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

% *Date of Decision: 29.10.2021*

+ **ARB. A. (COMM.) 58/2021**

NTPC LTD

..... Petitioner

Through Mr Sanjay Jain, ASG with
Mr Sanjoy Ghose, Senior Advocate with
Mr Naman Jain, Mr Arkaj Kumar,
Advocates.

versus

TECPRO SYSTEMS LTD

..... Respondent

Through Mr Sacchin Puri, Senior Advocate with
Mr A.V.S. Subramanam, Ms Mehak Tanwar,
Ms Jasvin Dhama and Mr Dham Singh,
Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

[Hearing held through video conferencing]

VIBHU BAKHRU, J. (ORAL)

1. The appellant (hereafter 'NTPC') has filed the present appeal under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act'), *inter alia*, impugning the orders dated 14.09.2021 and 29.09.2021 passed by the learned Arbitral Tribunal. Insofar as the order dated 14.09.2021 is concerned, NTPC assails the same to the limited extent that it directs maintenance of status quo

with respect to the subject Projects.

2. The Arbitral Tribunal is *in seisin* of the dispute between the parties relating to Supply and Services Contracts dated 17.05.2011 for Coal Handling Plant Package for Pakri Barwadih Coal Mining Project (main CHP Contracts); and the Supply and Services Contracts dated 20.10.2011 for the Extended Coal Handling Plant Package for Pakri Barwadih Coal Mining Project Block (extended CHP Contracts).

3. The respondent (hereafter 'TSL') claims that it is an established Engineering Procurement and Construction (EPC) Contractor and is engaged in providing turnkey solutions, *inter alia*, in respect of bulk material handling systems for cement, power and steels sectors.

4. NTPC is a public sector undertaking and was allocated the Pakri Barwadih Coal Block in Hazaribagh District of Jharkhand.

5. On 01.02.2010, NTPC issued invitation for bids for supply of installation of Coal Handling Plants Package Pakri Barwadih Coal Mining Block. The petitioner applied for the tender documents and on 20.02.2010 submitted its proposal for executing the works relating to the said Project. Thereafter, on 31.03.2011, NTPC issued the Notification of Award awarding the said contracts to TSL. Thereafter, NTPC issued another invitation for the extended supply and installation of the Coal Handling Plants package for Pakri Barwadih Coal Mining Block. TSL submitted its proposal pursuant to the said invitation. NTPC accepted the same and issued a Notification of Award dated 05.10.2011 for the extended supply and installation of CHP Package for Pakri Barwadih Coal Mining Block.

6. In the meantime, on 17.05.2011, NTPC and TSL entered into two separate Contracts for the Supply and Services respectively for setting up the facilities. Thereafter, on 20.10.2011, the parties entered into two further Contracts referred to as 'extended First Contract' and 'extended Second Contract'.

7. TSL claims that NTPC has failed and neglected to perform its obligations for due performance of the contracts in question including failure to timely hand over of encumbrance free work front; interfering extensively in execution of the project, which disrupted the works and inordinately delayed their completion; and, failure to make timely payments, amongst other breaches.

8. TSL claims that in view of the above, the execution of the contracts in question were delayed entirely for the reasons attributable to NTPC. TSL claims that since it was understood that NTPC was responsible for the delays, it also granted repeated extensions for completion of the contracts in question.

9. TSL claims that it is entitled to recover all costs incurred by it in carrying out the works for setting up the facilities and in addition, is entitled to be compensated for all loss and damages suffered as a consequence of breach on the part of NTPC in performing its obligations in a timely manner. TSL has also made a claim in respect of wrongful invocation of the performance bank guarantees.

10. NTPC disputed TSL's claims and in view of the said disputes, TSL issued a notice dated 25.04.2019 invoking the arbitration clause under the contracts in question. Both, NTPC and TSL, nominated their

respective arbitrators. And, both the nominated arbitrators appointed the presiding arbitrator, thus constituting the Arbitral Tribunal.

11. On 27.01.2020, TSL filed its Statement of Claims dated 18.01.2020 before the Arbitral Tribunal. Summary of Claims as set out by TSL in its Statement of Claims is reproduced below:

S. No.	Particulars of Claims	Quantified Value (INR Cr)
1.	Cost incurred by Claimant on providing supplies and services in the CHP contracts	742.88
2.	Overhead Cost Incurred by Claimant at actuals (Overheads + Interest on BG)	110.41
3.	Interest cost for works not compensated by NTPC (12% Interest)	155.02
4.	Total Cost incurred by TSL (1+2+3)	1008.30
5.	Revised Contract Value of CHP Contracts	670.72
6.	Claim Amount A (4-5)	337.58
7.	Claim for compensation arising out of Loss of Profits	84.76
TOTAL CLAIM (6+7)		422.35

12. The prayers made by TSL in its Statement of Claims are relevant and are set out below:-

- “(a) Declaring that the execution of the works involved in the CHP contracts have been caused solely due to the failure of the Defendant to fulfil its obligations.
- (b) Directing the Defendant to pay a sum total of INR 422.35 Crore to the Claimant

on account of its failure to fulfil its obligations under the CHP contracts leading to the unreasonable For the reasons stated in the application, the delay is condoned in execution of the works and significant escalation in costs of the Claimant.

- (c) Directing the Defendant to bear all of the Claimant's legal fees and any other cost(s) and fees relating to these proceedings, to be computed at the end of the arbitration proceedings;"

13. NTPC is contesting the aforesaid claims and filed its Statement of Defence. NTPC has also raised counter claims before the Arbitral Tribunal.

14. The impugned orders were passed in the application dated 02.09.2021 filed by TSL under Section 17 of the A&C Act. TSL had filed the said application to impugn NTPC's decision to terminate the contracts in question.

15. NTPC had issued notices dated 03.07.2021 alleging that TSL had failed to complete the Coal Handling Plant Package and the extended Coal Handling Project within the stipulated time and had called upon TSL to cure the breach. Thereafter, NTPC had issued notices of termination dated 12.08.2021, terminating the aforesaid Contracts. TSL claimed that the said notices were illegal as the delay in completion of the works was entirely attributable to NTPC. TSL claimed that claims made in the Statement of Claims were founded on

the assertion that NTPC had delayed the execution of the work and, the said dispute was an integral part of the subject matter being examined by the Arbitral Tribunal. TSL contended that since the notices of termination were also premised on the allegation of delay, TSL could assail the notice of termination as its cause of action essentially remained the same.

16. NTPC's principal reason to terminate the Contracts in question is to proceed further by awarding the contract for the balance works to third parties. Since, such an action on the part of NTPC would create third party interests to the prejudice of TSL; it claims that it was entitled to urgent orders under Section 17(1) of the A&C Act.

17. TSL's application under Section 17 of the A&C Act indicates that TSL relies on sub clauses (a) & (b) of Section 17(1)(ii) of the A&C Act which are set out in its application. And, on the strength of the averments made in the application, TSL seeks the following reliefs:

- “A. Allow the present application and set aside the termination of the Contracts i.e., “Coal Handling Plant Package” and “Extended Coal Handling Plant Package”, as the same being arbitrary and unlawful;
- B. Pass an order restraining the Respondent from creating any third party interest in the work being executed by the Claimant pursuant to both contracts;”

18. NTPC is contesting the aforesaid application and had also filed

an application under Section 16 of the A&C Act, *inter alia*, contending that the disputes sought to be raised by TSL are outside the scope of arbitration and therefore, the Arbitral Tribunal did not have any jurisdiction to adjudicate the same.

19. The Arbitral Tribunal took up TSL's application dated 02.09.2021 under Section 17 of the A&C Act and NTPC's application dated 06.09.2021 filed under Section 16 of the A&C Act for hearing on 14.09.2021. On that date, the Arbitral Tribunal passed an *ad interim* order, *inter alia*, directing NTPC to maintain *status quo* with regard to creation of any third party rights in respect of the contracts in question till the applications were decided. In addition, the Arbitral Tribunal also issued certain directions to TSL to file an affidavit providing certain details as mentioned in the said order.

20. By the impugned order dated 29.09.2021, the Arbitral Tribunal has appointed a commissioner to record the measurements of the works executed at the project site and to make an inventory of the plant and machinery, raw material, construction material lying at the site. The Arbitral Tribunal also issued certain other directions for the Commissioner to follow in execution of the commission.

21. Mr Jain, learned senior counsel appearing for NTPC submits that the impugned orders are not in aid of the arbitral proceedings. TSL had quantified its claims in the Statement of Claims and the only dispute before the Arbitral Tribunal is whether TSL is entitled to the sum of ₹422 crores as claimed by it. He further submits that the order under Section 17 of the A&C Act can be passed as an interim measure

in aid of the arbitral proceedings and not in aid of any further claim or any other dispute that any party may seek to raise at a future date.

22. He submits that in the present case, the direction to maintain *status quo* as to the projects and/or to direct joint measurements has no bearing on the disputes before the Arbitral Tribunal.

23. Mr Puri, learned senior counsel appearing for the respondent countered the aforesaid submissions. He submits that the Arbitral Tribunal had inspected the site and had thereafter, taken the decision that a joint measurement of the site was necessary. He, however, is unable to counter the aforesaid submission that the order maintaining *status quo* or joint measurement of work is not relatable to the disputes pending before the Arbitral Tribunal.

24. This Court is of the view that the reliefs sought by TSL in its application under Section 17 of the A&C Act as set out above are substantive reliefs. Such reliefs are outside the scope of Section 17 of the A&C Act and cannot be granted.

25. The Arbitration and Conciliation (Amendment) Act, 2015 brought about significant amendments in the A&C Act, including relating to the powers of an arbitral tribunal to grant interim measures of protection. The scope of Section 17 of the A&C Act as substituted is much wider than the scope of Section 17 as it existed prior to its substitution. The language of Section 17 (1) of the A&C Act is similar to the language of Section 9(1) of the A&C Act. Section 17(1)(ii)(e) of the A&C Act entitles a party to apply to the Arbitral Tribunal for such other interim measures of protection as may appear to the Arbitral

Tribunal to be just and convenient. The Arbitral Tribunal has the same powers for making orders as the court has for the purposes of and in relation to any proceedings before it.

26. In the present case, TSL had referred to sub-clauses (a) and (b) of Section 17(1)(ii) of the A& C Act in support of its application.

27. It is at once clear that the relief sought by TSL is not covered under the aforesaid clauses. The preservation of the Contract is not a subject matter of dispute before the Arbitral Tribunal and therefore, the prayer seeking setting aside of the notices of termination cannot by any stretch be considered as orders in aid of preservation of the subject matter of the arbitration agreement. TSL's prayer for setting aside the termination does not fall within the scope of clause 17(1)(ii)(b) of the A&C Act which relates securing the amount in dispute in arbitration. As noticed above, the dispute in arbitration relates to the petitioner's quantified claim of ₹422 crores. The prayers made under Section 17 of the A&C Act are not for securing that amount.

28. Undisputedly, the power of an Arbitral Tribunal to pass orders regarding interim measure or protection under Clause (e) of Section 17 (1) (ii) are wide. However, they do not extend to passing orders that are not in aid of the final relief. The said clause also makes it clear that the Arbitral Tribunal would have the same powers as the court has for the purposes of and relation to any proceedings. Thus, the principles that apply for grant of interim orders under the Code of Civil Procedure 1908 (hereafter 'CPC') would also be applicable. It is well settled that an injunction under Order XXXIX Rule (1) & (2) of the

CPC shall be issued only in aid of the final relief. In the present case, interdiction of the termination of the contracts by NTPC, does not in any manner aid the final relief as sought for by TSL in its Statement of Claims, which as noticed above, are quantified claims.

29. The contracts in question had been terminated and it is clear from the prayers made in the Statement of Claims that termination of the Contract is not a subject matter of challenge before the Arbitral Tribunal. Plainly, TSL cannot raise a substantive dispute by way of an application under Section 17 of the A&C Act. In this view, the directions to NTPC to maintain *status quo* with regard to the projects or interdicting NTPC from awarding the remaining works to other contractors are unsustainable. Insofar as joint measurement of work is concerned, the same is also not in aid of TSL's claim.

30. In view of the above, the appeal is allowed and the impugned orders, insofar as they direct NTPC to maintain *status quo* and to conduct joint measurements, are set aside.

31. During the course of the arguments, Mr Jain had contended that in any event, in terms of the contracts in question, NTPC is bound to conduct the joint measurement before handing over the site to any other contractor and NTPC would comply with this obligation.

32. Mr Puri also states that it would depute a responsible officer for conducting a joint inspection as and when called upon by NTPC.

33. NTPC is bound down to the statement made on its behalf. It is also further directed that if the exercise of joint measurement is conducted TSL would fully cooperate in the said exercise, as

committed by it. No further orders are required to be passed in this appeal.

34. It is clarified that all rights and contentions of the parties are reserved.

OCTOBER 29, 2021

pkv

VIBHU BAKHRU, J

[Click here to check corrigendum, if any](#)



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