

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

FAO No. 4855 of 2013(O&M)
Date of decision : September 10th, 2015

NHPC Limited

..... Appellant

Versus

Patel Engineering Ltd. and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Ajit Puduserry, Advocate and
Mr. Gaurav Chopra, Advocate
for the appellant.

Mr. A. S. Chandha, Advocate
for respondent No.1.

1. Whether reporters of local papers may be allowed to see the judgment ?
2. To be referred to the reporters or not?
3. Whether the judgment should be reported in the digest?

Amit Rawal, J.

The appellant has filed an appeal by invoking the jurisdiction as envisaged under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter called as 'the Act') by impugning the judgment rendered by Additional District Judge, Faridabad dated 4.7.2013, whereby, the objection filed under Section 34 of the Act, has been dismissed.

Mr. Mr. Ajit Puduserry, learned counsel appearing on behalf of the appellant submits that a contract dated 21.11.2003 for construction of Lot (TL-1) including Diversion Works, Barrage and

Spillways, In-take, Pen Stocks, Surface Power House, Tail Channel, Pot Head Yard and associated civil works of the 132 MW (4 x 33 MW) Teesta Low Dam Hydroelectric Project, State-III, in the State of West Bengal, India was entered between the appellant and respondent No.1-contractor. Total value of the work was ₹2,28,16,00,000/- + US \$ 23,00,00/- and the said contract was to be completed within 45 months from the date of letter of award i.e. 28.10.2003, Clause 20 of the General Condition of the contract hereinafter called (GCC) envisaged that the contract shall commence a work within 30 days from the date of issue of letter of award, whereas, clause 22 of GCC provided the completion of work within the aforementioned period. He further submits that forest clearance was issued by Ministry of Environment and Forest for diversion of land on 9.6.2003 without any stipulation regarding the payment of Net Present Value (NPV) for the forest land which was the concept then, developed by Hon'ble Supreme Court. A dispute arose between the department and the contractor and as a result thereof, the matter was referred to the arbitrator.

Before the arbitrator the contractor raised many claims including the claim of delivery of land, compensation of claim of ₹2,70,20,000/- on account of alleged unilateral change of classification of rock in measurement book. An amount of ₹15,05,06,087/- was claimed on account of suspension of work, at the work site due to law and order problem, owing to the call given by the Gorakha Jan Mukti Morcha (GJMM) for creation of separate State of Gorakhaland. As the work remained

suspended during 27.1.2007, 25.5.2007, 22.11.2007 and from 17.2.2008 to 29.2.2008, the department in pursuance to the claim, raised a preliminary objection that in view of clause 23.2 read with clause 28.1 of the GCC claim for damages on account of non-handing over of the site, was not maintainable as it contemplated only grant of extension of time in the event of owner's failure to fulfill any of its obligations under the contract, much less, no monetary compensation was payable.

He further submits that the contractor was also prohibited to claim indirect loss/damages. The arbitrator, in not relying upon aforesaid clause by the department held that the contractor was entitled to compensation by applying Hudson's formula on account of overhead charges amounting to ₹4,76,00,000/- along with interest @ of 12% per annum from the date of claim till the date of award. Besides this, the arbitrator had also exceeded, in jurisdiction in awarding the aforementioned claim.

He further submits that the Additional District Judge has not adverted to the objections taken in this regard, much less, there has not been even a passing reference, therefore the impugned order suffers from non-application of mind as the objection in this regard squarely falls within the parameters of Section 34 of the Act. He further submits that the objector had a right to raise objections, but the impugned order, does not reflect any adjudication upon the said objections.

Mr. A.S. Chadha, learned counsel appearing on behalf of the Contractor submits that there is no illegality and

perversity in the order as the objection viz-a-viz grant of damages does not fall within the realm of Section 34 of the Act. Therefore, the Court below has rightly rejected the objections, as the scope of interference in the objections, in view of catena of judgments is limited. He further submits that owing to the agitation by the Gorakhas, the contractor had been prevented from carrying on the work and he suffered damages and rightly so, the arbitrator has awarded damages keeping in view clause 36 GCC which deals with Force Majeure while clause 7 deals with Care of Works.

He further submits that there is no infirmity in the award as the appellant has failed to substantiate his claim in any manner, much less, the site free, from encumbrances, was not provided to the contractor for commencing the work and even intimation with regard to the permission had been lacking, whereas the contractor had procured machinery and labour which was kept idle for want of sanction, therefore the contractor has rightly been granted the compensation/damages along with fair rate of interest. Thus, prays that the impugned order is sustainable and prays for dismissal of the appeal and upholding of the order.

I have heard learned counsel for the parties and appraised the paper book.

It would be apt to reproduce clauses 36, 36.1 to 36.4 and 7, 7.1 to 7.5 as under:-

“36 FORCE MAJEURE

In the event of either party being rendered unable by force-majure to perform any obligation required to be performed by them under the

Contract, the relative obligation of the party affected by such force majeure shall upon notification to the other party be suspended for the period during which the effect of the force majeure event lasts. Subject to the clause 7 hereof, the cost and loss sustained by either party shall be borne by the respective parties.

36.1 The term 'Force Majeure' as employed herein shall mean earthquake above seven magnitude in Richter scale, hurricane, fire (not caused by the negligence of Contractor/its sub-Contractor/their personnel), war (declared or undeclared), invasion, rebellion, revolt, riot (other than among the Contractor's/its sub-Contractor's employees), civil commotion, civil war, nuclear fission, Floor Discharge in the Teesta river at Barrage site exceeding 5000 cumec, port or railway strike in India, provided these Affect the overall completion of the Project i.e. TIME FOR COMPLETION.

36.2 Upon the occurrence of any such cause, and upon its termination the party alleging that it has been rendered unable, as aforesaid, shall notify the other party in writing immediately but not later than 72 (seventy two) hours of the alleged beginning and ending thereof. Within 15 days after ending of such occurrence a communication shall be given to the other party giving full particulars and satisfactory evidence in support thereof.

36.3 Time for performance of the relative obligation suspended by the force majeure shall stand extended pursuant to clause 22 hereof to the extent the effect of such occurrence affects the

*overall completion schedule of the Project
i.e. TIME FOR COMPLETION.*

7. CARE OF WORKS

7.1 The Contractor shall take full responsibility for the care of the Works or any Section or part of the Works from Date of Award until Completion of Works as defined in Clause 25, and in the event that any damage or loss shall occur to any work during such period as aforesaid from any cause whatsoever save and except the loss or damage caused by any of the Excepted Risks as defined below, the same shall be made good by and at the cost of the Contractor and to the satisfaction of the Owner. The Contractor shall also be liable for any loss or damage to the works occasioned by it or by any of its sub-Contractors or any of their personnel or due to reasons attributable to them in the course of any operations carried out by it or by its sub-Contractors for the purpose of completing any outstanding work or complying with its obligations under Clause 26 (Defects Liability Period).

Excepted Risks for the above purpose shall mean the following:-

(a) war, invasion, act of foreign enemy, hostilities or war like operations(whether war be declared or not), civil war, rebellion, revolution, insurrection, mutiny, civil commotion, military or usurped power, martial law, (conspiracy, confiscation, commandeering by a group of malicious persons or persons acting on behalf of or in connection with any political organisation, requisition or destruction or damage by order of

any government de-jure or de-facto or by any public, municipal or local authority.

(b) Ionising, radiations or contamination by radioactivity from any nuclear fuel or from any nuclear wastage, from combustion of nuclear fuel, except when arising from radioactive sources used in the normal course of the carrying out of the contract by the Contractor;

(c) Earthquake (fire and shock) for the portion exceeding the ceilings provided as per Clause 36.2 thereof.

(d) Flood more than 5000 cumecs in the river Teesta at Barrage site.

In the event of insurance cover becoming available for any of the Excepted Risks during the subsistence of the Contract, the Contractor shall within 28 working days of date of receipt of request in writing of the Owner, arrange such insurance cover at the cost of Owner. The risk in respect of which the insurance cover so becomes available shall be deemed to have been deleted from the definition of Excepted Risks set out herein above during the period of availability of such insurance cover from the 29th working day after request by the Owner to the Contractor as stated above. The cost of such additional insurance shall be reimbursed to the Contractor by the Owner. In case the Contractor fails to arrange the said additional insurance cover in time, as requested by the Owner, the contractor shall be liable for loss or damage arising from such events or causes.

7.2 Till such time the whole or part of the Works are handed over to the Owner in accordance

with the provisions of the Contract, the Contractor shall forthwith but not later than 72 hours of the happening of the occurrence of any of the Excepted Risks resulting in damage or loss to any of the Works as a consequence thereof notify in writing the Owner about the same and, within 15 days of the happening of the occurrence, the contractor shall give a second notice and such notice shall contain particulars of the events, constituting Excepted Risks, evidence in support thereof and the extent of damage or loss to the works as a consequence thereof. In the event of the Contractor failing to give notice in accordance with the provisions of Clause 7.2 the Contractor shall bear the loss or damage if any arising out of any alleged Excepted Risks.

7.3 In the event of any loss or damage to the Works from date of Award until the Date of Completion arising from any of the Excepted Risks, the same shall be made good by the Contractor at the cost of the Owner and in such cases the costs payable by the Owner to the Contractor shall be at the same applicable rate as set out in the Contract.

7.4 In the event of any loss of damage to the Works arising as a consequence of any of such Excepted Risks during Defects Liability Period, the same shall if required by the owner be made good by the Contractor at the cost of the Owner. The costs payable by the owner pursuant to this clause 7.4 shall be at the rates mutually agreed.

7.5 Notwithstanding the provisions of clause 7.3 and clause 7.4 hereof but subject to

Clause 7.1 hereof, whatever any Excepted Risks is insured and/or is insurable in accordance with Clause 7.1 above the Owner shall not be required to pay any costs for making good the loss or damage to the Works arising as a consequence of the Excepted Risks to the extent payments are receivable from the Insurance Company for such losses or damages and in such an event, the owner shall pay the cost for making good the loss or damage in the Works over and above the payment receivable by the Contractor from Insurances for such losses or damages.”

On conjoint reading of the aforementioned clauses it reveals that in case of any of the parties being rendered unable or incapacitated by force-majeure to perform any obligation, the relative obligation of the party affected by such force majeure, shall upon notification to the other party, be suspended for the period during which the effect of the force majeure event lasts. Subject to the clause 7 the cost and loss sustained by either party shall be borne by the respective parties. The term ‘Force Majeure ‘ has also been defined under Section 36.2 which includes civil commotion and the bandh call given by Gorakhas falls within the expression civil commotion.

Even as per clause 7 it is the Contractor who shall take care of works, except risks defined, the same shall be made good by and at the cost of contractor and to the satisfaction of the owner and the excepted risk also includes civil commotion. However, the aforementioned clauses though, have been interpreted

in different manner by the arbitrator but the fact remains that the said objection, though, had been taken in the petition under Section 34 of the Act, has not been dealt with, much less referred to, what to talk to non-extent by the court below while rejecting objections under Section 34. The lower court was enjoined upon an obligation to ponder upon the said objections by giving reasons.

I would be committing fallacy, in case, I do not reproduce the reasoning assigned by the trial court viz-a-viz the claim of compensation:-

“So far as the claim for compensation on account of disruption of work due to a bandh by the GJMM is concerned, the local people had inflicted physical violence on the works due to which the work had to be stopped. The matter was taken up with the petitioner for settlement of account of the losses for idling of resources due to the band call which was rejected by it in view of the clauses 36 of the GCC which provides for extension of time. The Id.counsel for the petitioner has argued that since time can be extended in such exigencies, no compensation could be awarded. These clauses are applicable only where the execution of work is deliberately stopped but not where the work had to be stopped perforce due to a law and order situation. It was due to this that there was a delay in completion of the work which caused a direct loss to the contractor by idling all resources and as such it was held entitled to compensation. Against the petitioner was unable to point out any infirmity in the above findings which would bring them under challenge within the meaning of Section 34 of the

Arbitration and Conciliation Act.”

On going through the aforementioned finding, it is not discernible that the objections submitted on behalf of the appellant department with regard to the interpretation of the aforementioned clauses has been dealt with. Thus, in my view, it is a fit case for remand.

Keeping in view the aforementioned facts, the order dated 4.7.2011 of Additional District Judge, Faridabad is set aside. The matter is remanded back to lower court/objecting Court. The Additional District Judge, Faridabad shall decide the objections afresh. In essence, the objections bearing arbitration petition No.5 dated 3.2.2012 is restored back to its original number.

Parties through their counsel are directed to appear before the Additional District Judge, Faridabad. It is expected that the Additional District Judge, Faridabad shall decide the objections in view of the observations made above, much less, in accordance with law, as expeditiously as possible preferably within a period of four months from the date of receipt of certified copy of this order.

Accordingly, the appeal stands disposed of.

(AMIT RAWAL)
JUDGE

September 10th, 2015
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