

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 02.07.2019

+ **OMP (COMM) 16/2017 & IA No.528/2017**

NTPC LIMITED

..... Petitioner

versus

VOITH HYDRO JOINT VENTURE

..... Respondent

Advocates who appeared in these cases:

For the Petitioner: Mr Vikas Singh, Sr. Advocate with Mr Ashish Kumar and Ms Shantanu Sharma.

For the Respondent: Mr Sandeep Sethi, Sr. Advocate, Mr Ciccu Mukhapadhaya, Sr. Advocate with Mr Omar Ahmad, Mr Vikram Shah and Mr Ishan Gaur.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (hereafter 'NTPC') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act') impugning the arbitral award dated 23.08.2016 (hereafter 'the impugned award') rendered by the Arbitral Tribunal (by majority) comprising of Professor Dr. Albert Jan Van Den Berg (Presiding Arbitrator), Mr Michael Black, QC (Co-Arbitrator) and Justice (Retd.) G. N. Ray (Co-Arbitrator). The arbitral award was rendered by Professor Dr. Albert Jan Van Den Berg and Mr Michael

Black, QC with Justice G.N. Ray returning a contrary opinion. The Arbitral Tribunal partly allowed the claims made by the claimants and rejected the counter claim made by NTPC. Justice (Retd.) G. N. Ray rendered a contrary opinion accepting the NTPC's claim that the contract between the parties stood frustrated. He further concluded that the claim made by the claimants were barred by limitation. However, he concurred with the majority in holding that NTPC's counter claim was time barred and deserved to be rejected.

2. NTPC assails the impugned award, essentially, on three fronts. First, it claims that the claims made by the claimant are barred by limitation. Second, it claims that performance of the contract between the parties was rendered impossible and, therefore, had become void by virtue of Section 56 of the Indian Contract Act, 1872 (hereafter 'the Contract Act'). It is contended that in the circumstances, NTPC was liable to restore the advantage under the Contract but was not liable to make any payment on account of damages. Third, it is contended that the impugned award is contrary to public policy inasmuch as the Arbitral Tribunal has awarded damages without the claimants establishing the cost and expenses incurred by it.

Factual Matrix

3. On 23.06.2004, NTPC and Government of Uttarakhand entered into an agreement for execution of a Hydro Electric Project to be constructed on the river Bhagirathi known as Loharinag Pala Hydro Electric Power Project (4x150MW) (hereafter referred to as 'the

Project’). The Ministry of Environment and Forests accorded clearance for the project on 08.02.2005 and the infrastructure work commenced during the year 2005. On 30.06.2006, the Ministry of Power, Government of India conveyed its approval for granting the status of a ‘Mega Power Project’, to the Project.

4. On 30.06.2006, NTPC invited bids for the Electro Mechanical Package for the Project. An unincorporated Joint Venture named as Voith Siemens Joint Venture constituted by Voith Siemens Hydro Power Generation Ltda. (Brazil), Voith Siemens Hydro Power Generation S.p.A (Italy) and Voith Siemens Hydro Pvt. Ltd. (India) submitted its bid. The said bid was accepted and on 20.02.2008, NTPC and the constituent entities of Voith Siemens Joint Venture entered into three separate contracts (hereafter collectively referred to as ‘the Contract’). The said entities are collectively referred to as ‘the Claimants’). The details of the three separate contracts (the Contract) are as under:-

“(i) Agreement No. CS-5506-906(R)-2-FC-COA-5050 “for the work of design, engineering, manufacture, inspection and testing at supplier’s works, packing, forwarding and dispatch from manufacturer’s works to port of disembarkation in India of all offshore Plant and Equipment (including Type Tests) and Mandatory Spares on CIF (Indian port-of-entry) basis for Electro Mechanical Package (‘the Facilities’) of Loharinag Pala HEPP (4x150MW)” (“**First Contract**” or “**Offshore Supplies Contract**”);

(ii) Agreement No. CS-5506-906(R)-2-SC-COA-5051 "for the work of design, engineering, manufacture, inspection and testing at supplier's works, packing, forwarding and dispatch from manufacturer's works/place of dispatch (both in India) of all Plant and Equipment (including Type Tests) and Mandatory Spares on Ex-works (India) basis for Electro Mechanical Package ('the Facilities') of Loharinag Pala HEPP" ("**Second Contract**" or "**Onshore Supplies Contract**");

(iii) Agreement No. CS-5506-906(R)-2-TC-COA-5052 "for the work of providing all services i.e. port handling, port clearance and port charges for the imported goods, further loading, inland transportation for delivery at Site, inland transit insurance, unloading, storage, handling at Site, insurance covers other than inland transit insurance, installation, testing and commissioning, completion of facilities and handling over to NTPC including conducting Guarantee Tests in respect of all the Plant and Equipment covered under 'First Contract' and 'Second Contract' for the complete Electro Mechanical Package ('the Facilities') of Loharinag Pala HEPP (4x150MW)" ("**Third Contract**" or "**Onshore Services Contract**");"

5. On 13.06.2008, Professor G. D. Agarwal began a fast unto death on the bank of the river Bhagirathi protesting against the construction of the Project. He was subsequently, assured by the Ministry of Power, Government of India that a high-level expert group would be constituted "to examine the various technical issues involved in ensuring the required flow in the river Bhagirathi to keep the river

alive.” Complying with the aforesaid assurance, a high-level expert group was constituted in July, 2008.

6. On 14.01.2009, Professor G. D. Agarwal began a second fast. In February, 2009, the high-level expert group submitted its report. On receipt of the said report, the Ministry of Power informed Professor G. D. Agarwal that the release of water from the Project would be 16 cumec or as may be decided by Ganga Authority, which was under formation at the material time. He was also assured that there would be no further Hydro Power Projects on the River Bhagirathi. However, Professor Agarwal did not accept the assurance and did not end his fast.

7. On 19.02.2009, the Ministry of Power informed Professor Agarwal of its decision to “suspend work on Loharinag-Pala Barrage Project on Bhagirathi river immediately” and requested him to end his fast. Professor Agarwal ended his fast and on the same date – that is, on 20.02.2009 – the Government of India established the National Ganga River Basin Authority (hereafter ‘NGRBA’), with the Prime Minister of India as its Chairman, under Section 3(3) of the Environment Protection Act, 1986.

8. On 26.02.2009, the claimants sent a letter to NTPC enquiring whether the news reports regarding suspension of work had any bearing on the works under the scope.

9. In the meantime, a Public Interest Litigation captioned “*Rural Litigation and Entitlement Kendra v. Union of India and Others*” was filed in the Uttarakhand High Court, *inter alia*, challenging the decision

of the High Court to suspend the work on Loharinag-Pala Barrage Project. On 26.02.2009, the High Court of Uttarakhand passed an interim order directing that the decision of the Government of India to suspend the work on the Project would not be acted upon till further orders. Thereafter, on 20.03.2009, the Ministry of Power, Government of India directed NTPC to resume the work on the Project without any further delay.

10. On 18.05.2009, the High Court of Uttarakhand disposed of the writ petition (*Rural Litigation and Entitlement Kendra v. Union of India and Others*: W.P.(C)15/2009) by referring the question whether to continue the Project or not to the NGRBA. The Court also expressly vacated the interim order passed on 26.02.2009.

11. In the meanwhile, the parties continued to have the Technical Coordination Meetings (TCMs) on various dates. The Contract Review Meetings were also held on 14.05.2008 and 19.12.2008. The claimants also continued to submit the progress reports from time to time.

12. On 03.04.2009, the Claimants requested for information regarding the revised dates of readiness of certain civil works and by a letter dated 16.04.2009, NTPC informed the Claimants that the process for revision of the dates was under consideration and the same would be communicated to the Claimants in due course. At a meeting held on 07.05.2009, NTPC provided revised dates with regard to the readiness of some of the civil works.

13. On 24.09.2009, the Claimants addressed a letter to NTPC requesting an update as to the status of the Project in light of the civil progress, demonstrations and reports regarding the decision of the Uttarakhand High Court. Thereafter, on 02.11.2009, the claimants informed NTPC that they would be rescheduling the manufacturing plan of certain items.

14. On 12.11.2009, the Claimants issued a Notification under Clause 41.2(b) of the General Conditions of Contract forming part of the Contract (hereafter 'GCC') informing NTPC that the Claimants were reducing the rate of progress. It is relevant to note that in terms of Clause 41.2(b) of the GCC, the contractor could issue a fourteen days' notice to suspend the performance of its obligations under the Contract for any reason attributable to the Employer (NTPC).

15. On 05.01.2010, the Claimants sought certain clarifications with regard to status of the Project from NTPC. In the meanwhile, on 02.12.2009, the Claimants also submitted revision of the programme of performance. However, NTPC did not respond to the aforesaid letters.

16. On 31.12.2009, the Claimants sent a letter requesting for adjustment of the Contract Price pursuant to the revised programme sent earlier. NTPC responded to the aforesaid letter on 25.01.2010 informing the claimants that the price adjustment would be addressed as per the formula provided in the Contract. In response to the same, the Claimants sent a letter dated 09.02.2010 requesting NTPC to reassess the Claimants' request.

17. On 16.04.2010, the Claimants once again sought a clarification with regard to the status of the Project in the light of the news reports indicating that the Project had been shelved.

18. The Claimants sent another Notification under Clause 41.2(b) of GCC further reducing the rate of progress by a letter dated 10.05.2010.

19. On 26.05.2010, NTPC informed the Claimants that the work relating to the Project was suspended in compliance with the directions issued by the Government of India and the matter was under consideration of the NGRBA.

20. On 23.07.2010, NTPC sent a letter clarifying that its earlier letter dated 26.05.2010 was issued as a formal intimation regarding the status of the Project. It further clarified that all contractual issues relating to equipment would be dealt with separately as per contractual provisions. The said letter also indicated that the work was under suspension pursuant to the Government of India directives dated 19.02.2009.

21. On receipt of the aforesaid letter, the Claimants sent a letter dated 10.08.2010, *inter alia*, stating that NTPC had never informed the Claimants that 19.02.2009 was the date for suspension of the works and claimants would treat NTPC's letter as its notice of suspension.

22. On 27.08.2010, the Claimants once again sent a letter requesting clarification as to the further course of action in the light of the newspaper reports indicating that the Government of India had decided to scrap the Project.

23. On 31.08.2010, NTPC informed the Claimants that the Committee constituted by the Government of India had sent its recommendations to NGRBA to scrap the Project and called upon the Claimants to put their activities relation to the Contract on hold and not to take up any further activity in order to minimise the costs of the Project.

24. On 17.09.2010, the Claimants informed NTPC that the aggregate period of suspension had exceeded ninety days and, therefore, called upon NTPC to issue a written notice for resuming the performance or for a change in facilities in accordance with Clause 39 of GCC. The said letter was followed by another letter dated 25.09.2010, whereby the Claimants requested for reimbursement of additional costs and expenses in terms of Clause 41.3 of GCC.

25. On 01.11.2010, NGRBA accepted the recommendations to scrap the Project. NTPC communicated this decision to the Claimants by a letter dated 08.11.2010.

26. On 15.11.2010, the Claimants sent a letter dated 15.11.2010 informing NTPC that they were taking reasonable mitigating steps in terms of demobilisation and requested NTPC for detailed instructions as to how to proceed further.

27. On 24.12.2010, the Ministry of Power, Government of India sent a letter to NTPC informing NTPC of the decision of NGRBA to scrap the Project. This was duly communicated by NTPC to the Claimants

by a letter dated 05.01.2011. NTPC further requested the Claimants to submit detailed expenses for submission to the Government of India.

28. On 31.01.2011, NTPC sent a letter to the Claimants stating that in view of the directive of the Government of India, the Contract stood frustrated. Thereafter, by a letter dated 16.02.2011, NTPC called upon the Claimants to return the outstanding advances. However, prior to that the Claimants submitted a non-binding estimate of ₹190 crores (1900 million) as costs incurred.

29. On 28.02.2011, the Claimants sent a letter disputing that the Contract stood frustrated. They further denied that any amount paid under the Contract remained as an advance. They asserted that the same had been duly adjusted and called upon NTPC to withdraw its request for return of the amounts originally advanced and to return the bank Guarantees furnished by the Claimants.

30. Thereafter, the Claimants submitted a summary of the status of the work as on 29.04.2011 and called upon NTPC to conduct a joint physical verification. Similar requests were made by the Claimants by letters dated 11.05.2011 and 13.05.2011, as well.

31. The disputes between the parties could not be resolved and on 08.05.2013, the Claimants issued a notice to NTPC for appointment of an adjudicator under Clause 6.1.1 of GCC. It was further stated in the notice that if the process of allocation was not completed within the time frames as prescribed under the Contract, the said letter be treated as a notice by arbitration under Clause 6.2.7 of GCC.

32. On 23.09.2013, NTPC appointed Justice (Retd.) G. N. Ray as an adjudicator. However, in the meantime, on 09.09.2013, the Claimants served a notice appointing Mr Michael Black, QC as their nominee Arbitrator. The Claimants, thereafter, filed an application before the Supreme Court of India under Section 11 of the A&C Act for constitution of an Arbitral Tribunal. On 09.04.2014, the Supreme Court of India appointed Justice (Retd.) G. N. Ray as NTPC's nominated Arbitrator.

33. On 09.05.2014, both the nominated Arbitrators, Justice (Retd.) G. N. Ray and Mr Michael Black, QC, jointly appointed Professor Dr. Albert Jan Van Den Berg as the Presiding Arbitrator.

Impugned Award

34. The Tribunal rejected the preliminary objections raised by NTPC including the contention that the claims made were barred by limitation. The Tribunal held that the arbitration commenced on 9th September, 2013 in terms of Section 21 of the A&C Act. It held that this was within the limitation period of three years from 31st January, 2011 being the date on which NTPC had communicated its stand that the Contract stood frustrated. The Tribunal held that the said communication gave rise to the cause of action and therefore, the commencement of the arbitral proceedings was within the limitation period.

35. The Tribunal also did not accept NTPC's contention that it was relieved of all its obligation under the Contract in terms of Section 56 of the Contract Act, as the implementation of the Contract was rendered

impossible in view of the directives issued by the Government of India. The Tribunal held that the NTPC had not invoked the force majeure provisions under the Contract (Clauses 37 and 38 of the GCC), which were applicable in cases where performance of the Contract had been rendered impossible on account of force majeure conditions. The Tribunal further held that Section 56 of the Contract Act did not prevail over the provisions of the Contract, as the parties had stipulated the course to be followed by the parties in such a situation and the consequences thereof.

36. The Tribunal rejected NTPC's contention that directives issued by the Government of India including in terms of the letter dated 19th February, 2009 would have a direct effect on the Contract *dehors* the contractual provisions. It also rejected NTPC's contention that it was not required to give any notices as contemplated in the Contract for such force majeure events. The Tribunal concluded that in the absence of a contractual notice, the communication dated 19th February, 2009 did not have the effect of suspending, terminating or frustrating the Contract. It held that if NTPC intended the said letter to have the said effect, it was required to take recourse to the contractual provisions in that respect.

37. The Tribunal also rejected NTPC's contention that the letter dated 19th February, 2009 had rendered the Contract unlawful within the meaning of Section 23 of the Contract Act.

38. The Tribunal accepted NTPC's contention that the decision of NGRBA taken on 1st November, 2010 was binding on the parties as a matter of law. However, the Tribunal rejected the contention that the said decision altered the contractual situation at the time. It held that the said decision would fall within the force majeure provisions of the Contract but, none of the parties had taken the recourse to the same.

39. The Tribunal further held that NTPC's letter dated 31st January, 2011 asserting that the Contract "*stands frustrated*" was intended as a contractual notice, which had the effect of terminating the Contract.

40. It held that the termination of the Contract effected by the said notice was required to be construed as a "termination for convenience" as contemplated under Clause 42.1 of GCC, which entitled NTPC to terminate the contract for any reason.

41. The Tribunal also accepted the claims made by the Claimants in respect of claims for compensation and awarded total sum of USD 10,688,455.95; EUR 3,341,171.32; and ₹153,495,177.90. The compensation awarded to Claimants under various heads as summarized by the Tribunal, is set out below:-

	USD	EUR	INR
A. Engineering (¶ 860)	325,871.38	926,789.53	95,356,757.96

B. Material (₹ 905)	12,547,850.37	2,992,800.66	186,932,479.79
C. Model test (₹ 911,916)		639,203.14	
D. On-site expenses (₹ 929)			19,249,500.00
E. Off-site expenses (₹ 944)	871,962.20	915,069.97	259,235,689.53
F. Bank guarantees (₹ 961)		229,472.02	377,004.62
Less Advances received	-3,057,228.00	-2,362,164.00	-407,656,254.00
Totals	10,688,455.95	3,341,171.32	153,495,177.90

42. In addition to the above, the Tribunal also awarded cost of USD 13,136.50, EUR 204,475.06, INR 30,077,425.43 and GBP 94,942.30 in favour of Claimants and against NTPC.

43. In addition to the above, the Tribunal also awarded pre-award interest at the rate of 2.5% per annum, compounded annually, on the amount of USD 10,688,455.95 and EUR 3,341,171.32 from 08.05.2013 till the date of award. The Tribunal also awarded pre-award interest @ 8.5% per annum, compounded annually, on the amount of INR

153,495,177.90 from 08.05.2013 till the date of award. The Tribunal also awarded post-award interest from the date of award till the date of payment at the same rates.

Submissions

44. Mr Vikas Singh, learned senior counsel appearing for NTPC has assailed the impugned award, essentially, on two fronts. He submitted that the Tribunal had grossly erred in holding that the contractual provisions prevailed over Section 56 of the Contract Act. He stated that it had been authoritatively settled by the Supreme Court in ***Satyabrata Ghose v. Mugneeram Bangur & Co. and Another: AIR 1954 SC 44*** that Section 56 was a positive law and did not leave the matter to be determined according to the intention of the parties. He submitted that the Supreme Court had drawn a clear distinction between the Indian Law and English Law in this regard. Whereas in English Law, a Court was required to ascertain what the parties would have intended if there was a change in circumstances; in India, the only doctrine that was required to be followed was one of that supervening impossibility or illegality as set out in Section 56 of the Contract Act.

45. It is submitted that the said decision in the case of ***Satyabrata Ghose (supra)*** was also followed by the Supreme Court in its later decision in ***Energy Watchdog v. Central Electricity Regulatory Commission and Ors.: (2017) 14 SCC 80***. He submitted that the Contract had become void in terms of Section 56 of the Contract Act and the Tribunal had erred in not accepting the same.

46. Next, he submitted that the Tribunal had grossly erred in holding that NTPC had terminated the contract under Clause 42 of GCC. He submitted that Clause 42 of the GCC only applied for termination of the Contract for convenience. He submitted that NTPC had not terminated the Contract for convenience but the same was frustrated by virtue of the decision of NGRBA to scrap the said Project. He submitted that in terms of Section 65 of the Contract Act, NTPC was required to restore any advantage denied under the Contract but was not liable to compensate the claimants by treating the termination as one for convenience of NTPC.

47. He submitted that the Project was suspended by the Government of India on 19th February, 2009 and any expenses incurred by the Claimants could not be claimed by the Claimants.

48. Mr Singh earnestly contended that although the Tribunal held that the decision of NGRBA was law within the meaning of Clause 9.4 of GCC and was binding on the parties; yet, the Tribunal concluded that the Contract was terminated for convenience of NTPC. He submitted that the said conclusions are inconsistent and the decision of the Tribunal that the Contract was terminated under Clause 42.1 of GCC is perverse and the impugned award is liable to be set aside.

49. Lastly, he submitted that the award of compensation was perverse as the Claimants had not produced any evidence with regard to the expenses incurred by it towards manufacturing activity. He pointed out that the cost incurred by the Claimants had been redacted.

He submitted that the claimants having withheld the evidence of cost incurred by them were not entitled for award of any compensation. He submitted that no evidence of actual payments made by the Claimants or the prices under the contracts entered into by the Claimants with suppliers/contractors, for procurement of raw material had been produced.

Reasons and Conclusions

50. The first and foremost question to be addressed is whether the Tribunal's decision, that the contractual provisions prevailed over Section 56 of the Indian Contract Act is flawed and in conflict with the fundamental policy of Indian law. Section 56 of the Contract Act reads as under:-

“56. Agreement to do impossible act.—An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful.—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.”

51. As it is apparent from the plain reading of Section 56 Contract Act, an agreement to do an act which is impossible is void. Further, a contract to do an act which, after the contract is made, become impossible or unlawful becomes void when the act becomes impossible or unlawful. In such cases, the party that had received any advantage under such contract at the time when the agreement is discovered to be void, is required to restore such advantage to the person from whom the same was received. This is expressly enacted under Section 65 of the Contract Act.

52. The central controversy in the present case is whether Section 56 of the Contract Act would be applicable even in cases where the parties had contemplated the effect of supervening event, which renders it impossible to perform the contract. The contentions advanced by Mr Singh had proceeded on the premise that notwithstanding the terms of a contract between the parties, any act that had rendered it impossible to perform the contract would render the contract as void and thus, absolve the parties from discharging any of their contractual obligations. According to him, all that the parties are required to do in such cases is to restore any advantage received under the contract in terms of Section 65 of the Contract Act. As noticed above, he founded the said submission on the plain language of Section 56 of the Indian Contract Act and the decision of the Supreme Court in *Satyabrata Ghose (supra)*.

53. This Court is unable to accept the aforesaid contention. A contract which expressly provides for consequences in case its performance has rendered impossible on account of any supervening eventuality is not rendered void in its entirety, as contended by Mr Singh.

54. The Contract, essentially, has two facets. The first relates to the performance of reciprocal promises that parties are obliged to perform but for any supervening event. These obligations would obviously be curtailed if their performances are rendered impossible. To that extent, the Contract would stand frustrated as being incapable of performance. However, to the extent that the parties have already contemplated the consequences of such supervening event, the same would remain binding and parties would not be absolved to act in accordance with the commitment made in contemplation of such eventuality. It is open for the parties to agree that if on account of any force majeure condition it is impossible to perform a contract, a party would compensate the other for the efforts made notwithstanding that it is impossible to fully perform the same. It would be erroneous to contend that in such cases, the party who has so agreed to compensate the other contracting party for the efforts undertaken would be absolved of its obligation to do so merely because of a supervening event, the possibility of which was contemplated, had occurred. In this view, this Court is unable to find any fault with the decision of the Arbitral Tribunal that in such cases, the contractual provisions would prevail over the plain language of Section 56 of the Contract Act.

55. The reliance placed by Mr Singh in the case of *Satyabrata Ghose (supra)* is misplaced. In that case, the Supreme Court had addressed the development of the law of frustration of a contract in England and had noted that the law of frustration in England had developed under the guise of reading terms into the contract. The Court had referred to the decision in the case of *Taylor v. Caldwell: 3 B & S 826*, wherein the Court had dealt with a case where one of the parties had agreed to perform a concert at a venue, which was accidentally burnt by fire. Clearly, in such circumstances the party who had agreed to render a performance at the concert hall could not do so, as the concert hall itself was burnt and was not in a position for hosting such a concert. In the said context, the court had held that the contract must be read as “*as subject to an implied condition that the parties shall be excused, in case, before breach, performance becomes impossible from perishing of the thing without default of the contractor.*”. The Supreme Court also referred to the decision in the case of *Robinson v. Davison: (1871) LR 6 Exch 269*, wherein the plaintiff had contracted to play piano at a concert and was unable to render the performance as she had fallen ill. In this case too, the court held that the party in question had been incapacitated from performing the Contract. In the circumstances, the court read in an implied condition in the agreement to the effect that the contract was subject to the party being well enough to render the performance. The Supreme Court also referred to the decision in the case of *Dahl v. Nelson, Donkin and Co.: (1881) 6 AC 38*, wherein the court had held that in cases where unexpected event or change of circumstances occur, which were not contemplated by the parties, the

contract between them should not be construed literally as what the parties intended but what they, as fair and reasonable men, would have agreed upon if they had entertained the possibility of such an event. The court imputed an agreement, which the parties would have agree upon in case of the unexpected event or change that had occurred had been contemplated by them. The Supreme Court noted that this was also the approach of the court in ***Joseph Constantine Steamship Co. v. Imperial Smelting Corporation Ltd.: 1942 AC 154.***

56. In addition to the above judgments and various other judgements, the Supreme Court also referred to the decision of the court of appeal in ***British Movietonews Ltd. v. London and District Cinemas Ltd.: (1951) 1 KB 190.*** In that case, Denning L.J had observed that “*the court really exercises a qualifying power - a power to qualify the absolute., literal or wide terms of the contract – in order to do what is just and reasonable in the new situation.*” The aforesaid proposition of law, as put by Denning L. J., was reversed by the House of Lords. It was held that there was no change in law, whereby the courts could exercise a wider power. The Court reiterated that it was always a question of construction of the contract. After referring to the aforesaid English decisions, the Supreme Court observed as under:-

“15. These differences in the way of formulating legal theories really do not concern us so long as we have a statutory provision in the Indian Contract Act. In deciding cases in India the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in section 56 of the Contract Act, taking the word

“Impossible” in its practical and not literal sense. It must be borne in mind, however, that section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties.”

57. It is apparent from the above that the same were made in the context of various legal theories that were followed by the courts in the United Kingdom as there was no provision in the applicable laws similar to Section 56 of the Contract Act. Thus, in cases where parties do not contemplate the occurrence of an event that renders the performance of the contract impossible or illegal, the provisions of Section 56 of the Contract Act would be applicable. In such cases, it is not necessary for courts in India to read any implied condition in the contract or to speculate what the parties to the contract would have agreed had they contemplated the unforeseen, unexpected event or change in circumstances that had occurred subsequently. Section 56 would have little application where the parties expressly contemplate the recourse to be adopted by them in the event, there is any change in circumstances or an occurrence of an event that renders it impossible for the parties or anyone of them to perform the contract. Plainly, the decision of the Supreme Court in the case of *Satyabrata Ghose (supra)* is not an authority for the proposition that the parties would be absolved from performing their obligation in entirety on happening of the event that was contemplated by them and the recourse to be adopted by them on happening of such event was expressly stipulated in the contract.

58. A careful reading of the said decision also clearly indicates that in cases where the parties contemplate possibility of such an event, which would affect the performance of the contract, the same would not be frustrated. This is apparent from reading of paragraph 17 of the said decision, which is set out below:-

“17. It must be pointed out here that if the parties do contemplate the possibility of an intervening circumstance which might affect the performance of the contract, but expressly stipulate that the contract would stand despite such circumstances, there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens. As Lord Atkinson said in *Matthey v. Curling*(1), “a person who expressly contracts absolutely to do a thing not naturally impossible is not excused for non-performance because of being prevented by the act of God or the King’s enemies..... or vis major”. This being the legal position, a contention in the extreme form that the doctrine of frustration as recognised in English law does not come at all within the purview of section 56 of the Indian Contract Act cannot be accepted.”

59. The Arbitral Tribunal had noted that in the present case, the parties had expressly contemplated force majeure events and had set out the course that could be followed by any party assenting the same. The Tribunal had referred to clause 37 of the GCC, which is set out below:-

“37. Force Majeure

- 37.1 “Force Majeure” shall mean any event beyond the reasonable control of the Employer or of the Contractor, as the case may be, and which is unavoidable notwithstanding the reasonable care of the party affected.
- 37.2 If either party is prevented, hindered or delayed from or in performing any of its obligations under the Contract by an event of Force Majeure, then it shall notify the other in writing of the occurrence of such event and the circumstances thereof within fourteen (14) days after the occurrence of such event.
- 37.3 The party who has given such notice shall be excused from the performance or punctual performance of its obligations under the Contract for so long as the relevant event of Force Majeure continues and to the extent that such party's performance is prevented, hindered or delayed. The Time for Completion shall be extended in accordance with GCC Clause 40 (Extension of Time for Completion).
- 37.4 The party or parties affected by the event of Force Majeure shall use reasonable efforts to mitigate the effect thereof upon its or their performance of the Contract and to fulfil its or their obligations under the Contract, but without prejudice to either party's right to terminate the Contract under GCC Sub-Clauses 37.6 and 38.5.
- 37.5 No delay or non-performance by either party hereto caused by the occurrence of any event of Force Majeure shall
- (a) constitute a default or breach of the Contract

(b) (subject to GCC Sub-Clauses 32.2, 38.3 and 38.4) give rise to any claim for damages or additional cost or expense occasioned thereby

if and to the extent that such delay or non-performance is caused by the occurrence of an event of Force Majeure.

37.6 If the performance of the Contract is substantially prevented, hindered or delayed for a single period of more than sixty (60) days or an aggregate period of more than one hundred and twenty (120) days on account of one or more events of Force Majeure during the currency of the Contract, the parties will attempt to develop a mutually satisfactory solution, failing which the dispute shall be resolved in accordance with GCC Clause 6.

37.7 Notwithstanding GCC Sub-Clause 37.5, Force Majeure shall not apply to any obligation of the Employer to make payments to the Contractor herein.”

60. In addition to the above, the Tribunal had also taken note of Clause 38 of the GCC, which contemplated the contract being affected by various events such as war, hostilities, rebellion, revolution, riots, civil commotion, etc.

61. After examining the aforesaid clauses, the Tribunal held as under:-

- “352. As set out above, GCC Clause 37 shall apply to “any event beyond the reasonable control of the Employer or of the Contractor... and which is unavoidable notwithstanding the reasonable care of the party affected”. GCC Clause 38 applies to a number of more specific scenarios related to war, hostilities, rebellion, revolution, riots, civil commotion and explosions.
353. Based on the wide scope and detailed coverage of the possible scenarios, the Tribunal agrees with Claimants that these provisions constitute a complete scheme in relation to force majeure events that may arise in the course of performing the Contracts.
354. Respondent’s case is that the letter of 19 February 2009 constituted a “supervening illegality” rendering performance of the Contracts unlawful. If, as Respondent argues, the letter of 19 February 2009 was beyond its reasonable control and unavoidable, and if it “prevented, hindered or delayed” Respondent from performing the Contracts, the letter would fall under GCC Clause 37.
355. For the reasons set out below, the Tribunal finds that the wording of that provision, as agreed between the Parties, could have applied to the case at hand if it had been invoked by one of the Parties to the Contracts.
356. Indeed, in one of its submissions Respondent seemed to acknowledge as much, stating “[t]he facts established on record are squarely covered by the ‘force majeure’ clause in the contract

which excuses performance of the contract in the facts of the case”. Respondent subsequently backtracked from that position, stating that it should rather be read in the context of Respondent’s other arguments. The Tribunal takes Respondent’s subsequent submissions on this point, that GCC Clause 37 does not apply, as reflecting its position in these proceedings.

357. Claimants also raised the possibility of GCC Clause 38 applying to the present case, a contention which was rejected by Respondent. GCC Clause 38 includes “riot” and “civil commotion” as types of war risks. Respondent has made reference to such a scenario in the context of the present case, arguing that:

the extraordinary circumstances created by Professor Agarwal's fast unto death, and the agitation against the Project, had acquired a magnitude that threatened the law and order situation in Uttarakhand, with the potential of spreading throughout the country.

358. In the Tribunal’s view, the picture painted by Respondent is not borne out in the evidence on record. In any event, since Respondent’s case is rather that a supervening illegality arose, the Tribunal considers that GCC Clause 37 is more relevant than GCC Clause 38 in the present case.

359. Whether GCC Clause 37 or GCC Clause 38 would be applicable, it is sufficient to note that the letter of 19 February 2009, which Respondent alleges suspended, terminated or frustrated the Contracts, would not fall outside the scope of the Contracts. In this respect, Respondent's contention that the letter of 19 February 2009 took effect "*dehors*" the Contracts is rejected.
360. Respondent also places reliance upon the fact that the letter of 19 February 2009 was issued by the Ministry of Power, and that the suspension or termination was not instituted pursuant to any rights invoked by Respondent itself. However, this submission only confirms the applicability of GCC Clause 37, which relates to "any event beyond the reasonable control of the Employer". In this way, the Parties' agreement extends beyond the consequences of their own actions to the impact of events outside their reasonable control on the Contracts, potentially including action taken by the Ministry of Power.
361. While suspension or termination of the Contracts would have been possible if either of the Parties had invoked GCC Clauses 37 or 38, no Party did so.
362. As is evident from the terms of GCC Clauses 37 and 38, the letter of 19 February 2009 could not, and did not, result in any automatic suspension, termination or frustration of the Contracts."

62. This Court finds no infirmity with the aforesaid view. Plainly, NTPC had the option to invoke the force majeure clause. However, NTPC had refrained from taking any decision as required under the terms of the Contract and had procrastinated in issuing any notices under the Contract.

63. The next question to be examined is whether the impugned award is inconsistent inasmuch as the Tribunal had accepted that the decision of NGRBA to scrap the Project was law and was binding, yet had concluded that the same did not frustrate the Contract. The contention that the impugned award is inconsistent inasmuch as the Tribunal had accepted that the decision of NGRBA was law within the meaning of Clause 9.4 GCC and yet held that the same did not frustrate the Contract, is also unpersuasive. Indisputably, the decision taken by NGRBA on 1st November, 2010 to scrap the Project was binding. In view of the said decision, NTPC could not have proceeded with the Project. However, this did not absolve NTPC from taking recourse to the contractual provisions. The Tribunal held that such an event would fall under the regime of Clauses 37 and 38 of the GCC and, therefore, such impossibility ought to have been considered in accordance with the terms of the said terms of the Contract. The Tribunal's conclusion that "neither the decision of 1st November, 2010, nor the letter of 24th December, 2010 had the effect of frustrating or terminating the contracts" is required to be considered in the aforesaid context.

64. The controversy between the parties has undoubtedly raised serious contentious issues for the Tribunal to adjudicate. This Court is

not concerned with the merits of that decision. The scope of this petition is limited to examining whether the impugned award is in conflict with the fundamental policy of Indian law. Plainly, this is not so. The Tribunal's view that the decision of NGRBA would fall within the clause 37 of GCC, cannot be held to be perverse or in conflict with the fundamental policy of Indian law. Clearly, such a view does not fail the *Wednesbury* Test and cannot be held to be one that no reasonable person could possibly accept.

65. The contention that the Tribunal had grossly erred in holding that the letter dated 31st January, 2011 was a termination for convenience by NTPC is wholly perverse and untenable, is also unpersuasive. In terms of Clause 37 of GCC, the NTPC was entitled to suspend the works on occurrence of an event, which was beyond the reasonable control of the parties and which prevented, hindered or delayed the party from performance of the Contract. In such eventuality, it was incumbent upon NTPC to have issued notice as contemplated under Clause 37 of GCC. On such notice being given, the party would be excused from performance of his obligation till the time the force majeure condition continued. The parties were also obliged to take reasonable efforts to mitigate the effect of such an event. Sub-Clause 37.6 of GCC also contemplated that if the force majeure event continued beyond a stipulated period the parties would attempt to develop a mutually satisfactory solution, failing which the disputes would be resolved in accordance with Clause 6 of GCC. NTPC did not take recourse to the said Clause. It issued no notice as required under sub-clause 37.2 of

GCC. It finally sent a letter dated 31st January, 2011 assenting that the performance of the contracts stands frustrated.

66. At this stage, it is also relevant to note that occurrence of force majeure event did not excuse NTPC from discharging its obligation to make payments. This is expressly provided under sub-clause 37.7 of GCC.

67. In terms of Clause 42.1.1 of GCC, NTPC could terminate the Contract for any reason by issuing a notice to the said effect. In view of the aforesaid contractual provisions and noting that NTPC had not taken the recourse to Clause 37 of GCC, the Tribunal held that NTPC's letter dated 31st January, 2011 ought to be construed as a letter terminating the contract under Clause 42 of GCC. It is apparent from a plain reading of the impugned award that the Tribunal was persuaded to take the aforesaid view since it was NTPC's case that it had not terminated the Contract under Clause 37 and/or 38 of the GCC, which it undoubtedly could have in case of a force majeure event rendering it impossible to perform the Contract.

68. The case set up by NTPC is that the events resulting in scrapping of the Project were outside the Contract and not subject to any contractual stipulations. This case was rejected by the Tribunal, and in view of this Court, rightly so. The relevant extracts of the impugned award are set out below:-

“678. Regarding its letter of 31 January 2011, Respondent submits that it does not by itself create any right in favour

of Claimants, nor does it constitute any admission of liability. Respondent argues that this letter is a formal communication of the effect of the decision of 19 February 2009, and Claimants are not entitled to suggest that it was the first act frustrating the Contracts. On the plain terms of the letter, in Respondent's view the inescapable conclusion is that the letter of 19 February 2009, endorsed by the High Court of Uttarakhand and the NGRBA, was a case of frustration.

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687. In relation to Claimants' argument set forth in ¶684 (iii) above, the Tribunal agrees with Claimants that by stating that the Contracts “stand frustrated”, Respondent indicated its refusal to perform the Contracts, within the sense of Section 39 of the Contract Act. As Claimants point out, the letter of 31 January 2011 refers back to the directions from the Ministry of Power of 24 December 2010, which were to “take necessary action” in order to discontinue the Project. The action which was taken by Respondent, was to bring the Contracts to an end.

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692. Claimants argue that the termination effected by Respondent on 31 January 2011 was a “termination for convenience” within the meaning of GCC 42.1. GCC 42.1.1 reads as follows:

The Employer may at any time terminate the Contract for any reason by giving the Contractor a notice of termination that refers to this GCC Sub-Clause 42.1.

XXXX XXXX XXXX

693. The Tribunal has already determined above that Respondent's letter of 31 January 2011 indicated its refusal to perform the Contracts (see ¶ 687 above). It was clearly intended as a contractual notice which would have the effect of terminating the Contracts. The letter enumerates the three Contracts and references the directions from the Ministry of Power to discontinue the Project.

694. This is confirmed when the letter of 31 January 2011 is read together with Respondent's, letter of 5 January 2011. The letter of 5 January 2011 states that Respondent has to start winding up of the project. It asks Claimants for details of its expenditure and winding up expenses, and states that "[the contractual communication will be made to you after due approval by NTPC Management". The letter of 31 January 2011 is clearly that contractual communication.

695. While the letter of 31 January 2011 does not mention GCC Clause 42.1 explicitly, the Tribunal considers that the letter still falls squarely within the terms of GCC Clause 42.1.1. By this clause, Respondent can terminate the Contracts "for any reason" by giving a notice of termination. Respondent had received instructions from the Ministry of Power on 24 December 2010, which were based upon the NGRBA decision of 1 November 2010, to take the necessary action to discontinue the Project. As Respondent well understood, a "contractual communication" (as referred to in its letter of 5 January 2011) was necessary in order for the decision by the Government of India to have contractual effect. Respondent took such action, by exercising its right to terminate the Contracts under GCC Clause 42.1.

696. The Tribunal considers the failure to refer to GCC Clause 42.1 in the letter of 31 January 2011 to be an administrative failure which does not defeat the effect of the notice. There is no indication in GCC Clause 42.1.1 or otherwise that the requirement to refer to GCC Clause 42.1 is mandatory, in that failure to mention it would prevent a notice of termination from taking effect under that clause.

697. As such, the Tribunal determines that the letter of 31 January 2011 was a notice of termination for convenience by Respondent, within the meaning of GCC Clause 42.1. The Tribunal shall give further consideration to the consequences of such notice in relation to the legal basis of Claimants' claim for compensation (see ¶ 762 *et seq.* below).”

69. This Court finds no reason to interfere with the aforesaid view in these proceedings. Plainly, the said decision cannot be stated to be in conflict with the fundamental policy of Indian law and none of the grounds as available under Section 34 of the A&C Act to set aside an arbitral award, are established in this case.

70. The next issue to be examined is whether the quantum of compensation awarded to the Claimants was without any evidence or material. It was contended on behalf of NTPC that the Claimants had redacted the cost of materials procured from the contracts entered into with third parties and, therefore, the Claimants had failed to establish the costs incurred for the materials or the resources deployed. The said contention was advanced in the context of the award of compensation for the materials manufactured by the Claimants.

71. The aforesaid contention is unmerited, as the Tribunal had concluded that the Claimants were entitled to compensation in terms of Clause 42.1.3 of GCC, which obliged NTPC to pay the following amounts:-

- “(a) the Contract Price, properly attributable to the parts of the Facilities executed by the Contractor as of the date of termination
- (b) the costs reasonably incurred by the Contractor in the removal of the Contractor’s Equipment from the Site and in the repatriation of the Contractor’s and its Subcontractors’ personnel
- (c) any amounts to be paid by the Contractor to its Subcontractors in connection with the termination of any subcontracts, including any cancellation charges
- (d) costs incurred by the Contractor in protecting the Facilities and leaving the Site in a clean and safe condition pursuant to paragraph (a) of GCC Sub-Clause 42.1.2
- (e) the cost of satisfying all other obligations, commitments and claims that the Contractor may in good faith have undertaken with third parties in connection with the Contract and that are not covered by paragraphs (a) through (d) above.”

72. The Tribunal found that the compensation claimed by the Claimants was consistent with Clause 42.1.3 of GCC and such compensation could be awarded on the basis of the contract price contributable to the work done by the Claimants and not on the actual expenditure incurred by them. Paragraphs 880 and 881 of the impugned award are set out below:-

“880. The Tribunal is awarding compensation to Claimants under GCC Clause 42.1.3. Recovery for materials manufactured on a price basis is entirely consistent with that provision, which refers in part (a) to compensation for “the Contract Price, properly attributable to the parts of the Facilities executed by the Contractor as of the date of termination”.

881. Because the Tribunal accepts the quantification of Claimants’ claim for materials by reference to price rather than cost, it is not concerned by Respondent’s objection that purchase orders have been redacted.”

73. This Court finds no infirmity with the aforesaid view, which would warrant any interference in these proceedings. Apart from the above, it is also seen that the Tribunal had evaluated the evidence and materials produced before it for determining the quantum of compensation. It had also relied on the expert evidence led by the Claimants in this regard. The scope of the present proceedings does not entail reappreciation of evidence. Suffice it to state that the impugned award is based on sufficient material and evidence and, therefore, the same cannot be interfered with in these proceedings.

74. In view of the above, the present petition is dismissed. The pending application is disposed of. The parties are left to bear their own costs.

VIBHU BAKHRU, J

JULY 02, 2019
MK/RK