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

% Judgment Reserved on: July 18, 2012
Judgment Pronounced on: July 31, 2012

\+ **FAO(OS) No.416/2007**

NTPC LIMITED ..... Appellant
Represented by: Mr.R.P. Bhatt, Sr.Advocate instructed by Mr.Mohit Kumar and Mr.Tungesh, Advocates

versus

MARATHON ELECTRIC MOTORS INDIA LTD.
..... Respondent
Represented by: Mr.T.K. Ganju, Sr.Advocate instructed by Ms.Kumkum Sen, Mr.Prantik Hazarika and Mr.Aditya Ganju, Advocates

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. This appeal under Section 37 (1)(b) of the Arbitration and Conciliation Act, 1996 (in short, called "The Act") is directed against the order dated 22nd August, 2007 passed by the learned Single Judge in OMP No.331/2006 whereby the objections preferred by the appellant to the additional award dated 29th May, 2006 were dismissed.

2. Relevant facts are that the appellant invited bids for the erection, testing and commissioning of four units of Turbine Generators, each of 210 MW for the Kahalgaon Super Thermal Power Project in the District of Bhagalpur, State of Bihar. The respondent submitted their bid which was accepted. The appellant thereafter issued a letter of award in favour of

the respondent for erection, testing and commissioning of four units of turbine generator each of 210 MW for the Kahalgaon Super Thermal Power Project on 6th June, 1989.

3. Thereafter, a formal agreement was entered into between NTPC and the respondent on 20th March, 1990 and the contract was signed by the parties on 21st May, 1990. The value of the work was quantified at ₹2,34,43,503.92. The contract completion date was fixed as 6th August, 1992.

4. A letter of award was issued also in respect of High Pressure Piping contract on 20th July, 1992 for the same project and a formal agreement was signed on 20th November, 1992.

5. As a consequence of closure of the contract on 6th October, 1998, the appellant wrote a letter to the respondent stating that it had become entitled to recovery of a sum of ₹62,69,282.79 from the respondent. The appellant thereafter called upon the respondent by way of communication dated 24th September, 1999 to pay the said amount.

6. The respondent vide notice dated 12th September, 2001, under clause 25.1 of the General Conditions of Contract, requested the appellant to nominate an engineer and refer the matter pertaining to its claim for decision by the engineer. The appellant found that none of the claims of the respondent were tenable and information in this regard was given by vide letter dated 3rd October, 2001.

7. The respondent by a notice under clause 25.6 read with clause 25.4 dated 1st November, 2001, asked the appellant to refer its dispute for settlement to arbitration in accordance with clause 25.6 of General Conditions of Contract and also nominated its Arbitrator. The appellant also nominated former Law Secretary to the Government of India as its Arbitrator. The President of Institution of Engineers

(India) appointed Mr.Pradeep Chaturvedi, as the Presiding Arbitrator.

8. The arbitral tribunal thereafter entered upon the reference on 2nd April, 2002. The reference was concluded by an award dated 14th December, 2005 delivered by the majority of two members as also an award dated 2nd January, 2006 delivered by the learned dissenting arbitrator. The learned dissenting arbitrator differed only with regard to one counter claim of appellant for a sum of ₹5,07,000/- on account of the value of Central Store Issue materials.

9. Thereafter, the appellant being aggrieved by the majority of award, filed the objections under Section 34 of the Arbitration and Conciliation Act, 1996. The said objections numbered as OMP No.113/2006. After hearing, the same were withdrawn with a liberty to approach the Arbitral tribunal under Section 33 of the Act for correction of the Award. The following order was passed on 24th March, 2006:

> "OMP No.113/2006
> IA No.3422/2006
>
> Learned senior counsel for the petitioner advanced submissions at length. After hearing, learned senior counsel for the petitioner seeks to withdraw the petition as according to him appropriate remedy would be to approach the Arbitral tribunal under section 33 of the Arbitration and Conciliation Act, 1996 to correct what is claimed to be a typographical error/calculation mistake. Liberty granted.
>
> Dismissed as withdrawn."

10. In view of the said order, the petitioner filed an application under Section 33(1) of the said Act for correction, the details of which were mentioned in the application. After hearing both sides, the same was dismissed being without

merit with cost by order dated 29th May, 2006. The Arbitral tribunal by its additional award held that there is no computation error, clerical/typographical error or any other error of similar nature in the award on an apparently incorrect premises that no evidence of the cost of acquisition of IPC guide nozzle (like invoices of the company from where the replacement was procured) was filed before the Arbitral tribunal and therefore cost of acquisition could not be allowed due to absence of appropriate evidence.

11. The appellant thereafter challenged the said additional award passed on 29th May, 2006 by filing of the objections under Section 34 of the Act which was numbered as OMP No.331/2006. The appellant restricted his submissions in respect to two aspects before the learned Single Judge, who, after hearing both the parties, dismissed the objections by order dated 22nd August, 2007 and held that there was no merit in both aspects.

12. The present appeal has been filed against the said impugned order dated 22nd August, 2007. Both parties have made their respective submissions.

13. Mr. Bhatt, learned Senior advocate appearing on behalf of the appellant has made his submissions only with regard to claim Nos.2 and 3. In nut shell, his submission is that as far as missing HPC nozzle is concerned, the Arbitral tribunal in its award, accepted its replacement/procurement cost amounting to a sum of ₹16,72,599.75, but for no justifiable reasons, accepted the total value of missing IPC Guide Apparatus at ₹7 lac as against its actual cost of ₹27,33,683.00.

14. It is also submitted by the appellant that it was possible for the Arbitrator to accept the cost of ₹27,33,633/-

on the basis of set of documents filed by the appellant before the Arbitrator but still, the learned Single Judge did not allow the claim to compensate the appellant for the said loss and erroneously accepted the total value of IPC guide apparatus at ₹7 lac against its actual procurement cost although it accepted the procurement cost of HPC Sector guide apparatus. Thus, in the present case, the court below has accepted two different approaches on the same set of documents.

15. It is also alleged that the learned Single Judge did not appreciate that the actual recoveries are only ₹15.62 lac under the contract, there was no supporting evidence in favour of claim of ₹26.40 lac, the same was granted without any basis. Court below erred by not considering that as the result of rejection of overheads of ₹12,53,856.34 without there being any adverse finding as well as account of calculation error from the actual cost. As per contract value of thrust has restricted the recovery to ₹300000/- without any reason.

No submission with regard to allowing claim No.1 was made by the appellant similarly with respect of cost of ₹77500/- imposed by the Arbitral Tribunal while dismissing the application under Section 33 of the Act.

Scope of Appeal

16. We have gone through the pleading as well as all the orders passed by trial Court in the above matter and considered the rival submissions of both sides. The present matter has been filed by the appellant under Section 31(1)(b) of the Act. It is settled law that the Appellate Court should not interfere with the exercise of the discretion under appeal solely on the ground that if it had considered the matter at the trial stage, it may have come to a contrary conclusion. In

case, the discretion has been exercised by the trial Court reasonably and in judicial matter, the Appellate Court would not take different view by interfering with the Trial Court's exercise of discretion, unless, it is found that in exercising its discretion, the trial Court has acted unreasonably and capriciously or has ignored relevant facts, then it could be open to the Appellate Court to interfere with the trial Court's exercise of discretion. Reliance can be placed upon the case reported in AIR 1967 SC 209, *Uttar Pradesh Co-operative Society vs. Sundar Bros.*

17. The scope of judicial interference against the arbitral award which has time and again came up before the courts for consideration, wherein the view of the Courts including this Court are consistent that the Court while deciding Section 34 objection cannot culminate into the appellate Court to decide every legal and factual issue. It is only those errors of patent illegality, without jurisdiction or biasness or against the public policy where in the awards seems to be unsustainable, the Courts are empowered to interfere and not in all other cases to correct errors committed by the Arbitrator.

18. In 2003 (5) SCC 705, *Oil and Natural Gas Corporation vs. Saw Pipes Ltd.,* the Supreme Court has considered the scope of interference in Arbitral Award on the ground of Public Policy in great detail and observed that the phrase 'public policy of India" is required to be given a wider meaning so as to prevent frustration of legislation and justice, the Supreme Court has held thus:

> "31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider

meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case 1994 Supp. (1) SCC 644 it is required to be held that the award could be set aside if it is patently illegal. The result would be – award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or
(b) the interest of India; or
(c) justice or morality, or
(d) in addition, if is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void."

19. The reappraisal of evidence by the Courts is not permissible. In AIR 2001 SC 2516, *Ispat Engineering and Foundry Works v. Steel Authority of India Ltd.,* their Lordships of the Apex Court referring to various other judgments of the Apex Court, have held that the Court had no jurisdiction to investigate into the merits of the case or to examine the documentary and oral evidence in the record for the purposes of finding out whether or not the Arbitrator has committed an

error of law. **The Court as a matter of fact, cannot substitute its own evaluation and come to the conclusion that the Arbitrator had acted contrary to the bargain between the parties. (Emphasis Supplied).**

20. Holding that intervention of Court is envisaged in a few circumstances, like in case of fraud or bias by Arbitrators, violation of natural justice etc., in 2006(2) Arb.L.R.498 (SC) *Mc Dermott International INC. v. Burn Standard Co. Ltd. and Ors.,* the Supreme Court has held as follows:

> "55. The 1996 Act makes provision for the supervisory role of Courts, for the review of the arbitral award only to ensure fairness. Intervention of the Court is envisaged in few circumstances only, like, in case of fraud or bias by the Arbitrators, violation of natural justice, etc. The Court cannot correct errors of Arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. **So, scheme of the provision aims at keeping the supervisory role of the Court at minimum level and this can be justified as parties to the Agreement makes a conscious decision to exclude the Court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.**" (**Emphasis Supplied**)

21. Let us now examine the present case in light of settled law. In the present case, admittedly, the original award was passed by the Arbitral Tribunal on 14th December, 2005. The objections to the said award were filed by the appellant under Sections 28(3), 31(3), 33, 34(2)(a)(iv) and 34(2)(b)(ii) of the Act read with Section 151 CPC being OMP No.113/2006. No doubt, the objections with regard to the decision on claim Nos.2 & 3 were also raised by the appellant but, after hearing,

the said objections were withdrawn by the appellant on 24th March, 2006. Liberty was granted by the Court to the appellant to approach the Arbitral Tribunal under Section 33 of the Act to correct a typographical error/calculation mistake as claimed by the appellant.

22. The said application was filed on 1st May, 2006 i.e. more than 30 days after the expiry of the period provided by Section 33(1) of the Act. It is also the admitted position in the present case that the said application under Section 33(1) of the Act was not filed within time prescribed under Section 34(3) of the Act, rather all the objections to the award were taken by the appellant in the objection petition under Section 34 of the Act.

23. Section 33(1) of the Act reads as under:-

> "**33. Correction and interpretation of award; additional award.–** (1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties –
>
> (a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;
> (b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award."

24. Section 33 of the Act provides the Arbitral Tribunal to make correction of errors in arbitral award, to give interpretation of a specific point or a part of the arbitral award, and to make an additional award as to claims, though presented in the arbitral proceedings, but omitted from the

arbitral award. Sub-section (4) empowers the arbitral tribunal to make additional arbitral award in respect of claims already presented to the tribunal in the arbitral proceedings but omitted by the arbitral tribunal.

25. This Section deals with the correction and interpretation of award and additional award. Following types of errors may be corrected –

(i) Computation errors

(ii) Clerical errors

(iii) Typographical errors

(iv) Any other errors of a similar nature occurring in the award.

26. Under the said provision, a party can seek certain correction in computation of errors or clerical errors, in case, it occurs in the award, but the arbitral tribunal has no power to review of merit.

27. The said provision is akin to the provision of Section 152 CPC, in which also the Court can correct the errors like clerical and arithmetical, if they occur in the judgment or order. In the case reported in (1999) 3 SCC 500, *Dwaraka Das vs. State of M.P. and another,* the Supreme Court has observed that, "Section 152 CPC provides for correction of clerical or arithmetical mistakes in judgments, decrees or orders of errors arising therein from any accidental slip or omission. The exercise of this power contemplates the correction of mistakes by the Court of its ministerial actions and does not contemplate of passing of effective judicial orders after the judgment, decree or order."

28. In the decision of the Supreme Court in the case reported in AIR 2001 Supreme Court 1084, *Jayalakshmi Coelho vs. Oswald Joseph Coelho*, explaining the scope of the power to

correct clerical or arithmetical errors, the Supreme Court has observed as follows:-

> "The power of rectification of clerical, arithmetical errors or accidental slip does not empower the court to have a second thought over the matter and to find that a better order or decree could or should be passed.. There should not be re-consideration of merits of the matter to come to a conclusion that it would have been better and in the fitness of things to have passed an order as sought to be passed on rectification. On a second thought court may find that it may have committed a mistake in passing an order in certain terms but every such mistake does not permit its rectification in exercise of Courts inherent powers as contained under Section 152 C.P.C. It is to be confined to something initially intended but left out or added against such intention."

29. In the present case, the application filed under Section 33 of the Act after withdrawal of objection filed to the original award dated 14th December, 2005. The appellant did not move the application under Section 34(3) of the Act.

30. The Arbitral Tribunal in the original award dated 14th December, 2005 after considering the pleading and evidence has taken the view by accepting the letter addressed by the appellant to the insurance company on 3rd November, 1992 giving the anticipated loss of ₹7 lac, therefore, only the said amount is payable to the petitioner and said findings of the Arbitrator were challenged by the appellant in OMP No.113/2006 by filing objections under Section 34 of the Act, but admittedly after hearing, the learned counsel appearing on behalf of the appellant withdrew the said petition seeking liberty to approach the Arbitral Tribunal to file an application

under Section 33 of the Act for correction of typographical/error/calculation mistake.

31. In the application filed before the Arbitral Tribunal it was alleged that there were certain errors in the award dated 14th December, 2005 which needed to be corrected by the Tribunal as the Arbitral Tribunal was wrongly taken the cost of IPC nozzles at ₹7 lac instead of actual amount of ₹27,33,683.64 resulting in deduction of ₹20,33,683.64. The Arbitral Tribunal had also wrongly taken the cost of thrust wring at ₹3 lac as against actual cost of ₹3,49,982.78 resulting in deduction of ₹49,982.78 and failed to consider ₹12,53,856.54 as claimed being overhead.

Besides these, the appellant had given details of the following claims :

A) As against the actual cost of Russian materials of ₹62,69,282.71 as a result of implied rejection of overheads of ₹12,53,856.54, the recovery will stand reduced to ₹50,15,426.17. Besides a wrong deduction is made of ₹49,982.78 from the actual cost of Thrust Pads of ₹3,49,982.78. ₹7,00,000/- is taken towards cost of IPC Guide Apparatus as against total actual value of ₹27,33,683.64.

B) Though NTPC is entitled to the following amounts, it has been directed to pay to the respondent an amount of ₹30,11,711/- with interest @10% per annum from 01.11.2001 till the date of payment.

i) ₹20,33,683.00 on account of IPC guide apparatus.
ii) ₹49,982.78 on account of wrong deduction for Thrust Pads.
iii) ₹4,28,520.00 on account of overpayment of contractual dues only on the basis of the legal notice.

iv) ₹12,53,856.54 implied rejection of overheads.

₹37,66,042.32 Actually Recoverable by NTPC"

32. Prayer made in the application was that they are entitled to ₹42,73,042.32 as the Arbitral Tribunal by majority view allowed counter claim of ₹5,07,000/- and after adjustment on account of encashment of bank guarantee of ₹32,53,971/-, the appellant would be actually entitled to ₹10,19,071.32 along with interest @ 10% per annum from the date of reference i.e. 1st November, 2001.

33. The Arbitral Tribunal after considering the grounds taken by the appellant in the application under Section 33 of the Act vide additional award dated 29th May, 2006. The Arbitral Tribunal not only decided the matter on merit but also opined that the said application under Section 33(1) of the Act filed by the appellant was barred by limitation and therefore was not maintainable.

34. The Arbitral Tribunal in its additional award in paras 24 and 26 to 29 still dealt with grounds on merit taken in the application under Section 33(1) of the Act. Extract of the same are reproduced :-

> "24. We may now deal with each errors as alleged by the respondent/applicant. The first error indicate is the "taking the cost of IPC Nozzle at ₹7,00,000/- instead of actual of ₹27,33,683.64 resulting in deduction of ₹20,33,683.64." At the outset it may be stated that there is no error in the aforesaid calculation. It is stated in paragraph No.73 of the award that the respondents have written a letter No.Kha:092:RMCC:Ins./GEC-6/1197 dated 3rd November, 1992 to the United India Insurance Company stating the anticipated loss of about ₹7 lakhs (page 93, Vol. 11, R-23).

This is a clear admission by the Respondent/ Applicant about the loss suffered by it. Therefore, the Arbitral tribunal has taken the value of the loss suffered by it. Therefore, the Arbitral tribunal has taken the value of the IPC Nozzle as ₹7,00,000/-. Further, no evidence, of the cost of acquisition of the said IPC Nozzle (like invoices of the company from where the replacement was procured) was filed before the Arbitral tribunal. Thus, cost of acquisition of the IPC Nozzle could not be allowed to the respondent/applicant due to the absence of the appropriate evidence. It is no doubt that in the case of HPC Nozzle the Arbitral tribunal has allowed replacement cost. The reason was that in the case of HPC Nozzle there was no evidence on record to establish the loss suffered by the Respondent/ Applicant. In the case of HPC Nozzle the only evidence available on record was as to the replacement cost. The Arbitral tribunal has taken a conscious decision to allow loss suffered in the case of IPC Nozzle and replacement cost in the case of HPC nozzle in accordance with the evidence available on record. In the garb of seeking the co7rrection of typographical/ calculation error the respondent/applicant cannot be allowed to challenge the said finding and say that the Arbitral tribunal should have allowed a sum of ₹27,33,683.64.

26. The Second error indicates at page 3 of the application is “taking cost of thrust ring at ₹3,00,000 as against actual cost of ₹3,49,982.78 resulting in reduction of 49,982.78”. It is clearly stated in paragraph 95 of the Award that on account of Thrust Rings the respondents have recovered a sum of ₹3,49,982.78 from the Claimants. This fact is not disputed by the Respondent/Applicant. Out of the aforesaid sum of ₹3,49,982.78 the Claimant has claimed a refund of only ₹3,00,000. The said claim of the claimant has been rejected. Thus, the amount of ₹3,49,982.78 which had already been recovered by the respondents remained with

the respondents. Thus, we do not find any computation error, any clerical or typographical error or any other error of a similar nature in the Award. In any case, the Respondent/Applicant did not press this issue during the hearing.

27. The third error indicated at page 3 of the application is "omitting to consider ₹12,53,856.54 being overhead". The Respondent/Applicant has contended that in the case another claim overhead has been allowed. Therefore, the overhead should have been allowed in the case of this claim also.

28. Firstly, there is no rule that if "overheads" have been allowed on one item, they should be allowed on all the other items. Further, the Respondent/Applicant had not filed any details of overheads. "Overheads" is a very vague word. It may include anything and everything. In the absence of any details as to how the aforesaid amount has been arrived at or what are the contents of the overheads, it was not possible to consider this claim. In any case, in paragraph 109(E) of the Award it is clearly stated that all claims and counter claims not specifically allowed shall be treated as rejected. Thus, the claim for overheads also stands rejected.

29. It will not be out of place to refer the observation made by the Respondent/ Applicant in paragraph No.7 at page 5 of the Application. It is stated therein that "the claim of ₹555,500/- on claim No.1 of the respondent is beyond the terms of contract and has to be disallowed". In the first instance, it may be stated that it was the claim of the claimant and not of the Respondent as alleged. Further, by this statement the Respondent/ Applicant has questioned the findings of the Arbitral tribunal. It is not a question of correction of any computation error, any clerical or typographical error or any other error of a similar nature in the Award. In any case, the

Respondent/Applicant did not press this issue during the hearing."

35. The other finding of the Arbitral Tribunal in the application under Section 33(1) of the Act filed by the appellant in the additional award is that the application filed by the appellant is barred by limitation and, therefore, not maintainable. On merits, it was found by the Tribunal that the present case is not a case of computation errors, any clerical or typographical errors or any other error of a similar nature in the award, thus, on this account the award needs no correction.

36. Thereafter, the appellant's objections under Section 34 of the Act were dismissed by the learned Single Judge by passing the reasoned order dated 22nd August, 2007. Learned Single Judge rejected the argument of the appellant by coming to the conclusion that in view of the finding arrived at from para 24 onward of the additional award, it was the conscious decision taken by the Arbitral Tribunal to take the basis of the anticipated loss claimed by the appellant to determine the amount payable in respect of IPC nozzles which was admittedly mislocated/lost. It was also observed in the impugned order that in case of HPC nozzles in the absence of any other evidence it is the replacement cost which has been taken into account. The claim lodged with the insurance company of ₹24.57 lac was not pursued by the appellant which therefore could not be the basis as no determination took place. Initial anticipated loss has been taken as basis by the Arbitral Tribunal who took cognizance of a letter addressed by the appellant to the insurance company on 3rd November, 1992 giving the anticipated loss of ₹7 lac.

37. It is evident from the pleading of the appellant that the appellant had raised the same claim in the arbitration proceedings. It is also not in dispute that objections raised by the appellant in its petition filed under Section 34 of the Act to the additional award dated 29th May, 2006 are the same as raised in the objections to the original award dated 14th December, 2005 and the same were withdrawn after hearing. It is necessary to mention here, even in the application under Section 33 filed by the appellant after withdrawal of objection under Section 34 of the Act, same contentions were raised. We feel that the Arbitral Tribunal rightly came to the conclusion, a) that the application is not within the prescribed period and b) the subject matter of the application does not come within the preview of Section 33(1) of the Act as there was no typographical/clerical error in the original Award. Still, the Arbitral Tribunal again dealt with the contentions raised in the application.

38. Premise of the appellant/ objector under Section 34 to the additional award delivered by the Arbitral Tribunal after dismissal of application 33(1) of the Act are the same as filed to the original award being OMP No.113/2006 which was withdrawn after hearing. Under the aforesaid reasons, we are of the considered view that there is hardly any ground raised by the appellant in which any interference with the order passed by the learned Single Judge is called for.

39. The scope of challenge to an award under Section 34 of the Act does not open to the parties to challenge the ground that the arbitrator has reached at a wrong conclusion or has failed to appreciate the facts. The appreciation of evidence by the arbitrator is never a matter which the Court considers in the proceedings under Section 34 of the Act, as

the Court is not sitting in appeal over the adjudication of the arbitrator.

40. In the present case, the learned Single Judge after hearing the parties has accepted the reasons given in paragraph 14 of the award and held that the arbitrator has rightly taken the conscious decision on the basis of anticipated loss claimed by the appellant to determine the amount payable in respect of IPC Nozzles which was admittedly mislocated/lost. The claim stated to be lodged with the Insurance Company of ₹24.57 lac was admittedly not pursued and thus could not be the basis as no determination took place. The decisions referred by the appellant are not applicable to the facts and circumstances of the present case, as the facts in the present case are materially different.

41. The appeal is, therefore, dismissed.

42. No order as to costs.

(MANMOHAN SINGH)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

JULY 31, 2012/ka