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

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***Reserved on : 27.02.2020
Pronounced on : 27.05.2020***

+ O.M.P. (COMM) 297/2017

**ITALIAN THAI DEVELOPMENT PUBLIC COMPANY
LTD**

..... Petitioner

Through: Mr. Narendra Hooda, Sr.
Advocate with Mr. Aditya
Mishra, Mr. Ishan J and Mr.
Hrikesh, Advocates

versus

MCM SERVICES LTD

..... Respondent

Through: Mr. S.B. Upadhyay, Sr.
Advocate with Mr. Rajesh
Chhetri, Mr. Pawan Upadhyay
and Mr. Ravi Lochan,
Advocates

**CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH**

J U D G M E N T

1. Present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Award dated 22.03.2017 passed by the Arbitral Tribunal in so far as it has partially allowed the claims of the Respondent. Respondent herein was

the Claimant in the Arbitration Proceedings and the Petitioner herein was the Respondent.

2. Brief facts leading to filing of the present petition are that the Government of Himachal Pradesh decided to construct a Project, namely, Koldam Hydroelectric Power Project of 800 MW in Bilaspur District, situated about 25 km from District HQ on River Satluj and 4.5 Kms of Dehar Power Plant. Construction of the Project was to be done by National Thermal Power Corporation (hereinafter referred to as 'NTPC').

3. Petitioner participated in the Tender floated by NTPC and was appointed as a Contractor for the Project, for "main civil works Package I Dam, Spillway and Power Intake Package". Contractual relationships between the Petitioner and NTPC were governed by a Letter of Award dated 12.12.2003 and the FIDIC General Conditions of Contract (hereinafter referred to as 'FIDIC Conditions') read with the NTPC Conditions of Particular Application (hereinafter referred to as the 'COPA').

4. The works included in the Contract between the Petitioner and the NTPC were as under:

<i>Section</i>	<i>Particulars</i>
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<i>Section 2</i>	<i>Design and construction of u/s</i> <i>Diversion Dyke and d/s</i> <i>Cofferdam.</i> <i>Design, Installation and</i> <i>operation of water control works.</i> <i>Earth and rock fill dam.</i> <i>Dam Instrumentation.</i>
<i>Section 3</i>	<i>Excavation in De-silting basin area and Approach channel up to EL618m</i>
<i>Section 4</i>	<i>Power Intake structure.</i> <i>Intake and Spillway Control Building.</i>
<i>Section 5</i>	<i>Spillway and chute.</i> <i>Complete excavation for</i> <i>spillway, chute and plunge pool.</i> <i>Dam Instrumentation</i>
<i>Section 7</i>	<i>Excavation in Powerhouse area</i> <i>up to EL 531 m (average)</i> <i>including access road.</i> <i>Excavation, leveling and grading</i> <i>works of switch yard area.</i>
<i>Section 8</i>	<i>Underground drainage and grouting works in the foundation including galleries.</i>
<i>Section 9</i>	<i>Plugging of Diversion Tunnel.</i> <i>All other associated for all</i> <i>sections of works.</i>

5. The total estimated awarded value of the Contract in favour of the Petitioner was Rs. 6,64,55,55,021/-.

6. Under Clause 4.1 of the FIDIC Conditions read with COPA, Petitioner was permitted to sub-contract the work, awarded to it by NTPC. Petitioner, thereafter, subcontracted the work in respect of Sections 5, 8 & 9 to the Respondent herein and issued a Letter of Award on 10.03.2004 (hereinafter referred to as 'LOA'). Value of work, so awarded was Rs.2,32,55,61,050/- i.e. 12% less than the amount at which these Sections of work were awarded by NTPC to the Petitioner. Under the LOA the scope of work to be executed by the Respondent included:

<i>Spillway:</i>	<i>The spillway for Koldam is a gated spillway located on the left bank of Dam. The main elements of this structure are:</i> <i>✓ A concrete weir approximately 132m. wide, with a crest at elevation 625.</i> <i>✓ 6 gate bays, each equipped with a radial gate 17.10m wide by 17m high (by H M Contractor) .</i> <i>✓ A concrete closure section situated on the left bank of the weir with a top surface at elevation 648 , that prevents any bypassing of the gated weir by the left bank.</i> <i>✓ A reinforced-concrete chute of total length of approximately 420m, with width varying from 132m at the top to 70 m at the bottom, equipped at the bottom with a flip bucket that forms a jet trajectory at 30⁰ angle to</i>
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	<i>the horizontal.</i> <i>This structure shall respect the following operating specification;</i> <i>(i) Discharge a flow of 11,400 cu.m./sec, which corresponds to the Standard Project Flood, with 5 gates opened and a maximum water level of EL. 641.1</i> <i>(ii) Discharge a flow of 16,500 m³/s, which corresponds to the Probable Maximum Flood, with 6 gates opened and maximum water level of El. 646</i> <i>The spillway piers shall each have a room containing the radial gate control equipment</i>
<i>Underground</i> <i>Grouting and</i> <i>Drainage</i> <i>Works</i>	<i>The work is composed of:</i> <i>✓ Underground construction works for grouting and drainage galleries.</i> <i>✓ All the grouting and drainage works carried out from the galleries .</i> <i>✓ Installation of monitoring equipment in the galleries.</i>
<i>Diversion</i> <i>Tunnel Plugs</i>	<i>The two diversion tunnels will be equipped with losing plugs to ensure a permanent water tightness after filling up the reservoir. The closing of tunnel 2 are made out of reinforced concrete as well. The plugging shall be carried out along with the work of bottom outlet made of two pipes allowing to evacuate a flow of 580 Cu. M/S at full reservoir water level. This facility will allow to control the level of the reservoir during the first fill up, The steel lining at the invert for 100m length on the downstream of the floodgate shall be provided to limit erosions due to high velocity of the water full of abrasive materials</i>

7. Certain Provisions of the LOA which are necessary for the present petition are as under:

- i. *“Clause 3.2 of the Letter of Award required that the scope of work subcontracted to the Respondent/Claimant be completed in accordance with the specifications, terms and conditions contained in the FIDIC Conditions read with the NTPC COPA. Further, Clause 14 required the Respondent/Claimant to ensure that the work is completed in accordance with the Technical Specifications prescribed by NTPC.*
- ii. *Clause 4 provided that the subcontract was for a total consideration of Rs. 232,55,61,050. Clause 5 further provided that this consideration was subject to price adjustment in accordance with the formula specified in Clause 73 of the NTPC COPA.*
- iii. *Clause 8 stipulated that time is of the essence of the contract as far as the Respondent/Claimant's obligations are concerned and required the Respondent/Claimant to complete its works in accordance with the timeline prescribed by the NTPC in its Letter of Award dt. 12.12.2003. Clause 9 further stipulated the amount of compensation to be paid by the Respondent/Claimant in the event of delay.*
- iv. *Clause 10 stipulated the amount of money to be retained with the Petitioner as the Respondent/Claimant's security deposit towards its performance of its obligations under the Letter of Award.*
- v. *Clauses 11 and 21 of the Letter of Award read with Clause 3 of the Attachment to the Letter of Award explicated the obligation the Respondent/Claimant to mobilize sufficient resources and employ sufficient*

labour, as specified, for the completion of the work awarded to it in accordance with the timelines prescribed by NTPC.

- vi. *Clause 23 of the Letter of Award provided that disputes arising out the contract would be resolved in accordance with the procedure specified in Clause 67 of the FIDIC Conditions read with the NTPC COPA, and Clause 24 conferred exclusive jurisdiction on courts in Delhi in relation to matters arising from the contract.*
- vii. *Clause 2 of the Attachment to the Letter of Award clarified that payments to the Respondent/Claimant on a back to back basis after receipt of certifications and payments from NTPC for the work completed by the Respondent/Claimant, and clause 6 of the Attachment to the Letter of Award made the conditions of work in the FIDIC Conditions and NTPC COPA applicable to the contract on a back to back basis, except insofar as any inconsistency exists between the two, in which case the Letter of Award would prevail.*
- viii. *Clause 7 of the Attachment to the Letter of Award empowered the Petitioner to terminate the contract or a part thereof in the event of the Respondent/Claimant's nonperformance."*

8. According to the Petitioner, Respondent failed to fulfill its obligations under the LOA from the very beginning, as it failed to mobilize machinery as required and its work output suffered from severe delays, besides failing to meet the quality requirement specified by the NTPC. As per the Petitioner, Respondent abandoned the work, after failing to adhere

with the timelines for completion of work and on account of this disputes began to arise between the parties.

9. On 27.01.2009, Respondent invoked Clause 67 of the FIDIC Conditions, informing the Engineer of the disputes and seeking adjudication of the following claims:

<i>S.No.</i>	<i>Claim</i>	<i>Amount Claimed</i>
<i>1.</i>	<i>Idling of MCM's resources</i>	<i>Rs. 12,65,77,806.</i>
<i>2.</i>	<i>Release of unjustified recoveries and pending payments.</i>	<i>Rs. 78,71,126.</i>
<i>3.</i>	<i>Reimbursement of payment made to seconded staff</i>	<i>Rs. 37,79,729.</i>
<i>4.</i>	<i>Additional Work in certain inclined galleries</i>	<i>Rs. 65,05,419.</i>
<i>5.</i>	<i>Additional amount paid to workmen</i>	<i>Rs. 42,15,251.</i>
<i>6.</i>	<i>Release of security deposit amount</i>	<i>Rs. 4,91,92,145.</i>
<i>7.</i>	<i>Balance payment of RA Bills and Escalation Bills</i>	<i>Matter of calculation, therefore not ascertained</i>
<i>8.</i>	<i>Interest</i>	<i>1% per month, from the date on which payment was due till the date of actual</i>

		<i>payment.</i>
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10. On 17.04.2009, the Engineer communicated its decision to the parties finding all the claims preferred by the Respondent to be untenable, being against the explicit Provisions of the Contract and lacking sufficient details as well as evidence of the alleged loss. The Engineer, in fact, concluded that it was the Petitioner who had incurred losses and damages on account of breach and abandonment by the Respondent.

11. Subsequent, thereto, Respondent invoked Arbitration and filed its Statement of Claim on 27.10.2009 before the Tribunal, raising the following claims against the Petitioner:

<i>S. No.</i>	<i>Claim</i>	<i>Amount Claimed</i>	<i>Amount Awarded</i>
1.	<i>Idling Charges</i>	<i>Rs.12,65,77,806</i>	<i>Rs.1,34,67,162</i>
2.	<i>Refund of deductions and release of pending payments</i>	<i>Rs.78,71,126</i>	<i>Rs.32,42,705</i>
3.	<i>Reimbursement of service charges and service tax paid on salaries paid for seconded labour</i>	<i>Rs.12,55,921</i>	<i>Rs.5,08,904</i>
4.	<i>Additional Work in inclined galleries</i>	<i>Rs.65,05,419</i>	<i>Rs.65,05,419</i>

5.	<i>Reimbursement for additional payment made to workmen</i>	<i>Rs.42,15,251</i>	<i>Nil</i>
6.	<i>Release of security deposit</i>	<i>Rs.4,97,10,698</i>	<i>Rs.4,48,95,263</i>
7.	<i>Balance payment for work done along with escalation</i>	<i>Rs.14,67,73,025</i>	<i>Rs.1,19,96,310</i>
8.	<i>Payment of agency fee</i>	<i>Rs.28,24,36,088</i>	<i>Nil</i>
9.	<i>Interest</i>	<i>18% per annum from 16.02.2008</i>	<i>1% over RBI lending rate from 20.04.2009</i>

12. On 10.12.2009, Petitioner filed its Statement of Defence rebutting the claims raised by the Respondent, being against the Contractual provisions and also highlighting that there was no evidence or proof of alleged loss suffered by the Respondent under any of the claims raised by it. Respondent filed its rejoinder, thereto, and added new claims as follows:

<i>S.No.</i>	<i>Claim</i>	<i>Amount Claimed</i>
1.	<i>Agency fee (post award)</i>	<i>Rs. 12,96,00,000</i>
2.	<i>Idling Charges of staff and machinery till December 2009</i>	<i>Rs 16,79,25,216</i>
3.	<i>Costs for demobilization of machinery</i>	<i>Rs. 50,00,000</i>

13. On 22.04.2010, Petitioner also filed its counterclaims, seeking an Award of Rs. 18,49,00,730/- on account of additional costs incurred by the Petitioner in completing the balance work sub-contracted to the Respondent. These counterclaims were, however, suspended, as recorded by the Tribunal in its order dated 03.05.2014. Subsequently, Respondent sought to amend its claims and filed an amended Statement of Claim whereby it raised the following additional claims:

<i>S. No.</i>	<i>Claim</i>	<i>Amount Claimed</i>	<i>Amount Awarded</i>
10.	<i>Agency fee</i>	<i>Rs. 12,96,00,000</i>	<i>Nil</i>
11.	<i>Idling charges of staff and machinery on account of stoppage of services</i>	<i>Rs. 27,87,94,049</i>	<i>Nil</i>
12.	<i>Costs for demobilization of machinery</i>	<i>Rs. 50,00,000</i>	<i>Nil</i>
13.	<i>Costs for restoration of machinery</i>	<i>Rs. 99,35,229</i>	<i>Nil</i>

14. Petitioner filed its amended Statement of Defence and the Respondent filed amended rejoinder. Petitioner also filed a response to an

application filed by the Respondent for interrogatories and clarified the process by which the Respondent's bills were cleared, upon receipt of certification and payments from NTPC and also clarified that the difference, if any, in the amounts billed by the Respondent and paid to it, was on account of differences in certification and payments claimed by the Respondent on one hand and the NTPC on the other. Both parties led evidence and after hearing the parties, learned Tribunal passed the impugned Award, partially allowing the claims of the Respondent as under:

<i>Claim no.</i>	<i>Description</i>	<i>Awarded Amount in Rs</i>
<i>1</i>	<i>Idling charges</i>	<i>1,34,67,162.88</i>
<i>2(a)</i>	<i>Rent for Shaper Machine</i>	<i>12,501.00</i>
<i>2(c)</i>	<i>Refund as to construction of Approach Road to Gallery No.12</i>	<i>1,59,946.50</i>
<i>2(d)</i>	<i>Refund as to construction of Road No.5A</i>	<i>14,50,000.00</i>
<i>2(e)</i>	<i>Refund of medical & Dispensary Charges</i>	<i>6,82,825.88</i>
<i>2(f)</i>	<i>Refund of QC Lab Charges</i>	<i>7,00,676.85</i>
<i>3</i>	<i>Reimbursement of Service Charges of Seconded Staff supplied</i>	<i>5,08,904.71</i>
<i>4</i>	<i>Revised Rates of Excavation in Inclined Galleries No.3,5,7,9,10</i>	<i>65,05,419.20</i>

	<i>&H. Gallery No.6</i>	
6	<i>Refund of Retention money</i>	<i>4,48,95,263.00</i>
7	<i>Balance Payment & escalation</i>	<i>1,19,96,310.23</i>
	<i>TOTAL</i>	<i>8,03,79,010.25</i>
9	<i>Interest</i>	
	<i>Costs</i>	

15. The principal contention of learned Senior Counsel, Mr. Hooda, touching upon objections, with respect to most of the claims challenged herein is that the claims have been awarded by the Tribunal without considering and identifying the existence and breach of any contractual obligations by the Petitioner and de hors the fact that Respondent was unable to either plead or prove loss/damage as required under Section 73 of the Indian Contract Act, 1872. Arguments have also been made separately with respect to each of the claims awarded in favour of the Respondent.

CASE OF THE PETITIONER

Claim No. 1: Award of idling charges for non-utilization of equipments/resources deployed by the Respondent due to delays caused by extraneous factors.

16. Mr. Hooda argued that the Tribunal failed to appreciate that the claim was on account of factors such as strikes/protests by locals, delay in possession of Spillway/dumping area, etc. and none of these factors could

be attributed to the Petitioner and nor do they constitute Force Majeure Events. The Tribunal did not consider or identify the breach of any contractual obligations by the Petitioner and the Award of Claim was against the Provisions of Section 73 of the Indian Contract Act as no loss/damage was established by the Respondent. The Tribunal erroneously awarded the Claim on consideration of Clauses 12.1, 42.2 and 44 of the FIDIC Conditions read with NTPC COPA, even though these were not pleaded by the Respondent and moreover, these clauses placed obligations on NTPC qua the Petitioner and not on the Petitioner qua the Respondent under the contract. Even otherwise, the remedy contemplated by these Clauses could at best lead to a claim for grant of extension of time and price adjustment, in case of delays caused by specifying conditions, but which were neither claimed by the Respondent nor awarded by the Tribunal. Tribunal failed to appreciate that the work had been further sub-contracted by the Respondent and it neither pleaded nor proved that it had paid any compensation to its sub-contractors on account of idling and thus no loss could be claimed by the Respondent. It was argued that even if the Petitioner was to be held responsible, compensation would be limited to escalation as per Clause 73 of the Contract, which was already granted to

the Respondent. The Tribunal rightly held that in the absence of any evidence with respect to the alleged loss suffered, Contractor is not entitled to idling charges, yet ignoring the said finding, Tribunal allowed the idling charges, on an imaginary CPWD Formula.

17. Learned senior counsel for the Petitioner argued that the Tribunal completely ignored the cross examination, in which the witness of the Respondent failed to give any evidence on any loss suffered due to idling. In fact, the Tribunal itself reproduced the relevant cross examination, more particularly, question Nos. 19 and 20, which are as under:

“Q19. I put it to you that MCM executed the excavation works awarded to it through its various sub-contractors and therefore did not directly suffer any loss on idling of resources for which MCM has raised Claim No. 1. What do you have to say?”

Ans: It is incorrect, because we ourselves also worked besides the sub-contractors and have borne the expenses of equipment, machinery and manpower of sub-contractors as well as ourselves.

Tribunal's question: Is there anything to show whether the MCM has borne the expenses of sub-contractors?

Ans: I am not aware of it.

Q20. How much of the works that led to the claim No. 1 on idling of resources were carried out by sub-contractors of MCM?

Ans: I cannot say until I check the records.”

Claim No. 4: Payment for additional work in certain inclined galleries due to delays caused by extraneous factors: – Tribunal awarded Rs. 65,05,419.20.

18. Learned senior counsel contends that the findings of the Tribunal in para 250 of the Award are perverse and beyond the Provisions of the Contract. Tribunal overlooked that Respondent had abandoned the work and Petitioner had to deploy another sub-contractor, at higher rates, to complete the work. Cross examination of the Respondent's witness confirms abandonment of work on the part of the Respondent, more particularly, reply to question Nos. 27 and 28. It is further argued that the claim was based on factors such as strikes/protests by locals etc. and none of these factors could be attributed to the Petitioner and would at the highest constitute Force Majeure Events. The Award of Claim is also against the Provisions of Section 73 of the Indian Contract Act as the Tribunal has neither considered nor identified breach of any contractual obligations on the part of the Petitioner. Tribunal further erred in awarding the claim using the rates offered by the Petitioner to other sub-contractors who had completed the balance work after the Respondent had abandoned the same. This was against the scheme of payment under the Contract. Tribunal

further ignored the fact that under the Contract, the Respondent, at the highest, could be entitled to an extension of time and price escalation under Clauses 12.2, 42.2, 44 and 73, which was not even the pleaded case of the Respondent. Tribunal failed to appreciate that reliance of the Respondent on Section 54 of the Indian Contract Act was misplaced in as much as it had pleaded a case of reciprocal obligations, without identifying any obligations imposed or breached by the Petitioner under the Contract.

Claim No. 6: Release of security deposit in the sum of Rs. 4,48,95,263/-

19. Learned senior counsel for the Petitioner contends that the findings of the Tribunal under this Claim are perverse and against the contractual provisions. Tribunal has erroneously concluded that Petitioner was not entitled to forfeit the security deposit solely on the basis that the Petitioner withdrew its counterclaims against the Respondent and this is in contravention of the law on adjustments and equitable set off. The Claim was allowed in the teeth of Clause 10 of the Letter of Attachment, under which Respondent was not entitled to refund of the security deposit, until the Engineer issued a 'Certificate of Satisfaction' certifying complete discharge of the work sub-contracted under the Letter of Award. Respondent had abandoned the work during the pendency of the Letter of

Award, and was thus in breach of its obligations. Tribunal erroneously awarded a refund of security deposit to the extent of Rs. 4,48,95,263/- even though the record clearly indicated that the amount of security deposit lying with the Petitioner admittedly stood reduced to Rs.1,88,29,249/- on account of adjustments made towards the dues payable to Petitioner, to the extent of Rs. 3,08,81,448. Tribunal also neglected to consider that Petitioner suffered additional costs to the extent of Rs. 18,49,00,730/- on account of the abandonment of work by the Respondent.

Claim No. 7: Award of balance payments along with price escalation

20. Learned senior counsel for the Petitioner argues that the said Claim has been allowed by the Tribunal even though the same was beyond its jurisdiction having not been raised before the Engineer in accordance with clause 67 of FIDIC conditions read with COPA. The Award is a result of total non-application of mind. The Tribunal in its finding under para 262 of the Award has recorded that the Claim was for Rs. 1,82,79,471/-, based on the Statement of Claim. Under para 274, the Tribunal records the Petitioner's version, based on the documents of the Respondent, being Annexures R-1 to R-6, that there was no outstanding payment and the retention has reduced, considering the adjustment of the unpaid advance. In para 275, the Tribunal, based on the rejoinder of the Respondent, records its

revised Claim being Rs. 13,44,08,620/- and then in paras 276 and 278 based on pure guess work, comes to an assumption of total value of balance work being Rs. 5,68,91,573/-. Thereafter considering the full Award value of Claim No. 6, Tribunal finally arrived at a figure of Rs. 1,19,96,310/-. The Tribunal also ignores that the supporting documents under this Claim were fudged documents and there was duplication of claims.

21. Respondent thereafter submitted Annexure C-68 and a Tabular submission, reflecting the Claim amount to be Rs. 63,30,74,904/-. Respondent in the said Annexure showed net claim after only deducting the duplication made under Claim Nos.2 and 4 but did not show any deduction of Rs.25,545,555/- towards other claims settled by Petitioner as brought out in Annexure C-63. The Tribunal considered only two entries of the Respondent in Annexure R-3 i.e. RA-51 & 52 and ignored the total RA Bills 1 to 50. This part of the Award being totally illusive and based on guess work deserves to be set aside.

Claim No. 9: Award of Interest.

22. Mr. Hooda learned senior counsel submits that the Tribunal has awarded simple interest to the Respondent at the rate of 1% over and above the RBI prime lending rate, on the date of the Award, on the awarded

claims, excluding cost, from 20.04.2009 and this is completely contrary to the terms of the Contract between the parties, wherein payment of interest was explicitly prohibited, in case of any dues outstanding or in case of delayed payments. Attention of the Court is drawn to Clause 78 of the Contract which reads as under:

	<i>CONDITIONS OF PARTICULAR APPLICATION</i>
78	<i>No claim for interest or damage will be entertained or be payable by the Employer in respect of any amount or balances which may be lying with the Employer 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 making intermediate or final payments or in any other respect what-so-ever.</i>

23. Learned senior counsel relied on the judgment of the Supreme Court in case of *State of U.P v. Harish Chandra & Co., (1999) SCC 163*, where the Supreme Court dealt with an identical Clause and held as under:

“9. ...The said clause reads as under:

“1.9 No claim for delayed payment due to dispute etc.—No claim for interest or damages will be entertained by the Government with respect to any moneys or balances which may be lying with the Government owing to any dispute, difference; or misunderstanding between the Engineer-in-Charge in marking

periodical or final payments or in any other respect whatsoever.”

10. A mere look at the clause shows that the claim for interest by way of damages was not to be entertained against the Government with respect to only a specified type of amount, namely, any moneys or balances which may be lying with the Government owing to any dispute, difference between the Engineer-in-Charge and the contractor; or misunderstanding between the Engineer-in-Charge and the contractor in marking periodical or final payments or in any other respect whatsoever. The words “or in any other respect whatsoever” also referred to the dispute pertaining to the moneys or balances which may be lying with the Government pursuant to the agreement meaning thereby security deposit or retention money or any other amount which might have been with the Government and refund of which might have been withheld by the Government. The claim for damages or claim for payment for the work done and which was not paid for would not obviously cover any money which may be said to be lying with the Government. Consequently, on the express language of this clause, there is no prohibition which could be culled out against the respondent-contractor that he could not raise the claim for interest by way of damages before the arbitrator on the relevant items placed for adjudication. In fact, similar contention has been repelled by the aforesaid decision of the three-Judge Bench of this Court in paras 24 and 25 of the Report. It has been clearly observed in para 25 of the Report that under clause 4 which was pressed into service, no interest was payable on the amount withheld. The claim which was made in that case by Durga Parshad before the arbitrator was for the non-payment of the full amount as per final bill submitted by him and the interest so awarded on the said amount was clearly not covered by clause 4 of the contract. Similar is the fact situation in the present case and the wording of the clause in question is also of an identical nature. Therefore, the contention of learned Senior Counsel for the appellant-State that clause 1.9 barred the consideration of such

a claim for interest cannot be sustained. The High Court, therefore, rightly came to the conclusion that that clause was not a bar to such a claim. Further contention of learned Senior Counsel for the appellant that the claims regarding cutting of hard rock were wrongly granted, cannot be made the subject-matter of an objection under Section 30 of the Arbitration Act which could have been agitated for getting any reduction of the amount as awarded by the arbitrator. It was a question purely on the merits of the award which could not be agitated in objections as they were not in the nature of an appeal against the award before the court below. Civil Appeal No. 7643 of 1995 is disposed of accordingly.”

It is argued that Clause 78 of the Contract clearly bars payment of interest on any amount which remains lying with the employer on account of any dispute between the parties. Except damages, all sums of money payable under the Contract would be presumed to be lying with the employer and thus barred under Section 78.

24. Per contra learned Senior Counsel for the Respondent has at the outset argued that none of the objections raised against the Award fall within the scope of Section 34 of the Act and the Court cannot be called upon to interfere with the findings of fact recorded by the Tribunal or re-appreciate the evidence as an Appellate Court. The view taken by the Tribunal is a plausible view based on documents and evidence and calls for no interference.

Case of the Respondent

25. As regards Claim No. 1, it is argued that Respondent had claimed a sum of Rs. 12,65,77,806/- but the Tribunal after detailed analysis of material on record and taking cognizance of the admitted fact that idling had taken place, applied the CPWD Formula and awarded only Rs. 1,34,67,162.88/-. Petitioner's several letters on record particularly from pages 835 onwards, clearly indicated that there was idling of the equipment of the Respondent. In these letters, the Petitioner had itself, while stating the reasons for idling, demanded consequential reliefs from the principle employer, NTPC. Reasons for idling are also admitted, as evident from the documents on record, being, delay in handing over the site, delay in removal of physical obstruction, delay in site for dumping and stock, pile, area, etc. Idling charges for non or under utilization of equipment is in the realm of compensation or damages and covered under Section 54 of the Contract Act, under which the claim was made and not under Clauses 12.2 and 42 of the Contract, which the Petitioner had with NTPC, as alleged. Though there were 91 idling days, the Tribunal only considered 51 and allowed the claim. In the absence of any contractual Formula, the Tribunal rightly relied on the CPWD norms which are standard norms in all Construction Contracts. Reliance is placed on the judgment in the case of

NTPC v. Patel Engineering, 2015 SCC OnLine Del 7512 and Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy & Anr., (2007) 2 SCC 720.

26. Claim No. 4 pertains to revision of rates of excavation in inclined galleries and horizontal galleries. It was argued that the work was delayed due to site constraints where the work had to start from top end instead of bottom, as per planned methodology, which resulted in higher expenses. Delay in handing over the drawings and access roads by Respondents caused the delay. Respondent had completed more than 90% of the gallery work. Petitioner got the balance work executed through another agency at a higher rate and the Respondent only requested for the same rate to be paid to it.

27. Tribunal observed that Petitioner did not dispute the additional costs worked out by the Respondent nor denied payment of higher rates to the second agency. Clause 5 of the LOA provided that the price specified in para 4.0 was subject to price escalation under Clause 73 of COPA, which the Petitioner had with NTPC. The rates claimed by the Respondent were at par with M/s Himalaya Construction for similar excavation work and, therefore, the Tribunal rightly allowed the claim.

28. Learned Senior Counsel argued that under Claim No. 6, Respondent had claimed the amount withheld by the Petitioner, as Security Deposit. Clause 10 of the LOA provided for retention of 5% of RA Bills as security deposit which was to be returned back to the Respondent. The objection of the Petitioner was that Respondent had abandoned the work and, therefore, claimed Rs. 3.10 Crore as negative balance and deducted Rs. 4,48,95,263/- from the Respondent's RA bills for the period 2004-2008. Subsequently, however, the Petitioner withdrew its counterclaim of Rs. 18,49,00,730/-, which it had earlier submitted on account of alleged breach by the Respondent due to abandoning the work. Since the Petitioner itself withdrew the counterclaim, the Tribunal rightly held that the retention amount was in fact for the work executed and was Respondent's own money. It thus directed refund of the amount. It was also argued that under Clauses 6 & 7 of the 'Appendix' to the LOA dated 10.03.2004, Petitioner was entitled to terminate part or whole of the Contract in case of non-performance by the Respondent, but no such action was taken.

29. With respect to Claim No. 7, it is argued that Respondent had claimed Rs. 18,22,79,471/- but the Tribunal awarded only Rs. 1,19,96,310/- after detailed examination of the material on record. Petitioner has not

disputed the computation nor sought any clarification assuming there was any factual mistake, under Section 33 of the Act. The amount claimed is against the work done along with escalation and is based on the evidence led before the Tribunal. It is not open to this Court under Section 34 of the Act to re-appreciate the evidence. Relying on the judgment in the case of ***MP Power Generation vs. Ansaldo Energia, (2018) 16 SCC 661***, it is reiterated that under Section 34 of the Act, Court does not sit as a Court of Appeal and a possible view by the Arbitrator has to necessarily pass muster as the Arbitrator is the sole judge of quantity and quality of evidence.

30. Defending the Award under Claim No. 9, which relates to grant of Interest, learned Senior Counsel for the Respondent argues that the Petitioner's reliance on Clauses 77 and 78 of the Agreement entered into between NTPC and ITDC, to contend that these clauses prohibit the grant of interest, is misconceived. The same clauses have been considered in three Decisions of this Court, where the interest was allowed by interpreting the clauses to mean that they would apply only with respect to money lying with the employer and not with respect to adjudicated claims qua certain disputes. Reliance is placed on the judgment of the Single Judge of this Court in ***NTPC v. Patel Engineering, 2015 SCC OnLine Del 7512***, which

was upheld by the Division Bench in ***FAO (OS) 219/2015 titled NTPC v. Patel Engineering.*** It is submitted that judgment of the Division Bench was taken up in appeal before the Supreme Court and ***SLP(C) 25685/2015*** filed by NTPC was dismissed vide order dated 05.10.2015. Reliance is also placed on the decisions in the case of ***NTPC Limited v. Hindustan Construction Company Ltd., 2017 SCC OnLine Del 6652*** and ***Harish Chandra (supra).***

31. I have heard the learned Senior Counsels for the parties and examined their rival contentions.

32. Claim No. 1 was with respect to idling charges of machinery and manpower on account of stoppage of work by the Petitioner on many occasions due to obstructions in the work. The Tribunal relied upon a plethora of letters placed on record by the Respondent including Annexures C-3, C-4, C-5, C-28, C-29, C-30 etc., whereby the respondent had brought to the notice of the Petitioner, from time to time, that there were obstructions on the site on account of non-availability of access road, hindrances towards excavation, blasting work, stoppage of work due to problems by the locals. Tribunal extracted the 'summary of the reasons' for stoppage of work in great details, in para 201 of the Award. Reliance is

placed by the Tribunal on the various clauses of the Contract entitling the Respondent to idling charges. Clause 12.1 relates to unforeseeable physical obstructions or conditions; Clause 42.2 relates to entitlement to extension on account of failure to give possession and Clause 44 provides the consequences for delay, impediment or prevention by the employer. Tribunal placed reliance on various letters written by the Petitioner, wherein they had objected to the delay at their end as well as those portions of the letter where some hindrances and obstructions were not denied. The Tribunal also extracted a letter dated 10.01.2008 written by the Petitioner to the Respondent wherein the Respondent was informed that Petitioner was discussing the matter with NTPC on the issue of extension of time, driven by the delays to critical path. Pursuant to the directions of the Tribunal, Petitioner filed various documents including Statement of Claims raised by it against NTPC. The Tribunal after perusal of the statement, observed that the Petitioner had raised a Claim against NTPC on account of events that had adversely effected the progress of the work, extension of time etc. on account of delay in handling the site possession, removal of obstructions, delay in handling / dumping as well as on other aspects, which were essentially the same reasons on which the Respondent had claimed idling

charges from the Petitioner. The Tribunal then sifts the evidence on record which includes correspondence between the parties, the data showing the period of stoppage of work under different Heads such as rainfall, strike, non-availability of site for excavation, dumping etc. Having analysed the data minutely, the Tribunal rejects the Claim for idling charges on account of strike and the rainfall period. The Tribunal observes that neither of the parties presented the correct figures of idling or led satisfactory evidence on the assessment of rates to determine the idling charges. However, finding that none of the reasons cited by the Respondent regarding stoppage of work, as evident from several documents on record, were denied by the Petitioner and instead the Petitioner admitted in its letter dated 14.12.2005 that progress was adversely impacted due to various reasons, Tribunal allowed the Claim in favour of the Respondent. The Tribunal additionally notes that Petitioner had itself raised Claims against the NTPC on account of delays and obstructions in the progress of work by the NTPC. The Tribunal having found that there was no contractual formula to determine the idling charges, relied on the CPWD norms and calculated the charges by dividing the value of work done by total number of days worked and then multiplying the same with the number of idle days, after deducting 50%

towards material consumed. Thus, out of the total 91 idling days claimed, the Tribunal awarded the Claim only with respect to 51 days.

33. This part of the Award is based on analyses of several documents and evidence on record. As a finding of fact, the Tribunal has found that there were delays and hindrances caused by the Petitioner, resulting in the idling of machinery and manpower. Since there was no contractual formula, the Tribunal has applied the most commonly used CPWD Norms in such Contracts.

34. Petitioner had raised the same argument before the Tribunal, that in the absence of any evidence of the loss suffered, the Contractor is not entitled to idling charges, as is being raised here. The Tribunal took note of this argument in para 212 of the Award and then posed upon itself the task to sift the evidence to adjudicate the idling charges on real figures and rates reasonably assessed.

35. In paras 213 to 216 of the Award, the Tribunal extracts the figures furnished by the Respondent mentioning in detail the date, duration and the equipments along with idling hours to substantiate the Claim. The Tribunal thereafter relies on the cross-examination of the witness of the Respondent and extracts in the Award, some relevant portions therefrom. It is thereafter

that the Tribunal concludes that the Respondent was entitled to the said Claim.

36. In the case of *NTPC vs. Patel Engineering (supra)*, this Court has upheld the applicability of the CWC Guidelines for computing the idling charges, in the absence of a contractual formula. Under Section 34 of the Act, this Court cannot interfere in finding of facts or reappreciate the evidence. This part of the Award is thus upheld.

37. Claim No. 4 was for additional work in the inclined galleries and was based on the plea that the execution of work got delayed due to stoppage of work by local people and for not handing over the site in time, causing an increase in the rate of excavation. Petitioner resisted the Claim by denying that there was any stoppage of work, attributable to the Petitioner and instead claimed that it was the Respondent who had abandoned the work midway and another sub-contractor had to be engaged to execute the work at substantially higher cost. The Tribunal in order to decide the said Claim relies upon Annexure C-72, C-73 being letters written by the Respondent to the Petitioner bringing to its notice the change of methodology by the Petitioner in excavating the galleries, resulting in higher expenses than those envisaged under the Contract, as well as the reasons for delay such as

handing over the portals and access roads. The Tribunal also relies on Annexure C-59, letter dated 23.10.2006, whereby Respondent had sought revision of rates for the excavation work in the galleries and had brought out in detail the delay caused by the Petitioner. The response of the Petitioner vide letter dated 16.01.2008 was also taken note of by the Tribunal. The Tribunal then took note of Clause 4 of the LOA whereby the contract price was based on the unit rates and quantities, specified in the 'Attachment' to the LOA. It observed that the Petitioner did not dispute the additional costs worked out by the Respondent nor denied the payment of higher cost to M/s Himalaya Constructions, who had completed the balance work. Tribunal also relied on Clause 5 of the LOA dated 10.03.2004 providing that the Contract price was subject to price escalation in accordance with Clause 73 of COPA. Tribunal also notes that the petitioner did not join issue with the Respondent on the revision of rates, but took a stand that Respondent had abandoned the work, midway.

38. Once the Petitioner did not dispute the additional costs worked out by the Respondent on account of the change in methodology in excavation attributable to the Petitioner, the Tribunal, in my view, rightly allowed the present Claim. Respondent had applied for revision of rates, but the

Engineer did not even consider the issue in terms of Clause 73 of COPA. Petitioner had got the balance work executed through M/s Himalaya Constructions and had paid the said Company at a higher rate than the contractual rate between the parties herein. Since the Tribunal found that the Claim for additional cost was not disputed, it adopted the rate approved for M/s Himalaya Construction for the similar excavation work as the revised rate under the present Claim. In my view, the methodology adopted by the Tribunal was really in the domain of the Tribunal, once the Claim to higher rates was not disputed by the Petitioner.

39. In the case of *Associate Builders v. DDA*, (2015) 3 SCC 49, the Apex Court categorically held that the decision as to what Formula would be applicable in the particular facts of a case, depending the contractual terms, is the domain of the Arbitrator. It was held:

“56. Here again, the Division Bench has interfered wrongly with the arbitral award on several counts. It had no business to enter into a pure question of fact to set aside the arbitrator for having applied a formula of 20 months instead of 25 months. Though this would inure in favour of the appellant, it is clear that the appellant did not file any cross-objection on this score. Also, it is extremely curious that the Division Bench found that an adjustment would have to be made with claims awarded under Claims 2, 3 and 4 which are entirely separate and independent claims and have nothing to do with Claims 12 and 13. The formula then applied by the Division Bench was that it

would itself do “rough and ready justice”. We are at a complete loss to understand how this can be done by any court under the jurisdiction exercised under Section 34 of the Arbitration Act. As has been held above, the expression “justice” when it comes to setting aside an award under the public policy ground can only mean that an award shocks the conscience of the court. It cannot possibly include what the court thinks is unjust on the facts of a case for which it then seeks to substitute its view for the arbitrator's view and does what it considers to be “justice”. With great respect to the Division Bench, the whole approach to setting aside arbitral awards is incorrect. The Division Bench has lost sight of the fact that it is not a first appellate court and cannot interfere with errors of fact.”

Supreme Court in the above judgment also placed reliance on the judgment in *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181, wherein the Court had made the following observations:

“106. We do not intend to delve deep into the matter as it is an accepted position that different formulae can be applied in different circumstances and the question as to whether damages should be computed by taking recourse to one or the other formula, having regard to the facts and circumstances of a particular case, would eminently fall within the domain of the arbitrator.

107. If the learned arbitrator, therefore, applied the Emden Formula in assessing the amount of damages, he cannot be said to have committed an error warranting interference by this Court.

XXX

109. Sections 55 and 73 of the Indian Contract Act do not lay down the mode and manner as to how and in what manner the computation of damages or compensation has to be made. There is nothing in Indian law to show that any of the formulae adopted in other countries is prohibited in law or the same would be inconsistent with the law prevailing in India.

110. As computation depends on circumstances and methods to compute damages, how the quantum thereof should be determined is a matter which would fall for the decision of the arbitrator. We, however, see no reason to interfere with that part of the award in view of the fact that the aforementioned formula evolved over the years, is accepted internationally and, therefore, cannot be said to be wholly contrary to the provisions of the Indian law.”

This part of the Award calls for no interference.

40. Claim No. 6 was for release of security deposit of Rs. 4,97,10,698/-. Petitioner resisted the Claim before the Tribunal on the ground that Respondent had abandoned the work and the Project could not be completed by the Respondent. Petitioner vide letter dated 20.07.2009 communicated to the Respondent that after crediting all the amounts to which it was entitled, there was a negative balance of Rs. 3.10 Crores on the Respondent and thus the retention money got reduced to Rs. 1.88 Crores as against a contractual requirement of Rs. 4.97 Crores and thus, Respondent was not entitled to refund of the security deposit. The argument today before this Court is that having abandoned the contract, Respondent cannot be permitted the refund of security deposit and that too in the absence of

satisfaction of the Engineer on the completion of the Project under Clause 10 of the LOA, read with Clause 67 GCC. Clause 10 of the LOA permits 5% retention from each running bill towards security deposit with a further retention equal to 2.5% on completion of 12 months and a further 2.5% of the running bills after 25 months from the date of the LOA. The said provision also requires a satisfaction by the Engineer-in-Charge that all terms of the contract are duly carried out. As a matter of fact, Petitioner had deducted Rs. 4,48,95,263/- as retention money from the Running Bills between 2004-2008. When the respondent referred the dispute to the Engineer under Clause 67 GCC, the Engineer declined the release of retention money as according to the Engineer, Petitioner had incurred costs on account of breach by the Respondent. Petitioner had also filed a counter Claim for compensation on account of the alleged breach by the Respondent in abandoning the work. The counterclaim was subsequently withdrawn by the Petitioner and the Tribunal by order dated 03.05.2014 had suspended the proceedings qua the said Counterclaim. Recording this background, the Tribunal observed that once the Counter Claim had been withdrawn and the proceedings were suspended by the Tribunal, at present, Petitioner had no Claim against the Respondent, and therefore, the retention money could not

have been set off or adjusted against any Claim. On this basis, the Tribunal concluded that Respondent was entitled to refund of retention money deducted from their running bills towards the work actually done. The Tribunal was of the view that the question of performance or non-performance was of no relevance to this Claim as the Petitioner had given up all its claims/ counter claims against the Respondent. Relevant para of the Award reads as under:

“257. Claim No.6

Release of Security Deposit Rs. 4,97,10,698.00

Claimant's contention is that vide Letter dated 16.02.2008, Claimant demanded pending payment including Security Deposit but the same having not been paid, the claimant is entitled to recover Security Deposit.

258. Respondent resisted the claim pleading that the question of refund of security deposit does not arise when the Claimant has abandoned the work and when the project is not yet completed. Vide their Letter dated 20.07.2009, the Respondent clarified to Claimant that after crediting all the amounts to which the Claimant is entitled, there is still a negative balance of Rs. 3.10 crores on the Claimant and thus the retention money got reduced to Rs.1.88 crores as against the contractual requirement of Rs4.97 crores. The Claimant thus is not entitled to refund of the security deposit as claimed.

259. Clause 10 of the Letter of Award provides as under:-

"10.0 Retention:

A retention of 5% shall be deducted as security deposit from each running bills. Further retention equal to

2.5% of the running bills will be deduced on completion of 12 months period from the date of this letter. A further retention equal to 2.5% of the running bills will be deduced after completion of 24 months from the date of this letter. Thus the final Retention will be 10% (ten percent) of the running bills. The Retention shall be returned to MCM after the Engineer in charge has satisfied himself that all terms of the Contract have been duly and fully carried out by the MCM or after 90 days after the completion of defect liability period and on submission of the documents indicated in the main Contract we have with NTPC under sub-clause 10.1 of conditions of Particular Application:"

260. Pursuant to Clause 10 of LoA, the Respondent deducted Retention Money Rs.4,48,95,263/- from the claimant's Running Bills for the period between 2004 to 2008. The Retention Money therefore is the monies retained by the Respondent otherwise payable to the claimants for the works done between 2004 and 2008. When the claimant referred the dispute to Engineer under Clause 67 GCC, the Engineer decided that ITD cannot release-the Retention Money as ITD has incurred costs as a result of breach of contract by MCM by abandoning the works. The Respondent on the other hand, filed Statement of Claim / Counter Claim for awarding monetary compensation of Rs.184,900,730.36 on account of breach of contract committed by the claimant by abandoning the works. However, the Respondent having withdrawn the Claims / Counter Claims, this Tribunal by order dated 3.5.2014 suspended the arbitral proceedings in respect of the Claims / Counter Claims raised by the Respondent. The order of the Tribunal having attained finality, the Respondent as on today has no claims or counter claims as against the claimant. Had there been any claims or counter claims, the Retention Money would have been set off or adjusted against such claims / counter claims. But there being no claims or counter claims as on today, the claimant is entitled to refund of Retention Money deducted from their Running Bills for the

work actually done. There is no question of performance or non-performance of the contract by the claimant as it has no bearing as the respondent has given up all claims / counter claims against the claimant. The Respondent is therefore, liable to refund the Retention Money Rs.4,48,95,263/- from the claimant's Running Bills.”

There is no infirmity in this part of the Award and calls for no interference.

41. With respect to the contention of the parties under Claim No. 7, having perused the Award, it is seen that the Tribunal has examined the contentions of the parties and the plethora of documents and calculations placed on record, before arriving at the figure due to the Respondent. The Tribunal has taken note of the Claim of the Respondent from the Statement of Claim as well as the rejoinder and has also analysed the stand of the petitioner in the Statement of Defence. In addition, the amended pleadings have also been taken note of. Averments of the Petitioner in reply to the application for discovery and interrogatories is also analysed by the Tribunal. The Tribunal based on these documents records the value of the claims and the approved quantities and their differences. Reconciliation statements have been perused. The Tribunal also deals with the issue raised that the Claim was not referred to the Engineer and negatives it in para 271 which reads as under:

271. Admittedly, the Engineer vide his decision dated 17.04.2009 rejected the claim for Balance Payment and Escalation stating that there is no balance due and on the other hand there is negative accumulative account i.e. amount due from claimant to the Respondent to the tune of Rs. 1.40 crores. The claim for Balance Payment and Escalation was thus subjected to the decision of the Engineer who rejected the claim stating that there is a negative accumulated account to the tune of Rs. 1.40 crores due from claimant to the Respondent. Therefore, it cannot be said that the claim has not been referred to Engineer's decision. The Respondent's contention that the claim is not maintainable as the same having not been referred to Engineer's decision under Clause 67 GCC is therefore, liable to be rejected.”

42. In para 274, the stand of the Petitioner with regard to the balance payments with detailed figures is noted by the Tribunal and in para 276, the Tribunal renders a finding that the Petitioner worked out the total value of work only upto RA Bill No. 50, but did not take into account the subsequent bills for May 2008 and June 2008. Calculating the amounts due in the subsequent bills, the Tribunal arrives at a computation. In para 277, the Tribunal takes note of the admitted amounts received by the Respondent. Detailed tables showing the deduction towards contractual retention and other advances towards cement, store material, TDS, WCT, etc. are noted. Finally, taking into account all these payments / deductions and balance, the

Tribunal has arrived at a computation in para 277 towards the amount due to the Respondent, along with escalation.

43. It is thus, not open to the Petitioner to contend that this part of the Award suffers from non-application of mind. The contention that the Claim was not referred to the Engineer is also not correct as the Engineer rejected the Claim under Clause 67 GCC. Needless to state that this Court while examining the Award under Section 34 of the Act, cannot interfere in pure findings of fact and the methodology adopted for calculation. No interference is called for in the Award under Claim No.7.

44. Under Claim No. 9, the Tribunal has awarded simple interest to the Respondent @ 1 % over and above the RBI Time Lending Rates as *pendente lite* interest from 20.04.2009. The principal contention of the Petitioner herein is that the award of interest is in complete contravention of the terms of the Contract, whereby the payment of interest is explicitly prohibited in case of any outstanding due or delayed payment. Clause 78 according to the Petitioner bars any payment of interest on any amount which remains with the employer on account of any dispute between the parties. Respondent has, on the other hand, defended the Award by arguing that Clauses similar to Clauses 77 and 78 in the present Contract, have been

interpreted in three earlier judgments and it is not open to the Petitioner to place any other interpretation and the Claim has been rightly allowed. Both sides have cited their respective judgments which have been referred to in the earlier part of this judgment. Clauses 77 and 78 as referred to above, were considered by a Coordinate Bench of this Court in the case of ***NTPC Limited vs. Hindustan Construction Company Ltd., 2017 SCC OnLine Del 6652***. The Court has interpreted the clauses as under:

“51. As far as Clause 77 is concerned, the Court fails to appreciate how the said Clause would be relevant for deciding whether the contractor is entitled to pendent lite interest. It talks of the “interest upon any guarantee” or “payment of arrears” or “any balance which may on the final settlement of his account, be due to him” on account of omission on the part of the Engineer to pay the amount. The Court is unable to read the above Clause as prohibiting an AT from paying interest pendent lite to a secondary claim.

52. As far as Clause 78 is concerned, it only applies to “any amount or balance which may be lying with the employer”. The above balance amount could be lying as a result of two contingencies: (i) on account of any dispute or difference between the parties or (ii) on account of any delay or omission on the part of the Engineer in making interim or final payment. It is in the above specific conditions that no interest is payable. The sum and substance are not in the nature of sums that are yet to be determined as being payable. Again, this is not a Clause which prohibits payment of pendent lite interest in the manner contemplated in Union of India v. Ambika Construction (supra) or Union of

India v. Bright Power Projects (India) (P) Ltd. (supra). Therefore, in the considered view, there was no prohibition against the AT awarding interest in the manner it has in the impugned Award.”

45. This is the judgment which has been relied upon by the Respondent in its favour.

46. It needs a mention at this stage that clauses similar to these two clauses came up for consideration before the Supreme Court in a recent judgment in the case of ***Jaiprakash Associates Ltd. vs. Tehri Hydro Development Corporation Ltd. (THDC) 2019 SCC OnLine 143.*** The relevant clauses in the said case which, in my view, are *pari materia* to clauses 77 and 78 are 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 nay dispute, different or misunderstanding between the parties or in respect of any delay or omission on the part of

he Engineer in charge in making intermediate or final payments on in any other respect whatsoever.”

47. In the said case, the Arbitral Tribunal had granted interest @ 10% per annum as interest *pendente lite* apart from future interest. The Award was challenged in the High Court and a Single Judge of this Court quashed the Award, limited to the interest, awarded by the Arbitrators. In an intra-court appeal, the Division Bench upheld the Judgment of the Single Judge. The litigation was carried further to the Supreme Court by Jaiprakash Associates Limited to the question, whether the Arbitrators could have awarded interest in view of Clauses 50 and 51 of the GCC which governed the terms between the parties. The High Court had taken a view that if the interest was prohibited by the express terms of the Contract between the parties, the Tribunal has no jurisdiction to award the interest. On the interpretation of the Clauses, the High Court was of the view that they were *pari materia* to Clauses 1.2.14 and 1.2.15 of the Contract being subject matter of the judgment in ***Tehri Hydro Development Corpn. Ltd. v. Jai Prakash Associates Ltd., (2012) 12 SCC 10***, wherein the Supreme Court had interpreted the clauses to mean that no interest is payable on claim for delayed payment to the Contractor.

48. The Supreme Court culled out the broad principles with regard to the grant of pre-reference and *pendente lite* interest by an Arbitral Tribunal. Insofar as *pendente lite* interest is concerned, the Court observed that the 1996 Act had made a significant departure on the grant of *pendente lite* interest from the law under the 1940 Act. This distinction according to the Court was summarized by the Supreme Court in an earlier judgment in ***Sayeed Ahmed & Company vs. State of Uttar Pradesh (2009) 12 SCC 26***.

Relevant part of the judgment in ***Sayeed Ahmed (supra)*** is as under:

“14. The decisions of this Court with reference to the awards under the old Arbitration Act making a distinction between the pre-reference period and pendente lite period and the observation therein that the arbitrator has the discretion to award interest during pendente lite period in spite of any bar against interest contained in the Contract between the parties are not applicable to arbitrations governed by the Arbitration and Conciliation Act, 1996.”

49. The Supreme Court then relied upon the judgment in ***Sree Kamatchi Amman Constructions v. Divisional Railway Manager (Works), Palghat (2010) 8 SCC 767*** and ***Union of India vs. Bright Power Projects (India) Private Limited (2015) 9 SCC 695***, the later being a judgment by a Bench of three Judges, where this position of law was reiterated. The Court noted that again in the case of ***Sri Chittaranjan Maity v. Union of India (2017) 9***

SCC 611, the same question fell for consideration. Relevant part of the judgment in **Sri Chittaranjan Maity (supra)** is as under:

“16. Relying on a decision of this Court in *Ambica Construction v. Union of India* [*Ambica Construction v. Union of India*, (2017) 14 SCC 323], the learned Senior Counsel for the appellant submits that mere bar to award interest on the amounts payable under the contract would not be sufficient to deny payment on pendente lite interest. Therefore, the arbitrator was justified in awarding the pendente lite interest. However, it is not clear from *Ambica Construction* [*Ambica Construction v. Union of India*, (2017) 14 SCC 323] as to whether it was decided under the Arbitration Act, 1940 (for short “the 1940 Act”) or under the 1996 Act. It has relied on a judgment of Constitution Bench in *State of Orissa v. G.C. Roy* [*State of Orissa v. G.C. Roy*, (1992) 1 SCC 508]. This judgment was with reference to the 1940 Act. In the 1940 Act, there was no provision which prohibited the arbitrator from awarding interest for the pre-reference, pendente lite or post-award period, whereas the 1996 Act contains a specific provision which says that if the agreement prohibits award of interest for the pre-award period, the arbitrator cannot award interest for the said period. Therefore, the decision in *Ambica Construction* [*Ambica Construction v. Union of India*, (2017) 14 SCC 323] cannot be made applicable to the instant case.”

50. Significantly, the Supreme Court refers to the judgment of the Court in ***Reliance Cellulose Products Limited v. Oil and Natural Gas Corporation Limited* (2018) 9 SCC 266**, where the entire law on the subject was revisited. In the case of ***Reliance Cellulose (supra)***, the Supreme Court

had contrasted a Clause relating to grant of interest as in second Ambika Construction case i.e. *Ambica Construction v. Union of India*, (2017) 14 SCC 323, with the Clause in *Tehri Hydro* (*supra*). The Supreme Court in the case of *Reliance Cellulose* (*supra*) held as under:

*“24. A conspectus of the decisions that have been referred to above would show that under the 1940 Act, an arbitrator has power to grant pre-reference interest under the Interest Act, 1978 as well as pendente lite and future interest. However, he is constricted only by the fact that an agreement between the parties may contain an express bar to the award of pre-reference and/or pendente lite interest. Since interest is compensatory in nature and is parasitic upon a principal sum not having been paid in time, this Court has frowned upon clauses that bar the payment of interest. It has therefore evolved the test of strict construction of such clauses, and has gone on to state that unless there is a clear and express bar to the payment of interest that can be awarded by an arbitrator, clauses which do not refer to claims before the arbitrators or disputes between parties and clearly bar payment of interest, cannot stand in the way of an arbitrator awarding pre-reference or pendente lite interest. Thus, when one contrasts a clause such as the clause in Second Ambika Construction case [*Ambica Construction v. Union of India*, (2017) 14 SCC 323 : (2018) 1 SCC (Civ) 257] with the clause in *Tehri Hydro Development Corpn. Ltd. v. Jai Prakash Associates Ltd.*, (2012) 12 SCC 10 : (2013) 2 SCC (Civ) 122], it becomes clear that unless a contractor agrees that no claim for interest will either be entertained or payable by the other party owing to dispute, difference, or misunderstandings between the parties or in respect of delay on the part of the engineer or in any other respect whatsoever, leading the Court to find an express bar against payment of interest, a clause which merely states that*

no interest will be payable upon amounts payable to the contractor under the contract would not be sufficient to bar an arbitrator from awarding pendente lite interest under the 1940 Act. As has been held in First Ambica Construction case [Union of India v. Ambica Construction, (2016) 6 SCC 36 : (2016) 3 SCC (Civ) 36], the grant of pendente lite interest depends upon the phraseology used in the agreement, clauses conferring power relating to arbitration, the nature of claim and dispute referred to the arbitrator, and on what items the power to award interest has been taken away and for which period. We hasten to add that the position as has been explained in some of the judgments above under Section 31(7) of the 1996 Act, is wholly different, inasmuch as Section 31(7) of the 1996 Act sanctifies agreements between the parties and states that the moment the agreement says otherwise, no interest becomes payable right from the date of the cause of action until the award is delivered.”

51. Having traversed the various judgments on the subject, Supreme Court finally examined clauses 50 and 51 which were subject matter of controversy between the parties. Court was of the view that clauses 50 and 51 of the GCC being *pari materia* with the Clauses in the ***Tehri Hydro*** (*supra*) had been interpreted by holding that no interest was payable on delayed payments due to the contractor, and therefore, the same construction was adopted for interpreting clauses 50 and 51. The Supreme Court then examined the contention of the Appellant that this construction was contrary to the judgment in ***Harish Chandra*** (*supra*). It may be noted here that even in the present case reliance has been placed by the

Respondent on the judgment in *Harish Chandra's case (supra)*. To answer this question, the Court placed reliance on the discussion in the case of *Reliance Cellulose (supra)*, relevant para of which is as under:

“25. ...Also, unlike the clause in Tehri Hydro Development Corporation Ltd. (Supra), clause 16 does not contain language which is so wide in nature that it would interdict an arbitrator from granting pendente lite interest. It will be remembered that the clause in Tehri Hydro Development Corporation Ltd. (supra) spoke of no claim for interest being entertained or payable in respect of any money which may be lying with the Government owing to disputes, difference or misunderstanding between the parties and not merely in respect of delay or omission; Further, the clause in Tehri Hydro Development Corporation Ltd. (supra) goes much further and makes it clear that no claim for interest is payable “in any other respect whatsoever””

52. Finally, the Supreme Court held as under:

“21. It is pertinent to mention that the aforesaid judgment also discusses and analysis Harish Chandra case. In the first place, the judgment in Harish Chandra case is under the 1940 Act. More pertinently, this judgment is explained and distinguished in Sayeed Ahmed and Company case in the following paragraphs:

“17. The appellant strongly relied upon the decision of this Court in State of U.P. v. Harish Chandra & Co. [(1999) 1 SCC 63] to contend that Clause 1.09 of the contract did not bar the award of interest. The clause barring interest that fell for consideration in that decision was as under: (SCC p. 67, para 9)

“1.09. No claim for delayed payment due to dispute, etc.—No claim for interest or damages will be entertained by the Government with respect to any moneys or balances which may be lying with the Government owing to any dispute, difference; or misunderstanding between the Engineer-in-Charge in making periodical or final payments or in any other respect whatsoever.”

This Court held that the said clause did not bar award of interest on any claim for damages or for claim for payment for work done. We extract below the reasoning for such decision: (SCC p. 67, para 10)

“10. A mere look at the clause shows that the claim for interest by way of damages was not to be entertained against the Government with respect to only a specified type of amount, namely, any moneys or balances which may be lying with the Government owing to any dispute, difference between the Engineer-in-Charge and the contractor; or misunderstanding between the Engineer-in-Charge and the contractor in making periodical or final payments or in any other respect whatsoever. The words ‘or in any other respect whatsoever’ also referred to the dispute pertaining to the moneys or balances which may be lying with the Government pursuant to the agreement meaning thereby security deposit or retention money or any other amount which might have been with the Government and refund of which might have been withheld by the Government. The claim for damages or claim for payment for the work done and which was not paid for would not obviously cover any money which may be said to be lying with the Government. Consequently, on the express language of this clause, there is no prohibition which could be culled out against the respondent contractor that he could not raise the claim for interest by way of damages before

the arbitrator on the relevant items placed for adjudication.”

(emphasis supplied)

18. In Harish Chandra [(1999) 1 SCC 63] a different version of Clause 1.09 was considered. Having regard to the restrictive wording of that clause, this Court held that it did not bar award of interest on a claim for damages or a claim for payments for work done and which was not paid. This Court held that the said clause barred award of interest only on amounts which may be lying with the Government by way of security deposit/retention money or any other amount, refund of which was withheld by the Government.

19. But in the present case, Clause G1.09 is significantly different. It specifically provides that no interest shall be payable in respect of any money that may become due owing to any dispute, difference or misunderstanding between the Engineer-in-Charge and contractor or with respect to any delay on the part of the Engineer-in-Charge in making periodical or final payment or in respect of any other respect whatsoever. The bar under Clause G1.09 in this case being absolute, the decision in Harish Chandra [(1999) 1 SCC 63] will not assist the appellant in any manner.”

22. It is also pertinent to note that the judgment in Sayeed Ahmed and Company distinguishing the restrictive wording in Harish Chandra has been consistently followed by this Court in number of cases thereafter. In this scenario, when we find that Harish Chandra case which is of the vintage of 1940 Act and is distinguished in Sayeed Ahmed and Company coupled with the fact that the ratio of Sayeed Ahmed and Company has been consistently followed, there is no reason to deviate from the construction to Clauses 50 and 51 of the GCC given by the arbitral tribunal in the first instance as well as the High Court. Above all, these clauses is pari

materia with with Clauses 1.2.14 and 1.2.15 of GCC in THDC case which was a judgment between the same parties.”

53. It may be noted here that Clause 78 in the present case is exactly similar to the clauses in ***Jaiprakash (supra)*** and ***Tehri Hydro (supra)*** and the words of the Clauses which distinguished these cases from second Ambika were “in any other respect whatsoever”. Therefore, relying on the judgments as referred to above, in my opinion, learned Senior Counsel for the Petitioner is right in arguing that there was a clear bar in Clauses 77 and 78 for grant of interest on account of the eventualities mentioned therein. The judgment of ***Jaiprakash (supra)*** is a judgment by three Judges Bench and has considered the judgment in the case of ***Harish Chandra (supra)*** and in this view, the contention of the Respondent cannot be accepted.

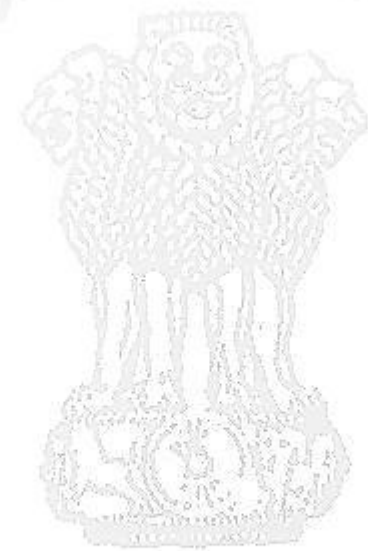
54. It is also important to see the paradigm shift in law with regard to the grant of *pendente lite* interest from the position that inured under the 1940 Act to the position under the 1996 Act. The Legislature in its wisdom has clearly sanctified the party autonomy and agreements between the parties by introducing Section 31(7) in the 1996 Act and has made the power of the Arbitrator to grant *pendente lite* interest, subject to any agreement between the parties to the contrary. In this view of the matter, it was not open to the

Arbitrator to have allowed the present Claim and granted *pendente lite* interest as the parties had under Clauses 77 and 78 agreed that there would be a bar to grant of interest. This part of the Award therefore, deserves to be set aside.

55. Accordingly, the Petition is partly allowed. The Impugned Award only to the extent of grant of *pendente lite* interest is set aside. No orders as to costs.

JYOTI SINGH, J.

MAY 27th, 2020
yo/rd



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