

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

% **Judgment reserved on: 12.02.2009**
Judgment delivered on: 16.03.2009

+ **EFA(OS)No.9 OF 2008, FAO(OS) 106 OF 2008 & FAO(OS) 107 OF 2008**

M/s. Centre for Development of
Telematics (C-DOT)

..... Appellant

Through: Mr. P. P. Malhotra, Additional
Solicitor General with Mr. J. C. Seth,
Advocate

versus

Ansal Properties & Infrastructure Ltd.(APIL) Respondent

Through: Mr. Gaurav Sarin, Advocate with
MS. Charul Sarin and MS. Supriya
Juneja, Advocates.

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL
HON'BLE MR. JUSTICE VIPIN SANGHI

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

VIPIN SANGHI, J.

1. The present appeals arises out of a common judgment delivered by the Learned Single Judge in three different proceedings initiated by the respondent viz:

- (i) **EFA(OS) No.9/2008** arises out of **Execution Petition No. 126/2005** (filed by the respondent to execute interim award dated

19.02.2003 made by the Arbitrator in favour of the respondent for an amount of Rs. 1,32,27,137/- along with interest at the rate of 9% per annum in respect of which the petition preferred by the appellant under Section 34 of the Act were dismissed by a Ld. Single Judge of this Court on 18.05.2005 in OMP No. 228/2003).

(ii) **FA(OS) No.107/2008** arises out of **OMP. No.309/2005** (U/s. 9 of the Arbitration & Conciliation Act (hereinafter called "The Act") to seek an injunction against the appellants to restrain them from encashing the Bank Guarantees furnished at the behest of the respondent in terms of their communication dated 23.08.2005);

(iii) **FAO(OS) No.106/2008** arises out of **Arbitration Petition No. 112/2007** (U/s. 11 of The Act seeking appointment of an Arbitrator for reference of the dispute pertaining to levy liquidated damages for delay in execution of the work, levied by the appellant, as communicated to the respondent vide communication dated 23.08.2005), and;

2. All the aforesaid proceedings arose out of disputes between the parties in respect of a contract awarded by the appellant to the respondent for construction of its main R&D building at Chhatarpur Mehrauli, Mandi Gaon Road, New Delhi. The contract was awarded on 18.02.1999. The work had to be completed by the respondent within 30 months i.e. by 10.08.2001. However, the work was provisionally certified as having been completed by the respondent only on

31.03.2005. The contract provided for extension of time in Clauses 44.1 to 44.3. The same read as follows:

“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 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 endeavors 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.

44.3 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.”

3. The contract also provided for compensation for delay in execution of the contract by the Contractor / respondent in Clause 47.1 which reads as follows:

“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 ½ % (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.”
(emphasis supplied)

4. The contract contained an arbitration agreement in Clause 67.1 which reads as follows:

“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.

iii) 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 bared 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 the 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 for the time being in force shall apply to the arbitration proceeding under this clause.” (emphasis supplied)

5. The respondent applied for extension of time on various occasions. The appellant extended the time up to 31.12.2003 provisionally. (We find that the learned Single Judge erroneously recorded that extension of time had been granted upto 31.12.2003 without levy of any damages or compensation for delay in execution of the work on the part of the contractor. In fact a perusal of the extension letters placed as Annexure-6 to Annexure-10 in FAO(OS) 107/2008 shows that on each occasion when the time was extended, it was stated by the appellant that the same was being extended without prejudice to the rights of C-DOT to recover compensation for delay in accordance with the provisions of Clause 47.1 of the agreement. From the correspondence and the averments on record it is clear that the extension of time upto 31.12.2003 granted by the appellant was only provisional). The decision on the request of the respondent for further extension of time beyond 31.12.2003 was kept pending by the appellant till the time the respondent completed the work under the contract.

6. During the currency of the work certain disputes arose between the parties. On the request of the respondent/contractor, these disputes were referred to arbitration in terms of the aforesaid

arbitration agreement. The Arbitrator gave his award of Rs. 1,32,27,137/- with interest at the rate of 9% per annum in favour of the respondent on 19.02.2003. As aforesaid, petition to challenge the said award at the behest of the appellant, under Section 34 of the Act was dismissed by this Court on 18.05.2005 in OMP No. 228/2003. The appellant did not prefer any further appeal and consequently the award dated 19.02.2003 became executable. The respondent filed Ex. P. No.126/2005 to seek execution of the interim award. In the meantime, it appears that the work under the contract was certified to be provisionally completed by the respondent on 31.03.2005 vide certificate issued on 24.05.2008. The undated "provisional completion certificate" issued by the appellant on 24.05.2005, *inter alia*, stated:

"5. Actual date of completion:

- 5.1 Site clearance – 09.08.1999
- 5.2 Basement completion – 30.06.2000
- 5.3 Entire structure – 15.12.2004
- 5.4 Balance work – 31.03.2005

6. Contract Value: Rs.36,78,90,630.00

7. Completion Cost: Final Bill under Process

8. Status of Defect Liability Period: Defect liability period is up to 30.03.2006, Copies of provisional defect lists forwarded to APIL is enclosed and are being attended by APIL (folio no.1 to 45). The integrated complete fire fighting system has to be demonstrated by APIL to C-DOT, the demonstration is to be given as per mutual agreement between C-DOT, APIL & BMS contractor.

9. Liquidated damages (if any): Extension of Time case under process

10. Performance of Contractor: Good"

7. The appellant communicated its decision in writing to the respondent on 23.08.2005 to levy liquidated damages of Rs.3,67,89,063/- (i.e. 10 % of the contract value) in terms of Clause 47.1 of the contract. It was further communicated that the appellant had decided to adjust the amount of interim award in favour of the respondent amounting to Rs.1,53,10,807/- (i.e. Rs. 1,32,27,137/- along with accrued interest thereon), and an amount of Rs. 42 lacs due to the respondent towards escalation, over and above the payment for escalation already made for the period up to 20.07.2003 as per Clause 70.1 of the General Conditions of Contract. After adjusting the aforesaid amounts, the respondent was called upon to make payment of the balance amount of Rs. 1,72,78,256/- failing which, the respondent was informed that the amount shall be recovered by encashing the Bank Guarantees furnished by the respondent.

8. Consequently, the respondent preferred the aforesaid OMP No.309/2005 under Section 9 of the Act to seek an injunction against the appellants to restrain them from encashing the bank guarantees, furnished by the respondent, in terms of their communication dated 23.08.2005. In April, 2007 the respondent also filed the aforesaid arbitration petition No.112/2007 under Section 11 of the Act to seek appointment of an arbitrator to refer the dispute pertaining to levy of liquidated damages for delay in execution of the work levied by the appellant (as communicated vide communication dated 23.08.2005) to arbitration.

9. The learned Single Judge, as aforesaid, has dealt with all these proceedings by the common impugned judgment. The learned Single Judge observed that the focal point which arose for consideration before him in all these cases was whether the issue of levy of liquidated damages, as communicated vide communication dated 23.08.2005, is final and binding on the respondent and whether the same falls in the category of “*excepted matters*” and is, therefore, not arbitrable. The learned Single Judge observed:

“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.”

10. The learned Single Judge further observed that the question whether the issue of levy of liquidated damages falls under the category of “*excepted matters*” or not, has to be decided by reference to the terms of agreement between the parties. He proceeded to hold that the dispute pertaining to levy of liquidated damages did not constitute an “*excepted matter*” and, on that basis proceeded to pass the impugned order, thereby: (i) restraining the encashment of the

Performance Bank Guarantee furnished by the respondent; (ii) referring the dispute with regard to levy of liquidated damages to arbitration, and; (iii) directed the appellant to make payment of the amount covered by the decree arising out of the interim award dated 19.02.2003 to the respondent within four weeks.

11. The submission of learned counsel for the appellant is that the learned Single Judge wrongly concluded that the determination of liquidated damages under Clause 47.1 is not an "*excepted matter*" and is arbitrable under the arbitration agreement contained in Clause 67.1 of the agreement between the parties. He submits that learned Single Judge gravely erred in construing the aforesaid clauses of the agreement by taking into account the fact that the work under the contract was provisionally completed on 31.03.2005; the provisional completion certificate was issued by the appellant on 24.05.2005 assessing the performance of the respondent as "good" and; the fact that the liquidated damages were imposed by the appellant only on 23.08.2005 i.e. after the dismissal of the objections preferred by the appellant against the interim award on 18.05.2005 in OMP No.228/2003.

12. On the other hand, learned counsel for the respondent supports the judgment of the learned Single Judge by submitting that the levy of liquidated damages was a patently calculated move to defeat and delay the execution of the interim award made by the arbitrator in favour of the respondent, against which the objections had

also been dismissed by this Court and which had attained finality. He submits that there was no reason for the appellant to have kept the decision with regard to grant of extension of time pending till after the completion of the work on 31.03.2005, and the timing of the levy of the so-called liquidated damages clearly demonstrates the *malafides* of the appellant.

13. Having heard learned counsel for the parties and having perused the decision of the learned Single Judge, the record of the case including the record before the learned single Judge in the aforesaid proceedings, we are of the opinion that the view taken by the learned Single Judge with regard to the interpretation of the aforesaid clauses of the agreement is unsustainable and the same cannot be upheld.

14. As noticed hereinabove, the respondent applied for extension of time on various occasions since the work was not completed by the contractually fixed date i.e. by 10.08.2001. Time was provisionally extended upto 31.12.2003. The decision on the request of the respondent for further extension of time beyond 31.12.2003 was kept pending by the appellants till the works under the contracts were completed. According to the appellant, this course of action was mutually decided by the parties in a meeting held on 18.02.2004. The appellant refers to the minutes of this meeting contained in a letter dated 19.2.2004. In this communication, the appellant, *inter alia*, recorded:

*“Shri Ansal requested for sanction of extension of time, release of payments of escalation and early payment of bills. **C-DOT clarified that due to the failure of all the previous targets committed before the C-DOT Board by M/s. APIL on various occasions, M/s. APIL were already informed that the case of extension of time would be decided only after the completion of the work. The same was accepted by M/s. APIL.**”*(emphasis supplied).

15. These averments of the appellant, and the communication dated 19.2.2004 of the appellant have remained uncontroverted. The appellant, in its I.A. No. 7373/2005 (under Order XXXIX Rule 4 CPC), filed in OMP No.309/2005 for vacation of the ex-parte stay granted on 01.09.2005, had specifically referred to the aforesaid communication dated 19.2.2004 to say that it had been agreed between the parties that the application for extension of time beyond 31.12.2003 shall be considered only after final completion of the work. In reply to the corresponding para 5(ii) of the said application, the respondent did not deny the factum of the said agreement having been arrived at in the meeting held on 18.2.2004, and did not deny the appellant's letter dated 19.2.2004. Pertinently, the respondent did not put the appellant to notice, that on account of the request for extension of time for completion of work not being decided in terms of Clause 44.3, the appellant would not be entitled to levy liquidated damages for the period beyond 31.12.2003.

16. In the light of the aforesaid uncontroverted correspondence, the requirement that the extension of time application made by the contractor has to be decided within three months of the same being

made, as stipulated in clause 44.3 of the agreement, could not be said to be a mandatory requirement, the breach whereof would relieve the respondent contractor of its obligation to pay liquidated damages for the delayed period, if the contractor was found to be responsible for the said delay and the appellant C-DOT suffered some damage. The learned single Judge has not even dealt with the stand of the appellant as aforesaid, and his conclusion is conditioned on the premise that the extension of time application was decided only after the provisional completion of the work.

17. The issue whether the levy of liquidated damages under Clause 47.1 constituted an “*excepted matter*” or not, in our view had to be determined on a plain reading of the agreement itself, and the approach adopted by the learned Single Judge in seeking to construe the meaning of the clauses of the agreement in the light of the fact that liquidated damages were sought to be levied after provisional date of completion of the contract cannot be appreciated. In our view, the fact that the application for extension of time was decided after the provisional completion of the works under the contract had no bearing on the interpretation of the relevant clauses.

18. A perusal of Clause 47.1 would show that the same does not require that the decision on the respondent’s application for extension of time and on the issue of liquidated damages for delay in completion of the work has to be decided upon and communicated to the contractor before actual date of completion of the work. To us it

appears natural that only after the works under the contract are completed the employer, after taking into consideration the relevant facts and circumstances, makes a determination on the aspect as to who is responsible for the delay i.e. whether it is the contractor or the employer, and to what extent. The question of levy of liquidated damages could be considered either simultaneously or soon after the decision on the said issue. This is what has been done in the facts of the present case by the appellant. Admittedly the contractual date of completion was 10.08.2001. The respondent had been granted provisional extension upto 31.12.2003. It was the categorical case of the appellant before the learned single Judge that the respondent applied for extension of time on 7.6.2005, i.e. after the provisional completion of the work on 31.03.2005. This request was considered by the Board of Directors of C-DOT on 2.8.2005, who decided to grant extension of time, on the advice of the consultants M/s. RITES Ltd. upto 20.07.2003 without compensation, and to levy liquidated damages @ 10% of the contract price for the period of delay from 21.07.2003 to 31.3.2005. The appellant also sought to justify levy of liquidated damages by stating that it had incurred rental charges of Rs. 3,57,93,450/- for the premises taken on rent due to the building in question not being complete.

19. We find that in compliance of the order dated 26.9.2005 passed in OMP No.309/2005, the appellant had placed on record the notings on the file leading upto the decision of the Board of Directors held on 2.8.2005. From these notings it appears that on the

application of the respondent dated 07.06.2005 seeking extension of time, the GM(Campus) made the following notings on 22.6.2005:

“In view of the letter dated 7th June, 2005 from M/s. APIL for extension of time and the recommendations thereupon, dated 21st June, 2005 from M/s. RITES, the following are the facts:

i. The work of M/s. APIL has been declared to be provisionally completed on 31st March, 2005. The minor repair works are going on. A certificate to this effect has been issued to them on 24th May, 2005.

ii. They should be given extension of time upto 31st March, 2005 since a provisional certificate that the work has been provisionally completed on that date has been issued to them.

iii. According to the conditions of the contract, this decision has to be taken at a different level. My recommendations are to levy 10% (ten percent) (of the agreement amount) compensation because C-DOT had to pay a huge amount on account of house rent due to the delay of M/s. APIL for which the details are available with Finance wing.”

20. The Executive Director made the next noting on the file on 02.08.2005, which recorded that the Directors discussed the application of the respondent dated 07.06.2005, and desired to know the impact of Clause 2 as noted in the noting by GM(Campus) quoted above. The G.M.(Campus) responded on the same day stating that except for the effect mentioned in his noting, there would be no additional impact on escalation on account of extension of time upto 31.3.2005. On 2.8.2005 itself the Directors, namely, Director (TD-2), Director(TD-1) and the Executive Director made the following notings:

“The recommendations of GM(Campus) in respect of the prayers of M/s. APIL regarding the following issues:

- (a) Extension of time
- (b) Cost escalation
- (c) Compensation for delay

is accepted by C-DOT Board. The total dues of M/s. APIL, in light of the decision of the Board, may be decided.

<i>SD/-</i>	<i>SD/-</i>	<i>SD/-</i>
<i>Director(TD-2)</i>	<i>Director(TD-1)</i>	<i>Executive Director</i>
<i>02.08.2005</i>	<i>02.08.2005</i>	<i>02.08.2005"</i>

21. From the above it is seen that C-DOT first considered the aspect of grant of extension of time and granted the same upto 20.7.2003 without levy of compensation. The C-DOT had, on its record, the computation of rents paid for the premises taken on rent because of non-completion of the building in question by the respondent, and on that basis proceeded to decide the aspect of levy of liquidated damages of 10% of the contract price.

22. We also find on record, a letter dated 4.8.2005 contemporaneously issued by the appellant to the Consultant, M/s. RITES Ltd on the subject of "Extension of time/Escalation Case and Arbitration Award of M/s APIL". The appellant, in this communication stated :

"1. This is regarding extension of time case and consequent escalation to be paid/ compensation for delay to be levied upon M/s APIL regarding the work of construction of Main R & D Building at C-DOT Campus, New Delhi. You may kindly refer to be meeting held today with Shri Gopal Ansal of M/s APIL. Also you may kindly refer to the subsequent meeting between C-DOT & M/s RITES held today.

2. *The competent authority has accepted the opinion of M/s RITES to grant extension of time to M/s APIL upto 20th July, 2003 without any compensation for delay. You may kindly indicate the amount to be paid to the contractor for escalation for this period.*

3. *It has also been decided to grant extension of time upto 31st March 2005 with levy of maximum compensation as per the relevant clause for the period between 21st July, 2003 to 31st March, 2005, both dates included. You may kindly suggest the modalities to recover the above stated amount towards the compensation for delay.*

4. *It has been further decided by the competent authority to accept the verdict of the Hon'ble High Court regarding payment of WCT & transplantation as per the Hon'ble Arbitrator's award. You may kindly suggest whether this amount could be adjusted against the compensation for delay.*

5. *Meanwhile, you may kindly put up draft letter(s) to be sent to M/s APIL conveying the above stated decisions."*

23. The appellant has also filed before the learned single Judge, an inter departmental memo dated 4.8.2005 from the General Manager (Campus)/CE(Electrical) to the Executive Director of the appellant, which records the factum of the decision of C-DOT to levy compensation being communicated to the respondent on the same day, and the other developments that had taken place. The relevant extract of this memo reads as under:-

"1. Shri Gopal Ansal, MD, M/s APIL along with his team met me, CE(E) and Shri Y.K. Sharma, AGM (CP), Shri P. Raghu, AGM (E) and Shri S.K.Kapoor, JGM (C), M/s RITES on 4th August, 2005 to discuss the details about reimbursement of WCT and other matters.

2.He was apprised with the decisions regarding WCT, Extension of Time case. Escalation due to them, the

position of latest running bill and the compensation for delay to be levied upon M/s APIL.

3. Shri Gopal Ansal and his team immediately indicated that they would move for conciliation/ arbitration on receipt of formal communication on above stated matters.

4. Subsequently, a meeting was held with the officers of M/s RITES and C-DOT to discuss the course of action to be taken by C-DOT, in case M/s APIL moved for conciliation/ arbitration. It was felt that lot of ground work shall have to be done by Campus Group and M/s RITES to fight this case effectively. Shri S.K. Jha & Shri U. M. Sinha from Campus Group have been directed to take up the necessary steps immediately."

24. It is, therefore, clear that the Board of Directors of the appellant decided to grant conditional extension of time from 21.7.2003 upto 31.03.2005 i.e. upon levy of 10% of the contract price as compensation. All these pertinent aspects/documents have not even been noticed by the learned single Judge while passing the impugned order.

25. Even from the letter dated 23.08.2005 it is seen that further escalation was admitted to be due to the respondent under Clause 70.1 of the GCC upto 20.07.2003. It is, therefore, clear that for the period after 20.07.2003, the appellant considered the delay as attributable to the respondent. As per Clause 47.1 for each week's delay attributable to the respondent contractor, the appellant was entitled to levy upto half percent ($\frac{1}{2}\%$) of the contract sum/price towards liquidated damages, subject to the same not exceeding 10% of the contract sum/price. As the delay is well beyond 20 weeks if

computed from 21.07.2003 onwards upto 31.03.2005, it cannot be said that the determination of liquidated damages in terms of Clause 47.1 at 10% of the contract price could not have been arrived at by the appellant.

26. Clause 47.1 leaves no manner of doubt that the decision of C-DOT to levy liquidated damages/compensation is stipulated to be *“final and binding on the contractor”*. The clause further provides that the amount of compensation, which cannot exceed 10% of the contract sum, *“may be adjusted or set off against any sum payable to the contractor under this or any other contract that the C-DOT”*. Clause 67.1, which is the arbitration agreement, in sub-Clause (iv) explicitly provides that *“except where the decisions have become final, binding and conclusive in terms of the contract, all disputes and 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”*. The reasoning of the learned Single Judge that the decision of C-DOT to levy liquidated damages cannot be said to have become final, since Clause 47.1 has not been specifically mentioned in Clause 67.1(iv) of the agreement is patently incorrect. As aforesaid, Clause 47.1 in terms says that *“The decision of the C-DOT in writing shall be final and binding on the contractor”*. Clause 67.1(iv) generally excludes from the scope of arbitration, disputes *“where to decisions have become final, binding and conclusive in terms of the contract”*. It was not necessary, therefore, to specifically make a mention of the decision of

C-DOT under Clause 47.1, in Clause 67.1(iv). It is not that Clause 67.1(iv) makes a mention of any other and particular clause of the agreement, which is outside the scope of arbitration. There was no basis for the learned Single Judge to have concluded that since Clause 47.1 is not specifically dealt with in Clause 67.1 (iv), the decision in terms of Clause 47.1 is arbitrable.

27. In our view, the finding of the learned Single Judge that no decision was taken by the appellant on the application of the respondent to seek extension of time before 23.08.2005 is unacceptable in the light of the documents/record discussed above, which have not been dealt with by the learned Single Judge in the impugned judgment. That decision was taken by the appellant C-DOT on 2.8.2003 and communicated to the respondent on 4.8.2003. That decision was based on the recommendation of the Consultants M/s. RITES Ltd. The learned Single Judge has failed to appreciate that the said communication dated 23.08.2005 not only conveyed the decision of C-DOT to levy compensation in terms of Clause 47.1, it also indicated that the appellant had decided to consider the delay up to 20.07.2003 as justifiable, as up to that date it had granted further escalation to the respondent.

28. We may also take note of the fact that the recommendation to grant extension of time without levy of compensation upto 20.7.2003 was recommended by the GM(Campus) as early as on 24.12.2004. Of

the two recommendations recorded by the G.M.(Campus) in his noting dated 24.12.2004, the first read:

“Recommendations:-

*1. M/s. APIL may be granted extension of time from 11th August, 2001 till 20th July, 2003 (approximately 2 years) for which period the escalation in respect of Labour & POL is also due to them. This balance amount would be Rs. 42.00 lakhs approximately. **Only M/s. APIL are responsible for the delay from 21st July, 2003 till date. For the period, proper compensation shall have to be levied upon.**”(emphasis supplied)*

29. Therefore, it appears, that the aspect of grant of extension of time upto 20.7.2003 without levy of compensation, and for levy of compensation for the period of delay thereafter did not crop up for the first time after the dismissal of the objections to the interim award dated 19.2.2003, on 18.5.2005. The same was raised and recorded even earlier to the said interim award becoming executable. This takes the wind out of the sails of the respondent's argument that the levy of liquidated damages by the appellant was mala fide, and timed so as to defeat the realization of the amount covered by the interim award dated 19.2.2003.

30. It appears that during the pendency of the aforesaid petitions before the learned Single Judge, on 07.07.2006 a meeting was held between the parties. In this meeting a mutual understanding was reached. The relevant extract from the minutes of the meeting held on 07.07.2006 reads as follow: -

“Point no.1: Issuance of Completion Certificate:

It was pointed out by C-DOT that various defect lists submitted by M/s. C-DOT had been pending since 2005 and have not been attended to, therefore, final, completion certificate cannot be issued. M/s APIL assured that the listed defects shall be rectified in the time bound manner and completed by third week of August, 2006. It was agreed to issue Final Completion Certificate once all the defects were rectified. Thereafter, the defect liability period shall be reckoned as per the terms of the contract.

.....

.....

Point 8 & 10: Conciliation

M/s APIL indicated that they wished to initiate the process of conciliation in terms of the procedure laid down in the contract so that all issues which have arisen during the currency of contract or afterwards whatsoever be its nature, between C-DOT and M/s APIL, could be referred to the conciliator and thereafter for arbitration or adjudication in case of failure of conciliation process.

Point 11: Confirmation of Time Extension

M/s. APIL requested to issue confirmation of time extension from 01.01.04 to 31.03.2005. C-DOT assured that the requisite confirmation shall be covered in the Final Certificate of Completion.”

31. The minutes were communicated by the respondent to the appellant. The appellant responded to the recording of the minutes on 25.08.2006. In its response the appellant referred to the following categorical commitments made by the respondent:

“(i) M/s APIL assured that the listed defects in the Building **shall** be rectified in the time bound manner and **completed by 3rd Week of August, 2006.**

(ii) M/s APIL shall submit unconditional Bank Guarantees for a total sum of **Rs.3.67 crores** to C-DOT.

(iii) M/s APIL was to submit the part measurement of Final Bill for necessary checking.”

32. The appellant stated that neither of these commitments have been fulfilled by the respondent with regard to the completion of the building upon rectification of defects. It was stated that majority of the works were still lying incomplete in the building. The specific works, which according to the appellant were incomplete, were also enumerated. The list of 56 pending items that were not complete according to the appellant was apparently enclosed with this communication. With regard to the furnishing of unconditional bank guarantees for a total amount of Rs.3.67 Crores to C-DOT, the appellant remarked that as per the current state of work the defect liability period would be at least till the end of 2007. However, most of the bank guarantees were expiring on 05.11.2006 and one was expiring on 07.02.2007. They also did not add up to the amount of Rs.3.67 Crores and covered only Rs.3.50 Crores. On the issue of conciliation and confirmation of time extension the appellant stated as follows: -

“(a) Conciliation: M/s APIL had intimated that they may wish to initiate the process of conciliation and arbitration in terms of the procedure laid in the Contract for all issues, which have arisen during the currency of the Contract. The same is already provided in Clause 67 of GCC.
Please note that it is requirement of sub-

clause(iv) of Clause 67(1) of GCC that no arbitration is envisaged on such matters in which final and conclusive decisions have been taken by the competent authority e.g. the matter of EOT and the compensation for delay. It is also a requirement of this sub-clause that a party invoking the arbitration shall give a 'list of disputes' with amounts claimed in respect of each claim along with its notice seeking for appointment of the arbitrator. So far M/s APIL have not made any invocation, as per said sub-clause.

(b) Confirmation of Time Extension: As has already explained during the aforesaid meeting, the details of Extension of Time can only be finalized after the work is actually completed. **The confirmation as to Extension of time, with or without levy of Liquidated Damages, will be contained in the prescribed proforma prescribed for grant of Extension of Time.** Hence the required confirmation of Extension of Time will be part of the Final Completion Certificate, which is to await actual completion of the work.

From the above it is evident that M/s APIL have miserably failed to comply with the assurances given by it to C-DOT in the 'Minutes'. As a consequence the matter continues to remain unresolved."(emphasis supplied)

33. Not only do we find that the learned Single Judge has factually erred in understanding the minutes of the meeting held on 07.07.2006, we also find that the response sent by the appellant dated 25.08.2006 has also not been correctly appreciated by him. While it is recorded in the impugned judgment that the appellant had assured the respondent in the meeting held on 07.07.2006 that the required confirmation pertaining to extension of time for the period 01.01.2004 to

31.02.2005 would be sent to the respondent shortly, the minutes as quoted above show that the assurance given by C-DOT was that the requisite confirmation shall be covered in the final certificate of completion. The final completion certificate itself was to be issued once all the defects were rectified. Therefore, the confirmation of time extension from 01.01.2004 to 31.03.2005 was conditional upon the removal of the defects by the respondent by third week of August, 2006. From the communication dated 25.08.2006 of the appellant it appears that the defects were not removed even as on the date of issuance of the said communication. We also find that the learned Single Judge has wrongly construed the stand of the appellant as contained in its letter dated 25.08.2006 to mean that *"the respondent even on 25.08.2006 had informed the petitioner that the details of extension of time could be finalized 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 31.03.2005"*.

34. To us it is amply clear that the appellant had already taken the decision to grant extension of time after 20.07.2003 subject to levy of liquidated damages to the extent of 10% of the contract price on 2.8.2005. The meeting dated 07.07.2006 was held during the pendency of the litigation, and it appears that the parties sought to negotiate a settlement. There were reciprocal promises made by the parties. As aforesaid, the respondent made promises to rectify the defects in a time bound manner and complete the same by 3rd week of

August, 2006; to submit unconditional bank guarantees for a total sum of Rs.3.67 Crores to C-DOT and; to submit the part measurement of final bill for necessary checking. In response the appellant also made certain promises including that the confirmation of extension of time shall be covered in the final certificate of completion. The minutes do not, in terms, say that C-DOT agreed to grant extension of time upto 31.3.2005 without levy of compensation. In any event, since the respondent did not fulfill its assurances given to C-DOT, as contained in the minutes, C-DOT treated the matter as unresolved and categorically stated so while issuing the communication dated 25.08.2006. From the highlighted portion of the communication dated 25.8.2006 it is seen that the stand of C-DOT was that the aspect of levy of liquidated damages for grant of extension of time upto 31.3.2005 was not given up by C-DOT and the C-DOT retained the right to pursue its claim for liquidated damages after the work is actually completed.

35. It also shows that even the respondent did not consider the aspect of time extension and liquidated damages as resolved in its favour, since the respondent desired to raise the said aspects in arbitration. It also shows that the appellant was vigilant enough to state that these aspects are beyond the scope of arbitration under clause 67.1 of the agreement. Merely because the appellant C-DOT may have agreed, as a measure of settlement, that it may reconsider the aspect of extension of time, which also impacted the levy of liquidated damages, it does not mean that the appellant can be bound down to that assurance while ignoring the fact that the corresponding

obligations as contained in the minutes dated 07.07.2006, to be performed by the respondent remained unfulfilled. The learned Single Judge, we find, has not only failed to appreciate this aspect of the matter but and has also misconstrued the obligations undertaken to be performed by the appellant in terms of the minutes dated 07.07.2006 while overlooking the stand of the appellant that the respondent had failed to discharge its corresponding obligations. Pertinently, the learned Single Judge does not even record that the respondent had fulfilled its obligations as undertaken in the meeting of 07.07.2006. We, therefore, do not agree with the finding arrived at by the learned Single Judge that the aspect of extension of time had remained undecided one way or another. The aforesaid finding of the learned single Judge is also in the teeth of the decision of the Board of Directors of the C-DOT dated 02.08.2005 which was also placed on the record by the appellant under the directions of the Court.

36. We also find a disconnect in the reasoning of the learned Single Judge. He concludes, as aforesaid, that the respondent's request for extension of time remained undecided till the completion of work on 31.03.2005 and that if the same had been decided earlier, one way or another, the respondent could have exhausted his remedies provided under Clause 67.1 of the contract. Immediately thereafter, he proceeds to conclude that the claim of the appellant for liquidated damages does not fall within the category of "*excepted matters*" as provided in Clause 67.1(iv) of the contract. We cannot appreciate how the learned Single Judge has arrived at the aforesaid conclusion, even

if the request of the petitioner for extension of time had not been decided till the completion of the work on 31.03.2005. We may hasten to add that we have already held that the application for extension of time could have been decided upon even after the completion of work under the contract, particularly in the light of the minutes of the meeting dated 18.2.2004 and that as a matter of fact, it had been decided on 02.08.2005 and communicated to the respondent vide communication dated 23.08.2005. The observation of the learned Single Judge that if the decision on the extension of time application of the respondent had been decided earlier, the respondent could have proceeded to exhaust its remedy under Clause 67.1 of the contract is also incorrect. This observation of the Ld. Single Judge pre-supposes that the aspect of extension of time subject to levy of liquidated damages under Clause 47.1 is an arbitrable dispute.

37. The observation of the learned Single Judge that because there is a dispute raised as to whether the delay in completion of the project beyond 20.07.2003 was attributable to one or the other party, the same has to be decided by the arbitrator, as the parties had agreed to refer their disputes to arbitration, is unsustainable. It is well settled that an arbitral tribunal derives its authority and jurisdiction from the arbitration agreement of the parties. If the parties have expressly agreed to exclude certain kinds of disputes from the scope of arbitration, it is not for the Court to thrust an arbitration upon the parties in respect of such excluded disputes i.e. "*excepted matters*"

merely because such disputes would eventually have to be resolved by a judicial forum.

38. The impugned decision of the learned Single Judge completely ignores the express language used in Clauses 47.1 and 67.1(iv) of the agreement. Various decisions as recorded by the learned Single Judge were cited before him by the appellant to contend that the dispute with regard to the levy of liquidated damages under Clause 47.1 was not an arbitrable dispute as it was an “*excepted matter*”. The learned Single Judge has, however failed to deal with any of those decisions. We may refer to only ***Vishwanath Sood v. Union of India and Another*** (1989) 1 SCC 657. While construing a similar clause (contained in clause 2 of the agreement before the Supreme Court), pertaining to levy of liquidated damages by the employer for delay on the part of the contractor beyond stipulated date of completion, where the clause also provided that the decision of the employer in writing shall be final and a similar arbitration agreement which stated “*except where otherwise provided in the contract, all questions and disputes.....shall be referred to the sole arbitration of the person appointed by the Chief Engineer, Himachal Pradesh Public Works Department.....*”, the Supreme Court held 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)

39. A Division Bench of this Court in **DDA v. Sudhir Brothers** 57 (1995) DLT 474 (DB) was dealing with a case where the arbitrator had entertained a claim founded upon Clause 2 of the contract, which provided for imposition of liquidated damages upon the contractor, by the employer and also provided that the decision of the employer is final and binding. The arbitration agreement stated that unless otherwise as provided, the disputes between the authorities were referable to arbitration. Even though the employer had requested the arbitrator to formally include the amount of liquidated damages imposed by it as a part of the award, and on that basis the arbitrator has considered and rejected the

claim of liquidated damages of the employer DDA, by relying upon **Vishwanath Sood (supra)** the Division Bench of this Court held that the arbitrator has no jurisdiction to deal with such a claim. The Court further held:

“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.”

40. Both the aforesaid decisions are squarely applicable in the facts of this case and the learned Single Judge was fully bound by them. The clause relating to levy of liquidated damages by the employer for delay in completion of the work beyond the stipulated date of completion, which also provides that the said decision should be final and binding, as also the arbitration clause between the parties in the present case are materially the same as those construed by the Supreme Court in **Vishwanath Sood**(supra) and followed by Division Bench of this Court in **Sudhir Brothers** (supra). The appellant, as required by the Supreme Court in **Vishwanath Sood** (supra) even gave a notice to the respondent on 05th December, 2003, requiring the respondent to explain as to why compensation under Clause 47.1 should not be levied upon the respondent. The notice was issued by

the General Manager (Campus) and the decision to levy compensation was taken by the Directors.

41. In view of the aforesaid discussion, we are of the opinion that the impugned judgment of the learned Single Judge cannot be sustained. We accordingly set aside the same. We hold that the issue of levy liquidated damages under Clause 47.1 of the agreement between the parties was an "*excepted matter*" and, therefore, can not be arbitrated upon by the arbitrator. Since OMP No.309/2005 was filed by the respondent under Section 9 of the Act to seek a restraint against the invocation of bank guarantees on account of levy of liquidated damages by the appellant, in our view, as the said dispute itself was not referable to arbitration, the OMP under Section 9 of the Act was not maintainable. In any event, considering the fact that the agreement between the parties itself provides that the liquidated damages levied by the appellant could be adjusted or set off against any sum payable to the contractor, there was no justification for grant of an injunction against the encashment of the bank guarantees furnished at the behest of the respondent. It is well settled that documentary credits, such as letters of credit and bank guarantees constitute independent contracts between the banker and the beneficiary, and should not lightly be interdicted at the behest of the party at whose instance the guarantee is issued. Since no case of fraud of an egregious nature, which can be said to have vitiated the underlying transaction between the parties, and of which the issuing banks have notice, appears to have been committed by the appellant,

and it cannot be said that the respondent would suffer irretrievable injustice, if the bank guarantees are encashed by the appellant to realize liquidated damages, in our view, the injunction could not and should not have been granted against the encashment of the bank guarantees. (See **U.P Cooperative Federation Ltd v. Singh Consultants and Engineers (P) Ltd.**, (1988) 1 SCC 174 and **BSES Ltd v. Fenner India Ltd, and Another**, (2006) 2 SCC 728) For the same reason, the application under Section 11 of the Act to seek reference of the dispute with regard to the levy of liquidated damages was also not maintainable as the said dispute could not have been referred to arbitration, it being an “*excepted matter*”. The direction issued by the learned Single Judge to the appellant to the effect that the appellant should make payment of the amount in terms of the interim award dated 19.02.2003 cannot be sustained for the same reason.

42. In view of the decision in **Sudhir Brothers** (supra), since the appellant has chosen to recover and adjust the amount of liquidated damages from out of the amounts payable to the respondent under the interim award aforesaid, and the amount of escalation of Rs.42 Lacs payable to the respondent, and also to invoke the bank guarantees furnished by the respondent, it shall be open to the respondent to take appropriate civil proceedings, if it so chooses, to impugn the levy of liquidated damages under Clause 47.1 of the agreement by the appellant, provided the same is filed within the period of limitation.

We, accordingly allow this appeal with costs quantified at Rs.20,000/- in each of the appeals payable within four weeks from today.

(VIPIN SANGHI)
JUDGE

(MUKUL MUDGAL)
JUDGE

March 16, 2009
as/rsk/dp