

Ntpc Limited vs.patel Engineering Limited

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Court : Delhi

Decided On : Apr-17-2018

Appellant : Ntpc Limited

Respondent : Patel Engineering Limited

Judgement :

\$~31 * IN THE HIGH COURT OF DELHI AT NEW DELHI Date of decision:

17. h April, 2018 + O.M.P. (COMM) 156/2018 NTPC LIMITED

... Petitioner

Through Mr.S.B. Upadhyay, Senior Advocate with Mr.Tarkeshwar Nath, Mr.Onkar Nath and Mr.Nishant Kumar, Advocates. versus PATEL ENGINEERING LIMITED Respondent Through Mr.Dayan Krishanan, Senior Advocate with Ms.Malavika Lal, Ms.Aakash Lodha and Ms.Gunika Gupta, Advocates CORAM: HON'BLE MR. JUSTICE NAVIN CHAWLA NAVIN CHAWLA, J.

(Oral) IA No.5107/2018 (Exemption) Allowed, subject to all just exceptions. O.M.P. (COMM) 156/2018 & I.A. No.5108/2018 (Stay) 1. Issue notice. Notice is accepted by Ms.Malavika Lal, Advocate on behalf of the respondent.

2. This petition under Section 34 of the Arbitration & Conciliation Act, 1996 has been filed by the petitioner challenging the Arbitral Award dated 01st December, 2017 passed by the Arbitral Tribunal adjudicating the disputes which had arisen between the parties in relation to the award of work of Construction of Head Race

Tunnel O.M.P. (COMM) 156/2018 Page 1 Package for Loharinag Pala HEP Project (4x150 MW) by the petitioner in favour of the respondent vide Letter of Acceptance No.01/CS-5506-908-2-CS-LOA-4709 dated 6th July, 2006 leading to the Contract Agreement No.01/CS-5506-908-2-CS-C0(2000)A-4709 dated 05th September, 2006.

3. The Stipulated Date for the Completion of work was 5th September, 2009. The petitioner had granted extension of time to the respondent upto 31st October, 2012 without levy of compensation. The work came to a standstill on 29th July, 2009 in view of the agitation by the Ganga Bachao Andolan activists. By letter dated 03rd August, 2009 even the stabilisation work was suspended by the petitioner.

4. The respondent vide its letter dated 08th September, 2009 intimated to the petitioner that the suspension of work is covered under clause 40.1 of the General Conditions of Contract (GCC) and that the period of 84 days as mentioned in clause 40.3 of the same had started running.

5. On 22nd February, 2010, the respondent informed the petitioner that the time limit of 84 days in terms of clause 40.3 of the GCC had expired on 20th October, 2009 and further notice period of 28 days had also expired on 17th November, 2009. The respondent further intimated that in terms of clause 51 of the Conditions of Particular Applications (COPA), they had elected to treat all the balance works from the Dabrani Adit and Gunaga Adit as an omission under Clause 40.3 of the GCC.

6. The Government of India constituted the National Ganga River O.M.P. (COMM) 156/2018 Page 2 Basin Authority (NGRBA) under Section 3(3) of the Environment (Protection) Act, 1986 and finally by its communication dated 31st January, 2011, the petitioner informed the respondent of the directives received from the Government of India for the closing of work on the project.

7. The learned senior counsel for the petitioner submits that as the present case was one of suspension of work under clause 40.3 of the GCC, the consequence thereof was provided in clause 51 of the COPA. He further submits that as the

Arbitral Tribunal has concluded that the present case was not the case of frustration as provided in clause 66.1 of the GCC, clause 65.8.2 of the COPA, which provides for the consequences of foreclosure of the contract, shall not be applicable.

8. Clause 40.3 and 66.1 of the GCC are reproduced herein under: - Suspension lasting more than 84 days
Suspension xxxxxxxx 40.3 If the progress of Works or any part thereof is suspended on the instructions of the Engineer and if permission to resume work is not given by the Engineer within a period of 84 days from the date of suspension then, unless such suspension is within paragraph (a), (b), (c) or (d) of Sub-Clause 40.1, the Contractor may give notice the Engineer requiring permission, within 28 days from the receipt thereof, to proceed with the Works or that part is suspended. If, within the said time, such permission is not granted, the Contractor may, but is not bound to, elect to treat the suspension, where it affects part only of the Works, as an omission of such part under to which progress to thereof in regard O.M.P. (COMM) 156/2018 Page 3 Payment in Event of Release from Clause 51 by giving a further notice to the Engineer to that effect, or, where it affects the whole of the Works, treat the suspension as an event of default by the Employer and terminate his employment under the Contract in accordance with the provisions of Sub-Clause 69.1, whereupon the provisions of Sub- Clauses 69.2 and 69.3 shall apply."

xxxxxxx Release from Performance 66.1 Performance If any circumstance outside the control of both parties arises after the issue of the Letter of Acceptance which renders it impossible or unlawful for either or both parties to fulfil his or their contractual obligations, or under the law governing the Contract, the parties are released from further performance, then the parties shall be discharged from the Contract, except as to their rights under this Clause and Clause 67 and without prejudice to the rights of either party in respect of any antecedent breach of the Contract, and the sum payable by the Employer to the Contractor in respect of the Work executed shall be the same as that which would have been payable under Clause 65 if the Contract had been terminated under the provisions of Clause 65."

Similarly Clause 51.1.3 of COPA and 65.8.2 of COPA are reproduced herein under: - - VARIATIONS CLAUSE 51 DEVIATIONS AND EXTENT OF PRICING xxxxxx 51.1.3 Valuation of Variation & If, on certified completion of the whole of the works it shall be found that a reduction or increase is O.M.P. (COMM) 156/2018 Page 4 more than twenty percent of the contract value as awarded resulting from:-

"(a) the aggregate effect of all variation orders and (b) all adjustments upon measurement of the estimated quantities set out in the Schedule of Items. The value of payment for the work beyond this limit will be varied by the percentages shown hereinafter for the plus and minus amount beyond the above limit. in Value of Variation Work in Increase Payment for minus variation Nil 6.00% 8.00% 10.00% Nil Decrease in Payment for plus variation Nil 3.00% 4.00% 5.00% 6.00% Upto 20% Above 20% & upto 35% Above 35% & upto 60% Above 60% & upto 100% Above 100% While working out the value of work for the purpose of variation, the payment towards price adjustment, the adjustment towards variation in Royalty charges and the value of work done under "Day Work Schedule the following cost of any additional test conducted, any compensation paid due to suspension of work and taxes on duties shall not be considered. Illustration (a) In case of variation in value of work by (plus) + 50 percent, the payment for (50-20) percent i.e. 30 percent of value of work shall be decreased by 4% (four percent). (b) In case of variation in value of work by (minus) - 50 percent, the payment for (50-20) percent i.e. 30 percent of value of work shall be increased by 8% O.M.P. (COMM) 156/2018 Page 5 (eight percent). xxxxxxxxxxxx 65.8 FORECLOSURE OF CONTRACT IN FULL OR IN PART DUE TO ABANDONMENT OR REDUCTION IN SCOPE OF WORK xxxxxxxxxxxx 65.8.2 The Contractor shall be paid at Contract rates full amount for works executed at Site and, in addition, a reasonable amount as certified by the Engineer for the items hereunder mentioned which could not be utilised on the work to the full extent because of the foreclosure: (a) Any expenditure incurred on preliminary site work, e.g. temporary access roads, temporary labour huts; staff quarters and site offices; storage accommodation and water storage tanks. from suppliers to accept delivery (b) (i) The Employer shall have the option to take over Contractors material or any part thereof either brought to Site or of which the Contractor is legally bound (for incorporation in or Incidental

to the work), provided, however, the Employer shall be bound to take over the materials or such portions thereof as the Contractor does not desire to retain. For materials taken over or to be taken over by the Employer, cost of such material shall, however, take into account purchase price, cost of transportation and deterioration or damage which may have been caused to materials whilst in the custody of the contractor. (ii) For Contractors materials not retained by the Employer, reasonable cost of transporting such materials from Site to Contractor's permanent stores or to his other Works, whichever is less. If materials are not transported to either of the said places, no cost O.M.P. (COMM) 156/2018 Page 6 of transportation shall be payable. (c) If any materials supplied by the Employer are rendered surplus, the same except normal wastage shall be returned by the Contractor to the Employer at rates not exceeding those at which these were originally issued less allowance for any deterioration or damage which may have been caused whilst the materials were in the custody of the Contractor. In addition, cost of transporting such materials from Site to the Employer stores, if so required by the Employer. (d) Reasonable compensation for transfer or Plants and Equipment from Site to Contractors permanent stores or to his other Works; whichever is less. If Plants and Equipment are not transported to either of the said places, no cost of transportation shall be payable. In the present case, the Arbitral Tribunal has considered the 10. effect of Clause 40, including Clause 40.3 of the GCC and Clause 51 of the COPA and has held as under: - The provisions of clause 40 come into operation when there is suspension of work. In the instant case, as we have held above, the work was suspended on the directions of the respondent. Clause 40.1 would not apply since none of the situations foreseen thereunder are applicable to the case at hand. Clause 40.2 provides for extension of time and addition of amount to be determined to the contract price for the cost incurred by the Contractor due to such suspension. The determination has to be made by the Engineer after due consultation with the Employer and the same has to be notified to the Contractor. In the present case, we do not find any such determination by the Engineer. Clause 40.3 deals with the situation where the work is suspended and permission to resume the same is not accorded by the Engineer within a period of 84 days from the date of suspension. In such a situation, the O.M.P. (COMM) 156/2018 Page 7 Contractor can give a notice of 28

days, after the expiry of the aforesaid period of 84 days, seeking permission to proceed with the work. If no permission is accorded by the Engineer within the aforesaid period of 28 days, the Contractor may elect to treat the suspension as an omission under clause 51 of COPA. Clause 51 of COPA deals with variations and omission of any work as mentioned in clause 51.1. We find that the claimant had written letters relating to the period of 84 days and 28 days to the respondent. Reference in this connection may be made to the letter of the claimant dated 22.02.2010 and letter of the respondent dated 28.03.2010. The stand of the respondent was that the time frame of 28 days was out of context since the situation was not in their control. We find that the claimant had fulfilled its obligations by requesting the respondent for permission to commence the works by giving 28 days notice. Admittedly, no such permission was forthcoming. Record shows that ultimately the project was scrapped. The respondent communicated through letter dated 11.12.2010 that the project had been scrapped and, therefore, clause 66.1 came into force. Clause 66.1 deals with from performance. The clause provides for payment to the contractor in accordance with clause 65. The claimant vide letter dated 28.12.2010 stated that the provisions of clause 65.8 and other relevant clauses would be applicable in this case. The claimant further stated that they would be entitled to seek compensation towards various claims during the currency of the contract and termination of the contract under various clauses. In pursuance thereto, the respondent vide letter dated 05.1.2011 called upon the claimant to submit details of expenditure already incurred and expenses for winding up so that the same could be submitted to the Govt. of India. Subsequent correspondence between the parties shows that no settlement could be arrived at in respect the value of work executed release for O.M.P. (COMM) 156/2018 Page 8 of the claims and, therefore, the claimant invoked arbitration. From the facts of the case and the evidence on record, we have no hesitation in holding that the claimant would be entitled to various amounts under clause 65.8.2 of COPA. Our finding is fortified from the fact that after the suspension of work, the respondent had asked the claimant to submit details of the amounts claimed, which had been done from time to time, as noted above. However, the parties could not arrive at an agreed figure and hence, the disputes. Even the judgment of the Delhi High Court in Hindustan Construction Company's case has upheld the award of various

amounts in terms of clause 65.8 of COPA. In para 40 of the judgment, the Court held that clause 66.1 of GCC is independent of any claim that the contractor made under clause 40.1 and 40.2. In para 41, the Court held that Contractor would be entitled for compensation for suspension of work in terms of clause 40.1 and 40.2 as also to the amount under clause 60.8.2 as a result of foreclosure of the contract. The contention of NTPC that once clause 66 gets triggered, clause 40 gets subsumed therein was rejected by the court. In para 46 also, it was held that the contractor was entitled for compensation, which was also sanctioned by clause 65.8 of COPA. 11. A reading of Clause 40.3 of the GCC would show that the contractor is not bound but may elect to treat the suspension, where it effects only a part of the work, as an omission of such part under Clause 51 of the COPA. In the present case, though the petitioner elected this course at an initial stage, as the work was finally foreclosed by letter dated 31st January, 2011, application of Clause 65.8.2 of the COPA cannot be said to be completely excluded.

12. In the judgment dated 25th January, 2017 in OMP6262014, O.M.P. (COMM) 156/2018 Page 9 NTPC Ltd. v. Hindustan Construction Company Ltd., this Court had disagreed with the broad submissions made by NTPC Ltd. that, once the contingencies contemplated under Clause 66 get triggered, the conditions enumerated under Clause 40 will be subsumed therein. In my view, the arguments being made today are contrary to the ones made earlier and that has been rejected by this Court in the above referred judgment. This Court had also held that Clause 66.1 stood attracted on the point on which there was a clear order of closure of the project. Paragraphs 40 and 41 of the judgment are relevant and are quoted herein below; - 40. Turning to Mr. Mehtas specific objection regarding Clause 66 of the COPA dealing with suspension for which compensation was payable under Clauses 40.1 and 40.2 of the GCC, the Court would like to first observe that Clause 66.1 of the GCC is independent of any claim that the contractor made under Clause 40.1 and 40.2. Clause 66.1 stood attracted in the present case on the point of which there was a clear order of closure of the project. This issue was duly dealt with by the AT where it came to the conclusion that the termination of the contract was not attributable to the contractor at all, but to NTPC on the directions of the Government of India.

41. The Court does not find any overlap of the two sets of claims i.e., cost compensation for the suspension of the work between two periods of suspension which HCC was entitled to in terms of Clause 40.1 and 40.2 of the GCC, and the amount that the contractor would be entitled to under Clause 60.8.2 as a result of the foreclosure of the contract. The Court is, therefore, unable to agree with the broad submission of Mr. Mehta that once the contingency contemplated under Clause 66 gets triggered, O.M.P. (COMM) 156/2018 Page 10 condition enumerated under Clause 40 will be subsumed therein. 13. In any case, this being a matter of interpretation of the contract, this Court cannot interfere with the interpretation put forth by the Arbitral Tribunal until and unless it finds that such interpretation is unreasonable or is one which could not have ever been arrived at.

14. In *Associate Builders vs. Delhi Development Authority* (2015) 3 SCC49 the Supreme Court had cautioned the Courts as under:-

"42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under: 28. Rules applicable to substance of dispute. (1)-(2) (3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction. This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do. 15. The learned senior counsel for the petitioner submits that this Court cannot place any reliance on the above mentioned judgment in *Hindustan Construction Company Ltd.* (supra) as the same is pending challenge in an appeal. On query being made, he concedes that there is no order of stay passed by the Division Bench. Be that as O.M.P. (COMM) 156/2018 Page 11 it may, I have considered the submissions made by the learned senior counsel for the petitioner on their own merit and I do not find any justification for interfering with the Arbitral Award in this case on the above issue.

16. The only other challenge of the learned senior counsel for the petitioner is to the award of interest by the Arbitral Tribunal. Placing reliance on Clause 77 and 78 of the COPA, the learned senior counsel for the petitioner submits that interest was not payable, being barred and prohibited under the contract. Clause 77 and 78 of the COPA are reproduced herein under:-

"78. 77. INTEREST ON MONEY DUE TO THE CONTRACTOR Omission on the part of the Engineer to pay the amount due upon measurement or otherwise shall neither vitiate or make the contract void, nor shall be Contractor be entitled to interest upon any guarantee or payments in arrears nor upon balance which may on the final settlement of his account, be due to him. NO CLAIM FOR DELAYED PAYMENT DUE TO DISPUTE ETC. No claim for interest or damage will be entertained or be payable by the Employer in respect of any amount or balances which may be lying with the Employer owing to any dispute, difference between the parties or in respect of any delay or omission on the part of the Engineer in making interim or final payments or in any other respect whatsoever. O.M.P. (COMM) 156/2018 Page 12 17. The Arbitral Tribunal has considered this issue in detail and has held as under:-

"in xxxxxx However, the present case, respondent has not conceded or admitted any of the claims and thus, they cannot claim that interest on such claims is barred by clause 78 of the contract. As such, we hold that the claimant is entitled to interest on the claims preferred by it. Another aspect worth mentioning is that in our earlier award dated 26.03.2012, we had considered various clauses of the contract and had held that the claimant was entitled to interest. Our award has been upheld right upto the Supreme Court and thus, we find no reason to differ from our earlier findings in respect of interest. We have also seen that in the judgment of the Delhi High Court in Hindustan Construction Company's case, the same issue was raised and the High Court held that the clauses relied upon by the respondent were not applicable to the facts of the case. It is important to emphasize that the same clauses have also been relied upon in the instant case as well. In view of our aforesaid findings, the judgments relied upon by the respondent regarding prohibition of award of interest, including Union of India versus Ambica Construction, 2016(3) RAJ1(SC), are not applicable to the facts of

the instant case. Award of interest is within the sole discretion of the Arbitral Tribunal in terms of Section 31(7) of the Act. Even the respondent has not disputed the discretionary power of the Arbitral Tribunal to award interest. We have also gone through the provisions of the contract and do O.M.P. (COMM) 156/2018 Page 13 not find any stipulation therein prohibiting award of interest xxxxxx The claimant has been deprived of its dues for years together and thus, it would be in the interest of justice to compensate the claimant for the period of deprivation by way of interest. Keeping the present day trend in mind, we feel interest @ 12% p.a. would meet the end of justice. Even though the amounts awarded in favour of the claimant have been withheld from different dates, however, we feel that justice would be done to the parties if the date of commencement of interest is reckoned from 29.09.2012, i.e. the date when the Arbitral Tribunal was constituted till the date of award. The Claimant shall be entitled to further interest @ 12% p.a. on the amount of the arbitral award till the date of payment of the amount by the respondent. 18. The learned senior counsel for the petitioner has placed reliance on the judgment of this Court in Jaiprakash Associates Ltd. vs. THDC India Ltd. 2013(5) R.A.J.

130(Del), to contend that this Court, interpreting almost a similar clause in an Agreement, negated the award of interest granted by the Arbitral Tribunal. He further places reliance on the judgment of the Supreme Court in Tehri Hydro Development Corporation Limited and Another Vs. Jai Prakash Associates Limited (2012) 12 SCC10 to contend that in the said judgment also the Supreme Court, interpreting Clause 1.1.14 and 1.2.15 of the Agreement therein, negated the claim of interest made by the contractor. The learned senior counsel for the petitioner has also relied upon the judgment of the Supreme Court in Sri Chittaranjan Maity vs. Union of India (2017) 9 SCC611 O.M.P. (COMM) 156/2018 Page 14 19. While there is no doubt that if the Agreement prohibits the award of interest for the pre-award period, that is pre-reference and pendente lite period, the Arbitral Tribunal cannot award interest for the said period, in my opinion, in the present case, I find no such prohibition in clause 77 and 78 of the COPA so far the claim of the respondent on which such interest has been awarded by the Arbitral Tribunal.

20. Whether interest on a particular amount awarded by the Arbitral Tribunal is prohibited or not depends on the term of the Agreement prohibiting the grant of such interest. In *Union of India vs. Ambica Construction* (2016) 6 SCC36 the Supreme Court, on a reference to a larger Bench, on the power of the arbitrator to award interest for pre-reference, pendent lite and future period, has held as under:-

"In our opinion, it would depend upon the nature of the 22. ouster clause in each case. In case there is express stipulation which debars pendent lite interest, obviously, it cannot be granted by the arbitrator. The award of pendent lite interest inter alia must depend upon the overall intention of the agreement and what is expressly excluded. xxxxx 25. xxxx Section 31(7)(a) of the 1996 Act confers the power on the arbitrator to award interest pendent lite, unless otherwise agreed by parties. Thus, it is clear from the provisions contained in Section 31(7) (a) that the contract between the parties has been given importance and is binding on the arbitrator. The arbitration clause is also required to be looked into while deciding the power of the arbitrator and in case there is any bar contained in the contract on award of interest, it operates on which items and in the arbitration O.M.P. (COMM) 156/2018 Page 15 clause what are the powers conferred on the arbitrator and whether bar on award of interest has been confined to certain period or it relates to pendency of proceedings before the arbitrator. xxxxxxxxxx 34. Thus, our answer to the reference is that if the contract expressly bars the award of interest pendent lite, the same cannot be awarded by the arbitrator. We also make it clear that the bar to award interest on delayed payment by itself will not be readily inferred as express bar to award interest pendent lite by the Arbitral Tribunal, as ouster of power of the arbitrator has to be considered on various relevant aspects referred to in the decisions of this Court, it would be for the Division Bench to consider the case on merits. 21. In the present case, what is prohibited under clause 77 of the COPA is the grant of interest upon any guarantee or payments in arrears or upon any balance which may on the final settlement of accounts be found due and payable to the contractor. Similarly under clause 78 of the COPA, what is prohibited is the grant of interest in respect of any amount or balances which may be lying with the employer owing to any dispute or difference between the parties or in respect of any delay or omission on the part of the engineer in making the

interim or final payments. In the present case, since the principal claim granted to the respondent in the Impugned Award, does not fall under any of the circumstances mentioned in clause 77 and 78 of the COPA, therefore, the prohibition on grant of interest contained therein would not be applicable.

22. The reliance of the learned senior counsel for the petitioner on the words in any other respect whatsoever in clause 78 of COPA O.M.P. (COMM) 156/2018 Page 16 cannot extend to the claim made by the respondent in the present case. These words have to be interpreted and understood to mean in their cogent sense taking colour from the preceding words or phrases. The rule of *Noscitur a Sociis* would be applicable while interpreting such general words.

23. In *State of U.P. v. Harish Chandra & Co.* (1999) 1 SCC63 the Supreme Court while interpreting a similar clause, held that the claim of interest by way of damages was not to be entertained against the Government with respect to only a specified type of amounts, namely, any money or balance which may be lying with the Government; it cannot extend to all kind of amounts which are not dependent upon any determination by the engineer under the Agreement. In *Jaiprakash Associates Ltd.* (supra), this Court has negated the award of interest on the claim which was for reimbursement on the account of fluctuation in foreign exchange rates and supply of material under the contract. This Court on the facts of that case held as under: 17. We thus correct the reasoning Clause 50 of the instant contract prohibits interest to be paid if payment is delayed on account of a measurement or otherwise. Clause 51 prohibits interest to be paid in respect of money lying with the corporation i.e. security deposits or retention money and also includes a prohibition for interest to be paid owing to any dispute, difference or misunderstanding between the parties or on account of delay or omission to make payments and the clause terminates with the phrase in any other respect whatsoever. O.M.P. (COMM) 156/2018 Page 17 18. The rule of *ejusdem generis* guides as that where two or more words or phrases which are susceptible of analogous meaning are coupled together, a *noscitur a sociis*, they are to be understood to mean in their cognate sense and take colour from each other but only if there is a distinct genus or a category. Where this is lacking i.e. unless there is a category, the rule cannot apply.

19. Thus, the two clauses in the instant case compel us to hold that neither there is a conflict in the decisions of the Supreme Court in Harish Chandras case (supra) and Jai Prakash Associates Case (supra) and that the law declared in Jai Prakash Associates, case (supra) governs the instant contract. 24. In Tehri Hydro Development Corporation Limited and Another (Supra) the Supreme Court set aside the award of interest on the claim of the contractor upon the final bill being raised. The Supreme Court after interpreting the clauses held as under:-

"Clauses 1.1.14 and 1.2.15, already extracted and analysed, imposed a clear bar on either entertainment or payment of interest in any situation of non-payment or delayed payment of either the amounts due for work done or lying in security deposit. On the basis of the discussions that have preceded we, therefore, take the view that the grant of pendent lite interest on the claim of Rs. 10,17,461 lakhs is not justified. The award as well as the orders of the courts below are accordingly modified to the aforesaid extent. 25. In the present case, as noted above, the claim of the respondent was not one for work done or the amount lying pending with the O.M.P. (COMM) 156/2018 Page 18 petitioner and, therefore, in my view, clause 77 and 78 of the COPA would have no application to the facts of the present case.

26. In NTPC Limited vs. Hindustan Construction Company Ltd. (Supra), this Court had also considered the effect of clause 77 and 78 of the COPA on the claim made by the contractor and held as under:

51. As far as Clause 77 is concerned, the Court fails to appreciate how the said Clause would be relevant for deciding whether the contractor is entitled to pendent lite interest. It talks of the "interest upon any guarantee" or "payment of arrears" or "any balance which may on the final settlement of his account, be due to him" on account of omission on the part of the Engineer to pay the amount. The Court is unable to read the above Clause as prohibiting an AT from paying interest pendent lite to a secondary claim.

52. As far as Clause 78 is concerned, it only applies to "any amount or balance which may be lying with the employer". The above balance amount could be lying as a result of two contingencies: (i) on account of any dispute or difference

between the parties or (ii) on account of any delay or omission on the part of the Engineer in making interim or final payment. It is in the above specific conditions that no interest is payable. The sum and substance are not in the nature of sums that are yet to be determined as being payable. Again, this is not a Clause which prohibits payment of pendent lite interest in the manner contemplated in Union of India v Ambika Construction (supra) or Union of India v. Bright Power Projects (India) (P) Ltd (supra). Therefore, in the considered view, there was no prohibition against the AT awarding interest in the manner it has in the impugned Award. O.M.P. (COMM) 156/2018 Page 19 27. This Court in its judgment dated 21.02.215 passed in OMP No.743/2013, NTPC Ltd. Vs. Patel Engineering Ltd., had negated a similar argument raised, relying upon Tehri Hydro Development Corporation Limited and Another (supra) and held as under:-

"21. The AT has discussed the case law extensively and in particular the decision in State of U.P. v. Harish Chandra & Co. (1999) 1 SCC63 to hold that the aforementioned clause only prohibited payment of interest on money lying with NTPC. Reliance was placed by Mr. Upadhyaya on the subsequent decision in Tehri Hydro-development Corporation Ltd. v. Jayprakash Associates VII (2012) SLT430 22. The Court is satisfied that even in respect of the interpretation of the law regarding payment of interest, the view taken by the AT, on the basis of the decision in State of U.P. v. Harish Chandra & Co. (supra) is a plausible view to take and does not call for interference. Interest was restricted to 12% per annum which the AT felt was reasonable. Again, interest was admissible only if the awarded amount was not paid within three months. The Court is unable to find any error having been committed by the AT in regard to the award of interest. 28. I find no reason to disagree with the above view and reasoning of this Court.

29. In view of the above, I find no merit in the present petition and the same is accordingly dismissed, with no order as to costs. NAVIN CHAWLA, J APRIL 17 2018 rekha O.M.P. (COMM) 156/2018 Page 20