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

Date of decision: 22nd January 2024

\+ ARB. A. (COMM.) 69/2022 & I.A. 17200/2022, I.A. 17202/2022

SIEMENS GAMESA RENEWABLE POWER PRIVATE LIMITED ..... Appellant

Through: Mr. Samudra Sarangi, Ms. Shruti Raina, Ms. Abhilasha Khanna, Ms. Riya Kalra, Ms. Alisha Luthra, Ms. Nitya Jain, Ms. Janvi Narang and Mr. Tanay Chaturvedi, Advocates.

versus

GREEN INFRA WIND ENERGY LTD ..... Respondent

Through: Mr. Kunal Tandon, Mr. Kapil Arora and Ms. Manjula Baxla, Advocates.

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI J.

By way of the present appeal filed under section 37 of Arbitration & Conciliation Act 1996 ('A&C Act'), the appellant impugns order dated 04.10.2022 passed by the learned Arbitral Tribunal on an application filed under section 17 of the A&C Act, whereby the appellant had *inter-alia* sought restoration/refund of the amount under 02 Advance Bank Guarantees, one issued by DBS Bank and the other issued by Kotak Mahindra Bank, aggregating to Rs.292,79,00,000/- crores that have been encashed by the respondent/Green Infra Wind Energy Ltd.

2. The bank guarantees were issued in connection with and under certain contracts between the parties for setting-up a 300 Mega Watts (MWs) wind power project at Bhujpul in Taluk Mandvi and Nakhatrana of District Kutch, Gujarat comprising 143 Wind Turbine Generators.

3. The present appeal was listed first before this court on 19.10.2022; and has been pending ever-since at the pre-notice stage.

4. Mr. Samudra Sarangi, learned counsel appearing for the appellant has taken the court through various portions of the impugned order, to argue that the learned Arbitral Tribunal has omitted to consider the circumstances in which the bank guarantees in question could have been invoked; and having held that it would not be possible to decide that issue without evidence being led as to whether the respondent could have invoked and encashed the bank guarantees, the learned Arbitral Tribunal has nevertheless proceeded to reject the prayers made in the application.

5. Relevant paras of the impugned order, as pointed-out by learned counsel for the appellant, are as follows :

> *"33. In order to decide whether it is just and convenient in the present case to direct refund of the amount encashed through the present application and direct the return of the amounts to the bank would require the Tribunal to have a conspectus of the entire claim and the counter claim and the equities involved, if any, before it. It would be necessary to see the total contract price, the amounts already paid on particular milestones, the proportion of the amounts paid to the proportionate obligations fulfilled and other such factors. As stated earlier, we do not have before us the complete pleadings and any concrete evidence in the matter. We find it difficult, in the circumstances to consider whether it would be just and convenient to direct the reliefs sought for i.e. declarations that the invocation was premature, illegal and ultra vires the provisions*

of the contract.

"34. Further, whether it would appropriate in the present case to direct refund of the amount involves consideration of the actions of the parties in the working out of the contract which in this case would require evidence of whether the parties fulfilled their obligations under the contracts up to the time the bank guarantees were invoked. This necessarily requires a consideration of the evidence. In this case, the respondent alleges that it had fulfilled all the obligations by commissioning all the WTGs and therefore the value of the bank guarantees was reduced to zero. The claimant has refuted this allegation. The respondent has relied on the endorsement on 116 Commissioning Certificates. The claimant has denied it. In any case, the respondent has claimed that the other WTGs are commissioned because of Deemed Commissioning Certificates which have not been produced before the arbitration panel. Ex facie, all the WTGs have not been commissioned. It would not be possible to render a finding if all the WTGs have in fact been commissioned and therefore the bank guarantees could not have been encashed at all.

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"36. An independent consideration of the financial condition of the claimant would also arise. Unless, evidence is led, this tribunal may not be able to conclude if it would be just and convenient to direct refund.

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"85. In the present case, as distinct from the above cases, the question is not so much whether a party should be injuncted from invoking a bank guarantee but whether, having invoked the bank guarantee, this Tribunal should hold, without any evidence being led, that the bank guarantee could not have been encashed by the beneficiary."

6. On the other hand, it has been brought to the notice of this court by Mr. Kunal Tandon, learned counsel appearing for the respondent/claimant that a specific issue in relation to encashment of

the subject bank guarantees has been framed by the learned Arbitral Tribunal in the counter-claim filed by the appellant/non-claimant. Mr.Tandon draws attention to the relevant issue, as recorded in Procedural Order dated 15.05.2023 made by the learned Arbitral Tribunal, which reads as follows :

> *"22. Whether the encashment of the Bank Guarantees for an aggregate sum of INR 292,79,00,000/- furnished by the Respondent was illegal. If so, to what effect? OPR"*

7. Mr. Tandon further points-out that the learned Arbitral Tribunal has given due consideration to the fact that their claims are in excess of the amount of bank guarantees that were encashed; and the issue whether restitution of the amount encashed would be possible has also been considered in light of the financial position of the respondent.

8. Attention in this regard is drawn to the following paras of the impugned order, which reads as under :

> "*88. Thus, in light of the above, although it is possible to see a certain haste in invoking the bank guarantees which is probably due to fact that the bank guarantees were due to expire on 31/03/2022. In our view, this haste is not sufficient to vitiate the entire act of invoking the bank guarantees which is done in terms of the contract guarantees. In any case, it would not be justified to restores status quo ante and direct refund of the amounts to the Contractor or direct deposit of the amount in a separate account having regard to the nature of the dispute and the failure to perform obligations by the respondent as claimed by claimant, set out hereinabove. It is not possible to ignore the claim made by claimant to the extent of Rs.* ***780.7*** *Crores, the Tribunal is of the considered view that the entire claim and the counter-claim, if any, should be adjudicated upon after permitting parties to lead evidence, instead of allowing this application under Section 17 for interim protection.*

> "*89. Furthermore, the Claimant has unequivocally stated before us that the amount is safe with it since it has a sound financial position. The present assets of the company itself are worth Rs.* ***2000*** *Crores and it is said to have numerous high end projects in India.* ***There is no doubt that if found, that they could not have invoked the bank guarantees, they would be bound to bring back the amounts with interest as may be ordered****. It is not necessary therefore to consider prayer for deposit in the joint account.*"
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> (bold in original)

9. At this point, the court reminds itself of the supervening principle of arbitration law, *viz.* the principle of least intervention by court in on-going arbitration proceedings, as *inter-alia* enshrined in section 5 of the A&C Act, which reads as under :

> *5.* ***Extent of judicial intervention.—*** *Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.*

10. A brief reference in this regard may also be made to the decision of this court in ***Indiabulls Housing Finance Ltd. vs. Shipra Estate Ltd.***[1], which explains the scope of interference by court under section 37 of the A&C Act as follows :

> "*29. A brief consideration as to the scope of the power of this Court under Section 37(2)(b) of the A&C Act would not be out of place at this point.* ***The law is long settled, that the use of power under Section 37(2)(b) of the A&C Act to interfere in "discretion" exercised by an Arbitral Tribunal under Section 17 of the A&C Act, has to be guarded and sparing****. Interference is warranted* ***only in exceptional circumstances****, in cases where the discretionary power of the* ***Arbitral Tribunal has been used in a manner that is palpably arbitrary, capricious, irrational or perverse****. [Manish Aggarwal v. RCI Industries and Technologies Ltd., (2022) 3 HCC*

[1] 2023 SCC OnLine Del 1087

(Del) 289] ***It is not permissible for a court to substitute the views it might have taken had it decided on the interim measures of protection in place of the view taken by the Arbitral Tribunal****. It is not for the court to replace its own discretion in place of that of the Arbitral Tribunal, unless impelled to do so on the grounds enumerated above.*"

(emphasis supplied)

11. Furthermore, to address the apprehension expressed on behalf of the appellant, namely that, while deciding the application under section 17 of the A&C Act the learned Arbitral Tribunal has, in fact, taken a final view on the issue of encashment of the bank guarantees, it is observed that that is not at all the case, as specifically expressed by the learned Arbitral Tribunal in the following paras of the impugned order :

> "*90.* ***The findings that we have recorded are prima facie findings and without leading any evidence as to the veracity of the contentions raised by the parties and do not connote any final conclusions.*** *The findings and observations are only intended for the purpose of deciding the present application under section 17 of the Act.*
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> "*91. Thus, the Section 17 application filed by the respondent is hereby disposed as dismissed in the above-mentioned terms.*"

(emphasis supplied)

12. To quell any misgivings on the appellant's part, it is noticed that a specific issue relating to the encashment of the bank guarantees in question has been framed, specifically to decide whether the encashment of the bank guarantees by the respondent was illegal. The learned Arbitral Tribunal will accordingly deal with this issue in the course of the arbitral proceedings.

13. In the above view of the matter, this court is not inclined to issue notice on the present appeal.

14. The present appeal is accordingly dismissed *in-limine*; without however expressing any opinion on the merits of the matter.

15. The appeal stands disposed-of.

16. Pending applications, if any, also stand disposed-of.

ANUP JAIRAM BHAMBHANI, J

JANUARY 22, 2024
V. Rawat

(Released on : 14th February 2024)