

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P.229/2009

Reserved on: March 15, 2012

Pronounced on: April 26, 2012

NATIONAL THERMAL POWER CORPORATION LTD.

..... Petitioner

Through: Mr. Dushyant Dave, Senior Advocate
with Ms. Ruchi G. Narula, Mr.
Anukul Raj and Mr. Anirudh,
Advocates.

Versus

SIEMENS ATIENGESELLSCHAFT

..... Respondent

Through: Mr. Dipankar Gupta, Senior Advocate
with Mr. Anil Bhatnagar, Mr. Amit
Dhingra and Mr. Aman Leekha,
Advocates.

AND

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CORAM: JUSTICE S. MURALIDHAR

JUGDMENT

26.04.2012

1. These two petitions under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act') by the National Thermal Power Corporation Limited ('NTPC') challenge the partial Award dated 31st July 2002 and the final Award dated 6th January 2009 passed by the International Court of Arbitration ('Tribunal') of the International Chamber of Commerce (ICC) by which NPTC has been directed to pay the Respondent Siemens Aktiengesellschaft ('SAG') a sum of Euro 17,158,557 on account of Claims C-2 to C-8, with Claim C-9 being rejected and further that NTPC should pay SAG a sum of Euro 7,604,296.38 by way of interest at 6% simple per annum on the aforementioned sum for the period from 20th August 2001 till the date of the Award i.e. 6th January 2009 and post Award interest at 6% simple per annum. NPTC was also directed to bear the cost of arbitration i.e. USD 877,000 excluding USD 30,000 set aside for stamp duty and Euro 989,100 towards attorneys' fees, expert fees and related expenses. According to NTPC, the total liability without calculating interest as on the date of the making of the Award i.e. 6th January 2009 was approximately Rs.174 crores.

Background Facts

2. NTPC awarded SAG on 30th September 1989 the project of Gas Based Combined Cycle Power Project of 817 MW at Dadri, Uttar Pradesh. The contract was entered into on 6th December 1989 and the General Terms and Conditions of the Contract ('GCC') formed part of the contract.

3. The project was to be constructed in two stages. In the first stage, four Gas Turbine Generators being Unit Nos.1, 2, 3 and 4 were to be constructed where power was generated by the use of natural gas and the waste gases escaping into the atmosphere. This was "the open cycle". The second stage involved construction of two Combined Cycle Modules, being Modules-1 and 2 where Unit Nos.1 and 2 and Units 3 and 4 respectively of Open Cycle

were combined. Waste gases from the open cycle were combined and utilized in the further generation of power.

4. There were specific time schedules for each of the stages of the entire project.

5. Disputes arose between the parties about the delay in the opening by NTPC of the Letters of Credit ('LC') which in turn led to delays during the execution of the first open cycle. Under Clause 20.2 of the Contract, the dates by which items of the first combined cycle had to be readied for shipment and with reference to such dates, the dates by which LCs were to be established by the NTPC were specified. For instance, the emergency DG generator was expected to be shipped on 1st February 1990 and the LC had to be established one month prior to that i.e. by 1st January 1990. The electrical items (Item Nos.83, 86, 88 and 90) had to be shipped by 1st May 1990. Correspondingly, the LC had to be opened on 1st April 1990. In fact, the LC for both these sets of equipments was established on 24th November 1990 and the dispatch could take place on 22nd December 1990. The gas turbine as well as generator for Unit No.1 was expected to be shipped on 1st June 1990. The LC for the gas turbine was established on 9th August 1990, with the delay of 100 days and was ultimately shipped on 30th August 1990. The LC for the generator was established on 24th November 1990, with a delay of 207 days and was ultimately shipped on 22nd December 1990.

6. There were corresponding delays in the subsequent stages of the project also. Ultimately the completion of the project was delayed by 55 months. The Gas Turbine 1 was commissioned with a delay of 13 months, the Gas Turbine 2 with a delay of 12 months, the combined cycle No.1 with a delay of 51 months. Gas Turbine 3 and Gas Turbine 4 were commissioned with a

delay of 11 and 14 months respectively. Combined Cycle 2 completed successful trial operation only on 8th March 1997 with a delay of 55 months.

7. The actual date of opening of the LCs by NTPC is not in dispute. However, NTPC explained its difficulties as being attributable predominantly to the following reasons:

“(a) The imports for the Dadri Gas Project were being financed through a bilateral loan between Govt. of India and Germany. As per the Govt. of India procedures, for the purpose of applying for Import License it is mandatory to have the loan agreement effective. The loan between Government of India and German Government (i.e. KFW) could not be signed in time leading to delay in the Import License (I/L) and consequently delay in establishing Letter of Credit, which is ‘act of Government beyond the control of the parties.

(b) Further DGTD did not clear a few electrical items, which were subsequently cleared only in Feb 1991 and I/L of these electrical items could, therefore be obtained in March 1991 and L/C was established on 8th April 1991.

(c) Apart from this, the Respondent-Siemens was also responsible for causing delays as can be demonstrated from the papers available on record of the case.”

8. NTPC claimed that despite the above difficulties it made all out efforts and obtained part import licence in July 1990 and the balance import licence in November 1990. The import licence for the remaining electrical items was issued on 9th March 1991. LCs were, thereafter, correspondingly established.

9. On 13th May 1991, SAG made a claim of DM 37.5 million (for a delay of 12.5 months calculated at the rate of 3 million per month) from NTPC

under Clause 22.2 of the GCC for the delay in opening the LCs and on various other grounds.

10. NTPC by its letter dated 2nd July 1991 denied SAG's Claims stating that the delay in the execution of the contract was due to the fault of SAG and not NTPC. SAG however reiterated its claim on 30th April 1992 which was rejected by NTPC on 22nd July 1992. SAG again revived the claim on 12th November 1993 for a sum of DM 70,698,674 but this was never agreed to.

11. According to NTPC, it asked SAG to submit necessary documentary proof to substantiate its claim that delay had occurred due to NTPC and also substantiate the additional cost claimed on account of such delay. NTPC states that it conveyed its willingness to allow the grace period for completion of the trial operation of the project by nine months under Clause 20.2 GCC "purely with the intention of accommodating the Respondent so that a healthy working relationship could continue between the parties."

12. SAG submitted a claim once again on 23rd June 2001 in the sum of DM 44.11 million to the General Manager, NTPC, Dadri, who was the Engineer in terms of the contract. By a letter dated 16th August 2001, the Engineer rejected the claim as not being tenable.

Partial Award of the ICC Tribunal

13. Upon rejection of its claim, SAG approached the International Court of Arbitration (ICC – Paris) under Clause 27 GCC and filed its claims C-2 to C-9 for a total amount of DM 44,111,949. By a letter dated 24th August 2001, the ICC informed NTPC of the lodging of the above claims against it by SAG. Apart from its reply to the statement of claims, NTPC also filed its counter claims for Euro 210,307. Among other counter claims by NTPC one was on account of failure of the SAG to fulfill its obligations under the

contract, *inter alia*, with respect to supply of spares, critical components, special tools and plants and the losses suffered by NTPC on account of delays caused by the SAG in completing the work as per schedule.

14. By an order dated 22nd March 2002, the Tribunal decided to hold preliminary hearings on the issue of limitation and jurisdiction. It is stated that the arguments on the preliminary issues were addressed on 3rd, 4th and 5th May 2002 at Delhi. Written submissions on the said issues were filed by both parties on 27th May 2002. By a partial Award dated 31st July 2002, the Tribunal rejected the contentions of NPTC that SAG's claims were barred by limitation and held that the same were arbitrable. In view of the settlement between the parties made on 6th/7th April 2000 it was held by the Tribunal that NTPC's counter claims were not admissible or arbitrable.

Earlier challenge to the partial Award

15. An appeal was filed by NTPC against the partial Award under Section 37 (2) (a) of the Act on the ground that the order passed by the Tribunal was virtually a decision under Section 16 (2) of the Act accepting the plea of lack of jurisdiction. The appeal, registered as OMP No.462 of 2003, was dismissed by this Court in ***National Thermal Power Corporation Ltd. v. Siemens Atiengesellschaft 121 (2005) DLT 36***. NTPC's further appeal to the Supreme Court was dismissed by the directions in ***National Thermal Power Corporation Ltd. v. Siemens Atiengesellschaft (2007) 4 SCC 451***.

16. Before the Supreme Court, it was contended by NTPC that since its counter claim had been rejected by the partial Award and it was a case of failure by the Tribunal to exercise jurisdiction, therefore it was an order under Section 16(2) or 16(3) of the Act in respect of which an appeal could have been filed to the High Court under Section 37 of the Act. This plea was negated by the Supreme Court by pointing out that what the Tribunal had

found in the partial Award was that in view of the MOM dated 6th/7th April 2000, “wherein the various claims of either party were thrashed out and settled, NTPC could not pursue most of the claims set out in the counter claim.” That was the finding on the merits of NTPC’s counter claims. It was not a decision either under Section 16(2) or 16(3) of the Act. The finding of the High Court to the same effect was upheld.

17. NTPC has filed O.M.P. No. 230 of 2009 questioning the rejecting of its counter claims by the partial Award. For the reasons explained hereinafter, the Court negatives this challenge.

The Final Award

18. The Tribunal proceeded to hear the final arguments on 12th, 13th and 14th May 2008 and the impugned final Award was passed on 6th January 2009. The claims of SAG allowed by the Tribunal were as under:

<i>S. No.</i>	<i>Claim No.</i>	<i>Description</i>	<i>Amount awarded (DM)</i>
1.	C-2	On account of increased costs for disruption and delay of Project Engineering, management and coordination	3,314,106
2.	C-3	On account of increased costs for acceleration of Project EPC	877,497
3.	C-4	Increased cost of additional travel	425,955
4.	C-5	Increased cost for storage of materials, equipment and machinery	192,198
5.	C-6	Increased cost for extension of contract performance guarantee	305,783

6.	C-7	Delayed payments incurring increased financial charges	10,308,337
7.	C-8	Head Office overheads and profits	18,135,345
8.	C-9	Costs of preparing the claim were rejected.	
		The total value of the claims of SAG that were allowed by the Tribunal	Euro 17,158,557

19. As already noted, the Tribunal awarded simple interest at 6% per annum from the date of the request for arbitration i.e. 20th August 2001 till the date of the Award and post Award interest at the same rate till the date of payment. Costs and fees were awarded as indicated earlier.

Issues finally decided by the Partial Award

20. One of the issues that arose before the Tribunal concerned the finality of the partial Award. The case of NTPC was that in terms of the reference framed under the ICC Rules read with the agreement between the parties under the arbitration clause read with Section 19(2) of the Act, the parties had agreed on the procedure to be followed by the Tribunal in conducting its proceedings. Reference was made to the issue Nos. 5.12 to 5.15, which were formulated by the Tribunal as part of the terms of the reference, which read as under:

“5.12 (i) Was there delay in opening the Letters of Credit and in the availability of the Import Licence or permission to ship Structural Steel plates, on the dates alleged by the Claimant?

(ii) Did the Respondent give an extension of time for nine (9) months?

(iii) If so, did the Respondent accept the implications as stated in paragraphs 13 and 14 of the Statement of Claim?

5.13 Whether the alleged delay in opening Letters of Credit/obtaining or Import Licence etc. by the Respondent is excusable and justified in terms of the relevant provisions of the Contract and in the facts and circumstances of the case?

5.14 Does responsibility for the delays in the Project rest with the Claimant or Respondent?

5.15 Has the Claimant committed any breaches of Contract as stated by the Respondent in its counter claims and in response to the claims of the Claimant?"

21. Under issue No.5.16 the Tribunal had to determine whether, in the event of NTPC having committed breach of the contract, SAG was entitled to receive damages. Under issue Nos. 5.17 to 5.20 the Tribunal was to ascertain the quantum of damages and costs payable to SAG and whether NTPC was entitled to any of its counter claims. It was submitted that despite formulating the procedure and observing that it was at that stage refraining from expressing views on merits and only referring to "a limited series of quotations from the relevant documentation" and further that "the first mention of limitation does not arise until the arbitration is commenced." It is urged by NTPC that a *fait accompli* was presented by the Tribunal in Para 38 of the final Award where it observed that "the intention of the Tribunal was to decide the issue of limitation definitively and finally unless the parties agreed, or it became clear that further evidence and submissions were required." It was submitted that under the terms of reference read with Article 20 of the ICC Rules, it was incumbent on the Tribunal to proceed with "establishing the facts of the case by all appropriate means" and thereupon make an Award in terms of Article 25 of the ICC Rules. It was submitted that the Tribunal, in fact, totally failed to determine the issues "on merits" in terms of the reference.

22. Before the Tribunal, NTPC raised a preliminary objection that SAG's

claims were time barred. On its part, SAG raised a preliminary objection that a majority of the counter claims of NTPC were subject to a settlement agreement between the parties recorded in the Minutes of the Meeting ('MOM') dated 6th/7th April 2000 and that certain other counter claims were time barred. Consequently, the Tribunal at the stage of the Partial Award, after due notice to the parties, decided the above two preliminary issues, viz. (i) Whether the claims of SAG were time barred; (ii) Whether the counter claims of the NTPC were admissible.

23. In its partial Award, the Tribunal noted the submissions of NTPC and first dealt with the issue concerning the jurisdiction. After referring to the correspondence between the parties, it was held that the case of NTPC that the limitation period began to run sometime between 1990 and 1992 was untenable. In the partial Award, the Tribunal in Para 3.9 observed that the parties had agreed, as noted by NTPC in its letter dated 11th September 1998, to a nine month extension of time (EOT) for the schedule for gas turbine and combined cycle modules and, therefore, they were "only in dispute as to the resulting extra costs, if any, due to the Claimant (SAG)." The Tribunal referred to the exchange of correspondence in 1997, 1998, 1999 and 2000. The question that fell for determination was whether within a period of three years prior to the date of reference of the disputes for arbitration i.e. 20th August 2001, the cause of action survived as far as SAG's claims were concerned. It was held that in para 4.24 that there was an agreement by the parties upon a nine-month EOT reached on 11th September 1998 and this was within the period of three years prior to the request for arbitration being received by the ICC in Paris on 23rd August 2001. The counter claims of NTPC were found covered by the MOM dated 6th/7th April 2000.

Present challenge to the partial Award

24. A point has been raised by SAG that NTPC did not file an application under Section 34 of the Act challenging the partial Award within time. It is submitted that the Supreme Court's decision was handed down in February 2007 whereas the present petition was filed in April 2009 which was well beyond the permissible period of limitation in terms of Section 34(3) of the Act. Reference is made to ***McDermott International Inc. v. Burn Standard Co. Ltd. (2006) 11 SCC 181.***

25. It is correct that in ***McDermott International Inc. v. Burn Standard Co. Ltd.*** the Supreme Court opined that a partial Award could be a final Award on matters decided therein "but made at an interim stage." It was further stated that a partial Award "is final in all respects with regard to disputes referred to the arbitrator which are the subject matter of such award." It was further categorically held that "both the partial award and the final award are subject matter of challenge under Section 34 of the Act." Again in ***State of Arunachal Pradesh v. Damani Construction (2007) 10 SCC 742***, it was acknowledged by the Supreme Court that an interim award in that case "was final to the extent of the claims decided therein." Indeed in the present case in Para 2.10 of the partial Award, it is referred to by the Tribunal as the "Final Partial Award."

26. As regards the counter claims of NTPC being rejected, in fact, the partial Award was the final Award. This was acknowledged by the learned Senior counsel for NTPC before the Tribunal which was recorded by it in Para 18.7 of the final Award which reads as under:

"7. The second issue disposed of by the Partial Award, was that of the Respondent's counterclaims as referred to in the Partial Award at paragraph 4, paragraphs 4.1 to 4.67:

"The first counter claim is not admissible both in its original form and as amended. The second,

third, fourth, fifth, sixth, eighth and ninth counterclaims which have been the subject of a prior binding settlement are not admissible. And the seventh counterclaim is not admissible, there being no dispute.”

It was expressly accepted by Mr. Dave that it was not open to the Respondent to seek to go behind this finding in the Partial Award. Accordingly, it was common ground that the finding of the Tribunal barring the Respondent’s counterclaims was final. No issue arises on this finding.”

27. The partial Award decided that the claims of SAG were not barred by limitation. In para 19, the Tribunal recorded what the position of NTPC was in regard to the partial Award. It reads as under:

“19. As the Transcript record (Day 1, pages 16-17), Mr. Dave said that his position with respect to the Partial Award was:

“Dushyant Dave: So far as the question of time bar is concerned, it has been held against us. But undoubtedly it is our stand that we have never agreed, we have only agreed to consider if it is possible and we are going to take a stand that by virtue of acquiescence they would not, be entitled to raise these claims now. So, it is our stand that we have never agreed to give it.

Dushyant Dave: We have ... there are two things, Sir, here. One is, it is for them to show that there was an agreement on our part that 9 months extension is granted. I think none of the documentary evidence adduced by them establish that. But, be that as it may, we have specifically averred in our reply to the statement of claim that we have never agreed. That’s our stand. And the witness only fortifies that in his evidence.

Chairman: I understand that ... but the question I think or the point that I think Mr. Gupta will or is

raising, is that it is not open to you to take these points at this stage of the proceedings, having regard to the terms of the Final Partial Award. If that's right, it will be helpful to know why you say... or given that, that is an argument, you are plainly going to have to meet. It would be helpful to know why you say that this is open to you?

Dushyant Dave: Because the findings in Partial Award were in respect of two specific issues. And in my respectful submission, those issues, decision on those issues, certainly would disentitle me from now arguing on limitation. But it certainly does entitle me to show that there was no agreement and therefore the Claimant has to prove that it is entitled to damages on account of any delay. That there was a delay and that therefore it is entitled to ... that will have to be established because those are part of the other issues which now are before the Hon'ble Tribunal for decision. A number of issues were framed and only two issues came to be decided in the Partial Award.” (emphasis added)”

28. NTPC urged before the Tribunal that it was incumbent on it to decide the issues on “merits” in terms of Article 20 of the ICC Arbitration Rules. In Para 47 of the final Award the Tribunal negated the said submission as misrepresenting the meaning of Para 4.1 of the partial Award. In other words, the expression “merits” referred to the merits of the claims of SAG and not the nine-month extension. Nevertheless, the Tribunal also accepted the contention, and in view of this Court correctly, that under the 1996 Act, the arbitral award has been defined under Section 2(c) to include an interim Award. Under Section 31(6) of the Act, the Tribunal can at any time make an interim award “on any matter with respect to which it may make a final arbitral award.”

29. On the issue of nine-month EOT the Tribunal in its final Award again referred to the procedural history and concluded in para 38 as under:

“38. It was on that basis that the May 2002 hearings took place. Both parties were plainly on notice that it was the intention of the Tribunal to decide the issue of limitation definitively and finally unless the parties agreed, or it became clear, that further evidence and submissions were required. Whether or not a nine month EOT has been given was an issue of fact squarely within the scope of the limitation issue. Neither party suggested in the hearings or in the post hearing briefs, that the issue of limitation including whether or not a nine month EOT had been given could not be decided finally on the basis of the evidence and submissions made in the May hearings. On this record, it is simply not open to the Respondents to suggest that the Partial Award was other than final. However, having regard to the different positions adopted by the parties at the March and May 2008 hearings and the requests by both parties that we should do so, the Tribunal has considered the evidence and submissions on the issue of the nine month EOT again.”

30. That is how the issue of nine-month EOT, although decided in the partial Award, came to be again decided in the final Award.

31. The position, therefore, that emerges is that the partial Award was, in fact, a final Award on two issues: (a) that the counter claims of NTPC were inadmissible and (b) SAG's claims were not barred by limitation. Since the partial Award was not challenged under Section 34 of the Act in respect of the above two issues within the limitation period prescribed under Section 34 (3) of the Act, it cannot be permitted to be urged in the present petition by NTPC. O.M.P. No. 230 of 2009 therefore cannot be entertained and is dismissed. It may also be mentioned that a third issue finally settled by the partial Award is that the Tribunal had jurisdiction to entertain the dispute (as

held in para 4.16 and 4.22 of the partial Award). That has also not been challenged by NTPC.

32. Therefore, the scope of the present proceedings of the challenge by NTPC relates to two broad areas, namely, (i) the question whether there was indeed a nine-month extension given by the NTPC as evidenced by the letters dated 11th September 1998, 22nd January 1999, 19th March 1999 and 13th December 1999; and (ii) whether the Award in respect of the individual claims of NTPC as noticed hereinbefore is sustainable in law.

Nine Months' Extension of time

33. One of the major grounds of challenge by NTPC to the impugned Award of the Tribunal on the issue of the nine month's EOT is that the Tribunal failed to decide the dispute in accordance with the terms of the contract which required SAG to complete several milestones. It is contended that the impugned Award of the Tribunal violated Section 28 (3) of the Act. Reliance is placed on the decisions in ***ONGC v. Saw Pipes (2003) 5 SCC 705***, ***Hindustan Zinc Ltd. v. Friends Coal Carbonisation (2006) 4 SCC 445***, ***State of Rajasthan v. Nav Bharat Construction Co. (2006) 1 SCC 86***, ***Delhi Development Authority v. R.S. Sharma and Company (2008) 13 SCC 80***, ***GAIL v. Hindustan Construction Company*** (decision dated 9th January 2012 in OMP No. 170 of 2004), and ***Harsaranjit Kocchar v. Amalgamated Bean Coffee*** (decision dated 1st November 2011 in OMP No. 301/2010).

34. Clause 22 GCC which provides for SAG to claim compensation for delays caused by NTPC reads as under:

“22.0 Delays by Owner or his Authorised Agents

22.1 In case the Contractor's performance is delayed due to any act of omission on the part of the Owner or his authorised agents, then the Contractor shall be given due extension of time for the

completion of the Works, to the extent such omission on the part of the Owner has caused delay in the Contractor's performance of his work. Regarding reasonableness or otherwise of the extension of time, the decision of the Engineer shall be final.

22.2 In addition, the Contractor shall be entitled to claim demonstrable and reasonable compensation if such delays have resulted in any increase in the cost. The Owner shall examine the justification for such a request for claim, and if satisfied, the extent of compensation shall be mutually agreed depending upon the circumstances at the time of such an occurrence.”

35. For the purposes of Clause 22.1 GCC it had to be determined if there was an act or omission on the part of the owner (NTPC) on account of which performance of the contractor's (SAG's) obligation was delayed. Crucial to Clause 22.2 was whether there was an owner-caused delay under Clause 22.1. If there was no such determination, the question of the contractor being entitled to demonstrable and reasonable compensation under Clause 22.2 did not arise.

36. SAG claimed that there were Owner caused delays for 13.5 months' during the initial stage for the first open cycle which was attributable to NTPC. It claimed that NTPC had in 1998 accepted responsibility for 9 months' delay. SAG concedes that in the later stages of the project there were delays attributable to it to the extent of 6 to 8 months for which NTPC invoked Clause 21 GCC and deducted the maximum LD from SAG's running bills. Though disputed, SAG did not challenge the imposition of LD and the same was not part of the arbitration proceedings. According to SAG, the period of 9 months came from NTPC itself. NTPC did not specify how it had calculated the 9 months' period. NTPC treated the 9 months as separate and distinct as compared to the overall delay to the project.

37. The correspondence, which was examined by the Tribunal, has again been referred to by learned Senior counsel on both sides. By a letter dated 2nd July 1991 NTPC wrote to SAG stating that “while there has been delay in opening of L/C for the electrical items, we do not agree with your contention that a time extension of 12.5 months is justified on this account.” It was pointed out that “there has been a delay of nearly 10 to 12 months in indigenous supplies under the scope of Siemens Limited which is solely to Siemens’ account and can in no way be attributed to NTPC.” Consequently, it was stated that “we, therefore, do not agree with your contention regarding additional cost to be borne by NTPC at approximately DM 3 million per month due to delay in establishment of L/C for electrical items.” By letter dated 7th April 1992 NTPC asked BHEL to expedite the mobilization of the erection activities. In a letter dated 22nd July 1992 NTPC informed SAG with reference to interim claim of DM 35.0 million under Clause 22.0 of the GCC and stated that if there were delays in executing the contract by BHEL/SAG, they themselves were responsible for the delayed commissioning of the project and that no delay could be attributed to the owner.

38. By letter dated 22nd June 1993 the NTPC informed SAG that it had yet to furnish details of the cost claim. It was pointed out that the issues raised by SAG “relate only to certain aspects of delays in commissioning of the gas turbine units in open cycle mode.” However, there had been “overall inordinate delays in commissioning of the gas turbine units in open cycle mode and the combined cycle modules.” It was further pointed out that “the above issues would also need to be satisfactorily resolved before a final view in the matter can be taken after commissioning of the combined cycle modules.” The above correspondence shows that the parties were still negotiating on the question of their respective obligations and as to who could be blamed for delays in commissioning of the overall project. It also

appears that they were willing to wait for the commissioning of the combined cycle modules before taking a final view.

39. Moving to the correspondence between the parties on the issue in 1997 and 1998, it is seen that in the letter dated 21st August 1997 SAG wrote to NTPC stating that there were contract closing formalities which were required to be attended to. Further, there were issues relating to submission/acceptance of PG Test report of CC Mod-II, settlement of LDs, extended warranties of equipment replaced by by-pass stacks, reconciliation of Rs. 48 crore items, settlement of claims raised by SAG and other major outstanding issues. The Tribunal referred to a letter dated 8th December 1997 written by SAG referring to meeting held with NTPC on 12th November 1997 on cost claim. NTPC had indicated that only some part of the claim would qualify for compensation and had insisted on list of documents to justify the reasonableness of the claim. A reference was made in the letter to Clause 22.2 of the GCC. Referring next to the letter dated 11th September 1998 it is seen that it is formally written by NTPC to SAG referring to SAG's letter dated 29th July 1998. In that letter SAG had pointed out that the details demanded by NTPC on the claim for cost compensation was beyond the contract stipulations as per Clause 22.2 of the GCC. It was pointed out that "NTPC is requesting for more and more details which are impossible to provide due to the reasons explained to you during our meeting held on 8th July 1998."

40. SAG by its letter dated 29th July 1998 clarified its stand on the question of delay in completion of project. It was stated that for the delay in completion of the open cycle, no LD could be levied on the contractors since the delay in opening the necessary LC led to an initial delay of about 15.5 months. By referring to the contractual dates on each of the Units 1, 2, 3 and 4 in relation to the Gas Turbine Generator it was pointed by SAG that "the

factual delay is less than the delay caused by reasons beyond contractor's control." In other words in its letter dated 29th July 1998 SAG was clearly taking the position that there was an initial delay of 15.5 months in completion of the project and the completion of the open cycle on account of delays in combined cycle modules.

41. NTPC's letter dated 11th September 1998 was a reply to the above letter. NTPC clarified to SAG that as per terms of Clause 22.2 of the GCC, only reasonable and demonstrable costs incurred by the contractor could be reimbursed in case of delays by the owner. Once again NTPC stated that SAG was required to furnish necessary documents without any further delay. Then the said letter dealt with each of the averments of SAG's letter dated 29th July 1998. NTPC stated that it could not be held responsible for delays in procurement of Rs. 48 crore items. In para 2 of the said letter it was stated as under:

"2. As regards delay in completion of open cycle, several discussions were held with you where it has been clearly indicated that the delays in arranging I/L and LC could effect the project schedule by 9 months. As such it is not to be construed that there cannot be any LD for delays in completion of open cycle trial operations."

42. The next paragraph dealt with the delay in relation to combined cycle module in terms of procurement of Rs. 48 crore items. In the last paragraph a reference was made to the discharge of CPGs. Since there were a number of outstanding issues NTPC stated that it was not in a position to concede to SAG's request for discharge of CPGs. A request was made to SAG to resume the contract closing meeting with NTPC in order to achieve contract closing expeditiously. While SAG was claiming a delay of 15.5 months in the open cycle, NTPC was claiming a delay of 9 months. Therefore, the owner was acknowledging delay in the open cycle to the extent of 9 months but not in the combined cycle or for the procurement of Rs. 48 crore items.

43. The attempt made by learned Senior counsel for the Petitioner to demonstrate that there was absolutely no acceptance by NTPC of any EOT time is not based on a correct reading of above letter. The contention that by a series of letters NTPC had in fact rejected the claim of SAG for EOT is also not borne out by the above correspondence that took place between the parties in the meanwhile particularly the letters of 1997 and July 1998 that were mentioned earlier. NTPC only refers to the letter dated 11th September 1998 which has been discussed in some detail.

44. The letter dated 1st December 1998 from NTPC to SAG makes no reference to letter dated 11th September 1998 but refers to a series of letters dated 30th September, 1st October, and 7th October 1998 as regards cost compensation. The stand of NTPC was that it was still willing to look into the claim and settle the same amicably in case it was agreeable on the number of titles of claims and furnish justification with documentary evidence. By letter dated 14th December 1998 written by NTPC wrote to SAG stating that the full LD @ 5% of contract price would be levied in terms of the contract. In terms of Clause 21.3 GCC, SAG was advised to indicate whether the recoveries were to be made from the first contract, second contract or the third contract. SAG was again requested to furnish further documents/details to substantiate its claim for cost compensation.

45. In its letter dated 22nd January 1999 NTPC insisted that it required detailed documents. In Para 3.2 of the said letter under the sub-heading 'Contractual Work Schedule' NTPC stated as under:

“NTPC is willing to consider the implication of delay in opening of LC to the extent of 9 (nine) months and accordingly, shift the schedule for GTs as well as CCs for a period of nine months from their respective contractual dates. The delays in procurement of 48 crores items have also been examined and we do not accept the extension sought by you for 31.5 months on account of Rs. 48 crores package. In view

of the above, we have already communicated vide letter dated 14th December 1998 regarding NTPC's decisions to levy full LD @ 5% of the contract price."

46. The above letter is significant because it is an unequivocal expression of NTPC's willingness "to consider the implication of delay in opening of LC to the extent of nine months and accordingly shift the schedule for GTs as well as CCs for a period of nine months from their respective contractual dates." Mr. Dave referred to a letter dated 19th March 1999 addressed by NTPC to SAG but it does not actually withdraw the statement made in Para 3.2 of the letter dated 22nd January 1999. In fact the said letter reiterates as under:

"3.2 Contractual Work Schedule

As already conveyed vide our letter dated 22nd January 1999, NTPC is willing to consider the implication of delay in opening of LC to the extent of 9 (nine) months and accordingly, shift the schedule for GTs as well as CC Modules for a period of nine months from their respective contractual dates. Further the trial operations of the CC Modules could be achieved with delays of more than four years with respect to original schedule. We, therefore, do not agree to SAG's contention that delay in completion of CC Modules is not attributable to Contractor(s) and reiterate NTPC's decision to levy full LD @ 5% of the contract price as communicated vide our letter dated 14th December 1998. In this connection it may be noted that as per advice of SAG vide letter dated 12th January 1999 BHEL have been requested to remit the LD amount. However, BHEL have not complied with. You are requested to take up with BHEL and ensure the LD amount is made available to NTPC at the earliest."

47. This has to be viewed in light of the minutes of the meeting held on 6th/7th April 2000 and in particular Para 10.0 thereof in which the position has been made clear as under:

"10.0 SAG requested that NTPC should look into the claims raised by them with more positive approach in view of the fact that there were delays, e.g., in arranging I/L and L/C by NTPC in total amounting to 15 months approx. SAG stated that they

have made above agreements on critical components with the understanding that the claims shall be settled by NTPC keeping above in view NTPC agreed to look into and revert back to SAG.”

48. The collective reading of the above letters it reveals that the Tribunal has correctly concluded that there was indeed an EOT and there was acceptance by the NTPC that delays of about nine months could be reasonably attributed it on account of delayed opening of LCs. The submission that there was not even a single communication from SAG from 1991 to 2000 wherein SAG had even implied that NTPC had granted or agreed to grant an EOT is not correct.

49. Before the Engineer, SAG made a claim for compensation for nine months' delay in terms of Clause 22.2 GCC. In terms of letter dated 16th August 2001 the Engineer gave a decision on Claim No. C-3 “increased cost for acceleration of Project Engineering Management and Co-ordination” stating that “Siemens was not able to commission the GTs within extended period of nine months since schedule date and as such no acceleration in activities could be demonstrated. – Hence not tenable.”

50. What was distinctly different as regards the stage of the final Award, in comparison with the stage of the partial Award, was that witnesses of SAG had been examined as had the witnesses of NTPC. For SAG Mr. Scharmann appeared as witness of the company and Mr. L.C.H. Bunton appeared as an independent expert. For NTPC Mr. S. Datta and Mr. A.K. Sinha appeared as witness. NTPC did not produce an expert witness.

51. Mr. Scharmann was involved in the negotiations of the contract for Dadri Project from mid 1988. He was also involved in the execution of the contracts from their inception. On the other hand, NTPC's witness, Mr.

Sinha admitted in his cross-examination that he had not been concerned with the project during construction and was not directly involved in it, having joined the project only in March 2007. Mr. Datta, the other witness of NTPC, was a junior member and was not a party to the correspondence between NTPC and SAG relating to owner-caused delay of 9 months. The observation of the Tribunal in this regard in Paras 108 and 109 reflected the correct picture and cannot be faulted.

52. NTPC has referred to the evidence of Mr. Scharmann. His answers to Questions Nos. 118 to 127 are relevant and read as under:

“Q.118 Mr. Scharmann, could you come to page 348 the letter of 11th September 1998. In paragraph 2 does it not record that these claims have been found to be untenable and therefore, rejected earlier?

A. Yes, May I clarify here. Untenable in the sense of values behind it. There are several other letters available saying we are ready to think over a cost compensation provided you are giving more details. I do not have the exact wording now in my mind.... what the meaning behind it. Untenable in this sense means untenable with regard to the demonstrability as requested by NTPC.

Q. 119 Is it correct that the letter at page 376 dated 22nd January 1999 at 377 last sentence categorically says that in the absence of documents and details to substantiate any claim, the claim is not considered as tenable?

A. Yes. It is the cost claim. The claim was never on 9 months or time. It was on cost. NTPC is referring to the cost claim.

Q. 120 Is it correct that earlier in 1991-92 you had made similar claims which were considered by NTPC and rejected?

A. Yes.... they were rejected.

Q. 121. Did you get an extension of time for completion of the works from the engineer?

A. According to my recollection there have been some letters extending the time but without contractual obligations. I do not know in which core bundle?

Q.122. Was there any extension of time granted by the Engineer to Siemens?

A. No.

Q. 123. Would you kindly turn to clause 22.1 of GCC. Does it not contemplate an extension by the Engineer whose decision is to be final?

A. Yes. It says so. May I also clarify that the Engineer only comes into picture once there is a dispute. Then his decision is to be final. That is now I read it.

Q. 124. And according to you there was no dispute about extension between Siemens and NTPC?

A. We had asked for extension of time and extension was granted.

Q. 125. Would you kindly turn to the 3rd line of Clause 22.1.... "then the contractor shall be given due extension of time for the completion of the works" Does it not contemplate request for extension of time at the relevant point of time before works are completed?

A. We had asked for extension of time. We were told it will be dealt with later at the project.

Q. 126. Your request for extension of time was rejected, is it not?

A. The cost claim was rejected.

Q. 127. Was an extension of time granted in 1991-92?

A. We were told that it will be dealt with at the end of the contract at a later date."

53. It is evident from the above answers of Mr. Scharmann that he was

clearly making a distinction between the issue of cost claims for which NTPC was insisting on documentation and question of nine months delay which was accepted by NTPC in its correspondence. In fact when he was directly asked whether request for EOT was granted, Mr. Scharmann replied in the affirmative even while he was clear that SAG's cost claims were rejected. A reference was made to the fact that there was a delay of 55 months in completion of the project and therefore, the delay of 9 months which was accepted and attributable to NTPC should be considered to be subsumed in the delay of 55 months. As rightly pointed out by learned Senior counsel for the Respondent, Clauses 22.1 and 22.2 of the GCC specifically focussed on the owner's delay and compensation that could be claimed by the contractor for such delay. There was no reason why despite of an overall of delay of 55 months in the completion of project, the parties could not have agreed that for any part of the delay attributable to the owner, the contractor could claim compensation. This is what SAG appears to have successfully demonstrated in the arbitral proceedings.

54. As observed earlier, the documents available to the Tribunal at the stage of partial Award, were also available to it for examination at the stage of the final Award. It took a consistent view. Its decision was neither contrary to the terms of reference or to the terms of the GCC or the applicable law. The Court, therefore, negatives the contention of NTPC that the impugned Award is liable to be set aside because the Tribunal failed to decide the dispute in accordance with terms of contract, thus violating Section 28 (3) of the Act. The submission that the Tribunal's final Award and partial Award are not in accordance with the agreement between the parties and liable to be set aside under Section 34 (2) (v) of the Act is also rejected.

55. The Court also finds no merit in the submission that the impugned Award of the Tribunal contained a decision that was beyond the scope of

submission to arbitration under Section 34 (2) (iv). The submission that NTPC was prohibited from presenting its case under Section 34 (2) (iii) of the Act is without basis. NTPC appears to have had a full opportunity of presenting its defence in the arbitration proceedings throughout.

Whether the disputes were decided by the Tribunal in accordance with the substantive laws of India?

56. The next major ground urged by NTPC is that the impugned Award is liable to be set aside under Section 28 (1) (b) (i) of the Act because the Tribunal failed to decide the disputes in accordance with the substantive law in India. The basis for the above submission is that according to NTPC time was the essence of the contract and this was a turnkey project. There were milestones for completion of various stages of the project. There were several stages by which these milestones had to be completed by SAG and therefore, the question of NTPC alone being responsible for completing these milestones could not be examined in isolation. The submission is that all the various stages linked to form an integral part of the contract and unless and until SAG had proved that it had completed its obligations well in time as contemplated by the contract, NTPC could not be saddled and made liable under the contract.

57. It is pointed out that the contract itself was for supply, erection, testing and commissioning, including construction of all associated civil, structural and architectural works for gas based combined cycle power project. SAG was to prepare and submit a detailed erection, testing and commissioning procedure for the equipment to be supplied by SAG and its associates in India. A draft quality management plan was to be prepared by SAG and discussed with NTPC and based on discussions, quality plans were to be submitted to NTPC as per schedule. In the second part of Clause 7 (1) (b) it was stipulated that manufacturing of equipments would not be started till

quality plans were approved by NTPC. However, due to critical delivery schedule “there are a few long lead items whose manufacture had to be taken up prior to the contract effective date.” SAG was to furnish field quality assurance system manual and field quality plan for various field activities. It was required that inspection procedure was to be finalised prior to manufacturing and clearance of equipment was to be as per the finalized inspection procedure only.

58. In terms of Annexure 5 read with Clause 15.1 SAG was to prepare contract manufacturing and delivery schedule for each individual equipment to enable NTPC to effect payments. The LC for the first quarter was to be opened one month before the first shipment, but for subsequent quarters, the updated amount for the LC was based on actual progress of work of the respective quarter which was to be intimated by SAG six weeks’ prior to start of that quarter which required NTPC to establish LC for that quarter.

59. It is pointed out that the contract was conditional on KFW financing. It is submitted that while the first instalment of initial advance of 15% and interim advance of 10% was to be paid subject to condition in Column 4, and Annexure V of the Contract, 50% was to be paid on production of invoices and evidence of shipment including Material Dispatch Clearance Certificate (‘MDCC’) issued by NTPC’s Corporate QA and I Representative. It is further submitted that while the LCs were agreed in mode of payments, their establishment by NTPC was conditional upon various tasks to be performed by SAG and except the first LC, the remaining to be established according to the actual progress of work as intimated by SAG. It is submitted that SAG had, in its claim, never adduced evidence to prove that it had established the milestones provided in the contract whereas the Minutes of the Meeting of the 5th Contract Review Meeting (‘CRM’) produced by NTPC show that those milestones were totally neglected by

SAG right from the beginning. It is submitted that this entire evidence is glossed over by the Tribunal. A reference is made to the answers given by the Expert Witness Mr. Bunton. It is submitted that the Tribunal's Award ignores the very philosophy of turnkey contract and its terms.

60. Referring to Section 52 of the Contract Act, 1872 ('CA') which requires performance of reciprocal promises, it is submitted that in view of SAG's failure to fulfill its obligations in agreed manner resulting in actual delay in shipment on account of delayed LCs, NTPC could not be held to have breached its obligation. A reference has been made to Section 63 of the CA and it is submitted that by series of acts SAG has dispensed with the performance by NTPC in respect of LCs and/or in any event extended time for such performance. It is submitted that since the Tribunal had failed to address this submission, the Award was violative of Section 28 (1) (b) of the Act. Further, the Tribunal had wrongly shifted the burden of proof on to NTPC when in fact SAG had failed to prove that it had fulfilled its obligations. Reliance is placed on the decisions in ***Keshavlal Patel v. Lalbhai Mills [1959] SCR 213***; ***Anandram Mangat Ram v. Bholaram Tanumal AIR 1946 Bom. 1***; ***Venkateswara Minerals v. Jugalkishore Chiranjitlal AIR 1986 Kant. 14***; ***Vegi Venkateswara Rao v. Venkatarama Rao AIR 1998 AP 6***; ***Manni Lal v. Bishun Dayal AIR 1930 Oudh 417***; ***State of AP v. Associated Engineering Enterprises AIR 1990 AP 294*** and ***V Chettiar v. K Mudaliar AIR 1925 Mad. 1029***.

61. It is pointed out by SAG that there was nothing in the contract identifying the funding from KFW as condition precedent. In fact in its letter dated 26th October 1989 SAG accepted the Telex of Award upon the conditions set out therein including one condition that the Letter of Award (LOA) shall not be subject to approval of KFW. However, no objection of KFW to the draft of a contract shall be applicable. It is pointed out that KFW

by its letter dated 27th November 1989 approved the contract. Mr. Scharmann also explained that while KFW was required to approve the terms of contract it did not make the obligations of the parties dependent on the arrangement of KFW funding. NTPC had in fact arranged for the LC for the first Gas Turbine and for payment of the initial advance, before the KFW Loan Agreement was signed. Indeed it does appear that the KFW funding was not a condition precedent for the parties to perform their respective obligations under the contract.

62. The argument of NTPC that the delay was the fault of the Government of India and not NTPC did not find favour with the Tribunal. The respondent SAG has alleged that NTPC delayed in establishment of L/C and I/L which led to delay and disruption of programmed sequence of works. According to SAG the aforesaid delay in turn delayed the supply of raw material and components for manufacture of by-pass stacks/dampers which directly affected the commencement and completion of by-pass stack dampers under the 2nd contract.

63. As regards the quality plans, Clause 7.1 stated that the quality plan for long lead items are summarized in Annexure I. This was even prior to the signing of the contract. In Annexure I, it was further agreed that for equipments supplied by SAG factories or from SAG's European sub-contractors, they would be accepted by the owner (NTPC) without separate justification or special approval. It is pointed out that Clause 7.7 concerning the Field Quality Assurance system manual is not applicable for the importation of the gas turbines. There was no requirement for approval of the shipment imported from Germany for these items.

64. As regards the issue of storage of manufactured equipment due to delay in LC's which was ready for shipment as a result of which SAG had suffered

losses. On the other hand SAG pointed out that Mr. Scharmann had in his witness statement, relied upon and proved the invoices for storage of equipment and this was the best evidence available. The documents are referred to show that the date of readiness of dispatch of equipment and corresponding period of storage at Hamburg port. It is further submitted that if the equipment had not been ready for shipment there would be no reason for SAG to write several communications to NTPC to expedite the LC's.

65. As regards the contention that the project was a turnkey one, the Tribunal had held conclusively, in para 114 of the final Award, that the regime of the contract emphasized sectional completion with separate milestones for each section. In granting nine months' EOT only at the stage of opening LCs, NTPC had itself conceded this position. Clauses 22.1 and 22.2 in fact support the submission of SAG that the project was not a turnkey one. This Court is therefore not, persuaded to hold that the Tribunal erred in ignoring the evidence on record or the applicable law.

Scope of challenge to Award on individual items of claim

66. Before proceeding to deal with the challenge to the impugned Award in respect of the individual claims, it is necessary to recapitulate briefly the settled law in respect of the scope of judicial review of arbitral awards under Section 34 of the Act. In **ONGC v. Saw Pipes Ltd. (2003) 5 SCC 705**, the scope of the expression "public policy of India" in Section 34 of the Act was explained thus: (SCC, p.727)

"31. Therefore, in our view, the phrase 'public policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory

provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term ‘public policy’ in *Renusagar case* it is required to be held that the award could be set aside if it is patently illegal. The result would be—award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality; or
- (d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.”

67. The said decision was further analysed by the later decision in ***McDermott International Inc. v. Burn Standard Co. Ltd. (2006) 11 SCC 181*** in which the Supreme Court undertook the exercise of comparing the scope of challenge under the earlier Arbitration Act 1940 and the 1996 Act. It was observed (SCC, p.209):

“58. In *Renusagar Power Co. Ltd. v. General Electric Co AIR 1994 SC 860* this Court laid down that the arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law; (b) the interests of India; or (c) justice or morality. A narrower meaning to the expression “public policy” was given therein by confining judicial review of the arbitral award only on the aforementioned three grounds. An apparent shift can, however, be noticed from the decision of this Court in *ONGC Ltd. v. Saw Pipes Ltd. (for short “ONGC”)*. This Court therein referred to an earlier decision of this Court in *Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly (1986)3SCC156* wherein the applicability of the expression “public policy” on the touchstone of Section 23 of the Indian Contract Act and Article 14 of the Constitution of India came to be considered. This Court therein was dealing with unequal bargaining power of the workmen and the employer and came to the conclusion that any term of the agreement which is patently arbitrary and/or otherwise arrived at because of the unequal bargaining power would not only be ultra

vires Article 14 of the Constitution of India but also hit by Section 23 of the Indian Contract Act. In *ONGC* this Court, apart from the three grounds stated in *Renusagar*, added another ground thereto for exercise of the court's jurisdiction in setting aside the award if it is patently arbitrary.

59. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act. However, we would consider the applicability of the aforementioned principles while noticing the merits of the matter.

60. What would constitute public policy is a matter dependant upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular Government. (See *State of Rajasthan v. Basant Nahata* (2005)12SCC77)

68. In *Ispat Engg. & Foundry Works v. SAIL* (2001) 6 SCC 347 the Supreme Court reminded that: (SCC p. 350, para 4)

“4. Needless to record that there exists a long catena of cases through which the law seems to be rather well settled that the reappraisal of evidence by the court is not permissible. This Court in one of its latest decisions (*Arosan Enterprises Ltd. v. Union of India* (1999) 9 SCC 449) upon consideration of decisions in *Champsey Bhara & Co. v. Jivraj Balloo Spg. & Wvg. Co. Ltd.* AIR 1923 PC 66, *Union of India v. Bungo Steel Furniture (P) Ltd.* AIR 1967 SC 1032, *N. Chellappan v. Kerala SEB* (1975) 1 SCC 289, *Sudarsan Trading Co. v. Govt. of Kerala* (1989) 2 SCC 38, *State of Rajasthan v. Puri Construction Co. Ltd.* (1994) 6 SCC 485 as also in *Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan* (1999) 5 SCC 651 has stated that reappraisal of evidence by the court is not permissible and as a matter of fact, exercise of power to reappraise the evidence is unknown to a proceeding under Section 30 of the Arbitration Act. This Court in *Arosan Enterprises* categorically stated that in the event of there being no reason in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, interference

would still be not available unless of course, there exists a total perversity in the award or the judgment is based on a wrong proposition of law. This Court went on to record that in the event, however, two views are possible on a question of law, the court would not be justified in interfering with the award of the arbitrator if the view taken recourse to is a possible view. The observations of Lord Dunedin in *Champsey Bhara* stand accepted and adopted by this Court in *Bungo Steel Furniture* to the effect that the court had no jurisdiction to investigate into the merits of the case or to examine the documentary and oral evidence in the record for the purposes of finding out whether or not the arbitrator has committed an error of law. The court as a matter of fact, cannot substitute its own evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties.”

69. The above legal position was reiterated in ***Ravindra Kumar Gupta and Company v. Union of India (2010) 1 SCC 409***. It said (SCC, p.413): “that the High Court committed a serious error in reappreciating the evidence led by the parties before the arbitrator. This evidence was duly scrutinized and evaluated by the arbitrator.” It was also observed that the arbitrator had given elaborate reasons with regard to the claim in question and therefore the findings recorded by the arbitrator could not be said to be either perverse or based on no evidence. The court held that a firm finding had been recorded under the claim in question by the arbitrator which was erroneously substituted by the High Court with its own opinion on appreciation of the evidence. “Such a course was not permissible to the High Court while examining objections to the award under Section 30 of the Arbitration Act, 1940.” In ***P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. (2012) 1 SCC 594*** the Court explained that the proceedings under Section 34 of the Act are not of an appellate nature. It said (SCC, p.601): “A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act.”

Claim No.2: Disruption and delay of project engineering, management and coordination

70. Claim No.2 was for DM 3,314,106.00 towards disruption and delay of project engineering, management and coordination. NTPC's case was that project engineering management and coordination were independent of availability of import licence and opening of LC and SAG was contractually bound to perform the aforesaid activities upon award of the contract for which initial payments (25%) were made by NTPC as per contract. Mr. Scharmann had admitted in his cross examination that manufacturing had been started irrespective of opening of LC. Further, NTPC expressed its concern about delays in Civil Design and Construction Activities which was acknowledged by SAG in various CRMs and letters and SAG agreed to augment its civil design etc. in Germany. Further, there were manufacturing delays by SAG and equipments were not shipped even after opening of LC.

71. SAG's case was that the workers were in fact underutilised. The workers who were employed to build the gas-fired power station could not progress with construction without the gas turbines themselves. Mr. Scharmann confirmed that manufacturing had begun during the period of delay, not that the SAG core project engineering, management and co-ordination team were properly utilised.

72. The Tribunal noted that an efficient organisation of a project of this magnitude required a team to be established by the contractor and for that matter, by the owner as well. It was usually not possible to disband a team either in whole or in part and then to reassemble it quickly. NTPC had the power to suspend the contract, but chose not to exercise it. The Tribunal noted that SAG had provided "extensive documentary details of the activity of team members to demonstrate disruption and delay and these documents have been audited by Mr. Bunton." The Tribunal's conclusion that the steps

SAG took with respect to the allocation of work were reasonable was based on an appreciation of evidence. It was rightly observed that “it is a principle of mitigation of loss, that the injured party need only take reasonable steps” and that steps in mitigation does not have to result in cost saving. This Court is unable to find any error in the above

Claim No. 3: Acceleration Costs Of Project Engineering Management and Coordination

73. NTPC submits that the various CRMs acknowledged that there were concurrent and overlapping delays by SAG’s consortium partners for the coordination of which SAG was responsible. It is contended that SAG has not provided any details of specific engineering activities allegedly accelerated and attributable to alleged delays arising out of the late opening of the LCs. It is submitted that the claim made by SAG for man hours in respect of various engineering activities is vague and not specific. Reference is made to evidence of Mr. Datta and Mr. Sinha. There was substantial delay caused by BHEL and Siemens India Ltd. (SI) in the erection activities and supply of material for the by-pass Stack. SAG was responsible for supervision and coordination of the activities of BHEL and SI. It is submitted that the Arbitral Tribunal has not considered any of the aforesaid contentions raised by NTPC and instead has observed that NTPC has not presented any evidence on quantum to counter SAG’s evidence and has proceeded to allow the claim fully.

74. SAG submits that it claimed acceleration costs because it was NTPC that demanded acceleration of the activities. Reference is made to the evidence of Mr. Scharmann and Mr. Bunton. It is contended that NTPC’s allegations regarding concurrent delays is without proper analysis. The delay in opening LCs was on the critical path. After the LCs were opened, NTPC asked SAG to “further intensify their expediting efforts”. SAG maintains

that it explained its claim in detail to the Engineer and in the Second Witness Statement of Mr. Scharmann. It is pointed out that NTPC has not analysed the alleged delays caused by BHEL and SI to show that they were concurrent.

75. The Tribunal noted that Mr. Scharmann was not cross-examined in relation to this claim apart from in relation to the overall delay period of 55 months. It held: “there is no doubt that the cost of acceleration requested by NTPC was a direct consequence of the initial nine months of delay, thus satisfying an applicable criterion of clause 22.2. Secondly, the claim related to the open cycle stage and Mr. Scharmann’s evidence was that the acceleration did serve to counteract the delay in the open cycle.” Further, it pointed out that NTPC failed to present evidence on quantum to counter Mr. Scharmann’s evidence and the detailed submissions of Mr. Bunton on costs. This again being a matter of appreciation of evidence does not warrant interference by the Court.

Claim No.4-Additional Travel Cost

76. This claim was for a sum of DM 425,955. NTPC submits that it never requested anyone from SAG to undertake extra travel for which the claim was made. SAG was required to coordinate activities of its consortium partners in addition to its own obligations under the contract. The concurrent and overlapping delays by SAG and its partners could have necessitated the alleged extra travel by its personnel. Further, the period 18th March 1990 to 7th April 1991 for which the extra travel was claimed was also the period of delay by BHEL and SI.

77. SAG points out that the claim is for the travel costs during the delay period when NTPC continued to ask SAG people to travel to India,

notwithstanding the fact that the project had been delayed. Further, NTPC could have checked its own records, but did not do so. There was no evidence from NTPC to suggest that the travel was the result of any delays on the part of BHEL or SI.

78. The Tribunal analysed the evidence of Mr. Scharmann and Mr. Bunton in some detail and concluded:

“Clause 22.2 of the GCC requires extra costs claimed to be demonstrable and reasonable. It is clearly demonstrable that additional meetings with travel and related expenses being incurred would have taken place. In the Tribunal’s view, in the light of the evidence before it, is reasonable to accept the amount claimed. Mr. Bunton checked the method by which Siemens’ staff claimed expenses. As he rightly says, this system depends on the integrity of those using it. There is no reason for the Tribunal to doubt either the integrity of the system or those who used *it*.

There is one further point. If NTPC was convinced that this claim was exaggerated it could, from *its* own records, have made *its* own analyses of the meetings with Siemens and produced records of its own internal meetings at which NTPC addressed the effect of delay and disruption which its failure to obtain import licences and letters of credit had caused. NTPC have produced no evidence of this kind at all.”

79. NTPC is unable to persuade this Court to hold the conclusion of the Tribunal as regards Claim No.4 to be patently illegal.

Claim No. 5-Enforced storage of Material Equipment, and Machinery

80. NTPC contends that it was not contractually bound to open the LC prior to signing of the loan agreement. In terms of Clause 1.02.00, no material/equipment shall be dispatched from the manufacturer before being tested/ inspected/ accepted by the owner’s engineer. Further, in terms of Clause 13.4, upon contractor’s inspection call that the material is ready for testing/dispatch, the owner engineer will witness the tests/inspect the test

reports and after acceptance, give clearance for dispatch. Dispatch payment in turn is to be released on submission of evidence of shipment including MDCC. Contractor will then request for opening of LC for the payments receivable in the next quarter for the material to be dispatched in that quarter. It is claimed that all LCs were opened by NTPC prior to issuance of MDCCs and therefore there was no delay in the opening of the LCs. On the contrary, SAG had not utilized the LCs fully since the equipment was not ready for dispatch. Further, Mr. Scharmann admitted that no documents in support of goods being ready for shipment were available on record.

81. SAG counters the above submission by pointing out that in terms of Article 15 of the contract, NTPC was bound to open LCs in accordance with the schedule. The loan agreement with KFW was not a condition precedent to the schedule. The MDCCs were a paper exercise that did not involve visits to the manufacturing locations, and were required for payment purposes. There is no evidence on record about inspection during or after the manufacturing process. None of the equipments was rejected by NTPC, so even if there was a delay in opening the MDCCs, the equipment was in fact ready at the start of the storage period. Further, MDCCs were not the same as inspection certificates. NTPC was required to, and did not, show that these were "true" concurrent delays in the sense of being the result of relevant events which were independent of the delays already caused at this time by the delay to the LC.

82. The Tribunal noted: "Having regard to the MDCC issue, the Tribunal has no reason to believe that Siemens' case in this respect is ill-founded or wrong in any material particular. NTPC has failed to produce any evidence to rebut Siemens' case and the claim is therefore allowed in full". It is seen that Mr. Scharmann spoke about the storage invoices which were placed on record. He testified that the said invoices related to equipment, the shipment

of which was delayed in the initial period. The relevant documents were also audited by Mr. Bunton. This again therefore involved appreciation of evidence by the Tribunal. The Court is not expected to sit in appeal by re-appreciating the evidence.

Claim No.6: Extension of the CPG

83. This claim was for DM 305,783.00. NTPC submits that the purpose of Contract Performance Guarantee (CPG) was to secure successful completion and performance of the entire contract and had to be kept alive till discharge of all obligations under the contract. Further, the CPGs were in any case required to be extended during the period of claim since the project was finally completed after an overall delay of 55 months. SAG points out that the claim is for the fact that the CPGs had to be extended for 9 months longer than they should have been as a result of the delay for which NTPC is responsible.

84. The Tribunal referred to the evidence of Mr. Scharmann who explained the nature and scope of the CPGs. In his report Mr. Bunton confirmed the amounts claimed and his cross-examination did not shake his report. With the Tribunal having found that NTPC had agreed to a nine-month EOT, the CPGs necessarily were required to be kept alive for the extended period. The Tribunal's conclusion in allowing this claim cannot be faulted.

Claim No. 7-Delayed payments incurring increased financing charges

85. NTPC submits that SAG was not able to utilize the LC amount in various quarters because the equipments were not ready for dispatch. Further, the list of mandatory spares had to be supplied by SAG in terms of Article 23 of the Contract. The said list was finalized by SAG only on 21st May 1992. SAG was entitled for payment only on MDCC and proof of dispatch. LCs were opened before issuance of MDCCs in respect of the

equipments listed in this claim. Further, no evidence has been furnished by SAG to show that the equipment was ready. It was admitted by Mr Scharmann that no identification of the equipment was available which could be correlated with dispatch and storage to claim increased cost.

86. SAG submits that its claim concerns the delay in receiving payment for the equipment that was shipped. There was a separate claim for the delay in receiving the interim advance and the final payment for the project. The equipment was approved at the end of the storage period, which must mean that it was ready at the start of the storage period. SAG could not issue its invoice for the interim advance until NTPC's Engineer had issued his certificate. The delay resulted from the fact that the Engineer did not issue his certificate. Eventually SAG issued the invoice without waiting for the certificate. The storage invoices showed that the equipment was being stored. The billing break-up showed the actual shipping date.

87. On this claim the Tribunal reasoned: "The life blood of contracts of this kind is cash flow. When payment obligations are not met on time, the contractor either has to finance expenditure from his own resources, or borrow, or both. Siemens lost the use of money due under the contract, but paid late, due to the late opening of letters of credit in the nine months delay in the initial stages. The calculation of what was lost by delayed payments is straightforward. The only questions are the applicable rate of interest and the applicable dates from which interest should be calculated." The Tribunal referred to the evidence of Mr. Scharmann and Mr. Bunton to conclude that 7.5% was a reasonable rate to be adopted for this claim. The said finding is unexceptionable.

Claim No. 8-Head Office Overhead & Profits

88. NTPC submits that the extent of delay is not clearly established since SAG admits that the period of nine months was not an identified period.

Further there was no evidence on record to show that overheads claimed were actually incurred. The alleged loss was also not reflected in balance sheets of SAG. No documentary evidence was made available to support SAG's claim except the statement of Mr. Scharmann. SAG submits that this is a new argument, not previously raised in the arbitration. Mr. Scharmann confirmed that the loss of contribution to the head office overheads and profits is not reflected in the balance-sheet. However, the loss claimed could be derived from the audited accounts by the application of the Emden Formula. In fact the Tribunal has, in allowing this claim adopted the Emden Formula which has been recognised by the Supreme Court as well. Nothing has been shown by the NTPC to doubt the correctness of this conclusion.

89. As regards NTPC's submission that the sum awarded by the Tribunal to SAG was nearly 60% -70% of the contract price, it is clarified by SAG that this submission is factually incorrect. In para 155 of the final Award the Tribunal summarised the total value of the claims of SAG and the amount of the claims which have been awarded to the SAG. It is pointed out that the amount awarded is less than 10% of the total contract price of the first contract. It appears that NTPC had converted the amount in foreign exchange to Indian rupees at the prevailing exchange rates but it did not convert the contract price in foreign exchange to Indian rupee at the prevailing rates.

Conclusion

90. For all the aforementioned reasons, this Court is not persuaded to interfere with either the partial Award dated 31st July 2002 or the final Award dated 6th January 2009 of the International Court of Arbitration of the International Chamber of Commerce in exercise of its powers under Section 34 of the Act. The challenge by NTPC to the rejection of its counterclaims is also rejected.

91. The petitions are dismissed with costs of Rs. 50,000/- each which shall be paid by the Petitioner NTPC to the Respondent SAG within four weeks from today.

S. MURALIDHAR, J.

APRIL 26, 2012

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