

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on: 01.10.2021

+ **O.M.P. (COMM.) 181/2021 & IA No. 7358/2021 and 7361/2021**

**M/S IRCON INTERNATIONAL LIMITED
& ANR.**

..... Petitioner

versus

**M/S CANNON ENGINEERING CONSTRUCTION
'CANNON COTTAGE'**

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Puneet Taneja with Ms Laxmi Kumar
and Mr Manmohan Singh Narula,
Advocates.

For the Respondent : Mr Faran Khan, Advocate.

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J

1. The petitioners have filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter the 'A&C Act') impugning an arbitral award dated 30.01.2021(hereafter the 'impugned award') delivered by the Arbitral Tribunal comprising of a learned Sole Arbitrator.

2. The impugned award was rendered in the context of disputes between the parties in connection with a contract dated 05.11.2014

relating to the work of “*Construction of service buildings, loco shed, RCC Trunk Drain and Misc. Civil Works in connection with the Construction of Private Railway Siding for Solapur Super Thermal Power Project of NTPC Limited near Hotgi Railway Station in Solapur District, Maharashtra-Pkg.4*”(hereafter “the Contract”).

3. The petitioners contend that the impugned award is vitiated by patent illegality as, it is contrary to the terms of the Contract and has been made in disregard of the documentary evidence placed on record.

Factual Context

4. Petitioner no. 2 (hereafter ‘NTPC’) had appointed Petitioner no. 1 (hereafter ‘IIL’) as their Project Management Consultant for work of Detail Project Report (DPR), Detailed Engineering, Project Management and Construction of Coal Transportation System for its power plant namely Solapur Duper Thermal Power Project (2X660 MW) at Solapur Maharashtra through a Letter of Award bearing no. 01/CS-9571-350-9-CY-LOA-5779 dated 01.06.2012.

5. Thereafter, on 07.12.2012, NTPC executed a Power of Attorney in favour of IIL on 07.12.2012.

6. On 10.07.2014, IIL issued a Notice Inviting Tender (NIT) for Package no. 4 concerning works related to the construction of service buildings, loco shed, RCC Trunk Drain and Miscellaneous Civil Works in connection with the construction of Private Railway Siding for Solapur Super Thermal Power Project at Solapur District, Maharashtra.

7. The respondent (hereafter 'Cannon') submitted its bid pursuant to the NIT. It was declared as the lowest bidder and accordingly, IIL issued a Letter of Award (LoA) dated 30.09.2014 in favour of Cannon, for execution of the aforesaid works at a contract price of ₹ 21,25,74,013.74/-. In terms of the Contract, the works were to commence on 30.09.2014 and were to be completed within a period of eleven months, that is, on or before 29.08.2015.

8. Cannon completed the works on 30.06.2016. However, during the execution of the works, certain disputes arose between Cannon and IIL. The disputes between the parties related mainly to Cannons' claims for: (i) earthwork at the rates applicable for excavation in Hard Rock; (ii) additional payment for use of Tie bolts for RCC Wall Shuttering; (iii) additional payment for providing finish to RCC/PCC Surface; (iv) release of balance payment of Final Bill that was withheld by IIL/NTPC; and (v) reimbursement of additional royalty and excise duty. The said disputes are briefly outlined, hereafter.

A. Hard Rock in Earth Excavation

9. On 19.11.2014, Cannon informed IIL that during excavation they experienced 0.90 meters of hard rock at the bottom layer and further, requested the Project Head of IIL to physically visit the site to classify the excavated work. The Project Head of IIL visited the excavated site and classified the earth-work. He also recorded the reduced level of the earth including hard rock in the field book. Thereafter, IIL regularly recorded the measurement of the earth-work in the field book,

classifying the soil as hard rock. The Running Account Bills (RA Bills) from the 2nd RA Bill till the 5th RA Bill reflected these levels, which were jointly signed by Cannon and IIL.

10. On 08.12.2014, Cannon addressed two letters to the Project Head of IIL and referred to the Central Public Works Department Specifications, 2009 (hereafter the 'CPWD Specifications') for the earth work. On 25.12.2014, Cannon once again addressed a letter reiterating that it had encountered hard rock while excavating at various locations and further pointed out various items, which were not covered under the Bill of Quantity (BOQ). There was exchange of correspondence between IIL and Cannon on the issue and their representatives also met to discuss the same.

11. On 03.03.2015, Cannon issued a letter to IIL and suggested two alternatives: (i) either Cannon should stop the work for want of approval or; (ii) continue with the work and the petitioners would pay interest for delayed payment. Cannon further requested IIL for its decision on the two alternatives. Cannon also submitted details of outstanding payments by providing a list of extra items executed up to February 2015, *vide* a letter dated 09.03.2015.

12. IIL sent a letter dated 09.06.2015 informing Cannon that payment for the extra/additional items would be paid only after approval from the competent authority. On 15.06.2015, Cannon sent a letter to IIL referring to several provisions of the Contract and stated that execution

of extra-items was necessary at the quoted rates of CPWD DSR-2013 for progress of the work.

13. By a letter dated 18.06.2015, IIL informed Cannon that the competent authority had approved the BOQ for non-scheduled items and called upon Cannon to complete the works within the stipulated period of time. By a letter dated 22.06.2015, IIL informed Cannon that as per the recommendations of the committee constituted, the trench of the corridor drain falls under the category of 'ordinary rock' and the earthwork could not be considered as hard rock as per the CPWD Specifications. In response to IIL's letter dated 18.06.2015, Cannon sent a letter dated 22.06.2021 stating that despite it having submitted a list of eighteen extra items, the petitioners have approved payments of only four items. Cannon addressed another letter to IIL on 22.06.2021 and objected to the recommendations of the committee constituted by NTPC.

14. Several communications were exchanged between IIL and Cannon from July 2015 to December 2015 regarding the issue of classification of soil. On 15.12.2014, Cannon sent a letter to the Principal of Walchand College of Arts and Sciences, Solapur, requesting him to depute a soil expert to classify the earth/rock. The lithological investigation was carried out on 18.12.2015 and 19.12.2015 in the presence of the officials of IIL. As per the said report, it was concluded that the NTPC area under construction is in a volcanic terrain and the rocks are a variety of Basalt. Cannon forwarded the said report to IIL on 24.12.2015 and asserted that its claim for hard rock excavation

was fully justifiable and requested for immediate payment along with interest. Cannon further requested for ₹42,000/- towards Geological Consulting Charges.

15. Thereafter, on 03.02.2016, Cannon informed IIL that the time to complete the work would expire on 31.03.20216 and, since it had encountered hard rock during excavation, it be permitted to resort to blasting beside using mechanical means for excavation to expedite the work. On the same date, Cannon sent another list of extra items including the disputed items, which were estimated till 31.03.2016. IIL replied to the aforesaid letter on 05.03.2016 informing Cannon that NTPC had directed that hard rock encountered during the excavation be stacked separately along the site for measurement purposes. Cannon responded on 10.03.2016 and pointed out that NTPC's instruction to stack the hard rock was issued at a belated stage, when the project is almost at the completion stage.

16. On 11.03.2016, Cannon informed IIL that the Hard Rock could not be stacked near the excavated truck drain due to the presence of a rail track and requested IIL to identify a location for stacking the hard rock for its approval.

17. On 21.07.2016, Cannon informed IIL that it had completed the tendered work on 30.06.2016 and demobilized its resources. IIL was also informed that the Final Bill would be submitted within a few days. Certain communications were exchanged between IIL and Cannon regarding completion and handing over of the work. The work stood

completed on 30.06.2016 and thereafter, on 19.07.2016, a Completion Certificate was issued to Cannon endorsing its performance as “good and resourceful”.

18. In August 2016, Cannon submitted its 21st RA and Final Bill to IIL. The payments were duly made, however, Cannon claimed that the payments were accepted under protest due to non-payment of certain items under CPWD DSR 2013.

B.Tie Bolt for the RCC Wall Shuttering

19. Cannon claimed that under the CPWD Specifications for RCC wall shuttering, the shuttering was required to be fastened with tie bolts so that they could achieve the line and level for the RCC Wall. It claimed that it had executed the work as per the CPWD Specifications and had provided the tie bolts for construction of the RCC Wall from the time of inspection of work until its completion.

20. On 14.02.2014, Cannon listed down the extra-items based on the CPWD DSR-2013 in the Joint Meeting held between IIL and Cannon for administrative approval and final payment. On 15.01.2015, Cannon issued a letter to IIL informing it about the additional extra items, which were carried out during the progress of the work. These items included fixing of the tie bolts. It is averred that the same was once again raised by Cannon at the Joint Meetings between the representative of the parties, which were held on 02.11.2015 and 15.01.2016. At the meetings, NTPC directed IIL to resolve the extra items based on CPWD DSR-2013. However, the same remained unresolved. Cannon claimed

that payments under the RA Bills which did not include the payment regarding tie bolts, were accepted under protest.

C. Providing finish to RCC/CC Surface

21. Cannon claimed that in terms of the Contract, the cost of centering, shuttering and reinforcement were paid at the rates for the relevant items under the BOQ, however, the cost of finishing of the RCC was not included in the BOQ and therefore IIL/NTPC was required to pay for the same.

22. This claim was raised by Cannon in the Joint Meeting held on 14.02.2014 between IIL and Cannon. On 15.01.2015, Cannon addressed a letter to IIL providing details of extra item surface finishing for RCC work and further, stated that certain additional extra items based on CPWD DSR-2013 had cropped up during the progress of the work. The same was once again raised by Cannon at the Joint Meetings between the representative of parties, which were held on 02.11.2015 and 15.01.2016. As noted herein before, at the said meetings, NTPC directed IIL to resolve the extra items based on CPWD DSR-2013. However, the same remained unresolved.

D.Final Bill

23. During the pendency of work under the Contract, the royalty charges were enhanced by a Notification dated 11.05.2015, issued by the Government of Maharashtra. The excise duty on steel was also revised from 12% to 12.5% with effect from 01.03.2015 in the Union

Budget of 2015-2016. Cannon sought reimbursement of additional levies. However, its claim was not accepted as according to IIL/NTPC, the same was included in the contracted item rates.

24. On 23.03.2016, Cannon deposited ₹12,80,000/- towards royalty charges with the Government Treasury. Thereafter, Cannon applied to the Tahsildar South Solapur on 20.04.2016 for issuance of a clearance certificate. The clearance certificate was issued by the Tahsildar South Solapur on 29.08.2016.

25. Cannon submitted its 21st and Final RA Bill on 07.08.2016 for a total amount of ₹49,14,400.53/- and also sought reimbursement of excess amount paid by it towards the excise duty and royalty amounting to ₹8,31,936.39/-. IIL released only ₹ 15,00,000/- to Cannon and withheld the remaining amount. IIL/NTPC did so on the ground that the Revenue Officer had raised a demand on account of Royalty alleging that the same remained outstanding.

26. Cannon claims that IIL made payments to it from time to time, however, failed to make payments on three counts – (i) cost towards hard rock excavation; (ii) providing and fixing tie bolt for the RCC wall shuttering and; (iii) providing finish to the RCC/CC surface.

27. Aggrieved by the same, on 23.01.2019 Cannon invoked the Arbitration Clause - Clause 56 of the General Conditions of the Contract (GCC). In terms of Clause 56 of the GCC, the Chairman and Managing Director of NTPC appointed Justice (Retd.) Sunil Ambwani as the Sole

Arbitrator, to adjudicate the dispute between the parties and, the arbitral proceedings culminated in the impugned award.

28. The tabular statement setting out the claims made by Cannon as noted by the Arbitral Tribunal is reproduced as under:

Claim	Description	Amount
Claim No. 1	Earth work in excavation by mechanical means hard rock blasting prohibited	₹2,09,24,545.52/-
Claim No.2	Providing and fixing the bolt, spring coil and plastic cone in wall shuttering complete as per the direction of Engineer-in-charge 20mm dia & 225 mm in length	₹58,07,364.75/-
Claim No. 3	6 mm cement plaster of mix (RCC Finishing) 1:3 (1 cement: 3 fine sand)	₹52,25,983.32/-
Claim No. 4	Cost of 21 st and Final Bill in process from 07.08.2016, till date pending	₹49,19,400.53/-
Claim No. 5	Reimbursement of Levy towards Royalty and Excise Duty	₹8,32,936.39
Total – (after deduction of ₹83,02,032.04/- as amount already paid for Ordinary Rock under Claim No. 1 + less ₹16,25,157,75/- as tender percentage at 6.67%)		₹2,77,82,041.72/-

29. IIL/NTPC also preferred counter-claims and sought royalty payment amounting to ₹9.04 crores along with interest at the rate of 12% per annum from the date of cause of action till the date of payment.

Impugned Award

30. The Arbitral Tribunal considered the rival contentions. In relation to the issue concerning cost towards hard rock excavation, the Arbitral Tribunal held that Cannon was entitled to the difference of amount between the ordinary rock and hard rock as an extra item. Accordingly, the Arbitral Tribunal entered an award in favour of Cannon for payment of earth work in soil condition of hard rock for 36444.39 cum at the rate of ₹574.15 per cum after adjusting ₹ 277.80 per cum paid for earth work in ordinary rock and after reducing the tender percentage at 6.6%.

31. In respect of Cannon's claim regarding providing and fixing tie bolts for the RCC wall shuttering, the Arbitral Tribunal held that even if the tie bolts were not specifically mentioned under the BOQ item for wall shuttering, the tie bolts were, nevertheless, used. Approval for the same was sought within fourteen days but no response was received from the Engineer In-charge within three months as agreed in terms of Clause 11 of the GCC. The Arbitral Tribunal, accordingly, held that since the number of tie bolts and its rate analysis were never denied, Cannon was entitled to payment for 31,097 sets of tie bolts as per CPWD Item No. 5.N.4 at the rate of ₹186.75 per set of tie bolts.

32. Cannon's claim regarding payment for finishing of RCC/CC surface was rejected by the Arbitral Tribunal as the 'drain work' carried out did not qualify as RCC/CC surface finishing. In any event, no approval was taken from the Engineer In-charge.

33. In relation to the Final Bill, the Arbitral Tribunal held that the petitioners could not withhold the payment of the Final Bill beyond a period of three months merely for the reason that a demand notice of royalty and penalty had been issued by the Tehsildar, Solapur. The Tribunal further held that Cannon cannot be held liable to pay the amount demanded without any notice being served upon them. After examining the material evidence the Arbitral Tribunal concluded that Cannon had in compliance with Clause 17.5 of the Special Conditions of Contract (SCC) produced documentary evidence of proof of payment of the enhanced excise duty and royalties and thus, was entitled to be reimbursed.

34. Accordingly, on 30.01.2021 the Arbitral Tribunal made the impugned award (corrected vide order dated 22.02.2021 under Section 33 of the A&C Act), awarding an amount of ₹ 2,42,60,973.45/-. Additionally, the Arbitral Tribunal also awarded compensation under Section 70 of the Indian Contract Act, 1872 at the rate of 12.5% on Claim nos. 2, 4 and 5, from 06.11.2016 (that is, the date three months after the submission of the Final Bill on 07.08.2016). The Arbitral Tribunal further held, in the event IIL/NTPC fail to make the payment within a period of six weeks from the date of the impugned award, Cannon will be entitled to future interest under Section 31(7) of the A&C Act. The counter-claims preferred by NTPC/IIL were rejected by the Arbitral Tribunal. The Arbitral Tribunal also declined to award any interest as under Clauses 16.1 and 50 of the SCC, the Arbitral Tribunal was proscribed from granting any interest.

Submissions

35. Mr Taneja, learned counsel appearing for the respondent submitted that the impugned award is patently illegal and contrary to the public policy of India inasmuch as, it had awarded claims payable to Cannon in complete disregard to the provisions of the Contract. He thereafter, advanced submissions in respect of each claim awarded in favour of Cannon. In respect of the award concerning the claim relating to excavation of 'hard rock', he submitted that the said award was contrary to the CPWD Specifications regarding classification of soils as defined in Clause 2.1 of the CPWD Specifications, which reads as under:-

“2.1 CLASSIFICATION OF SOILS

2.1.0 The earthwork shall be classified under the following categories and measurement separately for each category:

- a) All kind of soils: Generally any strata, such as sand, gravel, loam, clay, mud, black cotton moorum, shingle, river or nallah bed boulders, siding of roads, paths etc. hard core, macadam surface of any description (water bound, group tarmac etc.), lime concrete mud concrete and their mixtures which for excavation yields to application of picks, showels, jumper, scarifiers, ripper and other manual digging implements.
- b) Ordinary rock: Generally any rock which can be excavated by splitting with crow bars or picks and does not require blasting, wedging or similar means for excavation such as lime stone, sand stone, hard laterite, hard conglomerate and unreinforced cement

concrete below ground level. If required light blasting may be resorted to for loosening the materials but this will not in any way entitle the material to be classified as "Hard rock".

- c) Hard rock: Generally any rock or boulder for the excavation of which blasting is required such as quartzite, granite, basalt, reinforced cement concrete (reinforcement to be cut through but not separated from concrete) below ground level and the like.
- d) Hard rock (blasting prohibited): Hard rock requiring blasting as described under (c) but where the blasting is prohibited for any reason and excavation has to be carried out by chiseling, wedging, use of rock hammers and cutters or any other agreed method."

36. He submitted that in view of the aforesaid classification, hard rock could be excavated only by way of blasting and if the same was not permissible, mechanical means could be used. Blasting could be resorted only to loosen the earth and rock but that would not result in the soil being classified as 'hard rock'. He submitted that Clause 2.6 of the CPWD Specifications contained the provisions regarding blasting. The said clause specifically provided that in cases where blasting operations were considered necessary, the Contractor was required to obtain approval of the Engineer In-charge in writing for resorting to blasting operations. It also specified that blasting was not permissible in case of ordinary rock, but if it was resorted to, nothing extra would be payable for such operations. Similarly, Clause 2.8.3 of the CPWD Specifications also required a Contractor to obtain approval of the Engineer In-charge in writing for resorting to blasting operations.

37. Next, he submitted that the measurement of earth work in case of hard rock was required to be taken by stacking the hard rock and not solely by measuring the depth of cutting/excavation of earth. He referred to a note to Clauses 2.11.1 and 2.11.3 of the CPWD Specifications, which read as under:-

“2.11.1 The length and breadth of excavation or filling shall be measured with a steel tape correct to the measures cm. The depth of cutting or height of filling shall be measured, correct to 5 mm, by recording levels before the start of the work and after the completion of the work. The cubical contents shall be worked out to the nearest two places of decimal in cubic metres.

** **

2.11.3 Where ordinary rock and hard rock is mixed. The measurement of the excavation shall be made as specified in 2.11.1 and 2.11.2. The two kinds of rock shall be stacked separately and measured in stacks. The net quantity of the two kinds of rocks shall be arrived at by applying deduction of 50% to allow for voids in stacks. If the sum of net quantity of two kinds of rocks exceeds the total quantity of the excavated material, then the quantity for each type of rock shall be worked out from the total quantity in the ratio of net quantities in stack measurements of the two types of rocks. If in the opinion of the Engineer-in-Charge stacking is not feasible, the quantity of ordinary and hard rock shall be worked out by means of cross-sectional measurements.

Note:- In case of a ordinary rock, the quantity of excavation is to be measured by depth of cutting by recording the levels before the start of work and after the completion of the work. Whereas for hard rock apart from the measurement of excavation by way of recording of levels at the time of start and completion of work, the hard rock is to be stacked separately and measured in stacks. ”.

38. He contended that the aforementioned clauses also make it abundantly clear that the soil could be classified as hard rock only if the excavation was carried out by blasting and in cases where blasting was prohibited, by mechanical means. Further, the said rock was required to be stacked separately and measured. He submitted that in the present case, neither of the two conditions were satisfied. Cannon was not granted any permission to carry out blasting operations. Merely because it had applied for permission to carry out such operations or had used mechanical means such as Hydraulic drills, Poclain etc., could not lead to the conclusion that Cannon had carried out excavation of the hard rock. Further, Cannon had also not measured the hard rock by stacking the same.

39. Next, Mr Taneja submitted that the Arbitral Tribunal had grossly erred in allowing Cannon’s claim for tie-bolts for RCC wall shuttering. He submitted that no extra payment was required to be paid for use of tie bolts in RCC wall shuttering as the BOQ item provided for a

consolidated rate. He submitted that there was no written permission obtained from the Engineer In-charge for using tie bolts and therefore, merely because Cannon had used tie bolts for RCC wall shuttering, it could not claim any additional amount. He submitted that an extra item was required to be executed only if Cannon was called upon to do so.

40. He referred to BOQ Item no. 7 which is reproduced as under:-

7.	5.9	Centering and shuttering including strutting, propping etc. and removal of form for:				
a.	5.9.1	Foundations, footings, bases of columns, etc for mass concrete	Sqm.	186.40	500.00	92200
b.	5.9.2	Walls (any thickness), including attached plasters, butteresses, plinth and string sources etc.	Sqm.	334.50	27500.00	9198750

41. He submitted that the said item did not require use of any tie bolts. Thus, Cannon had used tie bolts for its own convenience and the liability for the same cannot be fastened on NTPC.

42. Next, he submitted that the Arbitral Tribunal had also grossly erred in allowing Cannon's claim for additional expenditure on account of increase in royalty as in terms of Clause 22 of the SCC, the rates agreed were firm till the end of the Contract. He also referred Clause 53.14 of the GCC, in support of his contention.

43. Insofar as the impugned award regarding the claim with respect to interest is concerned, Mr Taneja referred to Clauses 16.1 and 50 of the SCC and, submitted that in terms of the said clause, award of interest is impermissible.

44. Clause 16.1 of the SCC is set out below:-

“16.1 All "On Account/ Running Account" Bills/Invoices and the Final Bill/Invoice shall be raised by the contractor in the name of "JR CON AIC NTPC" ONLY. Efforts shall be made to release the payment within the period mentioned in clause 51.3 of NTPC's GCC. No interest will be paid on any delay on the payment of RA bills/Final bill.”

45. Clause 50 of the SCC is reproduced below:

“50.0 ARBITRATION:

50.1 This shall be governed by NTPC GCC Clause 56 with its updated amendments subject to the provisions of Indian Arbitration and Conciliation Act, 1996 and its updated amendments.

50.2 It is term of this contract that efforts shall be made to settle any dispute or difference through mutual/ amicable settlement at the first instance before invoking Arbitration by either party.

50.3 No interest shall be considered for any money payable through Arbitration Award in all stages viz pre-reference, pendent-lite and post award.”

46. Lastly, Mr Taneja submitted that the Arbitral Tribunal had grossly erred in dismissing the counter-claims raised on behalf of NTPC/IIL. He further stated that in terms of the Contract, NTPC was liable to be indemnified against any claim of royalty and therefore, it was entitled to a declaration that if any additional liability regarding the royalty was imposed by the concerned authorities, Cannon would be liable to pay the same.

47. Mr Simil Purohit, learned counsel appearing for Cannon, countered the aforesaid submissions. He submitted that the scope of Section 34 of the A&C Act does not permit further enquiry into the factual findings returned by the Arbitral Tribunal as the Arbitral Tribunal is the final adjudicator on all questions of fact as well as interpretation of the Contract. He submitted that the Arbitral Tribunal had awarded the amount payable for earth work in hard rock after adjusting for the payments received for work carried out in ordinary soil. The decision to do so was made after evaluating, amongst other material, the correspondence between the parties; the notings made in field book; and, the report received from Walchand College of Arts and Science, Solapur.

48. The matter regarding hard rock was also escalated to NTPC and NTPC had instructed IIL to do whatever was required under the terms of the Contract. He submitted that the instructions that the hard rock were required to be stacked was issued at a much belated stage and even at that stage, no space was provided to Cannon to stack the excavated hard rock. In the absence of any space for doing so, Cannon could not

be faulted for not stacking the excavated hard rock. He further submitted that in any event, the purpose to stack hard rock was only for measurement and, there was no dispute regarding the same.

49. Next, he submitted that the decision of the Arbitral Tribunal awarding additional amount for tie bolts could not be faulted. The CPWD Specifications required tie bolts to be used for holding the shuttering on RCC walls, where its thickness exceeded the specified limit. BOQ items also provided for a separate rate for tie bolts and therefore, Cannon was entitled to be paid for the said items.

50. Insofar as payment of royalty is concerned, he submitted that additional royalty was levied. The petitioner had substantiated its claim that the same was paid and therefore, the decision of the Arbitral Tribunal could not be faulted.

51. Insofar as payment of interest is concerned, Mr Purohit submitted that the Arbitral Tribunal had awarded interest as damages and not as interest.

52. Insofar as the counter-claim is concerned, Mr Purohit submitted that the said counter-claim was based on a letter issued by a Revenue Officer. The same was carried in appeal and the demand raised had been set aside. Therefore, the Arbitral Tribunal's decision to reject the counter claim cannot be faulted.

Reasons and Conclusion

53. At the outset, it is necessary to note that the scope of interference in an arbitral award is confined to the grounds as set out under Section 34 of the A&C Act. Undisputedly, an arbitral award can be interfered with under Section 34(2)(b)(ii) and Section 34 (2A) of the A&C Act only if this Court finds that the award is opposed to the public policy of India or is vitiated by patent illegality appearing on the record. This Court is not required to examine the disputes between the parties and re-appreciate the evidence or material placed before the Arbitral Tribunal to arrive at a fresh decision and supplant its decision in place of the findings of the Arbitral Tribunal. The Supreme Court, in a catena of decisions, has authoritatively explained that this Court shall not examine the issues as the first appellate court and the scope of examination is limited to the grounds as set out under Section 34 of the A&C Act. [See- *M/s Dyna Technologies Pvt. Ltd. vs. M/s Crompton Greaves Ltd.:* (2019) 20 SCC 1; *Ssangyong Engineering & Construction Company Limited v. National Highways Authority of India:* (2019) 15 SCC 131; *Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.:* 2021 SCC OnLine SC 695]

54. Notwithstanding the above, Mr Taneja, has sought to argue this petition extensively as if it is a first appeal. He has in effect, invited the Court to examine the disputes as a court would do in an original action. The said approach is, clearly, impermissible. The controversy raised in the present case must be examined bearing the aforesaid in mind.

55. One of the principal claims awarded in favour of Cannon relates to work of excavation in hard rock (Claim no.1). The question whether

Cannon had performed earth work in ordinary soil or hard rock is a question of fact and, as stated above, the Arbitral Tribunal is the final arbiter of a question of fact. The Arbitral Tribunal's finding as to a question of fact cannot be interfered with unless this Court concludes that it is patently illegal or otherwise falls foul of the public policy of India. According to NTPC/IIL, the Arbitral Tribunal had found that Cannon had, in fact, carried out earth work in hard rock and therefore, was entitled to the difference between the earth work in ordinary soil/ordinary rock (which was paid) and earth-work in hard rock, at the agreed rates for such work.

56. It is clear from the record that the Arbitral Tribunal had founded its decision on evaluation of the material placed by the parties. The Arbitral Tribunal had found that there was extensive correspondence between the parties indicating that Cannon had almost immediately, after the commencement of the work, pointed out that it had encountered hard rock. The earth work carried out was also recorded in the Field Book and admittedly, the concerned officials of IIL had recorded that the earth work was carried out in hard rock. At that stage, IIL did not dispute that Cannon had encountered hard rock.

57. The Arbitral Tribunal also found that Cannon had furnished a report from Walchand College of Arts and Science, Solapur confirming that the tests carried out had revealed the rock to be basalt, which is a hard rock. In addition to the above, the Arbitral Tribunal had found that the Contractor previously engaged by IIL, who had excavated till the earth surface, had also encountered hard rock and was paid on that basis.

It reasoned that Cannon, who was engaged to carry out earth work below the said surface, would also encounter a similar soil condition – hard rock. Admittedly, the excavation was carried out by machines and mechanical tools, which are required to be used for excavating hard rock, in the event blasting is not resorted to.

58. It is at once clear that there was ample material before the Arbitral Tribunal to accept Cannon's contention that it had, in fact, encountered hard rock. According to NTPC/IIL, the said finding is incorrect as in terms of the CPWD Specifications, earth work in hard rock required blasting which could only be done with the permission of the Engineer In-charge. It is only in the absence of this permission that a Contractor could resort to mechanical tools. It was contended that merely because Cannon had employed mechanical tools, could not lead to the conclusion that it had encountered hard rock. However, the finding of the Arbitral Tribunal that Cannon had carried out earth work in hard rock is not based solely on a finding that Cannon had used mechanical tools such as Poclain, JCB, etc. As noted above, the finding that Cannon had carried out work in hard rock is based on cogent material and other reasons as well.

59. This Court is unable to accept that the decision of the Arbitral Tribunal is contrary to the terms of the Contract between the parties, as contended on behalf of NTPC. In view of the above, NTPC's contention that the impugned award requires to be interfered with on the aforesaid ground, is unsustainable and is, accordingly, rejected.

60. The contention that the Arbitral Tribunal has grossly erred in entering an award in favour of Cannon for use of tie bolts and the impugned award is required to be interfered with on this ground, is also unmerited.

61. The Tribunal had found that Cannon had used tie bolts to hold the wall shuttering required to be placed on either side of the concrete walls which were required to construct the trunk drain. Cannon had claimed that considering the depth of the trunk drain wall and the CPWD's Specifications, it was required to use tie bolts for achieving the line and length of the RCC walls of the trunk drain. And, the use of tie bolts was not included in BOQ item No.7, which reads as under:-

7.	5.9	Centering and shuttering including strutting, propping etc. and removal of form for:				
a.	5.9.1	Foundations, footings, bases of columns, etc for mass concrete	Sqm.	18640	500.00	93200
b.	5.9.2	Walls (any thickness), including attached plasters, buttersesses, plinth and string sources etc.	Sqm.	334.50	27500.00	9198750

62. The Arbitral Tribunal accepted the aforesaid contention and found that since the use of tie bolts was not included in BOQ item no. 7 it was required to be paid for separately. The Arbitral Tribunal noted that Cannon had sought approval for the use of tie bolts as an

extra/additional item, at the rates as specified. This was in conformity with Clause 11 of the GCC, which required Cannon to seek an approval within a period of fourteen days of the occurrence.

63. The Arbitral Tribunal also found that as a matter of fact, tie bolts had been used for efficacious execution of the work. The Arbitral Tribunal also accepted the contentions that tie bolts were required to be used under the guidelines issued by the CPWD for execution of such work. It is to be noted that in arriving at the aforesaid conclusion, the Arbitral Tribunal appreciated the evidence led on behalf of Cannon as well as the oral testimony and cross-examination of the Engineer In-charge, who was examined as RW-1 on behalf of NTPC.

64. Mr Taneja, also reluctantly conceded that findings of the Arbitral Tribunal in this regard cannot be re-examined in these proceedings. He had, however, insisted that since no permission was granted by the Engineer In-charge for the use of the extra item, NTPC is not required to make any payment for the same. The Arbitral Tribunal had rejected the aforesaid contention. It had reasoned that Cannon had immediately sought approval of the extra item within a period of fourteen days as required under Clause 11 of the GCC. In terms of the Contract, the said request was required to be considered and decided by the Engineer In-charge within a period of three months. However, the Engineer In-charge had neither approved the extra item nor rejected the same. Meanwhile, Cannon had used tie bolts for the execution of the work in question as the same was required.

65. The Arbitral Tribunal reasoned that NTPC/IIL had not followed the provisions of the Contract, and could not be permitted to take advantage of their own wrong. This Court finds no fault in the aforesaid reasoning. In any view, the Arbitral Tribunal's decision cannot be stated to be perverse or patently illegal. It is clearly a plausible view and no interference with the same is warranted in these proceedings.

66. Insofar as the payment of additional royalty is concerned, the Arbitral Tribunal found that the rate of royalty of the building material was revised by the Government of Maharashtra by a notification dated 11.05.2015 and, royalty payable in respect of Rubble/Coarse aggregate; Murum; and Natural Sand was increased from ₹200 per 100 CFT to ₹400 per 100 CFT. It is also not disputed that the excise duty on steel was also revised from 12% to 12.5% with effect from 01.03.2015. Cannon had claimed the additional amount payable on account of increase in royalty and excise duty, as according to it, the same was not covered in the price quoted. NTPC/IIL had contested the aforesaid claim by referring to Clause 22 of the SCC and Clause 53.14 of the GCC.

67. Clause 22 of the SCC reads as under:-

“22.0 ACCEPTED RATEAPPLICABLE TILL THE COMPLETION OF WORK.

22.1 The accepted percentage and rate shall hold good till the completion of work and no additional claim will be admissible on account of fluctuation in market rates, increase in taxes/any other levies etc. on any individual material. However, the contract price adjustment/price variation shall be dealt as per clause No.44 of sec. The

rates & percentage quoted shall include all dues, royalties, all taxes and all other levies as payable by the contractor.”

68. Clause 53.14 of the GCC is set out below:

“53.14 Except as provided herein, no other expenditure incurred by the Contractor, due to levy of additional/increase in taxes, duties, octrol, royalty, levies, insurance premium(s) benefits to Workers/Labours or any other Clauses(s)/Item(s) due to any reason whatsoever, shall be payable to the Contractor.”

69. Cannon had countered the same and contended that the provisions of SCC would override the GCC and, in terms of Clause 17.5 of the SCC, Cannon was entitled to reimbursement on account of any additional levy. Clause 17.5 of the SCC reads as under:-

“17.5 If a new tax, duty or levy is imposed under statute or law in India after the date seven (7) days prior to date of bid opening and the contractor become liable there under to pay and actually pays the said new tax, duty or levy for bona fide use on the works contracted, the same shall be reimbursed to the contractor against documentary evidence of proof of payment provided that the amount thus claimed is not paid/ payable under-price variation provision of the contract.”

70. The Arbitral Tribunal accepted Cannon’s contention and found that Clause 17.5 of the SCC entitled Cannon to reimbursement of the additional royalty on building material and excise duty on steel. This Court concurs with the aforesaid view and finds no ground to interfere

with the conclusion of the Arbitral Tribunal. The contention that the award of such a claim is contrary to the terms of the Contract is clearly unmerited.

71. The next question to be considered is NTPC's challenge regarding the award of interest on the claims awarded in favour of Cannon. NTPC had relied on Clauses 16.1 and 50 of the SCC and, contended that the Arbitral Tribunal was proscribed from granting any interest.

72. It is apparent that the contentions advanced by NTPC are merited. Clause 50.3 of the GCC clearly proscribes the Arbitral Tribunal to award any interest. At this stage, it is relevant to refer to Sub-section (7) of Section 31 of the A&C Act and the same is set out below:

“31. Form and Contents of arbitral award –

7(a) Unless otherwise agreed by the parties, where and insofar as an arbitral award is for payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two percent higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.”

73. The opening words of Clause (a) of Section 31(7) of the A&C Act – “unless otherwise agreed” – makes it clear that although the Arbitral Tribunal has the power to award pre-award interest (pre-reference interest and pendente lite interest), the power is contingent on the parties not agreeing to the contrary. Therefore, if the contract between the parties proscribes payment of pre-award interest, the Arbitral Tribunal will not have any jurisdiction to award such interest for the period prior to the date of the award. This question is no longer *res-integra* [See- ***Kamatchi Amman Constructions v. Railways: (2010) 8 SCC 765; Union of India v. Ambica Constructions: 2016 6 SCC 36, Jai Prakash Associates Ltd. v Tehri Hydro Development corporation India Ltd.: (2019) 17 SCC 786***]

74. The Arbitral Tribunal had also considered the aforesaid decisions and observed as under:-

“9. In Jai Prakash Associates Limited vs. Tehri Hydro Development Corporation India Limited decided on 07.02.2019 the Hon'ble Supreme Court followed the judgment in Reliance Selolos Products Limited vs. ONGC. In the present case the bar of award of interest on the Arbitrator under Clause 50.3 of the agreement, restrains the Arbitrator appointed under Clause 15 of the Contract to consider for any money payable through arbitrator award as interest, in all stages viz. pre- reference, pendent lite or post award. The Arbitrator is a creature of the Agreement and even otherwise bound in law by the three Judges bench of Hon'ble Supreme Court in Jai Prakash Associates Limited vs. Tehri Hydro Development Corporation India Limited 2019 SCC Online SC 14 decided on 07.02.2019, which is the latest pronouncement of law

on the question of interest, when it is barred by the Arbitration agreement. The three Judges judgment holds the field as the law of the land under Article 141 of the Constitution of India. The Claim of interest is therefore not acceptable on Claim Nos. 1, 2, 4 and 5 awarded in favour of the Claimant.”

75. Notwithstanding that the Arbitral Tribunal had rejected Cannon’s claim for interest; it, nonetheless, awarded compensation under Section 70 of the Indian Contract Act, 1872 at the rate of 12.5% per annum on (a) the price of tie bolts (Claim no. 2); (b) on the admitted amount of the Final Bill (Claim no.4); and (c) increased amount of royalty and excise duty (Claim no.5). The said compensation would be payable for the period commencing three months after submission of the Final Bill dated 07.08.2016. The relevant extract of the impugned award reads as under:-

“In addition to the amounts awarded, the Claimant also awards compensation under Section 70 of the Contract Act, on the price of Tie Bolts (Claim No. 2), at the rate of 12.5% of the amount awarded per year, and on the amounts awarded on Claim Nos 4 for the increased amount of Royalty and Excise duty by Notifications issued by Govt of Maharashtra and the Union Budget respectively (Claim No 4), , and also on the admitted amount of Final Bill (Claim No.5) , which was checked and found payable by the Respondents to the Claimant, at 12.5% per year from the date, three months after of submissions of the Final Bill dated 07.08.2016, that is from 06.11.2016 for the work admittedly completed on 30.06.2016.”

76. Plainly, the award of compensation as aforesaid is patently illegal. If the contract proscribes the Arbitral Tribunal to award pre-award interest; the Arbitral Tribunal could not do so by camouflaging the same as compensation under Section 70 of the Indian Contract Act, 1872. The award of such compensation in favour of Cannon is, thus, liable to be set aside.

77. However, insofar as the award of future interest is concerned, the power of the Arbitral Tribunal to award the same is not contingent on the contract not providing otherwise. Clause (b) of Section 31(7) of the A&C Act does not contain any words that circumscribe the power of the Arbitral Tribunal to award future interest. More importantly, the award of future interest cannot be interfered with for the reason that even if the same is ignored, Cannon would nonetheless be entitled to future interest by virtue of Section 31(7)(b) of the A&C Act, which expressly provides for payment of future interest even if the award is silent in this regard.

78. There is little doubt that the jurisdiction of an Arbitral Tribunal is circumscribed by the agreement between the parties. Thus, if an Arbitral Tribunal is proscribed to award any interest, it would have no jurisdiction to do so. However, that does not mean that a party is not entitled to claim interest, if it is otherwise entitled to do so, by instituting an appropriate action in accordance with law.

79. The last question to be examined is whether the Arbitral Tribunal had erred in rejecting the counter-claims raised by NTPC. Mr Taneja, earnestly contended that NTPC was entitled to a declaration by the

Arbitral Tribunal that any royalty recovered from it would have to be reimbursed by Cannon. However, it is seen that NTPC had not prayed for any such declaration. The counter-claims indicate that NTPC had made the following prayers :-

- “(a) Award counter claim No.1 of Rs. 9.04 Crores towards royalty charges in favour of the respondent and against the claimant; and/or
- (b) Award interest @ 12% on the counter claim no.1 from the date of cause of action till the date of payment.
- (c) Award costs in favour of the Respondents.”

80. Clearly, the claim of ₹9.04 crores towards royalty charges could be not awarded in favour of NTPC since it had not paid the said amount. It is also admitted that the demand raised in respect of the royalty had been set aside by the concerned Appellate Authority. It is also NTPC's case that Cannon had provided receipts for the royalty paid by it. NTPC had founded its claim solely on the basis of a demand notice dated 03.07.2015 issued by the Tehsildar (South) Solapur, for a sum of ₹6,18,37,800/- under the provisions of the Maharashtra Land Revenue Code, 1966.

81. Paragraphs 9 and 10 of the counter-claims, which indicate the basis of the counter claim, are relevant and read as under:-

- “9. During the course of execution of various works, the Contractor/Claimant had brought sand and

aggregate from various vendors and towards utilization of the said materials generated from the minor minerals, the claimant used to submit royalty. receipts as issued by the Vendor in favour of the claimant as a proof of payment of the royalty. The said receipts were accepted by the Engineer-In-Charge i.e. Respondent No.1 as there was no ground at the relevant point in time to doubt the genuineness and authenticity of the said receipts.

10. However, Tehsildar South Solapur vide its notice dated 03.07.2015 raised a demand of Rs.6, 18,37,800/- with the Respondent No.1 under the provisions of Maharashtra Land Revenue Code (MLRC) towards the failure to deposit royalty in Respect of the said and aggregate utilized in the execution of railway siding works of IRCON International Limited.”

82. Admittedly, the demand notice dated 03.07.2015 issued by the Tehsildar (South) Solapur was set aside and this was also confirmed by NTPC/IIL to the Arbitral Tribunal, prior to the delivery of the award.

83. Thus, the Arbitral Tribunal’s decision to reject the counter-claims made by NTPC cannot be faulted. The Arbitral Tribunal has rightly held that the question whether NTPC would be entitled to any reimbursement of any royalty did not arise at this stage.

84. In view of the above, the impugned award to the extent that the Arbitral Tribunal has awarded compensation at the rate of 12.5% per annum on the amounts awarded against certain claims, for the period prior to the date of the impugned award, is set aside.

85. The petition is disposed of in the aforesaid terms. All pending applications are also disposed of.

VIBHU BAKHRU, J

OCTOBER 01, 2021

pkv

