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

Reserved on : 8th October, 2018

Date of decision : 4th February, 2019

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O.M.P. 329/2010

NTPC LTD.

..... Petitioner

Through: Mr. Puneet Taneja and Ms. Laxmi
Kumari, Advocates. (M:9810208494)

versus

M/S RAJ KISHAN & CO.

..... Respondent

Through: Mr. D. Moitra, Advocate.
(M:9971075019)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The present petition has been filed by NTPC Ltd. (*hereinafter*, 'NTPC') challenging Award dated 13th November, 2009 and correction order dated 22nd February, 2010. Another O.M.P. arising out of the same Award i.e. O.M.P. 320/2010 was dismissed vide order dated 12th September, 2012 by a Ld. Single Judge of this Court. An appeal was filed against the said judgment, which has been admitted and is pending before a Division Bench of this Court.

2. NTPC awarded contract dated 21st March, 1989 for general civil works (GCW) 4 X 210 Mega Watt at NCPS Dadri District Gautam Budh Nagar, UP to the contractor - M/s. Raj Kishan & Company (*hereinafter* 'Contractor') for a contract value of Rs.12,00,87,720.00/-. The case of NTPC is that the work was to be completed within 42 months and thus the scheduled date of completion was 20th September, 1992. However, the

Contractor abandoned the site without completing the project, on 31st January, 1998. The Contractor denies that the work was abandoned, and contends that the work actually stood completed. The factual position however is that no work was executed at the site after 31st January, 1998. Disputes arose between the parties and the Contractor invoked the arbitration clause. Vide order dated 25th November, 2003, this Court appointed the Ld. Sole Arbitrator. Various claims were raised by the Contractor and counter claims were raised by NTPC. The Ld. Sole Arbitrator awarded various claims in favour of the Contractor and some counter claims in favour of NTPC vide award dated 13th November, 2009. Corrections were carried out in the said award vide order dated 22nd February, 2010, and based on a conciliation between the parties, the Ld. Sole Arbitrator modified the impugned award. However, the award was challenged by the Contractor in O.M.P. 320/2010. The said petition was dismissed vide judgment dated 12th September, 2012.

3. The present petition, under Section 34 are the objections of NTPC. The objections have been restricted to the following claims: -

- (i) Award of a sum of Rs.6,79,237.45, being part of claim No.2 which related to payment towards deviated items. This amount, according to NTPC, is also part of Claim No.1(a) and Claim No.1(i)(i).
- (ii) Second challenge is towards the award in claim No.7 and 9.

None of the other objections are pressed for by NTPC.

Objection No.1 - Award under Claim No.2

4. The first objection is in respect of award of Rs.6,79,237.45 as part of Claim No.2, which is argued as being a part of Claim 1(a) and Claim 1(i)(i).

5. The claim raised by the Contractor, under claims 1(a) and 1(i)(i) are in respect of amounts payable to the Contractor on the basis of the measurement of the work executed by it. According to the Contractor, the work executed was duly measured and was entered in the measurement book of NTPC. Under claims 1(a) and 1(i)(i), the Contractor, claimed a sum of Rs.22,61,165/-. Under claim No.2, the contractor claimed a sum of Rs.2,38,00,000/-, which claim was voluntarily modified to 1,86,07,377/-, as being due for the work executed beyond the deviation limits. Under claims 1(a) and 1(i)(i), the learned Arbitrator allowed the claim to the extent of Rs.17,96,281/- and under claim No.2, the learned Arbitrator awarded Rs. 1,54,28,696.15. However, vide modification order dated 22nd February, 2010, the learned Arbitrator modified the claim awarded in respect of claim No.2 for a sum of Rs.6,79,237.45/- on the ground that the Contractor was already paid a sum of 1,47,49,458.70/-. The relevant portion of the modification order is set out herein below: -

“3. On the face of it there appears to be a computation error committed by me. The counsel for the claimant, however, argued that this does not amount to any error in the award in as much as in fact the claimant had not received Rs.1,47,49,458.70 paisa. There is no merit in this argument. I have given a finding on merits, which cannot be reopened while deciding this application, that the respondent had received Rs. 1,47,49,458.70 paisa till the 142 R.A. Bill. Thus I hold that this computation error is liable to be corrected in place of Rs. 1,54,28,696.15 paisa the amount to be allowed as mentioned in para 212 should be 6,79,237.45 paisa.”

6. Claims 1(a), 1(i)(i) and claim No.2 are overlapping in the sense that the former are claims by the Contractor for amounts in respect of work

executed and the latter is in respect of work executed qua deviated items. The total work executed by the contractor, obviously, includes the work executed beyond the limit of 20% for some items and 100% for some other items. For extra works and deviation, the Contractor is entitled to payments as per clause 10C of the General Conditions of Contract. However, the payment cannot be made twice.

7. Under claim No.2, though the original claim was for Rs.2,38,00,000, the contractor itself reduced it to Rs.1,86,07,377/-.

8. The objection of NTPC is that in respect of the deviated items, a sum of Rs.1,47,49,458.70 already stood paid, and thus, the Arbitrator initially erred in awarding Rs.1,54,28,696/-. Thus, the Arbitrator modified the award. However, even in the modification, according to the NTPC, the Arbitrator wrongly awarded Rs.6,79,237.45.

9. According to Mr. Puneet Taneja, learned counsel for NTPC, the parties had reconciled the measurements and the amounts payable under clause 1(a) and 1(i)(i) was only Rs.15,82,378.69/- out of 17,96,281/-. The Contractor, on the other hand, disputed the deduction of Rs.2,13,902.28/-. Mr. Moitra, in response, merely submits that no payments have been received qua the 143rd final bill, but payments have been made only upto 142nd bill.

10. A perusal of the order dated 26th January, 2007 passed by the Ld. arbitrator, shows that the parties had reconciled the amounts payable under clause 1(a) and 1(i)(i) which is recorded as under: -

“Counsel for the parties state that parties have reconciled the amount pertaining to claim No.1A and 1(i)(i) it is agreed that amount payable would be Rs. 15,82,378.69P. However, there is deduction of Rs.

2,13,902.28P which deduction the claimant disputes. Counsel for the respondent resumed the arguments but not completed. The arguments shall continue tomorrow 27th January, 2007 at 11.30 A.M. ”

11. The stand of NTPC is that claim No.2 which deals with the deviated items overlaps with claim 1(a) and 1(i)(i). According to NTPC, the amount award of Rs.6,79,237.45 has been wrongly awarded. The said amount is liable to be awarded only once.

12. This Court has perused the discussion of the Arbitrator on the said claims in the impugned Award and in order dated 26th January, 2007. There is no dispute that the amount of Rs. 1,54,28,696/- is not over and above the amount of Rs. Rs.1,47,49,458.70. This is also reiterated by the Ld. Single Judge in paragraph 55 of the judgement dated 12th September 2012 in OMP NO.320/2010. For the total work executed, the parties have reconciled the amount payable for work executed and NTPC admits the payment of Rs.15,82,378/-. The objection raised by the contractor is in respect of deduction of a sum of Rs.2,13,902/-. The Arbitrator has come to the conclusion that NTPC was not able to show that the deductions are relatable to deductions in the final bill, qua claim 1(a) and 1(i)(i). Thus, the arbitrator held that the amount of Rs. 2,13,902/- was wrongly made. This finding of the Arbitrator does not warrant any interference. However, since the work executed, for which payments have been reconciled under Claims 1(a) and 1(i)(i), includes the work executed beyond the deviation limits, the award of Rs.6,79,237.45 under claim No.2 would be a duplication and is accordingly set aside.

Second Objection qua Claim No.7 and 9

13. Under these heads, the contractor made claims for a sum of Rs.1,35,00,000/- being overhead losses, due to under utilization/partial utilization of tools, plants, machinery, staff and personnel for the prolongation of work. On this count, the learned Arbitrator has awarded a sum of Rs.60,04,386/-. It is the submission of Mr. Taneja that the Ld. Arbitrator having held that the parties had mutually agreed for extension of the contract till 30th September, 1996, without levy of any liquidated damages and without reserving any right to claim damages, the award of losses, for the period 1st May, 1995 till 31st January, 1998 is not sustainable. According to him, at best, the award could have awarded damages for a period post 30th September, 1996. It is further submitted by Mr. Taneja that the award of damages towards damages/losses is not automatic in nature and the Contractor has to establish that actual loss was suffered by means of documentary evidence.

14. On behalf of the Contractor, it is submitted that the learned Arbitrator has awarded the amount based on the Hudson's formula which has been recognised by the Supreme Court in ***McDermott International Inc. v. Burn Standard Co. Ltd. & Ors. (2006) 11 SCC 181*** (hereinafter, 'McDermott').

15. The findings of the Arbitrator are clear. The relevant paragraphs are set out below: -

“120.Admittedly, the respondent has granted 5 extensions and parties have signed revised bar charts in respect of 4 extensions. The first extension was from 21.9.1992 to 20.6.1993, second from 21.6.1993 to 31.12.1993 third from 1.1.1994 to 30.4.1994 fourth from 1.5.1994 to 30.4.1995 and the last one from 1.5.1995 to 30.9.1996.

.....

135. *The perusal of the above correspondence exchanged between the parties during the progress of the work, do indicate that both the parties have been to the some extent responsible for the delay occurring in the completion of the work. It cannot be said with any rationality that the respondent alone had been responsible for the delay in completion of the work. The claimant also had been responsible for not achieving desired progress in the execution of the works due to insufficient deployment of manpower and machinery. In some of the letters, the claimant admitted such facts, as it had been assuring deployment of sufficient resources in future.*

136. *Be as it may, the extensions for completing the work were repeatedly granted and such extensions so granted were unto 30.9.1996. The claimant has been executing the work during the said extended periods, without raising any objection or giving any notice that it was accepting such extensions, reserving its right to claim any damages on account of delays attributable to the respondent. It is, hence, clear that both the parties had given up their grievances with regard to the delays attributable to each other which definitely took place in execution of work and both parties obviously are not entitled to claim any damages of any type for the delay which has occurred at lease in the execution of work, till the last extension.*"

16. In the above two paragraphs of the Award, it is clear that the Arbitrator has held that till 30th September, 1996, both parties were responsible for delays and prolongation. It is only thereafter that the Contractor continued to correspond and raise grievances about the delays by NTPC.

17. Despite the above findings, the Ld. Arbitrator, in the final discussion

under Claims 7 and 9 held as under:

“161. Now coming to the period from 1.5.1995 to 30.9.1996, the correspondence and the documents already referred above indicate that the claimant had put its claims for being compensation for the losses being suffered by the claimant due to the reasons of delay attributable solely to the respondent and the parties had agreed to have the opinion of an expert/consultant Mr. Gahlowt in that respect. No final report of the said consultant has been placed on record. Apart from an averment made by the claimant in its pleading and applications that the said expert had given a final report, the claimants has not led any evidence to prove that in fact, such a final report had been given by the said expert. The onus was not on the respondent to show the negative that the said expert has not given any final report. The fact remains that in the MOM of May, 1996, the parties had referred to the claims of the claimant to be examined to be examined by the respondent, one of which was delay compensation.

162. In view of this, the claimant would be entitled to delay compensation for the period 1.5.1995 onwards, till 31-08-1998, if the finding is to be that delay in the progress of the work was for reasons attributable to the respondent. I have already referred to the correspondent ex-changed between the parties during the said period and it is irresistible that the conclusion can be arrived at that the respondent had failed to perform its various obligations with regard to release of payment, as envisaged in MOM of May 1996 and also its failure to release the fronts.

163. Hence, I hold that the claimant is entitled to have compensation for the losses suffered by the claimant due to prolongation of the contract.....”

18. Thus, the Ld. Arbitrator has awarded damages to the Contractor for the period prior to 30th September, 1996 i.e., from 1st May 1995 till 31st

August 1998, despite there being no evidence on record. The date of 31st August 1998 also appears to be a typographical error – as both parties are *ad idem* that the contractor left the site on 31st January 1998 and the 32 months period was also calculated based on 1st May 1995 to 31st January 1998. The Ld. Arbitrator having held that both parties are responsible for delays till 30th September 1996, could not have awarded damages for the period prior to 30th September 1996. The finding that the Contractor had reserved its right to claim damages, does not obviate the fact that the extensions were sought and granted after being agreed upon. To this extent, the award is self-contradictory. Thus, the award of damages towards losses for a total period of 32 months including the period till 30th September 1996, is clearly not sustainable. The period till 30th September 1996, deserves to be excluded.

19. Insofar as the Arbitrator's finding that the Contractor did not abandon the work, the same being a factual finding on the basis of the appreciation of the letters on record, this Court would not like to interfere with the same.

20. The question then arises is as to whether there would be automatic application of the Hudson's formula as contained in *McDermott (supra)* or would some evidence need to be led by the Contractor to prove actual loss. Admittedly, the site was vacated by the Contractor only on 31st January, 1998. Until then, the Contractor was executing the works. During the period of execution of the works, the Contractor would have to compulsorily retain staff, labour, office premises, etc. It is not even NTPC's case that the Contractor stopped the work prior to 31st January, 1998. This being the position, the award of damages under Claim Nos.7 and 9 is liable to be restricted for the period 1st October, 1996 to 31st January, 1998 i.e. a period of 16 months instead of 32 months awarded by the Arbitrator. Thus, the

amount awarded under Claim Nos.7 and 9 is restricted to a sum of Rs.60,04,386/- ÷ 2 = Rs.30,02,193/-.

21. Written submissions of the Contractor repeatedly state that the 143rd final bill has not been paid by NTPC. No issue has been raised in respect thereof in this petition. The 143rd bill, as per NTPC, has been claimed to have been made. This is a factual issue. If the 143rd Bill has not been paid, the same would be liable to be paid, subject to the decision in the pending appeal.

22. The O.M.P. is disposed of in the above terms. No order as to costs.

**PRATHIBA M. SINGH
JUDGE**

FEBRUARY 04, 2019/Rekha

