$~
* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
14.
\+ **O.M.P. 1250/2014**

NTPC LTD. ..... Petitioner
Through: Mr. Tushar Mehta, Additional Solicitor General with Mr. Tarkeshwar Nath, Mr. Saurabh Kumar, Mr. Omkar Nath, Mr. B.K. Pandey and Mr. Rajat Nayar, Advocates.

versus

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

CORAM: JUSTICE S. MURALIDHAR

O R D E R

% **08.02.2017**

1. The National Thermal Power Corporation ('NTPC') in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') has challenged an Award dated 16th June 2014 passed by the Arbitral Tribunal ('AT') in disputes between NTPC and the Respondent, Patel Engineering Ltd. arising out of a Contract Agreement ('CA') dated 30th November, 2006 whereby the work of construction of 600 MW Hydroelectric Power Project in Uttarkashi District, Uttarakhand in four civil packages was awarded to the Respondent. The present case is confined to one of those packages i.e., construction of Penstock & Power House Package.

2. The contract became effective from the date of the letter of acceptance

('LoA') i.e., 23rd September, 2006. The period of completion was 45 months from the date of issuance of the LoA. The terms and conditions of the contract applicable were mentioned in the FIDIC (Red Book 4th Edition 1987) and the Conditions of Particular Application ('COPA'). The disputes between the parties were referred to the AT.

3. The Respondent filed a statement of claim raising 8 claims including interest and costs. The claims and the amount awarded in respect of each of these claims are as under:

S. No.	Description of Claim	Amount claimed	Amount awarded
1.	Compensation for the cost of power supply for construction work by deployment of D.G. sets for Power House package due to non-availability/frequent failures of power supply provided by NTPC and Cost of rewinding of motors due to Voltage fluctuations.	Rs.11,37,36,110	Rs.1,62,69,417
2.	Claim for compensation for Idle Charges of Machinery and Manpower due to delay in handing	Rs.3,57,85,846	Rs.1,31,64,087

	over of Penstock & Power House Package sites		
3.	Cost of Extra Lead involved for hauling of excavated material of Power House complex works to Helegu Bridge Dumping Yard.	Rs.2,76,40,076.	Rs.2,67,00,309
4.	Open Excavation-Extra expenditure incurred due to change in methodology resulting in variation in quantities of BOQ No. A.1.1 and A.1.2 in Main Access Tunnel and Cable-Cum-Ventilation Tunnel Portal area and switchyard.	Rs.1,62,20,250.	Nil.
5.	Idle charges for Machinery and Manpower due to hindrances and stoppages of work at Power House Sites.	Rs.23,47,71,303.	Rs.6,33,07,231
6.	Claim towards infructuous expenses on account of various contractual obligations performed by the claimant thereby incurring liabilities	Rs.2,77,44,889.56 & Euro 1,56,496.10	Rs.88,57,281 & Euro 26,875.18

	which have been rendered infructuous on account of non-performance of reciprocal promises by the respondent.		

4. The AT has awarded interest @ 10% per annum with effect from 20th September, 2010 till the date of payment. It has further directed that if NTPC settles the amount within three months of the date of the Award, no interest will be payable for that period. The AT also awarded Rs. 10 lakhs together with the actual cost of the stamp papers as costs.

5. At the outset, it is pointed out by Mr. Dayan Krishnan, learned Senior counsel appearing for the Respondent that the issues that arise in the present petition stand covered by a judgment of this Court in ***NTPC Ltd. v. Patel Engineering Ltd. 2015 (2) Arb. LR 177 (Del)*** which has been affirmed by the Division Bench of this Court by its judgment in ***NTPC Ltd. v. Patel Engineering Ltd.*** [decision dated 24th April, 2015 in FAO (OS) 219/2015]. The further Special Leave to Appeal (Civil) No. 25685/2015 was dismissed by the Supreme Court on 5th October, 2015.

6. However, Mr. Tushar Mehta, learned Senior counsel appearing on behalf of NTPC sought to distinguish the said judgment on the ground that it was for a different package i.e., HRT. In particular, it was pointed out that as regards Claim No. 1 being for the cost of power supply for construction work by deployment of DG sets, the question whether NTPC was obliged to supply construction power free of cost even after the Respondent installed

its own sub-station to receive construction power as required under Clause 2.3.7.1 was not considered in the above earlier judgment.

7. A perusal of the order passed by the Single Judge in ***NTPC Ltd. v. Patel Engineering Ltd.*** (*supra*) reveals that Claim No. 1 in that case too concerned the reimbursement of the expenditure incurred for running the DG sets for two distinct periods i.e., 22nd January, 2007 to 20th May, 2008 and from 21st May, 2008 till 29th July, 2009. There too, as noted by the Court, the AT undertook a detailed analysis of Clause 2.3.7.1 and it found that the requirement thereunder was to supply construction power through 11KV lines and not through DG sets. With the Respondent having to deploy its own DG sets, since the DG sets supplied by NTPC were too erratic, the Court found that NTPC cannot rely upon Clause 2.3.7.1 (i) to avoid the liability of reimbursing the Respondent.

8. The issue arising in the present case is no different. The bar under Clause 2.3.7.1 from claiming damages on account of supply of electricity was not applicable since the claim was for reimbursement of the actual expenditure incurred on running the DG sets. The Court is unable to find any distinguishing feature as far as the present case is concerned. The Court, therefore, finds that as far as Claim No. 1 is concerned, the issue stands squarely covered by the decision of this Court which has been affirmed by the Supreme Court. In light of the law explained in ***Navodaya Mass Entertainment Ltd. v. J.M. Combines (2014) SCC Online SC 655*** and ***Associate Builders v. Delhi Development Authority (2015) 3 SCC 49***, the Court holds that the Petitioner has been unable to show that the allowing of

Claim No. 1, to the extent it has, by the AT suffers from any legal infirmity warranting interference.

9. Turning to Claim No. 2 which was for 'idle charges of machinery and manpower due to delay in handling over of site', it is sought to be pointed out that this was not a case of unusual delay of 14½ months as was noted in ***NTPC Ltd. v. Patel Engineering Ltd.*** (*supra*) (OMP No. 743 of 2013). It is pointed out that in the present case, one of the sites was handed over even prior to the agreed date and the other was handed over almost six months prior to the agreed date except one which was handed over within 10 months and that too with time extension and price escalation in terms of Clause 42.2 and Clause 73 of the contract.

10. The AT has in the present case factually found that there is a delay on the part of NTPC in handing over the site for construction of Power House and Penstock. A joint inspection was carried out on 15th February, 2007 which noted the list of persons employed by the Respondent and deputed at the work site and the list of machinery at the site. NTPC did not dispute the evidence in this regard. Further, as opposed to the original date of completion of 22nd October, 2010, NTPC granted extension of time (EOT) to the Respondent till 21st February, 2012 without liquidated damages ('LD'). However, notwithstanding the undisputed record of the Respondent regarding deployment of machinery and manpower, the AT awarded a reduced claim as per the CWC Guidelines.

11. The finding of the AT in this regard is purely factual and consistent with the documents placed on record as well as the terms of the contract. The

Court also finds that in the present case, of the three sites only one site was handed over and that too after more than 14½ months. Consequently, the Court is unable to find any distinguishing feature as far as the present case is concerned.

12. The earlier judgment in ***NTPC Ltd. v. Patel Engineering Ltd.*** (*supra*) (OMP No. 743 of 2013) which has been affirmed by the Supreme Court covers the issue on all fours against NTPC as far as Claim No. 2 is concerned. Mr. Tushar Mehta did not succeed in his attempt to distinguish the aforementioned judgment in its application to Claim Nos. 3 and 4.

13. However, as far as Claim No. 5 which was for 'Idle charges for machinery and manpower due to hindrances and stoppage of work', he submitted that the delay in the instant case as noted in the impugned Award is similar to the one mentioned in the earlier order dated 21st February, 2015. The award on this claim, according to him, was contrary to Clause 7.1 of the information to tender and Clause 81.

14. Mr. Dayan Krishnan, learned Senior counsel appearing for the Respondent, on the other hand, pointed out that there were no distinguishing features in those decisions and that the view taken by the AT was a perfectly plausible one. Mr. Mehta took the Court to Clause 42.2 of COPA which entitles the Contractor to EWOT time under Clause 44 and price adjustment as per Clause 73 in case of delay in handing over the site. Reference is also made to Clause 31.1 (d) of the COPA which stipulated that the Contractor will have no claim from NTPC in case of delay caused by acts and omissions of any other Contractor. Likewise, Clause 81 in amendment No. 4

to Volume 1 of COPA also disallows extra claims in respect of Clause Nos. 6.4, 12.1, 27.1, 31.1, 42.2 and 78 of COPA. The finding of the AT in this regard is again a purely factual one.

15. It transpires that the AT has not in fact awarded the entire amount of claim but has reduced it by 20% to account for the overlapping periods. It is further observed that a strike by the oil companies cannot be a ground for the claim when NTPC had no control over strike. The essential point about there being delay on account of NTPC and, as a result, the Contractor having to suffer hindrances and stoppage of work while incurring additional charges for machinery and manpower is no different in the present case.

16. The Court is not persuaded to hold that the AT's Award in respect of Claim No. 5 would attract any of the grounds under Section 34 of the Act warranting interference by the Court.

17. Each of the other claims are not different from the claims in the Award which was challenged in ***NTPC Ltd. v. Patel Engineering Ltd.*** (*supra*) (OMP No. 743 of 2013) which was dismissed by the Single Judge and affirmed by the Division Bench and the Supreme Court.

18. No ground is made out to interfere with the impugned Award. The petition is dismissed but in the circumstances, with no order as to costs.

S. MURALIDHAR, J

FEBRUARY 08, 2017/dn