

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

Reserved on: 28.08.2012

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Date of decision: 06.09.2012

+ **FAO (OS) No.337 of 2008**

M/S. GAMMON INDIA LIMITED APPELLANT

Through: Mr. Sameer Parekh,
Ms. Sonali Basu Parekh,
Mr. Kshatrashal Raj & Ms. Shweta Sharma,
Advs.

Versus

NATIONAL THERMAL POWER
CORPORATION LIMITED RESPONDENT

Through: Mr. Ramesh P. Bhatt, Sr. Adv. with
Mr. Inderbir S. Alag &
Mr. Jagdeep S. Lamba, Advs.

+ **FAO (OS) No.430 of 2008**

NATIONAL THERMAL POWER
CORPORATION LIMITED APPELLANT

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CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE VIPIN SANGHI

SANJAY KISHAN KAUL, J.

1. The dispute pertaining to a contract entered *inter se* parties in 1988 is still pending resolution!
2. National Thermal Power Corporation Limited (for short 'NTPC') invited tenders on 3.10.1986 for construction of two Natural Draft Cooling towers at their Thermal Power Station for generation of electricity at Kawas in Surat District, Gujarat on a lump sum basis. Gammon India Limited (for short 'GIL') submitted its bid on 18.12.1986 read with the final price bid dated 23.7.1987. In pursuance of the negotiations *inter se* parties the bid of GIL was accepted by NTPC on 20.10.1987 for a lump sum contract value of ₹5,70,07,000.00. The letter of award was issued on 17.2.1988. The work was completed albeit belatedly. The first cooling tower which was to be completed on 31.10.1989 with a further period of thirty (30) days was completed on 30.9.1991 with a delay of 22 months. The second cooling tower was to be completed by 31.1.1990 with a further period of thirty (30) days but was completed on 10.2.1993 with a delay of 36 months. In case of both the towers extension was granted by NTPC from time to time. GIL claimed amounts on account of delays as it had incurred additional expenses and suffered losses such as loss of productivity, loss of site overheads and head office overheads, loss of profit, cost of additional mobilization of plants, equipment, manpower, etc., rise in cost of labour, material and abnormal rise in the price of aggregates apart from other additional miscellaneous costs. In order to resolve these issues a joint

meeting was held between the parties at Mumbai on the outstanding issues on 15/16.10.1993. The minutes of this meeting were drawn which is the most crucial document. The said document is reproduced as under:

“MINUTES OF MEETING HELD BETWEEN NTPC AND GAMMON INDIA LIMITED AT GIL's OFFICE AT BOMBAY ON 15TH & 16TH OCTOBER 1993 ON THE OUTSTANDING ISSUES UNDER NATURAL DRAFT COOLING TOWERS PACKAGE FOR KAWAS GPP.

Present:

NTPC

1. Mr. J.N.Sinha
2. Mr. K.V.Rao
3. Mr. S.Ray
4. Mr. A.K.Srivastava
5. Mr. A.K.Sharma
6. Mr. P.Balakrishnan
7. Mr. S.K.Mahapatra
8. Mr. Yash Gupta

GIL

1. Mr. G.V.Hingorani
2. Mr. S.Chakrabarti
3. Mr. G.D.Chotraney
4. Mr. M.U.Shah
5. Mr. R.B.Sainani

The meeting was convened to discuss and resolve the outstanding issues under the Contract. It was specifically agreed and confirmed by GIL that with the resolution on various issues brought out in the meeting there would be no other issues or claims raised by them in future. The following was discussed and agreed between NTPC & GIL.

1. NTPC asked GIL to conduct the PG test on Cooling Tower No. 1 immediately but after giving a clear notice of one week for conductance of test.

2. GIL requested NTPC to consider extra payment on account of CNS treatment and mass fill which, as per them was not originally envisaged in the contract. NTPC clarified that the aforesaid claims of GIL were not tenable as per provisions of contract and same had also been clarified to

GIL earlier. GIL agreed to withdraw their claims for CNS and mass fill.

3. GIL stated that the actual time taken for execution of contract was much longer than the scheduled period as per the contract schedule, in view of initial delays, the time taken for CNS treatment and mass fill and malaria etc. Further GIL stated that during the execution they had to face unprecedented monsoon which also resulted in delays. Accordingly GIL requested that though they have agreed to withdraw their claims for CNS and mass fill, NTPC should sympathetically consider payment of escalation on the basis of actual work done instead of scheduled period as per L2 Schedule....

NTPC stated that though GIL request was not as per provisions of contract, under the circumstances, NTPC would examine and consider their request favourably and revert back on the matter. However, it was clarified to GIL that NTPC's decision in this regard would be final and binding on them. GIL agreed.

4. The primer for joint filling component for NDCT - 1. Has failed to give the required result during testing. The issue is pending with GIL SINCE A LONG TIME. GIL suggested for suitable deduction for the same. NTPC agreed for appropriate deduction for same. Other rectification and clearance of area will be carried out by GIL immediately.

5. Issue of Calibration certificate for pitot tube used in PG Test was discussed. GIL stated that this was tested in IIT, but NTPC stated that as per BS:4485 the same is not coming within the specified tolerance. GIL handed over documents to prove the results of the PG tests report, being within the guaranteed parameters, after considering the variation of IIT test results and BS:4485 Part II tolerances for approval.

6. NTPC informed that the Special loan advance was given to GIL on specified request of GIL with interest on such loan agreed by GIL and that their request for refund of

interest was not acceptable.

7. The issue on return of BGs shall be examined by NTPC.

8. The Hydraulic door closer has not been fixed so far. GIL expressed that such type of hydraulic door closer is not available. GIL will propose suitable deduction for same which was also agreed by NTPC.

9. GIL stated that just after the award of contract there was an unprecedented hike in the cost of aggregates and as such NTPC should compensate GIL for the extra cost incurred by them for the aggregates. NTPC clarified that GIL's contention was not as per provisions of Contract and hence not tenable. GIL agreed to withdraw their claim.

10. Regarding cement, steel consumption reconciliation it was pointed out by GIL that there is some difference in quantities finalized by NTPC. NTPC requested GIL to send their authorized Engineer for reconciliation purpose to Kawas site so that final figure can be arrived. GIL requested that the Cement consumption on account of casting of louvers due to breakage may also be considered in consumption.

11. Further it was agreed that GIL's request for extra consumption of cement and steel for change in piling system from under reamed piles to cast in situ driven piles and their request for globalization of M.S. and torn steel along with the issue of excess scrap generated and returned by them would be considered by NTPC favourably after the reconciliation of Cement and Steel quantities by GIL with Kawas site.

12. NTPC stated that since as per provision of contract only cement is to be issued free of cost by NTPC and empty cement bags are the property of NTPC, GIL should confirm acceptance to the amendment to the contract issued on 30/01/89 on the return of empty cement bags. It was agreed that since GIL has already returned substantial quantity of

empty cement bags, NTPC will not insist for any further return of empty cement bags.

NTPC
sd/-

GIL
sd/-
(emphasis supplied)

3. It is the case of the GIL that though NTPC had agreed to consider the case sympathetically with respect to the price escalation, nothing was done and since payments were not forthcoming the dispute was initially referred to the “Engineer” as provided in clause 26.1 of the General Conditions of Contract (for short ‘GCC’) on 30.4.1997. GIL filed a claim of ₹3,07,68,145.00 under six heads along with a claim for interest of ₹3,67,53,342.00 calculated up to 30.4.1997 totaling to ₹6,75,21,487.00 plus (+) interest from 1.5.1997 to 28.8.1997 when the demand for reference to arbitration was made apart from the *pendente lite* and future interest. This claim was denied by NTPC which also filed its counter claim on 26.7.1997. The Engineer rendered his decision on 31.7.1997 allowing part of the claims of GIL while allowing the counter claim of the NTPC to the tune of ₹2.33 crore.
4. The GIL not being satisfied with the decision of the Engineer invoked the arbitration clause on 28.8.1997. The claims and counter claims of the two parties were referred to the Arbitral Tribunal of three arbitrators.
5. The arbitration proceedings continued for four (4) years which published the award on 21.10.2004. The Arbitral Tribunal examined the claims and the counter claims of the parties which were as under:

Claims filed by GIL:

1. Balance price variation payment:	₹83,31,452/-
2. Extra payment on account of mass concrete fill	₹30,68,300/-
3. Extra payment on providing CNS layer	₹52,32,810/-
4. Compensation due to increase in cost on account of delay	₹67,56,000/-
5. Extra expenditure/cost towards abnormal hike in price of coarse aggregates	₹53,64,200/-
6. Payment of balance work done	₹21,15,483/-
7. Payment of interest @ 20% [For pre-reference period, <i>Pendent lite</i> period and Post award period (to be given later)]	₹3,67,53,342/-
8. Cost of reference to arbitration	
9. Any other claim on finalization of the claim	
Total:-	₹6,75,21,487/-

Counterclaims filed by NTPC

1. Award by the Engineer	₹2,33,21,347/-
2.(A) Against excess consumption of owner issue materials. Balance amount over and above the amount for this item in the Engineer's Award.	₹9,91,457/-
2.(B) Differential cast for using SRC in place of PSC	₹27,80,638/-
3. Liquidated damages for delay. Balance amount over and above the amount for this items in the Engineer's award	₹7,03,516/-
4. Interest on counter-claims over and above the amount in the Engineer's award	₹1,54,41,773/-
5. Cost of arbitration	₹10,00,000/-
Total amount of counter-claims	₹4,44,36,363/-

6. The Arbitral Tribunal rejected all the counter claims and partly allowed claim No.1 for Balance Price Variation Payment and partly for Payment of balance work done. Against the claim of ₹83,31,452.00 for balance price variation, the amount awarded was

₹78,64,197.00 as corrected by GIL. The claim for balance work was allowed partly on the basis of admission of NTPC and it is stated that this amount already stands paid after filing of the appeals before us.

7. The NTPC aggrieved by the award filed objections under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'said Act'). The learned single Judge in terms of an order dated 26.5.2008 has partly set aside the award to the extent that it awarded the balance price variation claim of GIL. FAO (OS) No.337/2008 has been filed by GIL while FAO (OS) 430/2008 has been filed by NTPC. The grievance of GIL is confined to the award being set aside in terms whereof the claim of GIL for balance price variation has been allowed while the appeal of NTPC is qua the amount awarded for the balance payment of ₹18,51,102.29 towards balance price. It has also been urged that the learned single Judge having come to the conclusion that the award spoke of delays on the part of the GIL with no delay on the part of the NTPC, failed to grant the counter claim.
8. A perusal of the arbitral award shows that it arrived at a conclusion – that the main reason for delay in completing the construction of the two towers was the inadequate data supplied by NTPC about soil conditions at the site of the two cooling towers. The data given in the tender document was found to be inadequate on two accounts – (i) Sub soil water condition at the foundation level was found to contain sulphates and ultimately sulphate resistant cement had to be used; (ii) Abnormal variation in soil condition – soil swelling pressure encountered was 34 tones/per sq.mtr. as against

10 tonne/per sq. mtr. indicated in the tender, with the result that the mass fill and CNS layer treatment had to be given to resist the upward pressure. However, qua the adjudication of GIL blaming NTPC for delay in execution of work the finding is that both parties had contributed to the delay in some manner or the other, while some delay occurred on account of heavy rainfall.

9. The Arbitral Tribunal took note of the minutes of the meeting dated 15/16.10.1993 (exhibit C-117) recognizing it as the most crucial piece of evidence. The meeting had been called to settle all outstanding issues and claims under the contract with resolution on various issues and the understanding that no other issues or claims would be raised by GIL thereafter. This crucial piece of evidence was relied upon by the Arbitral Tribunal to reject various claims of GIL as those aspects stood compromised by exhibit C-117. The counter claim was also rejected on this ground that none of these aspects were raised during the minutes of the meeting and cannot be raked up subsequently.
10. The learned single Judge, however, found that the award was contrary to the express terms of the contract as it was categorically provided that it was the obligation of GIL/contractor to inspect and examine the site and its surroundings. Clause 13.2 in this behalf reads as under:

“13.2 The Contractor shall inspect and examine the site and its surroundings and shall satisfy himself before submitting his bid as to the nature of the ground and sub-soil the form and nature of the site, metrological information, soil data, local and International Regulations, the quantities and nature of work and material necessary for the completion of the works and the means of access to the site, the

accommodation, he may require and in general shall himself obtain all necessary information as to risks, contingencies and other circumstances which may influence or affect his bid. Owner shall not entertain any claim under any circumstances, arising out of variation in site/soil data, whether such data is indicated in the bid documents or not, as the contractor is expected to ascertain in all such data himself to his entire satisfaction.”

11. The learned single Judge has also observed that as per clause 8.0.0 of the Technical Specification Section c (o), GIL was to carry out the soil investigation itself and it was specified that the information like soil characteristics given by NTPC in the tender were only indicative for guidance. Thus, the bidder was to fully satisfy itself about the nature of the soil strata, its bearing capacity and other characteristics to be encountered at the site of the cooling towers prior to the submission of bid. The detailed discussion in this behalf is contained in para 21 of the impugned order, which reads as under:

“21. In addition to this as per Clause No. 8.0.0 of Technical Specification Section c(o), the respondent/GIL was to carry out soil investigation itself. It was specified that information like soil characteristics given by the petitioner/NTPC in the tender were only indicative for guidance. Bidder was to fully satisfy himself about the nature of soil strata, its bearing capacity and other characteristics to be encountered at the site of cooling tower prior to submission of the bid. It was specifically stated by the petitioner that owner (NTPC) does not take any responsibility for actual soil data or for variation between the actual soil data and the indicative data. In view of this specific provisions in the contract and in view of the fact that the tenders were invited on 3rd October, 1986 and tenders were to be submitted in December 1986 and there was a gap of more than 2 1/2 months between invitation and submission of the bids, there was sufficient

time with every tenderer to do the soil investigation, find out the data and then submit his bid. Despite this specific provision in the contract, the observation of the Tribunal regarding soil condition and that the delay was due to inaccurate soil data supplied by the petitioner is contrary to the contract and does not stand the scrutiny of law. It was not the obligation of the petitioner to give a data to the claimant/respondent in respect of sub soil, water conditions or about soil pressure to be encountered. The tenderer who was to give bid, was at liberty to conduct sub soil testing before giving bid. The bid was being given for a work, which ran into several crores of rupees and every tenderer knew that the work involved below ground construction and sub soil structure for which proper soil testing and knowing the nature of soil was necessary. If the tenderer gives bid despite warning in the tender documents, without doing the actual soil testing only relying on the indicative data, no blame can be put on the owner (petitioner) and no compensation could be awarded on this ground. It is settled law that the Arbitrator is bound by the contract between the parties. The Arbitral Tribunal cannot re-write the contract and award claims. It can interpret the contract and arrive at a conclusion about meaning of a particular clause. Such an interpretation would be binding on the parties and Courts would not find faults with interpretation unless it shocks the conscience of the Court. But the Arbitral Tribunal cannot altogether ignore the terms of contract governing relationship of parties and make an award contrary to the contract. In this case the Arbitral Tribunal at the very outset came to the conclusion that delay in completion of work by GIL was due to inadequate supply of soil data by NTPC. These observations are contrary to express terms of the contract. The Tribunal has not even bothered to look into those terms and conditions of contract which deal with this aspect what to talk of interpreting the contract. The award of amount against claim No. 1 is liable to be set aside on the ground of being contrary to contract itself.”

12. Learned counsel for GIL made its three-fold submissions before us

– (i) the contract itself provided for escalation and extension; (ii) even if two views are possible the view of the arbitrator must prevail; (iii) the contract was based on a factual situation which went through a complete change and, therefore, escalation has been granted.

13. Learned counsel referred to various legal pronouncements of the Supreme Court. Learned counsel sought to rely upon the judgement of the Supreme Court in K.N. Sathyapalan (Dead) By Lrs. Vs. State of Kerala & Anr. (2007) 13 SCC 43, where in para 25 it was observed as under:

“25. In support of his submissions, Mr. Dave firstly referred to the decision of this Court in P.M. Paul v. Union of India [1989]1SCR115/1989 Supp (1) SCC 368 , wherein a dispute arose regarding payment of escalated costs. By an order of this Court, the dispute between the parties was referred to a retired Judge of this Court to ascertain who was responsible for the delay in completion of the building, what was the repercussions of the delay and how the consequences were to be apportioned. It had been contended therein that in the absence of any escalation clause it was not permissible for the Arbitrator to grant any escalation price sought by the contractor. The Arbitrator, however, noted that the claim related to the losses caused due to increase in prices of materials and costs of labour and transport during the extended period of the contract and accordingly allowed 20 per cent of the compensation sought. The question before this Court was whether the Arbitrator had travelled beyond his jurisdiction in awarding escalation costs and charges. This Court came to a finding that the Arbitrator had not mis-conducted himself in awarding the amount as he had done. Once it was found that there was delay in execution of the contract due to the conduct of the respondent, respondent was liable for the consequences of the delay, namely, increase in prices. It was held that the claim was not outside the purview of the contract and arose as an incidence of the

contract and the Arbitrator had jurisdiction to make such award.”

14. The plea that in the absence of any escalation clause it was not permissible for the arbitrator to grant any escalation was examined. The finding was that the arbitrator had not travelled beyond his jurisdiction in awarding escalation costs and charges once it was found that there was delay in execution of the contract due to the conduct of the respondent and the respondent was liable for consequences of delay. The Supreme Court relied upon an earlier pronouncement in P.M. Paul Vs. Union of India (*supra*). We may, however, note a crucial aspect in the aforesaid case, i.e., the finding that there was delay in execution of the contract on account of the conduct of the opposite party, while, in the present case there is no such finding. On the other hand, at best it can be said that both sides were responsible for the delay and, thus, it is a case of contributory negligence on factors, apart from the certain unforeseen circumstances as concluded by the Arbitral Tribunal, which were held to be responsible for delay.
15. In Food Corporation of India Vs. Joginderpal Mohinderpal & Anr. (1989) 2 SCC 347 while dealing with the Arbitration Act, 1940 it was held that if the view taken by the arbitrator was a plausible view, a speaking award was not required to be interfered with. To the same effect are the observations in M/s. Sudarsan Trading Co. Vs. Government of Kerala & Anr. (1989) 2 SCC 38.
16. Learned counsel also relied upon the judgement of the Supreme Court in State of U.P. Vs. Allied Constructions (2003) 7 SCC 396 to contend that even if a view is taken by the arbitral tribunal on an

aspect, in the absence of any specific clause dealing with that aspect, the same was not required to be interfered with.

17. Learned counsel relied upon the observations in Tarapore & Company Vs. Cochin Shipyard Ltd., Cochin & Anr. (1984) 2 SCC 680 to advance the third proposition where it was observed that once rates quoted became irrelevant on account of the circumstances beyond the control of the contractor, it would be open to the contractor to make a claim for compensation.
18. Learned counsel for the NTPC, on the other hand, relied strongly on the terms & conditions of the contract itself. Clause 13.2 quote aforesaid was referred to, to contend that it was the duty of GIL as per the contract to have satisfied itself as to the nature of the ground and sub soil, the form and nature of the site/the quantities and nature of work and material necessary for completion of the works and the means of access to the site, etc. It clearly provided that NTPC was not to entertain any claim under any circumstances arising out of variation in site/soil data, whether such data is indicated in the bid documents or not as the contractor was expected to ascertain all such data himself to his entire satisfaction. It was, thus, submitted that the clause was comprehensive and, thus, the very premise of the award of the Arbitral Tribunal was contrary to this clause as the aspect of soil variation had to be taken into account by GIL who was also required to do all search/testing in that behalf.
19. Learned counsel also sought to rely upon the instructions to the bidders where the relevant clauses read as under:

“13.0 LOCAL CONDITIONS

13.1 It will be imperative on each Bidder to fully inform himself of all local conditions and factors which may have any effect on the execution of the Works covered under these documents and specifications. The Owner shall not entertain any request for clarifications from the bidders, regarding such local conditions.

13.2 The Contractor shall inspect and examine the site and its surroundings and shall satisfy himself before submitting his bid as to the nature of the ground and sub-soil, the form and nature of the site, metrological information, soil data, local and International Regulations, the quantities and nature of work and material necessary for the completion of the works and the means of access to the site, the accommodation he may require and in general shall himself obtain all necessary information as to risks, contingencies and other circumstances which may influence or affect his bid. Owner shall not entertain any claim under any circumstances, arising out of variation in site/soil data, whether such data is indicated in the bid documents or not, as the contractor is expected to ascertain in all such data himself to his entire satisfaction.

14.0 PRICE BASIS AND PAYMENTS

14.1 The bidders shall quote in their proposals lump sum price for the entire scope of furnishing and erecting the equipment (covered under the Technical Specifications) as required in the Bid Proposal Sheets on a base price plus escalation basis unless otherwise specified in the Technical Specifications. Bidders quoting a system of pricing other than that specified run the risk of rejection.

Bidder shall indicate bid prices in Indian Rupees only.”

20. The aforesaid clauses, thus, require the bidders to fully inform themselves of the local conditions and factors and the bid had to be made on an agreed condition that the bidder had already properly

investigated and considered such factor while submitting the proposal. No claim for financial adjustment qua the contract awarded was to be entertained. It is in these circumstances that it was a firm price bid.

21. We had specifically asked learned counsels for the parties as to the cause of the delay in preferring the claim as the list of dates seems to indicate a complete silence between the time exhibit C-117 was drawn on 15/16.10.1993 and the reference of the dispute to the Engineer on 30.4.1997. We are informed that the final bill was made only on 26.7.1996. The final bill was sent under the cover of the letter dated 27.8.1996. Learned counsel for GIL also referred to exhibit C-118 dated 25.8.1994 which is a fax addressed by GIL to NTPC. The fax records that there was considerable delay in receiving substantial payments from NTPC which has defeated the very purpose of an amicable settlement through a joint meeting and requested release of outstanding payments including escalation immediately without further delay. On the other hand learned counsel for the NTPC has relied upon a communication dated 5.11.1989, exhibit C-120 which is addressed by NTPC to GIL. It refers to the minutes of the meeting dated 15/16.10.1993 in terms whereof NTPC had agreed to consider and examine the request for escalation. The letter also states that a decision in this behalf by NTPC was to be final and binding as per the provisions of the contract. NTPC states in the letter, thus, there is no question of payment as per bill of the GIL especially because the actual execution of the work was considerably delayed. As regards extra item of work, it is stated that the bill already stands withdrawn.

22. In the aforesaid factual matrix we have given our thought to the rival contentions of the learned counsels for the parties. It is trite to say that the arbitrator is a creation of the contract and must be bound by the terms & conditions of the contract as observed by constitution bench of the Hon'ble Supreme Court in Secy. Irrigation Department, Govt. of Orissa and Ors. v. G. C. Roy, (1992) 1 SCC 508_and the same view was further considered in New India Civil Erectors (P) Ltd. V. ONGC, (1997) 11 SCC 75. No doubt the arbitrator has a leeway to interpret terms & conditions of the contract and so long as the view taken by the arbitrator is a plausible view, it is not required to be interfered with merely because there is another plausible view. In the context of this legal principle if the terms of the contract are analyzed we find that clause 13.2 was all encompassing in its terms. This is the clause relied upon by the learned single Judge also. Clause 13.2 puts an obligation on GIL to satisfy itself as to the nature of ground and sub soil and that no claim by NTPC would be entertained under any circumstances arising out of "variation in site soil data, whether such data is indicated in the bid document or not". GIL was expected to ascertain all such data itself to its entire satisfaction. Not only that, as per the instructions to the bidders clause 13.0 dealt with local conditions and the bidder was to fully inform itself of all local conditions and the factors which may have any effect on the execution of the work and no financial adjustment was to be entertained in this behalf, the price basis being firm.
23. It is also the finding of the Arbitral Tribunal that the allegation of

GIL, that NTPC was responsible for the delays, is not correct. At best the finding is that of contributory delays as GIL also delayed in the execution of the contract.

24. The most important aspect to our mind is the minutes of the meeting dated 15/16.10.1993 (exhibit C-117). There are two aspects to these minutes. Firstly they record how the parties have understood the contract. Secondly they provide for settlement of all issues within the parameters of the minutes.
25. If the aforesaid document is scrutinized it will be seen that a number of claims made by GIL were beyond the terms of the contract which NTPC refused to honour and the claims were withdrawn by GIL, e.g., extra payment on account of CNS treatment and mass fill. However, in view thereof GIL pleaded that NTPC should sympathetically consider payment of escalation on basis of actual work done instead of the scheduled period and NTPC agreed to examine the claim even though it was beyond the provisions of the contract. This was, however, with the clarification that NTPC's decision in this regard would be final and binding on them to which GIL agreed.
26. It was initially sought to be pleaded before us that there was neither any acceptance nor rejection in this behalf and that is why in the list of dates after the minutes of this meeting the next date mentioned is of 30.4.1997. However, when we probed the matter further and asked learned counsel for the GIL as to why there was absence of any communication from both sides for such a long period of time, C-118 was supplied to us which was dated 25.8.1994 and sought to rake up the issue of balance payment by

GIL with NTPC. NTPC, however, relied upon C-120 which was a subsequent communication dated 5.11.1996 rejecting this claim as beyond the terms of the contract. Learned counsel for GIL sought to contend that this document was not really a rejection but we fail to appreciate the plea in view of what has been categorically stated therein. As per the minutes of the meeting dated 15/16.10.1993 the decision of NTPC in this behalf was to be final. Thus, the chapter qua this issue also stood closed with that rejection.

27. As noticed above even while making the claim it was acknowledged that this claim was beyond the pale of the terms of the contract but towards the objective of arriving at a settlement NTPC had agreed to examine the claim which it ultimately did not accede to as it wanted to make payments only in terms of the contract.
28. We are, thus, of the view that the Arbitral Tribunal went beyond the specific terms of the contract to award an amount and, thus, the learned single Judge was right in interfering with the same. The judgements referred to by learned counsel for the GIL do not assist it as none of them lay down a proposition and cannot lay down a proposition that arbitrator can go beyond the terms of the contract. It is not as if the terms of the contract are silent on a particular aspect and, thus, the Arbitral Tribunal on the basis of the evidence has awarded some amount. It is not absence of any specific clause, but a view taken in the teeth of a specific clause which is in question. We have also noticed while referring to the judgement in K.N. Sathyapalan (Dead) By Lrs. case (supra) that the crucial aspect in that case was that the blame for the delay lay at the door

of the opposite party which is not so in the present case.

29. In so far as the appeal of NTPC is concerned, it is strange that on the one hand NTPC has relied upon the minutes of the meeting of 15/16.10.1993 which are all encompassing and yet sought to rake up the counter claim which is, thus, rightly rejected by the Arbitral Tribunal – an aspect which has not been interfered with by the learned single Judge. We are unable to accept the contention of learned counsel for NTPC that the minutes only dealt with the claims of GIL and not the counter claims of NTPC. It is an all encompassing discussion and obviously the counter claims of the NTPC was in the nature of a counter blast. This finding is also, thus, not required to be interfered with.
30. We, thus, find no merit in these cross appeals which are dismissed leaving the parties to bear their own costs.

SANJAY KISHAN KAUL, J.

SEPTEMBER 06, 2012
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VIPIN SANGHI, J.