

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 07.07.2022

+ **O.M.P. (COMM) 137/2021**

SHYAMA POWER INDIA LIMITED

..... Petitioner

Versus

HARYANA VIDYUT PRASARAN

NIGAM LIMITED

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Rajshekhar Rao, Senior Advocate with Mr Kotla Harshavardhan, Mr Kshitij Maheshwari and Ms Sonal Sarada, Advocates.

For the Respondent : Mr Samir Malik, Ms Rimali Batra, Mr Sahil Sood, Ms Nikita Choukse and Mr Krishan Kumar, Advocates.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. Shyama Power India Ltd. (hereinafter '**SPIL**') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter '**the A&C Act**') impugning an Arbitral Award dated 14.12.2020 (hereafter '**the impugned award**') delivered by the Arbitral Tribunal comprising of a Sole Arbitrator (hereafter '**the Arbitral Tribunal**').

2. The impugned award was rendered in the context of disputes that have arisen between the parties in relation with two agreements dated 28.12.2019, for establishment of three transmission lines. The disputes relate to SPIL's claim for refund of the liquidated damages imposed by the respondent (hereinafter 'HVPNL'), cost overruns and outstanding payment for supply and completion of two transmission lines (referred to as Package B). The Arbitral Tribunal dismissed the claims raised by SPIL on the ground that they were barred by limitation. Thus, the only controversy that arises for consideration in this case is whether this decision of the Arbitrator is patently erroneous and vitiates the impugned award.

FACTUAL CONTEXT

3. HVPNL is a public sector undertaking incorporated under the Companies Act, 1956 and is, *inter alia*, engaged in the business of transmission, supply and distribution of electricity within the state of Haryana.

4. SPIL is a private limited company incorporated under the Companies Act, 1956 and engaged in the business of establishing and executing turn-key contracts of transmission lines, substations, and similar projects.

5. On 12.06.2009, HVPNL issued an Invitation for Bids bearing no. WB/2008/G-06 (hereinafter 'IFB') for executing the works regarding procurement of plant, design, supply and installation, erection, testing and commissioning of three 220 kv electricity

transmission lines viz. a line from Mayyer to Isherwal (hereinafter '**Hisar Line**'); a line from Panchkula to Tepla (hereinafter '**Panchkula Line 1**'); and, a line from Panchkula to Raiwali (hereinafter '**Panchkula Line 2**') on the terms and conditions stipulated in the Instructions to Bidders. The works relating to the aforesaid three lines are referred to as '**Package B**'.

6. On 29.09.2009, SPIL, as the lead partner, along with its joint venture partner - M/s ICOMM Tele Ltd., submitted a consolidated bid for Package B for a sum of ₹21,50,03,232/-. SPIL's bid was accepted by HVPNL on 01.10.2009 and thereafter, two Letters of Acceptance dated 02.12.2009 (hereinafter the '**LoAs**') were awarded to SPIL:-

(i) Letter no WB-10/G-06/Pkg B (Supply) for Ex-works Supply and CIP Entry Border Point/CIF Indian Port of Entry of all plant and equipment including mandatory spares and Design services of the Transmission Lines (First Contract).

(ii) Letter no WB-11/G-06/Pkg B (Erection) for port handling and custom clearance of plant and equipment including mandatory spares to be 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 included in the First Contract

specified in the contract documents required for complete execution.

7. Pursuant to issuance of the LoAs, two agreements (hereinafter collectively referred as the '**Agreements**') for Supply and Erection of the three transmission lines – the Hisar line, Panchkula Line 1 and Panchkula Line 2 – were executed between the parties on 28.12.2009. In terms of the Agreements, the effective date of commencement of work was 13.02.2010 and the scheduled date of completion of works under Package B was a period of fifteen months/450 days from the effective date of the Agreement, that is, on or before 05.05.2011. Further, in terms of Clause 13 of the Particular Conditions of the Contract (hereinafter '**PC**'), SPIL was required to submit a Performance Security in the form of Bank Guarantee of an amount equivalent to 10% of the Contract Price.

8. Admittedly, the works stipulated under the Agreements relating to Package B were not finished by the scheduled completion date. SPIL states that the delay was due to various breaches on the part of HVPNL and certain other reasons beyond its control. The Hisar Line was completed on 06.04.2012; the Panchkula Line 1 was completed on 12.08.2012; and, the Panchkula Line 2 was completed on 05.12.2012. Hence, the works under Package B stood completed on 05.12.2012. HVPNL sought to impose liquidated damages on SPIL, in terms of Clause 40.4 of the General Conditions of the Contract (hereinafter '**GCC**').

9. By various communications, SPIL requested for extension of time to complete the works relating to the transmission lines, without imposition of liquidated damages as, according to it, the delay in execution of the works was not attributable to it. HVPNL, from time to time, granted such extensions and deferred partial imposition of the liquidated damages, however, it stated that such deferment should not be treated as an extension of time as the same would be considered on merits after completion of the works; and, if the liquidated damages become leviable, the same would be recovered from SPIL along with the interest as per “*SBI Base Rate + 3% applicable on date of release of payment*”.

10. On 07.05.2012, HVPNL issued a Taking Over Certificate to SPIL with respect to the Hisar Line. And, on 17.12.2012, HVPNL issued the Taking Over Certificates with respect to the Panchkula Lines.

11. By a communication dated 30.04.2013, SPIL requested for final extension of time upto 05.12.2012, without imposition of liquidated damages and with benefits of price variation on actual basis, for the Panchkula Lines. SPIL stated that the delay in execution of the works was not attributable to it and was caused due to (i) Approval of GTP/DRG/type test; (ii) Vendor Approvals; (iii) Inspection and dispatch of instructions of tower parts and other line material; (iv) Approval of route plan; (v) Right of Way problem; (vi) Heavy rainfall in the area; and, (vii) Non availability of shut downs.

12. By a letter dated 17.05.2013, SPIL requested for final extension of time upto 06.04.2012, without imposition of Liquidated Damages and with benefits of price variation on actual basis, for the Hisar Line. SPIL stated that the delay in execution of the works was not attributable to it and was caused due to (i) Approval of GTP/DRG/type test; (ii) Vendor Approvals; (iii) Inspection and dispatch of instructions of tower parts and other line material; (iv) Approval of route plan; (v) Right of Way problem; (vi) Heavy rainfall in the area; and, (vii) Delay due to non-completion of 220Kv Sangwan Sub-station.

13. By a letter dated 25.10.2016, HVPNL communicated its decision regarding SPIL's application for final extension of time with respect to the Panchkula Lines. HVPNL sought to impose liquidated damages to the extent of 10% of the contract price for an alleged delay of 224 days on the part of SPIL in completion of the Panchkula Line 1 and an alleged delay of 346 days on the part of SPIL in completion of the Panchkula Line 2.

14. Thereafter, by another letter dated 09.08.2017, HVPNL communicated its decision regarding SPIL's application for final extension of time with respect to the Hisar Line. HVPNL sought to impose liquidated damages to the extent of 10% of the contract price for an alleged delay of 179 days on the part of SPIL in completion of the Hisar Line.

15. SPIL, by a letter dated 23.11.2017, invoked the agreement to refer the disputes to arbitration with respect to the disputes pertaining

to Package B, in terms of Clause 46 of the GCC, It further requested HVPNL to appoint an arbitrator within a period of thirty days.

16. Thereafter, by a communication dated 06.08.2018, HVPNL suggested the names of three persons, one of whom could be appointed as the Sole Arbitrator. And, by a letter dated 29.08.2018, SPIL accepted the appointment of Justice (Retd.) V.K. Gupta as the Sole Arbitrator to adjudicate the disputes between the parties.

ARBITRAL PROCEEDINGS

17. On 21.12.2018, SPIL filed its Statement of Claims before the Arbitral Tribunal. The claims made by SPIL with respect to Package B are tabulated below:

Claims	Particulars
Claim no.1	Declare that the respondent is in breach of its obligations under the First and Second Contract dated 02.12.2009.
Claim no.2	Quash the impugned letters dated 25.10.2016 and 09.08.2017
Claim no.3	Declare that the claimant is entitled to extension of time without the imposition of Liquidated Damages from: a. 08.05.2011 to 06.04.2012 for the Hisar Line; b. 08.05.2011 to 05.12.2012 for Panchkula Line-I; c. 08.05.2011 to 12.08.2012 for Panchkula Line-II
Claim no.4	Declare that the claimant is entitled to a sum of ₹1,94,16,157.40/- in lieu of wrongfully imposed

	liquidated damages and the respondent's action of holding back the aforesaid sum is wrong
Claim no.5	Direct the respondent to pay a sum of ₹1,94,16,157.40/- plus interest at the rate of 18% per annum from the scheduled date of final completion till date, to the claimant, towards wrongfully imposed liquidated damages, which the respondent has further wrongfully set off against other outstanding amounts payable to the claimant
Claim no.6	Direct the respondent to pay a consolidated sum of ₹2,66,06,872/- to the claimant, towards overrun costs incurred by it during the delay period i.e. from the scheduled date of completion till the actual date of completion, including fixed overheads, loss of profits, extension charges for the PBG's etc.
Claim no.7	Direct the respondent to pay an amount of ₹24,24,851.60/- plus interest at the rate of 18% per annum from the actual date of final completion to the claimant, as outstanding payment for completion of work under Package B
Claim no.8	Grant all costs to be incurred by the claimant towards the present arbitral proceedings
Claim no.9	Grant <i>pendente lite</i> interest and post award interest at the rate of 18% per annum, on the sums claimed herein till the date of actual payment

18. HVPNL filed its Statement of Defence, however, it did not raise any counter claims.

19. Before the Arbitral Tribunal, SPIL contended that the time period of 450 days/15 months must be interpreted to mean 'commissioning'

and for the said reason, the delay in commissioning of the Panchkula Line 2 would be relevant to assess the validity of the liquidated damages imposed by HVPNL. However, HVPNL submitted that since the value/price for each line was provided separately in the Agreements, the stipulated timeline of 450 days/15 months was meant for commissioning of each line and hence, the liquidated damages were, accordingly, imposed on SPIL post expiry of 450 days for the delay in each line, including the Hisar and Panchkula Line 1.

20. HVPNL further contended that the claims raised by SPIL were barred by limitation as the liquidated damages were deducted in the year 2012-2013 and the three transmission lines under Package B were commissioned by the month of December, 2012. Furthermore, the letters dated 25.10.2016 and 09.08.2017 issued by HVPNL were confirmations of the liquidated damages deducted in the year 2012 and the same could not be the basis of a fresh cause of action to invoke arbitration as SPIL already had knowledge of the said deductions. HVPNL also contended that the claims for cost-overruns preferred by SPIL were also barred by limitation as SPIL had neither mentioned nor sought the said claim in any communication during the entire cost of executing the works under Package B. HVPNL submitted that SPIL's claims were barred by limitation as the Agreements were completed on 17.12.2012, when the Taking Over Certificates were issued to SPIL and the final liquidated damages were deducted on 15.03.2013 and thus, the cause of action for SPIL to refer the disputes to arbitration arose then. HVPNL submitted that, by its letters dated 25.10.2016 and 09.08.2017,

it had rejected SPIL's application for extension of time and reiterated its position for the levy of liquidated damages, which was already closed in the year 2012-2013. SPIL had issued the notice invoking arbitration in the year 2018, that is, after a period of five years from the date of final deduction of liquidated damages and hence, the claims raised by it are barred by limitation.

21. SPIL claimed that the communications dated 25.10.2016 and 09.08.2017 issued by HVPNL were the final adjudication in respect of the request regarding extension of time and imposition of liquidated damages. Hence, invocation of arbitration was within the prescribed period of limitation.

22. SPIL referred to Section 43 of the A&C Act and Article 113 of the Limitation Act, 1963 and stated that the decision on extension of time was a consultative process and envisaged an agreement between the parties and if SPIL had incurred additional costs for completion of the project on account of delays caused by HVPNL, it would be entitled to extension of time as well as the extra costs incurred on account of the same.

23. SPIL further claimed that disputes arose between the parties when HVPNL, by its letters dated 25.10.2016 and 09.08.2017, rejected its applications for extension of time. And, consequently, the cause of action for cost-overruns also arose at this point. Since the notice invoking arbitration was issued to HVPNL on 23.11.2017, the claim for

cost-overruns was not barred by limitation as the same had been raised within a period of three years.

24. SPIL further submitted that there was no agreement or disagreement between the parties, within the meaning of Clause 40.2 of the GCC, until HVPNL decided its request for extension of time by its letters dated 25.10.2016 and 09.08.2017 and therefore, no disputes existed between the parties prior to the said dates.

THE IMPUGNED AWARD

25. By the impugned award, the Arbitral Tribunal held that the letters dated 25.10.2016 and 09.08.2017 issued by HVPNL were only a verification of the extension of time requests preferred by SPIL and the same were “*not so radical a departure from the prevailing situation*” that SPIL could not have contemplated arbitration prior to issuance of the aforesaid letters. The Arbitral Tribunal further held that mere communication of rejecting a belated request for extension of time “*would not, in any manner, alter, change, add or less from the payments*” already deducted in the month of March, 2013 and hence, SPIL’s knowledge about the deduction of liquidated damages arose in the month of March, 2013 and the communications issued by HVPNL on 25.10.2016 and 09.08.2017 would not alter the position of the payments made in 2013. Accordingly, the Arbitral Tribunal held that SPIL’s claim that it was entitled to the extension of time without imposition of liquidated damages was barred by limitation.

26. The Arbitral Tribunal further rejected SPIL's contention that the claims for cost-overruns were inherent in nature as SPIL had neither sent any communication regarding the said claim either during the period of limitation or post expiry of the period of limitation and had only raised the same during the arbitration proceedings. Thus, the Arbitral Tribunal rejected the said claim as it was barred by limitation.

27. Furthermore, SPIL had not raised a plea under Section 19 of the Limitation Act, 1963, however, the Arbitral Tribunal returned a finding on the aforesaid question. The Arbitral Tribunal referred to the decision of the Supreme Court in *Sushil Chawla v HP India Sales Pvt Ltd: 2019 SCC OnLine Del 7690*, wherein it was observed that Section 19 of the Limitation Act, 1963 would apply only when the debt is existing and in respect of which a part payment is made. The payment must be on account of the existing debt, and the payment made failed to meet that criteria.

28. Accordingly, the Arbitral Tribunal held that all the claims raised by SPIL were barred by limitation. Paragraph 31 of the impugned award sets out the decision of the Arbitral Tribunal with respect to the claims raised by SPIL. The same is relevant and set out below:-

S. No.	Prayer/ Relief Sought	Order/Judgement	Remarks
1.	Declare that the Respondent is in breach of its obligations under the Supply and the	Barred by Limitation, hence rejected.	The period pursuant to which the said declaration is being sought is 2009-2012 (i.e. until commissioning of

	Erection Contract dated 02.12.2009		all the three lines), however any such declaration by way of Arbitration Proceedings invoked in 2017-2018 is barred by limitation, and hence, rejected
2.	Quash the Impugned Letters dated 25.10.2016 and 09.08.2017	Barred by Limitation, hence rejected.	The letters referred to in the said prayer pertain to the analysis of the reasons for delay in construction of the Panchkula Line 1 and 2 and the Hisar Line.
3.	Declare that the Claimant is entitled to an extension of time without imposition of any LD from: 08.05.2011 to 06.04.2012 (Hisar Line) 05.05.2011 to 05.12.2012 (Panchkula Line 1) 08.05.2011 to 12.08.2012 (Panchkula Line 2)	Barred by Limitation, hence rejected.	The Claimant infers that the said communications are the basis for seeking the imposition of the LD and the cover over-runs. However, since the LD on the delay in construction of these lines was deducted from May 2012 to March 2013, the period of limitation for raising claims qua the said deductions and cost overruns, ran out from May 2015 to

			March 2016. Rather the letters being impugned by the Claimant are dated 7 months after the expiry of the period of limitation. Hence, declaration sought is barred by limitation, and rejected.
4.	Declare that the Claimant is entitled to a sum of INR 1,94,15,157,40/- in lieu of wrongfully imposed liquidated damages and that the Respondent's action holding back the said sum is wrong.	Barred by Limitation, hence rejected.	The Claimant reliefs pertain to LD imposed by the Respondent during May 2012 to March 2013, and hence are barred by Limitation.
5.	Direct the Respondent to pay a consolidated amount of INR 1,94,15,157,40/- plus interest @ 18% per annum from the scheduled date of final completion till date, to the Claimant, towards the wrongfully imposed LD, which the Respondent has further wrongfully set-off against the outstanding	Barred by Limitation, hence rejected.	The last line under the Contract was commissioned in December 2012, and the last invoice after deduction of the LD percentage was in March 2013, Hence, the relief with respect to refund of the LD deducted/set-off from payments made, is barred by time, hence rejected.

	amounts payable to the Claimant.		No direction on interest payment is required.
6.	Direct the Respondent to pay an amount of INR 2,66,06,872/- to the Claimant, towards the overrun costs incurred by it during the delay period i.e. from the SCOD until the actual date of completion, including fixed overheads, loss of profits and extension charges for PBG etc.	Barred by Limitation, hence rejected.	The claims relating to cost overrun have never been raised during the period of limitation i.e. May 2015 to March 2016. The claims relating to cost overrun, loss of profits and extension charges et el, have been raised for the first time during the arbitration proceedings and that is beyond the period of limitation and hence rejected.
7.	Direct the Respondent to pay Rs. 24,23,851,60 plus interest @18% per annum from the actual date of final completion to the Claimant as outstanding payment for completion of work under Package B.	Barred by Limitation, hence rejected.	Please see remarks against prayer 2, 3 and 5.
8.	Grant all costs to be incurred by the Claimant towards	Rejected.	Rejected.

	the present arbitral proceedings.		
9.	Grant pendente lite and post-award interest, at the rate of 18% per annum on the sums claimed herein up to the date of actual payment.	Rejected.	Rejected.

29. Aggrieved by the impugned award, SPIL has filed the present petition.

SUBMISSIONS

30. Mr Rao, learned senior counsel appearing for SPIL, assails the impugned award, essentially, on four grounds. He contended that the Arbitral Tribunal had ignored the evidence on record to dismiss its claims on the ground of limitation. He submitted that the Arbitral Tribunal had not noticed the language of the communication issued by HVPNL at the material time, which indicated that the issue whether the liquidated damages were leviable was not finally determined.

31. Next, he contended that the Arbitral Tribunal had travelled outside of the contractual framework in its finding that the cause of action had arisen when the liquidated damages were first withheld. He stated that the Arbitral Tribunal had completely ignored the contractual provisions, which stipulated that (a) liquidated damages could be imposed only in the case where the delay in execution of the Project works was attributable to SPIL; (b) no arbitrable disputes existed

between the parties prior to issuance of the letters dated 25.10.2016 and 09.08.2017; and, (c) a pre-emptive claim for cost overruns could not be made as the cost overruns were directly dependent on the final determination of extension of time by HVPNL.

32. Next, he contended that SPIL was unable to present its case on the issue of limitation before the Arbitral Tribunal. He contended that the Arbitral Tribunal, in absolute contravention of the fundamental policy of Indian Law that the issue of limitation cannot be raised after the submission of the Statement of Defence, raised a *suo moto* query in this regard for the first time during oral arguments at the stage of final hearing and furthermore, the issue of limitation was neither pleaded by HVPNL nor any issues were framed by the Arbitral Tribunal in this regard. He referred to the decisions of the Bombay High Court in ***Vimal G. Jain v Vertex Financial Services: 2007 SCC OnLine Bom 116*** and of this Court in ***Raj Kishan And Company v National Thermal Power Corporation: 2012 SCC Online Del 1496*** and ***Raj Kishan And Company v National Thermal Power Corporation: 2012 SCC Online Del 4799***, in support of his contention. He submitted that there were no opportunities for either of the parties to lead any evidence with respect to the said issue and SPIL's objections were 'completely ignored' by the Arbitral Tribunal. He further submitted that the Arbitral Tribunal had ignored the contractual framework inasmuch as the time for completion was stipulated for the entire Package B and not for individual transmission lines. He contended that the Arbitral Tribunal ignored the fact that SPIL's claims for damages were consolidated in

nature and the same were not particularized for each transmission line. And, thus the impugned award is liable to be set aside under Section 34(2A) and Section 34(2)(a)(iii) of the A&C Act.

33. Lastly, he contended that the Arbitral Tribunal had erroneously relied upon Article 137 of the Limitation Act, 1963 and the same applied to applications and not claims raised in arbitration. He submitted that in the facts of the present case, the right to sue accrued only upon the issuance of the letters dated 25.10.2016 and 09.08.2017 by HVPNL when a determination under Clause 40.2 of the GCC was made, and the same repudiated the SPIL's rights. He referred to the decision of the Supreme Court in *Shakti Bhog v Central Bank of India: 2020 SCC OnLine SC 482* and of this Court in *College Estates v Blue Star: 2018 SCC OnLine Del 9730*, in support of his contention.

34. Mr Malik, learned counsel appearing on behalf of HVPNL countered the aforesaid submissions. He submitted that SPIL had misconstrued the deferment of Liquidated Damages by HVPNL to contend that the same led to extending its cause of action. He stated that HVPNL had deferred recovery of partial liquidated damages for the reason that SPIL was facing certain financial constraints in executing the work. He stated that HVPNL, post deferment of the liquidated damages, continued to levy partial liquidated damages upto 10% of the contract price cap, as stipulated in the Agreements.

35. Next, he submitted that since the contract was completed on 17.12.2012, when the Taking Over Certificates had been issued to SPIL

and the final liquidated damages were deducted on 15.03.2015, the cause of action for SPIL for referring the disputes to arbitration arose then. He contended that the subsequent letters written by SPIL to defer the imposition of liquidated damages did not, by any means, extend the cause of action for SPIL. He submitted that the contention raised by SPIL is thus, contrary to the settled tenets of law, which stipulate that (i) letters/reminders do not extend the period of limitation; and, (ii) the limitation starts from the date of cause of action and not from rejection of representation. He referred to the decision of the Supreme Court in *State of Tripura and Ors. v. Arabinda Chakraborty and Ors: (2014) 6 SCC 460*, in support of his contention.

36. Lastly, he submitted that the contention raised by SPIL that it was not given an opportunity to controvert the plea of limitation and raise evidence in this regard, is erroneous inasmuch as, the plea of limitation was raised by HVPNL in the oral hearings before the Arbitral Tribunal as well as in the written submissions filed by HVPNL. He referred to the decisions of the Supreme Court in *Binod Bihari Singh v Union of India: AIR 1993 SC 1245* and of the Bombay High Court in *Sealand Shipping and Export Pvt. Ltd. v. Kinship Services (India) Pvt. Ltd.: 2011 (113) BOMLR 2142* and *Oil and Natural Gas Corporation Ltd. and Ors. v. Essar Oil Limited and Ors.: Arbitration Petition Nos. 267 and 630 of 2011*, in support of his contention.

37. He submitted that thus, the claims preferred by SPIL in its Statement of Claims before the Arbitral Tribunal are frivolous, *ex facie* illegal and barred by limitation.

REASONS AND CONCLUSION

38. The principal question to be addressed is whether the Arbitral Tribunal has erred in finding that the claims made by SPIL are barred by limitation. According to SPIL, its claims relating to recovery of liquidated damages are inextricably linked to the decision regarding extension of time for completion of the contract and therefore, were alive. HVPNL rejected SPIL's requests for grant of extension of time without levy of liquidated damages in respect of the Panchkula Lines on 25.10.2016 and for the Hisar Lines on 09.08.2017 and thus, its cause of action for challenging the levy of liquidated damages could not arise prior to that date.

39. HVPNL had sought to deduct liquidated damages from the payments against the invoices raised by SPIL. However, at the request of SPIL, the recovery of part of the liquidated damages was deferred. The Arbitral Tribunal held that deferring recovery of the liquidated damages did not extend the period of limitation as HVPNL had, in fact, indicated deduction of liquidated damages against invoices raised by SPIL. This is clear from Paragraph 23 of the impugned award, which reads as under:

“23. The situation before us is similar in that the cause of action had arisen on each occasion when the Respondent deducted the LD and deferred the time for deduction of LD. Hence, the Claimants claims/reliefs qua arise on each such occasion of deduction and on each such occasion when the Respondent paid all invoices but with confirmation of the deductions of LD (which was merely being deferred). Hence, the

claims / relief sought qua refund of LD payments and, further raising fresh claims of LD refund and cost over-runs is time-barred.”

40. The aforesaid reasoning is central to the controversy raised in the present petition. According to SPIL, the aforesaid view is *ex facie* erroneous and vitiates the impugned award. SPIL claims that although HVPNL had indicated deductions on account of liquidated damages, SPIL had requested that the same be deferred. HVPNL had acceded to SPIL’s request *albeit* subject to the conditions that if liquidated damages were leviable, the same would be recovered with interest. SPIL claims that the communications between the parties, clearly indicated that the dispute regarding levy of liquidated damages was a live issue.

41. The first limb of the aforesaid controversy is whether the levy of liquidated damages is inextricably linked to the issue regarding extension of time for completing the contract. According to the Arbitral Tribunal, the same is not connected and the cause of action resulting from levy of liquidated damages had arisen notwithstanding that SPIL’s claim for extension of time for completion of the contract was being processed. This is evident from Paragraph 29 of the impugned award, which is set out below:

“29. Moreover, a cause of action must relate to the reliefs being claimed. The Claimant herein is not seeking mere declaration of rejecting the EOT analysis provided by the Respondent, but rather seeking a reversal of the LDs deducted by the

Respondent, which payments / deductions were final and concluded in the March 2013. Mere communication of rejecting a belated request for EOT does not in any manner affect, change, add or less from the payments already concluded in March 2013. Hence, the Claimant's knowledge of the LD deduction, which is one of the reliefs sought, arose in March 2013, and the communications in August 2018, in no manner affect the position of the payments made in 2013."

42. This Court is unable to accept that the question of recovery of liquidated damages is not connected with the claim for extension of time. SPIL had sought extension of time for completion of the contract on various grounds; it claimed that the delay was for reasons beyond its control or otherwise attributable to HVPNL. It is not HVPNL's case that it would be entitled to levy liquidated damages in the event the delay in execution of the work was found to be justified. Plainly, HVPNL cannot claim any damages on account of delay for reasons attributable to it.

43. It is also relevant to refer to Clause 40.1 of the GCC, which expressly provides for extension of time in certain circumstances. The said clause is reproduced below:

"40. Extension of Time for Completion

40.1 The Time(s) for Completion specified in the PC pursuant to GC Sub-Clause 8.2 shall be extended if the Contractor is delayed or impeded in the performance of any of its obligations under the Contract by reason of any of the following:

- (a) any Change in the Facilities as provided in GC Clause 39
- (b) any occurrence of Force Majeure as provided in GC Clause 37, unforeseen conditions as provided in GC Clause 35, or other occurrence of any of the matters specified or referred to in paragraphs (a), (b) and (c) of GC Sub-Clause 32.2
- (c) any suspension order given by the Employer under GC Clause 41 hereof or reduction in the rate of progress pursuant to GC Sub-Clause 41.2 or
- (d) any changes in laws and regulations as provided in GC Clause 36 of
- (e) any default or breach of the Contract by the Employer, Appendix to the Contract Agreement titled or any activity, act or omission of the Employer, or the Project Manager, or any other contractors employed by the Employer, or
- (f) any delay on the part of a sub-contractor, provided such delay is due to a cause for which the Contractor himself would have been entitled to an extension of time under this sub-clause, or
- (g) delays attributable to the Employer or caused by customs, or
- (h) any other matter specifically mentioned in the Contract

By such period as shall be fair and reasonable in all the circumstances and as shall fairly reflect the delay or impediment sustained by the Contractor.”

44. Clause 26.2 of the GCC provides for the imposition of liquidated damages. The said clause is set out below:

“26.2 If the Contractor fails to attain Completion of the Facilities or any part thereof within the Time for Completion or any extension thereof under GC Clause 40, the Contractor shall pay to the Employer liquidated damages in the amount specified in the PC as a percentage rate of the Contract Price or the relevant part thereof. The aggregate amount of such liquidated damages shall in no event exceed the amount specified as “Maximum” in the PC as a percentage rate of the Contract Price. Once the “Maximum” is reached, the Employer may consider termination of the Contract, pursuant to GC Sub-Clause 42.2.2.

Such payment shall completely satisfy the Contractor’s obligation to attain completion of the Facilities or the relevant part thereof within the Time for Completion or any extension thereof under GC Clause 40. The Contractor shall have no further liability whatsoever to the Employer in respect thereof.

However, the payment of liquidated damages shall not in any way relieve the Contractor from any of its obligations to complete the Facilities or from any other obligations and liabilities of the Contractor under the Contract.

Save for liquidated damages payable under this GC Sub-Clause 26.2, the failure by the Contractor to attain any milestone or other act, matter or thing by any date specified in the Appendix to the Contract Agreement titled Time Schedule, and / or other program of work prepared pursuant to GC Sub-Clause 18.2 shall not render the

Contractor liable for any loss or damage thereby suffered by the Employer.”

[underlined for emphasis]

45. Clause 26.2 of the PC is also relevant and reads as under:

“PC 26. Completion Time Guarantee

PC 26.2

Applicable rate for liquidated damages: 0.5% of contract price per week or part thereof.

Maximum deduction for liquidated damages: 10% of contract price.

No bonus will be given for earlier completion.”

46. The opening sentence of Clause 26.2 of the GCC expressly indicates that the liquidated damages under the said clause would be levied only if the Contractor fails to complete the facilities within the time stipulated for completion or any extension thereof under Clause 40 of the GCC. Thus, clearly, if any extension of time for completion of the contract was granted to SPIL under Clause 40 of the GCC, liquidated damages could not be imposed. Thus, the levy of liquidated damages is contingent on rejection of SPIL’s claim for exclusion of time.

47. The next question to be examined is whether the issue of levy of liquidated damages was finally closed by HVPNL.

48. SPIL had applied for extension of time for completion of the Panchkula Lines for the first time by its letter dated 04.06.2011 and had sought further time till 08.08.2011. The said letter was followed by another letter dated 08.08.2011, whereby SPIL had requested for extension of time upto 31.12.2011 without imposition of liquidated damages for the delay, which it claims was not attributable to it. Thereafter, SPIL, by its letter dated 01.09.2011 requested HVPNL “to advise the concerned quarters not to impose LD on our RA bills”.

49. The scheduled date for completion of the Agreement was 05.05.2011. As noted above, if the completion of the project was unjustifiably delayed beyond that date, HVPNL would be liable to impose liquidated damages in terms of Clause 26.2 of the GCC. In this context, SPIL sent a letter dated 13.09.2011 requesting HVPNL to defer the levy of liquidated damages. The said letter is set out below:

“RK/HVPNL-101 Dt. 13.09.11

To

The Chief Engineer M.M.
HVPNL Panchkula

Sub.: Defferment of L.D. against Package No.WB/G-6
PKG A&B.

Respected Sir,

We hereby confirm that all the T. line under these Package will be commissioned by 31.12.2011. Hence you are requested to deffer the L.D. upto 31.12.2011 for supply and Erection.

In case of the extension of time is not allowed then the amount of L.D. can be deducted along with applicable SBI base interest rate + 3% Extra from our bills.

Thanking you,

Yours faithfully,

Sd/-”

50. It is relevant to note that the aforesaid letter sought extension of time for both the packages (Package A and Package B). The dispute in the present case relates to Package B (Panchkula Lines and Hisar Line).

51. HVPNL responded to the said letter on 19.09.2011. The contents of the said letter are reproduced below:

“Subject: Deferment of Liquidity Damages against Contract No.WB-8 to 11/G-06/Pkg.-A&B/XENWB Dated 30.01.2010 for Construction of 220 KV Transmission Lines associated with 220 KV Substation Rangla Rajpur, Raiwali & A-5, Faridabad.

Please refer your letter dated 01.09.2011 and 13.09.2011 on the subject cited above,

In this regard, it is intimated as under:

- I. The contractual completion date for the contract no.WB-8 to 11/G-06/Pkg.-A&B/XENWB was 05.05.2011. Due to various reasons, the contracts could not be completed within time. Now you have committed to complete the work of both packages by 31.12.2011. Accordingly, the 80% of Liquidity Damages (after consider the Liquidity Damages along with interest,

pending payments and retention money of the contract) are deferred till 31.12.2011 against contract no.WB-8 to 11/G-06/Pkg.-A&B/XENWB, if recovered.

- II. In case LD becomes leviabale, the same shall be recovered form you along with the interest as per SBI Base rate +3% applicable on date of release of payment.”

52. The second paragraph of the above letter is important. The expression “*In case LD becomes leviabale*” clearly indicates that the question whether liquidated damages were leviabale was not concluded against SPIL. As noticed above, the levy of liquidated damages is dependent upon whether the Agreement is completed within the time stipulated or as extended under Clause 40 of the GCC. Since the question regarding extension of time was pending; the question whether SPIL would be liable to pay liquidated damages remained open.

53. On 24.12.2011, SPIL made a further request for extension of time till 31.03.2012 without levy of liquidated damages in respect of Package B. This was followed by another letter dated 01.03.2012, whereby SPIL stated that it had submitted all the relevant documents pertaining to extension of time for completion till 30.06.2012 for Packages A and B. SPIL also requested that the levy of liquidated damages be deferred upto 30.06.2012.

54. HVPNL acceded to the said request and by a letter dated 27.03.2012 agreed to defer recovery of 90% of the liquidated damages

till 30.06.2012. The second paragraph of the said letter is relevant and set out below:

“II. In case LD becomes leviable, the same shall be recovered from you along with the interest as per SBI Base rate +3% applicable on date of release of payment. It is further added that your request has been accepted with the condition that you will adhere to the schedule submitted by you along with your request. In order to monitor the progress of work, it is requested to ensure submission of weakly progress report viz a viz pert chart to the concerned Project Manager under intimation to this office.”

55. It is important to note that HVPNL reiterated that “*in case LD becomes leviable, the same shall be recovered from you along with the interest as per SBI Base rate +3% applicable on date of release of payment*”.

56. SPIL made a request for extension of time on various occasions for completion of the Panchkula Lines as well as the Hisar Line.

57. The Hisar Line was commissioned on 06.04.2012; Panchkula Line 1 was commissioned on 12.08.2012 and Panchkula Line 2 was commissioned on 05.12.2012.

58. Thereafter, on 08.07.2013, SPIL sent a letter requesting for deferment of liquidated damages for both the packages (Package A and Package B). SPIL also confirmed that “*in case LD becomes leviable,*

we agree for recovery of the same with interest rates as per HVPNL norms (i.e. SBI base rate +3%)”.

59. HVPNL acceded to this request and deferred the levy of liquidated damages *albeit* on the condition that “*in case liquidated damages becomes leviable, the same shall be recovered from you along with the interest as per SBI base rate +3% applicable on date of release of payment*”.

60. By a letter dated 15.01.2014, addressed to the Chief Engineer (TS), HVPNL, SPIL requested that its time extension case for Packages A and B be forwarded to CE (MM), HVPNL.

61. By letters dated 30.04.2013 and 17.05.2013, SPIL requested HVPNL for extension of time and set out its case for the delay in commissioning the Panchkula Lines and Hisar Line respectively.

62. HVPNL rejected SPIL’s request for extension of time for the Panchkula Lines by a letter dated 25.10.2016. It concluded that the handing over of Panchkula Line 1 was delayed by 224 days; and, Panchkula Line 2 was delayed by 346 days and the said delay was clearly attributable to SPIL. Therefore, the maximum amount of liquidated damages (10%) was leviable on account of the said delay. In view of the said reasoning, HVPNL confirmed levy of the liquidated damages computed at 10% of the contract value. Accordingly, the cause of action for SPIL to initiate arbitral proceedings regarding levy of liquidated damages arose on that date.

63. Similarly, by a letter dated 09.08.2017, HVPNL rejected SPIL's request for extension of time for the Hisar Line. HVPNL further sought to impose liquidated damages (10%) on account of the said delay of 179 days.

64. Aggrieved by the letters dated 25.10.2016 and 09.08.2017, whereby HVPNL had decided to impose the maximum penalty of 10% and reject SPIL's request for extension of time in respect of the Panchkula Lines and Hisar Line respectively, SPIL issued a letter dated 23.11.2017 requesting for appointment of an arbitrator for resolution of the said dispute.

65. According to SPIL, HVPNL's decision is unfair and unjustified as the work had been delayed on various grounds such as forest clearance, severe ROW problem, prolonged court cases and delay in arranging the mandatory approvals by HVPNL from other government agencies.

66. It is apparent that the Arbitral Tribunal had ignored the language of various communications issued by HVPNL, whereby it had deferred the recovery of liquidated damages. Clearly, this was not a case where HVPNL had levied liquidated damages and deferred its recovery simpliciter; in this case, HVPNL also confirmed the recovery was contingent on the liquidated damages being found to be *leviable*. This matter was concluded with HVPNL finding that SPIL was responsible for delay in completion of Panchkula Line 1 by 224 days; Panchkula

Line 2 by 346 days; and, Hisar Line by 179 days and was thus, liable to pay 10% of the contract value.

67. This Court is of the view that the Arbitral Tribunal has erred in proceeding on the basis that the cause of action for recovering the liquidated damages and for extension of time, are unrelated. Admittedly, if SPIL's request for extension of time was accepted by HVPNL under Clause 40 of the GCC, there is no question of HVPNL imposing any liquidated damages. HVPNL rejected SPIL's case for extension of time and imposed the maximum liquidated damages quantified at 10% of the contract value for the first time on 25.10.2016 for the Panchkula Lines and on 09.08.2017 for the Hisar Line.

68. In view of the above, the Arbitral Tribunal's conclusion that SPIL's claim in respect of the Panchkula and Hisar Lines for recovery of liquidated damages is barred by time is, *ex facie*, erroneous as it completely ignores the language of the letters issued by HVPNL.

69. Thus, the decision of the Arbitral Tribunal that SPIL's claim regarding liquidated damages is barred by limitation is, *ex facie*, erroneous.

70. The impugned award to the extent it rejects SPIL's claim regarding levy of liquidated damages as barred by limitation, is set aside. The parties are at liberty to refer the said dispute to arbitration afresh.

71. The petition is allowed to the extent as aforesaid.

JULY 07, 2022
RK

VIBHU BAKHRU, J

HIGH COURT OF DELHI



भारतमेव जयते