

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 16.12.2021

+ **O.M.P. (COMM) 318/2020 and IA No. 16126/2021**

M/S SPML INFRA LIMITED

..... Petitioner

versus

NTPC LIMITED & ANR

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Mukul Talwar, Senior Advocate with
Aayush Agarwala, Mr Samrat Sengupta and
Ms Namrata Saraogi, Advocates.

For the Respondents : Mr Bharat Sangal, Senior Advocate with
Mr R.R. Kumar, Advocate.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (hereafter 'SIL') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 impugning an arbitral award dated 02.03.2014 (hereafter the 'impugned award') delivered by the Arbitral Tribunal comprising of Justice (Retired) M.C. Agarwal as the Sole Arbitrator (hereafter the 'Arbitral Tribunal').

2. SIL claims that it is a leading infrastructure company and has executed several projects. The respondent (hereafter ‘NTPC’) is a Government of India enterprise and is, *inter alia*, engaged in the activity of generating electricity and managing the sale. NTPC had issued a Notice Inviting Tenders (NIT) on 02.05.2006 for inviting bids for the work of ‘*Construction of the Main Plant Civil Works Package for Korba Super Thermal Power Project, Stage III (1 x 500 MW)*’ (hereafter the ‘**Project**’).

3. On 12.06.2006, SIL submitted its bid pursuant to the aforesaid NIT. The same was found to be the lowest and after negotiation, NTPC issued a Letter of Award (hereafter ‘**LOA**’) dated 08.09.2006 whereby, the aforesaid contract was awarded to SIL. Thereafter, the parties entered into a contract bearing no. CS-2140-322-9-CS-COA-4740, in respect of the aforesaid Project on 28.02.2007 (hereafter ‘**the Contract**’).

4. The works were to be completed within a period of thirty-seven months from the date of the LOA (that is, on or before 07.10.2009). The value of the Contract was agreed at ₹67,59,66,972/-, which was amended to ₹76,92,73,538.78/- (up to Amendment No.6). SIL claimed that it had mobilised its resources immediately after issuance of the LOA. However, it claims that execution of the works was delayed on account of several reasons (hindrances) attributable to NTPC. SIL claimed that it had incurred huge losses on account of failure on the part of NTPC to perform its obligations under the Contract. It claimed that some of the delays were also occasioned on account of repeated change

in the methodology of execution of the works as demanded by NTPC. SIL claimed that NTPC had issued the NIT, without the necessary ground work and without being fully ready for the execution of a contract of such nature.

5. In view of the above, SIL raised certain claims, which were denied by NTPC.

6. The LOA was amended on several occasions. The last amendment, prior to reference, being the sixth amendment was made on 01.09.2010.

7. In terms of Clause 10 of the Contract, it was open for the parties to seek recourse to arbitration in terms of Clause 56 and 57 of the General Conditions of Contract (hereafter 'GCC'), as applicable to the Contract. In view of the disputes between the parties, SIL invoked the Arbitration Clause (Clause 56 of the GCC) by a notice dated 11.06.2010. Pursuant to the said request, the Arbitral Tribunal was constituted and the Sole Arbitrator was appointed to adjudicate the disputes between the parties.

8. On 10.11.2010, SIL filed its Statement of Claims before the Arbitral Tribunal claiming an aggregate amount of ₹44,52,90,985/-, in addition to interest and costs. The summary of SIL's claims is set out below:

Claim No.1. Claim on account of extra works executed at the site amounting to Rs.5,56,78,755/-.

A) Additional expenses incurred for carrying continuous dewatering with specialized techniques – Rs. 2,49,82,825.00

B) Additional quantity of excavation carried out at site in excess of quantities mentioned in the drawings – Rs. 58,40,443.70

C) Additional expenses incurred for mobilizing additional piling rigs – Rs. 56,87,925.00

D) Extra work of breaking of underground RCC drain amounting to Rs. 2,23,20,543.00.

Claim No.2. Claim on account of amounts withheld from various bills submitted by the petitioner amounting to Rs.68,16,458/-.

Claim No.3. Claim on account of compensation for overstay and idling at site during the extended period amounting to Rs. 5,59,45,025/-.

Claim No. 3A Claim for bank charges incurred on Bank Guarantees kept alive during the extended period amounting to Rs. 21,74,031/-

Claim No.4. Rs.30,88,41,000/- incurred due to additional expenses for compressing the completion schedule to match the Respondent's targets as far as was practicable.

Claim No.5. Claim of loss of goodwill amounting to Rs.76,92,735/-.

Claim No.6. Claim on account of interest on delayed payment made against RA Bills.

Claim No.7. Claim for presuit, pendente lite and future interest @18%p.a.

Claim No.8. Claim on account of costs amounting to Rs. 50,00,000/-.

9. The Arbitral Tribunal rejected SIL's Claim nos. 3, 3A and 6 as non-arbitrable. The Arbitral Tribunal also rejected all other claims, except Claim no. 2, which was partly allowed. It allowed the said claim to the limited extent by directing that recovery from SIL on account of extra wastage/consumption of steel falling in the category of 'S-III' would be made at a price of 50% more than the average procurement price instead of at the rate of 300% above the average price. Insofar as the counter-claims are concerned, the Arbitral Tribunal found that there was no arbitrable dispute and accordingly, declined to entertain the same.

Submissions

10. Mr Mukul Talwar, learned senior counsel appearing for SIL, has restricted SIL's challenge to the present award, essentially, on four fronts. First, he submits that the decision of the Arbitral Tribunal to reject Claim nos. 3 and 3A on the ground that there is no dispute is, *ex facie*, perverse and patently illegal. SIL's Claim no. 3 related to loss incurred on account of prolongation of works and, its Claim no. 3A was in respect of expenditure incurred in extending the Bank Guarantees for the period beyond the stipulated term of the Contract. Both the said claims were premised on the basis that the works were delayed on account of reasons attributable to NTPC. SIL had, accordingly, claimed

that NTPC was liable to compensate SIL for additional cost and expenditure for the period beyond the stipulated period as agreed by the parties.

11. Mr Talwar submitted that the Arbitral Tribunal had proceeded on an erroneous basis that SIL had not raised any dispute in regard to the aforesaid. He referred to the letter dated 29.04.2010, whereby SIL had raised several issues including suffering losses and damages “*due to prolongation of the contract*”. He pointed out that SIL had informed NTPC that it would compute the financial effect of prolongation of the Contract and the said amount would be payable by NTPC.

12. Second, he submitted that the Arbitral Tribunal had found that the provision for recovering 300% of the average procurement price for use of steel beyond the stipulated parameter was unreasonable and was in the nature of penalty as no such compensation could be claimed by NTPC. Yet, the Arbitral Tribunal held that NTPC would be entitled to make recovery for free use of steel at the rate of average procurement price of steel plus 50%. He submitted that there was no material before the Arbitral Tribunal to ascertain that 50% of the average procurement price was a reasonable compensation.

13. Third, he submitted that the Arbitral Tribunal had grossly erred in denying SIL’s claim for interest on the premise that it had not allowed any of its claims. However, the Arbitral Tribunal overlooked the fact that it had partly allowed SIL’s claim for excess recovery on account of wastage of steel.

14. Lastly, he submitted that the Arbitral Tribunal had also erred in denying SIL's claim for dewatering of the site. He submitted that the Arbitral Tribunal had erred in not appreciating that SIL had suffered losses as it encountered huge quantity of underground water, which was beyond the anticipated level. Accordingly, it had to deploy dewatering pumps due to NTPC's failure to inform SIL, at the pre-tender stage, about the different geological and marine conditions at the site.

15. Mr Sangal, learned senior counsel appearing for NTPC, submitted that SIL's claim for recovery on account of steel was premature as the parties had not completed the process of reconciliation regarding the use of free supply steel. He pointed out that the Arbitral Tribunal had also noted that the process of reconciliation was not complete. And therefore, there was no final quantification of the amount recoverable from SIL on account of wastage of steel.

Reasons and Conclusion

16. The first and foremost question to be addressed is whether the impugned award is vitiated by patent illegality inasmuch as, the Arbitral Tribunal has found SIL's Claim nos. 3 and 3A to be non-arbitrable. The Arbitral Tribunal had struck in issue whether Claim nos. 3, 3A, 5, 6, 7 and 8 are non-arbitrable. NTPC had contended that the said claims had not been raised before it and therefore, it had never refuted the same. The Arbitral Tribunal found that SIL had not quantified its Claim nos. 3 and 3A prior to filing of its Statement of Claims before the Arbitral Tribunal.

17. Insofar as Claim no.3 is concerned, the Arbitral Tribunal held that “no proper and specific claim as required by law” had been made and denied and therefore, “no arbitrable dispute had arisen between the parties in regard to claim No.3 before the said claim was set up in these arbitration proceedings”. Accordingly, the Arbitral Tribunal held that the said claim was not arbitrable. Similarly, in regard to Claim no. 3A, the Arbitral Tribunal found that SIL had not put forward any claim in respect of the bank charges for keeping the Bank Guarantee alive during the extended period and therefore, the said dispute was not arbitrable.

18. The aforesaid conclusion is, *ex facie*, erroneous. There is no dispute that SIL had sent a letter dated 29.04.2010 clearly stating as under:

“We have suffered losses and damages due to prolongation of contract. Financial effect of the same will be intimated to you and the same are payable to us by NTPC.”

19. SIL had also set out various hindrances, which had resulted in prolongation of the Contract. In addition, it had also quantified certain claims. Undisputedly, NTPC had rejected all claims made by SIL in its letter dated 29.04.2010. The disputes between the parties were referred to arbitration. The Statement of Claims filed by SIL had clearly articulated its claim for a sum of ₹5,59,45,025/- towards compensation for loss suffered due to overstay at the site during the extended period. It had also claimed bank charges on the Bank Guarantee being kept alive during the said period. NTPC had not acceded to the said claim.

Thus, clearly there were disputes between the parties that required to be adjudicated.

20. This Court had pointedly asked Mr Sangal whether there was any specific contractual stipulation that required SIL to fully quantify its claim prior to seeking reference of disputes to arbitration. He had fairly stated that there was no such provision. In the given circumstances, the decision of the Arbitral Tribunal regarding Claim nos. 3 and 3A made by SIL, are unsustainable.

21. Insofar as Claim no. 2 is concerned, SIL had claimed that an amount of ₹51,50,000/- had been deducted by NTPC on account of ‘steel liners’, which could not be recovered and were incorporated in the works. The Agreement provided for penalty for wastage of steel. Consumption of MS Liner (Pipes and plates) was divided into four categories, namely, S-O, S-I, S-II and S-III. Consumption of such steel items in compliance with the norm would be provided free of any charge. In addition, SIL was also granted a further allowance of 4% as wastage. However, consumption of steel in excess of the said allowance would be recovered from SIL. It was stipulated that excess consumption/wastage beyond the norms to the extent of 7% (referred to as S-II level) would be recovered at the average procurement price plus a mark up of 25%. Consumption beyond the said S-II level would invite recovery at three times the average procurement price. The relevant provisions of the Contract are set out below:

“(vii)(a) Actual consumption = (issue) - (surplus steel)

- (b) Surplus steel = untampered steel plates surplus unused liner & used liner removed above bottom of pile cap level which are returned to owner (use liner for the last lot of installed piles, which can not be reused shall be limited to maximum 25% of the number of piles executed in the package. For 600 dia pipes
- (c) Wastage = (Actual consumption) – (Theoretical consumption).
- (d) The quantum of free of cost issues MS Pipe & plate and rate for the penal recovery for excess consumption over and above such free of cost quantities shall be worked out on the following basis. In view of the cutting of liner and reusing the same wastage.

SI.	Consumption of MS liner (Pipes & No. plates)	Basis of Issue and recovery rates
S-0	Theoretical consumption (without considering any wastage, scrap or loss) as per specification and drgs.	Free
S-I	Wastage limited to plus four percent (+4%) of the aforesaid theoretical consumption (S-0) for all Pipes & sheared plates and upto plus five percent (+5 %) of (S-0) for unsheared plates towards allowable wastage. (All wastage steel quantities to be returned to Owner)	Free
S-II	Excess consumption beyond S-I above upto 7 % of the aforesaid theoretical	Recovery at average procurement rates

	consumption (S-0) for all Pipes & sheared plates, and 9 % of the aforesaid theoretical Consumption (S-0) for un-sheared plates (all wastage steel quantities to be returned to Owner)	as applicable at the time of recovery for Pipes & plates etc. plus twenty five percent (+25%)
S-III	Excess consumption beyond S-II (All wastage steel quantity to be returned to Owner)	Recovery at three (3) times the average procurement rates as applicable at the time of recovery for pipes, plates etc.”

22. SIL had used the steel liners for holding the excavation while carrying out the piling work. SIL found that the recovery of steel liners was thereafter difficult, as that would involve carrying out excavation around the pile for a technician to cut the liner in order for the same to be pulled out. In the circumstances, the steel liners remained in the ground and were incorporated in the works.

23. The impugned award indicates that the parties had reconciled their accounts till 31.10.2012 and it was found that NTPC had withheld a sum of ₹32,91,889/- towards recoveries on account of excess consumption of free supply steel. The Arbitral Tribunal found that it was not NTPC's case that the amounts recovered were a genuine pre-estimate of the losses likely to occur on account of excess use of steel. The Arbitral Tribunal found that recovery at the rate of 300% for excessive use of steel beyond the stipulated norms would be in the

nature of penalty. Thus, the Arbitral Tribunal held in favour of SIL that recovery at the rate of 300% of the average price of steel was impermissible. And, proceeded to hold that recovery for steel liners could be made at the average price of procurement plus a mark up of 50%. The relevant extract of the impugned award is set out below:

“68. In the present case NTPC did not plead or contend that recovery of value of steel supplied for steel liners is a genuine pre-estimate of loss likely to result or that loss to that extent has actually occurred to it. A jump from 25% to 300% from S-II to S-III is prima facie of the nature of penalty. But a contractor is obliged to use owner issued free material with utmost care and it is to enforce such discipline on the contractor that such provisions are made in the contract. In the present case it is not alleged by NTPC that the claimant misappropriated the steel. The difficulties encountered in removing/retrieving some of the liners are also not in dispute or doubt. The steel liners when left in tact with the piles are bound to add to the strength of the piles. Keeping in view all these circumstances and the fact, of which an arbitrator also can take judicial notice, that prices of steel have been continuously rising, I feel that recovery for of the wastage of steel for steel liners falling in the category S-III should be made @50% more than the average procurement price (+50%). I hold accordingly.

Before parting with this issue it may be stated that at the hearing I was told that the process of re-conciliation is not yet complete. Further the amounts referred to above have only been withheld and not finally adjusted from the final bill of the Contractor.”

24. NTPC has not challenged the finding of the Arbitral Tribunal that a recovery at the rate of 300% of the average procurement price of steel was in the nature of penalty and is impermissible. Thus, the said finding

cannot be interfered with. Concededly, there was no material before the Arbitral Tribunal to establish that 50% mark up would be a genuine estimate of the additional costs and expenses incurred by NTPC for consumption in excess of the norms. Clearly, this finding of the Arbitral Tribunal cannot be sustained as it is patently erroneous.

25. There is also merit in Mr Talwar's contention that the Arbitral Tribunal had not considered the claim of interest on the ground that SIL had not prevailed in any of its claims. However, this is, *ex facie*, erroneous as the Arbitral Tribunal had found in favour of SIL regarding the amounts withheld on account of excessive consumption of steel.

26. SIL had claimed a sum of ₹ 2,49,82,825/- as additional costs for dewatering the excavation. SIL claimed that it had encountered large quantity of underground water at the site where the pipes were required to be laid. This was not anticipated or contemplated by the parties. SIL contended that NTPC had failed in its duty to inform SIL regarding huge quantity of underground water. Consequently, SIL had to incur additional costs for dewatering. It sought compensation for the same.

27. The Arbitral Tribunal framed two questions to be addressed in this regard. The said questions are set out below:

- “(a) Whether the claimant carried out continuous dewatering beyond the scope of work contracted for?
- (b) Whether the claimant is entitled to receive from the respondent Rs.2,49,82,825.00 or any other sum for such dewatering?”

28. The aforesaid questions were considered as two limbs of Issue no.3.

29. Clause 5 of the Technical Specifications contained provisions regarding excavation below the ground-water table. The said clause is set out below:

**“5.00.00 EXCAVATION BELOW GROUND
WATER TABLE**

5.01.00 Wherever ground water table is met with during excavation, the contractor shall immediately report the fact to the Engineer.

5.02.00 The Contractor shall dewater and maintain dry working conditions by maintaining the water table atleast 0.5m below the bottom of the excavation level by well-point dewatering or deep well dewatering or any other method. Contractor shall prepare the detailed scheme for dewatering in line with IS: 9758 and submit the same to the Engineer for approval. The dewatering work shall be done as per approved scheme. He shall continue dewatering i.e. maintain dry working condition till excavation, concreting, curing, water proofing, back filling/filling, testing and all other operations included the scope of work, which require dry condition in the area are completed.”

30. The Arbitral Tribunal noted the aforesaid Clause (Clause 5 of the Technical Specifications) and also referred to Clause 3.01.01 of the Technical Specifications, which reads as under:

“3.01.01 Before tendering, bidder is advised to visit site and its surroundings to assess and satisfy themselves about the local conditions such as nature of ground and subsoil condition, under ground water table local terrain and any other relevant information as required by them. Bidder shall be deemed to have considered local conditions and information and to have satisfied himself in all respects before quoting his rates and terms and no claim whatsoever in this respect shall be entertained by the Owner at a later date.”

31. It is not disputed that SIL was required to apprise itself of the site conditions to determine the nature of soil etc., as expressly provided in Clause 3.01.01 of the Technical Specifications as set out above.

32. NTPC had furnished a report regarding Sub-Soil Data. However, it was also expressly provided under the Contract (Clause 8 of the Technical Specifications) that the “*Owner [NTPC] shall not entertain any claim, whatsoever, or account of variation of subsoil data actually encountered during execution with respect to the subsoil data enclosed with this document.*”

33. The Arbitral Tribunal found that the agreed price (item rate) for excavation also included the work of “*dewatering and lowering the ground water table to maintain dry working condition*”. It is clear from the terms of the Contract that SIL was not entitled to any additional

payment on account of dewatering of excavation and lowering of the water table as the same was included within the scope of works.

34. It was contended on behalf of SIL that NTPC had provided a list of minimum plant, equipment and machinery required to be deployed by SIL and the same included only eight pumps [four pumps of 3HP to 5HP and four pumps of 10 HP to 20HP]. SIL stated that it had relied on the said specification and assumed that such machinery would be sufficient to carry out the dewatering work. However, in fact sixty HP pumps were required. This contention was not accepted by the Arbitral Tribunal and it held that SIL was required to apprise itself of all conditions as expressly provided under the Contract. As an experienced contractor, SIL was required to make its own appraisal. The list of equipment was only the minimum equipment required and SIL was required to augment the same, if necessary, to execute the works.

35. In addition to the above, the Arbitral Tribunal also found that NTPC had failed to produce the required evidence to establish its claim. According to SIL, it had engaged two expert agencies (M/s Pump & Machineries and M/s Complete Dewatering System) for dewatering. However, it did not disclose the actual amount paid to them.

36. The findings of the Arbitral Tribunal that the work of dewatering was covered within the scope of works under the Contract and therefore, no additional amount was payable to SIL, cannot be faulted. The said decision is founded on the contractual provisions, which are unambiguous. In any view, the said decision cannot be stated to be

patently illegal and SIL's contention that the impugned award is vitiated by patent illegality, is without any merit. It is, accordingly, rejected.

37. In view of the above, the impugned award, to the extent that the Arbitral Tribunal had rejected SIL's Claim nos. 3, 3A and Claim no.7 (for interest) is set aside. The impugned award to the extent that it holds that NTPC would be entitled to recover 50% mark up on the excessive use of steel is also set aside.

38. The petitioner is at liberty to seek reference of the said disputes to arbitration afresh.

39. The petition is disposed of in the aforesaid terms. The pending application is also disposed of.

VIBHU BAKHRU, J

DECEMBER 16, 2021
RK/v