

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 26.11.2021

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O.M.P. (COMM) 560/2020

NTPC LTD

..... Petitioner

versus

LARSEN AND TOUBRO LIMITED

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Aman Lekhi , ASG with Mr Adarsh Tripathi, Mr Vikram S Baid, Mr Ritwiz Rishabh, Mr Ajitesh Garg, Advocates.

For the Respondent : Mr Dayan Krishnan, Senior Advocate with Mr Dharendra Negi, Ms Tanya Tiwari, Mr Sukrit Seth, Advocates.

AND

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O.M.P. (COMM) 524/2020

LARSEN AND TOUBRO LIMITED

..... Petitioner

versus

NTPC LTD

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Dayan Krishnan, Senior Advocate with Mr Dharendra Negi, Ms Tanya Tiwari, Mr Sukrit Seth, Advocates.

For the Respondent : Mr Aman Lekhi , ASG with Mr Adarsh Tripathi, Mr Vikram S Baid, Mr Ritwiz Rishabh, Mr Ajitesh Garg, 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 12.06.2020 (hereinafter 'the impugned award') delivered by the Arbitral Tribunal constituted of three members, Mr Arun Kumar, I.A.S (Retd.), Justice M.Y. Eqbal (Retd.) and Justice Dr Mukundakam Sharma (Retd.) as the Presiding Arbitrator (hereafter 'the Arbitral Tribunal').

2. The controversy in the present case arises in the following context:

2.1 Tenders were invited by NTPC Limited (hereafter 'NTPC') for implementation of contracts relating to setting up of the Khargone Super Thermal Power Project (hereinafter 'the Project'). The work was divided into three packages as under:

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|----------------------------------|-----------------|--|
| <i>Contract Package 1</i> | <i>:</i> | <i>CIF Supply (Indian Port of Entry)</i> |
| <i>Contract Package 2</i> | <i>:</i> | <i>Ex-works (India) Supply</i> |
| <i>Contract Package 3</i> | <i>:</i> | <i>Inland Transportation, Inland Insurance, Civil Works, Structural Works, Installation. Testing & Commissioning of EPC</i> |

Package (Indian Port and Entry)

2.2 Larsen and Toubro Limited (hereafter 'L&T') had participated in the bidding process pursuant to the aforesaid notice inviting tenders. L&T's bid for the contracts was accepted and on 31.03.2015, NTPC issued three Notifications of Awards in favor of L&T.

2.3 Thereafter, contracts for all the aforesaid packages were signed by the parties on 03.04.2015.

2.4 The impugned award was rendered in the context of the disputes that have arisen between the parties in connection with the third contract package (hereafter 'the Contract Agreement') for the 'supply and erection including civil works of EPC Package Khargone Super Thermal Power Project' awarded to L&T by NTPC by the Notification of Award on 31.03.2015.

2.5 The dispute between the parties relates to the L&T's claim for payment of additional amounts as compensation for the increase in costs on account of increase in the basic minimum wage rates notified in terms of notification no. S.O.188 (E) dated 19.01.2017 (hereafter 'the Notification') issued under the Minimum Wages Act, 1948.

2.6 By its various communications, L&T stated that the increase in minimum wages of construction workers had severely affected the labour cost portion in executing the contracts and requested NTPC to consider reimbursement of additional costs in terms of Clause 31.4.3 of

the Special Conditions of Contract (hereafter ‘SCC’), which provided for reimbursement of increased expenses, *inter alia*, resulting from any change in law.

2.7 NTPC rejected L&T’s claim stating that price adjustment for compensation for any increase in the minimum wages was covered in Appendix-2 of the Contract Agreement.

2.8 L&T did not accept NTPC’s stand and requested NTPC to appoint an adjudicator for settlement of the disputes. By the award passed by the adjudicator on 07.10.2018, NTPC was directed to reimburse L&T in terms of Clause 31.4.3 of the SCC.

2.9 Aggrieved by the award passed by the adjudicator, NTPC invoked Clause 6.2 of the General Conditions of Contract (hereafter ‘GCC’) read with Clauses 4 and 42 of the SCC and referred the matter to arbitration for adjudication of the disputes.

3. The claims made by L&T before the Arbitral Tribunal are set out below:

CLAIM	PARTICULARS	AMOUNT
Claim no.1	Impact due to revision in minimum wages	₹99 crores (revised to ₹103.2 crores/-)
Claim no.2(a)	Interest @14% per annum on monthly	₹13.03 crores/-

	payments due from March 2017 till 31 st December 2018	
Claim no.2(b)	Interest @14% per annum on monthly payments due from 1 st January, 2019 till date of payment	
Claim no.3	To pay increased costs on account of the notification dated 19.01.2017 from 1 st January 2019 till completion of the contract within a time period and in default, interest.	
Claim no.4	Costs of arbitration	₹1,53,81,629/-

4. The impugned award was delivered by majority, with Justice (Retired) M.Y. Eqbal entering a partially dissenting opinion. The Arbitral Tribunal partially allowed the claims of L&T and held that L&T was entitled to receive an amount of ₹18.24 crores from NTPC along with an interest at the rate of 10% per annum from the date of filing the claim before the Arbitral tribunal till the date of payment.

L&T was additionally allowed to prove its entitlement for further reimbursement by providing evidence to NTPC that it had incurred such additional expenditure, within six weeks from 12.06.2020. The Arbitral Tribunal directed that the additional evidence, if provided by L&T, would then be scrutinized by NTPC and both the parties would mutually arrive at an agreed amount and NTPC would pay the amount within six weeks along with an interest at the rate of 10% per annum on the said amount from the date of filing of the claim till the date of payment. However, if the parties could not agree on such amount, they would to take assistance of a Chartered Accountant, who would determine and certify the amount payable to L&T. NTPC would pay the amount as certified within two months of the decision along with an interest at the rate of 10% per annum from the date of the Statement of Claims till the date of payment. Further, L&T was also awarded ₹50,00,000/- as costs of arbitration to be paid within six weeks.

5. Aggrieved by the impugned award, the parties have filed the present petitions.

6. L&T claims that the impugned award is patently illegal to the extent that it requires L&T to prove payment of increased costs. It is contended on L&T's behalf that the Arbitral Tribunal had erred in ignoring expert evidence, which established that the payments of increased costs were required to be paid on the basis of the increase in minimum rates of wages and the agreed labour component of each work; and, not on the basis of actual payment vouchers.

7. NTPC contends that the impugned award is contrary to the terms of the Contract Agreement, which expressly provides the manner in which increase/decrease in cost of labour has to be factored in the Contract Price. NTPC further contends that impugned award is vitiated by patent illegality as after having concluded that the L&T had not proved its claim, the Arbitral had issued directions to enable L&T to once again prove its claims after the impugned award.

Reasons and Conclusion

8. The principal dispute between the parties relates to L&T's claim for additional payment on account of increase in the cost of labour resulting from the increase in the minimum rates of wages payable to various categories of labour in terms of Notification No. S.O. 188 (E), dated 19.01.2017 (hereinafter 'the Notification') issued under the Minimum Wages Act, 1948. According to L&T, the said notification constituted a change in the law resulting in L&T incurring additional costs, which was required to be reimbursed in terms of Clause 31.4.3 of the SCC included in the Contract Agreement. Clause 31.4.3 of the SCC is set out below:-

“31.4.3 If due to an enactment of any new Act or Statute and rules made thereunder or any modification to the Acts/Statute or rules made thereunder, all after seven (7) days prior to the date set for opening of Price Bids and as a consequence thereof, the Contractor has to incur additional cost or expenditure, the same will be reimbursed by the Employer to

the Contract, excepting those due to reasons attributable to the Contractor and those being already compensated by other provisions of the Contract, like Price Adjustment, Taxes and Duties etc.”

9. NTPC disputes that L&T is liable to be paid any amount in terms of Clause 31.4.3 of the SCC on account of increase in labour wages pursuant to the Notification. It is NTPC’s case that the price variation on account of increase in labour costs is specifically provided for in Appendix-2 of the Contract Agreement and Clause 31.4.3 of the SCC is inapplicable as it applies only in cases where the increase in expenditure is not factored in the price adjustment provisions. According to NTPC, Appendix-2 to the Contract Agreement contains an exhaustive mechanism to compensate L&T for any changes in the cost of labour and material component during the execution of the contract.

10. The Appendix - 2 to the Contract Agreement contained a formula for revision in the price component for civil works, structural works, installation, testing and commissioning. The said formula for the Indian Rupee Portion for the Installation Services is set out below:-

“For Installation Price Component (excluding Civil Works and Structural Works component) of the contract:

- i) It is understood that the price component for erection portion of Installation Services comprises a fixed portion and variable portion

linked with the index of labour (description and co-efficient as enumerated).

- ii) The monthly price adjustment amount for the erection portion of Installation Services component will be computed as per the formula given below:

- a) Indian Rupee Portion of the Installation Services

$$ER = ER1 - ER_0$$

ER1 will be computed as follows:

$$ER1 = ER_0 (0.15 + 0.85 F1)$$

$$\frac{\text{-----}}{F_0}$$

Where :

ER = Adjustment to Erection portion of Installation Services component of contract price expressed in Indian Rupees payable to the contractor for each billing.

ER1 = Adjustment amount of Erection portion of Installation Services component of contract price expressed in Indian Rupees payable to the Contractor.

ER0 = Value of the Erection work done in the billing period, which shall be calculated as under:

For the purpose of computing ER₀, each Erection bill (which is excluding initial Advance and amount payable

on completion bill (which is excluding initial Advance and amount payable on completion of the Facilities and on successful completion of Guarantee test) during the Erection period upto the 'Completion of the Facilities' shall be divided by a factor as indicated below:

Erection portion of Installation – [Initial Advance amount
Services component of the + Erection Portion of
Contract Price Installation Services
component of the
Contract Price payable on
completion of the
Facilities + Erection
Portion of Installation
Services component of
the Contract Price
payable on successful
completion of Guarantee
test]

11. The Arbitral Tribunal considered the aforesaid dispute and found in favour of L&T that it is entitled for reimbursement of additional expenditure on account of the increase in the basic minimum rates of wages for various categories of labour.

12. The Arbitral Tribunal also referred to Section 4 of the Minimum Wages Act, 1948 and the same is set out below:-

“4. Minimum rate of wages.- (1) Any minimum rate of wages fixed or revised by the appropriate

Government in respect of scheduled employments under sec. 3 may consist of-

- (i) a basic rate of wages and a special allowance at a rate to be adjusted, at such intervals and in such manner as the appropriate Government may direct, to accord as nearly as practicable with the variation in the cost of living index number applicable to such workers (hereinafter referred to as the “cost of living allowance”); or
- (ii) a basic rate of wages with or without the cost of living allowance and the cash value of the concessions in respect of supplies of essential commodities at concessional rates, where so authorised; or
- (iii) an all inclusive rate allowing for the basic rate, the cost of living allowance and the cash value of the concessions, if any.

(2) The cost of living allowance and the cash value of the concessions in respect of supplies of essential commodities at concessional rates shall be computed by the competent authority at such intervals and in accordance with such directions as may be specified or given by the appropriate Government.”

13. The Arbitral Tribunal noted that the minimum rate of wages had two components – the basic rate of wage and a cost of living allowance which was required to be computed by the Competent Authority at such intervals as may be specified.

14. The Arbitral Tribunal observed that the Notification of the minimum wages for labour are in two parts. The first being the basic minimum wage rate and the second being a Variable Dearness

Allowance (VDA). The second component of VDA is revised from time to time to commensurate with the increase in the cost of living. The Arbitral Tribunal found that insofar as the VDA is concerned, the same was factored in the formula for the variation in the Contract Price, as stipulated in Appendix-2 of the Contract Agreement but not the increase in the basic minimum wage rate. This was apparent as in the terms of the formula, the price for labour component was linked to the “*All India Consumer Price Index for Industrial Workers*” as published by Labour Bureau. Thus, the Arbitral Tribunal was persuaded to accept that Appendix - 2 only factored in the variable cost of living allowance as published by the Labour Commissioner periodically and did not factor any rise in the basic minimum rate of wages.

15. Accordingly, the Tribunal held that insofar as the increase in the basic rate of wages is concerned, the same was not factored in Appendix-2 to the Contract Agreement and consequently, was required to be compensated in terms of Clause 31.4.3 of the SCC.

16. Mr Lekhi, learned ASG contended that the said conclusion was contrary to the plain language of the Contract Agreement. He submitted that Clause 31.4.3 of the SCC could not be interpreted in the manner as done by the Arbitral Tribunal. Clause 31.4.3 of the SCC expressly excluded any increase which is compensated by other provisions of the Contract Agreement and Clause (i) of Appendix – 2 to the Contract Agreement expressly provided for computation of adjustment in the Contract Price to reflect the changes in cost of labour.

17. Clause (1) of Appendix-2 to the Contract Agreement reads as under:-

“The Contract price shall be subject to price adjustment during performance of the Contract to reflect changes in the cost of labour and material components etc. in accordance with the provisions described below :”

18. Mr Lekhi submitted that the aforesaid clause made it amply clear that Appendix-2 to the Contract Agreement catered to reflect all changes in the cost of labour, which would also include the basic minimum rate of wages. He submitted that merely because the formula for calculating the variation in Contract Price did not fully reimburse any variation in the basic minimum rate of wages, it did not follow that the same was required to be separately reimbursed. Thus, the impugned award is contrary to the terms of the Contract Agreement.

19. This Court is unable to accept that the impugned award is *ex-facie* contrary to the term of the Contract Agreement and therefore, is vitiated by patent illegality. The Arbitral Tribunal has interpreted the provisions of Clause 31.4.3 of the SCC along with Appendix - 2 to the Contract Agreement. The decision of an Arbitral Tribunal in respect of construction of a Contract is final and the Court cannot supplant its view in place of that of the Arbitral Tribunal. Concededly, the scope of interference with an impugned award under Section 34 of the A&C Act is limited. Unless the court finds that the impugned award is patently illegal on the face of the award or falls foul of the fundamental policy of Indian Law, the impugned award cannot be set aside. In the present

case, the Arbitral Tribunal's interpretation as to the construction of Clause 31.4.3 of the SCC is a plausible one. This Court is unable to accept that such an interpretation is *ex-facie* erroneous and contrary to the plain language of the Contract Agreement.

20. The second question that needs to be addressed is whether the Arbitral Tribunal's decision to award a sum of ₹18.24 crores in favour of L&T, is patently illegal. Mr Lekhi, contended that even if it is assumed that L&T was entitled to reimbursement of additional expenditure on account of increase in the minimum rates of wages, L&T was required to prove the quantum of additional expenditure incurred on that count. He pointed out that Arbitral Tribunal had accepted that Clause 31.4.3 of the SCC provided for reimbursement of actual costs/expenditure incurred and L&T had failed to substantiate its claim as it had not provided any evidence of payment of additional expenditure. Notwithstanding the aforesaid finding, the Arbitral Tribunal awarded a sum of ₹18.24 crores in favour of L&T on the ground that NTPC had admitted that the same was payable in the written submissions filed by it. He submitted that NTPC had not filed any affidavit admitting that the aforesaid sum was payable to L&T. In the written submissions filed before the Arbitral Tribunal on behalf of NTPC, it was merely stated that the additional costs incurred by L&T would not amount to more than ₹18.24 crores. He submitted that this could not be construed as an unequivocal admission that in fact, L&T had incurred any such expenditure. He contended that the said submission was made in the alternative and merely stated that on the

basis of certain documents submitted by L&T at the material time, its claim could not exceed ₹18.24 crores; NTPC did not accept L&T's claim as construed by the Arbitral Tribunal.

21. It is well settled that The Indian Evidence Act, 1872 does not apply to Arbitral Proceedings. An arbitral tribunal is required to evaluate the material placed before it to draw its inference. In the present case, the Arbitral Tribunal had found that there was material on record to support L&T's claim that it had incurred a sum of ₹18.24 crores as additional expenditure on account of increase in the basic minimum rates of wages. Such material was not furnished by L&T but had been provided by NTPC. The relevant extract of the impugned award setting out the reasons that persuaded the Arbitral Tribunal to accept that there was material on record to sustain L&T's claim to the extent of ₹18.24 crores is set out below:-

“47. It is stated by the respondent that against the claim of more than Rs.1113.00 Crores made by the claimant the actual additional cost incurred by the claimant would amount to not more than Rs.18.24 Crores. When we are faced with the situation of making an assessment of the quantum payable in view of the revision, we find that no evidence at all is led by the Claimant to prove and establish as to what amount was paid by the Claimant (Contractor) to the labourers by way of enhanced minimum wages which is required to be reimbursed as stipulated in the agreement and consequently, it was not possible to make such an assessment and therefore, the claim of the Claimant for

payment was found to be not proved. But fortunately, for the Claimant, the Respondent has led some evidence justifying payment of such amount by way of reimbursement through placing on record Annexure-R1 and R2. The said evidence of the R1 and R2 is based on the records available with the Respondent showing enhanced payment to the labourers by way of payment of revised minimum wages which is to be reimbursed by the Respondent and the assessment is on a reasoning that the enhanced wage has been paid by the Claimant to the Labourers by way of payment of revised minimum wages which is to be reimbursed by the Respondent. The summation is based on month-wise, category-wise labour employed and the total wages paid category-wise. As discussed hereinbefore, there is no difficulty in relying upon the derive support from the said evidence as the said evidence is in the nature of admission towards obligation to pay by way of reimbursement. Consequently, we act upon such admission of the Respondent and assess the quantum of the amount of Rs.18.24 crores as payable to the Claimant by way of reimbursement towards payment of revised wages. We also, in the interest of justice, grant one more opportunity and liberty to the Claimant, to prove and establish before the Respondent through production of reliable and cogent evidence that it is entitled to more amount than Rs.18.24 crores by way of reimbursement of the amount paid by the Claimant to the labourers which is the amount assessed by us on the basis of the admission of the Respondent. We also make it clear that we are inclined to provide this one time

opportunity to the Claimant as could not and did not produce any evidence in the arbitration proceeding to justify assessment of the quantum by way of reimbursement in view of its own separate interpretation of the clause referred to hereinbefore, which we find illegal, unacceptable and baseless.”

22. It is seen from the above that the Arbitral Tribunal had relied upon the documents placed by NTPC marked as R-1 and R-2. It is thus, essential, to briefly examine the affidavit filed by NTPC’s witness, Sh Vijender Singh, Senior Manager (P&P), NTPC. The relevant paragraphs of the said affidavit are set out below:-

“20. I say that in any case, even if it is accepted for the sake of argument, but without admitting the same, that the Claimant is entitled to some reimbursement due to its incurring additional cost/expenditure due to increase in minimum wage than also the reimbursement has to be only of the actual expenditure and not on the basis of any theoretical percentage cost in each work price component.

21. I say that for claiming such reimbursement the Claimant should have placed the actual cost incurred by it due to the increased minimum wage rate. I say that every month the Claimant submits the record of payment received by each of its workmen, including the workmen employed by its sub-contractors, to the Respondent as required by the contract between the parties.

22. I say that thus, the number of workers employed by the Claimant (directly or

indirectly), the number of days worked by each of the workmen and the rate at which he is paid by the Claimant or its sub-contractors is mentioned in the proof of payments submitted to the Respondent by the Claimant.

I say that as the sample, the details submitted by the Claimant regarding the payments made by it or its sub-contractors to their respective workmen/labour in each category for the months of January, 2017 to December, 2018 along with the details submitted regard to atleast one sub-contractor for each month are being annexed hereto and marked as Exhibit R/1 (Collectively).

23. I say that the said data has been collated by me personally from the records of the data submitted every month by L&T. I further that based on the said collated data I have placed on record charts which is being annexed hereto and marked as Exhibit R/2 (Collectively) reflecting the actual quantity of man days relation to increase in minimum wages has to be considered.

24. I say that as per the said calculations it is clear that even if it is accepted without admitting that the total increase in additional expenditure incurred by the Claimant would be far less than what is now claimed by the Claimant.

25. I say that the Claimant has failed to place such materials or any other material on record to support its claim and therefore the present claim deserves to be dismissed with costs in favour of the Respondent.”

23. It is clear from the above that NTPC's witness had deposed that he had collated the records and data submitted by L&T and the Annexure (Ex. R/2 Colly) reflected "*the actual quantity of man-days in relation to which increase in the minimum wages has to be considered*". Undeniably, the said data collated by NTPC's witness did constitute relevant material and therefore, it cannot be contended that the impugned award is based on no material/evidence at all. Ex. R-2 collectively did reflect the contemporaneous data submitted by L&T and it was affirmatively stated that the increase in minimum wages has to be considered in relation to that data. As stated above, this Court cannot reappreciate or re-evaluate the material placed before the Arbitral Tribunal. In this case, the Arbitral Tribunal had examined the material before it and found that there was material to support L&T's claim to the extent of ₹18.24 crores. The standards of examination under Section 34 of the A&C Act do not permit any interference with the aforesaid conclusion of the Arbitral Tribunal.

24. The last aspect to be examined is whether the decision of the Arbitral Tribunal to grant further opportunity to L&T to further establish that it is entitled to any sum in addition to ₹18.24 crores, is patently erroneous.

25. In addition to granting L&T further opportunity to produce material in support of its claim, the Arbitral Tribunal had also directed that in case, the parties are unable to mutually agree on the amount of additional payment required to be paid to L&T, the same would be referred to a Chartered Accountant who, would examine the records

and issue a certificate. NTPC was directed to pay the aforesaid amount along with 10% interest per annum. The operative part of the impugned award setting out the aforesaid directions is reproduced below:-

“.....It shall, however, be open to the claimant within six weeks from today to prove and establish through other and additional evidence on proof of payment that they had incurred and in fact paid more than this amount to their labourers either directly or through their sub-contractors. This nature of additional evidence if any when produced by the claimant before the respondent within six weeks, the respondent shall examine the validity and legality of the said evidence and proof and give due weightage to such evidence and thereafter jointly arrive at an agreed figure. If the said figure is more than Rs.18.24 Crores the same shall be paid by the Respondents within six weeks thereafter. The additional amount, which is found due and payable, shall also be paid by the respondent to the claimant along with an interest of 10% per annum on the said amount also, from the date of filing of this claim till the date of payment.

The evidence that is produced by the claimant in support of its further claim would be scrutinized by the claimants and respondents jointly and the amount arrived at after such mutual discussion shall be accordingly paid in the aforesaid manner and, if in case, no joint decision is arrived at, it shall be open to the parties to take help of a recognized and duly certified chartered accountant who shall compare the records and on the basis thereof

certify an amount which is found due and payable, if any, to the Claimant in which case, the said amount shall be paid by the Respondent within two months of such decision. The amount so determined by the chartered accountant as payable to the Claimant over and above payment already received by the Claimant on this count shall also carry an interest of 10% per annum from the date of the claim petition till the date of payment.”

26. Mr Lekhi had submitted that the aforesaid directions are patently illegal. Once, the Arbitral Tribunal had found that L&T's had failed to prove its claim, the same was liable to be rejected. There was no requirement for the Arbitral Tribunal to issue further directions regarding holding of mutual discussions. He submitted that the Arbitral Tribunal had also put in place a mechanism, which required any difference in calculation to be referred to a Chartered Accountant with a further direction to NTPC to pay the amount as certified by the Chartered Accountant along with interest at the rate of 10% per annum.

27. This Court finds merit in the contention that the aforesaid directions are beyond the scope of reference of the Arbitral Tribunal. L&T had not sought any declaratory relief in its statement of claims. It had claimed a sum of ₹112 crores along with interest at the rate of 14% per annum on monthly payments due from March, 2017 till December, 2018 in addition to future interests and costs. The details of the amounts were specified in Annexure - 1 to the Statement of Claims. A plain reading of the Statement of Claims indicates that L&T claimed that it

was entitled for reimbursement of additional costs or expenditure in terms of Clause 31.4.3 of the SCC of the Contract Agreement. It had then proceeded to quantify the claim on a notional basis assuming that the Contract price for installation, civil and structural works included a labour component of 85%, 25% and 15% respectively.

28. The Arbitral Tribunal had on the basis of pleadings framed the following issues:

- I. Whether the claims of the Claimant are not maintainable and are not arbitrable in the light of the contractual provisions between the parties?
- II. Whether the Claimant is entitled to claim any amount on account of rate of increase in the minimum wages and in terms of the claims made in the statement of claim and if so far what amount and for which period?
- III. If the aforesaid issue is decided in favour of the Claimant, whether any interest is also payable on the said amount and if so for which period and at what rate?
- IV. Cost, if any, and if so, payable to which party?"

29. The Arbitral Tribunal found that although, L&T had established that it was entitled to reimbursement of additional amounts on account of the increase in the notified basic minimum wages, such reimbursement was required to be based on actual payments and not on any notional basis. Thus, having concluded that the L&T had failed to establish its claim, the only award that an Arbitral Tribunal could make

was to deny L&T's claim. The first issue struck by the Arbitral Tribunal was required to be decided accordingly.

30. L&T had prevailed in its stand that it was entitled to reimbursement of additional expenditure incurred on account of increase in the basic minimum wage rate, but had failed in its contention that the said amount was to be determined on a notional basis. In view of the decision of the Arbitral Tribunal, it may be possible for L&T to claim reimbursement of additional expenditure on submission of the proof of the same. It is also material to note that L&T's claim is not one of damages for breach of the contract in which case its failure to establish the quantum of damages would be fatal to its case. L&T's claim is for reimbursement in terms of Clause 31.4.3 of the SCC which is to be computed in accordance with the Contract Agreement. NTPC had failed in its defence that Appendix 2 to the Contract Agreement factors in all variations in the Contract Price arising from increase in rates of wages and Clause 31.4.3 of SCC is inapplicable. In view of the decision of the Arbitral Tribunal, NTPC is obliged to pay the consideration determined in accordance with the Contract Agreement as interpreted by the Arbitral Tribunal. If there is any dispute or controversy that may arise resulting from L&T's claim for reimbursement, the same would clearly be a separate dispute.

31. However, the Arbitral Tribunal awarded interest on the amount that L&T had failed to establish before the Arbitral Tribunal. Further, the Arbitral Tribunal has also entered an award in favour of L&T for a sum that may be certified by a Chartered Accountant and directed that

the same be paid with interest at the rate of 10% per annum from the date of the Statement of Claims.

32. This Court finds the same patently erroneous. There is no mechanism under any Contract Agreement for reference of any dispute regarding quantification of a claim to a Chartered Accountant. There was no agreement between the parties that a certificate issued by a Chartered Accountant would be final and binding. The Arbitral Tribunal had no occasion to examine any such certificate. The award against NTPC to pay an amount that may be certified by a Chartered Accountant along with interest at the rate of 10%, clearly amounts to making an award in respect of a dispute, which the Arbitral Tribunal had no occasion to consider.

33. This Court is also unable to accept that any interest could be awarded on that amount from a date of the Statement of Claims considering that the Arbitral had found that L&T had failed to establish its claim. The Arbitral Tribunal found that L&T's interpretation of Clause 31.4.3 of SCC was "*illegal, unacceptable and baseless*". In view of the above, the impugned award to the extent that it directs payment of *pendente lite* and future interest on the amounts that may be found payable after L&T has submitted its claim for reimbursement and NTPC has approved it, is patently illegal. *Pendente lite* interest cannot be awarded on a claim that has been rejected. The impugned award to the extent that it directs NTPC to pay an amount that is determined by the Chartered Accountant is also patently illegal and is set aside.

34. Mr Krishnan, had contended that in view of the decision of the Supreme Court in ***Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.: 2021 SCC OnLine SC 695***, the impugned award could not be set aside on the ground of patent illegality as the Court had explained that any contravention of law, which was not linked to public policy or public interest, would be beyond the expression of ‘patent illegality’ as used in Section 34 (2A) of the A&C Act. There is merit in Mr Krishnan’s contention that the scope of patent illegality is very narrow and as explained by the Supreme Court in ***Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.*** (*supra*), every error of law committed by an arbitral tribunal does not fall within the scope of the patent illegality. However, the Court had also clarified that illegality, which goes to the root of the matter will fall within the concept of patent illegality. In the present case, this Court finds that the award passed by the Arbitral Tribunal directing NTPC to pay the amounts that may be determined in future along with interest from the date of filing of the Statement of Claims after having concluded that L&T had failed to establish the amount claimed by it, reflects illegality that strikes at the root of the matter. The impugned award to that extent is patently illegal on the face of the award.

35. L&T has also challenged the impugned award to the limited extent that the Arbitral Tribunal has found that L&T would not be entitled to any payment under Clause 31.4.3 of the SCC without proving actual payment of additional expenditure. It is contended on behalf of L&T that the Arbitral Tribunal had erred in ignoring the evidence of the

expert which had clearly established that the practice of the construction industry was to adjust the contract price by a price adjustment formula and the price adjustment was never done on the basis of actual increase or decrease in the costs of inputs required for execution of Contract Works.

36. It was argued that a contractor could use various methods for executing the work including by using mechanical means instead of employing a larger work force and the correct method for determining the increase in prices was to ascertain the components of the contract on a notional basis. It was submitted that in the present case the parties had already agreed to the labour components of different works on a notional basis under Appendix - 2 of the Contract Agreement and therefore, L&T's quantification of its claim on the basis of the labour components was required to be accepted.

37. The Arbitral Tribunal had considered the aforesaid contention and found the same to be unmerited. The Arbitral Tribunal had examined the language of Clause 31.4.3 of the SCC and found that the use of the word 'reimburse' would necessarily imply that the Contractor would require to prove actual payment of increased expenditure/costs for seeking reimbursement of the same. Accordingly, the Arbitral Tribunal concluded as under:-

“42 We also record a find that from a plain reading of Clause 31.4.3 quoted at paragraph 16 above it would be clear that the Clause pertains to reimbursement of actual expenditure incurred, on grounds of change of a law/statute. We are of

the opinion that actual expenditures incurred would only be liable to be reimbursed subsequent to notification dated 19.01.2017. the requirement of proof thereafter inevitably follow for a claim of reimbursement.”

38. The contention that the aforesaid conclusion is patently erroneous and the impugned award is liable to be set aside to the aforesaid extent, is *ex-facie* unmerited. The conclusion of the Arbitral Tribunal is clearly a plausible one. This Court is unable to accept that the said interpretation of the clause is one that no reasonable person could possibly accept.

39. In view of the above, the impugned award is set aside to the limited extent that it directs further payments after the same are determined with interest. The petition filed by NTPC [OMP (COMM) 560/2020] is partly allowed.

40. L&T’s petition [OMP (COMM) 524/2020] is dismissed.

41. Parties are left to bear their own costs.

VIBHU BAKHRU, J

NOVEMBER 26, 2021

pkv