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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 6th December, 2018
+ **O.M.P. 668/2009**

NATIONAL HYDRO-ELECTRIC POWER
CORPORATION

..... Petitioner

Through: Mr. B. P. Singh and Dr. S. K. Khatri,
Advocate.

versus

M/S CONTINENTAL CONSTRUCTION
LTD. & ANR.

..... Respondents

Through: Mr. Satpal Singh, Advocate with Mr.
V. K. Sharma, Arbitration consultant.
(M:9810780218)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. Present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter 'the Act'*) has been preferred by the National Hydro-Electric Power Corporation (*hereinafter 'NHPC'*) challenging the impugned award dated 5th June, 2009 passed by the learned Sole Arbitrator. M/s. Continental Construction Limited – Respondent No.1 (*hereinafter 'Contractor'*) entered into a contract with NHPC on 1st October, 1985 in respect of works for '*Construction of power tunnels Up-Stream Package at Chamera Project (Stage-I)*'. The date of commencement was 1st January, 1986 and the stipulated date of completion was 31st July, 1989. The actual work was completed on 31st January, 1994. There is no dispute in respect of these dates.

2. The original contract was awarded for a total value of Rs.19,58,60,430/-. Various extra works were also given to the Contractor.

The final bill was submitted by the Contractor for a sum of Rs.78,29,50,414.60/-. The Contractor raised several claims including for non-payment of the final bill. Since NHPC did not take any action and process the payment of final bill or clear any of the Contractor's claims, a petition under Section 11 (6) of the Act was moved in the Delhi High Court. The matter finally culminated in the Supreme Court and vide order dated 11th May, 1999, Shri Abdul Hamid Raina, retired engineer of the NHPC was appointed as the Sole Arbitrator.

3. Before the learned Arbitrator, the following claims were raised by the Contractor.

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S. No.	Brief Description of Claims	Amount Claimed (Rs.)
1	Payment due on BOQ items	90,750.00
2	Payment due on beyond (+) 30% deviation of individual items.	1,38,09,428.79
3	Payment due on beyond (-) 30% deviation of individual items.	2,07,52,865.24
4	Payment due on beyond (+) 20% overall deviation of contract sum.	11,91,58,238.10
5	Payment due on account of withheld/unpaid extra items to be released.	3,52,84,095.82
6	Payment to be released on account of unaccepted recoveries	1,54,14,580.09
7	Payment due on account of escalation	82,42,264.64
8	Payment due on account	12,68,75,200.00

	on unpaid claims	
Total Rs.		33,96,27,423.20
9	Interest @ 24 per annum w.e.f. 19-10-94 to 31.08.98	31,54,45,950.50
10	Interest @ 24 per annum w.e.f. 01-09-98 to date of actual payment	A matter of Calculation
Grand total Rs.		65,50,73,373.70

4. The total claims awarded by the Arbitrator are as under:

S. No.	Description of Claims	Amount in Rs.
1	Amount of Award in favour of the Claimant (Annexure-A)	3,91,89,289.79
2	Less recoveries awarded against counter claims of Respondent (Annexure-B)	47,10,227.50
3	Net amount of Award in favour of the Claimant	3,44,79,062.29
4	Pre reference Interest awarded @ 14% p.a. w.e.f. 01.01.95 to 31.08.98	1,77,15,342.20
5	Interest @ 12% p.a. from 1.9.98 to date of award i.e. 05.06.09	4,44,77,990.35
6	Total amount of Award as on 05.06.09, the date of Award	9,66,72,394.84

5. The above amounts were corrected vide award dated 5th August, 2009.

The final claims awarded are set out herein below:

S. No.	Description of Claims	Amount in Rs.
1	Amount of Award in favour of the Claimant	2,53,12,503.24

	(Annexure-A)	
2	Less recoveries awarded against counter claims of Respondent (Annexure-B)	47,10,227.50
3	Net amount of Award in favour of the Claimant	2,06,02,275.74
4	Pre reference Interest awarded @ 14% p.a. w.e.f. 01.01.95 to 31.08.98	1,05,85,448.50
5	Interest @ 12% p.a. from 1.9.98 to date of award i.e. 05.06.09	2,65,76,933.57
6	Total amount of Award as on 05.06.09, the date of Award	5,77,64,657.81

6. Before this Court, the only objections raised by NHPC are in respect of claim no.8.1 in which Rs.46,50,000/- was awarded by the learned Arbitrator as also the claims relating to interest. No objections are pressed against any of the other awarded amounts.

Claim no.8.1: In-fructuous expenditure on supervision, overheads etc. together with pre-reference, *pendente-lite* and future interest on the final amount.

7. Amounts under this head were claimed on the ground of failure of NHPC to meet the contractual obligations in time as also due to expenses incurred due to changes in the geographical conditions and other unforeseen circumstances. The claim was for a total sum of Rs. 10,83,75,463/-.”

8. The Contractor raised this claim on the ground that that overheads and other expenditure, were claimed to have been incurred by the Contractor due to delays and hindrances. The delays highlighted by the Contractor are –

- 1) Delay in handing over of the site by NHPC;
- 2) Delay due to change in location of structures;
- 3) Delay due to extremely adverse and unforeseen geological conditions;
- 4) Delay due to the factors directly attributable to NHPC over which the Contractor had no control.

9. The overheads claimed including continuing wages of staff, maintenance of camps, ventilation, dewatering, lighting, conveyance, running vehicles, wages of staff, maintenance of camps, telephone, telex, postage, financing expenses, etc. Learned Arbitrator after considering the submissions of the Contractor and submissions of NHPC held that the Contractor would be entitled for overhead and financing costs for a period of five months. Accordingly, out of the claimed sum of Rs.10,83,75,463/-, the Contractor was awarded Rs.46,50,000/-, which included financing cost @ 14% per annum. The split-up of the amount was calculated as below:

OVERHEADS		
1	Date of commencement of main work.....	= 01-01-1986.
2	Stipulated date of completion	= 31-07-1989
3	Period allowed for completion of works.....	= 43 months
4	Contract Value.....	= Rs.1958.60 Lacs
5	Monthly turn over, = 1958.60/43	= Rs.45.54 Lacs
6	Time related cost per month (i.e. overheads @ 15%) = $0.15 \times 45.54/1.5$	= Rs.5.94 lacs
7	Actual date of	= 31-01-1994

	completion.....	
8	Extended period for completion.....	= 54 months
9	Total Value of work done.....	= Rs.4191.95 Lacs
10	Value of extra work done after the Contractual date of completion	= Rs. 2233.35 lacs
11	Corresponding time for which time related cost already recovered from extra works = $2233.35 \times 43 / 1958.60$	= 49.03 months Say 49 months
12	Amount of un-recovered overheads payable to the contractor = $(54-49) \times 5.94$	= Rs. 29.70 Lacs
13	Financing cost @ 14% p.a. for a period of 48.5 i.e. $\frac{1}{2}$ of $(43+54)$ months	= Rs.16.8 Lacs
14	Total amount of Award against overheads	= Rs. 46.5 Lacs

10. The main objection raised by learned counsel for NHPC is that the learned Arbitrator failed to consider the bar against award of such amounts under clauses 21.1 and 21.2 of the Special Conditions of the Contract. It is submitted that the entire award has been made by the learned Arbitrator without considering the fact that for all the additional work done, due payments were made and even escalation was granted. The Contractor was thus not entitled to anything in addition over and above the said payments, in view of delays. The overheads incurred by the Contractor were duly compensated and hence during the five month period, no additional overheads ought to have been awarded. Further submission of learned counsel for the NHPC is that there was no evidence led before the learned

Arbitrator to actually show and establish that any additional overhead expenses were incurred by the Contractor. Even the basic material was not placed on record. Learned counsel for NHPC relies upon the judgment of the Delhi High Court in *National Highways Authority of India v. Bumi Hiway (M) SDN BHD, in OMP 249/2013 decided on 25th March, 2015*.

11. The contention of learned counsel for the Contractor, on the other hand, is that the learned Arbitrator has given detailed reasoning as to why clause 21.1 is not applicable. The learned Arbitrator, after considering 15%, as the overhead component, awards the same only for a period of five months. Considering the nature of delay, this award is not unreasonable, inasmuch as even while applying Hudson's formula, some amount is awarded as overhead expenditure based upon the total value of the contract. Learned counsel for the Contractor relies upon the judgment of this Court in *Punjab National Bank v. Bijlee Construction, 190 (2012) DLT 195*, as also section 54 of the Contract Act, 1872. He further relies upon the judgment of the Supreme Court in *McDermott International Inc. v. Burn Standard Co.Ltd. & Ors., (2006) 11 SCC 818*.

12. This Court has heard the submissions of the parties in respect of this claim. The Court is not going into the question of calculation and the manner in which the learned Arbitrator has arrived at the period of five months and Rs.46,50,000/-. The same is a factual analysis. However, what the Court has to consider is whether the award of this claim was barred under clause 21 of the special conditions of the Contract. Clause 21 is set out herein below:

"21. FACILITIES BY CORPORATION

21.1 Where any facility/material or anything is

agreed to be provided by Corporation to Contractor and if it is not provided or if there is any delay in providing the same, Contractor shall not be entitled to any claim or damage from or against Corporation. Contractor may, however, ask for a suitable extension of time which may be granted by Engineer-in-Charge, at his sole discretion as provided in clause 39 of the General Conditions of the Contract.

21.2 In the Contract, unless it is specifically provided that a particular facility, material or any other thing is to be provided by Corporation at its own cost, it is agreed by the parties that the same shall be provided by Contractor at its own cost.”

13. A perusal of this clause shows that if there is any delay by the Corporation i.e. the NHPC in providing any facility, any material, **or anything as agreed**, the Contractor would not be entitled to any claims or damages against NHPC. The clause provides that the Contractor is entitled to seek extension, which would be granted by the Engineer-in-Charge. Learned counsel for the Contractor argues that the factors which resulted in the delay do not constitute a facility or material. A perusal of the reasons for delays, as enumerated by the learned Arbitrator, shows that firstly the delay was in respect of handing over of the site and secondly due to change in the location of structures. Both these would constitute facilities provided by NHPC. The third factor i.e. unforeseen climate conditions is not covered by clause 21. However, broadly, the delay is due to handing over of the site and the change in the location of the structures. Learned Arbitrator has rejected the application of clause 21.1 by holding that the NHPC has not cited any reason falling under clause 21.1. Relevant portion of the award is set out herein below:

“3. The reference by the Respondent to clauses 5 and 15 of GCC is misplaced. Clause 5 deals with the ‘Sufficiency of Tender’ and Clause 15 deals with ‘Works to be carried out in accordance with specifications, drawings and orders etc.’ In the present case the Claim is for compensation for the losses sustained by the Claimant due to failure by the Respondent in fulfilling his obligations under the contract. Clause 21.1 of SCC stipulates that the Contractor shall not be entitled to any claim or damage from the Corporation in case any facility/material or anything related to facility/material, though agreed to be provided by the Corporation, is not provided or there is delay in providing the same. However the Respondent has not cited any such reason of delay in execution of the work.”

14. This conclusion of the learned Arbitrator that, no reason, as covered in this clause, has been cited by NHPC, is clearly contradictory. The award itself records in the above paragraph that NHPC had placed reliance on this clause and had argued that the factors contributing to the delay were covered by the clause. The Arbitrator clearly erred in holding that the NHPC did not cite any reason as covered by clause 21.1. It is the admitted position that extension was granted to the Contractor without levy of any liquidated damages or compensation in terms of clause 21.1. The question is whether the Contractor can claim anything over and above the same under the claim of overhead expenditure. During the five months, which the learned Arbitrator holds to be the delayed period, there is no doubt that the work was being executed by the Contractor and for the said work, payment has been made by the NHPC. When there is a clear bar under the contract, the learned Arbitrator could not have simply rejected this plea of NHPC by

holding that the delays are not due to the delay in provision of the facility, material or any other reason. This interpretation is erroneous. The finding that NHPC has not cited any reason as contained in Clause 21.1 for the delay is thus not tenable. The reasons cited by the Contractor itself for the delays, resulting in the claim being raised, clearly show that they are covered by this clause 21.1. Moreover, delays due to climatic conditions cannot be attributed to the NHPC.

15. Further the learned Arbitrator has also not considered any specific evidence, which has been led but has simply applied 15% as the overheads component. In the absence of any material i.e. evidence in terms of payment of wages, actual office expenditure incurred during this period etc., by applying the ratio in ***Bumi Hiway (supra)***, this Court is of the opinion that without proving actual damage and loss, the Contractor could not have claimed any amounts under this head. Relevant portion of the said judgment is set out herein below:

“13. The principal question that arises therefore is whether in the absence of BHSB placing any material before the AT to prove any loss of profit or damages having been incurred, the AT was justified in proceeding to award BHSB any amount in respect of the said two claims.

14. The Court is conscious of the scope of the interference with an Award in terms of Section 34 of the Act. In Associate Builders v. Delhi Development Authority 215 (2014) DLT 204, after referring to the decision in ONGC Limited v. Western Geco International Limited 2014 (9) SCC 263 the Supreme Court held that where a finding is based on no evidence or the AT takes into account something irrelevant to the decision which it arrives at, such decision would necessarily be perverse. The AT was

expected not to give an Award which was contrary to the settled legal position.

15. In McDermott International Inc. v. Burn Standard Co. Ltd. (supra), the Court specifically dealt with the method for computation of damages. The Court prefaced its discussion with the remarks that “In the assessment of damages, the Court must consider only strict legal obligations, and not the expectations, however reasonable, of one contractor that the other will do something that he has assumed no legal obligation to do.” The Court then explained each of the formulae commonly adopted. The Court noted the criticisms of the Hudson’s formula observing that “it adopts the head office overhead percentage from the contract as the factor for calculating the costs and this may bear little or no relation to the actual head office costs of the contractor.” The Emden formula which has received judicial support in a number of cases has the advantage of using the “contractor’s actual head office and profit percentage rather than those contained in the contract.” The Eichleay formula is used “where it is not possible to prove loss of opportunity and the claim is based on actual cost.” The Court did not endorse any one particular formula since “it is an accepted position that different formulas can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the arbitrator.” What is significant as far as the above discussion is concerned is that it is only concerned with the application of formulae and not whether the formulae would apply notwithstanding there is no proof of the contractor having suffered overhead charges or loss of profit.

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17. The net result of the discussion is that nowhere in

the decision in McDermott International Inc (supra) did the Supreme Court hold that even without producing any material to show loss of overheads or profit, the Arbitrator could apply one of the formulae to award the claims.

18. On the other hand, the Court finds that it has been repeatedly stressed in the decisions of the Court that some basic material has to be placed on record by the contractor to demonstrate loss of profits. It is one thing to say that on account of the premature termination of a contract, losses would be suffered and such in such instances it will be possible to demonstrate loss of profit. However, that is not the case here. Extension of time was given by NHA1 up to 30th September 2004 without levy of LD. As the AT itself noted, BHSB did earn profits but over an extended period of time. Secondly, as the AT itself noted, BHSB did not produce any material to show that it had suffered any overhead costs or loss of profit. Therefore, the question of the AT simply applying the formulae did not arise. The Award appears to have proceeded on guess work.

19....22.....

23. For the aforementioned reasons, the Court is unable to sustain the impugned Award of the Arbitrator as it has proceeded merely on surmises and conjectures in awarding BHSB's claim for overheads and loss of profits without there being any evidence whatsoever produced to even prima facie show that it had suffered overhead charges and incurred losses. This is not a case of inadequacy of evidence but there being no evidence whatsoever to justify the impugned Award. In such circumstances, merely applying formulae to the total cost of the project to calculate the compensation was impermissible in law. The award of the amount under Claim No.7 is therefore set aside. Consequently, the question of awarding any interest on the said amount also does not arise."

16. For the above reasons, the award of amounts under 8.1 is not liable to be sustained and the same is, accordingly, set aside.

Objections in respect of Interest amounts:

17. The next objection is in respect of interest amount, which has been awarded by the learned Arbitrator. The learned Arbitrator has considered one year period as a grace period for the payment of final bill. Post the one year period, the learned Arbitrator has awarded 14% interest from 1st January, 1995 till 31st August, 1998 and interest @ 12% per annum from 1st September, 1998 till 5th June, 2009, which is the date of award.

18. The submission of learned counsel for NHPC is that no interest is payable in respect of any delayed period for non-payment of the final bill in view of clause 49. Learned counsel also relies on the judgment in *Union of India v. Pradeep Vinod Construction Co., in OMP 296/2005 decided on 30th July, 2018*.

19. On the other hand, learned counsel for the Contractor relies upon clause 48 of the Special conditions of Contract to argue that a maximum of six months is the period in which the withholding of the final bill amount can be done. Admittedly, the learned Arbitrator has granted interest after a period of one year from the raising of the final bill. This, according to the learned counsel for the Contractor, cannot be held to be barred under clause 49. Relevant clauses 48, 49 are extracted herein below:

“CLAUSE 48 : PAYMENT OF FINAL BILL:

The final bill shall be submitted by the contractor within one month of the date fixed for completion of the work or of the date the certificate of completion furnished by the Engineer-in-Charge. No further claim in this regard unless as specified herein under shall be entertained. Payment shall be made within three

months if the amount of the contract plus that of the additional items is upto Rs.2 lakhs and in 6 months, if the same exceeds Rs. 2 lakhs of the submission of such bill. If there shall be any dispute about any item or items of the work then the undisputed item or items only shall be paid within the said period of three months or six months, as the case may be. The contractor shall submit a list of the disputed items within thirty days from the disallowance thereof and if he fails to do so, his claim shall be deemed to have been fully waived and absolutely extinguished.

CLAUSE 49: OVER PAYMENTS AND UNDER PAYMENTS:

49.1 Whenever any claim whatsoever for the payment of a sum of money to the Corporation arises out of or under this contract against the Contractor, the same may be deducted by the Corporation from any sum then due or which at any time thereafter may become due to the contractor under this contract and failing that under any other contract with the Corporation or from any other sum whatsoever due to the contractor from the Corporation or from his security deposit, or he shall pay the claim on demand.

49.2 The Corporation reserve the right to carry out post-payment audit and technical examination of the final bill including all supporting vouchers, abstracts, etc. The Corporation further reserves the right to enforce recovery of any overpayment when detected, notwithstanding the fact that the amount of the final bill may be included by one of the parties as an item of dispute before an arbitrator appointed under Clause 55 of this contract and notwithstanding the fact that the amount of the final bill figures in the arbitration award.

49.3 If as a result of such audit and technical examination any overpayment is discovered in respect of any work done by the Contractor or alleged to have been done by him under the contract, it shall be

recovered by the Corporation from the Contractor by any or all of the methods prescribed above, and if any under-payment is discovered, the amount shall be duly paid to the contractor by the Corporation.

49.4 Provided that the aforesaid right of the Corporation to adjust overpayments against amounts due to the contractor under any other contract with the Corporation shall not extend beyond the period of two years from the date of payment of the final bill or in case the final bill is a MINUS bill, from the date the amount payable by the Contractor under the MINUS final bill is communicated to the Contractor.

49.5 Any sum of money due and payable to the contractor (including the security deposit returnable to him) under the contract may be withheld or retained by way of lien by the Engineer-in-Charge or Corporation against any claim of the Corporation or such other person or persons in respect of payment of a sum of money arising out of or under any other contract made by the contractor with the Engineer-in-Charge or Corporation or with such other person or persons.

49.6 The sum of money so withheld or retained under this clause by the Engineer-in-Charge or Corporation will be kept withheld or retained as such by the Engineer-in-Charge or Corporation or till his claim arising out of in the same contract or any other contract is either mutually settled or determined by the arbitrator, if the contract is governed by the arbitration clause under the clause 55 or by the competent court hereinafter provided, as the case may be, and the contractor shall have no claim for interest or damages whatsoever on this account or any other ground in respect of any sum of money withheld or retained under this clause. ”

20. A perusal of the above two clauses shows that under clause 48, if the final bill is less than Rs.2 lakhs, the amount would have to be paid within a period of three months and if the amount of the final bill exceeds Rs.2 lakhs,

the Engineer-in-Charge has the discretion to pay within a period of six months. Under clause 49, the claim of interest is barred only when the money is withheld or retained by the Engineer-in-Charge of the Corporation. The said two clauses have to be read conjointly and it cannot be argued that the interest is not payable in perpetuity if Engineer-in-Charge of the Corporation does not authorise the payment of the bill. Such an interpretation would be contrary to public policy. The admitted position is that a substantial amount was due to the Contractor under the final bill, which the learned Arbitrator has awarded. The computation of the outstanding amount under the final bill is not in dispute but the only issue being disputed is in respect of the award of interest. A reading of clauses 48 & 49 distinguishes the present case from the judgment in the *Pradeep Vinod Construction (supra)*. Learned counsel for the Contractor has placed reliance on *H. P. Housing & Urban Devt. Auth. & Anr. v. Ranjit Singh Rana, AIR 2012 SC 1337* to submit that even in the said case, interest @ 18% was upheld by the Supreme Court. The award of interest is in accordance with law and is not barred under the contract.

21. Under these circumstances, it is held that the interest awarded by the Ld. Arbitrator of 14% and 12% per annum cannot be said to be unreasonable or perverse. Interest at 12% p.a. would be payable from the date of the award till date of this order. The payments be now made by NHPC of the awarded amounts, as per the present order, within 3 months. If payment is not made within 3 months, interest at the rate of 18% p.a. shall be payable on the total awarded amount.

22. The O.M.P is disposed of, in the above terms.

**PRATHIBA M. SINGH
JUDGE**

DECEMBER 06, 2018/dk

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