



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

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Reserved on : 14.08.2023

Date of Decision : 20.12.2023

IN THE MATTER OF:

O.M.P. 1/2018

NHPC LIMITED

..... Petitioner

Through: Mr.S.B. Upadhy, Sr.Adv. with
Mr.Narender Pal Singh, Advocate

Versus

HINDUSTAN CONSTRUCTION
COMPANY LIMITED & ORS.

..... Respondents

Through: Mr.Dayan Krishnan, Sr.Adv. with
Mr.Rishi Agrawala and Ms.Shruti
Arora, Advocates

AND

O.M.P. (COMM) 302/2020 & IA. No.17626/2015

HINDUSTAN CONSTRUCTION COMPANY LTD

..... Petitioner

Through: Mr.Dayan Krishnan, Sr.Adv. with
Mr.Rishi Agrawala, Ms.Shruti Arora,
Advocates

versus

NATIONAL HYDRO ELECTRIC POWER
CORPORATION LTD.

..... Respondent

Through: Mr.S.B. Upadhy, Sr.Adv. With
Mr.Narender Pal Singh, Advocate



CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

1. Present petitions have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter, referred to as '*the A&C Act*') impugning the Arbitral Award dated 31.12.2014 (hereinafter, referred to as '*impugned award*') delivered by Arbitral Tribunal consisting of three members.
2. The impugned award was rendered in the context of disputes that arose between the parties in connection with a contract agreement No.NHPC/CCW/Chutak/Lot-1 (hereinafter, referred to as '*the contract*').
3. The factual matrix of the case and the controversy involved in the present case is as follows:-
 - i. National Hydro Electric Power Corporation (hereinafter, referred to as '*NHPC*') invited tenders for the contract for '*Civil works for Diversion Channel, Coffor Dams, Barrage, Intake structure, head race tunnel, surge shaft, pressure shaft, underground power house, TRT system and switchyard of Chutak HE Project, Kargil (J&K)*'. In this regard, the notice inviting tender was issued on 26.05.2006.
 - ii. Hindustan Construction Company Ltd. (hereinafter, referred to as '*Contractor*') participated in the bidding process and in pursuance of acceptance of its bid vide letter of acceptance dated 23.09.2006, was awarded the contract and an agreement was executed in this regard on 30.10.2006.



iii. The contract price was Rs.410,54,17,507.82. The commencement date of the work was the date of the letter of acceptance i.e., 23.09.2006 and the stipulated time for completion of work was 50 months. The schedule completion date was 22.11.2010 however, the work was completed on 30.09.2011.

iv. The dispute between the parties relates to Contractor's claim for payment of additional cost incurred during the extended period of contract between 23.11.2010 to 30.09.2011 and certain other claims pertaining to the works executed by the Contractor. In all six claims were made by the Contractor.

v. Both NHPC and the Contractor nominated one arbitrator each and the two arbitrators unanimously appointed the third arbitrator.

4. The impugned award was delivered on 31.12.2014, whereafter, both NHPC and the Contractor filed applications under Section 33 of the A&C Act on 23.01.2015 and 28.01.2015 respectively, thereby seeking correction of computation errors in the award. Both the applications were rejected vide common order dated 31.02.2015.

5. The claims made by the Contractor before the Arbitral Tribunal are set out below:-

Claim I: Additional cost incurred by the Claimant during the extended period of the Contract between 23.11.2010 and 30.09.2011: Rs.974,271,373/- + Rs.202,003,161/- (as interest)

Claim II: Claim towards Concrete in Geologically Accepted Over Break, executed over and above the quantities provided in BOQ: Rs.1,80,25,545/- + Rs.56,50,518/- (as interest)



Claim III: Compensation for the unrecovered element of costs and profits which remain uncompensated to the Contractor due to reduction in scope of work and Contract price: Rs.47,19,78,434/- + Rs.8,84,47,465 (as interest)

Claim IV: Compensation of cost for use of Aviation Turbine Fuel (ATF) instead of High Speed Diesel (HSD) for continuing the work during winter seasons/road closure periods: Rs.109,37,635/- + Rs.3,59,81,464/- (as interest)

Claim V: Reimbursement of Additional Cost due to Subsequent Legislation: Rs.61,16,68,926/- + Rs.15,88,49,787/- (as interest)

Claim VI: Reimbursement of Building and Other Construction Worker's Cess: Rs. 394,92,420/- + Rs.1,86,78,806/- (as interest)

6. NHPC filed its statement of defence but did not raise any counter claims.

7. The Arbitral Tribunal vide the impugned award passed a majority award in relation to Claim No.1, whereas Claim No.2 to 6 were unanimously awarded in favour of Contractor.

8. Mr. Upadhyay, learned Senior Counsel representing NHPC, while assailing the impugned award has restricted the challenge to sub-section 2A of Section 34 i.e., on the ground of patent illegality.

9. The Contractor has impugned the award to the extent of quantification of Claim No.5 by the AT, which awarded a reduced sum without any basis. Contractor had claimed a sum of Rs.61,16,68,926/- towards reimbursement of enhanced wages paid to the labour due to enhancement of minimum wages notified by the State Government during the course of the Contract however, the AT awarded only a sum of Rs.17,52,00,000/-, which the contractor is aggrieved with in its petition.



10. Following is the claim-wise discussion, including the respective contentions of the parties and this Court's opinion in the context of grounds of challenge under Section 34:-

CLAIM NO.I

11. The claim pertains to cost compensation due to delay in completion of the work. NHPC's objections to the impugned award in relation to Claim No.1 is summarised as following:-

- i) Grant of extension of time by NHPC shall not itself result in consequential cost compensation. There is no provision in the contract for such consequence to flow.
- ii) Cost compensation is payable to the contractor only in certain eventualities as mentioned in the following clauses: Clause 6.4- where delay is attributable to the delay in sharing drawings with the Contractor, Clause 42.2-where delay is due to delay in site handover to the Contractor, Clause 12.2 - where delay is due to unforeseen obstructions encountered by the Contractor. As per NHPC, none of the conditions were met so as to entitle the Contractor to claim cost compensation and the AT committed a patent error by awarding compensation beyond the provisions of the contract.
- iii) AT acted against the clear intent of the Contract by ignoring Clause 53.1 wherein giving of a 28-days prior written notice was a pre-condition stipulated before any claim could be made against NHPC. In the notice, the contractor was required to notify the NHPC of the occurrence of the event which gives rise to a claim against NHPC. No such notice was given by the Contractor.



- iv) Clause 53.1 contains a non-obstante clause and thus would override Clause 53.4. Even if the consequences of non-compliance of Clause 53.1 are mentioned in Clause 53.4, it will not do away with the requirement of notice because of *non-obstante* nature of Clause 53.1.
- v) Even otherwise, contractor could not prove the costs allegedly incurred by it due to delays. No evidence was produced by the contractor and the claims were merely notional.
- vi) AT's grant of claim in the absence of any evidence amounts to patent illegality, as laid down in *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India*¹.
12. On the other hand, Contractor's contentions in support of the arbitral award are as under:-
- i. There is no patent illegality in any of the findings of the AT. The AT stuck to the provisions of the contract and has not travelled outside.
- ii. AT's findings are based on a plausible view of the contractual clauses, which cannot be upset in Section 34 merely because of an alternative interpretive view that could be adopted by the court. AT's view cannot be supplanted by the court's own opinion.
- iii. AT has returned a finding of fact that NHPC was responsible for delays and such delays are covered by eventualities contemplated under Clauses 6.4, 12.2 and 42.2 of General Conditions of Contract (hereinafter, referred to as 'GCC'). AT has therefore concluded that the Contractor was entitled to cost compensation under the said clauses.

¹ MANU/SC/0705/2019



iv. AT has returned a finding of fact that the notice as contemplated under Section 53.1 was given by the Contractor. AT has further held that even otherwise notice under Section 53.1 is not a condition precedent for making a claim.

v. Clause 53.4 lays down the consequences of non-compliance of Clause 53.1, which clearly indicates that the contract contemplated lodging of claims without the issuance of notice under Clause 53.1. Clause 53.4 stipulates that the compensation shall be restricted to the sums determined by the Engineer or arbitrator appointed under Clause 67.3.

iv. AT has justified the claim by virtue of Section 53, 55 and 73 of the Indian Contract Act, 1872 (hereinafter, referred to as 'ICA'). AT has held that the Contractor was entitled to compensation under Section 73 in the event of breach committed by the Contractor.

13. The aforesaid contentions of the parties and AT's approach in dealing with the claim No.1 is discussed below. The Arbitral Tribunal while examining the claim No.1 framed following two issues:-

"i. Whether the procedure stipulated in clause 53.1 of the G.C.C. has been complied with? If not whether the claims are maintainable?

ii Whether the claimant is entitled to the amount of INR 974,271,373/- as compensation and/or any other amount as additional cost incurred by it during the extended period of contract?"

14. AT observed that out of the seven extension of time (hereinafter, referred to as 'EoT') applications made by the Contractor, NHPC granted extension only on 3 occasions and extended time till 30.09.2011, however while dealing with the EoT applications, no reasons were assigned which



formed the basis of the determination of EoT, except on one occasion. AT referred to NHPC's letter dated 19.07.2011, which was issued in reply to the Contractor's letter dated 13.06.2011, and returned the findings that the NHPC was guilty of the following delays: delay of 11 days in handing over the site to the Contractor, which is a ground covered under Clause 42.2 of GCC; further delay of 298 days due to delays in issuance of drawings by NHPC, which is a ground covered under Clause 6.4 of GCC for grant of cost compensation; and another delay of 384 days caused due to defaults of interfacing contractors appointed by the NHPC, which AT held was a ground covered under Clause 42.2 of GCC. AT also rejected NHPC's allegation that delays were concurrent in nature and held that no cogent reason was assigned for treating parts of delays as concurrent. AT referred to NHPC's letter dated 21.11.2012 and held that NHPC did not dispute that it was responsible for delay and had only contended that no cost compensation was payable for the delays. AT observed that even in the Statement of Defence (hereinafter, referred to as 'SOD') filed by the NHPC, there is no denial that it did not cause delays and the only defence was the concurrent nature of delays, which disentitled the Contractor from claiming cost compensation. AT also took note of the statement made by RW1 (NHPC's witness) in his cross examination wherein the witness in response to a specific question put to him asking if he could show any document showing concurrent delays on the part of the Contractor, stated that "*I will check and revert*". AT concluded that since no evidence was produced by NHPC in support of its assertion despite the opportunity granted by the AT, even after the conclusion of the evidence, the plea of concurrent delay had to be rejected and held that there was no concurrent delay.



15. The AT was also persuaded by the fact that NHPC did not impose any liquidated damages (hereinafter, referred to as '*LD*') against the Contractor, to conclude that the Contractor was not responsible for the delays. AT examined the reasons cited by the parties for the delays and concluded that the entire delay was caused by NHPC and the same is fully covered by Clause 6.4, 12.2 and 42.2 of GCC and 44.1 of Conditions of Particular Applications (hereinafter, referred to as '*COPA*'), entitling it to claim cost compensation.

16. AT looked at the evidence and concluded that the Contractor had achieved 6 out of the seven milestones on or before the contractually stipulated time. Milestone 7 was delayed for the reasons not attributable to the Contractor. The 7th milestone was supposed to be achieved by 22.11.2009 however, the same was achieved on 11.05.2010. By way of a letter dated 22.01.2010, the Contractor requested NHPC for revalidation of the Milestone 7 elaborating the reasons for the delay. NHPC responded after a period of around 10 months vide their letter dated 27.10.2010, retrospectively revalidating the date of 7th milestone. NHPC imposed LD of Rs.28,73,792/- and deducted the same from the RA bills of the Contractor. However, the said LD was refunded after the overall completion of work.

17. After returning the aforesaid factual findings, the AT opined that the Contractor was entitled to cost compensation under Section 73 of the ICA read with Sections 53, 54 and 55. AT also referred to judgments in Rawla Construction Co. v. Union of India², National Highways Authority of India v. Oriental Structural Engineers Pvt. Ltd.-Gammon India Ltd. (JV)³, DDA v.

² 1981 SCC OnLine Del 315

³ 2013 SCC OnLine Del 399



S.S. Jetley⁴, DDA v. Naraindas⁵ to conclude that the defaulting party is liable to compensate the innocent party.

18. AT also dealt with the objection raised by NHPC regarding the non-issuance of mandatory notice under Clause 53.1 by the Contractor. As per the AT's interpretation, Clause 53.4 itself permits the AT to determine the amount of money payable to the Contractor even in respect of the claims w.r.t which notice under Clause 53.1 is not given. In any case, the AT has given a factual finding in the award that the details of the particulars of the delay events suffered by the Contractor had been submitted in the EoT applications made by it. AT recorded that those details remained uncontroverted by NHPC. AT has further based its decision on the fact that NHPC had admitted that the delay was caused due to Delay Events. Thus, AT rejected the objection regarding Clause 53.1, by giving its reasons for the same.

19. On the quantification of the claim no. 1, the AT noticed that the claim had been broken up in six heads namely, a) Additional Overhead costs; b) Additional Expenses towards retention of equipment at the site; c) Additional expenses towards running of DG sets for site & camp facilities; d) Additional expenditure by way of financing charges (interest) on account of delayed recovery of the component of overhead and profits; e) Additional expenditure on account of loss of earning capacity and profits and consequent loss of interest on profit; and f) Additional labour costs.

20. The first head relating to Overhead Costs were further sub-divided into the following sub heads namely: Employee Remuneration & Benefits;

⁴ 2000 SCC OnLine Del 615

⁵ 2007 SCC OnLine Del 1596



Repair & Maintenance Expenses; Rent; Electricity Charges; Revenue Expenses; and Share of Head Office Expenses.

AT was satisfied with the auditor's certificate dated 21.02.2012 produced by the Contractor in support of this claim. The certificate was issued by K.S. Aiyar & Co., Chartered Accountant, who were stated to be the statutory auditors of the Contractor. The certificate certified the revenue and expense s statement as per the books of account of the company. As stated above, the AT was satisfied with the quality of evidence produced in support of the claim. From the award, it appears that NHPC did not raise any objection to the authenticity of the certificate or the revenue and expense statement it certified. No evidence was produced by NHPC to create doubts about the statement the certificate certified. Thus, the AT had no reason to disbelief the certificate. NHPC's objection pertained to the percentage of costs that could be attributed to the overhead costs. The overheads are treated as one of the compensation heads in the event of delays in completion of works. AT has not committed any error in relying upon the auditor's certificate. In Associates Builders v. DDA⁶, it has been held that AT is the master of both quality and quantity of evidence it would require to reach its findings.

21. The 2nd head of the Claim No.1 pertained to expenses towards retention of equipment at site. The AT observed that the net depreciation value of the machinery should be calculated on half yearly depreciation basis instead of hourly depreciation claimed by the Contractor. There is

⁶ (2015) 3 SCC 49



nothing amiss in this approach of the AT, which only worked out a formula for calculating the depreciated value of the machinery.

22. Dealing with the 3rd head of the Claim No.1, the AT, very reasonably, resorted to price adjustment formula in the contract wherein weightage of fuel was kept at 14% of the contract value. The estimations have been made based upon a formula and are not therefore arbitrary. AT is well within its jurisdiction to resort to the formula-based estimation.

23. For the estimation of claim under 4th head, the AT relied upon the judgement in State of WB v. Afcons Infrastructure Ltd.⁷ to justify the grant of financing charges. Once the AT held NHPC responsible for delays, the contractor was entitled to claim financing charges as a consequential claim.

24. For 5th head, the AT relied upon the ratio laid down in Bharat Coking Coal Ltd v. L.K. Ahuja⁸, to award loss of profit and the loss of interest thereupon. The grant is justified and reasonable. There is no reason to interfere with the decision of the AT.

25. As far as claim pertaining to labour costs was concerned, the AT relied upon wage register produced by the Contractor in support of the claim. The AT noted that no evidence was produced by NHPC to suggest that wages were not paid to the labour or that the registers were not authentic. Nothing was produced to create any doubt in the mind of the AT about the genuineness of the register and its suitability for reliance as a piece of evidence. In view thereof, there is nothing for this court to take adverse note of.

⁷ 2011 SCC OnLine Cal 3752

⁸ (2004) 5 SCC 109



26. The reasons appear to be plausible, and this Court has no reason, in this jurisdiction, to scrutinise the AT's findings as if it were an appellate court sitting in appeal. As stated above, as far as quantification of Claim No.1 is concerned, it can't be said that it is a case of no evidence. The evidence was produced and the AT, being the master of both quality and quantity of evidence, was satisfied with it and relied upon the same. No error, much less patent error, is found to have been committed by the AT in its approach, which in the opinion of this Court, followed a judicial approach in reaching its conclusions.

CLAIM NO.II

27. This claim pertains to concreting work in Geologically Accepted Over-breaks ('GAO'), which the Contractor claimed it had undertaken. It is case of the Contractor that it had to undertake quantity of works that far exceeded the quantities estimated in the Bills of Quantity (hereinafter, referred to as 'BOQ') for Item Nos.9.1.2.2 of Group D, Item 9.3.2 and 9.4.2 of Group E and Item 9.1.3.2 & 9.2.2 of Group F.

Contractor invoked Clause 12.2 of the GCC for making this claim. As per the Contractor, unforeseen obstructions were encountered by it during the execution of works, which entitled it to claim costs incurred by it due to such obstructions.

28. NHPC countered the claim by disputing the applicability of Clause 12.2. According to NHPC, the claim is in the nature of variation claim under Clause 52 of GCC, whereunder the procedure for claiming variation is prescribed, which was not followed by the Contractor and the mandatory notice was also not given. It was also contended that if any claim qualifies as a variation item, the rate determination has to be made by the Engineer of



NHPC. If the rates are already provided in the BOQ for such work, only such rates would be payable. NHPC has challenged AT's award of new rates, other than provided in the BOQ, and contended that the same amounted to rewriting of contract by AT and hence, liable to be set aside.

29. According to the AT, the concreting work in Over Break actually executed by the Contractor far exceeded the BOQ quantities, which would entitle the Contractor for a revised rate for the excess quantities. AT held that the concreting quantities executed was 23437.34 cubic metres, which was more than the BOQ quantities of the aforesaid items. AT opined that the reduced rate of 50% of the concreting work quoted for invert and overt lining, was unreasonable and did not adequately compensate the Contractor due to excessive GAO encountered by the Contractor.

30. According to this Court, the revision of rate by the AT does not amount to re-writing of the contract to render it patently illegal. As per AT's interpretation, the excess GAO encountered by the Contractor amounted to obstructions contemplated under Clause 12.2, which would entitle it to claim compensation, which could not be at the BOQ rates for such work[,] since such rates do not adequately compensate the Contractor. NHPC's contention that the compensation as per BOQ rates would be adequate has been rejected by the AT. AT has noted that NHPC did not dispute the quantity claimed by the Contractor nor did it dispute the fact that the same was due to GAO that occurred during excavation.

31. It is not for this Court to interfere in the measure of compensation awarded by the AT since the same does not appear to be unreasonable, disproportionate, or arbitrary.

CLAIM NO.III



32. Under this claim, the Contractor had claimed unrecovered costs and profits due to reduction in the scope of work. Contractor had complained that against the contract price of Rs.410.54 Crores mentioned in the Letter of Award, the actual work executed and paid for was only Rs.340.95 Crores. This reduction of the contract value resulted in reduction in the profit that the Contractor could have earned. It was submitted that, as far as cost and expenses incurred by the Contractor remained unchanged which resulted in reduced profit. The reduction in the executed contract price was Rs. 69,41,69,035/- which worked out to approx. 17% of the original contract price. Contractor based its claim on Section 70 of the ICA, wherein it is stated that if a person does anything for another person non-gratuitously, such person is liable to be compensated by the person receiving the benefits.

33. NHPC opposed the claim and contended that increase or decrease in the work could have been dealt with only under Clause 52 of the GCC, which is a specific clause of the Contract. Thus, AT's reliance on Section 70 of the ICA, ignoring the contract provisions, is incorrect.

34. According to this Court, AT has justified its decision of non-applicability of Clause 52 of the GCC by stating that any increase or decrease of the contract price by more than 15% would result in revision of rates. The AT noted that even though the tender provided for Clause 52.3, however, the same was deleted by COPA amendment. In view thereof, AT opined that there was no reason for NHPC to deny due compensation to the Contractor. Contractor claimed a sum of Rs.47,19,78,434/- towards loss of profits based on the original contract value of Rs.410.54 Crores. AT refused to award the sum claimed as it is in favour of the Contractor and moderated the amount to Rs.13,98,80,000/-, being 20% of the reduced work. The AT



further awarded interest on the said amount from the date of filing of the claim till the date of payment. According to this court, the claim awarded by the AT is not in violation of any of the contractual provisions. The quantification of claim by the AT is reasonable and within the AT's power to estimate the loss. This court has no reason to interfere with the findings of the AT.

CLAIM NO.IV

35. Under Claim No. 4, Contractor claimed additional cost incurred by it in using Aviation Turbine Fuel ('ATF') instead of High-Speed Diesel ('HSD') for the construction work. It was the case of the Contractor that soon after the commencement of work, in September 2006, it was found in the months of November to January that the equipment could not be used due to freezing of HSD in winters. As per the Contractor, it tried various methods to resolve the problem, however, no solution was found. Eventually, Indian Oil Corporation ('IOC') advised the Contractor to mix ATF with HSD as the freezing point of ATF is -47 degree centigrade. The Contractor sent its proposal to NHPC on 25.09.2007 and the same was not objected to by NHPC. The Contractor assumed that NHPC did not have any objection and thus the Contractor went ahead and purchased large quantities of ATF in the months of July to October 2007 and during the winter months in the year 2007-2008 and 2008-2009. That apart, in the year 2009, there was an occasion when IOCL was unable to supply HSD, which is evident from their letter dated 24.04.2009, and the Contractor was constrained to use ATF. Since ATF is more expensive than HSD, the Contractor claimed the higher cost incurred by it. Contractor based its claim on Clause 12.2 of the GCC, treating non-availability of HSD and its non-feasibility to be used in



winter, as an ‘obstruction event’ contemplated under the said Clause 12.2 of the GCC. Contractor also referred to the meeting held on 10/11.06.2010, wherein NHPC had agreed to endorse the recommendation of the Engineer for payment of additional cost incurred by the Contractor for the use of ATF. Contractor further referred the various letters and reminders written by it for reimbursement of cost. It is further claimed by the Contractor that in the meeting of the Committee of Directors held on 04.01.2011, NHPC had agreed to release the payment, however, despite assurances, payments were not made.

36. On the contrary, NHPC disputed the claim and contended that there was no provision in the contract under which such a claim could be made. It was further contended that Clause 12.2 of GCC cannot be invoked for this claim.

37. The AT rejected NHPC’s objection, by holding that since NHPC benefitted from the use of ATF, it cannot deny the payment of cost incurred by the Contractor in using ATF instead of HSD. The AT referred to Section 70, ICA to justify the claim. According to this court, NHPC has not been able to point out any error that the AT may have committed in awarding this claim in favour of the Contractor. NHPC has not been able to point out any provision of the Contract under which such a claim was prohibited. On the contrary, AT relied upon Clause 12.2 of GCC to hold that non-availability and non-feasibility of HSD as a fuel in winter months was the kind of ‘obstruction’ contemplated in Clause 12.2 of GCC and is liable to be compensated for.

38. In view thereof, there is no reason for this Court to interfere with the findings rendered by the AT.



CLAIM NO.V

39. Under this claim, the Contractor has sought reimbursement of additional cost incurred by it in payment of additional wages to labour due to enhancement of Minimum Wages (‘MW’) effected by the government from time to time during course of the Contract.

40. Contractor made the claim under Clause 70.7 of the GCC, contending that additional cost had been incurred by it due to ‘change in law’, and hence, it is entitled to be compensated. Contractor claims that revision of MW from time to time by way of notification of the Government amounts to ‘change of law’. Contractor had submitted that between May 2009 to 1 April 2012, the MW had increased from Rs. 120/- to Rs. 180/- for un-skilled workers. It is further contended by the Contractor that by virtue of Clause 34.2 of the COPA, it was legally obliged to pay MW to the labour in terms of the Minimum Wages Act, 1948. It claims that a certificate dated 24.02.2014 had been issued by the Labour Enforcement Officer, Central certifying that it had complied with all the statutory and other payment payable to its workers and that there were no proceedings pending under any legislation including the Minimum Wages Act, 1948.

41. NHPC rejected the claim on the ground that as per Price Adjustment Formula (‘PAF’) under Clause 70.3 of the COPA, the Contractor has been adequately compensated due to escalation in the labour cost during the course of the Contract. It was contended that the PAF has various variables one of which is ‘labour’. It is a specific provision in the Contract to take care of labour price escalation, therefore, reference to Clause 70.7 of COPA, is not correct. It was also contended by NHPC that in Clause 70.2 of COPA, it is specifically mentioned that amounts paid under the PAF shall be deemed



to include amounts to cover the contingency of rise and fall of costs. It is argued that the Contract only contemplates the escalation sums to be paid pursuant to PAF and actual cost incurred due to any rise and fall in cost is not contemplated to be payable. This being the mandate of the Contract, the claim made by the Contractor is not tenable under the Contract provisions.

42. However, the Contractor disputed NHPC's interpretation of the Contract and referred to Clause 70.7 of the COPA to argue that to the extent it is not fully compensated through the PAF under Clause 70.3 of the COPA, the Contractor is entitled to claim the remainder of compensation under Clause 70.7 of the COPA. It was argued by the Contractor that under the PAF, the labour price escalation is based on CPI index which does not capture the actual rise in escalation in labour cost of the Contractor due to increase in MW notified by the government from time to time. It was further argued that the percentage increase in the CPI Index was in the range of 18% to 70%, whereas the percentage increase in the MW, during the same period, was in the range of 25% to 150%. It was contended that due to this mismatch, the labour price escalation amount paid under PAF was inadequate.

43. The AT, while interpreting the contract provisions, held that Clause 70.2 of the COPA was not applicable and that the same would be governed by Clause 70.7 of the COPA. AT held that Clause 70.2 does not prohibit payment of compensation under Clause 70.7. AT opined that PAF under Clause 70.3 does not cater to the additional costs in relation to the change in legislation effected in particular area. AT also found the PAF to be inadequate as far as payment of compensation for labour price escalation is concerned, since the same follows CPI based escalation.



44. According to this Court, the interpretational difference of the AT is not a ground for inference in the award under Section 34 of the Act. This Court does not concur with the interpretation adopted by the AT so far as the interplay between Clause 70.2, Clause 70.3 and Clause 70.7 of the COPA is concerned in the context of larger intent and object behind these provisions, more particularly, the fact that the Contract in question was an item-rate contract, wherein the price quoted by the Contractor is for each item of work mentioned in the BOQ rather than its individual components, however, as stated above, it is not the Court's remit under Section 34 of the Act to supplant its own view to replace a plausible interpretation adopted by the AT.

45. Having said that, the AT did not agree with the awarding of Claim No.5 in favour of the Contractor based on the formula-based quantification adopted by it. It was noted that the claim was in the nature of reimbursement of additional cost actually incurred by the Contractor in payment of enhanced wages to the labour, on account of payment of MW from time to time. It was incumbent upon the Contractor to clearly demonstrate the sums paid by it to the labour, prior to each enhancement, and enhanced wage paid, post each revision of MW notified by the government. This, the Contractor was supposed to prove for each category of labour namely, skilled, unskilled and semi-skilled deployed by it.

46. However, the AT completely ignored the fact that the Contractor did not lead any evidence in support of quantification of its claim and resorted to a formula-based quantification. In fact, the AT commented that "*it is not practical to compute the differential cost of actual cost incurred on the labour and the expenditure as per escalated base cost of the labour*".



According to this Court, this observation is completely erroneous and indicates lack of judicial approach by the AT. AT gave a long rope to the Contractor by waiving off the legal obligation to prove the quantification of the claim by observing that the same is not practical. It may also be borne in mind that, as far as claim for damages upon breach of contract is concerned, the quantification of claim may be made by way of a formula since it may not be possible to precisely quantify the damages. However, in a claim for reimbursement of cost incurred, it may not be legally justified to permit a party to quantify their claim based on a formula without leading evidence. In the present case, without establishing the actual additional wages paid to the labour, by leading evidence of payment of enhanced wages, the Contractor should not have been awarded the claim.

47. It is also noteworthy that the amount claimed is a substantial sum of Rs.61,16,68,926/-, out of which Rs.17,52,00,000/- has been awarded by the AT without any piece of evidence produced by the Contractor. The enormity of claim itself would have necessitated a more legally calibrated approach based on evidence rather than an abstract sense of reasonable and fair assessment of claim. Recently, a Coordinate Bench of this Court in Satluj Jal Vidyut Nigam Limited v. Jaiprakash Hyundai Consortium⁹ has cautioned against awarding of large claims in construction contracts without insisting on proving the same, by leading evidence. The Court had expressed its disapproval of such approach which can lead to serious and prejudicial monetary consequences for the employers.

⁹ 2023 SCC OnLine Del 4039



48. It is seen that that even the Contractor is aggrieved by the chopping and pruning of the claim amount without assigning any cogent reasons, for which, it has preferred its own objections under Section 34 of the Act. This Court does not find any merit in the objections raised by the Contractor , however, has referred to the same only to highlight the arbitrary approach of the AT.

49. For the reasons stated above, the award of Claim No. 5 is set aside. Since, all the claims are independent and severable, the partial setting aside of the award to the extent of Claim No. 5 is permissible as has been held in National Highways Authority of India v. Trichy Thanjavur Expressway Limited¹⁰.

CLAIM NO.VI

50. Under this claim, the Contractor sought reimbursement of a sum of Rs. 3,94,92,420/- deducted by NHPC from the bills of the Contractor towards Building and Other Construction Workers Cess ('BOCW Cess'). According to the Contractor, at the time of submission of the bid by it, no cess was payable under the BOCW Cess Act, 1996 since no regulation had been framed by the state government of Jammu and Kashmir. The Regulations under BOCW Cess Act were notified later on upon which , the BOCW Cess became payable by the Contractor. Since, the BOCW Cess became payable under a 'change in law', the Contractor became eligible for reimbursement of additional cost under Clause 70.7 of the COPA. Contractor is aggrieved by the BOCW Cess recovered by NHPC paid by it from the bills of the Contractor.

¹⁰ 2023 SCC OnLine Del 5183



51. NHPC contested the arguments of the Contractor and refuted that the liability to pay the Cess under the BOCW Cess Act was not known to the Contractor at the time of submission of bid, since the Act was notified in the year 1996. It may well be that the BOCW Cess came to be first collected in the year 2010, when the regulations under the BOCW Cess Act were notified, however, it cannot be said that a new legislation was notified subsequent to submission of the bid.

52. The AT awarded the claim in favour of the Contractor relying upon the ruling of the Hon'ble Supreme Court in Dewan Chand Builders v. Union of India¹¹. AT held that the Cess could not have been collected by NHPC prior to March 2010, since the Board under the BOCW (Regulation of Employment and Condition of Service) Rules had not yet been setup. AT further relied upon a judgement rendered by this Court in National Highways Authority of India v. Gammon Atlanta (JV)¹², wherein it was held that liability to pay cess would arise only when the rules under BOCW Cess Act are notified by the state government. Based on the aforesaid judgements, the AT held that the liability to pay cess was not a pre-existing liability and hence NHPC was liable to make good the same under Clause 70.7 of the COPA.

53. According to this Court, the AT has reasoned its findings based on the above referred case laws. As per the AT's interpretation, since the liability to collect cess under the BOCW Cess Act did not arise until the constitution of Board in the state, which happened in the year 2010, the liability was fastened on the Contractor by virtue of a 'change in law' and hence it was

¹¹ (2012) 1 SCC 101

¹² 2013 SCC OnLine Del 3149



liable to be reimbursed under Clause 70.7 of the COPA. It rejected NHPC's contention that the liability to pay cess was pre-existing, by giving cogent reasons, as explained above. NHPC did not make out any ground to establish that the claim awarded was contrary any provision of the contract or any law.

54. For the reasons stated above, this court finds no reason to interfere with the award rendered by the AT under Claim No. 6.

55. Resultantly, NHPC's petition is allowed to the extent of setting aside of impugned award qua Claim no.5 and as a consequence the HCC/Contractor's petition being OMP(COMM) No. 302/2022 challenging the quantification of claim no.5 is dismissed. Pending application(s) are disposed of.

MANOJ KUMAR OHRI
(JUDGE)

DECEMBER 20, 2023