistence on further proof of the amount as WDV was found to be unjustified as the claim was duly supported by the report of Chartered Accountant. There is no infirmity in the opinion of the Arbitrator. Therefore, the objections urged on this ground, also cannot sustain.

10. No other ground(s) of challenge, is pressed apart from those noted hereinabove.

11. In view of the above, the Court does not find any merit in the present petition and accordingly, the same along with the pending applications, is dismissed.

SANJEEV NARULA, J

OCTOBER 29, 2021
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(corrected and released on 13th November, 2021)