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

Reserved on: 21st January, 2019

Date of decision: 26th February, 2019

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O.M.P. 504/2011

THDC INDIA LTD

..... Petitioner

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

versus

JAI PRAKASH ASSOCIATES LIMITED

..... Respondent

Through: Mr. Lovkesh Sawhney, Advocate (M-
9810010392)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The present Section 34 petition has been filed challenging arbitral Award dated 22nd January, 2011 passed by a three-member Tribunal. The Respondent-contractor was awarded a contract for construction of “*Chute and Shaft Spillways at Tehri for the Tehri Dam for the Tehri Hydro Development Corporation (THDC).*” The Letter of Intent was issued on 15th December, 1998. The date of commencement of the work was 29th December, 1998, with a completion period of 54 months. The scheduled date of completion was 28th June, 2003. However, the actual date of completion was 31st December, 2007. The total value of the contract was Rs.474,81,53,760/-. Disputes had arisen between the parties, and the contractor raised various claims. The Arbitral Tribunal was constituted vide THDC’s letter dated 31st July, 2007. Vide the impugned Award, the Arbitral

Tribunal decided various claims and awarded a total sum of Rs.14,98,94,329/-. Some amounts were also awarded to THDC against claim No.7. The relevant portions of paragraphs 5.2 and paragraph 6 are recorded herein below: -

“5.2 The Claimants shall also be entitled for receiving payment of price adjustment from the Respondents under GC Clause 36 on the aforesaid awarded claims where admissible. The AT awards accordingly for the payment of price adjustment in favour of the Claimants. The amount awarded here-in-before in para-5.1 together with such price adjustment shall constitute the amount awarded in favour of the Claimants and as against the Respondents.

...

6. *The position of the amount awarded by the AT in favour of the Respondents and as against the Claimants is as below.”*

S. No.	Details of Claims	Claimed Amount (in Rs.)	Awarded amount (in Rs.)
1.	Amount awarded against claim no.7	3,06,66,970.00	3,06,66,970.00

2. The objections before this Court under Section 34 relate to the following issues: -

a) **Claim no.1**- Claim for reimbursement of payments made under the newly levied U.P. Tax on entry of goods for Rs.65,70,529/-.

b) **Claim no.3** – Award of Price Adjustment under Claim no.3

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c) **Claim no.8** – Award of Price Adjustment under Claim no.8

d) In addition, award of Interest was also objected to.

Claim No.1: Claim for reimbursement of payments made under the newly levied U.P. Tax on entry of goods for Rs.65,70,529/-.

3. The contractor claimed a sum of Rs.65,70,529/- on the ground that entry tax was levied by the State of U.P. on movement of vehicles, after the submission of bids by the contractor. The said tax was levied vide an Ordinance of 31st October, 1999. It was the contractor's case that any newly imposed tax is liable to be reimbursed to the contractor as per clause 30 of the General Conditions of Contract (GCC). The Arbitral Tribunal, after perusing the documents and the contract, awarded a sum of Rs.60,72,164/- in favour of the contractor.

4. Mr. Taneja appearing for THDC submits that the Arbitral Tribunal has misinterpreted clause 30.0 and has wrongly directed reimbursement of the amounts claimed by the contractor. According to learned counsel, liability to pay taxes was purely that of the contractor. THDC was to reimburse any taxes and charges/duties only of "direct material inputs". According to Mr. Taneja, entry tax which was imposed in respect of construction equipment or spares does not constitute direct material inputs and hence the tax is not liable to be reimbursed. He relies upon the definition of "construction plant" in clause 1.0(x) in the GCC to submit that "construction plant" does not include material or other things which are intended to form part of the permanent work. He further relies on an explanation of 'Standard Costings' from www.accountingcoach.com to submit that direct materials means those raw materials which are traceable to

a product. He places reliance on *Numaligarh Refinery Ltd. v. Daelim Industrial Company Ltd. (2007) 8 SCC 466* to submit that the Supreme Court has held that once it is clear that the taxes are to be borne by the contractor, even countervailing duty is the responsibility of the contractor.

5. On the other hand, Mr. Lovkesh Sawhney, appearing for the Respondent, submits that the clause itself is clear i.e. that new taxes which are not in the contemplation of the contractor are not deemed to be included within the submitted bid. The contractor cannot be burdened with the additional liability of paying those taxes which are not in existence at the time of submission of the bid. He further submits that raw material is different from material inputs. Construction inputs and spares, which are used for construction in fact constitute material inputs. He further submits that unless the finding of the Tribunal is perverse, this Court ought not to entertain objections in respect of the same. He relies upon the findings of the Arbitral Tribunal in paragraph F under Claim No. 1 to submit that though the construction equipment and spares are not directly consumable material, they still constitute a direct material input for execution of work.

Findings

6. There is no doubt that the UP Entry Tax came into existence after the submission of the bids and was thus not taken into consideration by the contractor while submitting the bid. The tax liability would depend on an interpretation of Clause 30, which reads as under:

“Clause 30.0 TAXES, DUTIES AND LEVIES ETC.

i) All existing sales tax or duty or levy,. etc. (of central or state government, municipal or local authorities etc.) such as octroi, Dharat, Terminal Tax on all

*materials, equipments, Petrol, oil, Lubricants and spare parts that the contractor has to purchase for the performance the contract, **shall be payable by the contractor** and the corporation will not entertain any claim for compensation whatsoever, in this regard. The rates quoted by the Contractor shall be deemed to be inclusive-of all such taxes, duties, levies, royalties etc .*

*ii) Any statutory increase and/or **new impositions in the taxes**, duties, levies, octroi, royalties, Dharat, terminal tax (other than exise duty) **on direct material inputs to the works shall be paid by the contractor and the same shall be reimbursed to him on production of documentary evidence** of increase/new imposition and proof of its payment to concerned Govt. authorities. If there is any reduction in above, the same is to be passed on to THDC by contractor.”*

7. A perusal of the above Clause reveals that under sub-Clause (i), all existing taxes, levies and duties on all the inputs were to be paid by the contractor and no claim for compensation was entertainable from THDC. However, in case of any new tax impositions, the same was to be initially paid by the contractor and thereafter reimbursement could be claimed. Mr. Taneja’s argument is that all newly imposed taxes which are imposed on “direct material inputs” are liable to be reimbursed. What are direct material inputs? He submits that since the equipment and spares which are used on the project are retained by the contractor, they do not constitute direct material inputs. He relies on an extract from www.accountingcoach.com with respect to the meaning of the term “direct materials purchased”. The said extract reads as under:

***“DIRECT MATERIALS PURCHASED: STANDARD
COST AND PRICE VARIANCE***

Direct materials refers to just that – raw materials that are directly traceable into a product. In your apron business the direct material is the denim (In a food manufacturer's business the direct materials are the ingredients such as flour and sugar, in an automobile assembly plant, the direct materials are the cars' component parts)”

8. On the basis of this extract, the submission is that it is only raw materials that are directly traceable to the products that would constitute direct material inputs. The Tribunal, on this aspect holds as under:

“...

Thus, the extra expenditure incurred by the Contractor towards payment of entry tax which was imposed subsequent to the submission of bids remained uncompensated. The equipment brought by the Contractor for execution the work was also an 'input' for doing the work. The Contractor's equipment may not be directly consumable material in the work but it was a direct material input for execution of the work. The Respondents are taking the phrase 'direct material input' to mean the materials which are directly used as inputs and are consumed in construction work. The phrase 'direct material input' cannot be confused with 'consumable raw material' which is put in directly in the execution of the work. The phrase 'direct material input' can only mean the 'inputs' i.e. resources which are 'material' for the execution of the work and are 'directly' related to the construction work. The equipment and related spares brought to site by the Contractor for execution of the work were thus 'direct material inputs' in the work. The rates quoted by the Contractor in the bid only cater to the depreciation of the equipment in the execution of the work. The entry tax imposed subsequent to submission of bids remains uncompensated and the Contractor could never foresee such expenditure at the time of bidding. The AT,

therefore, holds that the expenditure incurred by the Claimants towards payment of entry tax is required to be reimbursed to them. The Claimants have been able to prove such expenditure to the extent of Rs.60,72,164/- only.

G. The AT, therefore, awards the amount of Rs.60,72,164/- in favour of the Claimants M/s Jaiprakash Associates Ltd. The Respondents, M/s Tehri Hydro Development Corporation Ltd. are accordingly directed to pay this amount of Rs.60,72,164/- to the Claimants M/s Jaiprakash Associates Ltd. against claim no. 1 which was for Rs.65,70,529/-."

9. As seen from the above extract, the Tribunal distinguishes between 'direct material inputs' and 'consumable raw material' and holds that the two terminologies are not identical. According to the Tribunal, inputs would include resources used for the execution of the work and are directly related to the construction of the work.

10. A perusal of Clause 30 shows that the question as to what constitutes direct material inputs can in fact be deciphered from sub-clause (i) itself. The contractor is liable under sub-clause (i) for all existing taxes and charges on materials, equipments, petrol, oil and spare parts which are treated as inputs relevant to the construction. While Clause 30.0(i) fastens the liability on the contractor for existing taxes, for any new imposition, under sub-clause (ii) it uses the phrase "direct material inputs." What constitutes direct material inputs has to be the same for sub-clause (i) and sub-clause (ii). Equipment and spares are inputs relevant to the construction project. Though the said equipment and spares may be retained by the contractor and used in other projects, entry tax is imposed for the movement of the said equipment and their entry into a particular State. The said tax is

relevant directly to the construction as, if not for the said project, the equipment would not be brought to the site. The retention of the equipment after the project is over, by the contractor cannot determine as to whether entry tax is payable or not. If not for the movement of the equipment, no tax would be liable to be paid. On a plain reading of Clause 30, it is clear that all the inputs which go into the construction including fuel, equipment and spares would constitute direct material inputs. Thus, the Tribunal is right in holding that '*direct material inputs*' is not '*consumable raw material*' alone.

11. In ***Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd. (2007) 8 SCC 466***, countervailing duty was imposed after the agreement was executed between the parties. The contractor claimed reimbursement of the same. The Bombay High Court held that the countervailing duty was not liable to be reimbursed. The reason for this was Clause 6 of the agreement which reads as under:

“6. It is specifically understood and agreed between the parties hereto that if there is any liability towards taxes/duties (including customs duty on foreign component of supply portion) as may be assessed/claimed/demanded by the Indian or foreign authorities concerned, it shall be the sole responsibility/liability of the contractor to pay all such taxes/duties and that the owner shall not be responsible at all for the payment of such taxes/duties.”

This judgment of the Bombay High Court was upheld by the Supreme Court. A perusal of the clause above itself clearly shows that there was no separate clause in relation to new impositions, unlike in the present case. In ***Numaligarh Refinery Ltd. (supra)***, all taxes, duties etc. were the sole responsibility of the contractor. Since, there was no delineation or

O.M.P. 504/2011 *Page 8 of 17*

distinction between existing taxes and duties and new impositions, the Supreme Court upheld the judgment of the Bombay High Court that the countervailing duty was to be borne by the contractor. The clause in the present case is different and hence it is distinguishable from the facts of *Numaligarh (supra)*.

12. The award of reimbursement of entry tax under Claim -1 is accordingly upheld.

Claim no.3 – Award of Price Adjustment under Claim no.3

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Claim no.8 – Award of Price Adjustment under Claim no.8

13. These two claims are related to price adjustment, which was awarded by the Tribunal. They relate to payment of amounts due to 'wrong classification of concrete done in wall in front of tunnel T-1 and T-2'. The Tribunal has gone into the question of wrong classification and has held that the contractor is entitled to compensation due to wrong classification and awarded a sum of Rs.94,59,988/-. THDC does not challenge the award of this amount. However, what is challenged is the award of price adjustment under General Condition Clause 36 of the contract. The relevant portion of the award which grants price adjustment is set out herein below:

“E. The Claimants have also prayed that they are entitled to Price Adjustment as admissible under GC Clause 36. The AT further awards that the Respondents shall also pay Price Adjustment to the Claimants as admissible under the aforesaid clause in addition to the awarded sum of Rs.94,59,988.00

F. The Respondents, M/s Tehri Hydro Development Corporation, are accordingly directed to pay the amount of Rs.94,59,988.00 + Price Adjustment amount

as admissible under GC Clause 36 to Claimants, M/s Jaiprakash Associates Ltd. against claim no.3”

It is submitted by Mr. Taneja that the award of price adjustment is without any reasoning. He further submits that since the Tribunal has held that the wall should be treated as a miscellaneous structure under BOQ item no.18.09, price adjustment is not liable to be given. On the other hand, Mr. Sawhney submits that since the Tribunal held that this was a BOQ item, escalation was liable to be allowed.

14. Claim – 8 related to payment towards ‘work done for placement of high strengthened concrete in shaft spillways’. The contractor prayed that the rate for this item is governed by Clause 35(ii) which deals with extra items. The argument was that high-strength concrete is different from conventional concrete, and hence this is an extra item.

15. THDC does not challenge the award of the principle but argues that price adjustment is liable to be granted under Clause 36(i)(b) only if the rate of such item has been worked out ‘on the basis of actual analysis of the cost of material’. Since the Arbitral Tribunal treated this work as a substituted item and not a BOQ item, price adjustment is not liable to be granted on all extra and substituted items.

16. A perusal of the award insofar as Claim – 3 is concerned, shows that there is no doubt that the work done under Claim – 3 is considered as a BOQ item. Thus, price adjustment has been rightly granted by the Tribunal. Insofar as the work covered under Claim – 8 is concerned, initially in the award no price adjustment was granted. The contractor, however, relies on an observation of the Tribunal in para 5.2 which reads as under:

“5.2 The Claimants shall also be entitled for receiving

payment of price adjustment from the Respondents under GC Clause 36 on the aforesaid awarded claims where admissible. The AT awards accordingly for the payment of price adjustment in favour of the Claimants. The amount awarded here-in-before in para 5.1 together with such price adjustment shall constitute the amount awarded in favour of the Claimants and as against the Respondents.

On the basis of this observation of the Tribunal, it is argued that price adjustment was given by the Tribunal.

17. However, in order to get the position clarified, the contractor moved an application under Section 33 of the Act. The Tribunal then clarified the position by a separate order dated 25th March, 2011, which reads as under:

“10. A simple reading of the aforesaid Para makes it very clear that as per the Award, the price adjustment has to be paid by the Respondents to the Claimants on all the claims where admissible under GC Clause 36 in addition to the awarded amounts. The Claimants in their Statement of Claims had requested for price adjustment on claims no.3 and 8. The AT has also noted this in the narration of the claims no.3 and 8 in the Award. The AT has awarded the claims no.3 and 8 on the basis of BOQ rates of the contract. In view of the para 5.2 of the Award, the Claimants shall be entitled to receive from the Respondents, price adjustment in respect of Claim No.3 & 8 as per GC Clause 36. While dealing with the claim no.3 in Para E on page no.23 of the Award, AT has mentioned that the Respondents shall also pay price adjustment to the Claimants as admissible under the clause (GC Clause 36) in addition to the awarded amount in respect of claim no.3. However, similar mention of price adjustment with respect to claim no.8 was omitted by accident by the AT. As awarded amount on claim no.8 has also been found payable in the Award as per

B.O.Q. rates as such price adjustment shall be payable to the Claimants on claim no.8 also in accordance with GC Clause 36 in addition to the amount of Rs.10,61,49,000.00 awarded against claim no.8. Thus as per para 5.2 of the Award, price adjustment as admissible under GC clause 36 shall be payable on claims no.3 and 8 only.”

18. According to Mr. Taneja, this order was beyond the scope of review or correction by the Tribunal. Since there was no price adjustment given in the first place in respect of Claim – 8, the same could not have been awarded by means of correction as it was a substantive claim.

19. On this, the argument of THDC may not be right. Though in Claim – 3, THDC specifically claims price adjustment, the observation in para 5.2 is clear that the Tribunal gave a general price adjustment “where admissible”.

20. The question is whether price adjustment is admissible for the work covered under Clause – 8. The Tribunal has treated the work under Claim – 8 as an extra or substituted item. This is clear from para D. The relevant extract is reproduced herein below:

“...
Thus the work of M-60 high grade concrete with micro-silica is a substituted item in place of M-30 concrete. There is no rate for payment of high-grade concrete with micro-silica in Part-B & C of Contract.”

Work done under Claim – 8 is treated as a substituted item, to which Clause – 36 relating to price adjustment does not apply automatically. The relevant portion of Clause -36 is extracted herein below:

“Clause 36.0 PRICE ADJUSTMENT

i) Contract price as awarded shall be adjusted for increase or decrease in rates and price for labour, materials, fuel and lubricants in accordance with the

following principles and procedures:-

a) Hire charge of equipment taken on hire from the corporation by the Contractor, materials if any and electrical energy etc. supplied by the Corporation, at fixed prices shall be excluded from the scope of the price adjustment.

b) For the purpose of price adjustment, the value of work done during the period shall be taken as the value of work done minus (i) Cost of materials issued by the Corporation, if any (ii) Electricity charges (iii) Hire charge of equipments, if any. The value of work done for the purpose of price adjustment shall also include extra, additional, substituted and altered items whose rates have been worked out on the basis of actual analysis of cost of material.

Base date for the purpose of escalation on such extra items shall be the month in which the execution of extra items begins. The approved item rate shall then be de-escalated based on the indices to the base date for the contract as whole and then on such reduced rates escalation as per contract shall be paid in the same fashion as for normal scheduled items.”

From the above clause, it is clear that price adjustment is available for BOQ items, for extra, additional, substituted and altered items only if an actual analysis of the cost of material has been done. The Tribunal has, while working out the rates for this item, not worked out the same on the basis of an actual analysis of the cost of material. This is clear from the following extract:

“ ...

Once it is found that there is a rate available in the schedule of quantities and bids for payment of this substituted item of work, the other provisions of fixing rates in GC Clause 35 are no longer required to be looked into. The AT has also considered the authorities cited by the Respondents in this respect. The AT finds

that when there is a rate specified in item no.23 of Part-A high grade concrete with micro-silica which is Rs.4512 per cum, the other provisions of GC Clause 35 are not required to be looked into. There is, therefore, no contractual requirement to analyse the rate from any similar item(s) of work or on the basis of Central Water Commission Guidelines. The AT holds that the Claimants are accordingly required to be paid for the substituted item of work done in RBSS and LBSS @Rs.4512 per cum. The AT also finds that there is no dispute about the quantities executed for this work in RBSS & LBSS and as given by the Claimants in the updated Ann-CV submitted before the AT. On the basis of these executed quantities in RBSS & LBSS and after off-setting the amount already paid to the Claimants, the additional amount payable against claim no.8 comes to Rs.10,61,49,000.00 (rounded off). The AT accordingly awards Rs.10,61,49,000.00 in favour of the Claimants against claim no.8 which was for the claimed amount of Rs.18,38,07,673.00. ”

21. The Tribunal has merely applied a rate which could be closest to the relevant item. Since actual analysis of the cost of material has not been done on work forming part of Claim – 8, no price adjustment could have been granted. There is no basis or reasoning given by the Tribunal for awarding the price adjustment. A general observation in para 5.2 does not mean that the Tribunal had applied its mind on this aspect. Thus, on Claim – 8, price adjustment is not liable to be granted.

Claim for Interest from the date of cause of action till the date of award.

22. The Arbitral Tribunal has awarded interest of 10% per annum on the awarded amount. It is the argument of THDC that Clause 50.0 and 51.0 prohibit the grant of any interest. The said two clauses read as under:

"Clause 50.0 INTEREST ON MONEY DUE TO THE CONTRACTOR

No omission on the part of the Engineer in charge to pay the amount due upon measurement or otherwise shall vitiate or make void the contract, nor shall the contractor be entitled to interest upon any guarantee or payments in arrears nor upon any balance which may on the final settlement of his account, be due to him.

Clause 51.0 NO CLAIM FOR DELAYED PAYMENT DUE TO DISPUTE ETC.

No claim for interest or damage will be entertained or be payable by the corporation in respect of any amount or balance which may be lying with the corporation owing to any dispute, difference or misunderstanding between the parties or in respect of any delay or omission on the part of the Engineer in charge in making intermediate or final payments or in any other respect whatsoever. "

This clause has been interpreted by Delhi High Court in ***Jaiprakash Associates Ltd. v THDC India Ltd FAO(OS) 596/2011***, decided on 14th December, 2012 wherein the Division Bench held as under:

"17. We thus correct the reasoning. Clause 50 of the instant contract prohibits interest to be paid if payment is delayed on account of a measurement or otherwise. Clause 51 prohibits interest to be paid in respect of money lying with the corporation i.e. security deposits or retention money and also includes a prohibition for interest to be paid owing to any dispute, difference or misunderstanding between the parties or on account of delay or omission to make payments and the clause terminates with the phrase 'in any other respect whatsoever'.

18. The rule of ejusdem generis guides us that where two or more words or phrases which are susceptible of analogous meaning are coupled together, a noscitur a

sociis, they are to be understood to mean in their cognate sense and take colour from each other but only if there is a distinct genus or a category. Where this is lacking i.e. unless there is a category, the rule cannot apply.

19. Thus, the two clauses in the instant case compel us to hold that neither there is a conflict in the decisions of the Supreme Court in Harish Chandra's case (supra) and Jai Prakash Associates" case (supra) and that the law declared in Jai Prakash Associates" case (supra) governs the instant contract."

23. The above judgment of the Division Bench has been recently upheld by the Supreme Court in ***Jaiprakash Associates Ltd. v Tehri Hydro Development Corporation India Ltd., Civil Appeal 1539/2019, Decided on 7th February, 2019*** wherein the Supreme Court has observed as under:

"16. In this whole conspectus and keeping in mind, in particular, that present case is regulated by 1996 Act, we have to decide the issue at hand. At this stage itself, it may be mentioned that in case clauses 50 and 51 of GCC put a bar on the arbitral tribunal to award interest, the arbitral tribunal did not have any jurisdiction to do so. As pointed out above, right from the stage of arbitration proceedings till the High Court, these clauses are interpreted to hold that they put such a bar on the arbitral tribunal. Even the majority award of the arbitral tribunal recognised this. Notwithstanding the same, it awarded the interest by relying upon Board of Trustees for the Port of Calcutta case. The High Court, both Single Bench as well as Division Bench, rightly noted that the aforesaid judgment was under the 1940 Act and the legal position in this behalf have taken a paradigm shift which position is clarified in Sayeed Ahmed and Company case. This rationale given by the High Court is in tune with the legal position which stands crystallised by catena of judgments as noted above.

17. Another reason given by the High Court is equally convincing. The Clauses 50 and 51 of GCC are pari materia with Clauses 1.2.14 and 1.2.15 of GCC in THDC case. Those clauses have been interpreted by holding that no interest is payable on claim for delayed payment due to the contractor. Same construction adopted in respect of these clauses, which, in fact, is a case between the same parties, is without any blemish.”

24. Applying the above judgment, the award of interest is liable to be set aside as Clauses 50 and 51 clearly bar grant of interest in respect of any amount or balance or in any respect whatsoever.

25. Thus, the award of the Tribunal is set aside in so far as it relates to Claim 8 and the claim for interest from the date of cause of action till the date of award. The findings of the arbitrator under Claims 1 and 3 are not interfered with.

26. O.M.P. is disposed of in the above terms. No orders as to costs.

PRATHIBA M. SINGH
JUDGE

FEBRUARY 26, 2019

Rekha/Rahul