

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

+ **FAO(OS) 6/2008 & FAO(OS) 7/2008**

Date of Decision : February 16, 2009

1. **FAO(OS) 6/2008**

OIL & NATURAL GAS CORPORATION LIMITED Appellant
Through: Mr. Gourab Banerji, Sr. Advocate
with Mr. R.G. Srivastava,
Advocate.

versus

MITRA GUHA BUILDER (INDIA) COMPANY Respondent
Through: Mr. S.K. Taneja, Sr. Advocate
with Mr. S.S. Shastri & Mr. T.K.
Tiwari, Advocates

2. **FAO(OS) 7/2008**

OIL & NATURAL GAS CORPORATION LIMITED Appellant
Through: Mr. Gourab Banerji, Sr. Advocate
with Mr. R.G. Srivastava,
Advocate.

versus

MITRA GUHA BUILDER (INDIA) COMPANY Respondent
Through: Mr. S.K. Taneja, Sr. Advocate
with Mr. S.S. Shastri & Mr. T.K.
Tiwari, Advocates

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MR. JUSTICE VIPIN SANGHI

- | | |
|--|-----|
| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

%

JUDGMENT (Oral)

MUKUL MUDGAL, J.

1. These appeals challenge the common judgment of the learned Single Judge dated 02.11.2007 in OMP Nos. 358/2005 and 359/2005. The respondent M/s Mitra Guha Builder (India) Company were appointed as the contractor for the construction of multi storied residential flats for ONGC officers and employees in Sector-39, Noida, under two identical contracts dated 05.01.1996. The original stipulated date of completion of work was 21st August, 1997 in both the contracts. The works under the contracts were actually completed on 24th May, 1999. The total delay in completion of the work was 640 days. Out of 640 days, according to the appellant ONGC, the respondent was accountable and liable for 39 weeks delay i.e. 273 days and rest of the delay was on account of the appellant.
2. The disputes having arisen between the parties, Mr. Justice

P.K. Bahri (Retd.) was appointed as Arbitrator in terms of the Arbitration Agreement between the parties. The learned arbitrator allowed the claims of the respondent to the extent of Rs.69,36,252/- (corrected to Rs.66,36,252/- by the learned Single Judge) in the award relating to FAO(OS) No.6/2008 and Rs.58,11,164/- in the award relating to FAO (OS) No.7/2008. The learned arbitrator also awarded interest @ 10% p.a. from 01.07.2001 till payment in both the awards dated 01.07.2005. The learned Single Judge dismissed the objections preferred by the appellant to the two awards under Section 34 of the Act while converting the amount of the award in OMP No.358/2005 out of which FAO(OS) No.6/2008 arises.

3. The main plea raised by the learned senior counsel for the appellant Shri Gourab Banerji is with regard to the interpretation of Clause 2 which reads as follows:

“Clause 2: Compensation for Delay

The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be deemed to be the essence of the contract on the part of the contractor and shall be reckoned from the 15th day after the date on which the order to commence the work is issued to the contractor. The work shall throughout the stipulated period of the contract be proceeded with all due diligence and the contractor shall pay compensation on amount equal to $\frac{1}{2}$ % per week as the Superintending Engineer (whose decision in writing shall be final) may decide on the amount of the contract, value of the whole work as shown in the agreement, for every week that the work

remains uncommenced, or unfinished, after the proper dates. After further to ensure good progress during the execution of the work, the contractor shall be bound in all cases in which the time allowed for any work exceeds, one month (save the special jobs) to complete one-eighth of the work, before one-fourth of the whole time allowed under the contract has elapsed and three-eighths of the work, before one-half of such time has elapsed, and three-fourth of such the work, before three-fourth of such time has elapsed. However, for special jobs if a time schedule has been submitted by the contractor and the same has been accepted by the Engineer-in-Charge, the Contractor shall comply with the said time schedule. In the event of the contractor failing to comply with this condition, he shall be liable to pay as compensation an amount equal to $\frac{1}{2}$ % per week as the Superintending Engineer (whose decision in writing shall be final) may decide on the said contract value if the whole work for every week that the due quantity of works remains incomplete provided always that the entire amount of compensation to be paid under the provisions of the clause shall not exceed ten per cent (10%) of the tendered cost of the work as shown in the tender."

4. Learned senior counsel for the appellant submits that the decision of the Superintending Engineer to levy liquidated damages under Clause 2 being final, the same was an "*excepted matter*" not falling within the jurisdiction of the arbitrator to adjudicate upon. It is argued that the aforesaid Clause is *para materia* with Clause 2 of standard contracts of DDA/PWD which have received the attention of the Hon'ble Supreme Court and this Court in judgments titled as ***Vishwanath Sood v. Union of India and Another*** (1989) 1 SCC

657 and **DDA v. Sudhir Brothers** 57 (1995) DLT 474 (DB) and various other decisions.

5. The counsel for the appellant has thus submitted that the expression "*whose decision in writing shall be final*" has to be given its true meaning. As construed by the Hon'ble Supreme Court and the Division Bench of this Court in the aforesaid decisions, any claim covered by such a Clause would not be arbitrable.

6. He further submits that the Arbitrator has wrongly concluded without giving any reasons, that this levy of liquidated damages under the agreement amounted to penalty. The finding of the Arbitrator that no plea was taken by the appellant of suffering any loss due to the delayed completion of contract is belied by the pleadings, where such plea has specifically been taken in Para 49. He has relied upon the following pleading before the Arbitrator to contend that such a finding of the Arbitrator is totally contrary to the record:

"It is further submitted that the entire project was delayed by the claimant without any justified reasons and the respondent had to incur huge expenditure in providing residential accommodation to its officers and employees and had to face hardships and difficulties.

As stated, it is a case of liability of the claimant to compensate the respondent by a pre-estimated amount of damages in the case of delay, defaults, and breaches committed by the claimant."

7. Mr. Taneja, on the other hand submitted that the Claim for liquidated damages was delayed and was only a counter blast to the petitioner's Claim.

8. In ***Vishwanath Sood*** (Supra) decision, the law laid down is as follows:

"8. Clause 2 of the contract makes the time specified for the performance of the contract a matter of essence and emphasizes the need on the part of the contractor to scrupulously adhere to the time schedule approved by the Engineer-in-charge. With a view to compel the contractor to adhere to this time schedule, this clause provides a kind of penalty in the form of a compensation to the Department for default in adhering to the time schedule. The clause envisages an amount of compensation calculated as a percentage of the estimated cost of the whole work on the basis of the number of days for which the work remains uncommenced or unfinished to the prescribed extent on the relevant dates. We do not agree with the counsel for the respondent that this is in the nature of an automatic levy to be made by the Engineer-in-charge based on the number of days of delay and the estimated amount of work. Firstly, the reference in the clause to the requirement that the work shall throughout the stipulated period of the contract be proceeded *with due diligence* and the reference in the latter part of the clause that the compensation has to be paid "in the event of the contractor *failing* to comply with" the prescribed time schedule make it clear that the levy of compensation is conditioned on some default or negligence on the part of the contractor. Secondly, while the clause fixes the rate of compensation at 1 per cent for every day of default it takes care to prescribe the maximum compensation of 10 per cent on this ground and it

also provides for a discretion to the Superintending Engineer to reduce the rate of penalty from 1 per cent. Though the clause does not specifically say so, it is clear that any moderation that may be done by the Superintending Engineer would depend upon the circumstances, the nature and periods of default and the degree of negligence or default that could be attributed to the contractor. This means that the Superintending Engineer, in determining the rate of compensation chargeable, will have to go into all the aspects and determine whether there is any negligence on the part of the contractor or not. Where there has been no negligence on the part of the contractor or where on account of various extraneous circumstances referred to by the Division Bench such as *vis major* or default on the part of the Government or some other unexpected circumstance which does not justify penalising the contractor, the Superintending Engineer will be entitled and bound to reduce or even waive the compensation. It is true that the clause does not in terms provide for any notice to the contractor by the Superintending Engineer. But it will be appreciated that in practice the amount of compensation will be initially levied by the Engineer-in-charge and the Superintending Engineer comes into the picture only as some sort of revisional or appellate authority to whom the contractor appeals for redress. **As we see it, Clause 2 contains a complete machinery for determination of the compensation which can be claimed by the Government on the ground of delay on the part of the contractor in completing the contract as per the time schedule agreed between the parties. The decision of the Superintending Engineer, it seems to us, is in the nature of a considered decision which he has to arrive at after considering the various mitigating circumstances that may be pleaded by the contractor or his plea that he is not liable to pay compensation at all under this clause. In our opinion the question regarding the amount of compensation leviable under**

Clause 2 has to be decided only by the Superintending Engineer and no one else.”
(emphasis supplied)

9. In ***Sudhir Brothers*** (supra) the law laid down is as follows:

“4. Our attention has been drawn to the arbitration clause and also the relevant clause which relates to exclusion of certain matters from the purview of arbitration. The relevant clause 2 in the arbitration agreement deals with the question of compensation and directs that the concerned engineer should decide this question and his decision is final. The arbitration clause opens with the words "Unless otherwise provided". In view of this language, it is obvious from the decision of the Supreme Court in Vishwanath Sood v. Union of India and another (AIR 1989 S.C. 952) that the Arbitrator could not have gone into the merits of the levy of compensation by the engineer. In that view of the matter, the D.D.A. ought not to have requested the Arbitrator to include the said amount in the arbitration award. We are told by the counsel for the appellant/D.D.A. the Arbitrator was in fact informed that he could not go into the matter on merits. In any event, the D.D.A. committed a blunder in requesting the Arbitrator to formally include the above said amount as part of the award. Taking advantage of the said request, the contractor argued the question of levy on merits and obtained a decision from the Arbitrator in his favor.

5. We, therefore, find that the entire procedure adopted by both the parties was totally unwarranted. If the D.D.A. considered that it was entitled to the recovery of Rs.5,69,473/- outside the arbitration, it could have taken such steps as it thought necessary instead of asking the Arbitrator to include the said amount in the award. The contractor was also wrong in taking

advantage of the same and asking the Arbitrator to give a finding on the merits of the claim. The Arbitrator acted totally without jurisdiction in going into the said question and deleting the said item of counter claim for Rs.5,69,473/- and holding that the contractor not liable for payment of compensation. That was not within the power of the Arbitrator. In view of the said unfortunate events, we have no option but to set aside that part of the award of the Arbitrator wherein he has gone into the merits of the decision of the Superintending Engineer and had come to the conclusion that the sum of Rs.5,69,743/- was not payable by the contract. The validity of the levy of compensation is, therefore, taken out from the award.

6. It will, therefore, be for the D.D.A. to seek to recover the said amount of Rs.5,69,743/- in whatever manner it is open to it and in case any such proceedings are taken, it will be open to the contractor to raise all defenses that may be open to him in law to contend that the levy is bad. In case, the D.D.A. seeks to recover the said amount of compensation from the contractor it will be open to the contractor to file a suit and raise all such contentions as he may deem it. We make it clear that the question of limitation will not be raised by either of the parties, in view of the above unfortunate procedure adopted by both parties."

10. From the proposition of law laid down in the aforesaid judgments, it is clear that the dispute regarding the validity of levy of liquidated damages was held to be not arbitrable, and the decision of the Superintending Engineer in accordance with the formula prescribed in Clause 2 was held as being incapable of being challenge in arbitration for the reason that that decision, according

to the agreement between the parties, was agreed to be treated as final and even the arbitration agreement opened with the words “unless otherwise provided.....”. In the present case the first aspect of the decision of the S.E. being final is present, but the second aspect is missing. The arbitration agreement between the parties reads:

“CLAUSE 25 – Settlement of disputes by Arbitration

If any dispute, difference, question or disagreement shall, at any time, hereafter arises between the parties hereto or the respective representatives or assigns in connection with or arising out of the contract, or in respect of meaning of specifications, design, drawings, estimates, schedules, annexures, orders, instructions, the construction, interpretation of this agreement, application of provisions thereof or anything hereunder containing or arising hereunder or as to rights, liabilities or duties of the said parties hereunder or arising hereunder any matter whatsoever incidental to this contract or otherwise concerning the works of execution or failure to execute the same whether during the progress of work or stipulated/extended period or before or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by a Director of O.N.G.C. Ltd at the time of dispute. There will be no objection to any such appointment that the arbitrator so appointed is an employee of O.N.G.C. Ltd. or that he had to deal with the matters to which the contract relates and that in the course of his duties as O.N.G.C. Ltd employees, he had expressed views on all or any of the matters in dispute or difference.

If the arbitrator to whom the matter is

originally referred dies or refuses to act or resigns for any reason from the position of arbitrator, it shall be lawful for the Director of O.N.G.C. Ltd. to appoint another person to act as arbitrator in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor if both the parties consent to this effect, failing which the arbitrator will be entitled to proceed de-novo.

It is further a term of this contract that no person other than the person appointed by a Director of the Corporation as aforesaid shall act as arbitrator and that, if for any reason that is not possible, the matter is not to be referred to the arbitration at all.

The arbitrator(s) may, from time to time, with the written consent of all the parties to the consent to the contract enlarge the time for making and publishing the award.

It is a term of contract that the party invoking arbitration shall specify the dispute to be referred to arbitration under the clause.

It is also a term of the contract that the contractor shall not stop the work under this contract and the work shall continue as expected to continue whether the arbitration proceedings have commenced or not.

The arbitrator shall be deemed to have entered on the reference on the date of the issue of notice by him to both the parties for filing of the claims.

The arbitrator shall give reasoned award in respect of each dispute or difference referred to him. The award so aforesaid shall be final and binding on all the parties to this contract in accordance with the law.

It is also a term of the contract that if the contractor(s) do/does not make any demand for arbitration in respect of any claim(s) in

writing within 90 days of receiving the intimation from the Corporation that the bill is ready for payment, the claim of the contractor(s) will be deemed to have been waived and absolutely barred and the Corporation shall be discharged and released of all liabilities under the contract in respect of these claims.

The decision of the Superintending Engineer regarding the quantum of reduction as well as his justification in respect of reduced rates for sub-standard work, which may be decided to be accepted, will be final and would not be open to arbitration.

The venue of the arbitration shall be in Delhi.

Subject as aforesaid, the provision of Indian Arbitration Act, 1940 and any statutory modification or re-enactments thereof and rules made thereunder and for the time being, in force shall apply to the arbitration proceedings under this clause.”

11. What needs to be considered is, whether the issue of levy of liquidated damages can be considered to be an “excepted matter” in these circumstances.

12. Once the agreement provided that the decision of the S.E. on the question of levy of liquidated damages is final, it meant that the same could not have been agitated in an arbitration proceeding. This is so, because what is agreed to be final and binding cannot give rise to an arbitrable dispute. The existence of an arbitrable dispute is the *sine-qua-non* for the invocation of arbitration. Otherwise, the agreement that the decision of the S.E. shall be final

would have no meaning. The parties have consciously provided that the decision of the S.E. shall be final only to exclude the said issue from the scope of arbitration. The intention of the parties to exclude some of the decisions of the S.E. from the scope of arbitration is clearly visible from the sub-Clause which reads:

“The decision of the Superintending Engineer regarding the quantum of reduction as well as his justification in respect of reduced rates for sub-standard work, which may be decided to be accepted, will be final and would not be open to arbitration.”

13. That, however, cannot mean that the decision of the Superintending Engineer cannot be challenged altogether and that the contractor is remediless against the decision of the S.E. It has been held in ***State of U.P. v. Tipper Chand*** (1980) 2 SCC 341 which is followed in ***Bharat Bhushan Bansal v. U.P. Small Industries Corporation Ltd. Kanpur***, (1999) 2 SCC 166 that such a determination by the S.E. cannot be said to be a judicial or quasi-judicial adjudication. That being the position, the decision of the S.E., though not being open to challenge in arbitration, the same would be open to challenge in a civil suit. That is also the ratio of ***Sudhir Brothers*** (supra). Thus, if liquidated damages are levied by the Superintending Engineer, his decision could be challenged in appropriate civil proceedings but not in arbitration proceedings.

14. The arbitrator dealt with the aforesaid Claim of the

appellant in para 48 of the Award passed in arbitration case No.297/2002 and similarly in para 46 of the Award passed in arbitration case No.297A/2002 in the aforesaid terms:

“48. It is significant to mention that the respondent did not impose any penalty during the period the contract was being performed. Although the respondent has been in correspondence threatening to impose penalty under clause 2 of the contract yet it did not deem it fit to impose any penalty till much after the contract has been completed. It kept the matter in suspense by not extending the period of the contract and it rather accepted the fact that the contract had been satisfactorily performed. I have already given a finding that the respondent was responsible for delay to a large extent. Thus the respondent could not have legally imposed any penalty on the claimant for delay occurring in execution of the contract. The respondent chose to impose penalty only vide letter dated 15.5.2001 (R-56). This was quite a belated action on the part of the respondent.

49. The case of ONGC V Saw Pipes Ltd. JT 2003 (4) SC 171 relied upon by the learned counsel for the respondent is not at all applicable to the facts of the present case. Firstly in the cited case the delay was imputable to the contractor whereas that is not the case here. In the cited case the clause for imposing liquidated damages for delayed performance was a pre-estimate of the loss presumed to be suffered due to delayed performance. In the present case, the clause 2 is not for imposing any liquidated damages of such nature. This judgment itself shows that in case a clause is penal in nature then the loss must be proved for recovering any penalty. In the

present case no plea is taken that the respondent suffered any loss due to delayed completion of the contract.”

15. Whether there was delay in levy of liquidated damages or not, could not have been determined by the arbitrator, and the determination of the issue whether the decision of the Superintending Engineer under Clause 2 constituted an excepted matter or not, had no correlation with the justification of the levy of liquidated damages.

16. From paras 27 and 28 of the Award made in Arbitration Case No.297/2002 (and paras 26 and 27 of the Award made in case No.297A/2002), it is clear that vide letters dated 08.12.99, 09.12.99, 17.12.99, 11.02.2000 and 17.04.2000 the appellant called upon the respondent/contractor to remove the defects failing which it would get the defects remedied at his cost. The Arbitrator in fact, recorded a finding in para 28 that the respondent contractor was also responsible for prolongation of the contract.

17. Having considered the fact that it was the appellant who first gave notices to rectify the defects and thereafter gave a notice to levy liquidated damages on 15.05.2001, followed by a letter to the respondent that the final bill was ready, and the respondent was required to reconcile the final bill to ensure the settlement of the account, it cannot be said that Liquidated Damages were imposed a counter blast to the respondent's claim. The claim before the

learned arbitrator was filed in 07.09.2001. Thus, it could not have been concluded that the raising of the claim for liquidated damages was an afterthought. In any event, the learned Arbitrator had no jurisdiction to rule on the aspects of legality or justification for the levy of liquidated damages.

18. The Learned Single Judge in respect of the aforesaid plea observed:

“I find that no part of the objections of the petitioner fall within the ambit of the aforesaid description as given in Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd (Supra). The award is in accordance with the settled legal position. The petitioner cannot deny the liability to make payment by adjusting admitted amounts against the alleged damages/penalty when a substantive part of the delay is found attributable to the petitioner and there is a smaller part of the delay attributable to the respondent. In fact, if calculation had been made of damages on a daily basis for delay, amount payable to the respondent would have been more than that payable by the respondent as the delay on the part of the petitioner is of 367 days and on the part of the respondent is of 273 days.”)

19. The learned single Judge was, it appears, swayed by the fact that the total delay was 640 days out of which the period of 273 days was attributable to the respondent and 367 days was attributed to the appellant. What appears to have escaped the attention of the learned single Judge is the fact that the Arbitrator

rejected the Claim of the respondent/ contractor for damages on account of non issuance of the notice, and that finding had not been challenged by the respondent either before the Learned Single Judge or before us.

20. The learned arbitrator has given no justification whatsoever for concluding that Clause 2 was a clause permitting levy of penalty, which is impermissible in law, and not a clause levying liquidated damages being a pre-estimate of damages. The mere absence of a recital in the clause of the agreement to the effect that the parties agree that the liquidated damages are genuine pre-estimate, would not lead to the conclusion that the parties have provided for levy of penalty and not liquidated damages. In our view, the reasoning adopted by the Supreme Court in **ONGC v. SAW Pipes** JT 2003 (4) SC 171 was applicable in the facts of this case and the learned Single Judge has wrongly disregarded the same.

21. Accordingly we are satisfied with the award of the Arbitrator to the extent of Claim no. 6 and Counter Claim cannot be sustained and to that extent the finding of the Learned Single Judge is set aside and the rest of the judgment is upheld.

22. Having taken into account the facts of the case which indicate that a large part of the delay was attributable to the

appellant, we are satisfied that while setting aside the award on Claim No.6 and Counter Claim, the respondent be directed to refund only the principal amount covered by claim No.6 and the counter claim to the appellant not later than 06.04.2009 in respect of each of the awards. However, if the amount is not refunded within the prescribed period, the amount shall be refunded with interest at the rate of 10 per cent per annum which was prescribed by the Arbitrator and upheld by the Learned Single Judge.

Appeals stand disposed off.

MUKUL MUDGAL, J.

VIPIN SANGHI, J.

FEBRUARY 16, 2009
dp