



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

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Reserved on: October 19, 2023

Pronounced on: April 24, 2024

+ **FAO(OS) (COMM) 184/2023 & CM APPLs. 44094/2023,
44095/2023, 44096/2023, 50352/2023, 53104/2023**

THDC INDIA LTD.

..... Appellant

**Through: Mr. Sanjay Jain, Senior Advocate
with Mr. Shaantaanu Tyagii,
Mr. Ansh Jain & Mr. Aayush
Kevlani, Advocates**

Versus

M/S PCL-INTERTECH LENHYDRO CONSORTIUM JV

.....Respondents

**Through: Mr. Neeraj Kishan Kaul, Mr. Dama
Seshadri Naidu, Mr. Gopal Jain &
Ms. Kiran Suri, Senior Advocates
with Mr. Jatin Mongia, Mr. Udai Raj
Khanna, Mr. Purvesh Bhuttan,
Mr.Dheeraj P Deo, Ms. Meghna
Mishra, Mr. Ankit Rajgarhia,
Ms. Palak Sharma & Mr. Rohit
Kumar, Advocates for PCL JV**

**Mr. Sudhir Nandrajog & Dr. Menaka
Guruswamy, Senior Advocates with
Ms.Arundhati Katju, Mr. Sridhar
Potaraju, Mr. Gaichangpou Gangmei,
Mr. Arjun D. Singh, Ms. Lothungbeni
T Loth, Mr. Yimyanger Longkumer,
Mr. Aayush, Mr. Rajat Srivastava,
Ms. Zeba Zorah, Mr. Utkarsh Pratap,
Ms. Shristhi Borthakur, Mr. Manan
Takka & Mr. Aditi Prakash,
Advocates for Consortium JV**



CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

JUDGMENT

SURESH KUMAR KAIT, J

1. The appellant has preferred the present appeal under the provisions of Section 37(1) (c) of the Arbitration and Conciliation Act, 1996 read with Section 13 of The Commercial Court, Commercial Division and Commercial Division of The Commercial Courts Act, 2015 challenging the judgment and order dated 12.07.2023 passed by the learned Single Bench in O.M.P. (COMM) 303/2020, whereby its objections under Section 34 of the Arbitration and Conciliation Act, 1996, against the Arbitral Award dated 17.12.2010 have been dismissed.

2. According to appellant- THDC India Limited is a Government Company, owned by NTPC Limited and Government of Uttar Pradesh in the ratio of 74.496 to 25.504, and operates several hydro power projects, to fulfill the irrigation and drinking water needs of the population. The respondent-M/s PCL Intertech Lenhydro Consortium JV is a Joint Venture comprising of two partners, namely, Progressive Constructions Ltd., (PCL) and Intertech Lenhydro Consortium (ILC). The second partner, Intertech Lenhydro Consortium, is the lead partner and comprises of two Russian entities, M/s Intertech Service and M/s Institute Lenhydro Project, having



equal shares in the JV.

3. The appellant claims to have awarded the work for construction of Civil works of Dam, Spillway and Powerhouse of 400 MW Koteshwar Hydro Electric Project to PCL *vide* Letter of Award dated 31.08.2002 for a scheduled contract value of Rs.334,51,66,092/-. The parties had entered into an Agreement on 14.11.2002, according to which the work was to commence from the date of Letter of Award i.e. 31.08.2002 and was to be completed within 45 months i.e. by 31.05.2006.

4. According to appellant, in utter disregard of Clause-56 of the General Conditions of Contract (**GCC**), the respondent PCL immediately after execution of the Agreement dated 14.11.2002 sublet the work to M/S Ritwik Swari JV *vide* Contract dated 16.11.2002, which stipulates that prior written consent of the Engineer-In-Charge is required before subletting any portion of the contract.

5. The appellant has averred that the respondent fulfilled the technical qualification, which was prerequisite of the bid, as its Russian Partner- M/s Institute Lenhydro Project has immense technical expertise, including an ability to operate in elevated areas of hilly regions. However, ever since the signing of the Agreement, M/s Institute Lenhydro Project has been missing from the site since the beginning. The appellant has alleged that *vide* letters dated 25.04.2006, 28.04.2006, 29.04.2006 and 03.05.2006 the pre-bid qualification criteria was discussed with M/s Institute Lenhydro Project, who *vide* its letters dated 08.03.2002, 11.03.2002 and 20.07.2002 had reassured its participation and involvement in the project but was never available at the site.



6. Thereafter, in the Review Meeting held on 02.05.2006, after due discussions time to conclude the project was extended even though formal letter extending the time was issued on 16.06.2007. In the meantime, the work continued.

7. On the request of respondent vide letter dated 14.02.2007, the appellant agreed to not levy damages in terms of Clause-48 of GCC and received a 'No Claim Certificate' (NCC) from the respondent. However, thereafter vide letter dated 17.03.2007, during project review discussions, the respondent expressed inability to continue to pay for machinery and material due to financial constraints and appellant agreed to make payments directly to the manufacturers, suppliers and labourers. Thereby, the first time extension was granted up to March, 2008 without levy of liquidated damages. Thereafter, again second extension was given till June, 2009 to conclude the project, but by reserving the right to levy of liquidated damages.

8. On the assertion that the delay occurred was attributable to the appellant herein, the respondent invoked arbitration vide letter dated 16.06.2007. In the Statement of Claims uptill 30.05.2007, the respondent in Claims No. 1 to 6 alleged breach of specific obligations on the part of appellant and in Claims No. 7 to 13 claimed damages due to delay caused by the appellant.

9. In the Statement of Defence, the appellant challenged the maintainability of claims and alleged non-application of mind and patent illegality on merits. The appellant also filed counter claims alleging illegal sub-letting of work by respondent; return of risk and cost advance facility



provided by the appellant and corresponding interest on it.

10. The learned Arbitral Tribunal in its Majority Award accepted the claims of the respondent holding that delay of 63 months was not attributable to respondent and awarded damages in the sum of Rs.71 Crores plus computation on increased cost of materials with interest @12% for the pre-award period and @18% post award period. The Minority Award rejected the claim of the respondent being barred by the NCC issued.

11. The appellant, by filing petition under Section 34 of the Arbitration and Conciliation Act, 1996, challenged the Majority Arbitral Award dated 17.12.2010.

12. The learned Single Bench vide impugned judgment dated 12.07.2023 observed that the impugned arbitral award extensively deals with the objection raised by the appellant before the Arbitral Tribunal and the law is well settled that the Arbitral Tribunal is the sole judge of the quality and quantity of evidence. The merit based review, as sought by the appellant, has been frowned upon by the Supreme Court in a catena of cases and it cannot be said that the view taken by the Arbitral Tribunal is not even a possible view so as to warrant interference under Section 34 of the Arbitration and Conciliation Act, 1996. However, with regard to counter claims of the appellant, the learned Single Bench held that Clauses- 50 and 51 constitutes a clear bar on an award of *pendente lite* interest and the learned Arbitral Tribunal clearly appears to have acted in gross violation of the settled legal position. The learned Single Bench, thus, partly allowed the petition preferred by the appellant setting aside the impugned arbitral Award to the extent it grants *pendent lite* interest to the respondent, however,



declined to interfere in the rest of the Award.

13. The challenge to the judgment dated 12.07.2023 passed by the learned Single Bench, by the appellant is on the ground that the impugned Arbitral Award was made against the terms of the contract and the learned Single Judge has erroneously refused to interfere in the Award though empowered under Section 34 of the Act.

14. During the course of hearing, learned Senior Counsel appearing on behalf of appellant submitted that the learned Single Judge did not appreciate the proposition of law laid down by the Hon'ble Supreme Court in *Patel Engineering Limited Vs. North eastern Electric power Corporation Limited* (2020) 7 SCC 167 which hold that if the award is contrary to the terms of the contract, the Award is patently illegal. It was submitted by learned senior counsel for the appellant that even for extension of the time granted, the rates has to be agreed upon as per actual contract as has been contemplated in Clause 36 of GCC, however, by re-writing the rates from 31.05.2006, the Tribunal has re-written the contract and has thereby revised the rates.

15. Learned Senior Counsel for appellant submitted that the learned Single Judge has gravely erred by allowing the learned Tribunal to re-write the terms of the contract. The learned Single Bench has totally ignored the provisions of price escalation the parties had agreed under Clause 36 of GCC and thus, has allowed the learned Tribunal to travel beyond the agreement and re-write the contract.

16. In support of above contentions, reliance was placed upon the



decision of Hon'ble Supreme Court in the case of ***Ramchandra Reddy & Co. Vs. State of A.P. & Ors.***: (2001) 4 SCC 241 wherein it has been held that an Arbitrator cannot award higher rates than those prescribed under the contract which fact has been completely ignored by the learned Single Judge.

17. Reliance was also placed upon decision of Hon'ble Supreme Court in the case of ***Ssangyog Engineering & Construction Co. Ltd. vs. National Highways Authority of India (NHAI)*** (2019) SCC 131 wherein it has been held that a contract can be re-written only in very exceptional circumstances when the conscious of the Court is shocked by infraction of fundamental notions or principles of justice. Thereby the learned Tribunal while passing the majority award has breached fundamental principle of justice, i.e. unilateral or alteration of a contract can never be foisted upon an unwilling party nor can a party to agreement be liable to perform a bargain not entered into with the other parties.

18. Learned Senior Counsel for appellant submitted that the evidence relied upon by the learned Tribunal is that of invoices of purchase of plant & machinery and there is no evidence to show that the plant & machinery was available on site, which is a pre-requisite for any claim of idling. Thereby, conclusion of the learned Tribunal that there is enough evidence to prove idling of plant & machinery, which caused due to delay caused in handing over the project site, and as such, the said plant & machinery could not have been used on any other project and deserves to be set aside.

19. It was pointed out that learned Tribunal in paragraphs No.60,84,103,117 and 141 of the impugned judgment has noted that the
FAO(OS) (COMM) 184/2023



work had begun on site during the period for which idling has been calculated and if this had been the position, there could not have been idling of all the plant & machinery. Thereby, the grant of claims for idling on all plant & machinery is *prima facie* contradictory, unjust and demonstrates the non-application of mind by the learned Tribunal.

20. It has been agitated on behalf of the appellant that the learned Tribunal while calculating the period of idling of plant & machinery held that the same was idle for average of 26 months during the original 45-month length which amounts to roughly 58 per cent of the total time period of the original contract, however, proceeded to held that it will apply to the 11.012 months' time extension for which damages were sought and thereby 6.35 months were taken as against idling was calculated. The grievance is that the learned Single Judge has refused to interfere in Claim 8 by stating that the learned Tribunal is the sole Judge of the quality and quantity of the evidence and the only evidence presented was invoices of purchase of plant & machinery and not their deployment on site resulting in idling.

21. It was further averred on behalf of appellant that the requirement under Section 73 of the Indian Contract Act is for actual damages to be proved by the appellant against which no evidence of expenditure incurred, in the form of invoices or rental agreements in case of office space etc. was produced and the learned Tribunal on assumptive calculations calculated the expenditure without any evidence. Also submitted that the respondent has shown the running expenses of INR 21 crores on account of salaries of staff while calculating the damages which is without any premise of pay slip, or any other detail of the employees hired.



22. It was contended on behalf of appellant that the learned Tribunal has illegally applied Hudson formula in the *McDermott* case for computing the damages and does not give any reason to apply for the same and came up to the calculation of INR of 28.26 crores even much more claimed by the respondent of INR 20.932 crores.

23. The appellant has averred that the learned Tribunal has erred in accepting the wrongful claims for damages, which includes maintaining respondent's office on site and that of its subletter RSJV, even though one of them was supposed to complete the work. Also the Tribunal has erred in awarding damages for overheads due to maintaining the main office of the respondent, especially when it has no relation to the project or delay and would have continued to operate irrespective of the delay.

24. Reliance is placed upon the decision of Hon'ble Supreme Court in *PSA Sical Terminals Pvt. Ltd. Vs. The Board of Trustees of V.O. Chidambranar Port Trust, Tuticorin and Ors.* AIR 2021 SC 4661 in support of aforesaid averments.

25. With regard to award of rate of interest, the appellant contended that the learned Tribunal has awarded an excessive rate of 18% and the learned Single Judge has failed to appreciate that thereby the interest component has reached 200% of the principal component.

26. The appellant being a Public Sector Undertaking should not be expected by the court to pay 200% interest on principal amount. It is contended that the Minutes of Meeting dated 17.03.2007 already observes that huge loss has been caused due to issues in other construction projects,



and the Russian partner, Intertech Lenhydro Consortium who owns 50% of the JV. Hence, in the interest of justice and equity, the interest rate is liable to be reduced from 18% to 9%.

27. It has been averred that the learned Single Judge has failed to take into consideration the decision of the Hon'ble Supreme Court in ***Vedanta Ltd. Vs. Shenzhen Shandong Nuclear Power Construction Co. Ltd.***: (2019) 11 SCC 465 wherein it has been held that an Award is excessive and disproportionate when interest amounted 50% of the principal amount and was thus, reduced from 18% to 9%. The learned Single Judge has thus erred in allowing the excessive and unjust interest of 18% for the post Award period. Reliance is also placed upon decision of Hon'ble Supreme Court in ***Nabha Power Ltd. Vs. Punjab State Power Corporation Ltd.*** : (2018) 11 SCC 598 in support of above submissions.

28. The learned Arbitral Tribunal has wrongly concluded that there was coercion in granting the No Claim Certificate to the respondent by stating that appellant had refused to grant extension of time. The assumption of learned Tribunal is contrary to the evidence, i.e. Minutes of Meeting dated 02.05.2006 wherein the respondent was informed by the appellant of its intention to grant extension of time.

29. It was submitted in para 26 of the impugned Award the learned Arbitral Tribunal has observed that *it is common knowledge that every Contractor is required to grant a no claim certificate on the basis of which extension is granted by the employer* and despite this observation, the learned Arbitral Tribunal has ruled that *mere request of no claim certificate by the appellant is enough evidence for coercion.*



30. It was further submitted that the learned Tribunal has overlooked the evidence that the appellant expressly chose not to levy the liquidated damages, conceding its request vide letter dated 14.02.2007 whereas the earlier extension granted by the appellant were subject to levy of liquidated damages vide orders dated 02.08.2004 and 23.02.2005, however, in return of the concessions made by the appellant on the request of the respondent vide letter dated 14.02.2007, the respondent had issued undated NCC.

31. The learned Arbitral Tribunal has further erred that the date of invoking of arbitration, i.e. 16.06.2007 was the date for grant of extension of time and thus, it was a sign of protest which served as a conclusive evidence to show that NCC was issued under coercion.

32. Clause 60 of the Dispute Resolution Clause through which arbitration is invoked, stipulates a two-tiered process for resolution of disputes, first by bringing up the dispute before the Engineer-In-Charge and only then if no resolution is arrived at, arbitration can be invoked and thereby, the respondent had begun the two-tiered process much before the NCC was issued by launching its complaint with the Engineer-In-Charge vide letter dated 19.02.2007 and thus, the learned Tribunal has failed to consider Clause 60 of GCC in the light of letter dated 19.02.2007.

33. The appellant has averred that when the appellant waived their right to levy liquidated damages in exchange of grant of NCC by the respondent, that very movement the respondent invoked arbitration on the same date, i.e. 16.06.2007.

34. The learned Tribunal has, therefore, illegally rewarded the respondent



for its *malafide* conduct. It was further stated that the plea of coercion taken by the respondent is an afterthought. Reliance is placed upon decision of Hon'ble Supreme Court in *State of Kerala vs. M.A. Mathai* (2007) 10 SCC 195 in support of afore-noted contention.

35. The appellant has averred that the learned Single Judge has failed to appreciate that the claim numbers 1,2,4,5,6,9,13A,13B and 13D were allowed by the learned Arbitral Tribunal contrary to the terms of the contract and for this matter has accepted the view of the learned Tribunal that claim for interest @ 16% on risk and cost advance on the premise under Section 34, the Court is not supposed to modify at a different view than the Award given by the learned Arbitral Tribunal. Learned Single Judge as well as the learned Arbitral Tribunal has completely ignored the vital evidence of the Minutes of Meeting dated 17.03.2007 wherein it was agreed that risk and cost advance is liable to be returned along with interest. There was no other document on record to demonstrate that the appellant had notified the Contractor about the rate of interest and the Contractor has continued to avail the advances despite the said notice. The learned Tribunal has erroneously and arbitrarily held that the delay of 63 months was not attributable to the respondent because most of the project site was handed over in 2002 itself. Further, land acquisition was completed in April, 2005 and based upon it, the learned Tribunal attributed the delay of 32 months to handover the last village to the respondent.

36. The learned Tribunal has failed to appreciate that the work had already begun on the site much before and the respondent bore no responsibility for delay upto final handover. Also, that since the areas were



not handed over, no work could be started on the project and so, appellant cannot be held responsible for the delay for entire period.

37. It is contended on behalf of appellant that learned Tribunal arbitrarily granted a further period of 24 months in addition to period of 13 months for geological reasons whereas it was the responsibility of the respondent under Clause-10 of the instructions to the tender, to conduct a survey of the geological events in the area and accordingly, factor them into his bid which fact has been completely ignored by the learned Tribunal and thereby, the learned Tribunal has illegally made the appellant liable for damages arising out of these geological events. Also, the learned Tribunal has committed a patent illegality by holding that the appellant has admitted the delay which is not attributable to the respondent by granting the extension of time vide letter dated 16.06.2007.

38. Learned Single Judge has erred in concluding that since extension of time was granted, it must be treated as admission on the part of the appellant and extension of time could only be granted under Clause- 58 only in practical situations, whereas as per Clause- 48 of GCC, the extension can be granted when the delay is attributable to the respondent *al bit* possibility of levying liquidated damages, which fact has been ignored by the learned Tribunal.

39. Lastly, learned senior counsel for appellant submitted that the learned Single Judge has fallen into grave error by accepting the findings returned by the learned Arbitral Tribunal and refused to consider the pleas of appellant under Section 34 of the Act. It was submitted that the impugned award suffers from non-application of mind and, therefore, deserves to be



set aside.

40. To the contrary, learned senior counsel appearing on behalf of respondent submitted that the present appeal preferred under the provisions of Section 37 of the Act, deserves to be dismissed in view of the fact that the learned Single Judge under Section 34 of the Act has declined to interfere in the majority arbitrary award dated 17.12.2010 which is well-merited and based on the evidence on record.

41. Learned senior counsel submitted that the scope of interference by the court under Section 37 of the Act is limited and narrow and in a catena of decisions, the Hon'ble Supreme Court and the High Courts have already held that the scope of interference under the provisions of Section 37 of the Act is almost nil.

42. Reliance was placed upon decisions in ***Municipal Corporation of Delhi Vs. Sweka Powertech Engineers Pvt. Ltd.*** 2023/DHC/001058; ***Delhi Airport Metro Express (P) Ltd. Vs. DMRC*** : (2022) 1 SCC 131; ***Municipal Corporation Of Delhi Vs. Mr. Narinder Kumar*** 2023/DHC/000598; ***NHAI Vs. BSC-RBM Pati joint Venture*** 2018 SCC Online Del 6780; ***Reliance Industries Ltd Vs. Gail (India) Ltd*** FAO (OS) (COMM) 301/2019; ***Union of India Vs. Chenab Construction Company*** (2019) SCC Online Del 10515; ***Ssangyong Engg. & Construction Co. Ltd. Vs. NHAI*** : (2019) 15 SCC 131 and ***Associate Builders Vs. Delhi Development Authority*** (2015) 3 SCC 49.

43. Learned senior counsel appearing on behalf of respondent submitted that the learned Arbitral Tribunal, while passing the impugned award, based



upon the material and evidence placed on record, held that the delay in execution of the work was solely attributable to the appellant and the delay in giving possession of work sites and borrow area sites due to geological reasons and slope failures and their stabilisations were not attributable to the respondent, which resulted in a delay of 63 months from September, 2002 till December, 2006 and this finding has been upheld by the learned Single Judge vide impugned judgment.

44. Learned senior counsel submitted that the findings returned by the learned Arbitral Tribunal in respect of claim No.12 on the aspect of delay is that unprecedented delay of 63 months is solely attributable to the appellant in view of the fact that the rates quoted at the time of bidding were valid for any length of time and unforeseeable delay is not acceptable under the facts and circumstances of this case.

45. Learned senior counsel further submitted that the prices had undergone a drastic change in a hyper-inflation environment and for this reason, compensation in the form of revised rates for inputs materials was claimed before the learned Tribunal which was granted by considering the inputs rates prevalent on 31.05.2006 after detailed consideration of rates analysis and as per Central Water Commission Guidelines (CWC). The learned Tribunal, however, had rejected the claim of respondent, i.e. 9.77% claim towards interest burden and increase of 100% on the BOQ rates, however, as per Clause- 35 of the Contract, if any extra items are to be executed during execution of the contract, the rates for such extra work should be derived based on actual rates analysis as on the date of execution of extra work and for this reason, the learned Tribunal has allowed the



revision of rates only for the period beyond the contractual period.

46. With regard to the plea of appellant that by revision of rates, the learned Arbitral Tribunal has re-written the contract, i.e. beyond its jurisdiction, learned Senior Counsel submitted that review of rates has only been awarded for the work executed beyond the contractual period of 45 months, after due consideration that the appellant was solely responsible for a gross and unusual delay of 63 months beyond the period of original contract. Moreover, Clause 36(C) of the Contract does not in any way prohibit or bar grant of such compensation or damages in the form of revised rates for input materials. Thereby the impugned order rightly provides that the price variation/adjustment beyond the contractual period has to be as per Clause 36 of the Contract taking base indices as on 31.05.2006 and not as on 01.01.2002.

47. Learned senior counsel submitted that had the learned Arbitral Tribunal taken the base as on 2002, the same would have amounted to unjust enrichment of respondent, however, the learned Tribunal has rightly taken the base indices on 31.05.2006 and, therefore, the impugned award is reasonable, just and appropriate.

48. Reliance is placed upon decisions in *K.N. Satyapalan Vs. State of Kerala* : 2006 (12) SCALE 654; *State of Karnataka v. RN Shetty & Co* : AIR 1991 KAR 96; *NHAI Vs. Elsamex-TWS-SNC (JV)* : 2014 SCC Online Del 4475.

49. Learned senior counsel submitted that the contract was envisaged on the use of 9,000 tonnes of steel, however, at the end of execution, the actual



quantity of steel was 50,000 tonnes which was required to be compensated. Moreover, there has been price escalation in the rates of cement and other material used from 2002 till 2006 and the amount payable under Clause- 36 or awarded by the Tribunal towards the compensation for loss, is only towards the material used and work done by the respondent during the stipulated period and it has in no manner granted any undue benefit to the respondent. The revised rates granted to the respondent are based on annual schedule of rates published by government departments which has formed the bases for price variation and compensation.

50. With regard to claim No.8 of the respondent for the loss suffered due to idling of plant & machinery, learned senior counsel submitted that the impugned award demonstrates that claim No.8 is on documents, details and invoices for the plant & machinery along with the examination of the delay to compute the period of idling and hence, the plea of appellant herein that there was no evidence on record to establish existence of plant & machinery on site was in fact never raised in the statement of defence.

51. The learned Arbitral Tribunal has rightly held that delay of 63 months is entirely attributable to the appellant and, therefore, compensation for idling for a period of 26.117 months + 6.35 months on the basis of average period computed at Rs.24 crores was granted even though the respondent had claimed Rs.28.02 crores on the count. For arriving at this computation, the learned Arbitral Tribunal did not follow the formula raised by the respondent but followed the formula in McDermott case.

52. So far as the plea of appellant herein that the learned Tribunal has erred in awarding compensation of loss suffered due to overheads in the

FAO(OS) (COMM) 184/2023



original contract period vide claim No.10 A to 11 is concerned, the learned senior counsel submitted that this claim was awarded upon the findings of delay on the part of the appellant and the formula to apply is entirely within the domain of the Arbitrator which is used for calculation of overhead loss. The learned Single Judge has rightly held that the learned Tribunal is the sole Judge of the quality and quantity of the evidence and declined to interfere with the award.

53. Learned senior counsel submitted that the reliance is placed upon decisions by the appellant are completely distinguishable on facts and do not advance the case of the appellant. Thus, dismissal of the present appeal is sought by respondent.

54. Relevantly, the appellant had entered into an Agreement dated 14.11.2002 with respondent-PCL for construction of Civil works of Dam, Spillway and Powerhouse of 400 MW Koteswar Hydro Electric Project, which was to be completed in 45 days from the date of Letter of Award dated 31.08.2002. However, vide letter dated 16.06.2007 the time was extended but the appellant vide letter dated 14.02.2007 agreed to not levy the delay charges. Thus, the first time extension was granted up to March, 2008 without levy of liquidated damages. However, thereafter again the second extension was given till June, 2009 to conclude the project but by reserving the right to levy of liquidated damages.

55. To state that the delay was attributable to appellant, the respondent invoked arbitration vide letter dated 16.06.2007.

56. The respondent filed the following Statement of Claims before the



learned Arbitral Tribunal:-

“8.The case set up by the claimant was that on account of the aforesaid delays, it is entitled to the following claims:-

CLAIMS	DESCRIPTION	AMOUNT IN RS.
CLAIM-1	Compensation for losses suffered due to non-handing over of land on right bank of village Pendaras.	Rs. 19,72,92,148/-
CLAIM-2	Right and left bank excavation and slope stabilization extra rates and payments for working in hazardous conditions outside the project area	Rs. 4,94,78,982/-
CLAIM-3	Payment for construction of approach road on right bank from Baily bridge to permanent road	Rs. 14,39,800/-
CLAIM-4	Payment for construction of diversion structure:Upstream dyke	Rs. 76,59,144/-
CLAIM-5	Payment for construction of approach (haul road) for development of B-1 & B-2 quarries.	Rs. 2,03,20,771/-
CLAIM-6	Payment for purchase of sand and coarse aggregates for tunnel lining, inlet and outlet works.	Rs. 45,31,500/-
CLAIM-7	Compensation for losses suffered due to abandonment of cable-way/ cable crane system for Koteswar dam and power house and extra payment for replacement of concrete by Rotec.	Rs. 2,00,00,000/-
CLAIM-8	Compensation for losses suffered due to idling of plant and machinery	Rs. 27,96,41, 427/-
CLAIM-9	Compensation for losses suffered due to idling; Man power resources.	Rs. 17,28,64,620/-
CLAIM-10(A)	Compensation for losses	Rs. 20,93,20,000/-



	<i>suffered due to overheads.</i>	
<i>CLAIM-10(B)</i>	<i>Compensation for losses suffered due to non-realization of profit.</i>	<i>Rs. 31,44,30,000/-</i>
<i>CLAIM-11</i>	<i>Compensation for losses suffered due to undue increase in cost of input materials, during the 45 months original stipulated completion time in the contract.</i>	<i>Rs. 4,51,33,232/-</i>
<i>CLAIM-12</i>	<i>Compensation for losses suffered due to undue increase in cost of input materials: by way of revision of rates for works executed after the expiration of original stipulated completion time of 45 months in the contract (i.e., after May, 2006)</i>	<i>Claim is for actual quantity executed after May-2006</i>
<i>CLAIM-13(A)</i>	<i>Compensation towards extra costs / losses suffered on mobilization advance towards interests and BG's.</i>	<i>Rs. 10,59,30,259/-</i>
<i>CLAIM-13(B)</i>	<i>Compensation towards extra costs / losses suffered on performance B.G. due to 40 months delay.</i>	<i>Rs. 1,67,25,830/-</i>
<i>CLAIM-13(C)</i>	<i>Compensation for losses suffered due to 40 months delay on insurances.</i>	<i>Rs. 1,92,75,923/-</i>
<i>CLAIM-13(D)</i>	<i>Compensation for losses suffered due to the Interest levy on Risk and cost advance.</i>	
<i>CLAIM-14</i>	<i>Interest on Claims.</i>	
<i>CLAIM-15</i>	<i>Compensation on account of the cost incurred towards this Arbitral proceedings</i>	

57. The appellant filed its counter claims before the learned Arbitral Tribunal, which are as under:-

COUNTER CLAIMS	DESCRIPTION	AMOUNT IN RS. CRORES	INTEREST AMOUNT
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			IN RS. CRORES
<i>Counter Claim-1</i>	<i>Claim for Rs. 33.19 Cr towards advances made under the Risk and Cost Account</i>	28.06	5.13
<i>Counter Claim-2</i>	<i>Claim for Rs. 12.30 Cr towards Deferred Recovery of Mobilization Advance.</i>	6.35	5.95
<i>Counter Claim-3</i>	<i>Claim for Rs. 10.45 Cr. Towards Deferred recovery of Equipment Advance.</i>	10.45	-
<i>Counter Claim-4</i>	<i>Claim for Rs. 11.73 Cr. Towards Departmentally issued steel at the request of the Claimant on Deferred cost recovery</i>	11.53	0.20
<i>Counter Claim-5</i>	<i>Interest for the amount claimed against the claim 1 to 4</i>		
<i>Counter Claim-6</i>	<i>Cost of arbitration</i>		

58. The appellant in the present appeal has averred that the learned Single Judge has failed to appreciate that the claim numbers 1,2,4,5,6,9,13A,13B and 13D were allowed by the learned Arbitral Tribunal contrary to the terms of the contract. The learned Single Judge also did not consider that grant of Claim No.8 for idling of all plant & machinery demonstrates non application of mind by the learned Tribunal, and also, the learned Tribunal has re-written the contract by allowing the revision of rates only for the period beyond the contractual period.

59. **This Court has gone through the claims and counter claims of the parties narrated in the impugned award as well as in the impugned judgment in the light of Agreement dated 14.11.2002 entered between**



the parties.

60. The utmost grievance raised by the appellant herein is that the respondent in violation of Clause-56 of General Conditions of Contract, further sublet the work to M/S Ritwik Swari JV vide Contract dated 16.11.2002 and also its Russian Partner- M/s Institute Lenhydro Project, who had immense technical expertise, including an ability to operate in elevated areas of hilly regions, had been missing from the site since the beginning.

61. The appellant has relied upon Agreement dated 16.11.2002 entered between respondent with M/S RSJV Swathi Joint Venture, wherein the respondent had assigned the work M/S RSJV Swathi Joint Venture asking to execute the work on back to back basis as per the agreed rates.

62. On this Count, we find that the learned Tribunal in its Award held as under:-

“75. Both the parties acted upon this minutes of meeting and it was signed by the Claimant PCL-Intertech Len Hydro Consortium JV, the Respondent THDC & the Joint Venture partners of M/s. Ritwik-Swathi JV on 02.05.2006. Further, the Respondent in his letter dated 22.05.2006, inviting reference to this meeting dated 02.05.2006, notified the Claimant at page-67 of Book-II, giving approval for the engagement of sub-Contractor of RSJV as per agreement Clause-56 of GCC and stated that "as per agreement Clause-56 of GCC regularizing of engagement of Sub-Contractor RSJV i.e., Rithwik-Swathi JV is agreed.

76. The facts being as above we refer to Clause-56 which reads as below:



“56.0 SUB-LETTING:

The Contractor shall not without the prior written consent of the Engineer-in-charge sublet any portion of the contract. Any subletting shall in no way absolve the Contractor of any of his responsibilities under this contract. The provision of labour on a piece work basis shall not be deemed to be a subletting under this Clause”.

We find that this Clause specifies that the contract shall not be sublet without prior written consent of the Engineer-in-charge in any part of the contract. Further the Clause also specifies that any subletting shall in no way absolve the Contractor of his responsibilities under this contract. It is also a term of this Clause that the provision of labour on a piece work basis shall not be deemed to be subletting of the work. In this case the Respondent produced in Book-Ill pages-2 to 9a copy of the agreement dated 16.11.2002 for subletting between M/s. PCL & M/s. Rithwik-Swathi JV. The agreement between the Claimant and the Respondent is entered on 14.11.2002. Further we find that the meeting held on 02.05.2006 the Claimant and the Respondent along with the authorized representatives of RSJV have noted that RSJV has been working at the Koteshwara Dam project along with M/s. PCL since beginning and have agreed that "keeping in view the association of M/s. PCL sub-Contractor THDC expressed that since the engagement has already been made and the matter being fait accompli THDC has no objection to regularize the engagement". This has been signed by the authorized representatives of the Claimant, the Respondent as well as the RSJV. It is only after the parties came to consensus regarding this matter the official communication reiterating and regularizing the same was made on 22.05.2006 by the Respondent addressed to the Claimant inviting reference to Clause-56 of GCC. We further notice that as per the Contract between the Claimant and the Respondent



dated 14.11.2002 page- 6 Vol-1 of the contract under Article-1.0 para-1.3 it is agreed that "Any modifications / Amendments to the contract shall be affected only by a written instrument signed by the authorized representatives of both the parties". While we find that under Clause-56 there is no provision for regularizing a sub-contract but the parties have the authority to exercise their powers as per Article-1 para-1.3. Hence according to us we find that such exercise of the authority is Permissible under the provisions of the contract under Article-1.3. Therefore, we find that the Respondent along with the Claimant have exercised this authority to modify Clause-56 of the contract and agreeing for regularizing the engagement of the sub-Contractor RSJV being fully aware of the fact that the RSJV was working on the site from the beginning. Further the Respondent has agreed to this engagement as a fait accompli which as per Law Lexicon 3rd edition-2005 means "Fact or deed accomplished, presumably irreversible". Hence, we find that objection by the Respondent on this issue is not sustainable. Thus the Respondent having effectively modified the Clause-56 as per Article-1.3 would have no case to plead that this sub contracting is against the provision under Clause-56 of the contract and this contention of the Respondent deserves to be rejected and accordingly we reject this contention. From the materials placed before us, we are of the considered opinion that RSJV was executing the work as Sub Contractor right from the beginning and the Respondent never objected and finally regularized the Sub-Contract. Once having regularized it is not open for the Respondent to resist the claim on that ground."

63. The learned Single Bench taking note of aforesaid observations of the learned Arbitral Tribunal, relied upon Minutes of Meeting dated 02.05.2006, which reads as under:-



**“MINUTES OF THE MEETING HELD ON
02.05.2006 WITH M/S PCL-JV REGHAR4DING
KOTESHWAR HEP (400 MW)**

The meeting was called by THDC vide letter No. THDC/KDP/PLG/06- 07/8-11/31 Dated 29.04.2006 to review the progress status of construction of civil works of Koteshwar Dam, Spillway and Power House at THDC Noida Office wherein representatives of M/s PCL and their sub-Contractor work M/s RithwikSwathi JV (RSJV) attended the meeting. The list of participants is placed at Annexure-1

Following issues were discussed and decided:

THDC expressed that as per the Agreement No. THDC/RKSH/CD-197/AG dated. 14.11.2002 the civil works were scheduled to be completed by May, 2006 However as per the status of works which was discussed, it is anticipated that the works under the Agreement shall be completed by March, 2008. THDC also expressed that the pace of work by M/s PCL/sub contractor engaged by M/s PCL is not in tune with time schedule which was discussed during the meetings taken by CMD, THDC on 16.11.2005 & 04.03.2006. THDC further practically stopped their operations and valuable time is being lost. The excavation activates for the foundation in the main area have been almost completed and still concrete works has yet not started. The concrete work which commenced in the power dam area is also almost stand-still THDC expressed concern at the stoppage of work. THDC took strong exception to the engagement of sub Contractor by M/s PCL without obtaining prior approval. It was informed by M/s PCL that the formal engagement of the Sub-Contractor under Clause 56 of the Contract Agreement has not been accomplished since certain issues were being resolved with their sub-contractor viz M/s RithwikSwathi JV. THDC noted



that M/s RithwikSwathi JV has been working at the Koteswar Project alongwith M/s PCL since beginning.

Keeping in view the association of M/s PCL sub-contractor THDC expressed that since engagement has already been made and the, matter being fait accompli THDC has no objection to regularize the engagement.

On the progress of commissioning the project, it was agreed that M/s PCL and the Sub-contractor M/s RithwikSwathi JV will immediately resume the technical man-power and the equipment, which is required for the construction of Dam, Spillway and Power House shall be made available to match the construction requirements

PCL have also informed that the order for placing of concrete was tied up with M/s Rotec industries INC, USA. The Letter of Credit would be opened by their sub-contractor for which PCL will extend necessary cooperation and documentation. PCL have also assured that all necessary steps would be taken for starting concreting.

1. M/S PCL Intertech Len Hydro Consortium JV (R.D. Soni)
2. M/s RithwikSwathi JV
- a) M/s Rithwik Projects Ltd. (C.M.Ramesh)
- b) M/s Swathi Constructions Pvt. Ltd. (P. Pulla Rao)
3. THDC Ltd. (M.S. Gusain)”

64. The learned Single Bench also relied upon letter dated 22.05.2006 written by the appellant to the respondent, which reads as under:-

“Tehri Hydro Development Corporation Ltd.
(A Joint Venture of Govt. of India & Govt. of U.P.)
Koteswar Hydro Electric Project
Koteswar, TehriGarhwal (Uttaranchal) Pin-249 001
Phone: (01378) 231445, Fax: (01378) 231337

NO: THDC/KHEP/DGM/D&PH/PCL/06/92 Dated: 22 May, 2006

The Chairman & Managing Director



*M/s PCL intertechLenhydro Consortium (JV)
Raghava North Block, 7th Floor
R.R. Tower, Chirag Ali Lane
Hyderabad – 500001 (A.P.)*

Sub:- Regarding engagement of sub contractor.

Ref.:- Your letter no.PCL/KOT/F-4/20 dt. 20.05.2006.

With reference to your above letter on subject cited above you may refer meeting held on 02.05.2003 at THDC Noida office wherein it was directed that THDC has no objection to regularize the engagement as the mater being fait accompli.

As per agreement clause No.56.0 of GCC, regularizing of engagement of sub contractor (RSJV) i.e. Ritwik Swathi JV is agreed. However, engagement of sub contractor shall no way absolve the M/s PCL – Intertech Lenhydro Consortium (JC) of any of his responsibilities under the contract.

*(U.K. Thakur)
DGM (D&PH) ”*

65. It is not in dispute that before the learned Tribunal, the appellant had filed counter claims against the respondent and the sub-letter did not raise any objection qua non-joining of the sub-contractor. Also, in its statement of defence averred that the respondent vide its letter dated 03.05.2006 had conveyed that it was willing to regularize the engagement of sub-contractor, which shall in no way absolve the respondent of any of its responsibilities under the Contract. Thus, in our view the learned Single Bench has rightly relied upon Paras-75 and 76 of the impugned Award to affirm engagement of sub contractor. In our view, by putting the condition that *the respondent shall not be absolved of its responsibilities under the contract* even if it is sub-let, the respondent has acted well within the scope of Section 56 of the GCC, as noted in Para- 63 hereinabove.



66. As far as issuance of NCC issued by the appellant is concerned, this Court finds that as per Agreement dated 14.11.2002, the work was to commence from the date of Letter of Award i.e. 31.08.2002 and was to be completed within 45 months i.e. by 31.05.2006. The respondent vide letter dated 28.11.2005 requested for extension of time upto 30.06.2008 and the appellant vide letter dated 02.05.2006 granted extension of time. Thereafter, the respondent issued first NCC, making it clear that no claims for time period of the original contract shall be made but the said NCC is undated. Yet again, respondent vide letter dated 14.02.2007 sought further extension of time upto 30.09.2009 and the appellant vide letter dated 16.06.2007 granted the same. However, on the same date i.e. 16.06.2007, the respondent invoked arbitration and so, issuance of NCC on 16.06.2007 cannot be said to be voluntary.

67. Coming to the claims of the appellant that the learned Single Judge has failed to consider that claims No.1,2,4,5,6,9,13A,13B and 13D were contrary to the terms of the contract, which were allowed by the learned Tribunal; we have gone through the Statement of Claims and the findings returned by the Tribunal as well as learned Single Bench of this Court in respect thereof.

68. With regard to *Claim No.12, i.e. compensation for losses suffered due to undue increase in cost of input materials; by way of revision of rates for work executed after the expiration of original stipulated completion time of 45 months in the contract*, the Arbitral Tribunal has held that the delay in execution of the project was solely attributable to the appellant herein, as there were delays in handing over the sites and borrow



area sites and also due to geological reasons, such like slope failures on right bank and left bank and their stabilization etc., which were not attributable to respondent. The Tribunal held that there was net delay of 63 months from September 2002 till December 2006 and so, the plea of appellant that the rates quoted at the time of bidding shall remain valid for any length of time and even in times of unforeseen delays, cannot be accepted. The Tribunal held that the delay was unusual and the respondent deserved compensation in the form of revised rates for input materials prevalent on 31.05.2006.

69. During the course of hearing, learned Senior Counsel appearing on behalf of appellant relied upon decision in ***Indian Oil Corporation Ltd Vs. Shree Ganesh Petroleum Rajgurunagar*** (2022) 4 SCC 463 to submit that the Tribunal has ignored that there already exists a price adjustment mechanism in the contract in the form of Clause 36 of the GCC. This Court finds that the decision in ***Indian Oil Corporation Ltd (Supra)*** a Lease Agreement and a Dealership Agreement was executed between the parties including a construction Agreement. The respondent therein had invoked the arbitration under the Dealership Agreement and not the Lease Agreement. The Hon'ble Supreme Court held that the disputes under the Lease Agreement were to be referred to the Managing Director of the appellant, who was to be the sole Arbitrator. The respondent had infact invoked arbitration qua the Dealership Agreement and even the appointment of Arbitrator was contrary to the procedure prescribed and so, the Award was set aside.

70. The appellant before us has relied upon decision in ***Ssangyog Engineering (Supra)***, wherein the respondent had invited bids for



construction of four lane bypass on National Highway 26 and appellant's bid were accepted, however, due to change indices under the WPI series, disputes arose and referred to the learned Arbitral Tribunal to adjudge whether the price adjustment under the contract would continue? The Supreme Court therein relied upon Government guidelines given in Circular dated 15.02.2013 to set aside the Arbitral Award and decisions of the Court under Sections 34 and 37 of the Act.

71. Reliance was also placed upon decision in *National Highways Authority of India Vs. Progressive –MVR (JV) (2018) 14 SCC 688*. In the said case, the NHAI had filed multiple appeals against multiple contractors who were awarded work for construction of roads etc. The disputes are with regard to interpretation of Clause 70.3 of the conditions of the contract which contained "price adjustment formula", which was different from the one in Clause-36 of the GCC. In the case in hand, the Tribunal has taken into consideration the WPI indices for the 'price adjustment factor' to ensure that respondent does not get undue benefits.

72. Thus, the decisions in *Indian Oil Corporation Ltd (Supra)*, *Ssangyog Engineering (Supra)* and *National Highways Authority of India (Supra)* are distinguishable on facts and thus, not applicable to the present case.

73. In our considered opinion, in the present case, the Tribunal has allowed the revision of rates only for the period beyond the contractual period i.e. 45 months beyond the period of 63 months and so, appellant's contention that it amounts to re-writing of contract cannot be accepted. By granting revision of rates from 31.05.2006, the learned Tribunal has adopted a just and reasonable approach.



74. The Hon'ble Supreme Court in ***K.N. Satyapalan Vs. State of Kerala (2007) 13 SCC 43*** on the question whether in the absence of any price escalation clause in the original agreement and a specific prohibition to the contrary in the supplemental agreement, the appellant could have made any claim on account of escalation of costs and whether the Arbitrator exceeded his jurisdiction in allowing such claims as had been found by the High Court, held that the arbitrator appears to have acted within his jurisdiction in allowing some of the claims on account of escalation of costs which was referable to the execution of the work during the extended period. In our judgment, the view taken by the High Court was on a rigid interpretation of the terms of contract and the supplemental agreement executed between the parties, which was not warranted by the turn of events. The learned Single judge of this Court has thus rightly rejected the contention of the appellant that by granting revision of rates, the Tribunal has re-written the contract.

75. With regard to **Claim No.8 i.e. compensation for losses suffered due to idling of plant and machinery**, this Court finds that this claim of appellant is based upon documents, details and invoices for the plant and machinery. The learned Arbitral Tribunal taking note of the vouchers, invoices and details from the manufacturer and observed as under:-

“156. In so far as CLAIM-12 is concerned the claim is for revision of rates beyond the contract period for reasons of delays not attributable to the Claimant as observed by us in the earlier paras while delays were discussed and we have held that a delay of 63 months is not attributable to the Claimant for the reasons recorded there under. The EOT1 & EOT2 given by the Respondent are under Clause-58 of the contract where the Respondent is empowered to give the extension only for the delays that are not attributable to the Claimant. The contention of the



Respondent that the no claim certificate NCC1 given by the Claimant at the time for according the EOT1 by the Respondent has been held us in the earlier paras that such NCC will not disentitle the Claimant for the reasons recorded therein regarding the Extension of Time EOT2 also the No Claim Certificate NCC2 is held by us that it will not disentitle the Claimant to his claims. Further, we see from Clause36(c) at page-288 that —price adjustment shall apply only for work carried out within the stipulated time or Extension granted by the corporation and shall not apply to the work carried out beyond the stipulated time for reasons attributable to the Contractor. Hence, we find from this Clause conjointly read with Clause-58 of the contract when the extension of time is given under Clause-58 for reasons not attributable to the Contractor withholding of or freezing the indices is against the provision of the contract and the Respondent has committed a breach in freezing the indices while according EOT2.

157. The rates quoted by the Claimant are admittedly for completion of the work within 45 months which could not be completed for several reasons and delays not attributable to the Claimant as held by us earlier for non-fulfilment of several obligations, under the contract by the Respondent. In a contract of this nature when the obligation of the Respondent are not fulfilled and because of this if the contract is extended, even though at the request of the Claimant, admittedly for reasons not attributable to the Claimant, to hold that the rates quoted at the time of bidding should remain valid for any length of time is an unfair proposition and is not acceptable under the facts and circumstances of this case where the extension is much more than the original period of 45 months contract for reasons not attributable to the Claimant.

158. The Claimant relies on 2006 (12) SCALE 654: Satyapalan Vs State of Kerala, where the Apex court under para-26 held that "ORDINARILY, the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfill its obligations under the contract which has a direct bearing on the work to be executed by the other party, the



Arbitrator is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations. That is the distinguishing feature of cases of this nature and M/s. Alopi Parshad's case (supra) and also Patel Engg's case (supra). As was pointed out by Mr. Dave, the said principle was recognized by this court in P.M. Paul's (supra), where a reference was made to a retired Judge, this court gave its approval to the excess amount awarded by the arbitrator on account of increase in price of materials and costs of labour and transport during the extended period of the contract, even in the absence of any escalation Clause. The said principle was reiterated by this court in T.P. George's case (supra)". We rely on this judgment. Further, in the case of AIR 1991 KAR 96: State of Karnataka Vs R. N. Shetty & Co., relied by the Claimant, we find that the Arbitrators in that case had considered revised rates in respect of quantities of work that were executed beyond the contract period and awarded revised rates in respect of the works executed after the contract period rates which are just and fair towards payment of compensation to the Contractor which the Court upheld. Further in that case the arbitrators have added the price escalation that has taken place there after by revising the base date to the date of the revised rates being made applicable after the contract period. In challenging to the award the court held —in the circumstances it cannot be stated that the arbitrators had committed any illegality by approving the principle adopted by the Arbitrator in revising the rates after the contract period and also adding the price variation by shifting the Base date for price variation as just and fair. Even in the present case before us the CLAIM-12 is for a just and fair compensation based on the cost of materials, labour, etc., worked out on an accepted principle of rate analysis considering the input rates that were prevalent on 31.05.2006 which is the end of contract period in respect of works carried out beyond the original contract period. We have examined these rates and the various invoices, rate analysis based on which the rates for the BOQ items executed beyond 31.05.2006 are shown at pages-686 to 689 of C-1-3 for the 95 items. We find that the rate analysis for these items submitted in pages-724 to 801 of C-1-3 is in conformity with the accepted principles of



deriving the rate and also as per CWC guidelines. However, we find that in the rate analysis of each item an additional amount of 9.77% of the prime cost is added towards the interest burden on account of Bank Guarantee cost, margin money cost, insurance cost, etc., and we find that this addition is not allowable accordingly we award the rates for these items by deleting appropriately this 9.77% [....]

XXXXXXX

161. These rates are based on the price indices prevailing as on 31.05.2006 and the execution of the works will be subject to the price variations. As the price variation Clause in the contract considers the base index and prices as on 30 days prior to the date of submission of the bid allowing the same base date for price variation Clause would not be appropriate as the relevant base dates would be only those prevailing on 31.05.2006 for the revised rates awarded. Hence, we find that the same price variation formula would apply even in the extended period with the necessary change in the base date for the revised rates beyond the contract period for reasons explained above. The base prices and indices shall be as on 31.05.2006 and not prior to the date of submission of bid i.e., 01.01.2002. We consider that this as reasonable just and appropriate in view of the facts and circumstances of the case and accordingly award the rates as given in the table above for the items executed beyond the contract period with the base price and indices for price adjustment as per Clause-36 being considered as 31.05.2006.

162. In respect of other minor items not listed above for which the rate analysis has not been submitted but only an increase of 100% is asked above the BOQ rates we reject this claim as it is not substantiated and allow only the BOQ rates with price adjustment as per Clause-36 with the BOQ rate and base indices as on 01.01.2002.

163. The Supreme Court in Satyapalan's case (2007) 13 SCC 43, relying upon the earlier decision in P.M. Paul's case and P.P. George case accepted the contention of the Contractor that even in the absence of any price



escalation Clause and with a specific prohibition to the contrary the Contractor would be entitled to claim on account of escalation costs and it would not be beyond the jurisdiction of the Arbitrators to allow such case. On the materials on record, we are of the considered opinion that the Contractor was unable to fulfill his obligation under the contract and could not execute the project in time and did incur extra cost and as such the Arbitral Tribunal was entitled to compensate the Contractor for the extra costs incurred as a result of failure of the Employer to live up to its obligation. We have no doubt in our mind that the Claimant was prevented by unforeseen circumstances from completing the work within the stipulated period and this delay could have been prevented by THDC and therefore the Tribunal was duty bound to find out the reasonable basis for compensation in respect of the CLAIM-12 and that is what we have arrived at in preceding paragraphs.”

76. With aforesaid observations, the Tribunal held that since the delay in execution of the project is entirely attributable to the appellant and not the respondent, and there is delay of 63 months, which includes the period from September 2002 to December 2007; proceeded to grant compensation for idling for a period of 26.177 months + 6.35 months only on the basis of a weighted average period, computed at only Rs. 24 crores, However the respondent herein raised a claim of 28.02 Crores. The learned Single Judge on the aforesaid observations of the Tribunal held that the Tribunal is the sole judge of the quality and quantity of evidence and has thus, rightly declined to interfere with the impugned Award.



77. So far as **Claim No.10A in respect of compensation for losses suffered due to overheads** is concerned, the appellant has contended that the Tribunal has erroneously allowed the claim of respondent without the factum of loss being proved by any evidence.

78. Relevantly, Claim No.10A was granted by the Tribunal considering the Hudson formula, taking into account the provisions of overheads in the contractual rates, the total sum involved and the delay and has thereby calculated the proportionate loss of overheads for the delay occasioned. The learned Single Judge on this claim has observed that it cannot be said that the view taken by the Tribunal is not a possible view, requiring interference by the Court under Section 34 of the Act.

79. With regard to other claims being Claim no.1 (towards losses suffered due to non handing over of land on right bank of village Pendaras); claim no.2 (towards extra rates and payments for working in hazardous condition outside the project area in respect of right and left bank excavation and slope stabilization), Claim no. 4 (towards Payment for construction of diversion structure upstream of dyke), claim no. 5 (towards payment for the construction of approach (haul road) for the development of B-1 and B-2 quarries), claim no. 6 (towards payment for purchase of sand and coarse aggregates for tunnel lining, inlet and outlet works), claim no.10(A) (towards losses suffered due to overheads), claim no.13(A) (towards extra costs/losses suffered on mobilization Advance towards interest and BG's, claim no.13(B) (towards extra costs/losses suffered in performance BG due to 40 months delay) and claim no. 13(D) (towards losses suffered due to the interest levy on risk and cost advance); the learned Single Judge has



observed that the learned Arbitral Tribunal in the impugned Award has in detail referred to the manner in which the excavation work was carried out and so, it cannot be said that the methodology adopted by the Tribunal is not plausible.

80. There is not dispute to the legal position that scope of interference by Courts in Section 37 of the Act in arbitral proceedings is extremely limited and the Court is not expected to re-assess or re-appreciate the evidence led before the learned Tribunal unless the party challenging the Award is able to show “patent illegality”. On the aspect of interference by the Court, the Hon’ble Supreme Court in ***Delhi Airport Metro Express (P) Ltd. Vs. DMRC (2022) 1 SCC 131*** has observed as under:-

“28. This Court has in several other judgments interpreted Section 34 of the 1996 Act to stress on the restraint to be shown by Courts while examining the validity of the arbitral awards. The limited grounds available to Courts for annulment of arbitral awards are well known to legally trained minds. However, the difficulty arises in applying the well-established principles for interference to the facts of each case that come up before the Courts. There is a disturbing tendency of Courts setting aside arbitral awards, after dissecting and reassessing factual aspects of the cases to come to a conclusion that the award needs intervention and thereafter, dubbing the award to be vitiated by either perversity or patent illegality, apart from the other grounds available for annulment of the award. This approach would lead to corrosion of the object of the 1996 Act and the endeavours made to preserve this object, which is minimal judicial interference with arbitral awards. That apart, several judicial pronouncements of this Court would become a dead letter if arbitral awards are set aside by categorising them as perverse or patently illegal without appreciating the contours of the said expressions.

29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law



committed by the Arbitral Tribunal would not fall within the expression “patent illegality”. Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression “patent illegality”. What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them. An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality. Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression “patent illegality”.

81. In the present appeal, the appellant has miserably failed to putforth that the Arbitral Award as well as the decision of the learned Single Judge is perverse, illegal or suffers from any patent illegality. In our considered opinion the impugned judgment and order dated 12.07.2023 passed by learned Single Bench does not call for any interference.

82. The present appeal and pending application, if any, are accordingly dismissed.

(SURESH KUMAR KAIT)
JUDGE

(NEENA BANSAL KRISHNA)
JUDGE

APRIL 24, 2024/r

FAO(OS) (COMM) 184/2023

Page 38 of 38