

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

+ **OMP No. 309/2005, Arb.P.No.112/2007 &
Ex.P.No.126/2005**

#M/s Ansal Properties & Industries Ltd.

..... Petitioner

! Through: Mr. Gaurav Sarin with Ms.Charu
Sarin, Advocates

Versus

\$Centre for Development of Telematics

.....Respondent

^ Through: Mr.J.C.Seth, Advocate

CORAM:-

* **HON'BLE MR. JUSTICE S.N. AGGARWAL**

1. Whether reporters of Local paper may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether the judgment should be reported in the Digest?

S.N.AGGARWAL, J (ORAL)

These are three petitions all arising out of dispute between the parties under a contract awarded by the respondent to the petitioner for construction of its main R & D Building at Chattarpur, Mehrauli Mandi Gaon Road, New Delhi. One of these three petitions is under Section 11 and the

second is under Section 9 of the Arbitration & Conciliation Act, 1996. The third petition is an execution petition which seeks to execute the arbitral award dated 19.2.2003 in favour of the petitioner that became final consequent upon dismissal of the objections of the respondents against the said award vide judgment dated 18.5.2005 passed by this Court in OMP No. 228/2003. The arbitral award dated 19.2.2003 which is sought to be executed is in the sum of Rs.1,32,27,137/- with interest at 9% p.a in favour of the petitioner.

The brief facts of the case giving rise to these three petitions are as follows.

The respondent had awarded a contract to the petitioner for construction of its main R & D Building at Chattarpur, Mehrauli Mandi Gaon Road, New Delhi. The contract was awarded on 18.2.1999. In terms of the contract, the work was to be completed by the petitioner within 30 months i.e by 18.8.2001. The work under the contract was actually completed by the petitioner on 31.3.2005. The contract between the parties provided for extension of time

and the relevant clauses in the contract relating to extension of time are Clauses 44.1 to 44.3 and the same are extracted below:

“44.1 Extension of Time for Completion

The work shall throughout the stipulated period of the Contract be proceeded with due diligence. If the works be delayed by:-

- i) force majeure or
- ii) abnormally bad weather, or
- iii) serious loss or damage by fire, or
- iv) civil commotion, local commotion of workmen, strike or lockout, affecting any of the trades employed on the Work, or
- v) delay on the part of other contractors or tradesmen engaged by the C-DOT in executing work not forming part of the Contract, or
- vi) non-availability of stores, which are the responsibility of the C-DOT to supply, if any, or
- vii) non-availability or break down of tools and plant to be supplied or supplied by the C-DOT, if any, or
- viii) any other cause which, in the absolute discretion of the C-DOT is beyond the Contractor's control

then upon the happening of any such event causing delay, the Contractor shall immediately give notice thereof in writing to

the Engineer, but shall nevertheless use constantly his best endeavours to prevent or make good the delay and shall do all that may be reasonably required to the satisfaction of the Engineer to proceed with the Work.

44.2 Request for Extension of Time

Request for extension of time, to be eligible for consideration, shall be made by the Contractor in writing within fourteen days of the happening of the event causing delay on the prescribed form to the Engineer under intimation to C-DOT. The Contractor may also, if practicable, indicate in such a request the period for which extension is desired.

44.3 Grant of Extension of Time

In any such case the C-DOT may give a fair and reasonable extension of time for completion of the Work. Such extension shall be communicated to the Contractor by the Engineer in writing within 3 months of the date of receipt of such request. Non application by the Contractor for extension of time shall not be a bar for giving a fair and reasonable extension by the C-DOT and this shall be binding on the Contractor.”

The contract also provides for compensation for delay in execution of the contract and the relevant clause in this regard is Clause 47.1 and the same is extracted below:

“47.1 Compensation For Delay

If the Contractor fails to maintain required progress in terms of the Contract or to complete the Work and fails to clear the Site

on or before the stipulated or extended date of completion, he shall, without prejudice to any other right or remedy of the C-DOT on account of such breach be liable to pay agreed compensation of an amount equal to 1/2% (Half percent) of the Contract Sum/Price or such smaller amount as the C-DOT may decide, for every week the progress remain below the agreed progress schedule or that the Work/phase remains incomplete. The decision of the C-DOT in writing shall be final and binding on the Contractor.

Provided always that the total amount of compensation for delay to be paid under this clause shall not exceed 10% (Ten Percent) of the Contract Sum of the Work or of the Contract Sum/Price of the item or group of items of work, as shown in the letter of acceptance, for which a separate period of completion is originally given.

The amount of compensation may be adjusted or set off against any sum payable to the Contractor under this or any other contract with the C-DOT.”

The contract between the parties further provides for arbitration in the event any dispute or difference may arise between them under the said contract. The relevant clause in this regard is Clause 67.1 and the same is extracted herein below:-

“67.1 Settlement of Disputes and Arbitration

Except where otherwise provided in the Contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the Work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the Contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the Work or the execution or failure to execute the same whether arising during the progress of the Work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:-

i) If the Contractor considers that he is entitled to any extra payment or compensation in respect of the works over and above the amounts admitted as payable by the C-DOT or in case the Contractor wants to dispute the validity of any deduction or recoveries made or proposed to be made from the Contract, the Contractor shall forthwith give notice in writing of his claim, in this behalf to the Engineer within 30 days from the date of disallowance thereto for which the Contractor claims such additional payment or compensation or disputes the validity of any deduction or recovery. The said notice shall give full particulars of the claim, grounds on which it is based and detailed calculations of the amount claimed and the Contractor shall not be entitled to raise any claim nor shall the C-DOT be in any way liable in respect of any claim by the Contractor unless notice of such claim shall have been given by the Contractor to the Engineer in the manner within the time as aforesaid. The Contractor

shall be deemed to have waived and extinguished all his rights in respect of any claims not notified to the Engineer in writing in the manner and within the time aforesaid.

ii) The Engineer shall give his decision in writing on the claims notified by the Contractor within 30 days of the receipt of the notice thereof. If the Contractor is not satisfied with the decision of the Engineer, the Contractor may within 15 days of the receipt of the decision of the Engineer submit his claims to the ED C-DOT for conciliation along with all details and copies of correspondence exchanged between him and the Engineer. The ED C-DOT shall appoint the Conciliator.

lii) If the conciliation proceedings are terminated without a settlement of the disputes, the Contractor shall, within a period of 30 days of termination thereof shall give a notice in the form prescribed by the C-DOT, to the ED C-DOT for appointment of an Arbitrator to adjudicate the notified claims, failing which the claims of the Contractor shall be deemed to have been considered absolutely barred and waived.

iv) Except where the decisions have become final, binding and conclusive in terms of the Contract, all disputes or differences arising out of the notified claims of the Contractor as aforesaid and all claims of the C-DOT shall be referred for adjudication through the arbitration by the Sole Arbitrator appointed by the ED C-DOT. If the Arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another Sole Arbitrator shall be appointed in the manner aforesaid by the ED C-DOT. Such person be entitled to proceed with

the reference from the stage at which it was left by his predecessor.

It is a term of the Contract that the party invoking arbitration shall give a list of the disputes with amounts claimed in respect of each dispute along with the notice for appointment of arbitrator.

It is also a term of the Contract that no person other than a person appointed by the ED C-DOT as aforesaid should act as an Arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of the Contract that the Arbitrator shall adjudicate on only such disputes as are referred to him by the ED C-DOT and give separate award against each dispute and claim referred to him. The Arbitrator shall give reasons for the award.

It is also a term of the Contract that if any fees are payable to the Arbitrator, these shall be paid equally by both the parties.

The Conciliation and Arbitration shall be conducted in accordance with the provision of the Arbitration and Conciliation Act 1996 or any statutory modifications re-enactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceeding under this clause."

Since the petitioner could not complete the work within the stipulated time period of 30 months, the petitioner applied for extension of time from time to time. The time was extended by the respondent upto 31.12.2003 without levy of

any damages or compensation for delay in execution of the work on the part of the contractor. However, the decision on the request of the petitioner for further extension of time beyond 31.12.2003 was kept pending by the respondent till the time the petitioner would complete the work under the contract.

Certain disputes had arisen between the parties under the contract even before the work was actually completed by the petitioner on 31.3.2005. The petitioner had made certain claims which were referred for arbitration in terms of Clause 67.1 referred above. The Arbitrator appointed by the respondent gave an award of Rs.1,32,27,137/- with interest at 9% p.a in favour of the petitioner (Contractor) on 19.2.2003. Aggrieved by the said award, the respondent filed objections under Section 34 of the Arbitration & Conciliation Act, 1996. Those objections were dismissed by this Court vide its judgment dated 18.5.2005 passed in OMP No. 228/2003 and thereby the interim award in favour of the petitioner being the Contractor had acquired finality.

Subsequent to the above referred interim award in favour of the petitioner acquired finality, the petitioner in the meanwhile, had completed the work under the contract on 31.3.2005. Thereafter, the respondent vide its decision taken on 2.8.2005 decided to extend the time for completion of work without levy of any damages till 20.7.2003 and thereafter up to 31.03.2005 subject to levy of compensation of 10% of the total contract value for delay on the part of the petitioner in execution of the work. On this decision being taken by the respondent, a communication dated 23.8.2005 (Annexure P-7 at Page 247 of the paper book) was sent by the respondent to the petitioner informing it that the respondent has decided to levy liquidated damages of Rs.3,67,89,063/- at 10% of the contract value in terms of Clause 47.1 of the contract. Vide said communication the petitioner was further informed that the respondent had decided to adjust the amount of interim award in favour of the petitioner amounting to Rs.1,53,10,807/- alongwith an amount of Rs.42 lacs allowed to it on account of escalation for the period upto 20.7.2003 as per Clause 70.1 of GCC. The petitioner was accordingly called upon to pay the

balance amount of Rs.1,72,78,256/- to the respondent by 2.9.2005 failing which the petitioner was informed that the said amount shall be recovered through encashment of bank guarantees furnished by the petitioner.

It was at this stage when the petitioner received the impugned communication dated 23.8.2005 from the respondent, the petitioner filed the petition under Section 9 of the Arbitration & Conciliation Act, 1996 being OMP No. 309/2005 for an injunction against the respondents that they should be restrained from encashing its bank guarantees as threatened vide their letter dated 23.8.2005. Before petition under Section 9 was filed, the petitioner had already filed an execution petition being Ex.P.No. 126/2005 for execution of the interim award dated 19.2.2003 in its favour. Later on, the petitioner also filed a third petition in April, 2007 under Section 11 of the Arbitration & Conciliation Act, 1996 seeking appointment of an Arbitrator for reference of the dispute pertaining to the levy of liquidated damages for delay in execution of the work levied by the respondent as

communicated to the petitioner vide communication dated 23.8.2005.

All the above petitions are taken up for hearing on board together because focal point that arise for consideration in all of them is whether the claim of the respondent to levy liquidated damages as communicated vide communication dated 23.8.2005 is final and binding on the petitioner and if so, whether it falls under the category of 'Excepted Matters' and is, therefore, no longer arbitrable. In case it is found that the levy of liquidated damages by the respondent falls under the category of 'Excepted Matters' and is thereby final and binding on the petitioner (Contractor), then in that event the respondent will be entitled to adjust the said amount by way of adjustment against the amount it is liable to pay to the petitioner in terms of interim award dated 19.2.2003. However, if it is found that the demand of the respondent for alleged liquidated damages does not fall in the category of 'Excepted Matters' then in that event the petitioner would be entitled for execution of the interim award dated 19.2.2003 and the

petitioner would further be entitled to an injunction order against the respondent restraining it from encashing the bank guarantees till the claim of the respondent for liquidated damages is decided by the Arbitrator under the contract.

Mr.Seth, learned counsel appearing on behalf of the respondent has vehemently argued that the decision of the respondent to levy liquidated damages against the petitioner is final and binding on the petitioner in terms of Clause 47.1 of the contract referred above. He has relied upon several judgments of the Supreme Court in ***Food Corporation of India vs. Surendra, Devendra & Mahendra reported in (2003) 4 SCC 80; G.M.Northern Railways vs. Sarvesh Chopra reported in AIR 2002 SC 1272 Union of India vs. J.N.Constructions, reported in 2003(3) Arb.LR 478 (Delhi) (DB), M/s H.M.Kamaluddin Ansari & Co. vs. Union of India & Ors., reported in (1983) 4 SCC 417, Sri Harsha Constructions, Hyderabad vs. Union of India & Ors. Reported in 2006(1) Arb.LR 308 (AP) (DB), Oil & Natural Gas Corporation Ltd. vs. SAW Pipes Ltd.,***

reported in 2003(2) Arb.LR 5 (SC), Vishwanath Sood vs. Union of India & Anr. Reported in AIR 1989 SC 952, Firm Ashok Traders and Anr.etc. vs. Gurumukh Das Saluja & Ors.etc. Reported in 2004(1) Arb.LR 141 (SC), Rajasthan State Mines & Minerals Ltd., vs. Eastern Engineering and Anr. Reported in AIR 1999 SC 3627, M/s Sundaram Finance Ltd., vs. M/s. NEPC India Ltd.reported in AIR 1999 SC 565, N.B.C.C Ltd. vs. IRCON International Ltd., reported in 1997 (Supp.) Arb.LR 512, Apple Finance Ltd., vs. Gayathri Sugar Complex Ltd. Reported in 2004(3) Arb.LR 379 (Madras) & Daewoo Motors India Ltd. vs. Union of India & Ors. Reported in (2003) 4 SCC 690. On the strength of these judgments Mr.Seth has argued that it would be a futile exercise to refer the matter relating to levy of liquidated damages for arbitration because the decision of the respondent thereon falls under the 'Excepted Matters' and is, therefore, final and binding on the Contractor being the petitioner herein. I do not consider it necessary to discuss all these judgments separately because there is no dispute about the legal proposition laid down therein that in case any claim

falls under the category of 'Excepted Matters' then the same cannot be referred for arbitration.

The question whether the claim of the respondent for liquidated damages falls under the category of 'Excepted Matters' or not is a question of fact and can best be decided only by reference to the terms of the agreement between the parties. In case upon interpretation of various clauses of the contract it is found that the matter relating to liquidated damages does not fall under the category of 'Excepted Matters' then the above referred judgments relied upon by Mr.Seth would be of no consequence.

Now, I proceed to examine the terms of the contract between the parties to ascertain whether the liquidated damages levied by the respondent vide its communication dated 23.8.2005 fall under the category of 'Excepted Matters' or not. Clause 44.3 of the contract between the parties is an enabling clause conferring a discretion upon the respondent to grant a fair and reasonable extension of time for completion of the work. According to clause 44.3 the respondent could have

extended the time either suo moto or on a request for such extension made by the Contractor. In case the request for extension of time was made by the Contractor (petitioner), then it was obligatory upon the respondent to have communicated its decision to the petitioner within three months of the date of receipt of such request. Admittedly, the time was extended by the respondent upto 31.12.2003 and the request of the petitioner for further extension of time was kept in abeyance till the time the petitioner would complete the project work.

Clause 67.1 of the contract between the parties provides for a scheme for settlement of dispute through arbitration. A perusal of Clause 67.1 referred above would show that it contains an inbuilt mechanism for resolution of dispute that may arise between the parties under the contract. As per the said clause, the Contractor in the first instance was required to send a notice of his claim to the engineer of the respondent and in case he was not satisfied with the decision of the engineer then he could have made a representation to

the ED C-DOT within 30 days of the decision of the engineer. In case the Contractor was still not satisfied with the decision of the engineer, he could have submitted his claim for conciliation to the ED C-DOT and in that event the ED C-DOT was required to appoint a Conciliator. It is provided in Clause 67.1 (iii) that if the conciliation proceedings were to terminate without settlement of the dispute, the Contractor could give a notice in the form prescribed within a period of 30 days of the termination thereof to the ED C-DOT for appointment of an Arbitrator to adjudicate the notified claims. Sub Clause (iv) of Clause 67.1 provides that all disputes and differences arising out of the notified claim of the Contractor and all claims of C-DOT except those matters on which the decision of the respondent was to be final, binding and conclusive were to be referred for adjudication by a Sole Arbitrator to be appointed by the ED C-DOT.

Whether the decision of the respondent to levy liquidated damages has become final or not has not been dealt with by Clause 67.1(iv) of the agreement. Mr. Seth has relied upon

Clause 47.1 to urge that the respondent was well within its right to levy compensation for delay on the part of the petitioner in completing the project on formula agreed upon between the parties as is mentioned in the said clause. I do not find any substance in this argument advanced by Mr.Seth appearing on behalf of the respondent. A plain reading of Clause 47.1 of the contract (at Page 95 of the paper book) would show that the right of the respondent to claim compensation for delay in execution of the project work could arise only on failure of the petitioner to complete the work and clear the site on or before the stipulated or extended time period. In this case the respondent had not taken any decision on the request of the petitioner for extension of time till the project work was completed on 31.3.2005. The respondent, on the other hand, had issued a provisional completion certificate to the petitioner on 24.5.2005 (Annexure P-4 at Page 201 of the paper book) and in column 10 thereof has assessed the performance of the Contractor as 'Good' and in Column 9 which deals with liquidated damages (if any), it is mentioned that extension of time case was under process. This document

of the respondent by itself would imply an admission on the part of the respondent that the request of the petitioner for extension of time was not finalised on the date the project work was completed by the petitioner on 31.3.2005.

After the petitioner had filed its execution petition and a petition under Section 9 of the Arbitration & Conciliation Act, 1996 (both of which were filed in 2005), a joint meeting had taken place between the representatives of both the parties on 7.7.2006 and in that meeting it was mutually agreed upon between the parties that the C-DOT shall release outstanding payments to the petitioner after the petitioner would submit unconditional bank guarantees for a total sum of Rs.3.67 crores to C-DOT. On the date this joint meeting was held between the representatives of the parties on 7.7.2006, the Bank Guarantees worth Rs. 3 crores furnished by the petitioner were already lying with the respondent and, therefore, it was agreed upon between the parties that the petitioner would furnish guarantees only for the balance amount of Rs.67 lacs. It was further agreed upon between the

parties on that date that the bank guarantees would be encashed by the respondent as per legal status of the matter i.e in accordance with the orders of this Court in this regard. The respondent had further assured the petitioner in its meeting held on 7.7.2006 that the required confirmation pertaining to extension of time for the period from 1.1.2004 to 31.3.2005 would be sent to the petitioner shortly. The minutes of the meeting that took place between the representatives of the parties on 7.7.2006 are at Page 22 of the case being Arbitration Application No. 112/2007.

The respondent sent its reply regarding minutes of the meeting that was held on 7.7.2006 to the petitioner vide its letter dated 25.8.2006 which is not disputed by the learned counsel appearing on behalf of the respondent. A perusal of the said letter of the respondent dated 25.8.2006 would show that the respondent even on 25.8.2006 had informed the petitioner that the details of extension of time could be finalised only after the work was completed. All this clearly shows that the respondent had not taken any decision on the

request of the petitioner regarding extension of time till the project work was completed on 31.3.2005. Had the respondent taken a decision on the request of the petitioner for extension of time one way or the other, then it would have enabled the petitioner to exhaust its remedy as provided to him in Clause 67.1 of the contract referred above. Now, the respondent cannot turn around and say that they have taken a decision to extend the time beyond 20.7.2003 upto 31.3.2005 subject to levy of liquidated damages. In the considered opinion of this Court the claim of the respondent for liquidated damages does not fall within the category of 'Excepted Matters' as provided in Clause 67.1 (iv) of the contract. The learned counsel for the respondent could not tell, when asked, whether there is any clause in the contract which entitles the respondent to levy damages as a condition for extension of time after the completion of the project work. The thrust of the argument of Mr.Seth appearing on behalf of the respondent is that the delay in completion of the project beyond 20.7.2003 for which damages have been levied is wholly attributable to the petitioner being the Contractor. The petitioner has denied the

same. This gives rise to a dispute between the parties as to whether the respondent is entitled to the damages for alleged delay or not. This dispute obviously has to be decided by some authority, whether by the Court or by the Arbitrator. In this case, the parties had mutually agreed to refer their disputes that may arise between them under the contract for decision of the Sole Arbitrator to be appointed by the respondent.

The petitioner has made certain claims against the respondent which the respondent has already referred to the Arbitrator vide its communication dated 8.11.2007 which has been placed on record. Since the claim of the petitioner has already been referred by the respondent for arbitration, it would be appropriate in case the respondent may also prefer its claim for liquidated damages before the same Arbitrator before whom the claims of the petitioner are pending for adjudication. Since the claim of the respondent for liquidated damages is yet to be adjudicated by the Arbitrator, it would be expedient and in the interest of justice to direct the petitioner to keep the bank guarantees alive till the decision by the

Arbitrator on the said claim of the respondent. Accordingly, the petitioner is hereby directed to keep the bank guarantees alive till the decision of dispute with regard to the claim of the respondent for liquidated damages is adjudicated by the Arbitrator. The respondent is directed not to encash the said bank guarantees without prior permission of the Court or till the decision of the Arbitrator, whichever is earlier. In the meanwhile, the respondent is directed to make payment of the amount in terms of the interim award dated 19.2.2003 to the petitioner within a period of four weeks from today.

In view of the above, all these petitions stand disposed of leaving the parties to bear their own costs.

January 10, 2008
mb

S.N.AGGARWAL
[JUDGE]