IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 26.10.2021

\+ **O.M.P. (COMM) 504/2020**

M/S NATIONAL THERMAL POWER CORPORATION LIMITED ..... Petitioner

versus

M/S PATEL ENGINEERING LIMITED ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr. Tarkeshwar Nath, Advocate.
For the Respondent : Mr. Dayan Krishnan, Senior Advocate with Mr. Rishi Agrawala, Ms. Shruti Arora, Mr. Aakashi Lodha, Ms. Sukrit Seth, Advocates.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner (hereinafter 'NTPC') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter the 'A&C Act') impugning an arbitral award dated 14.01.2020 (hereinafter 'the impugned award') delivered by the Arbitral Tribunal constituted of Dr. P.C. Markanda, ER. H.S. Dogra and

ER S.P. Banwait as the Presiding Arbitrator (hereafter 'the Arbitral Tribunal').

2. The impugned award was rendered in the context of disputes that have arisen between the parties in connection with the contract for execution of the "Penstok & Power House Package" for the Hydroelectric Power Project across river Bhagirathi in District Uttarkashi (hereafter 'Loharinag Pala HE Project'). The parties had entered into the formal agreement embodying the contract on 30.11.2006.

3. The controversy in the present case arises in the following context:

3.1 The main civil works of the Loharinag Pala HE Project were divided into the four packages:

Contract Package 1 **:** *Construction of Adits to HRT.*
Contract Package 2 **:** *Construction of Head Race Tunnel*
Contract Package 3 **:** *Construction of Penstock and Power House.*
Contract Package 4 **:** *Construction of Barrage and Desilting Chamber.*

3.2 On 24.10.2005, NTPC invited tenders for the work of construction of 'Penstock & Powerhouse Package' for Loharinag Pala H.E Project (4 x 150-MW) on the basis of International Competitive Bidding.

3.3 The respondent (hereafter ' PEL') submitted its bid, which was accepted and, on 23.09.2006, NTPC issued the Letter of Acceptance (LoA) in favour of PEL. In terms of the said LoA, the work was to be completed within a period of forty-five months at an agreed consideration of ₹2,35,26,42,768/- and Euro 22,699,157.84/-, after deduction of 3.40% as discount as per offer plus cost of Schedule of Day-Work of ₹55,77,000/-. Subsequently, NTPC issued an amendment and, the total cost of work was increased from ₹371,44,99,171.73/- to ₹377,60,82,087.11/-.

3.4 Thereafter, on 30.11.2006, NTPC and PEL entered into the agreement for "*Construction of Penstock & Powerhouse Package for Loharinag Pala Hydro Electric Power Project (4 x 150-MW)*" (hereinafter 'the Contract').

3.5 PEL was also separately awarded the contract package for construction of the Head Race Tunnel.

3.6 In February 2009, reports were received that certain activists were agitating for closure of the Loharinag Pala HE Project. One Professor G.D. Agarwal, who was opposing the execution of the project, had gone on a hunger strike in protest against the project in question.

3.7 On 19.02.2009, due to the hunger strike by Prof. G.D. Agarwal to oppose the execution of the project, the Ministry of Power, Government of India decided to suspend the work at the Loharinag-Pala HE Project.

3.8 On 20.02.2009, looking at the sensitivity of the issue, the Central Government, in exercise of its powers conferred under Sections 3(1) and 3(3) of the Environment (Protection) Act, 1986 (hereinafter the 'EPA Act') constituted "The National Ganga River Basin Authority" (NGRBA) under the chairmanship of the Prime Minister, with the objective of taking measures for the abatement of pollution and the conservation of the river Ganga with sustainable development goals.

3.9 The aforesaid decision of the Ministry of Power to suspend the Project was challenged by an NGO before the High Court of Uttarakhand at Nainital by filing a Public Interest Litigation (Writ Petition No.15 of 2009). And, by an order dated 26.02.2009 passed by the High Court, the said decision.

3.10 Thereafter, on 18.05.2009, the High Court vacated the aforementioned stay order and opined that the NGRBA should constitute a broad based experts committee to give its opinion and recommendations on the continuation of the project or otherwise.

3.11 In June 2009, NTPC extended the contract period from original completion date of 22.06.2010 to 21.01.2012.

3.12 Thereafter, PEL, by a letter dated 29.07.2009, stated that the work was suspended on the advice of the manager of NTPC. NTPC disputes the same and states that no such advice was given by them.

3.13 On 07.08.2009, NTPC issued a letter to PEL instructing them to continue with the safety and stabilization works as per the list attached

to the same letter and to report completion of the same. According to NTPC, all possible works under the Package except face blast and underground excavation in tunnel, were to be executed as safety and stabilization works.

3.14 In September 2009, NTPC claimed that PEL continued to give the impression that the project was under suspension, though the execution of the works was not suspended in terms of Clause 40.1 of Conditions of Contract (hereafter 'GCC'). It insisted that the safety and stabilization works be completed.

3.15 On 22.10.2009, NTPC sent a letter to PEL stating that PEL had unilaterally stopped the works despite repeated instructions given to them and, this was not in accordance with Clause 13.1 of the GCC. PEL, invoked the provisions of Clause 40.3 of the GCC and served the twenty-eight days prior notice of the same date (22.10.2009) on NTPC.

3.16 On 01.11.2010, NGRBA, in its meeting headed by the Prime Minister of India, finally decided to scrap the project and, on 24.12.2010, the Ministry of Power, Government of India, communicated its decision to NTPC to the aforesaid effect.

3.17 On 31.01.2011. NTPC issued a letter to PEL stating that in terms of the communication issued by the Ministry of Power, the Contract stood frustrated.

3.18 The parties attempted to resolve their disputes. PEL claims that the attempts were not successful. On 04.06.2012, PEL issued a notice

under Clause 67.1 of the GCC for resolution of the disputes. The disputes remained unresolved and, the parties were referred to arbitration.

Arbitral Proceedings

4. PEL filed its Statement of Claims before the Arbitral Tribunal. The claims made by it are summarized as under:

Claim	Particulars	Claimed amount
Claim no.1(a)	Idle charges of machinery from date of suspension of work up to transfer from the site	₹41,77,25,289/-
Claim no.1(b)	Idle charges of manpower	₹7,24,54,633/-
Claim no.1(c)	Cost of steel linear plates brought specifically for fabrication and erection of penstock	₹26,76,99,146/-
Claim no.1(d)	Compensation for expenses incurred by approved sub-contractor PES engineering for erection, maintenance, demobilization of fabricated shed constructed for fabrication of steel liners	₹5,10,56,278/-
Claim no. 1(e)	Infructuous expenses incurred on infrastructures	₹6,54,39,254/-

Claim no.1(f)	Interest charges on inventory maintained on site as per joint verification	₹98,39,171/-
Claim no. 1(g)	Cost of monitoring instruments handed over to NTPC	₹18,41,092/-
Claim no. 1(h)	Cost of pre-cast concrete leggings casted over permanent works	₹5,06,250/-
Claim no. 1(i)	Demobilization charges incurred due to discontinuation of project	₹1,18,45,524/-
Claim no.1(j)	Reimbursement of interest recovered by NTPC on all outstanding advances	₹4,75,55,161/-
Claim no. 1(k)	Insurance, bank guarantees and bank commission charges, interest to others, loss on exchange rate diff A/C & WCT etc.	₹48,58,52,477/-
Claim no.1(l)	Funding charges @5%	₹7,15,90,714/-
Claim no. 1(m)	Overhead charges @25%	₹35,79,53,569/-
Claim no. 1(n)	Loss of profit on turnover @15%	₹48,90,91,401/-
Claim no.2	Claim for pre-suit, pendente lite and future interest @18% p.a.	
Claim no.3	Claim for cost towards arbitration	

5. Before the Arbitral Tribunal, PEL claimed that it had received verbal instructions on 29.07.2009 to suspend all works of the 'Penstock and Power House Package' in view of the proposed *dharna* by *Ganga Bachao Andolan* activists. PEL had issued a letter on the same date confirming that it had received the aforesaid instructions. The work was suspended during the day shift and restarted during the night shift of 29.07.2009. PEL claimed that on 30.07.2009 and 31.07.2009, it executed certain stabilization work during the day shift as mucking was allowed only in the night shift.

6. PEL further claimed that on 01.08.2009, NTPC instructed it to discontinue all activities except stabilization work on all faces of the Power House Complex till further instructions. Thereafter, on 03.08.2009, the Site In-charge of NTPC instructed suspension of all works including stabilization work and this was mentioned by PEL in its letter dated 03.08.2009. PEL acknowledged that thereafter, certain communications were exchanged regarding carrying out of balance safety and stabilization work but carrying on further work was near impossible. PEL claimed that since the Contract related to execution of supporting works of the entire excavated lengths of the tunnels, it was necessary to continue tunnel ventilation and lighting along with dewatering. And, in the given circumstances, it was not possible for it to continue only the work of stabilization for a long period of time. PEL claimed that it had explained all its difficulties to NTPC. However, despite difficulties, PEL continued to work up to 03.10.2009 but it became impossible to work thereafter and the work came to a standstill.

In the meanwhile, by its letter dated 08.09.2009, PEL claimed that the stoppage of work, as directed, amounted to 'Suspension of Work' in terms of Clause 40.1 of the GCC. It had also stated that the said suspension had lasted for more than eighty-four days with effect from 29.07.2009.

7. PEL also sent another letter dated 14.09.2009 seeking instructions to resume the work of tunnel excavation.

8. NTPC responded by its letter dated 14.10.2009 informing PEL that work of the Project was suspended by the Government of India and it was also incurring heavy losses, which was beyond its control. It further informed PEL that the NGRBA had also extended the suspension of work for the next two months.

9. PEL claimed that in the aforesaid circumstances, it had invoked the provisions of Clause 40.1 of the GCC. By its letter dated 22.10.2009, PEL had also served a notice of twenty-eight days, as required under Clause 40.3 of the GCC. PEL claimed that in the circumstances, it was entitled to the losses and costs incurred by it along with interest.

10. NTPC disputed the claims made by PEL. It asserted that it had never called upon PEL to suspend the work; on the contrary, PEL had, on its own, suspended the work and reported it in its letter dated 29.07.2009. NTPC further claimed that it had issued instructions to PEL to continue the safety stabilization work and the said work was carried out in the last week of September 2009 albeit at a very slow pace. NTPC alleged that PEL had no intention to complete the work

and had abandoned the project. NTPC disputed the claim raised by PEL, *inter alia*, asserting that PEL had stopped the work on its own accord. It further claims that in view of the decision of the Government of India to terminate the project, the Contract between the parties was frustrated and in terms of Clause 66.1 of the GCC, the parties were released from their respective obligations. It was claimed that this was not a case of suspension or termination, but of frustration of the Contract.

Impugned Award

11. The Arbitral Tribunal had admitted the material on record and concluded that the work was suspended from 29.07.2009 onwards. The same was noted in PEL's letter dated 29.07.2009 and was unrebutted. It was also not in dispute that NTPC had directed to stop the work by its letter dated 11.12.2010. The Arbitral Tribunal further found that the correspondences exchanged between the parties revealed that PEL had invoked the provisions of Clauses 40.1, 40.2 and 40.3 of the GCC relating to suspension of work. This was also conveyed to NTPC in writing. NTPC had sent a letter dated 14.08.2009 informing PEL that the work of the project had been suspended in view of the orders of the Government of India and, that it was also suffering heavy losses on that account but the same was beyond its control.

12. The Arbitral Tribunal also noted that certain news reports were received that the project was to be scrapped and the said news articles were sent by PEL to NTPC with a request to confirm the same. PEL had

also addressed a letter dated 29.09.2010 to NTPC requesting it to intimate the factual position. NTPC had, thereafter, responded by a letter dated 21.10.2010 informing PEL that a final decision was expected shortly. The Arbitral Tribunal noted that NTPC had also categorically stated that the option for omission of balance work stood good. Thereafter, by a letter dated 11.12.2010, NTPC informed PEL that the NGRBA had decided to scrap the project.

13. The Arbitral Tribunal found on evaluation of the correspondence exchanged between the parties that it was NTPC's consistent stand that the Loharinag Pala HE Project was under 'suspension' pursuant to orders of Government of India. The Arbitral Tribunal found that inconsistent with the aforesaid stand as NTPC had, by its letter dated 31.01.2011, asserted for the first time that the Contract stands frustrated. The Arbitral Tribunal held that the said stand was not well founded as none of the contingencies as contemplated under the Indian Contract Act, 1872 were present in the instant case and NTPC's change of stance that the Contract was frustrated was not tenable. On further evaluation of the material, the Arbitral Tribunal did not accept NTPC's contention that the project had been abandoned and held it to be unsustainable. The Arbitral Tribunal was of the view that the evidence on record indicated that this was a case of '*suspension and not abandonment or frustration*' and, it held accordingly.

14. The Arbitral Tribunal, having held that the case was one of suspension, proceeded to hold that the PEL would be entitled to various

amounts under Clause 65.8.2 of the Conditions of Particular Application (COPA).

15. Similarly, disputes had also arisen in respect of the Contract Package for the construction of Head Race Tunnel, the same had also been referred to arbitration and some of PEL's claims in respect of that contract were also allowed with reference to Clause 65.8.2 of the COPA. The Arbitral Tribunal also noted that in another case relating to the same project (Loharinag Pala HE Project), the claims made by the contractor (Hindustan Construction Company Ltd.) had also been allowed. The said award was challenged by NTPC. But its petition to set aside the award (*OMP No.626/2014: NTPC Ltd. Vs. Hindustan Construction Company Ltd.*) was rejected by this Court by an order dated 25.01.2017. The Arbitral Tribunal referred to the aforesaid decision and found that the facts in that case were *pari materia* to the facts in this case.

16. The Arbitral Tribunal then proceeded to examine the various claims and delivered the impugned award. A tabular statement summarizing the award entered by the Arbitral Tribunal in respect of the claims and sub-claims as set out in the impugned award, is reproduced below:

"Claim No.	**Particulars of Claim**	**Amount awarded**	**Reference**
I.	Claim for idle charges of	₹7,89,06,928/-	Annexure A-1

	Machinery/ Equipments		
II.	Claim for idle charges of Manpower	₹3,04,84,779/-	Annexure A-2
III.	Claim for compensation towards cost of Steel Liner Plates brought especially for Fabrication and Erection of Penstock	₹13,63,90,665/-	
IV.	Claim for expenses incurred by approved sub-contractor PES Engineers Pvt. Ltd. for erection, maintenance and demobilization of fabrication shed constructed for fabrication of steel liners	NIL	
V.	Claim towards infructuous expenses on account of cost of Infrastructures	₹2,40,30,789/-	Annexure A-3

VI.	Interest charges on Inventory of Materials Maintained on site - as per Joint Verification	₹68,32,757/-	Annexure A-4
VII.	Claim for cost of Monitoring Instruments handed over to the Claimant	₹18,41,092/-	Annexure A-5
VIII.	Claim for Pre-cast leggings casted for permanent works	NIL	
IX.	Cost of Demobilization	₹1,18,45,524/-	
X.	Reimbursement of interest recovered by the Respondent on all outstanding advances	NIL	
XI.	Insurance, Bank guarantee and Bank commission charges, interest to others, Loss on Exchange Rate difference account & W.C.T etc.	₹1,80,69,696/-	
XII.	Funding charges at 5% of total of (1) to (X)	NIL	
XIII.	Overheads at 25% of total of (1) to (X)	NIL	

XIV.	Loss of Profit on turnover	NIL	
2.	Claim for pre-suit, *pendente lite* and future interest at the rate of 18% per annum	From 30.10.2012 till the date of award, at the rate of 12% per annum. Further interest at the rate of 12% on the awarded amount till the date of payment of the amount.	
3.	Costs	₹40,00,000/-	

Submissions

17. Mr. Natraj, learned ASG assailed the impugned award, essentially, on three grounds. First, he submitted that the impugned award to the extent the Arbitral Tribunal has allowed claims of PEL with reference to Clause 65.8 of the COPA, is patently erroneous, as it was beyond the claims made by PEL. He submitted that PEL had founded its claims on Clause 40 of the GCC and it made no claim under Clause 65.8 of the COPA. Thus, the impugned award was liable to be set aside. He thereafter proceeded to refer to each sub-claim and reiterated the aforesaid submissions.

18. Second, he contended that the Arbitral Tribunal had allowed the claims for insurance and bank guarantee and the same were not referable to any provisions of the Contract.

19. Third, he contended that claim for interest (pre-suit, *pendente lite* and future) is contrary to the terms of the Contract. He referred to the judgment of this Court in ***Jaiprakash Associates Ltd. Vs. Tehri Hydro Corporation Ltd.: 2012 SCC OnLine Del 6213*** and contended that the said decision is squarely applicable to the facts of the present case as clauses of the contract interpreted in that case (Clauses 50 and 51) were similar to the relevant clauses of the Contract in the present case.

20. After the oral submissions were concluded, Mr Nath sought to urge an additional ground. He submitted that the Arbitral Tribunal had erred in allowing PEL's claim in respect of diminution in value of machinery and had allowed a set off in the said value against the amounts due to NTPC. He submitted that Clause 60.6 of the COPA entitled PEL to remove plant and equipment, which were hypothecated to NTPC to another work site on furnishing of a bank guarantee in case the Contract was suspended for more than fifteen days. He submitted that that the total equipment advance recoverable from PEL was ₹10,44,22,845/- and Euro 85,667 (calculated upto 30.06.2019) and therefore, PEL could have removed the equipment by furnishing a bank guarantee. It was further contended that the impugned award is patently illegal as the Arbitral Tribunal had failed to consider NTPC's letter dated 27.07.2011, whereby PEL was called upon to shift the equipment

and machinery. He contended that an arbitral award in ignorance of vital evidence is vitiated by patent illegality.

21. Mr. Krishnan, learned senior counsel appearing for PEL countered the aforesaid contentions. At the outset, he submitted that the issues sought to be raised by NTPC were squarely covered by the earlier decisions of this Court in ***NTPC vs. Hindustan Construction Company*** *(supra)* and ***NTPC vs. Patel Engineering Ltd.: OMP (COMM) No.156/2018, decided on 17.04.2018***.

22. Next, he submitted that the issue regarding pre-suit, *pendente lite* and future interest was also covered by the decisions of this Court in ***NTPC vs. Patel Engineering Ltd.: OMP (COMM) No.743/2013, decided on 21.02.2015***; ***NTPC vs. Patel Engineering Ltd.: FAO(OS) No.219/2015, decided on 24.04.2015****;* and ***NTPC vs. Patel Engineering Ltd.: OMP (COMM) No.156/2018*** *(supra)*. He further submitted that similarly the issue regarding claim of costs for arbitration is also squarely covered by the aforesaid decisions.

23. In respect of the contention that the Arbitral Tribunal had ignored NTPC's letter dated 27.07.2011 calling upon PEL to remove its machinery, Mr. Krishnan submitted that NTPC, by its letter dated 08.07.2011, permitted PEL to remove the machinery on its undertaking but it thereafter, insisted on furnishing of a bank guarantee. PEL had objected to the same, as according to PEL, there was no requirement to submit the bank guarantee and therefore, it had requested NTPC to take measures for safekeeping of the said equipment. However, NTPC had

denied its responsibility to do so. He submitted that in view above, the findings of the Arbitral Tribunal that NTPC was responsible for deterioration and inertia on its part, cannot be faulted.

24. He submitted that NTPC's contention that PEL's claim for insurance had been allowed without any basis is also erroneous as the same is based on evidence.

Reasons & Conclusions

25. At the outset, it is necessary to observe that Mr. Natraj's contention that the grounds raised in the present petition are not covered by earlier decisions, is unmerited. A plain reading of the judgements arising from the arbitral awards delivered in respect of disputes relating to the Loharinag Pala HE Project, as referred to above, indicate that principal issue involved is common.

26. The contention that the Arbitral Tribunal could not have allowed any claims by referring to Clause 65.8 of the COPA is premised on the assumption that the same was not a subject matter of controversy before the Arbitral Tribunal. However, a plain reading of the Statement of Claims indicates otherwise. PEL had asserted in its Statement of Claims that it had submitted "*its claim for running expenses periodically, under various heads, during the period of suspension of the project up to complete demobilization of all sites due to discontinuation of the project. The Claimant had submitted these claims as provided under Clauses 40.2, 40.3, 65.8 and 66 and other relevant clauses of contract*."

27. In its Statement of Defence, NTPC had disputed the claims raised by PEL, but it did not dispute that PEL had made the claims as stated by it. It was not NTPC's case that PEL's claims were not covered under the said clauses; NTPC claimed that the claims under the said clauses were not sustainable as the Contract was frustrated and the parties were released of their obligations under Clause 66 of the GCC.

28. At this stage, it would also be relevant to refer to relevant clauses. Clauses 40.1, 40.2 and 40.3, as amended by the Conditions of Particular Application (COPA) are set out below:

> "40.1. Suspension of Work
>
> The Contractor shall, on the instructions of the Engineer suspend the progress of the Works or any part thereof for such time and in such manner as the Engineer may consider necessary and shall, during such suspension, properly protect and secure the Works or such part thereof so far as is necessary in the opinion of the Engineer. Unless such suspension is:
>
> (a) otherwise provided for in the Contract,
>
> (b) necessary by reason of some default of or breach of contract by the Contractor or for which he is responsible,
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> (c) necessary by reason of climatic conditions on the Site, or
>
> (d) necessary for the proper execution of the Works or for the safety of the Works or any part thereof (save to the extent that such necessity arises from any act or default by the Engineer or the Employer or from any

of the risks defined in Sub-Clause 20.4), Sub-Clause 40.2 shall apply

40.2. Engineer's Determination following Suspension

Where, pursuant to Sub-Clause 40.1, this Sub-Clause applies the Engineer shall, after due consultation with the Employer and the Contractor, determine;

(a) any extension of time to which the Contractor is entitled under Clause 44, and

(b) the amount, which shall be added to the Contract Price, in respect of the cost incurred by the Contractor by reason of such suspension, and shall notify the Contractor accordingly, with a copy to the Employer.

40.3. Suspension lasting more than 84 Days

If the progress of the 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 to the Engineer requiring permission, within 28 days from the receipt thereof, to proceed with the Works or that part thereof in regard to which progress 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 Clause 51"

29. According to NTPC, the Contract was frustrated and the parties were released from performing their obligations in terms of Clause 66.1 of GCC. Clause 66.1 of GCC is set out below:

"66.1. Payment in Event of Release from 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 then 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 would have been payable under Clause 65 if the Contract had been terminated under the provisions of Clause 65."

30. Clauses 65.8.1 and 65.8.2 of COPA are set out below:

"65.8. FORECLOSURE OF CONTRACT IN FULL OR IN PART DUE TO ABANDONMENT OR REDUCTION IN SCOPE OF WORK

65.8.1. If at any time after acceptance of the tender the Employer shall decide to abandon or reduce the scope of the Works for any reason whatsoever and hence not require the whole or any part of the Works to be carried out, the Engineer shall give notice in writing to that effect to the Contractor and the Contractor shall have no claim to any payment of compensation or otherwise whatsoever, on account of any profit or advantage which he might have derived from the execution of the Works in full but which he did not derive in consequence of the foreclosure of the whole or part of the Works.

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.

b) (i) The Employer shall have the option to take over Contractor's material or any part thereof either brought to Site or of which the Contractor is legally bound to accept delivery from suppliers (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 material 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 Contractor's 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 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 of Plants and Equipment from Site to Contractor's 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."

31. The Arbitral Tribunal had referred to Clauses 40, 66.1 of GCC and 65.8 of the COPA and 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

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 is 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. 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 release from performance. The clause provides for payment to the contractor for the value of work executed in accordance with clause 65. The Claimant had, stated in their communications 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 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 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……"
> [emphasis supplied]

32. The Arbitral Tribunal had also referred to the decision of this Court in ***NTPC Ltd. Vs. Hindustan Construction Company Ltd.*** (*supra*) and observed as under:

> "…….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.
>
> As already held above, the facts of the instant case being para materia with the facts of the case before the Delhi High Court, the judgment would also be squarely applicable to the present case……."

33. It is apparent from the above that the question whether NTPC's claim could be awarded by reference to Clause 65.8 of the COPA was well within the scope of disputes before the Arbitral Tribunal. Thus, the contention that the impugned award traversed outside the dispute

and the Arbitral Tribunal rendered the award outside the scope of the Statement of Claims, cannot be accepted.

34. The next question to be examined is whether the Arbitral Tribunal erred in allowing the claims for insurance [Claim 1(xi)].

35. PEL had made claims for insurance, bank guarantee and bank commission charges, interest to others, and loss of exchange rates. NTPC had contested PEL's claims for insurance and other charges on the ground that the said claims would subsume in other claims. According to NTPC, PEL had also considered insurance on Plant and Machinery, while computing idle charges of Plant and Machinery. NTPC contested PEL's claim for costs for extension of Bank Guarantees (Bank Guarantee against Mobilization Advance and Performance Bank Guarantee) by asserting that PEL could have returned the Mobilization Advance and sought release of the Bank Guarantee issued against the Mobilization Advance. In addition, NTPC had also contended that even during the joint verification exercise, PEL had not produced any cogent evidence except a certificate of the Chartered Accountant to establish its case.

36. The aforesaid contentions were rejected by the Arbitral Tribunal. The impugned award indicates that the Arbitral Tribunal had examined PEL's claims for idle plant and machinery and specifically noted that it had not allowed any claims on account of that sub-head. Similarly, the Arbitral Tribunal also found that element of insurance was not included in the costs of idle manpower and accordingly, allowed the claims

regarding insurance. The impugned award also indicates that the Arbitral Tribunal had examined the evidence regarding the details of the amounts claimed and noted that the same were available on record "in Book-C3, Pages 237 – 241". It is not disputed that the details of the insurance claim were placed on record. NTPC had also conceded that PEL had provided a Chartered Account's certificate to substantiate its claim. Thus, undeniably, there was material available in support of the aforesaid claim and the contention that Arbitral Tribunal's decision is not based on any evidence at all, cannot be accepted. The Evidence Act, 1872 does not apply to arbitral proceedings and an arbitral tribunal can make an arbitral award based on material placed before it. As stated above, in the present case, there was material before the Arbitral Tribunal that persuaded it to allow the claim. The questions as to sufficiency of material or its persuasive value fall outside the scope of Section 34(2) and 34(2A) of the A&C Act. And, this court cannot reappreciate the material and supplant its view over that of the Arbitral Tribunal.

37. PEL's claims regarding loss of exchange rate and bank commission were rejected as the Arbitral Tribunal found that there was no evidence in support of the same.

38. The contention that the claim is not supported under any clause of the GCC or COPA is clearly an afterthought. PEL's claim for insurance is based on assertion that the expenses incurred are attributable to the site and the project in question.

39. Insofar as NTPC's contention that the Arbitral Tribunal had erred in awarding costs is concerned, the said contention is unmerited. PEL had prevailed in its claim and therefore, was entitled to costs. NTPC's contention in this regard was also not accepted by a Coordinate Bench of this Court in ***NTPC v. Patel Engineering Ltd.: OMP No.743/2013, decided on 21.02.2015***. NTPC's appeal against the said decision (***NTPC v. Patel Engineering Ltd.: FAO(OS) No.219/2015, decided on 24.04.2015)*** was dismissed and the Special Leave Petition [SLP(C) No.25685/2015] was also rejected by the Supreme Court by an order dated 05.10.2015.

40. The remaining question to be addressed is regarding the grant of interest. The Arbitral Tribunal has granted interest at the rate of 12% per annum from 30.10.2012 till the date of the award and further interest on the awarded amount till the date of payment.

41. PEL had claimed pre-suit, *pendente lite* and future interest at the rate of 18% per annum. NTPC had disputed the aforesaid claim on the strength of Clauses 77 and 78 of the COPA. According to NTPC, the said clauses do not permit grant of any interest to PEL.

42. NTPC had relied upon the decisions of the Supreme Court in ***Sayeed Ahmed and Co. v. State of U.P.: 2009 (12) SCC 26*** and ***Tehri Hydro Development Corporation Ltd. and Anr. v. Jai Prakash Associates Ltd.: (2012) 12 SCC 10*** [hereinafter ***'Jai Prakash Associates Ltd – I'***], in support of its contention. PEL, on the other hand, relied on ***State of U.P. v. Harish Chandra & Co.: (1999) 1 SCC***

63 and had contended that the relevant clauses of the COPA in the present case (Clauses 77 and 78) did not prohibit grant of interest, as claimed.

43. The Arbitral Tribunal had considered the rival contentions and observed that in ***Jai Prakash Associates Ltd -I***, the Supreme Court had not noticed its earlier judgment in the case of ***State of U.P. v. Harish Chandra & Co.*** (*supra*). The Arbitral Tribunal further observed that on closer examination, there was no contradiction between the two decisions. In ***Jai Prakash Associate Ltd -I***, the final bill had been prepared. The contractor had claimed a sum of ₹10,17,461/- on the basis of said final bill. And, the said claim was allowed with interest. The Arbitral Tribunal held that since in the facts of that case, the amount due had been ascertained and withheld, no interest was payable in terms of the relevant clause of the contract. However, in the present case, NTPC had not conceded or admitted to any claim and thus, it could not assert that interest was barred under Clause 78 of the COPA.

44. In addition to the above, the Arbitral Tribunal had also observed that a similar view had been accepted by this Court in ***NTPC Ltd. v. Hindustan Construction Company Ltd*** *(supra)*. The Arbitral Tribunal also held that it has the discretionary power under Section 31(7) of the A&C Act to award interest.

45. Undisputedly, the question whether the Arbitral Tribunal could award interest in the given facts, is covered by the earlier decisions of this Court as contended by Mr. Krishnan. The said issue was considered

by a Coordinate Bench of this Court in ***NTPC Ltd. Vs. Patel Engineering Ltd.: OMP No.743/2013, decided on 21.02.2015***. The relevant extract of the said decision is set out below:

> ***"Interest and Costs***
>
> 20. Extensive arguments were advanced by Mr. Upadhyaya in respect of the award of interest by the AT. Reliance was placed on Clause 78 which states as under:
>
> > "78. 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."
>
> 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 SCC 63*** 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) SLT 430***.
>
> 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."

46. It is evident from the above that this Court had considered the decisions of the Supreme Court in ***State of U.P. v. Harish Chandra & Co.*** (*supra*) and ***Jai Prakash Associate Ltd -I***. The Arbitral Tribunal's interpretation of the law regarding the payment of interest was a plausible view and thus, warranted no interference in this proceeding.

47. NTPC was a party to the aforesaid decision and had filed an appeal before the Division Bench of this Court [**FAO(OS) No.219/2015** captioned ***NTPC Ltd. Vs. Patel Engineering Ltd.***]. The Division Bench of this Court had set out the afore-quoted paragraphs from the decision of the Coordinate Bench of this Court and had expressed concurrence with the aforesaid view.

48. It is relevant to note that in that case, the learned counsel for NTPC had relied on the decision in the case of ***Jai Prakash Associate Ltd. -I*** and had pointed out that Clause 78 of the COPA was identical to Clause 1.2.14 of the contract interpreted by the Supreme Court in that case. The Division Bench of this Court did not accept the aforesaid contention and sought to distinguish the decision in the case of ***Jai Prakash Associate Ltd -I*** on the ground that in that case, the contract also involved another clause – Clause 1.2.15 relating to interest but no such clause existed in the contract between the parties in the case before it. The relevant extract of the said decision is as under:

"8. Insofar as the payment of interest is concerned, which falls in claim No. 7, we find that the learned Single Judge has examined this aspect under the head 'Interest and Costs'. We need not reinvent the wheel here and, therefore, we are extracting the reasoning adopted by the learned Single Judge:-

> ***"Interest and Costs***
>
> 20. Extensive arguments were advanced by Mr. Upadhyaya in respect of the award of interest by the AT. Reliance was placed on Clause 78 which states as under:
>
> "78. 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."
>
> 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 SCC 63*** 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) SLT 430***.
>
> 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."

We agree with the conclusion of the learned Single Judge. However, before us Mr Mehta sought to place reliance, once again, on the decision of the Supreme Court in ***Tehri Hydro-development Corporation Ltd (supra)*** to submit that Clause No. 78 of the contract between the parties herein was identical to Clause No. 1.2.14 of the contract which was under consideration before the Supreme Court and in that context, the Supreme Court had disallowed the interest. However, we feel that in the contract before the Supreme Court, there was another clause, namely, Clause No. 1.2.15 relating to interest on money due to the contractor which reinforced the submission on the part of the appellant before the Supreme Court that no interest was payable. The said Clause 1.2.15 in the case before the Supreme Court was as under:-

> "1.2.15 *Interest on money due to the contractor*.— No omission on the part of the engineer-in-charge to pay the amount due upon measurement or otherwise shall vitiate or make void the contract, nor shall the contractor be entitled to interest upon any guarantee or payments in arrears nor upon any balance which may on the final settlement of his accounts be due to him."

> Such a clause is absent in the present contract. Therefore, the said decision would not be of any help to the appellant."

49. The basis on which the Division Bench of this Court had sought to distinguish the decision in the case of ***Jai Prakash Associate Ltd -I*** is based on a factually incorrect premise that the contract between NTPC and PEL did not contain any clause similar to 1.2.15 as in that case. The contract between NTPC and PEL in that case [FAO(OS) No.219/2015] as well as in the present case also includes a clause – Clause 77 of the COPA, which is similar to Clause 1.2.15 as discussed by the Supreme Court in the case of ***Jai Prakash Associate Ltd -I***. The Special Leave Petition against the decision of the Division Bench of this Court was dismissed. However, it is well settled that dismissal of an Special Leave Petition by the Supreme Court does not amount to the Supreme Court affirming the view in the judgment sought to be appealed.

50. The aforesaid issue of interest also came up for consideration before a Coordinate Bench of this Court in respect of the same project albeit in the context of contract package relating to a head race tunnel. The arbitral tribunal constituted to adjudicate the disputes relating to that contract had also allowed PEL's claim for interest on similar terms as in the present case.

51. NTPC's petition under Section 34 of the A&C Act was rejected by a Coordinate Bench of this Court in ***NTPC Vs. Patel Engineering***

Ltd.: OMP(COMM) No.156/2018, decided on 17.04.2019. The relevant extract of the said decision is set out below:

> "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 SCC 10, 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 SCC 611.
>
> 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 SCC 36, 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:-

"22. In our opinion, it would depend upon the nature of the 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 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 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 SCC 63*, 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.*
>
> *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 Chandra's 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 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."*

52. In addition to the above, the Court had also referred to the earlier decision in ***NTPC Ltd. v. Patel Engineering Ltd.: OMP No.743/2015, decided on 21.02.2015***, and observed that it had found no reason to disagree with the aforesaid view.

53. The issue of award of interest is covered by the aforesaid decisions. However, it is contended on behalf of NTPC that the aforesaid decisions do not take into account a subsequent decision of the Supreme Court in ***Jai Prakash Associates Ltd v. Tehri Hydro***

Development Corporation: (2019) 17 SCC 786 (hereinafter referred to as '***Jai Prakash Associates Ltd.-II')***, whereby the appeal preferred against the decision of the Division Bench of this Court in ***Jai Prakash Associates Ltd. v. Tehri Hydro Development Corporation: 2012 SCC OnLine Del 6213***, (hereafter referred to as '***Jai Prakash Associates – Del'***) was rejected.

54. The controversy relating to interest revolves around the interpretation of Clauses 77 and 78 of the COPA. The said clauses are set out below:

> **"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 the Contractor be entitled to interest upon any guarantee or payments in arrears nor upon any balance which may on the final settlement of his account, be due to him.
>
> **78. 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 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."

55. The aforesaid clauses are similarly worded as Clauses 50 and 51 of the GCC and were subject matter of interpretation by the Division Bench of this Court in ***Jai Prakash Associates – Del***. In that case, the Arbitral Tribunal had allowed the appellants' claim for reimbursement on account of fluctuation in foreign exchange and had also awarded interest at the rate of 10% per annum.

56. Tehri Hydro Development Corporation (THDC) had filed a petition under Section 34 of the A&C Act impugning the arbitral award. The same was considered by a Coordinate Bench of this Court and the court had accepted THDC's challenge and had set aside the arbitral award to the extent it awarded interest in favour of the appellant (***Tehri Hydro Development Corporation India Ltd. vs. Jai Prakash Associates Ltd.: (2011) 184 DLT 468***). Jai Prakash Associates Ltd. had preferred an appeal against the said decision to the Division Bench of this Court. The main issue urged before the Court was with regard to the applicability of the decision of the Supreme Court in ***State of U.P. v. Harish Chandra & Co.*** (*supra*) as it was, *inter alia*, contended on behalf of the appellant that the clause interpreted by the Supreme Court in ***State of U.P. v. Harish Chandra & Co.*** (*supra*) was somewhat similar to Clause 51 of GCC in that case (which is identically worded as Clause 78 of the COPA in this case).

57. The Division Bench of this Court did not accept the said contention and held that the clause considered by the Court in ***State of U.P. v. Harish Chandra & Co.*** (*supra*) prohibited grant of interest in respect of money or balance lying with the government owing to any

dispute or difference and thus, it applied only to specified type of amount. The Court rejected the contentions that there was any conflict between the decisions of the Supreme Court in ***State of U.P. v. Harish Chandra & Co.*** (*supra*) and ***Jai Prakash Associate Ltd -I***.

58. The relevant extract of the decision of the Division Bench of this court in ***Jai Prakash Associates – Del*** is set out below:

> "15. Thus, the argument by learned counsel for the appellant that there is hiatus between the decisions of the Supreme Court in *Harish Chandra's case* (supra) and *Jai Prakash Associates*' case (supra) is not correct inasmuch as in the latter case there were two clauses prohibiting interest and both of them clearly envisaged a prohibition to pay interest with respect to not only monies lying with the government but even with respect to delayed payments or omissions to make payments for work done or on account of measurements not taken etc. Clauses 50 and 51 of the instant contact are pari materia with clause 1.2.14 and 1.2.15 in *Jai Prakash Associates*' case (supra).
>
> 16. The reasoning of the learned Single Judge by drawing a distinction between Clause 1.9 in *Harish Chandra's case* (supra) and Clause-51 of the instant contract is palpably not sound inasmuch as the learned Single Judge has emphasized that in *Harish Chandra's case* (supra) the prohibition was limited to a claim being entertained and in the instant case the prohibition related to not only a claim being entertained but even payable; for the reason how would a thing be payable unless it is to be entertained. But, the final conclusion arrived at by the learned Single Judge is correct.
>
> 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*'.

18. The rule of *ejusdem generis* guides us 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 Chandra's case* (supra) and *Jai Prakash Associates*' case (supra) and that the law declared in *Jai Prakash Associates*' case (supra) governs the instant contract."

59. The decision of the Division Bench of this court ***Jai Prakash Associates – Del*** was appealed to the Supreme Court. The Supreme Court referred to the earlier decisions and upheld the aforesaid decision. It is material to note that the material clauses in that case are similarly worded as Clauses 77 and 78 of COPA. The relevant extract of the said decision is set out below:

"15. In a recent judgment in the case of ***Reliance Cellulose Products Limited v. ONGC***, the entire case law on the subject is revisited and legal position re-

emphasised. That was also a case which arose under the 1940 Act. The Court held that under the 1940 Act, an arbitrator has power to grant pre-reference interest under the Interest Act as well as pendente lite and future interest, however, he is constricted only by the fact that an agreement between the parties may contain an express bar to the award of pre-reference and/or pendente lite interest. Further, the Court has evolved the test of strict construction of such clauses, and unless there is a clear and express bar to the payment of interest that can be awarded by an arbitrator, clauses which do not refer to claims before the arbitrators or disputes between parties and clearly bar payment of interest, cannot stand in the way of an arbitrator awarding pre-reference or pendente lite interest. Further, unless a contractor agrees that no claim for interest will either be entertained or payable by the other party owing to dispute, difference, or misunderstandings between the parties or in respect of delay on the part of the engineer or in any other respect whatsoever, leading the Court to find an express bar against payment of interest, a clause which merely states that no interest will be payable upon amounts payable to the contractor under the contract would not be sufficient to bar an arbitrator from awarding pendente lite interest. Further, the grant of pendente lite interest depends upon the phraseology used in the agreement, clauses conferring power relating to arbitration, the nature of claim and dispute referred to the arbitrator, and on what items the power to award interest has been taken away and for which period. Also, the position under Section 31(7) of the 1996 Act, is wholly different, inasmuch as Section 31(7) of the 1996 Act sanctifies agreements between the parties and states that the moment the agreement says otherwise, no interest becomes payable right from the date of the cause of action until the award is delivered.

16. After discussing and analysing almost all the judgments on this subject, the legal position is summed up in the following manner:

> "24. A conspectus of the decisions that have been referred to above would show that under the 1940 Act, an arbitrator has power to grant pre-reference interest under the Interest Act, 1978 as well as pendente lite and future interest. However, he is constricted only by the fact that an agreement between the parties may contain an express bar to the award of pre-reference and/or pendente lite interest. Since interest is compensatory in nature and is parasitic upon a principal sum not having been paid in time, this Court has frowned upon clauses that bar the payment of interest. It has therefore evolved the test of strict construction of such clauses, and has gone on to state that unless there is a clear and express bar to the payment of interest that can be awarded by an arbitrator, clauses which do not refer to claims before the arbitrators or disputes between parties and clearly bar payment of interest, cannot stand in the way of an arbitrator awarding pre-reference or pendente lite interest. Thus, when one contrasts a clause such as the clause in Second ***Ambica Construction case*** with the clause in ***Tehri Hydro Development Corpn. Ltd.***, it becomes clear that unless a contractor agrees that no claim for interest will either be entertained or payable by the other party owing to dispute, difference, or misunderstandings between the parties or in respect of delay on the part of the engineer or in any other respect whatsoever, leading the Court to find an express bar against payment of interest, a clause which merely states that no

> interest will be payable upon amounts payable to the contractor under the contract would not be sufficient to bar an arbitrator from awarding pendente lite interest under the 1940 Act. As has been held in First ***Ambica Construction case***, the grant of pendente lite interest depends upon the phraseology used in the agreement, clauses conferring power relating to arbitration, the nature of claim and dispute referred to the arbitrator, and on what items the power to award interest has been taken away and for which period. We hasten to add that the position as has been explained in some of the judgments above under Section 31(7) of the 1996 Act, is wholly different, inasmuch as Section 31(7) of the 1996 Act sanctifies agreements between the parties and states that the moment the agreement says otherwise, no interest becomes payable right from the date of the cause of action until the award is delivered."

17. In this whole conspectus and keeping in mind, in particular, that present case is regulated by 1996 Act, we have to decide the issue at hand. At this stage itself, it may be mentioned that in case clauses 50 and 51 of GCC put a bar on the arbitral tribunal to award interest, the arbitral tribunal did not have any jurisdiction to do so. As pointed out above, right from the stage of arbitration proceedings till the High Court, these clauses are interpreted to hold that they put such a bar on the arbitral tribunal. Even the majority award of the arbitral tribunal recognised this. Notwithstanding the same, it awarded the interest by relyi0ng upon Board of Trustees for the ***Port of Calcutta case***. The High Court, both Single Bench as well as Division Bench, rightly noted that the aforesaid judgment was under the 1940 Act and the legal position in this behalf have taken a paradigm shift which position is

clarified in ***Sayeed Ahmed and Co. case***. This rationale given by the High Court is in tune with the legal position which stands crystallised by catena of judgments as noted above.

18. Another reason given by the High Court is equally convincing. The Clauses 50 and 51 of GCC are pari materia with Clauses 1.2.14 and 1.2.15 of ***GCC*** in ***THDC case***. Those clauses have been interpreted by holding that no interest is payable on claim for delayed payment due to the contractor. Same construction adopted in respect of these clauses, which, in fact, is a case between the same parties, is without any blemish."

60. The aforesaid decision was carried in appeal to the Supreme Court. The Supreme Court upheld the aforesaid decision in ***Jai Prakash Associates Ltd.-II***

61. The controversy considered by the Division Bench of this Court ***Jai Prakash Associates – Del*** and by the Supreme Court ***Jai Prakash Associates Ltd.-II*** was centered around the interpretation of the last six words of Cause 51 of the GCC – *"or in any other respect whatsoever"*. Clause 51 of the GCC in those cases is identically worded as Clause 78 of the COPA in this case and Clause 1.2.14 of GCC considered in ***Jai Prakash Associate Ltd -I***. It was contended by the appellant (in ***Jai Prakash Associates – Del*** *and* ***Jai Prakash Associates Ltd.-II'***) that the said words must take colour from the preceding category namely monies lying with employer owing to dispute in respect of delay or omission on the part of the engineer in making interim or final payments. As is apparent from the above quoted extract of the decision in ***Jai Prakash Associates – Del***, the Division Bench of this Court had

rejected the contention that the rule of *ejusdem generis* would apply as the court found that the necessary conditions for application of the said rule were lacking. The said view was affirmed by the Supreme Court in ***Jai Prakash Associates Ltd.-II*** *(supra).* The Court referred to its earlier decision in ***BHEL Vs. Globe Hi-Fabs Ltd.: (2015) 5 SCC 718,*** wherein similar clauses had been interpreted and it was held that the same cannot be held *ejusdem generis* along with the words 'earnest money' and 'security deposit'. The relevant extract of the decision in ***Jai Prakash Associates Ltd.-II*** is set out below:

> "22. Insofar as argument based on the principle of *ejusdem generis* is concerned, the Division Bench has held that that is not applicable in the present case. We find that it is rightly so held. *Ejusdem generis* is the rule of construction. The High Court has negated this argument in the following manner:
>
> > "18. The rule of *ejusdem generis* guides us 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."
>
> As rightly held, the rule of *ejusdem generis* would be applied only if there is distinct genus or a category, which is lacking in the instant case. This rule is applicable when particular words pertaining to a clause, category or genus are followed by general words. In such a situation, the general words

are construed as limited to things of same kind as those specified. In that sense, this rule reflects an attempt 'to reconcile incompatibility between the specific and general words in view of the other rules of interpretation that all words in a statute are given effect if possible, that a statute is to be construed as a whole and that no words in a statute were presumed to be superfluous".

23. In fact, construing the similar clause, this Court in the case of ***BHEL Vs. Globe Hi-Fabs Ltd.*** has held that rule of ejusdem generis is not applicable inasmuch as:

> "12. The rule of ejusdem generis has to be applied with care and caution. It is not an inviolable rule of law, but it is only permissible inference in the absence of an indication to the contrary, and where context and the object and mischief of the enactment do not require restricted meaning to be attached to words of general import, it becomes the duty of the courts to give those words their plain and ordinary meaning. As stated by Lord Scarman:
>
> 'If the legislative purpose of a statute is such that a statutory series should be read ejusdem generis, so be it, the rule is helpful. But, if it is not, the rule is more likely to defeat than to fulfil the purpose of the statute. The rule like many other rules of statutory interpretation, is a useful servant but a bad master.'

So a narrow construction on the basis of ejusdem generis rule may have to give way to a broader

construction to give effect to the intention of Parliament by adopting a purposive construction.

* * *

15. A word of caution is here necessary. The fact that the ejusdem generis rule is not applicable does not necessarily mean that the prima facie wide meaning of the word "other" or similar general words cannot be restricted if the language or the context and the policy of the Act demand a restricted construction. In the expression "defect of jurisdiction or other cause of a like nature" as they occur in Section 14(1) of the Limitation Act the generality of the words "other cause" is cut down expressly by the words "of a like nature", though the rule of ejusdem generis is strictly not applicable as mention of a single species "defect of jurisdiction" does not constitute a genus. Another example that may here be mentioned is Section 129 of the Motor Vehicles Act which empowers any "police officer authorised in this behalf or other person authorised in this behalf by the State Government" to detain and seize vehicles used without certification of registration or permit. The words "other person" in this section cannot be construed by the rule of ejusdem generis for mention of single species, namely, "police officer" does not constitute a genus but having regard to the importance of the power to detain and seize vehicles it is proper to infer that the words "other person" were restricted to the category of government officers. In the same category falls the case interpreting the words "before filing a written statement or taking any other steps in the proceedings" as they occur in Section 34 of the Arbitration Act, 1940. In

> the context in which the expression "any other steps" finds place it has been rightly construed to mean a step clearly and unambiguously manifesting an intention to waive the benefit of arbitration agreement, although the rule of ejusdem generis has no application for mention of a single species viz. written statement does not constitute a genus.
>
> 16. In the present case we noticed that the clause barring interest is very widely worded. It uses the words "any amount due to the contractor by the employer". In our opinion, these words cannot be read as ejusdem generis along with the earlier words "earnest money" or "security deposit".
>
> 24. The upshot of the aforesaid discussion would be to hold that the conclusions of the High Court in the impugned judgment are correct and need no interference. This appeal is accordingly dismissed."

62. It is also relevant to refer to the decision of the Supreme Court in ***Reliance Cellulose Products Ltd. v. Oil and Natural Gas Corporation Ltd.: (2018) 9 SCC 266***. In that case, the Court had considered a clause which provided that the payment would be made within thirty days of the receipt of stores and inspection at site "*but any delay in payment will not make the Commission liable for any interest*." The Court found that the said clause was much narrower than the clauses prohibiting interest considered by the Supreme Court in ***Ambica Construction v. Union of India: (2017) 14 SCC 323*** and ***Jai Prakash Associate Ltd -I (supra)***. According to the Supreme Court, the clauses in that case were

distinguishable as the clause in ***Jai Prakash Associate Ltd.-I*** was much wider. Paragraph 25 of the said decision is relevant and is set out below:

> "25. In the present case, Clause 16 of the General Conditions of Contract only speaks of any delay in payment not making ONGC liable for interest. There is nothing in this clause which refers even obliquely to the arbitrator's power to grant interest. This Court finds that the aforesaid clause is narrower than the clause considered by the three-Judge Bench in ***Second Ambica Construction case*** which states that no interest will be payable on amounts payable to the contractor under the contract. Clause 16 in the present case confines itself only to delay in payment and not to any other amounts payable to the contractor under the contract. Also, unlike the clause in ***Tehri Hydro Development Corporation Ltd.,*** Clause 16 does not contain language which is so wide in nature that it would interdict an arbitrator from granting pendente lite interest. It will be remembered that the clause in ***Tehri Hydro Development Corpn. Ltd.*** spoke of no claim for interest being entertained or payable in respect of any money which may be lying with the Government owing to disputes, difference or misunderstanding between the parties and not merely in respect of delay or omission; Further, the clause in ***Tehri Hydro Development Corpn. Ltd.*** goes much further and makes it clear that no claim for interest is payable "in any other respect whatsoever". It is, thus, clear that Clause 16 cannot possibly interdict the payment of pendente lite interest on the facts of the present case."

63. In view of the aforesaid decisions of the Supreme Court (***Reliance Cellulose Products Ltd. v. Oil and Natural Gas Corporation Ltd.*** (*supra*) and ***Jai Prakash Associates Ltd.-II)***, the question whether

Clause 78 of the COPA has to be interpreted in wide terms, is no longer *res integra*. In view of the authoritative decision of the Supreme Court in this regard, the impugned award to the extent that it holds that Clause 78 of COPA is not applicable is difficult to sustain.

64. It also follows that the earlier decisions of this court in ***NTPC vs. Patel Engineering Ltd.: OMP (COMM) No.743/2013, decided on 21.02.2015***; ***NTPC vs. Patel Engineering Ltd.: FAO(OS) No.219/2015, decided on 24.04.2015***; and ***NTPC vs. Patel Engineering Ltd.: OMP (COMM) No.156/2018*** *(supra)*, which were rendered prior to the Supreme Court's decision in ***Jai Prakash Associates Ltd.-II,*** would no longer hold the field in so far as the question of pre-award interest is concerned.

65. Considering the above, the pre-award interest granted by the Arbitral Tribunal to PEL cannot be sustained. The same is prohibited by the terms of the Contract and thus the impugned award to that extent is liable to be set aside.

66. NTPC's contention that the impugned award is vitiated by patent illegality as the Arbitral Tribunal has failed to consider NTPC's letter dated 27.07.2011, is unpersuasive. The Arbitral Tribunal had found that NTPC had not allowed PEL to remove hypothecated machinery and also not taken any steps to dispose of the same in an open market and consequently, it was responsible for the deterioration and value of the said machinery. The Arbitral Tribunal also found that PEL could not shift the machinery to any other location without permission of NTPC

and by its letter dated 12.08.2011, NTPC had directed PEL to keep the machinery in question inside the tunnel. NTPC's letter dated 27.07.2011 has not been specifically noticed by the Arbitral Tribunal in the impugned order. However, that does not vitiate the impugned award. The Arbitral Tribunal is required to examine the disputes between the parties and it is not necessary for the Arbitral Tribunal to specifically refer to every document placed by parties on record or elide upon by them. It was PEL's case that it could not remove the machinery without permission of NTPC and such permission had been effectively denied. It had also applied for permission to remove the machinery but a decision in this regard was not forthcoming. The Arbitral Tribunal had accepted the said observation after evaluating the material available on record. Although, by a letter dated 27.07.2011, NTPC had permitted PEL to remove the machinery, but it had insisted that PEL also pay the guaranteed amount for the same. PEL contended that it was not liable to do so as the Contract in question had been terminated not on account of any fault on the part of PEL. PEL had thus, sought removal of the machinery without any condition and admittedly, the same was not permitted.

67. It is not necessary for the Arbitral Tribunal to specifically note all material placed before it in its award. As long as the Arbitral Tribunal has considered the dispute and has addressed the same, the arbitral award cannot be faulted with.

68. In view of the above, the petition is disposed of by setting aside the impugned award to the limited extent that it awards interest for the period prior to the date of the award. All pending applications are also disposed of.

VIBHU BAKHRU, J

OCTOBER 26, 2021
Gsr/RK