

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 24.04.2015

+ **FAO(OS) 219/2015**

NTPC LTD

... Appellant

versus

PATEL ENGINEERING LTD

... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Tushar Mehta, ASG with Mr Tarkeshwar
Nath, Mr B. K. Pandey and Mr Saurabh Kumar
For the Respondents : Mr Dayan Krishnan, Sr Advocate with Mr Rishi
Agrawala, Ms Aayushi Sharma Khazandri, Ms Manvi and
Mr Karan Luthra

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

CAV 392/2015

The learned counsel for the respondent/ caveator is present.

The caveat stands discharged.

CM 7489/2015

Allowed subject to all just exceptions.

FAO(OS) 219/2015 & CM 7488/2015

1. This appeal is directed against the judgment dated 21.02.2015 delivered by a learned Single Judge of this Court on a petition under Section

34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the said Act'). The said petition was filed by the appellant (NTPC Limited) challenging the Award dated 26.03.2013 passed by the Arbitral Tribunal. The Award was in relation to disputes which had arisen between the appellant and the respondent in relation to a contract dated 05.09.2006 for the construction of the Head Race Tunnel Package as part of the 600 MW Loharinag Pala Hydroelectric Power Project in Uttarkashi, Uttarakhand.

2. We have heard the learned counsel for the parties at length. Essentially, eight claims were decided by the Arbitral Tribunal and which were the subject matter before the learned Single Judge. For the present, Mr Tushar Mehta, the learned ASG, has advanced submissions on seven claims and has not adverted to the eighth claim which is in connection with the costs of arbitration and costs towards stamp paper.

3. The decision of the Arbitral Tribunal on claim No. 1, claim No. 4 as also on claim No. 7 were specifically challenged by Mr Mehta. Claim No. 1 pertained to the re-imbursement for cost of power for construction work. Claim No. 4 related to the compensation for loss of barrage quarry and claim

No. 7 related to the interest awarded at the rate of 12% w.e.f. 20.09.2010, in the event the awarded amount was not paid within a period of three months.

4. Insofar as claim No. 1 is concerned, it was contended by Mr Mehta that it was beyond the terms of the contract and, therefore, the same ought not to have been awarded. A reference was made to Clause 2.3.7.1. Sub-clauses 1.1, 1.3, 1.4 and 1.5 of the said Clause read as under:-

“2.3.7 Power supply and Illumination

2.3.7.1 General

1.1 Construction power for the Package will be provided by NTPC free of cost. Construction power will be provided at 11000 Volts system at one point at each Adit. Contractor shall provide and install all necessary Equipment and protections, which are necessary, like 11 KV Breakers/ Switchgears, 11/0.415 KV Transformers, LT Panch Cabling and other protection arrangements to cover up their installations to avoid undue tripping of NTPC system. Equipments required for further distribution and utilization of energy at construction site for power, light etc. shall be installed by agency on their own. The agency will submit the detail single line diagram of Power Distribution Scheme for the approval of NTPC.

XXXX XXXX XXXX XXXX

1.3 NTPC does not guarantee the maintenance of uninterrupted supply of Power and in case of any interruption of such supply of Power the contractor shall be responsible for making at his own cost alternative arrangement for stand-by power. Contractor shall arrange

DG sets of adequate capacity at his cost to meet back up and emergency power supply requirement including lighting, dewatering and ventilation.

A minimum of 3 nos. 500 KVA DG sets (one at each adit) shall be provided to meet the back up / emergency power requirement in case of outage of the normal power supply.

- 1.4 No claim for damage will be entertained by NTPC on any account in connection with such supply of power.
- 1.5 Where the contractor makes his own arrangement for Power required for the works, nothing extra will be paid for the same.

XXXX XXXX XXXX XXXX”

5. Reading the above Clauses, Mr Mehta submitted that although the appellant was to provide free uninterrupted supply of power, the same was not guaranteed and that the respondent would have to make its own arrangement for stand-by power. Referring to sub-clause 1.4, it was contended that no claim for damage would be entertained by the appellant on any account in connection with any supply of power. And, referring to sub-clause 1.5, the learned ASG submitted that nothing extra was to be paid to the respondent, if the respondent made its own arrangement for power required for the works.

6. Clause 2.3.7.1 has been examined in detail by the Arbitral Tribunal as also by the learned Single Judge. The interpretation given by the Tribunal, which has been accepted by the learned Single Judge, is that what the respondent is claiming is neither damages nor any extra payment. All that the respondent claimed was re-imbursement for the cost of power which was utilized for the construction work. It was submitted by the respondents that Clause 2.3.7.1 and, particularly, the sub-clauses referred to above, deal with stand-by power. But, the facts at the ground level were that the supply of power was not interrupted only for short intervals, but for long durations of time extending up to 12 hours on several occasions and such interruptions were not an exception, but a regular feature as the Tribunal returned a finding that these long interruptions were virtually on all days of the project during the construction of the works. Because of these long and regular intervals of non-supply of power, the power which had to be arranged by the respondent could no longer be considered to be a mere 'stand-by' arrangement. Therefore, the Arbitral Tribunal took the view that clause 2.3.7.1 would not come in the way of the respondent seeking re-imbursement for the cost of power for the works. This is an interpretation which has been placed by the Tribunal in the factual context of the case. That interpretation,

it is well settled, is within the domain of the Tribunal, unless, of course, the interpretation is so outlandish that it could be regarded as being perverse. The learned Single Judge did not find the interpretation to be perverse. Nor do we. And, therefore, we do not agree with the submission made by Mr Mehta that the said claim could not have been awarded within the four corners of the contract.

7. Coming to claim No. 4, compensation for loss of barrage quarry has been awarded to the respondent. According to Mr Mehta, this was beyond the terms of reference. This aspect of the matter has also been examined in detail by the Arbitral Tribunal as also by the learned Single Judge. The fact of the matter is that aggregate was to be procured from the barrage quarry to be made available by the appellant. There was a length of 400 metres of barrage quarry which was available. The earlier contractor had deposited waste material/ muck at the site covering a length of about 120 metres. It is only these 120 metres which were made available to the respondent for sourcing its aggregate. The balance 280 metres was not made available to the respondent by the appellant. On repeated queries being made by the Arbitral Tribunal, no answer was forthcoming as to why the balance length of 280 metres was not made available to the respondent. Left with no

alternative, the respondent had to procure its aggregate from outside. It is in these circumstances, that the Arbitral Tribunal thought it to be fair and just to award compensation for the loss of the barrage quarry. We see no reason to take a view different from that of the Arbitral Tribunal and as confirmed by the learned Single Judge.

8. Insofar as the payment of interest is concerned, which falls in claim No. 7, we find that the learned Single Judge has examined this aspect under the head 'Interest and Costs'. We need not reinvent the wheel here and, therefore, we are extracting the reasoning adopted by the learned Single Judge:-

"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.”

We agree with the conclusion of the learned Single Judge. However, before us Mr Mehta sought to place reliance, once again, on the decision of the Supreme Court in *Tehri Hydro-development Corporation Ltd (supra)* to submit that Clause No. 78 of the contract between the parties herein was identical to Clause No. 1.2.14 of the contract which was under consideration before the Supreme Court and in that context, the Supreme Court had disallowed the interest. However, we feel that in the contract before the Supreme Court, there was another clause, namely, Clause No. 1.2.15 relating to interest on money due to the contractor which reinforced the submission on the part of the appellant before the Supreme Court that no interest was

payable. The said Clause 1.2.15 in the case before the Supreme Court was as under:-

“1.2.15 *Interest on money due to the contractor.*— No omission on the part of the engineer-in-charge to pay the amount due upon measurement or otherwise shall vitiate or make void the contract, nor shall the contractor be entitled to interest upon any guarantee or payments in arrears nor upon any balance which may on the final settlement of his accounts be due to him.”

Such a clause is absent in the present contract. Therefore, the said decision would not be of any help to the appellant.

9. Insofar as the other claims are concerned, we find that those claims have been decided entirely on the basis of factual findings with which we cannot interfere in the present appeal. As such, we do not find any merit in the appeal. The same is dismissed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

APRIL 24, 2015
SR

SANJEEV SACHDEVA, J