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

+ **OMP 626/2014 & I.A.10812/2014**

Reserved on: December 17, 2016

Date of decision: January 25, 2017

NTPC LIMITED

..... Petitioner

Through: Mr.. Tushar Mehta, ASG (Sr.)
with Mr. Tarkeshwar Nath, Mr. Rajat Nair,
Mr. Onkar Nath and Mr. Saurabh Kumar
Tuteja, Advocates.

versus

**HINDUSTAN CONSTRUCTION
COMPANY LTD.**

..... Respondent

Through: Mr. Dayan Krishnan, Senior
Advocate with Mr. Rishi Agrawala and Ms.
Malavika Lal, Advocates

CORAM: JUSTICE S.MURALIDHAR

J U D G M E N T

25.01.2017

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1. By this petition under Section 34 of the Arbitration & Conciliation Act, 1996 ('the Act'), the Petitioner NTPC Ltd. (NTPC) seeks to challenge the Award and the order dated 29th September, 2013 and 25th January 2014, respectively passed by the Arbitral Tribunal ('AT') in the disputes between NTPC and the Respondent, Hindustan Construction Company Ltd. ('HCC').

Background

2. A contract dated 17th November, 2006 for the setting up of 600 MW

(4x150 MW) Hydroelectric Power Project in Uttarkashi District, Uttarakhand, styled as Loharinag Pala Hydroelectric Power Project ('Project'). Although the contract was formally signed on 17th November, 2006, it had become effective from 3rd August, 2006 which was the date of issuance of the Letter of Acceptance ('LoA') in favour of HCC. The total value of the contract as agreed was Rs. 246,48,17,654/-. The project was to be completed within 40 months from the date of issuance of the LoA.

3. Disputes arose between the parties for the part of the works executed up to December 2008 and were referred to the AT which pronounced an Award dated 10th September, 2012 in favour of HCC. The said Award was challenged by NTPC in this Court by filing OMP No.1148/2012. The claims made by HCC in the said arbitration were as under:

- "a. Additional claim due to variation in the River Diversion in pursuance of letter dated 04.06.2007 (claimed amount Rs. 10,49,76,210.45/-).
- b. Claim for cost in respect of non-supply of power by NTPC (Claimed amount Rs. 6,90,29,025.96/-)
- c. Claim for cost of disruptions and delays / underutilization of the resources from inception to 30.11.2008 (claimed amount Rs. 71,72,96,974.59/-"

4. According to NTPC, while the works of the said package were under progress, various media reports came up on internet on 20th February, 2009 regarding the suspension of the Project by the Ministry of Power, Govt. of India. It is, however, contended by NTPC that there was no such

communication between the parties and the works were under progress as usual. Reference is made to the minutes of the Weekly Progress Review meeting dated 23rd February, 2009 in this regard.

5. HCC on 20th February, 2009 wrote to NTPC stating that the works had been suspended on the instructions of NTPC. However, NTPC denies having instructed HCC in that regard. Meanwhile, in a Public Interest Litigation ('PIL') filed by a Non-Governmental Organization ('NGO'), the High Court of Uttarakhand at Nainital by its order dated 26th February, 2009 stayed the 'suspension of project' and all works were resumed without any restrictions.

6. On 30th July, 2009, HCC wrote to NTPC that all the works had been stopped on the instructions of the Engineer-in-Charge ('EIC') with effect from 29th July, 2009. NTPC maintained that no such instruction for stoppage of work was issued by it.

7. NTPC states that the entire works comprised of two main groups, namely, (a) open works & (b) underground works. It is stated that as far as the open works are concerned, after the diversion of river Bhagirathi on 14th December, 2008, they continued till 25th June, 2009. On 26th June, 2009, due to high discharge in river Bhagirathi, the upstream and down-stream cofferdams were breached by HCC and, thereafter, no work was possible till the receding of monsoon discharge. Thus, no work took place in the barrage for four months except repairing of the diversion channel, which was allowed by NTPC by its letter dated 7th August, 2009.

8. The second group of work i.e., underground works consisted of the works in Desilting Chambers, Head Race Tunnel, Gate Operation Chambers and the Silt Flushing Tunnels. According to HCC, the second period of suspension of work commenced on 29th July, 2009. It is stated that NTPC did not permit HCC to demobilize the sources till 11th November, 2009. On NTPC's part, it states that immediately after the suspension on 29th July, 2009, NTPC vide its letter dated 7th August, 2009 instructed HCC to continue the safety and stabilization works as per the list attached to the said letter. It covered all the works of underground portion of the package except the face blast for excavation of DC-III inlet / outlet tunnels and SFT.

9. HCC's case, on the other hand, is that it had been refused permission for demobilizing the deployed resources, permission for which was finally given on 11th November, 2009 by NTPC to remove its equipments against furnishing of a Bank Guarantee ('BG'). This, according to NTPC, came after HCC's reluctance to complete the safety and stabilization works despite repeated instructions in that regard. By its letter dated 11th November, 2009, NTPC pointed out to HCC Clause 60.6.5 of the Conditions of Particular Application ('COPA') which states that the hypothecated equipments could be removed from the site after submitting a BG for the outstanding amount of the equipment advance along with its interest.

10. On 15th February, 2010, HCC wrote to NTPC serving a 28 days' notice under Clause 40.3 of the General Conditions of Contract ('GCC') seeking instructions to proceed with the execution of the balance works. On 15th

April, 2010, NTPC allowed HCC to remove all the equipments and materials where no advances from NTPC were outstanding. By the letter dated 28th June, 2010 NTPC accepted the BG furnished by HCC for the outstanding amount of equipment advance required as per the contract for removal of the hypothecated equipments. According to NTPC, HCC submitted the BG after much delay and this was approved on 28th June, 2010.

11. By its letter dated 14th July, 2010, HCC requested NTPC to give a certificate of completion of works and to treat the balance parts of the works as “omission of the works” in terms of Clause 40.3 of COPA. By letter dated 30th August, 2010, NTPC agreed to HCC’s option for omission of the balance works.

12. It is stated that the National Ganga River Basin Authority (‘NGRBA’) constituted under Section 3(3) of the Environment (Protection) Act, 1986 (‘EPA’) by the Ministry of Power, Government of India at its meeting held on 1st November, 2010 headed by the Prime Minister of India decided to scrap the Project. According to NTPC, as a result of the above, scrapping of the Project as per Clause 66.1 of the contract was revived. By its letter dated 31st January, 2011, NTPC communicated to HCC that in view of the directives of the Ministry of Power, Government of India, the contract stood frustrated in terms of Clause 66.1 of the contract.

13. NTPC states that interest bearing advances, viz., mobilization advance and machinery advance that had been extended to HCC could not be fully recovered. This was due to the stoppage of works. NTPC then called upon

HCC to return the outstanding advance including interest.

Arbitral proceedings

14. HCC notified NTPC by its letter dated 30th January, 2012 about their appointment of Arbitrator in terms of Clause 67.3 of the contract and called upon NTPC to appoint its Arbitrator within 30 days. Finally, vide letter dated 9th March, 2012, the matter was referred to the AT, already dealing with the pre-suspension claims.

15. As far as present case is concerned, the claims of HCC are as under:

“4.1. Cost relating to suspension of work under Clause 40.1 of GCC and the law; for a period between 20.02.2009 and 27.02.2009 and from 29.07.2009 to 11.12.2010 respectively.

4.2. Claim arising from the closure of the contract comprising of:

4.2.1.1 Balance payment of works executed,

4.2.1.2 Recovery of amounts retained from RA Bills

4.2.1.3 Demobilisation cost

4.2.1.4 Preliminary expenses

4.2.1.5 Cost of maintaining Bank Guarantees and return of Bank Guarantees

4.2.1.6 Loss of Profit.

4.3. Claim for extension of BGs related to Arbitration Case No. 1”

16. The first defence taken by NTPC was that it was not a case of suspension as stated by HCC, rather one of abandonment of the Project by HCC. Secondly, the case falls under the category of 'Omission of Works' relatable to Clause 40.3 of GCC. After initially disagreeing with the suggestion of HCC, NTPC by its letter dated 30th July, 2010 agreed to the suggestion of omission. Since the situation was beyond the control of both the parties, NTPC by its letter dated 11th December, 2010 invoked Clause 66.1 of the contract which required both the parties to release the performance of their respective obligations. As a consequence of invoking Clause 66.1, payment had to be made to the contractor in terms of Clause 65 of COPA. HCC, in its rejoinder, disputed all the three defences put up by NTPC.

17. The following issues were framed by the AT in respect of the three claims made by HCC and also the claim for interest:

"Claim No. 1

1. Whether there was suspension of the project work on the instructions of EIC for two spells of period namely from 20.02.2009 to 27.02.2009 and from 29.07.2009 to 11.12.2010.

2. Whether it is a case of voluntary stoppage of work by HCC as pleaded in SOD.

3. Whether the claimant is entitled for claim as made in Claim No. 1.

Claim No. 2

4. Whether the discontinuation of Project falls under Clause 66.1 or Clause 65.8 of COPA or

Frustration of the contract.

5. Whether it amounts to omission of works as pleaded by the Claimant.

6. Whether the claimant is entitled for claims as made in Claim No.2.

Claim No. 3

7. Whether the claimant is entitled for the claim for extension of PBGs and mobilization and equipment advance BGs?

Quantification of Claim Amount:

8. Whether the quantum of amount arrived at by the Claimant for Claim No. 1, 2 & 3 has been correctly calculated? If not, to what extent the claims are allowable?

Claim for Interest:

9. Whether the claimant is entitled for interest? At what rate and from what date?

The impugned Award

18. By the impugned Award and order dated 29th September, 2013 and 25th January, 2014 respectively, the AT answered the Issue Nos. 1, 2 and 3 in favour of HCC. The AT concluded that the works were under suspension from 20th February, 2009 to 27th February, 2009 and 29th July, 2009 to 11th December, 2010. The claims preferred by HCC were allowed by the AT as under:

“(i) Cost of the works executed – Rs. 1,80,78,874/-

(ii) Release of amounts retained from RA Bills –

Rs. 71,35,385/-

(iii) Cost for extension of BGs related to Mobilization and Equipment Advances – Rs. 12,36,463/-

(iv) Cost for extension of BGs related to Performance – Rs. 23,51,116/-

(v) Demobilization cost – Rs. 231,36,401/-

(vi) Loss of Profit – Dropped

(vii) Preliminary site expenses - Rs. 9,30,72,526/-”

19. On 18th October, 2013, the AT *suo moto* made certain corrections which were clerical in nature.

Application under Section 33

20. On 28th October, 2013, NTPC filed an application under Section 33(i)(a) of the Act which was dismissed by an order dated 25th January, 2014 by the AT. In the said application, two broad issues were raised by NTPC under Section 33 of the Act. The first pertained to non-mentioning of the adjustment of the loan amount refundable to NTPC from the awarded amount. This outstanding amount was Rs. Rs 14,38,08,153/-. The AT in the order dated 25th January, 2014 held that in the first place the said application was time barred as it was filed beyond the period of 30 days from the date of receipt of the Award. Nevertheless, even on merits, the AT held that the first issue raised was that a mere clerical error and, therefore, cannot be examined in the said application under Section 33 of the Act.

21. The second issue arose from the case of NTPC that certain figures of recovery, namely, Rs. 3,88,15,459.66 had been taken from the 43rd RA Bill in respect of the corrected figure of Rs. 3,36,98,558.19. As regards this issue, the AT pointed out that both in the Statement of Claims ('SoC') and in the rejoinder submitted before the AT, the same figure i.e., Rs. 3,88,15,459.66 was used. In the preliminary report of Quantum Merit Consultants ('QMC') provided on 13th May, 2013 to both parties, the same figure was used but throughout this period, no objection had been raised by NTPC. Throughout the proceedings, NTPC did not point out the so-called mistake for correction. Further, NTPC provided a proper copy of 43rd RA Bill (revised) only with its application. It was not a document available to the AT during the proceedings. In any event, the said document could not be read at the stage of an application under Section 33 of the Act. It was also not merely a clerical error. On the said application, the AT held that by the said application, NTPC was seeking a review of the Award dated 29th September, 2013 which was impermissible in law. The application was, accordingly, dismissed.

Previous round of litigation

22. To complete the narration of facts as far as these petitions are concerned, it must be noted that on 3rd February, 2015, an order was passed in Execution Petition No.151/2014 filed by HCC under Section 36 of the Act seeking enforcement of the Award dated 29th September, 2013. It was noted that under paragraph 5.1.4 of the present petition under Section 34 of the Act challenging the Award i.e. O.M.P. No. 626/2014, NTPC had made an averment that "in terms of Clause 65.8 of FIDIC, HCC is not entitled to the

claim as mentioned at Sl. No. (ii), (iii), (iv) & (vi)..." It was further averred that the AT had exceeded its jurisdiction by allowing other claims.

23. In the said order dated 3rd February 2015, the Single Judge concluded that the challenge to the Award under Section 34 of the Act did not include a challenge to the aforementioned claim of HCC at Sl. Nos. (i), (v) & (vii) under Claim No. 2. By the same order that NTPC was asked to pay HCC the amount awarded by the AT under Sl. No. (i), (v) and (vii) of Claim No. 2. By a separate order of the same date in OMP No.626/2014, the challenge in the petition was confined to the claim of HCC other than the aforementioned claims.

24. Both the above orders dated 3rd February, 2015 were challenged by NTPC before the Division Bench (DB) of this Court by filing FAO(OS) No. 154/2015 and EFA(OS) No. 10/2015. By its judgment dated 6th July, 2015, the DB set aside the aforementioned order dated 3rd February, 2015 in Ex. Pet. No. 151/2014 by holding that the above averment in paragraph 5.1.4 of OMP No. 626/2014 did not amount to an admission by NTPC of the quantification of the said case by the AT. It was directed that challenge in OMP No. 626/2014 would include the challenge to the Award of the AT allowing serial nos. (i), (v) and (vii) under Claim No. 2 as well.

25. It may also be mentioned that by the same order dated 3rd February, 2015 in OMP No.626/2014, the Court had noted the preliminary objections of HCC that the petition was time-barred. That part of the order dated 3rd February, 2015 passed in OMP No.626/2015 was not challenged by NTPC.

Submissions of the ASG

26. Mr. Tushar Mehta, learned Additional Solicitor General of India (ASG) appearing on behalf of NTPC submitted as under:

(i) The AT had categorically held that the works had been foreclosed under Clause 66.1. Consequently, only this category of claims specified in Clause 65.8.2 of the GCC could have been contractually awarded. The said category of claims were:

- a. Amounts of works executed at site;
- b. Demobilization (Compensation for transfer of Plants and Equipments);
- c. Expenditure incurred on Preliminary site work.

Thus, it was impermissible for the AT to award the claims under any other provisions of the contract much less under Clause 40.1 of the GCC or the general law.

(ii) Once the contingency contemplated under Clause 66 gets triggered, the condition enumerated under Clause 40 (i.e. suspension of work) gets subsumed particularly since Clause 66 specifically provides that the period of its operation would commence from the date of the LoA till the date of occurrence of impossibility of the performance of the contract beyond the control of the parties. The suspension during that period would become irrelevant and *non nest* for raising any claim under the contract for the alleged period.

(iii) Allowing of claims, both for the suspension as well as the foreclosure of

the contract would amount to granting two reliefs for the same event and this was impermissible under the contract and/or cannot be read into it. Therefore, the Award of the AT insofar as it allowed Claim No. 1 in favour of HCC was beyond the specific terms of the contract.

(iv) As regards the Claim No. 2, it is submitted that the AT passed the Award without any proof or evidence on record establishing the quantum of the claims made by HCC.

(v) The AT has awarded the amount for payment of work under Clause 65.8 amounting to Rs. 1,80,78,874/- whereas as admitted by NTPC, Rs. 72,54,678/- was outstanding in terms of Bill of Quantification (BOQ) merely on the basis of the QMC's report, which had been appointed by the AT by its order dated 1st June, 2013 for checking the calculations of HCC's records.

(vi) QMC had not ascertained or verified the authenticity/veracity of the record maintained by HCC. They only conducted a mechanical exercise of compiling records, checking and reconciliation of calculations. Thus, the said amounts were not proved and ought not to have been accepted by the AT.

(vii) NTPC was entitled to retain Rs.71,35,385/- from the RA Bills of HCC under Clause 60.8 since the work was not carried out to the satisfaction of NTPC.

(viii) Despite Clause 77 and 78 of the Contract barring payment of interest on the money payable to HCC, the AT awarded interest to HCC. This was against the impressed provisions of the contract as well as the law laid down by the Supreme Court in *Union of India v. Ambica Construction (2016) 6 SCC 36*. Reliance is also placed on the decision of the *Union of India v. Bright Power Projects (India) (P) Ltd. (2015) 9 SCC 695* and it was urged that the AT had no right to award *pendent lite* interest if the parties had agreed to not pay interest to each other.

Submissions of Senior Counsel for HCC

27. Countering the above submissions, Mr. Dayan Krishnan, learned Senior Counsel appearing for HCC, referred to the specific findings of the AT regarding suspension of the work following the hunger strike by Dr. G.D. Agarwal, a former professor of IIT against the construction of the project from 14th January, 2009 onwards. There was a clear finding by the AT that there was suspension of work from 20th February, 2009 to 27th February, 2009 on the instructions of the EIC of NTPC. There is also a clear finding about the second suspension from 29th July, 2009 till 11th December, 2010. He, accordingly, submitted that these factual findings were based on the evidence laid down before the AT and have not been shown to have been perverse.

28. As regards Claim No. 2, Mr. Krishnan pointed out that there is a categorical finding by the AT that the action of NTPC in terminating the contract was not valid and HCC was entitled to be compensated under Clause 65.8.2. This was independent of all the claims arising out of the

suspension of work. He also referred to the fact that the AT held that the BG ought to have been released immediately after the contract was foreclosed by NTPC since no further performance of the work was possible and, in such a case, keeping the performance of the BG thus locking up substantial assets was unnecessary.

29. Mr. Krishnan pointed out that the AT wrote to QMC for checking of the claims with the vouchers and mathematical computations since NTPC expressed its reservations even despite initially agreeing to the same as per the Minutes of the Meeting dated 29th April, 2013. The preliminary report of QMC was made available to both the parties who had been asked to furnish their comments by 17th August, 2013. Those comments were taken on record by the AT. It is submitted that the AT examined in detail the original claim amount, the revised claim amount and the amount after reconciliation by QMC and, thereafter, allowed the said claims. He pointed out that in the circumstances, it could not be said that any part of Claim No. 2 was outside the purview of the contract or that it was not proved by placing the material on record.

30. Lastly, as regards interest, Mr. Krishnan referred to the Award dated 29th September, 2013 passed by the AT allowing HCC's application seeking interest for the pre-reference period. He pointed out that in this detailed Award, reasons have been given for allowing *pendent lite* interest and that they was based on the correct understanding of the legal position. He distinguished the two decisions cited by Mr. Mehta as regards the applicability to the facts of this case.

Scope of the powers under Section 34 of the Act

31.1 Before commencing the examination of the above submissions, it is necessary to recapitulate the legal position regarding the scope of the Court's powers of judicial review of an arbitral Award under Section 34 of the Act.

31.2 In *Associate Builders v. Delhi Development Authority AIR 2015 SC 620*, the Supreme Court summarised what constituted the fundamental policy of Indian law. In that process, it extracted certain passages from the earlier decision in *ONGC Ltd. v. Western Geco International Ltd., 2014 (9) SCC 263*. In para 40 of that judgment, it was observed as under:

“40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest.”

31.3 A reference was also made in *Associate Builders v. Delhi Development Authority (supra)* to the decisions in *Kuldeep Singh v. Commissioner of Police (1999) 2 SCC 10* and *P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd., (2012) 1 SCC 594*, where it was reiterated that the Court does not sit in appeal over the Award of an Arbitral Tribunal by

reassessing or re-appreciating the evidence. It was reiterated that the Award could be challenged only on the grounds mentioned under Section 34(2) of the Act.

Claim No.1

32. Turning to the case on hand, the narration facts in the impugned Award reveals that prior to the actual closure of the project, there was indeed a suspension of the project although NTPC appears to have been in denial. There were two distinct periods of suspension of work i.e., between 20th February, 2009 and 27th February, 2009 as a result of fast unto death by Dr. G.D. Agarwal and for the second period between 29th July, 2009 and 11th December, 2010. Even during the period of suspension, HCC had been submitting Statement of Claims to NTPC for additional costs. HCC had suggested demobilization of equipments in order to mitigate the losses due to suspension, which was allowed by NTPC on 15th April, 2010 after exchange of several letters and submission of BGs. The final foreclosure took place on 11th December, 2010 and, thereafter, claims were submitted afresh by HCC on 8th February 2011. Factually HCC was able to demonstrate that there were two suspensions before the foreclosure.

33. One of the issues framed by the AT was whether it was a case of voluntary stoppage of work by HCC as pleaded by NTPC or whether the suspension of the project was on the instruction of the EIC. As noted by the AT, four witnesses were examined on behalf of HCC whereas NTPC did not adduce any oral evidence. Documents were filed by both the parties. The deposition of four witnesses was discussed in substantial detail by the AT. It

was noted that no evidence was adduced by NTPC to contradict the oral evidence adduced by HCC. It was found that NTPC directed HCC to carry out stabilization work which was a contractual requirement under Clause 40.1 and 40.2 which dealt with the suspension of work.

34. Reference was made by the AT to the letters written by HCC on 20th February, 2009 and 24th February, 2009, in particular, the letter dated 19th February, 2009 issued by the Ministry of Power informing Mr. G.D. Agarwal that the work on the project had been suspended. It was *inter alia* stated that there were verbal instructions of DGM, NTPC asking them to suspend the work. However, some of the site representatives of NTPC had been giving instructions that HCC should execute the works partially or during the night and these instructions put HCC in a dilemma and they were not in a position to comply with the said instructions.

35. HCC asked NTPC by its letter dated 24th February, 2009 to clarify the position informing HCC how long the suspension would last and whether to stop the work during the suspension. In its reply dated 25th February 2009, NTPC never denied that such suspension was ordered by the DGM, NTPC and clearly stated that safety of structures at various work fronts and stabilization works had to be undertaken. NTPC simply stated that it was pursuing the matter with the Government of India and would revert soon. The work resumed only after the High Court of Uttarakhand at Nainital in a PIL stayed the operation of the order dated 19th February, 2009 of the Government of India informing that Mr. G.D. Aggarwal called off the strike. On analysis of all the above findings including the minutes of Weekly

Review and the deposition of CW-1 to CW-3, the AT came to the conclusion that the project work had indeed been suspended from 20th February, 2009 to 27th February, 2009 on the instructions of EIC, NTPC.

36. Likewise, as far as the second suspension of long period from 29th July, 2009 onwards, the AT discussed the evidence placed before it in elaborate detail. The correspondence exchanged between the parties revealed that NTPC had accepted that works necessary for the safety and stabilization of works already carried out prior to such suspension would be undertaken and the other project works were suspended'. Meanwhile, NGRBA held a meeting on 5th October, 2009 and a draft resolution was issued stating that "the issue of hydro electric projects in the upper reaches of Bhagirathi (Loharinag Pala, Pala Maneri and Bhairon Ghati) to be studied by Union Ministry of Environment and Forest, and Power and report submitted to NGRBA in 60 days". This ultimately lead to the closure of the project on 1st November, 2010. However, a formal notice was given by NTPC only on 11th December, 2010. The letter dated 14th October, 2009 (C-35) of NTPC accepted that the final suspension of the project had been extended by 60 days.

37. The above developments underscore that a suspension had already taken place which was then extended by the decision of the NGRBA. The AT also noted the explanation of HCC in its letter dated 25th October, 2009 that it was facing a highly charged situation under which the works were physically and legally impossible to be undertaken. The AT also referred to a series of letters of NTPC where it accepted that the project had factually

been suspended. When HCC on 14th July, 2010 undertook invoked Clause 40.3 of the GCC/COPA to treat the balance work as omission of the work, NTPC pointed out that since the Government of India had not revoked suspension, it was not in a position to deal with HCC's request.

38. The categorical finding of the AT was that the evidence of CW-3 supported the case of HCC that the work was suspended for the aforementioned period during which HCC had been instructed by NTPC to carry out safety and stabilization works. This was in terms of Clause 40.1 of the GCC under which HCC was obliged to secure the safety during suspension of work. It was further observed by the AT that at no stage was any effort made by NTPC to tackle the situation even though the contract provides for it. The AT concluded that "NTPC has not even explained why suspension was not there even with the established fact that oral instructions had been confirmed by HCC to NTPC and were never denied".

39. In view of the aforesaid analysis, the AT answered the Issue Nos. 1 to 3 in favour of HCC and held that there was absolutely no doubt that the project was suspended during the second period of suspension namely during the period from 29th July, 2009 to 11th December, 2010.

40. Turning to Mr. Mehta's specific objection regarding Clause 66 of the COPA dealing with suspension for which compensation was payable under Clauses 40.1 and 40.2 of the GCC, the Court would like to first observe that Clause 66.1 of the GCC is independent of any claim that the contractor made under Clause 40.1 and 40.2. Clause 66.1 stood attracted in the present case on the point of which there was a clear order of closure of the project.

This issue was duly dealt with by the AT where it came to the conclusion that the termination of the contract was not attributable to the contractor at all, but to NTPC on the directions of the Government of India.

41. The Court does not find any overlap of the two sets of claims i.e., cost compensation for the suspension of the work between two periods of suspension which HCC was entitled to in terms of Clause 40.1 and 40.2 of the GCC, and the amount that the contractor would be entitled to under Clause 60.8.2 as a result of the foreclosure of the contract. The Court is, therefore, unable to agree with the broad submission of Mr. Mehta that once the contingency contemplated under Clause 66 gets triggered, the condition enumerated under Clause 40 will be subsumed therein.

42. As regards the cost compensation payable under Clause 40.1 and 40.2, the AT discussed the same in sufficient detail the claim made by HCC. The procedure adopted by the AT in this regard is set out in the impugned Award itself in the following passages:

“v. ...The Arbitral Tribunal had directed NTPC during proceedings that they may check the claim details and provide comments, as had been done under LPHPP-1 arbitration, but it was denied, except for comments on principles. Such comments were given under SOD. On the basis of such comments, wherever acceptable, HCC revised their claim and also deleted the claim under sub-head "H". However, for cross checking of vouchers and mathematical checking, it was agreed with both the parties (MOM dated 29-04-2013 that the services on accounts consultant shall be used for the purpose by the Arbitral Tribunal under section 26 of the A&C Act, 1996.

vi) Accordingly, the subheads (Annexure A to J) have

been got checked by one Quantum Meriut Consultants (QMC), along with comments from both parties. Final report of the consultant, submitted on 09.09.2013 has been taken on record. Quantification of claims shall be taken up under appropriate head later.”

43. The Court is, therefore, unable to agree with the submissions of NTPC that the Award of the AT in allowing Claim no. 1 is beyond the specific terms of the contract and the same is liable to be set aside and that the AT while exercising its powers acted beyond its jurisdiction and thus does not attract Section 28 of the Act or any of the grounds under Section 34 of the Act.

Claim No.2

44. The principal ground of attack as far as Claim no. 2 is concerned is that the amount awarded to HCC was not the proven amount and that QMC’s report ought not to have been accepted.

45. The AT agreed with HCC in that carrying out the normal work of the project was neither legal nor physically possible when the work had been suspended by the Government of India. Further, NTPC’s stand that there was voluntary abandonment of work by HCC was untenable in view of the fact that the project itself was ultimately foreclosed under Clause 66.1 in terms of the contract which provided for termination of the contract by NTPC on the instructions of the Government of India. This was, therefore, clear foreclosure or termination of the contract.

46. In view of aforesaid, there was no illegality committed by the AT in invoking Section 73(2) of the Contract Act holding that where there was any

antecedent breach of the contract by one of the parties, which in this case was committed by NTPC, then the other party i.e., HCC was entitled to seek compensation for such breach by way of damages. The amounts were also payable under Clause 65.8 of COPA.

Other claims

47. The AT had also explained how as regards the loan advances, NTPC might have been entitled to refund of basic advances but it would not be entitled to interest thereon since during the suspension of works, the contractor cannot recover the advances including the interest thereof. Further, when the entire work was terminated, there was no justification for NTPC requiring HCC to keep the performance of the BG alive. Machinery worth more than Rs.100 crores was at site, with the amount of unrecovered advance being only about Rs. 14 crores. Even hypothecated equipments were adequate for recovering the unrecovered advance under Clause 40.3 of the GCC read with Clause 66.1 or Clause 65.8.2 of COPA.

48. As regards the quantification of the individual items of claims under claim no. 2, the procedure of having QMC to verify the bills was adopted even for these claims. Under paragraph 12 (iv) of the Award, the AT has discussed in elaborate detail this aspect of the matter. The comments of both the parties were invited on the report of the QMC. The AT explained the entire process as under:

“(iv) The comments/observations etc from both parties were received on 17.08.2013, which were taken on record, and copies were handed over to QMC to take care of the comments/observations made available by the parties to arrive at the most acceptable checked figures in

respect of various Annexures (A to S). This exercise, as mentioned earlier, would not have been necessary had NTPC agreed for joint verification of the computation etc. as had been done in the first arbitration. Even with the services of Consultant, NTPC had an opportunity to interact as per provisions of the Arbitration & Conciliation Act, 1996, but it appears NTPC had decided otherwise.

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(v) The AT have gone through the entire details regarding various Annexures and carefully considered unresolved matters/issues. Accordingly suitable amendments have been made in the amounts computed by the consultant wherever considered necessary in the following Annexures for reasons briefly given against each.”

49. In view of the elaborate discussion, it can, therefore, hardly be said that the amount under claim no. 2 was awarded without sufficient proof or there was no material in support thereof. The Court, therefore, is unable to sustain the objections of NTPC in this regard.

Award of interest

50. The last ground of challenge is on the interest component of the Award. Since reliance is being placed by Mr. Mehta on Clause 77 and 78 of the contract, they are required to be reproduced:

“77. INTEREST ON MONEY DUE TO THE CONTRACTOR

Omission on the part of the Engineer to pay the amount due upon measurement or otherwise shall neither vitiate or make the contract void, 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 account, be due to him.

78. NO CLAIM FOR DELAYED PAYMENT DUE TO DISPUTE ETC

No claim for interest or damage will be entertained or be payable by the Employer in respect of any amount or 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.”

51. As far as Clause 77 is concerned, the Court fails to appreciate how the said Clause would be relevant for deciding whether the contractor is entitled to *pendent lite* interest. It talks of the “interest upon any guarantee” or “payment of arrears” or “any balance which may on the final settlement of his account, be due to him” on account of omission on the part of the Engineer to pay the amount. The Court is unable to read the above Clause as prohibiting an AT from paying interest *pendent lite* to a secondary claim.

52. As far as Clause 78 is concerned, it only applies to “any amount or balance which may be lying with the employer”. The above balance amount could be lying as a result of two contingencies: (i) on account of any dispute or difference between the parties or (ii) on account of any delay or omission on the part of the Engineer in making interim or final payment. It is in the above specific conditions that no interest is payable. The sum and substance are not in the nature of sums that are yet to be determined as being payable. Again, this is not a Clause which prohibits payment of *pendent lite* interest in the manner contemplated in ***Union of India v Ambika Construction***

(*supra*) or *Union of India v. Bright Power Projects (India) (P) Ltd (supra)*. Therefore, in the considered view, there was no prohibition against the AT awarding interest in the manner it has in the impugned Award.

53. The Court has perused the order dated 25th January, 2014 passed by the AT and finds that the same does not suffer from any legal infirmity since indeed what NTPC was seeking was a review of the Award. The Court is unable to find any error committed by the AT on reaching the conclusion that the application was barred by time or that it was not tenable on merits.

54. The Court is of the view that NTPC has been unable to make out any ground for interference with the impugned Award under Section 34 of the Act.

Conclusion

55. In view of the aforementioned reasons, the Court finds that none of the provisions of Section 34 of the Act stand attracted. The petition is, therefore, dismissed with costs of Rs. 50,000 which shall be paid by NTPC to HCC within four weeks.

S.MURALIDHAR, J

JANUARY 25, 2017
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