IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 743/2013

Reserved on: January 13, 2015
Decision on: February 21, 2015

NTPC LTD. ..... Petitioner
Through: Mr. S.B. Upadhyaya, Senior Advocate with
Mr. Tarkeshwar Nath, Advocate.

versus

PATEL ENGINEERING LTD. ..... Respondent
Through: Mr. Dayan Krishnan, Senior Advocate with
Ms. Malavika Lal, Advocate.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
21.02.2015

1. This petition under Section 34 of the Arbitration and Conciliation Act 1996 ('Act') by NTPC Ltd. is directed against an Award dated 26th March 2013 passed by the Arbitral Tribunal ('AT') regarding the disputes between NTPC Ltd. and the Respondent Patel Engineering Ltd. arising under a contract dated 5th September 2006 for the construction of the Head Race Tunnel Package as part of the 600 MW Loharinag Pala Hydroelectric Power Project in Uttarkashi, Uttarakhand. The total value of the contract was Rs. 216,29,89,177 and Euro 171,95,368. The period of completion was 38 months from the date of issuance of the Letter of Acceptance (LOA) which was issued on 6th July 2006.

2. The disputes that arose between the parties were referred to arbitration before the AT. There were 6 items of claim preferred by the Respondent. By the impugned Award, the AT comprising one technical member, one senior Advocate and presided over by a retired Judge of the High Court, decided the claims as under:

(i) The Respondent was held entitled to Rs. 2,11,65,892 towards reimbursement of the expenditure incurred for running the diesel generator (DG) sets at the site for the period 6th July 2006 to 5th November 2007 as well as for the subsequent period from 6th November 2007 till July 2009 in regard to the Dabrani site. This would hold good for the Gunaga site as well.

(ii) The Respondent was held entitled to Rs.12,46,21,049 towards costs of idle charges and manpower due to delay in handing over the Head Race Tunnel package site.

(iii) The Respondent was held entitled to Rs.3,58,57,843 towards compensation for cost of establishment at Khopa due to paucity of land at Dabrani.

(iv) As regards compensation for loss of barrage quarry, the Respondent was held entitled to Rs.1,30,47,786.

(v) The Respondent was held entitled to Rs.4,16,98,361 as idle charges for machinery and manpower due to hindrance and stoppages of work and Rs. 2,05,52,327 as idle charges due to power failure.

(vi) Towards cost of infructuous expenses including bank guarantee charges, premium of CAR policy, CPM Policy & Fire, workmen compensation policy and waiver of interest for mobilisation advance, the Respondent was held entitled to Rs. 3,36,77,062 and Euro 94,630.45.

(vii) In the event that the awarded amount was not paid within a period of 3 months, the Respondent was held entitled to interest at 12% per annum with effect from 20th September 2010.

(viii) The respondent was awarded Rs. 10 lakhs towards costs of arbitration and costs towards amount of stamp paper.

3. This Court has heard the submissions of Mr. S.B. Upadhyaya, learned Senior counsel for NTPC and Mr. Dayan Krishnan, learned Senior counsel for the Respondent.

Claim No.1

4. It was submitted by Mr. Upadhyaya that as per Clause 2.3.7.1 (1.1) of the Technical Specifications (TS), the Respondent had to instal their own 11 KV/450V substation to receive construction power from the 11 KV construction power line of NTPC. It is pointed out that NTPC provided free construction power from the start of actual construction work in terms of Clause 2.3.7.1. This was not to be supplied for the Respondent Contractor's mobilisation infrastructure and township etc. As regards the Dabrani site, the Adit work was started on 12th October 2007 and the petitioner provided construction power free of cost from 5th November 2007. As regards the work of the Head Race Tunnel from the Dabrani site, it was started on 14th January 2008. As regards the Gunaga site, free construction power

was provided since the beginning of construction. It is pointed out that the Respondent installed the substation at Dabrani for receiving the 11 KV power supply provided by NTPC only on 10th January 2008. The station at Gunaga was only installed on 22nd October 2008. It was the Respondent which had to provide minimum 3 DG sets of 500KVA each. It was not permitted to claim any cost of the electricity charges as per Clause 2.3.7.1 (1.3). Likewise, in terms of the amendment to Clause 2.3.7.1 (1.4), a claim for damages on account of power connection was specifically barred. Clause 2.3.7.1 (1.5) barred separate payment to the Contractor in case the Contractor made his own arrangement for supply of power. It was further submitted that the Respondent did not provide voltage stabiliser in terms of Clause 2.3.7.2.1 of the TS. The voltage fluctuation in the construction power supply of NTPC was within the norms. Since the DG sets were to be arranged by the Respondent, the AT in awarding the idle charges for running the DG sets prior to and after 5th November 2007.

5. In reply, it was pointed out by Mr. Krishnan that the liability to supply free construction power was squarely on NTPC in terms of Clause 2.3.7.1 of the TS. However, there were frequent interruptions on a daily basis in the supply of power. Often there was no power supply for periods exceeding 12 hours. The Respondent was expected to make alternative arrangements through DG sets only by way of backup for emergencies and not as a matter of routine. It was submitted that the Respondent was not claiming damages, but reimbursement of the expenditure incurred on running of the DG sets which it was compelled to on account of the failure of NTPC to fulfil its obligations to supply construction power free of cost to the

Respondent. It was submitted that the AT was justified in following the Central Water Commission (CWC) guidelines for calculating the cost of compensation for running the DG sets as these guidelines were followed in all Hydro and River Valley projects. Clause 51.1.2 of the Conditions of Particular Application (COPA) provided that CWC guidelines were to be adopted for arriving at new rates.

6. The above submissions have been considered in light of the relevant clauses of the contract and the Award of the AT. At the outset it must be noted that the impugned Award is a unanimous award and an extremely detailed one giving elaborate reasons for each of the items of claim. The AT also discussed, with regard to each item of claim, the relevant clauses of the contract. The AT on an analysis of the evidence divided the period of claim No.1 for the Dabrani site into two: from 6th July 2006 till 5th November 2007 and from 6th November 2007 to July 2009. The AT noted that the evidence on record showed that because of low voltage and fluctuations in the power supply, the appliances of the Respondent got damaged from time to time. The Respondent was therefore held entitled to be compensated for rewinding of the appliances after allowing 50% winding for normal wear and tear. The AT undertook a detailed analysis of Clause 2.3.7.1 relied upon by both the parties. It was not a matter of dispute that NTPC was able to provide electricity only from 5th November 2007. Therefore from 6th July 2006 up to that date, the Respondent was totally dependent on the DG sets deployed by it. Further the AT found that the requirement of Clause 2.3.7.1 was that the construction power was be supplied through 11 KV lines and not through DG sets. Since the DG set supplied by NTPC was too erratic,

the Respondent had no other option but to deploy its own DG sets. Therefore, NTPC could not rely upon Clause 2.3.7.1 (i) to avoid the liability of reimbursing the Respondent. The AT perused the log books which showed that DG sets had to be operated by the Respondent on almost all the dates whereas as per the contract it was meant to meet only situations of emergency. The Respondent had also prepared detailed tabulated statements, which could not be disputed by the NTPC, which showed that the DG sets were operated for the lighting of the colony as well as for construction work. The AT found that Clause 2.3.7.1 which prohibited claiming damages on account of supply of electricity was not applicable since what the Respondent had claimed was reimbursement of the actual expenditure incurred on running the DG sets.

7. The scope of the powers of the Court in exercise of its jurisdiction under Section 34 of the Act is well-settled. As held by the Supreme Court in ***Navodaya Mass Entertainment Ltd. v. J M Combines 2014 (9) SCALE 687*** ,the Court would not be justified in reappraising the material on record and substituting its own view in place of the Arbitrator's. Only where there is an error apparent on the face of the record or the Arbitrator has not followed the statutory legal position would there be any justification for interfering with the Award. Even if two views are possible, the view taken by the Arbitrator would prevail. Likewise in ***Associate Builders v. Delhi Development Authority 2014 (13) SCALE 226*** the Supreme Court reiterated that in examining a challenge to the award, the Court is not sitting in appeal. All that the court would examine is whether the Arbitrator has adopted a judicial approach, that is to say he has acted fairly and not

perversely. Merely because two views are possible, it cannot be a ground for interference with an arbitral Award.

8. Applying the above parameters, the Court finds that the conclusions of the AT regarding the entitlement of the Respondent to reimbursement for the expenditure incurred in running the DG sets deployed at Dabrani for both periods, as well as for running the DG sets at the Gunaga site are based on a proper analysis of not only the clauses of the contract but also the evidence on record. Even as regards computation of the claim, the AT has gone by the CWC guidelines. The detailed calculations have been appended to the Award as Annexure 1. The Court is unable to be persuaded to hold that the impugned Award of the AT as regards Claim No.1 suffers from any patent illegality.

Claim No.2

9. Claim No.2 pertained to compensation for cost of idle charges of machinery and manpower due to delay in handing over of the Head Race Canal site. The submission of NTPC was that the Respondent had already been granted extension of time in terms of Clause 44 COPA and price variation under Clause 73.0. In fact when extension was granted upto 31st October 2012 by NTPC by its letter dated 30th June 2009, it was subject to the condition that the extension of time would not entitle the Respondent to claim idle charges for the delay in handing over the site. It is submitted that the AT proceeded more on equity than on the specific provisions of the contract. The Respondent was in fact executing the work of two contracts simultaneously and did not have sufficient equipment to execute the work. Under Clause

31.1 (d) COPA, the Respondent would have no claim in case of delay caused by acts of omissions of another contractor which in this case was the PWD.

10. The above submissions have been considered. Three sites were to be handed over to the Respondent. The Dabrani site was to be handed over on 6th November 2006, the Gunaga site on 6th December 2006 and the Helugu site on 6th March 2007. On the date of the contract, another agency had been engaged by NTPC and was working at the Dabrani site. Consequently it was not possible for the Respondent to immediately commence work. However the Respondent had already mobilised all the machinery and manpower to execute the work as per the revised program. Till April 2007, despite several requests, the work at Adit 1 could not be completed by the agency deployed by NTPC. The work was further delayed due to permission not been available for felling of trees. Local villagers also stopped the work from 13th to 30th August 2007. It is only on 10th October 2007 that NTPC assigned the balance work left undone by the other agency to the Respondent. However, since the other agency did not vacate the site, the Respondent could not immediately commence the work even then. The AT has found, on discussing the evidence in great detail, that there was a delay of 14 and half months in NTPC making available the Dabrani site on 14th January 2008. Though the additional work as regards the Gunaga site was assigned on 15th January 2008, the actual work there could also not commence. The Helugu site was never handed over. There was therefore a fundamental breach of the contract by NTPC. This was a case of failure of reciprocal promises. In view of the failure by NTPC to hand over 2 of the 3 sites, the AT

found that Clause 42.2 would not apply. This was a case of an extraordinary delay in handing over of the site which could not have been foreseen by the parties. The AT found that Clause 31.1 (d) also would not be attracted since the other agency referred to therein was not even under the control of the Respondent. The extension of the contract by NTPC was done *suo motu* and without levy of liquidated damages. This itself showed that NTPC did not suffer any loss. The delay was clearly therefore not attributable to the Respondent which had to suffer loss as it had already deployed machinery and manpower. The AT again used the CWC guidelines as the basis for computing the compensation and appended a detailed calculation to the Award.

11. Again the findings of the AT are clearly findings of fact based on an analysis of the entire evidence as well the clauses of the contract. Going by the parameters laid down by the Supreme Court in the aforementioned decisions, the Court is not persuaded to conclude that any ground has been made out for interference with the detailed findings and conclusions of the AT in regard to Claim No. 2.

Claim No.3

12. Claim No. 3 was for compensation for cost of establishment at Khopa due to paucity of land at Dabrani. The AT found that in terms of the contract, land adjacent to the Dabrani site had to be made available to the Respondent for setting up infrastructure facilities. At the time when the Respondent was issued the LOA by NTPC, another contractor M/s. Coastal Projects was executing the work at the Dabrani site. As such, the Respondent could not be granted the land as

shown in the tender. In the circumstances, the Respondent acquired 11,000 sq. m of land from as many as 22 landowners on leasehold basis. This was only a fraction of an area of 113,400 sq.m of land that had to be handed over by NTPC to the Respondent. The relevant documents in this regard were produced by the Respondent before the AT. The AT explained in detail in its Award the basis on which it allowed a certain percentage of the amount claimed towards overhead charges and profits using the CWC guidelines.

13. In respect of Claim No. 3, the submission of the Petitioner is no different from what was submitted before the AT. The submission that the Respondent had arranged for more land than was needed has rightly been rejected by the AT. The fact that land was not made available in terms of the contract has been unable to be denied even by NTPC. The court is unable to find any error having been committed by the AT in its analysis and conclusions. The computation of the amount awarded is also set out in the Award itself. No ground is made out for interfering with the Award in respect of Claim No.3.

<u>Claim No.4</u>

14. Claim No.4 was in respect of compensation for loss of barrage quarry. In terms of the contract only such coarse aggregates as approved by NTPC could be used. NTPC approved samples obtained from a barrage quarry which was of 400 m length. Pursuant to an agreement between the District Magistrate Uttarkashi, the Respondent and NTPC, the Respondent deposited Rs. 1.87 lakhs, and was granted permission to undertake quarrying for extracting the material for

aggregates under the supervision of NTPC. It so happened that for a length of 120 m another agency deployed by NTPC i.e., M/s. Hindustan Construction Company had deposited muck and therefore that area could not be used. The AT made repeated enquiries and yet NTPC could not explain why permission was not granted to the Respondent to undertake quarrying in the remaining length of 280 m. The AT accordingly proceeded to compute the amount to which the respondent was entitled under this claim. The overheads and profits were restricted to 20% as per the CWC guidelines. The detailed calculations were appended to the Award.

15. Having examined the impugned Award, and having considered the submissions of counsel for the parties, the court is unable to find any serious or patent error committed by the AT warranting interference under Section 34 of the Act with this part of the Award.

Claim No.5

16. Claim number 5 was for idle charges for machinery and manpower due to hindrances and stoppages of work at Head Race Tunnel sites. According to NTPC, Clause 2.3.7 of the TS made it clear that NTPC did not guarantee uninterrupted supply of power. Clause 7.1 of information to tenderers made it clear that NTPC would not entertain any claim on account of any obstruction, blockage, disruption including landslides or accidents. Under Clause 8.3 of COPA, it was for the Respondent to engage local labour from among the displaced and that was not the responsibility of NTPC. The condition of the road at NH-108 was well known to the Respondent even at the time of tendering. The responsibility of engaging security

personnel at its own cost for security of its belongings was that of the Respondent. It is accordingly submitted that no such claim for reimbursement of idle charges was admissible.

17. The evidence on record before the AT showed that there had been several hindrances and obstructions in the smooth functioning of the Respondent. Chief among these was the non-availability of space for mobilisation and setting up of infrastructural facilities. Then there was non-availability of power supply for construction; non-rehabilitation of project affected persons resulting in violent protests; poor conditions of the approach roads and main roads; geological problems in underground works and transporters' strike. The AT found that there was no clause in the contract that prohibited payment of compensation on account of stoppages and hindrances after the handing over of the sites. The AT found that Clause 7.1 was not applicable since in terms of Clause 12.2 COPA, if the Contractor encountered physical obstructions other than climatic conditions, which were not foreseen, then he could give notice forthwith to the Engineer. The AT further found that Clause 2.3.7.1 (iii) applied only to occasional interruptions whereas in the present case the log books, the photographs and other evidence showed that the interruptions were a regular feature and not occasional. The AT therefore found as a matter of fact that the Respondent had made out a case for reimbursement. Again the AT appended to the Award the detailed calculations.

18. The Court again is unable to find any error having been committed by the AT in analysing the clauses of the contract, the

evidence on record and coming to the above conclusions in respect of Claim No. 5.

Claim No.6

19. Claim No.6 was towards infructuous expenses on account of interest on outstanding advances, CAR, CPM, workmen compensation policy and bank guarantee charges. These were only incidental to the other claims which had already been held in favour of the Respondent. The Court is unable to find any error having been committed by the AT. It has given a detailed basis for arriving at the figure awarded under this Claim.

Interest and Costs

20. Extensive arguments were advanced by Mr. Upadhyaya in respect of the award of interest by the AT. Reliance was placed on Clause 78 which states as under:

> "78. No claim for interest or damage will be entertained or be payable by the employer in respect of any amount or balances which may be lying with the employer owing to any dispute difference between the parties or in respect of any delay or omission on the part of the engineer in making interim or final payments or in any other respect whatsoever."

21. The AT has discussed the case law extensively and in particular the decision in ***State of U.P. v. Harish Chandra & Co. (1999) 1 SCC 63*** to hold that the aforementioned clause only prohibited payment of interest on money lying with NTPC. Reliance was placed by Mr. Upadhyaya on the subsequent decision in ***Tehri Hydro-development Corporation Ltd. v. Jayprakash Associates VII (2012) SLT 430***.

22. The Court is satisfied that even in respect of the interpretation of the law regarding payment of interest, the view taken by the AT, on the basis of the decision in ***State of U.P. v. Harish Chandra & Co.*** (supra) is a plausible view to take and does not call for interference. Interest was restricted to 12% per annum which the AT felt was reasonable. Again, interest was admissible only if the awarded amount was not paid within three months. The Court is unable to find any error having been committed by the AT in regard to the award of interest.

23. Even as regards award of costs, given the length of the arbitration it cannot be said that the costs awarded is excessive.

24. No grounds have been made out for interference with the impugned Award. The petition is dismissed.

S. MURALIDHAR, J.

FEBRUARY 21, 2015