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

RESERVED ON: 08.11.2013
PRONOUNCED ON: 13.08.2014

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FAO(OS) 489/2009

NTPC LIMITED

... Appellant

Through: Mr. R.P. Bhatt, Sr. Advocate with
Mr. Yakesh Anand and Ms. Sonam Anand,
Advocates.

Versus

M/S V U SEEMON AND ANR.

.... Respondents

Through: Mr. Jayant. K. Mehta, Mr. Abhay Anand
Jena and Ms. Bina Gupta, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

S.RAVINDRA BHAT, J.

% In these proceedings, the appellant, National Thermal Power Ltd (hereafter NTPC), is aggrieved by the judgment and order dated 07.08.2009 of a learned Single Judge of this Court in CS (OS) 1393-A/1999, CS (OS) 1444-A/1999 and I.A. 9932/1999. The impugned judgment rejected NTPC's challenge to an award, preferred under Sections 30 and 33 of the Arbitration Act, 1940 (hereinafter referred to as "the Act").

2. The brief facts are that on 25.05.1987, NTPC accepted the bid of M/s V.U. Seemon (the Respondent, hereafter "the Contractor" or

the “claimant”) dated 20.12.1986, made through their Telex Award dated 07.05.1987 and awarded the contract for the construction of boundary wall and fencing package for Kawas Gas Power Project. The scheduled completion of the entire work was 06.05.1988. An extension of six and a half months however was granted to the Contractor. Later, alleging non-completion as on 21.04.1989, a notice was given by NTPC requiring completion of the balance work by 15.05.1989, failing which it threatened to award the balance work to another agency at the risk and cost of the Contractor. On 19.06.1989, NTPC terminated the contract, in terms of Clause 41 of the General Conditions of Contract for Civil Works (“GCC”). At that time, work worth only ₹77 lakhs was done, out of which ₹75 lakhs were paid, as opposed to the total contract value of ₹1,07,31,580/-. Thereafter, expenditure of ₹42,62,705/- incurred by NTPC in completing the balance work by another contractor was claimed from the Contractor, due to which the latter issued notice invoking arbitration as on 07.12.1989. The Contractor approached this Court under Section 20 of the Act for appointment of Arbitrator. NTPC had, on its own, appointed Sh. P.C. Nag (hereinafter referred to as the ‘Arbitrator’). The arbitral proceedings initiated in 1991 continued till 1999 and the award was made in favor of the Contractor on 03.05.1999.

3. NTPC preferred objections to the award, following the filing of award in Court, under Sections 30 and 33, on 01.10.1999 which were dismissed by the Learned Single Judge in the impugned judgment. The Learned Single Judge found no perversity in the findings returned

by the Arbitrator holding that the question of interpretation of clauses of a contract is within the domain of the Arbitrator and, unless the view taken is so perverse or absurd, it cannot be interfered with by the Court. The Learned Single Judge was of the view that it was not the function of the Court to re-appreciate the evidence or interfere with an Award merely on the basis that the Court could have come to a different conclusion on the material available to the Arbitrator. Reliance was placed on *Gujarat Water Supply and Sewage Board v. Unique Erectors (Gujarat) (P) Ltd. & Anr.* [AIR 1989 SC 973] and *Food Corporation of India v. Joginderpal Mohinderpal & Anr.* [(1989) 2 SCC 347]. It was further held that the views taken by the Arbitrator on various aspects were plausible. The court may or may not agree with those views but inasmuch as they were plausible and within the four corners of the contractual terms which bind the party, the same cannot be disturbed by the Court in exercise of its powers under the said Act.

4. The Single Judge disagreed with the submissions made by the NTPC on the issue of misconduct on the part of the Arbitrator either with respect to his personal conduct or his conduct in law. It was further stated that the Court did not find the Award to be contrary to law.

Appellant's contentions

5. The NTPC argued firstly that the claimant's letter of 07.05.1987 barred it from making any claims in respect of the delay or related issues. Learned counsel emphasized here that the findings of the

Arbitrator are both contrary to the record as well as the contract. It was urged that the finding in paragraph 23 of the impugned judgment that there was no infirmity in the award is unsustainable in law, on this score. Once the party expressly agreed in writing to give-up any claim or part thereof, the question of its being justified and pressed at a subsequent stage in legal proceedings cannot arise.

6. It was argued that the interpretation of Clauses 6 and 7 by the Arbitrator in his Award, which was not disturbed by the learned Single Judge, are clearly erroneous. In this regard, it was urged that cumulatively these had obliged the claimant to satisfy itself about the worksite and the surrounding areas. Having accepted this as a condition of the contract, the claimant could not have turned around subsequently after the award of the contract, and contended that specific knowledge should have been given with respect to the soil being susceptible to tidal action, as to enable it to make provision to avoid loss of time, and delay. The claimant/Contractor, in terms of these conditions, was deemed to have satisfied itself about the site, the strength and the vulnerability, the topography, the climate and natural factors it was susceptible to. Not having done its job properly, it could not make a claim alleging delay on the part of the NTPC. It was argued that to the extent the Arbitrator construed the contract contrary to its express terms, his determination was illegal and ought to have been set aside. The impugned order, according to counsel, is not sustainable in law.

7. It was next argued that the Arbitrator as well as the Single Judge fell into error in holding that the contract was illegally terminated. It was submitted that the reasons outlined by the Arbitrator in holding NTPC to be responsible for the delay are unsustainable. The submission was that the overall appreciation of the materials, including various letters exchanged by the parties which led to the repeated extensions granted, did not warrant the inference that NTPC was at fault or that it sought to interfere unduly in the day-to-day execution of the contract. Learned counsel also argued that the finding of illegality in the termination is not borne out by the record or by any provision of law and that the findings are, therefore, *ex-facie* erroneous and liable to be set aside. Likewise, it was urged that the award of amounts towards increase in materials costs, rise in labour costs in the completion of fencing work, and similar costs in respect of boundary wall, that were attributed to alleged breaches by NTPC are not borne-out by the record. Learned counsel relied upon the documents produced, i.e. R-30, R-32 and R-36. It was urged that there was no provision in the contract enabling price escalation on account of increased cost, material and labour and, therefore, in awarding these amounts, the Arbitrator acted contrary to the express provisions of the contract and exceeded his jurisdiction – an aspect overlooked by the learned Single Judge. Likewise, submitted counsel, the claim for loss of profit and interest thereon are unsustainable given the error committed with respect to the findings of delay and wrongful termination.

8. NTPC further argued that the land was already in possession of the Contractor for chain link fencing, and as for the boundary wall and piling, it was agreed by the parties that the land for boundary wall would be released in phases. As far as the work awarded in May 1987 (i.e. during the monsoon) was concerned, counsel argued that it was the Contractor who had planned the execution poorly, since the work was accepted without any objection. Also, the entire land for construction of boundary wall was released well in advance of the date of completion of contract except for a 150M patch. It was further stated that NTPC's decision to not impose liquidated damages in spite of the Contractor's inability to meet deadlines in the course of work cannot be held against it. It was urged that NTPC was justified in terminating the contract which is justified by a look at the documents referred to as R-37 dated 25.04.1988, R-173 dated 23.12.1988 and R-176 dated 29.12.1988 along with the clauses of the GCC. Furthermore, it was erroneously decided against NTPC that the contract was terminated illegally by letter dated 19.06.1989. It was submitted that while the application for extension, after the exhaustion of contractual term for completion was pending consideration, no progress of work was discerned on site and despite repeated communications through letters and notices, no progress was shown. Finally, due to stopping of work at site, NTPC issued notice dated 21.04.1989 thereby granting extension up to 15.05.1989. When there was still no progress of work, NTPC was compelled to terminate the contract on 19.06.1989.

9. Learned senior counsel laid considerable emphasis upon the award of ₹35,72,142.80/- towards alleged work done under Item No. 27 of Bill of Quantities (“BOQ”). It was urged in this regard that the interpretation of the contract, especially conditions of contract in Clauses 10 and 11, contemplated that quantities beyond the permissible limits were to be paid for only in accordance with the rate analysis carried out on behalf of/shown by the Contractor. Up to the allowed deviated limits, payments could be done in respect of the BOQ in Appendix-E. There was a clear error in interpreting this term because Item 26 which dealt with “Installation of bored cast-in-situ cement concrete under-reamed piles of 25 cm diameter and of standard length” up to 5.5 m, was payable at ₹900/- per pile. The quantity mentioned in Annexure E, i.e. the BOQ, was 2425 and the total amount contemplated was ₹21,82,500/-. Item 27 stipulated that any extra work or reduction over and above that stipulated in Item 26, within permissible deviation (permissible deviation is from a depth of 5.5 metres up to 6.5 metres, and quantity deviation in respect of work under the soil is permitted to the extent of 100% i.e. 5120 DM), was ₹170/- per DM, for every extra 2560 DM. The total quantity of work done was 1,59,507 DM (1,33,375 DM in the 2425 piles, plus 5120 DM in the 100% permissible deviation, plus 21,012 DM of extra work, beyond what was contemplated in Items 26 and 27). For the extra 21,012 DM of work done, amounting to 383 piles, neither Item 26 nor 27 stipulated the rate. Clauses 10 and 11 were accordingly to be applied, and a market analysis was required to be done by the claimant/Contractor. Since the rate analysis was not undertaken, a rate

was worked out by the EIC after calling for details from sub-contractors, and a rate of ₹16.36 per DM was worked out. According to NTPC, as against the Contractor's claim for an amount of ₹42,52,004/- only an amount of ₹1,64,0711- was payable.

10. It was submitted that the award of ₹35,72,148.80 was contrary to the terms of the agreement, especially GCC 10 and 11. Learned counsel highlighted that the claimant did not produce any evidence in this regard and merely relied upon the contract itself. The contract could be and had to be strictly interpreted to mean what the parties had agreed. In other words, the parties had agreed that a certain quantity of work would be done and visualized a rate for such quantity. Once the quantities (stipulated in the BOQ) were exceeded, the rate had to be either negotiated or if there was a dispute, the party claiming higher rate had to, logically, prove the existence of such higher rate and could not fall back upon the agreed rate for a similar quantity of work. Learned counsel submitted that the award, to the extent it accepted the claimant's submissions on this aspect, was clearly erroneous. This constituted an error on the face of the record.

11. Elaborating further, it was urged that the claimant, without any legal basis, had demanded ₹170 per DM for the work beyond the permissible deviation. Learned counsel submitted that the length of pile had to be done through the process of boring. For the standard length of 5.5 m permissible up to 6.5 m, neither any extra manpower nor any machinery was required. For extra boring, concreting material was required. In terms of technical specifications, the entire pier work

had to be completed within the stipulated time, i.e. 6 hours from the time of the process start. If the contractor had used any excess material, he was, of course, entitled to reimbursement. The award of any amount in the absence of proof of market rate or proof of any extra cost incurred, therefore, was a clear error of law. Learned counsel also argued lastly that the award of interest @ 18% was excessive and ought to have been interfered with by the learned Single Judge.

Respondent/Claimant's contentions

12. It was stated that paragraph 3 of the Letter of Award ("LOA") dated 25.05.87 stipulated that specific agreed modifications in clauses of LOA shall take precedence over tender documents. Clause 6 of the LOA dated 25.5.1987 provided as follows:

"6. The total contract value and the unit rates shall remain 'firm' till the completion of the entire contract within the contract completion period or as extended by NTPC and no variations on whatsoever account shall be accepted by NTPC. However, the total contract price is subject to change due to quantity variation based on the unit rates indicated in Appendix-E in accordance with the provisions contained in General Condition of Contract for Civil Work."

(Emphasis added)

13. It is argued that a bare reading of Clause 6 of LOA revealed that the total contract price was subject to change due to quantity variation based on the unit rates indicated in Appendix-E in accordance with the provisions contained in the GCC. Accordingly, since rates in

Appendix E have been made firm, provisions by GCC 10 (vi) (B) (a) and (b) also stood superseded by 3 & 6 of LOA. It was urged that the approval for execution of work given on the pile register under signature, was in terms of instructions of NTPC to bore up-to a particular depth till the sand bed was reached for each pile and only thereafter allow concrete to be poured. This continued for 26200 DM. However, on submission of RA bills, only payment for work up to 5120 DM was received and the remaining work done for 21,012 DM was not paid for. With respect to GCC 10 & 11 it was urged that Annexure E as well as CPWD schedule show various trade items but CPWD do not provide for a section of piles i.e. no trade item for piles exist as it is a highly skilled job executed by a specialist.

14. The claimant/Contractor submitted that Claim No.7 was for work done by it under Item No.27 of BOQ for which it was not paid by NTPC. What is important is to note is that NTPC had not disputed the factum or quantity of the excess work but only the 'rate' that was payable in respect of such quantity. Considerable reliance was placed on Item Nos. 26 and 27 of the BOQ by the claimant/Contractor who submitted that the findings of the arbitrator in paragraph 7.4.0 of the Award show that he duly and in detail considered the claims and NTPC's opposition. Consequently, the Court cannot review those findings as an appellate forum. The NTPC's argument was that the rate payable for the deviation in the quantity was in accordance with clauses 10 and 11 of the GCC and not at the rate quoted in the BOQ. According to it, therefore, as against the claim of the Respondent for

an amount of ₹42,52,004/- only an amount of ₹1,64,071/- was payable. The Contractor refuted this, stating that the LOA expressly provided that the rates were firm. Item No.27 of the BOQ was clear and explicit and was a document accepted by the Appellant prior to award of work to the Contractor. Thus, the Contractor was entitled to the 'rate' mentioned in the BOQ. Urging that Arbitrator rejected the NTPC's objection with his reasoning and observations contained in paragraph 7.4.6, the contractor submits that the efficacy of such view, which is plausible and reasonable, cannot be tested by the court. A reading of paragraph 7.4.6 of the Award would show that the reasons given by the Arbitrator are after appreciating the evidence led by the parties. The choice made by the Arbitrator as to the rate of ₹170/- per DM is as per the BOQ whereas the quantity of the excess work, as aforesaid, was not in question. The conclusion of the Arbitrator is well reasoned and neither erroneous nor illegal.

15. Dealing with the award on claims 3, 6, 8, 9 and 13, it is submitted that they were categorized by the Arbitrator as 'delayed damages' as follows:

<i>Claim No.</i>	<i>Brief Description</i>	<i>Principal</i>	<i>Interest</i>	<i>Total</i>
3.	<i>Delay damages in the shape of increase in cost of materials and labour for completion of fencing work due breaches by the Respondent</i>	11,54,000	2,00,000	13,54,000

6.	<i>-do- for Boundary Wall</i>	7,45,989	1,34,280	8,80,269
8.	<i>Expenses incurred in extending Bank Guarantees</i>	62,900	-	63,900
9.	<i>Loss of profit due to breaches by respondent</i>	10,73,158	1,93,168	12,66,326
13.	<i>Delay damages due to delayed issues of cement</i>	-	NOT PRESSE D	
	<i>TOTAL</i>	30,36,047	5,27,448	35,63,495

16. The above claims arose on the Contractor's plea that NTPC was responsible for the delay in execution of works and that thereafter it wrongly terminated the agreement. The Arbitrator found and held that NTPC was responsible for delay and that the termination was wrongful. In this regard, reliance is placed on the discussion and reasoning of the Arbitrator in the award. It is also argued that the said claims were then considered by the Arbitrator in paragraphs 6.0.0 - 6.1.5. The Arbitrator awarded an amount of ₹16,36,616/- as against a claim of ₹35,63,495/-. The conclusions of the Arbitrator in paragraph 6.1.5 are well-reasoned. They are neither perverse nor suffer from any illegality.

17. As to the claim of costs *pendent lite* and future interest @ 20% p.a., it is submitted that the Arbitrator considered the issue of award and rate of interest in paragraphs 8.0.0-8.1.4 of the Award and granted 18% simple interest per annum on the awarded amount from

16.10.1990 to the date of payment or date of decree whichever is earlier. This award of interest by the Arbitrator was after consideration of various factors, such as wrongful termination of contract by NTPC; its being responsible for the delay caused in execution of the contracted works by the Contractor; NTPC protracting the arbitration proceedings; and the Claimant having paid 18% compound interest on the monies borrowed by it from the banks for its working capital to execute the contracted works. It is, therefore, urged that none of the grounds argued by NTPC to assail the award are justified.

Analysis and Findings

18. Before analyzing the rival submissions, some relevant clauses from the contract must be extracted for reference. The clauses have been extracted herewith:

Clause 6 of the GCC reads as follows:

“Inspection of Site:

The Contractor shall inspect and examine the Site and its surrounding and shall satisfy himself before submitting his tender as to the nature of the ground and subsoil (so far as is practicable), the form and nature of the Site, 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 could influence or affect his tender. No extra charges consequent on any misunderstanding or otherwise shall be allowed.”

Clause 7 of the GCC reads as follows:

“Sufficiency of Tender:

The Contractor shall be deemed to have satisfied himself before tendering as to the correctness and sufficiency of his tender for the works and of the rates and prices quoted in the Schedule of Quantities, which rates and prices shall, except as otherwise provided, cover all his obligations under the Contract and all matters and things necessary for the proper completion and maintenance of Works.”

Clauses 10 (vi) (B) (a) & (b) of the GCC states as follows:

“10 Deviations/Variations, Extent and Pricing: [....]

10 (vi) (B) In case of work below ground surface as it exists at the time of commencement of work, quantities of which may change due to site conditions, provisions contained in subconditions (i) to (v) shall not apply to:

(a) Items of any individual trade which exceed by more than the percentage mentioned in Schedule A of the value of that trade included in the contract as a whole, unless the Contractor and the Engineer-in-Charge agree to a higher percentage for any particular item.

(b) The value of any item not included in the Contract in excess of 5% of the contract sum whichever is higher.

NOTE: Individual trade means sub-heads into which the Schedule of Quantities as provided in the Contract has been divided and in the absence of any such provision in the Contract, the sub-heads as given in the Schedule of Rates.”

Clause 11 of the GCC reads as follows:

“11. In the case of additional items which exceed limits laid down in 10 (vi) (B) the contractor may, within fourteen days of receipt of order or occurrence of the excess claim revision of the rates supported by proper analysis, for the work in excess of the abovementioned limits, provided that if the rates so claimed are in excess of the rates specified in the Schedule of Quantities or of those derived in accordance with provisions of sub-para (i) to (iv) of Condition 10 by more than five percent, inform the Engineer-in-Charge under advice to the Accepting Authority and the Engineer-in-Charge shall, within three months of receipt of the claim supported by analysis, after giving consideration to the analysis of rates submitted by the Contractor, determine the rates on the basis of market rates and if the rates so determined exceed the rates specified in the Schedule of Quantities or those derived in accordance with the provisions of sub-paras (i) to (iv) of Condition 10 by more than five percent, the Contractor shall be paid in accordance with the rates so determines. In the event of the Contractor failing to claim revision of rates within the stipulated period, or if the rates determined by the Engineer-in-Charge within a period of three months of receipt of the claim supported by analysis are within five percent of the rates specified in the Schedule of Quantities or of those determined in accordance with the provisions of sub-paras (i) to (iv) of Condition 10, the Engineer-in-Charge shall make payment of the rates as specified in the Schedule of Quantities or those already determined under sub-paras (i) to (iv) of Condition 10 for the quantities in excess of the limits laid down in para (vi) of Condition 10.

11.2 The provisions of the preceding paragraph shall also apply to the decrease of the rates of items for the work in excess of the limits laid down in sub-para (vi) of Condition 10 provided that such decrease is more than five percent of rates specified in Schedule of Quantities in accordance with the provisions or sub-paras (i) to (iv), the Engineer-in-Charge may after giving notice to the Contractor within two months of receipt of order by the Contractor or occurrence of excess and after taking into consideration any reply received from him within fourteen days of receipt of the notice, revise the rates for the work in question

within two months of expiry of the said period of 14 days having regard to the market rates.”

Paragraph 3 of the LOA dated 25.5.1987 provided as follows:

“3.0 You shall perform the above work at the Kawas Project site complete in all respects as per specifications and the terms and conditions contained in the following documents issued to you (all of which form an integral part of the Contract) except for the specific agreed modifications that are brought out in the various clauses of this Award letter.”

Paragraph 6 of the LOA provides as under:

“6. The total contract value and the unit rates shall remain 'firm' till the completion of the entire contract within the contract completion period or as extended by NTPC and no variations on whatsoever account shall be accepted by NTPC. However, the total contract price is subject to change due to quantity variation based on the unit rates indicated in Appendix-E in accordance with the provisions contained in General Condition of Contract for Civil Work.”

Paragraph 7 of the LOA provides as under:

“7.0 TIME SCHEDULE

It is clearly understood between the parties that time is the essence of this contract and it shall be strictly adhered to as the work under this contract is very important and critical. All the works covered under this contract shall be completed in all respects within 12 (twelve) months from the date of Telex of Award dated 7.5.07. All the works shall be carried out as per the agreed detailed time/work schedule. This contract became effective from the date of issue of the Telex of Award i.e. 7.5.87”.

Paragraph 8.3 of the LOA provides as under:

“If you fail to maintain the above stage-wise progress or fail to complete the work and clear the site at your own costs on or before the contract completion date or extended date of completion, if any, you shall without prejudice to any other right or remedy of NTPC, on account of such breach, pay to NTPC as liquidated damages and not as penalty at the rate of (ILLEGIBLE) for every week of delay or part thereof of the value of work shown above (if there is delay for a particular stage) (as specified in Clause 8.1) or the total value of the contract if the whole of the work or part thereof is delayed as provided in Clause 32 of GCC for Civil work. The total amount of liquidated damages payable by you for delays in completion of the whole work shall however, not exceed seven and half percent of the total contract value.”

Clause 15.1 of LOA reads as follows:

*“15.0 You have also agreed to provide the following features at no extra cost to NTPC vide your letter dated 07.05.1987:
i) --- shall provide chain link fencing as per IS-2722 with mesh size 75mmx75mm with core wire dia. 5.15mm thickness GI wire and vertical post angle 50x50 mm in place of angle 65x45x5mm at no extra cost and the unit rate indicated in our proposal for the item would remain same.”*

19. NTPC relied on *Arosan Enterprises v. Union of India*, (1999) 9 SCC 449 where it was held that the ground of misconduct by the Arbitrator is made out only when the Arbitrator has acted with demonstrable perversity or applied a principle of law which is patently erroneous and but for such erroneous application of legal principle, the award could not have been made; this was resisted by counsel for Contractor.

20. The two significant and connected questions of fact relevant for the purpose of this appeal are, affixing responsibility to either or both of the parties for the cause of the delay and to consider whether the termination of the contract by NTPC on grounds of delay by the Contractor, was illegal. NTPC argues that delving into the matter of causes of delay is beyond the jurisdiction of the Arbitrator. If the latter out of the two questions is answered in the affirmative i.e. in favor of the Contractor, it must follow that the delay was attributable to NTPC. The Arbitrator delved into the various causes of delay in order to adduce liability and thereby determine the distribution of amount awarded in favor of the Contractor.

21. This Court is of the opinion that the Arbitrator has not gone beyond his jurisdiction in considering the causes of delay. The detailed reasoning also shows *prima facie* that no attempt has been made by the Arbitrator to misinterpret the evidence to support one party. The question of whether there was delay in performance of contract is essentially one of fact. The Arbitrator was of the opinion that it was necessary to look into the causes of delay and subsequent events such as termination of contract, both of which gave rise to various claims. The breach arising out of inaction or silence over tidal effect coupled with black cotton soil and incomplete site-filling and leveling was attributed to NTPC. Here, the Arbitrator took into consideration Clauses 6 and 7 of the GCC which did not require the Contractor to carry out a detailed investigation of the site conditions but merely to visit and inspect the site. The Arbitrator also held that non-disclosure of site conditions peculiar to the Kawas site in the

synopsis of the project was attributable to NTPC. The breach of contract arising out of more difficult and onerous site conditions than was contemplated under the agreement too was, in the Arbitrator's view, imputable to the NTPC. The award also held that the Contractor was not required to provide for dewatering of frequent tidal overflows and work in marshy conditions and that the delay in submitting chain link sample was also entirely because NTPC wanted non-ISI PVC coated variety but at the same time conforming to ISI specifications. The breach arising due to not providing for sand filling below the foundation was attributable to NTPC since it had been investigating the project; the basic requirement of sand filling in the soil should have been foreseen and provided for. This could have resulted in avoidable loss of time. The delay in handing over work-area, in bits and pieces, was further on account of NTPC. It was held that the areas for fencing boundary walls were not released well in advance for the completion of work by 06.05.1988 or at least 06.11.1988, which was a major cause of delay. Moreover, the award of work just before monsoon was on account of NTPC's faulty planning. The breach of reciprocal promise payment by installments and consequent delay caused too was identified as a default on part of NTPC, since regular cash flow was necessary for the Contractor to keep contractual activities alive and non-payment or delayed payment affected performance of the Contractor.

22. For NTPC to contend that termination of the contract was due and justifiable, on account of default of the Contractor, it had to

establish that delay cited was ascribable to an act or omission of the Contractor. So far as the alleged illegal termination of contract was concerned, it was held by the Sole Arbitrator in paragraph 5.4.4 of the Award as follows:

“5.4.4 Taking into consideration evidence and documents filed before me, pleading and written submissions, arguments made and citations and authorities quoted and applying my mind I decide that, as already decided earlier delays are reasons attributed to the Respondent and the termination of contract is illegal. Hence, the Claimant (Respondent) is entitled to claims of damages. As regards the quantum, this has been dealt with in the award of relevant claims.”

It can be seen from the above discussion that the entire question of delay was to be considered having regard to the facts and circumstances of the case. The Arbitrator considered the evidence on the record and held that the delay in execution was on account of the lapses and omissions of NTPC and that it was not attributable to the Contractor. There is authority for the proposition (Ref. [*J.G. Engineers Private Limited vs. Union of India and Anr.*](#), (2011) 5 SCC 758, *BSNL vs. Motorola India (P) Ltd.*, (2009) 2 SCC 337) that even if the decision as to the rate of liquidated damages and certain others were excepted matters, the right to levy liquidated damages would arise only if the contractor was responsible for the delay and was in breach- which has to be gone into by the Arbitrator alone.

23. NTPC had argued that the Single Judge failed to appreciate that the award was liable to be rejected on grounds of it being averse to

public policy. This argument is premised on the footing that the contract was consequent to an open bid tender. It was submitted that the contract was awarded to the Contractor on the basis of an open system of bidding wherein the price quoted was lowest amongst those competing for the contract and that if the Contractor was allowed to enlarge his claims and raise his claims on grounds specifically barred by the contract and GCC, it would frustrate the purpose of competitive bidding and shall set a dangerous precedent for commercial practice. Reliance was placed on paragraph 22 of this Court's judgment in *NTPC v. M/s Gammon India Ltd. & Anr.* 2008 VIII AD (Delhi) 136.

24. This Court is of the opinion that the possibility of these practices is tangible. Yet it is illogical consider this as a probability attributable to only the bidder. To assume that the contractor bidder is the party which is in the dominant position, thus able to take advantage of the bidding process, would not only be unacceptable but also untenable, as the contrary is proved in the facts of the present case itself. It was held by the Arbitrator as well as the Single Judge that the delay was caused by NTPC. It may therefore be considered equally likely for the entity awarding the contract to accept a particular bid and later contribute to creating such circumstances which may not be conducive for the contractor to complete the allotted work in a timely and efficient manner.

25. Claim No. 7 formed a major ground of contention as well as a substantial part of the quantum of the award. The Arbitrator gave detailed reasons for deciding the claim in favor of the Contractors

observed and that paragraphs 3 & 6 of the LOA superseded the contract agreement according to which contract price was subject to change in quantity variation. It was further decided that even if the applicability of GCC 10 and 11 was accepted, it was not established that the deviation limit for the trade as a whole was exceeded, since piling was a species of the genus of foundation items of 'work below ground surface' in terms of GCC 10(1)(B). Moreover, clause 11.1 provided for optional revision of rates, hence it was at the discretion of the contractor to seek the same or choose to stick to the rates so quoted. Also, in accordance with Clause 11.2, a strict time frame had to be followed as mentioned in the provision wherein a notice was to be served by NTPC within two months from occurrence which was not done. The Arbitrator rejected the argument that a letter of the required nature was served as on 04.02.1988 for the occurrence dated 02.01.1988, which is within limitation, however due to the letter not being mentioned in the subsequent correspondence dated 18.08.1988, it was concluded that such letter was never served and was thereby predated. It was found that the rate decided was communicated only on 21.04.1989 after a lapse of 15.5 months which was considered extra-contractual since it was held by the Arbitrator that reminders cannot postpone accrual of cause of action. On this *rationale* the Arbitrator held that ₹35,72,148.80 @ ₹170/- per DM was payable by NTPC.

26. If the clauses in the contract are open to two plausible interpretations, it is legitimate for the arbitrator to accept one or the other available interpretation and even if the Court may think that the

other view is preferable, the Court will not or should not interfere with interpretation of the Arbitrator. Reliance can be placed on *Food Corporation of India Vs Joginderpal Mohinderpal & Another* AIR 1989 SC 1263, *Puri Construction Pvt. Ltd Vs Union of India* AIR 1989 SC 777, and *Hind Builders Vs Union of India* AIR 1990 SC 1340 to substantiate the proposition that this Court, while exercising appellate power, should not substitute its opinion with that of the arbitrator. It is thereby solely the decision of the Arbitrator as to what would be the interpretation of the documents with respect to the said claim, whether harmonious or following a strict hierarchy of documents. Since the explanation provided by the Arbitrator is a reasonable one, which considers both view points, this Court is not inclined to interfere with the same.

27. *M/s. Sudarsan Trading Co. v. The Government of Kerala*: [1989] 1 SCR 665 is an authority for the proposition that the Court cannot examine whether in arriving at its decision, the arbitrator acted correctly or incorrectly. It was held, pertinently – when the lower court had examined the reasons, in considering a challenge to such award, that:

“31. This, in our opinion, the court had no jurisdiction to do, namely, substitution of its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. Whether a particular amount was liable to be paid or damages liable to be sustained, was a decision within the competency of the arbitrator in this case. By purporting to construe the contract the court could not take upon itself the burden of saying that this was

contrary to the contract and, as such, beyond jurisdiction. It has to be determined that there is a distinction between disputes as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be exercised. There may be a conflict as to the power of the arbitrator to grant a particular remedy."

28. The question was again considered by a three-Judge Bench of the Supreme Court in *State of U.P. v. Allied Construction* (2003) 7 SCC 396 . The Court held that:

*"4. Any award made by an arbitrator can be set aside only if one or the other term specified in Sections 30 and 33 of the Arbitration Act, 1940 is attracted. It is not a case where it can be said that the arbitrator has misconducted the proceedings. It was within his jurisdiction to interpret Clause 47 of the Agreement having regard to the fact-situation obtaining therein. (sic) It is submitted that an award made by an arbitrator may be wrong either on law or on fact and error of law on the face of it could not nullify an award. The award is a speaking one. The arbitrator has assigned sufficient and cogent reasons in support thereof. Interpretation of a contract, it is trite, is a matter for arbitrator to determine (see *M/s. Sudarsan Trading Co. v. The Government of Kerala*: [1989] 1 SCR 665). Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The Court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the Court unless, of course, the reasons are totally perverse or the judgment is based on a wrong*

proposition of law. As error apparent on the face of the records would not imply closer scrutiny of the merits of documents and materials on record. Once it is found that the view of the arbitrator is a plausible one, the Court will refrain itself from interfering."

29. In the present case, concededly there was no standard quantitatively or monetarily for piles bored or excavated beyond or beneath 5.5 metres. The standard existing was in respect of a quantity bored up to 5.5 metres and beyond, till 6.5 metres. NTPC's objection to the award is that the Contractor failed to produce any material in respect of market rate for such work (beyond the contracted depth) and in the absence of any such proof, the amount awarded was unsustainable. This Court holds that the objection is meritless. The Contractor relied on material in the form of the agreement between the parties for less onerous work, i.e. piling of depth up to 5.5 metres. It is inconceivable that for depth beyond that agreed standard, the contractor should not be paid even that rate. It is not NTPC's case that the rate quoted for that depth is excessive. The NTPC does not dispute its liability to pay for the work up to the agreed quantity - or depth. It does not dispute the work done, i.e., the depth bored beyond the agreed parameters. Pertinently, Item No.27 stated that the rate for *"Extra/reduction of length over item No. 26 (within permissible limit)* for 93 piles was ₹90 per pile and for 5120 DM was ₹170 per DM. It could equally have been argued by NTPC that if there were reduction, the amount payable was less. Having regard to these materials, there is no merit in the submission that the Arbitrator erred in awarding ₹170 for the work actually done, contrary to law.

30. It is settled law that interpretation of contracts, is within the exclusive domain of the arbitrator. When this Court sits in appeal, *after decision of a Single Judge*, it carries out a very narrow review, which rarely permits reconsideration of findings of facts. The fact that this Court may arrive at a different conclusion than that reached by the Arbitrator is no ground to interfere with the award. This Court does not sit in appeal over, but merely review of the arbitrator's decision.

31. As far as the question of interest is concerned, even though the award was made in 1999, the fact remains that the amount was payable to the Contractor. Since the dispute commenced in 1989 and continued for a decade thereafter, till the award was made, and for the last 14 years on account of the NTPC's own conduct in questioning it, this is not an appropriate instance calling for disturbance of the award of interest.

32. It is held that there is no infirmity with the impugned award and the impugned judgment and order of the Single Judge. There is no merit in the appeal and the same is dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

**SUDERSHAN KUMAR MISRA
(JUDGE)**

AUGUST 13, 2014