

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 08.12.2021

+ **O.M.P. (COMM) 139/2021**

M/S TATA PROJECTS LTD.

..... Petitioner

Versus

M/S NTPC LIMITED

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Sameer Parekh, Ms Smita Bhargava and
Mr Tanuj Agarwal, Advocates.

For the Respondent : Mr Chetan Sharma, ASGI with Mr Adarsh
Tripathi, Mr Vikram S Baid, and Mr Ajitesh
Garg, Advocates.

AND

+ **O.M.P. (COMM) 171/2021 and IA Nos. 6288/2021 & 6289/2021**

NTPC LTD.

..... Petitioner

Versus

M/S TATA PROJECTS LTD.

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For the Respondent : Mr Sameer Parekh, Ms Smita Bhargava
and Mr Tanuj Agarwal, Advocates.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The parties have filed these petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter the '**A&C Act**') impugning an Arbitral Award dated 01.12.2020 (hereinafter the '**impugned award**') passed by the Arbitral Tribunal constituted of three members, Justice (Retd.) Badar Durrez Ahmed, Justice (Retd.) Mukul Mudgal and Justice (Retd.) Dr. Mukundakam Sharma as the Presiding Arbitrator (hereinafter '**the Arbitral Tribunal**').

2. The impugned award has been rendered in the context of disputes that have arisen between the parties in relation with the agreements dated 12.09.2014 for execution of certain works relating to the Lara Super Power Thermal Project.

Factual Context

3. On 05.06.2014, NTPC issued an Invitation for Bids (IFB) for the works regarding "*Coal Handling Plant Package for Lara Super Power Thermal Project, Stage I (2 x 800 MW)*" (hereinafter '**the Project**'), on the terms and conditions stipulated therein.

4. Pursuant to the said IFB, Tata Projects Ltd. (hereinafter '**TPL**') participated in the two stage bidding process. It submitted its bids for executing the Project works: Techno Commercial Bid dated 27.06.2014 (Stage I) and Price Bid dated 13.08.2014 (Stage II). TPL also submitted a discount letter dated 14.08.2014. TPL's bid was accepted and

thereafter, NTPC issued three Notifications of Awards dated 26.08.2014 (hereinafter '**NoA**') in favour of TPL.

5. The effective date of commencement of the contract was 26.08.2014 and Unit No.1 was to be executed within a period of thirty months and Unit no.2 was to be executed within thirty-four months from the effective date of commencement of the contract.

6. Thereafter, on 12.09.2014, three 'Contract Agreements' (hereinafter collectively referred as the '**Agreements**') were signed between the parties for a total consideration of EURO 5,10,000/- and ₹321,95,59,742/-. The details of the three Agreements are tabulated below:

Contract Agreement [CS-9548-155(R)-2-FC-COA-6200] for contract price of EUR 5,10,000/- (hereinafter referred to as ' Foreign Supply Contract ')	Design, engineering, manufacture, procure, shop fabrication, testing, inspection at manufacturers works, packing, supply, forwarding and dispatch of offshore plant and equipment on CIF (Indian Port-of-Entry) basis for the Coal Handling Plant Package for Lara Super Power Thermal Project, Stage 1 (2 x 800 MW).
Contract Agreement [CS-9548-155(R)-2-FC-COA-6201] for	Design, engineering, manufacture, procure, testing,

9. In accordance with the terms of the Agreements, TPL submitted three Performance Securities amounting to ₹19,53,84,214/-, ₹12,65,71,761/- and EURO 51,000, under the cover of its letter dated 19.09.2014. These Securities were valid upto 26.03.2019.

10. On 19.01.2017, the Ministry of Labour and Employment, Government of India issued a notification [Notification No S.O. 188 (E)] under the Minimum Wages Act, 1948 increasing the minimum basic rate of wages for various categories of labour.

11. In 2017, the Government of India announced the implementation of the Integrated Goods and Service Tax and Central Goods and Service Tax Act with effect from 01.07.2017.

12. Admittedly, there were delays in execution of the Project. TPL requested NTPC to grant extension of time in terms of Clause 40 of the General Conditions of Contract (GCC), as applicable to the Agreements.

13. NTPC granted such provisional extensions from time to time and requested TPL to extend the bank guarantees, insurance, labour license and other statutory requirements. NTPC also stated in its communications that the grant of extension would be without any extra financial burden on it and it reserved its right to levy liquidated damages. However, TPL claimed that the delays were for reasons not attributable to it and the commercial/financial implications arising out of the extensions would be on account of NTPC.

14. The controversy essentially relates to (i) TPL's claim for payment of additional amounts on account of prolongation/delay costs; (ii) TPL's claim for reimbursement of Goods and Services Tax (GST); and (iii) TPL's claim for increase in costs resulting from increase in the basic wage rate in terms of the Notification No S.O. 188 (E) dated 19.01.2017; and (iv) NTPC's claim for liquidated damages. TPL claims that that the Agreements entailed reciprocal obligations and NTPC was obliged to provide the requisite work fronts and land; access to site; provision of power for construction; timely payment of running account bills; to enable TPL to perform its obligations and complete the Project within the stipulated time. TPL alleged that NTPC had failed to perform its obligation in a timely manner. Accordingly, it claimed prolongation costs and additional costs incurred due to stoppage of works.

15. NTPC claimed that TPL was unable to complete the Project works within the stipulated time period and thus, sought several extensions during the course of the Project. NTPC stated that it had granted such extensions from time to time but was not liable to pay any compensation for prolongation of contract; on the contrary, it was entitled to damages. TPL was also informed that any change in cost of labour would be paid through Price Adjustment provisions as provided in Appendix 2 of the Agreements. And, a separate claim on account of additional cost or expenditure incurred by TPL due to the hike in minimum wages was inadmissible. TPL was further informed that the Contract Price is inclusive of all taxes and, duties and was covered under the benefit being given for Mega Power Project. NTPC further

claimed that since the delay was on part of TPL, it would have to bear the GST which was payable after 01.07.2017

16. On 26.08.2017, a revised L2 work schedule was submitted by TPL and subsequently, a meeting was held between the parties for L2 schedule revision. The Minutes of the Meeting record that TPL had asked for extension of time for completion of the Project works on the basis of the delay in providing the requisite fronts and strikes at the Project site. On 21.11.2017, NPTC granted extension of time for completing the works for Unit 1 and Unit 2 till 30.01.2018 and 30.05.2018 respectively. TPL was also requested to submit revised PV bills, extended bank guarantees, insurance, labour license and comply with other statutory requirements. Further, NTPC had also advised TPL to finish the balance works and achieve completion of the Project works within the abovementioned timeline, failing which NTPC would have the right to levy liquidated damages

17. On 25.01.2018, TPL notified NTPC about the successful completion and commissioning of the facilities for Unit 1 and requested for the issuance of a Completion Certificate. TPL also requested NTPC to take over the facilities in accordance with the provisions of the GCC. TPL claimed that though the plant was commissioned, it could not reach full capacity due to non-availability of coal, which was required to be supplied by NTPC. Thereafter, by a letter dated 16.03.2018, TPL requested NTPC to issue the Completion Certificate and to take over the facilities from TPL with an assurance that TPL was ready for carrying out the Performance Guarantee Test.

18. TPL, by a letter dated 06.07.2018, raised various claims relating to additional expenses on account of (i) stoppage of work by local groups; (ii) deployment of additional security at site; (iii) deployment of DG sets due to frequent non availability of construction power at site; and (iv) compensation on account of extended stay, quantified to approximately ₹70,37,36,551/- for expenses incurred till March 2018 and projected costs till December 2018. TPL also claimed GST payments to the tune of ₹69.67 lakhs and CST payments amounting to ₹45.77 lakhs and also requested NTPC to release the abovesaid amounts. TPL also called upon NTPC to refer the matter to an adjudicator in terms of Clause 6.1 of the GCC, if it was not agreeable to release the outstanding payments, and requested NTPC to confirm the name of the adjudicator.

19. Thereafter, on 19.07.2018, NTPC issued the Completion Certificate for Unit 1 reflecting the date of completion as 23.03.2018. TPL claims that the said completion date was erroneous and the completion date should have been reflected as 25.01.2018. By a letter dated 31.07.2018, TPL requested NTPC to issue a revised Completion Certificate with the effective date of completion as 25.01.2018. NTPC responded to the aforesaid communication on 01.08.2018 and informed TPL that it had issued the Completion Certificate with respect to Unit 1 in terms of Clause 24.7 of the GCC. Since the coal reclaiming circuit was made operational on 21.03.2018, TPL's request for a revised certificate was not tenable.

20. By a letter dated 10.08.2018, TPL reiterated its request for appointment of an adjudicator to resolve the disputes between the parties. Further, it stated that if an adjudicator is not appointed by 20.08.2018, TPL would be constrained to invoke arbitration in terms of Clause 6.2 of GCC.

Arbitral Proceedings

21. In view of the above disputes, TPL issued a notice dated 07.09.2018 invoking the arbitration agreement, under Clause 6.2.1 of the GCC and, sought reference of the disputes to arbitration. TPL appointed Justice (Retd.) Badar Durrez Ahmed as its nominee Arbitrator. On 18.10.2018, NTPC nominated Justice (Retd.) Mukul Mudgal as its nominee arbitrator. Thereafter, Justice (Retd.) Dr. Mukundakam Sharma was appointed as the Presiding Arbitrator.

22. Before the Arbitral Tribunal, TPL filed its Statement of Claims claiming an amount of approximately ₹38,51,44,254/- along with *pendente lite* and future interest at the rate of 14% per annum till realisation. TPL also claimed costs and expenses. Before the Arbitral Tribunal, TPL submitted that in terms of Clause 10 and Clause 2.4 of the GCC, NTPC was obligated to make due payments; approve the design; ensure supply of electricity; and availability of the different fronts during execution of the works. But NTPC had failed to perform its obligations. TPL further claimed that there had been a disruption in the supply of electricity and TPL had to stop the works due to shortage of supply of electricity. In addition to this, TPL also contended that

there were hindrances in executing the Project works due to the agitations by the villagers, resulting in delay in completion of the Project. TPL had claimed that even after NTPC had granted several extensions of time, there were lapses on the part of NTPC including in making the requisite fronts available to it. Therefore, it was entitled to prolongation costs in terms of Sections 54 and 55 of the Indian Contract Act, 1872. TPL further submitted that since the extension of time and prolongation of the Contract was attributable to NTPC, it could not levy any liquidated damages. TPL also claimed expenses incurred on account of statutory increase in labour wages and the balance GST amount payable to it.

23. A tabular statement stating the claims made by TPL in its Statement of Claims are summarised below:

Claim no 1 - Claim relating to unconditional Extension of Time till 30.12.2018 and Prolongation cost due to extended stay	₹35,34,01,340
Claim no 2- Additional Expenses incurred during stoppage of works	₹59,07,067
Claim no 3- Cost for Additional Security	₹48,38,771
Claim no 4- Costs of DG sets due to irregular construction power	₹11,33,579
Claim no 5- Additional expenses incurred due increase in labour wages	₹1,15,31,579
Claim no 6- Claim for payment of balance Goods and Services Tax (GST)	₹83,31,918

Claim no 7- Interest	<i>Pendente lite</i> and future interest at the rate of 14% per annum till realisation
Claim no 8- Costs	Costs of Arbitration

24. NTPC filed its Statement of Defence disputing TPL's claims. However, it did not raise any counter claims. Before the Arbitral Tribunal, NTPC contended that its obligations were limited to those stipulated in the contractual provisions and there was no lapse or fault on its part in due performance of its obligations under the Agreements. NTPC also referred to Clause 20.01.00 of the Technical Specifications and contended that in terms of the said clause, TPL could not raise any claims against NTPC for delays caused due to the act or omission of other contractors and it would be entitled to extension of time as per Clause 40 of the GCC, which was duly granted to it. NTPC further contended before the Arbitral Tribunal that although it had granted such extensions from time to time, it had specifically mentioned that the same was without prejudice to impose liquidated damages. NTPC also claimed that the disturbances created by the villagers in execution of the Project works and the disruption of supply of electricity were covered under the *Force Majeure clause* and TPL would be entitled to extension of time without involving any financial implications. NTPC further contended that TPL was not entitled for additional expenses claimed on account of increase in labour wages and balance GST payment as the same were covered by the contractual provisions. Before the Arbitral

Tribunal, NTPC also contended that TPL was not entitled to the declaration that NTPC was not entitled to levy any liquidated damages for the delay caused by it.

25. In view of the rival contentions, the Arbitral Tribunal struck the following issues:

- “1. Whether the Claimant completed the work of Unit # 1 within the extended time granted by the respondent till 31.01.2018?
2. Whether the Claimant is entitled in the alternative to extension of time till 23.03.2018 with respect to Unit no 1?
3. Whether the Claimant is entitled to prolongation cost due to the extended stay?
4. Whether the Claimant is entitled to reimbursement of additional expenses incurred for stoppage of works
5. Whether the Claimant is entitled to be awarded the cost for additional security?
6. Whether the- Respondent was obligated to provide construction power under the Contract
7. Whether the Claimant is entitled to be awarded the cost for additional DG sets incurred due to the irregular supply of construction power by the Respondent?
8. Whether the Claimant is to be reimbursed the additional expense incurred due to increase-in labour wages?
9. Whether the Claimant is entitled to be reimbursed the payment of balance Goods and Services Tax (GST)?

10. Whether the Claimant is entitled to interest at the rate of 14% per annum on the aforementioned amounts?”

Findings of the Arbitral Tribunal

26. The Arbitral Tribunal found that neither NTPC nor TPL could be held responsible for any shortcomings in the performance of the contractual obligations and the same had been revised time and again with the mutual consent of both the parties. The Arbitral Tribunal declined to award the prolongation costs or additional expenses incurred during the stoppage of work as claimed by TPL and held that Sections 54 and 55 of the Indian Contract Act, 1872 had no application to the facts of the present case. The Tribunal also held that the disturbances caused by the villagers and the occasional non supply of electricity was covered under the scope of *force majeure*. TPL was entitled to extension of time on account of the same but no additional compensation. The Arbitral Tribunal also held that NTPC was not entitled to levy liquidated damages as claimed by NTPC. Accordingly, the Tribunal held that TPL was granted extension of time for completion of Unit 1 till 25.03.2018 and for Unit 2 till 31.12.2018. TPL's claim for prolongation costs amounting to ₹35,34,01,340/- and additional expenses incurred for stoppage of works amounting to ₹59,07,067/-, were rejected.

27. The Arbitral Tribunal found that there was no disturbance in the law and order situation within the premises of the Project site and the entire plant was protected by the boundary wall and by deployment of CISF personnel. The Arbitral Tribunal accepted that since the labourers

were provided accommodation inside the premises, TPL could not have faced any hindrance or difficulty in executing the Project works. The Arbitral Tribunal referred to Clauses 22.3 and 22.7 of the GCC and concluded that TPL was responsible to provide safety, security, gate control at the Project site and thus, it was not entitled to receive any payment towards the cost of additional security. Accordingly, the Arbitral Tribunal rejected Claim no. 3 of TPL and decided Issue no. 5 as framed, in favour of NTPC.

28. The Arbitral Tribunal concluded that there was no responsibility on the part of NTPC to allow and pay for the DG sets for uninterrupted supply of power at the Project site. Accordingly, the Arbitral Tribunal rejected Claim no. 4 of TPL and decided Issue nos. 6 and 7 as framed, in favour of NTPC

29. The Arbitral Tribunal considered the claim for additional expenses incurred, due to increase in labour wages and accepted TPL's contention that the substantial increase of 40% cost on account of revision of minimum basic rate of wages in terms of the Notification dated 19.02.2017 fell within the sweep of Clause 17 of the GCC and therefore, NTPC was responsible to reimburse the said expense. Accordingly, the Arbitral Tribunal accepted Claim no. 5 of TPL and decided Issue no. 8, in favour of TPL.

30. The Arbitral Tribunal referred to Clause 7.2 of the SCC and Clause 36 of the GCC and found that any change in law regarding the liability to pay tax during the currency of the Contract would be

applicable and the Contract Price would be accordingly adjusted considering the increase in the tax liability. The Tribunal found that the Project could not be completed due to multiple reasons and was extended from time to time by the parties. There was a change in law during the extended period as a new set of taxes were imposed, and NTPC would be liable to reimburse the same. NTPC had reimbursed a sum of ₹14,80,219/- towards liability to pay for GST. The Arbitral Tribunal concluded that NTPC could not make any adjustment in the Contract Price against the said payment of GST. Accordingly, the Arbitral Tribunal accepted Claim no. 6 of TPL and awarded a sum of ₹68,51,699/- [₹83,31,918/- (as claimed) less ₹14,80,219/- (sum already paid)] to TPL. Issue no. 9, was decided in favour of TPL. TPL's claim for interest at the rate of 14% per annum (Claim no. 7) was accepted by the Tribunal and, accordingly, Issue no. 10 was decided in TPL's favour.

31. Aggrieved by the impugned award, the parties have filed these petitions.

Submissions

32. Mr Parekh, learned counsel appearing for TPL assailed the impugned award principally on the ground that the Arbitral Tribunal's decision to decline the prolongation/delay costs to TPL is *ex facie* erroneous. He submitted that the reference to Clause 20.01 of the Technical Specifications was patently erroneous as the same was not applicable.

33. He referred to Sections 54 and 55 of the Indian Contract Act, 1872 with respect to TPL's claim for prolongation costs and also relied on the decisions of the Supreme Court in *M/s Hind Construction Contractors by its Sole Proprietor Bhikam- Chand Mulchand Jain (Dead) by LR's v. State of Maharashtra: (1979) 2 SCC 70*; *Arosan Enterprises Ltd. v. Union of India and Another: (1999) 9 SCC 449* and *McDermott International Inc. v. Burn Standard Co. Ltd. and Others: (2006) 11 SCC 181*, in support of his contention that in contracts relating to construction, time is not the essence of the contract and more so, when the contract contains specific provisions for extension of time. He submitted that if there were any delays for reasons not attributable to TPL, it was entitled to extension of time. And insofar as the delays caused by NTPC, it was entitled to prolongation/delay costs.

34. He submitted that since NTPC did not provide TPL with the requisite work fronts resulting in delay in execution of the works, it was liable to compensate TPL for the same. He referred to the decisions of the Supreme Court in *Assam SEB v. Buildworth (P) Ltd: 2017 (8) SCC 146* and, of this Court in *Rawla Construction Co v. UOI: ILR 1982 Delhi 44*; *Food Corporation of India v. A.M Ahmed & Co.: (2006) 13 SCC 779* and *K. N. Sathya-palan v. State of Kerala: (2007) 13 SCC 43*, in support of his contention.

35. Next, he submitted that the Arbitral Tribunal had found that the delays were caused by NTPC and therefore, several extensions of time were granted by it. The Arbitral Tribunal had rejected NTPC's claim to

levy liquidated damages on the aforesaid basis. However, the Arbitral Tribunal had relied on Clause 20.01.00 of the Technical Specifications and Clause 37 of the GCC (*Force Majeure* clause) to decline the award of prolongation costs to TPL. He submitted that the Arbitral Tribunal had failed to appreciate the nature of the delays caused by NTPC and, the Arbitral Tribunal had erred in assuming that the delays were covered under the aforesaid clauses. He submitted that due to the nature of the contract, the works were divided amongst different contractors and the primary obligation of NTPC was to provide the requisite fronts, without which, the execution of works was not possible. He contended that Clause 20.01.00 of the Technical Specifications was not applicable to the facts of the case. The said clause stipulates that “*the Contractor shall co-operate with all other Contractors or tradesmen of the Employer*” and did not relate to the obligation of NTPC. Thus, the Arbitral Tribunal had wrongly relied on the said clause. Further, he contended that the aforesaid clause should be read as *contra proferentem*.

36. He submitted in the alternative that if the aforesaid clause was interpreted in the manner as contended by NTPC, it would be void under Section 23 of the Indian Contract Act, 1872. He relied on the decision of the Supreme Court in ***General Manager Northern Railways v. Sarvesh Chopra: (2002) 4 SCC 45***. He submitted that the Tribunal had erred in holding that the said clause could not be declared unconscionable as the parties were bound by the contractual obligations.

37. Mr. Sharma, learned ASG appearing for NTPC, countered the aforesaid submissions. He submitted that in terms of Clause 10 of the GCC, on 26.09.2014, NTPC was liable to provide the legal and physical possession of land for office, store, crusher house and access to the site to TPL for execution of the Project works and, the said contractual obligations and responsibility were admittedly fulfilled by NTPC as the land was free of encumbrances. He further submitted that as per the contractual provisions, NTPC was liable to provide fronts to TPL progressively and the same was duly provided.

38. Next, he submitted that there was also no delay on the part of NTPC in fulfilling the reciprocal obligations and the same is evident from the fact that NTPC had granted various extensions of time to TPL, however, the said extensions of time had included a rider that such extensions were without any financial implications on NTPC and would also be subject to levy of liquidated damages by NPTC. Thereafter, on the basis of a mutual agreement regarding the availability of fronts between the parties, a revised L2 Schedule was made and was binding on both the parties. Further, TPL had not raised any claims regarding prolongations costs or other costs at the material time of submitting the revised L2 schedule. He submitted that TPL was only entitled to the relief of extension of time in terms of Clause 40 of the GCC for completion of the work and the same was duly granted.

39. He submitted that the findings of the Arbitral Tribunal are based on cogent material and evidence. The Arbitral Tribunal had interpreted the contractual provisions in a reasonable manner and thus, the

impugned award cannot be interfered with. He referred to the decisions of the Supreme Court in *MMTC Ltd v. Vedanta Ltd: (2019) 4 SCC 163*, *Ssangyong Engineering and Construction Company Ltd. v. National Highways Authority of India: (2019) 15 SCC 131* and, of this Court in *Elta Systems Limited v. Government of India: OMP (COMM) 307 of 2018, decided on 16.06.2021*.

40. He submitted that the finding of the Arbitral Tribunal that NTPC could not levy liquidated damages is perverse as levy of liquidated damages is a contractual right available with NTPC. He further submitted that the Tribunal had held that majority of the delay was attributable to TPL and had therefore, erred in holding that NTPC was barred from imposing any liquidated damages.

41. Further, he submitted that the decision of the Arbitral Tribunal to grant increase in minimum wages of labour is perverse and deserves to be set aside. He submitted that the cost implications arising out of the Notification dated 19.01.2017 issued by the Government of India, is duly covered within the scope of Appendix 2 of the Agreements and, the impugned award was contrary to the terms of the Agreements.

42. Next, he submitted that the decision of the Arbitral Tribunal to grant the award of GST in favour of TPL is also liable to be set aside. He contended that TPL was not entitled for any reimbursement on account of change in law beyond the stipulated supply period. And, since the delay in execution of the Project works is attributable to TPL,

neither its claim for GST amount nor the claim for increase in wages could have been awarded to TPL.

Reasons and Conclusion

43. Both the parties have assailed the impugned award. TPL had assailed the same on the limited ground that the Arbitral Tribunal has disallowed its claim for additional costs/compensation on account of prolongation of work. TPL states that the work in respect of Unit 1 and Unit 2 were to be completed within a period of thirty and thirty-four months respectively. However, the works under the Agreement were inordinately delayed.

44. Mr Parekh, learned counsel for TPL submitted that no contractor could possibly suffer the cost overruns on account of such delays and therefore, the Arbitral Tribunal had grossly erred in rejecting TPL's claim in this regard. He contended that the Arbitral Tribunal's finding as recorded in paragraph 46 of the impugned award, to the effect that TPL was responsible for the delay, is perverse and contrary to the record. Mr Parekh referred to the Minutes of the Meeting dated 26.08.2017 and on the strength of the said document, contended that NTPC had specifically agreed that the delays were attributable to it. He further submitted that the revised schedule of work (L2 Schedule) also indicated that the delays were attributable to NTPC. He contended that the Arbitral Tribunal had grossly erred in relying on Appendix 1, Appendix 2 and Appendix 3, which were merely tables prepared by NTPC for the purposes of arbitration and did not have any evidentiary value. He submitted that the instances of delays in respect of the Track

Hopper as mentioned by the Arbitral Tribunal by way of an illustration in paragraph 46, were replete with errors on the face of the record. The fronts of the Track Hopper were handed over progressively from 22.01.2015 to 14.03.2015 and even thereafter, a patch of 50 meters was not available. He submitted that this was clearly evident from the noting in Appendix 1, which were referred to by the Arbitral Tribunal. He states that the Arbitral Tribunal had incorrectly noted that the work was partially completed on 29.06.2017 and 14.08.2018. However, Appendix 1 as furnished by NTPC clearly mentions that the work was completed on 14.08.2017 (and not on 14.08.2018). He submitted that this was a patent error on the face of the impugned award that vitiated the finding of the Arbitral Tribunal to the effect that TPL was responsible for the delay.

45. NTPC also contends that the impugned award to the extent that it declares that no liquidated damages can be levied on account of delay in execution of the works, is patently erroneous. NTPC claimed that since the Arbitral Tribunal had found that the claimant (TPL) was responsible for the delays and the delay on account of NTPC was 'minimal'; the decision that NTPC cannot levy any liquidated damages, is perverse and patently erroneous.

46. As is apparent, both the parties have founded the challenge to the impugned award on the basis of the findings recorded by the Arbitral Tribunal in paragraph 45 and 46 of the impugned award. However, the findings recorded in paragraph 45 and 46 cannot be read in isolation and must be read in the proper context.

47. There is no real dispute that the delay in execution of the works were caused for various reasons including (i) delays in handing over the work fronts; (ii) on account of stoppage of work due to heavy rains; (iii) strike and agitation by villagers etc. The Arbitral Tribunal had noted that by a letter dated 26.08.2017, TPL had sought revision of L2 schedule only on two grounds – delay in handing over of fronts by other contractors and strike by local villagers. NTPC acceded to TPL’s request and extended the time for completion of the contract without raising any financial claims.

48. Insofar as the delay on account of handing over of the work fronts is concerned, the Arbitral Tribunal found that no claim on that ground was permissible. This was so because the parties had agreed in terms of Clause 20.01.00 of the Technical Specifications that if the work was delayed because of any acts or omission of another contractor, TPL would have no claim against NTPC other than for extension of time for completion of the work. The Arbitral Tribunal noted that TPL had sought modification of the said clause during the pre-bid discussions. However, the parties had thereafter agreed that “*provision of bidding documents would prevail*”.

49. Next, the Arbitral Tribunal found that some of the reasons that had resulted in delay could be classified as *Force Majeure* events. In respect of such events, the parties had agreed – in terms of Clause 37.5(b) of the GCC – that such events shall not “*give rise to any claim for damages or additional cost or expense action thereby*”.

50. In addition to the above, the Arbitral Tribunal also found that NTPC had handed over the possession of the site and access to TPL. The decision of the Arbitral Tribunal that TPL is not entitled to any compensation for prolongation of the work at site is mainly founded on the aforesaid findings. The impugned award is not founded on any specific finding regarding handing over of front for Track Hopper.

51. The reference to partial completion of the work on 14.08.2018 (as noted in paragraph 46 of the impugned award) appears to be a typographical error and the same should be read as 14.08.2017. According to the revised L2 Schedule, the said work was required to be completed on 04.02.2017. There may be some merit in Mr Parekh's contention that TPL was not responsible for the delay in respect of completion of the work for the Track Hopper as mentioned by the Arbitral Tribunal in paragraph 46 of the impugned award. However, the impugned award is not pivoted on that finding.

52. NTPC's contention that it was entitled to levy liquidated damages was also rejected on the grounds as stated hereinbefore. Its reliance on paragraph 46 of the impugned award is not apposite, when one reads various findings returned by the Arbitral Tribunal and the impugned award as a whole.

53. It is also relevant to note that the findings recorded by the Arbitral Tribunal in paragraphs 45 and 46 of the impugned award are based on certain material as available on record, while Mr Parekh is correct that the Minutes of the Meeting dated 26.08.2017 may not support the said

view. However, that is not the only material, which has been considered by the Arbitral Tribunal.

54. This Court is not required to re-appreciate or re-evaluate the evidence and supplant its opinion over that of the Arbitral Tribunal. The arbitral award can be interfered with on merits only on the grounds as specified under Section 34(2)(b)(ii) and Section 34(2A) of the A&C Act.

55. In *Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49*, the Supreme Court had observed as under:

“It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.”

56. The said view was reiterated by the Supreme Court in *MMTC Limited v. M/s Vedanta Limited: (2019) 4 SCC 163*. In the said decision, the Court explained as under:

“11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may

interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the “fundamental policy of Indian law” would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and *Wednesbury* [Associated Provincial Picture Houses v. *Wednesbury Corpn.*, (1948) 1 KB 223 (CA)] reasonableness. Furthermore, “patent illegality” itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See *Associate Builders v. DDA* [Associate Builders v. *DDA*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Also see *ONGC Ltd. v. Saw Pipes Ltd.* [ONGC Ltd. v. *Saw Pipes Ltd.*, (2003) 5 SCC 705] ; *Hindustan Zinc Ltd. v. Friends Coal Carbonisation* [*Hindustan Zinc Ltd. v. Friends Coal*

Carbonisation, (2006) 4 SCC 445] ; and *McDermott International Inc. v. Burn Standard Co. Ltd.* [*McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181])

13. It is relevant to note that after the 2015 Amendment to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub-section (2-A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.”

57. In a recent decision in ***Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.***: 2021 SCC OnLine SC 695, the Supreme Court found flaw with the approach of the Courts to re-examine and re-evaluate the evidence for the purposes of ascertaining whether the impugned award was vitiated by patent illegality. It further explained the scope of the ground of patent illegality under Section 34(2A) of the A&C Act as under:

“24. This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by courts while examining the validity of the arbitral awards. The limited

grounds available to courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the courts. There is a disturbing tendency of courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.

25. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression 'patent illegality'. Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression 'patent illegality'. What is prohibited is for courts to re-appreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable

person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression 'patent illegality'.

26. Section 34 (2) (b) refers to the other grounds on which a court can set aside an arbitral award. If a dispute which is not capable of settlement by arbitration is the subject-matter of the award or if the award is in conflict with public policy of India, the award is liable to be set aside. Explanation (1), amended by the 2015 Amendment Act, clarified the expression 'public policy of India' and its connotations for the purposes of reviewing arbitral awards. It has been made clear that an award would be in conflict with public policy of India only when it is induced or affected by fraud or corruption or is in violation of Section 75 or Section 81 of the 1996 Act, if it is in contravention with the fundamental policy of Indian law or if it is in conflict with the most basic notions of morality or justice. In *Ssangyong* (supra), this Court held that the meaning of the expression 'fundamental policy of Indian law' would be in accordance with the understanding of this Court in *Renusagar Power Co. Ltd. v. General Electric Co.* In *Renusagar* (supra), this Court observed that violation of the Foreign Exchange Regulation Act, 1973, a statute enacted for the 'national economic interest', and disregarding the superior courts in India would be antithetical to the fundamental policy of Indian law. Contravention of

a statute not linked to public policy or public interest cannot be a ground to set at naught an arbitral award as being discordant with the fundamental policy of Indian law and neither can it be brought within the confines of 'patent illegality' as discussed above. In other words, contravention of a statute only if it is linked to public policy or public interest is cause for setting aside the award as being at odds with the fundamental policy of Indian law. If an arbitral award shocks the conscience of the court, it can be set aside as being in conflict with the most basic notions of justice. The ground of morality in this context has been interpreted by this Court to encompass awards involving elements of sexual morality, such as prostitution, or awards seeking to validate agreements which are not illegal but would not be enforced given the prevailing mores of the day.

27. In light of the principles elucidated herein for interference with an arbitral award by a court in exercise of its jurisdiction under Section 34 of the 1996 Act, we proceed to consider the questions that arise in these Appeals as to whether the Division Bench of the High Court was right in setting aside the award of the Arbitral Tribunal dated 11.05.2017.”

58. In view of the above, the Court is unable to accept that the decision of the Arbitral Tribunal to reject TPL's claim for additional cost/compensation on account of prolongation of work and to reject NTPC's claim for any liquidated damages falls foul of the Public Policy of India or can be stated to be vitiated on account of patent illegality.

59. This Court finds no merit in the contention that Clause 20.01.00 of the Technical Specifications is unconscionable or illegal. The

Arbitral Tribunal had examined the decision in *General Manager, Northern Railways v. Sarvesh Chopra* (*supra*) and found that the same does not apply in the facts of this case. The Arbitral Tribunal also found that TPL was aware of the import of the said clause as it had sought its modification but had subsequently accepted the contractual terms. This Court finds no fault with the view of the Arbitral Tribunal.

60. It was also contended on behalf of NTPC that there was no issue framed by the Arbitral Tribunal regarding levy of liquidated damages. The said contention is, plainly, unmerited as the principal case before the Arbitral Tribunal related to the dispute whether TPL was entitled to any prolongation costs. The said claim was rejected on the ground that, in the facts and circumstances of the case, neither party would be justified to claim any compensation/damages on account of prolongation of the work.

61. NTPC had also assailed the decision of the Arbitral Tribunal to award additional expenses incurred due to increase in labour costs. The Arbitral Tribunal had found that TPL was entitled to such increase in terms of Clause 17 of the SCC, as such increase in cost was relatable to the Notification dated 19.01.2017 issued under the Minimum Wages Act, 1948. In terms of the said Notification, the basic rate of wages for various categories of labour were increased substantially to the extent of 40%. According to NTPC, no amount was payable for such increase as it was factored in the formula specified in Appendix 2 of the Agreement. However, the Arbitral Tribunal found that the price variation formula as set out in Appendix 2 factored in an increase in the

labour cost on the basis of “*All India Consumer Price Index for Industrial Workers (All India Monthly Average) as published by Labour Bureau, Shimla, Government of India*”.

62. The “*Brief on Consumer Price Index for Industrial Workers (New Series)*” published by the Labour Bureau of the Government of India expressly stated as follows:

“The CPI-IW purport to measure the temporal change in the retail prices of fixed basket of goods and services being consumed by an average working class family...”

63. Thus, the said Index was based on the prices of basket of goods and services consumed by working class families. It is apparent that this was directly relatable to the Variable Dearness Allowance (VDA) as periodically declared by the concerned Labour Commissioner.

64. Section 4 of the Minimum Wages Act, 1948 indicates two components of wages. The first being the basic rate of wages and special allowance; and the second being the cost of living allowance. The Arbitral Tribunal found that whilst the cost of living allowance was factored in the formula prescribed in Appendix 2; revision in the minimum basic wage rate was not.

65. Undeniably, the Notification dated 19.01.2017 did constitute a change in law resulting in an increase in the cost of labour. The same was required to be compensated to the extent that it was not covered under Appendix 2. The Arbitral Tribunal found that the formula set out in Appendix 2 to the Agreements was relatable to the cost of living.

Therefore, the increase in costs due to increase in the basic minimum wage rate was required to be compensated.

66. The Arbitral Tribunal also referred to the decision in *NHAI v. ITD Cementation India Ltd.: (2015) 14 SCC 21* and allowed TPL's claim for increase in cost resulting from the Notification.

67. It is also relevant to note that in *Larsen and Toubro Limited v. NTPC Limited: OMP COMM 524/2020, decided on 26.11.2021*, this Court has rejected the challenge to an arbitral award whereby the arbitral tribunal that had rendered that award had accepted the aforesaid view and had held in favour of the claimant.

68. The impugned award cannot be faulted on the aforesaid ground and NTPC's challenge to the same is rejected.

69. In addition to the above, NTPC has also challenged the impugned award to the extent that it allows TPL's claim for GST. TPL had claimed an amount of ₹83,31,918/- on account of levy of GST under the Integrated Goods and Services Tax Act, 2017 and Central Goods and Services Tax Act, 2017.

70. The levy of Goods and Services Tax came into effect from 01.07.2017. The Arbitral Tribunal found that the enactment of the statute for levy of GST constituted a new law and therefore, the Contract Price was liable to be adjusted in terms of Clause 7.2 of the SCC. NTPC had disputed the same on the ground that it was not liable to pay the GST on account of delay in the execution of the project. The Arbitral

Tribunal did not find any merit in the said contention. The Arbitral Tribunal held that in view of the findings regarding the delay in execution of the Project works, no further conditions could be put by NTPC. NTPC was bound to give effect to Clause 7.2 of the SCC. The Arbitral Tribunal found that after the Statement of Claims was filed, an amount of ₹14,80,219/- had been paid and, TPL was thus, entitled to the balance amount of ₹68,51,699/-.

71. This Court finds no error in the aforesaid view. In any view of the matter, it is a plausible view. In the circumstances, no interference with the impugned award is warranted.

72. The petitions are unmerited and are, accordingly, dismissed. The pending applications are also disposed of.

DECEMBER 08, 2021
RK/v

VIBHU BAKHRU, J