

+ **OMP 648/2008**

**NATIONAL SMALL INDUSTRIES  
CORPORATION LTD**

Through: Mr. A.K. Thakur & Mr. Rajiv Arora,  
Advocates

**DUAL STRUCTURAL & INDUSTRIES LTD** ... Respondent

***CORAM :-***  
**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

- RAJIV SAHAI ENDLAW, J.

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2. The respondent made claims against the petitioner:

- (i) for refund of Rs 40,23,524/- wrongly recovered by the petitioner from the respondent as liquidated damages;
- (ii) for interest @ 21% per annum on the above amount from 16<sup>th</sup> August, 2002 to 20<sup>th</sup> November, 2002;
- (iii) Rs 20,40,287/- for recovery of overheads and establishment costs during the contract period;
- iv) for recovery of Rs 5,33,404/- towards additional site establishment and overhead costs for the extended period of contract beyond the originally stipulated period;
- v) for recovery of Rs 8,38,222/- towards increase in the costs of inputs for the work carried out after the originally stipulated contract completion period;
- vi) for recovery of Rs 3,49,519/- towards loss of interest on the account of late release of running bill payments;
- vii) for interest at 21% per annum, pre suit, pendente lite and post award on the aforesaid amount and for costs.

3. The petitioner herein also made a counter claim against the respondent for recovery of Rs 65,93,668/- on account of loss of revenues due to undue delay in completion of the work by the respondent. A sum of Rs 8,91,000/- was also claimed by the petitioner on account of extra expenditure incurred on establishment and contingency due to delay by the respondent in completion of work.

4. The arbitrator published the award dated 25<sup>th</sup> September, 2004. Only the claim of the respondent for refund of Rs 40,23,524/- recovered by the petitioner towards liquidated damages was allowed and the petitioner was also directed to pay interest on the said amount at 8% per annum from 16<sup>th</sup> August, 2002 to 2<sup>nd</sup> September,

2002, at 10% per annum from 3<sup>rd</sup> September, 2002 to 25<sup>th</sup> September, 2004 and at 12% per annum from 26<sup>th</sup> September, 2004 till the date of payment. All the other claims of the respondent against the petitioner as well of the petitioner against the respondent were rejected.

5. The petitioner herein preferred OMP 5/2005 in this court under Section 34 of the Act with respect to the said award. Notice thereof was issued. The respondent did not prefer any petition under Section 34 of the Act with respect to the award. OMP 5/2005 was disposed of vide order dated 10<sup>th</sup> May, 2006. This court set aside the award directing refund of Rs 40,23,524/- by the petitioner to the respondent and consequently the award for interest on the said amount. The rest of the award was maintained. The arbitral record was ordered to be sent back to the arbitrator.

6. Pursuant to the aforesaid order, the arbitration proceedings were resumed before the same arbitrator who has now published the award titled “Reconsidered award” dated 30<sup>th</sup> August, 2008 with respect whereto the present petition has been preferred. The arbitrator has reaffirmed his award for refund of Rs 40,23,524/- by the petitioner to the respondent together with interest at the rate as awarded in the earlier award.

7. For appreciating the contentions of the counsel for the petitioner, it is appropriate to set down the relevant dates.

| S.No. | Date                          | Particulars                                                                                                         |
|-------|-------------------------------|---------------------------------------------------------------------------------------------------------------------|
| 1.    | <u>9.10.1998</u><br>2.11.1998 | Date of contract between the parties                                                                                |
| 2.    | 21.10.1998                    | The petitioner added additional work of construction of one canteen and two additional rooms in the existing hostel |

|     |            |                                                                                                                                                                                              |
|-----|------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|     |            | building                                                                                                                                                                                     |
| 3.  | 21.10.1998 | The petitioner handover the construction site to the respondent                                                                                                                              |
| 4.  | 10.11.1999 | Further additional work of phase-II of the building is added to the work already allotted by the petitioner to the respondent.                                                               |
| 5.  | 02.02.2000 | The respondent seeks extension of time for completion of works.                                                                                                                              |
| 6.  | 20.02.2000 | Stipulated date of completion of works including additional works according to the petitioner.                                                                                               |
| 7.  | 09.06.2000 | The petitioner by a letter of this date extended the time for completion of works till 31 <sup>st</sup> August, 2000, reserving its right to levy liquidated damages (LD) on the respondent. |
| 8.  | 29.09.2000 | The respondent seeks extension of time for completion of works.                                                                                                                              |
| 9.  | 17.11.2000 | The petitioner vide letter of this date extended time till 31 <sup>st</sup> December, 2000 reserving its right to levy LD.                                                                   |
| 10. | 21.06.2001 | Work completed.                                                                                                                                                                              |

8. The contract entitled the petitioner to levy LD for delay in completion or works @ 1% of the contract value per week and subject to maximum of 10%. The petitioner levied LD in the sum of Rs 40,23,524/- aforesaid under the said provision of the contract and deducted the same out of the monies admittedly payable to the respondent. It was in these circumstances that the respondent in its claim petition before the arbitrator sought refund of the said monies disputing/controverting the levy of liquidated damages by the petitioner.

9. The arbitrator in the first award dated 25<sup>th</sup> September, 2004 held that as per the contract of the work initially awarded by the petitioner to the respondent the stipulated date of completion was 20<sup>th</sup> February, 2000; that when the additional works were awarded

to the respondent, neither any specific time frame was fixed by the petitioner or was mutually agreed by the parties for those works nor made essence of the contract; that the time till 20<sup>th</sup> February, 2000 for completion of the works initially awarded though of the essence, upon the award of additional works ceased to be of the essence of the agreement; that after 20<sup>th</sup> February, 2000 no new period of completion was fixed and it is to be deemed that the time had been set at large and no longer the essence of the agreement; the contention of the counsel for the petitioner that levy of LD is automatic upon failure of the respondent to complete the works could not be accepted as the scope of the work had been substantially enlarged without fixing specific additional time; that there was initial delay on the part of the petitioner in handing over the full site and in decision, issue of drawings, the last drawing having been issued only on 13<sup>th</sup> November, 2000. The arbitrator thus held the respondent not entitled to LD and axiomatically allowed the claim of the respondent for refund of the amounts deducted towards LD.

10. This court in order dated 10<sup>th</sup> May, 2006 in OMP 5/2005 and which order has attained finality held that a conjoint reading of clauses 9, 11 and 30 of the contract show that the time was of the essence of the contract and in case of the respondent's failure to complete the work within stipulated time provision for LD is made in the contract; that as per clause 9, the petitioner was within its right to award additional work to the respondent and such work had to be executed by the respondent in the manner specified in the contract and treating the same as part of the works as originally awarded; that on award of additional work time for completion of the work was to be extended in the proportion which the additional cost of the

additional work bears to the original contract sum plus 25% of the time calculated in the said manner; and when the time is extended in such manner, the extended time becomes the essence of the contract. This court found that the arbitrator had not considered the implication of clauses 9, 11 and 30 of the contract and had in contravention thereof wrongly concluded that while awarding the additional work no specific time frame was stipulated and time did not remain the essence of the contract. This court noted that the arbitrator had imputed some delay on the petitioner but held that the arbitrator was mainly influenced by the fact of the time being not of the essence after the award of substantial additional work. This court thus set aside the award to the said extent. While doing so this court noticed the submissions of the respondent also and held that it would be for the arbitrator to decide the issue afresh after considering submissions of both the parties and with reference to legal position clarified in the said order.

11. The arbitrator has in the reconsidered award noticed that under clause 9.2 of the contract, upon award of additional work, the time for completion is to be extended as noticed above in the order of the High Court or "such further additional time as may be considered reasonable by the engineer-in-charge" (there is no dispute as to the contract providing so). The arbitrator has further held that it was necessary for the petitioner to assess extra time required for the additional work before commencement of the same and that the extended time could be the essence of the contract only if time was so assessed and known to both parties when the additional work was taken up. He has further held that only then LD could be levied for non-completion of the works within the said time. The arbitrator further found that the petitioner had not

communicated to the respondent the extended time available taking into consideration the additional work and letter in this regard was written for the first time on 9<sup>th</sup> June, 2000 only granting provisional extension upto 31<sup>st</sup> August, 2000. The arbitrator has held that there was no definite stipulated date for completion of work and assessment of delay in terms of clause 30.1 and hence levy of LD was not justified.

12. The arbitrator further found that the petitioner had computed delay of 139 days on the part of the respondent. The arbitrator found that the petitioner had in the hindrance register maintained by it and produced before the arbitrator, arbitrarily arrived at the delay on the part of the respondent of 139 days; that the last two columns of the hindrance register which were to be worked out were blank and the details of arriving at the period of 189 delays had not been communicated by the petitioner to the respondent. The arbitrator also found the reasons given by the petitioner for computation of net hindrance period to be arbitrary and not supported by calculations. It was thus held that the levy of LD was not justified. Accordingly, the earlier award was reaffirmed.

13. Though the counsel for the petitioner had attempted to argue that the clause regarding levy of LD in the present case was identical/similar to that before the Supreme Court in **ONGC Ltd Vs. Saw Pipes Ltd.** 2003 5 SCC 705, but in my view the said question does not arise for adjudication in the present case. Though, the arbitrator has in the reconsidered award noticed the contention of the counsel for the respondent that no losses had been suffered by the petitioner owing to the delay, even if any, and thus the petitioner was not entitled to any LD which is in the nature of penalty, but the

arbitrator having found no delay on the part of the respondent for which LD could be levied did not deal with the said aspect. The reconsidered award turns only on the finding of the arbitrator of there being no delay inviting levy of LD. The challenge by the petitioner to the reconsidered award has to be thus confined to the said finding only of the arbitrator.

14. Faced with the aforesaid the counsel for the petitioner contended that the arbitrator has misconducted himself in not treating the award dated 25<sup>th</sup> September, 2004 earlier published by him to have been set aside by this court vide order dated 10<sup>th</sup> May, 2006 (supra) and by merely giving another reason for support of the finding in the earlier award. It is further contended that inspite of the direction of this court the arbitrator has in the reconsidered award not dealt with clause 9.2 of the contract. He has in the course of the hearing also handed over copies of the letters dated 29<sup>th</sup> April, 2000 and 29<sup>th</sup> September, 2000 of the respondent to the petitioner and contended that the respondent had therein admitted delay. He has also drawn attention to the letter dated 15<sup>th</sup> June, 2001 copy whereof is on the record and wherein the respondent had admitted the delay for the reasons of its precarious financial conditions and requested for waiver of LD or levy of token LD. It is contended that the same is an admission by the respondent of its liability for LD and which has not been considered by the arbitrator.

15. It is next argued that the only case set up by the respondent before the arbitrator was of time not being of the essence and it is argued that it was never the case of the respondent that there was no delay.

16. The counsel for the petitioner qua the hindrance register first contended that the arbitrator had after the order dated 10<sup>th</sup> May, 2006 (supra) of this court directed the petitioner to produce the hindrance register; however, upon the senior counsel for the respondent pointing out that the hindrance register had been filed by the petitioner before the arbitrator as far back as in the year 2003, the same was admitted to be the correct position by the counsel for the petitioner also; it was however contended that the arbitrator before the reconsidered award did not seek any clarifications from the petitioner with respect to the hindrance register and that the finding of the arbitrator with respect to the hindrance register are factually incorrect.

17. Per contra the senior counsel for the respondent has contended that the arbitrator had after the order dated 10<sup>th</sup> May, 2006 of this court reached the conclusion that there was no delay. He has drawn attention to clause 9.2 of the contract providing for computation as aforesaid of time upon additional work being allotted and has highlighted that the formula provided therein is only one of the alternatives and the other alternative is "or such further additional time as may be considered reasonable by the engineer-in-charge". It is urged that it was thus incumbent upon the petitioner to, after the award of additional work, communicate to the respondent the time for completion in terms of the formula prescribed in clause 9.2 or as considered reasonable by the engineer-in-charge. It is argued that no such time was communicated and thus the respondent was not in the know of the time within which, after the award of additional work, the works were to be completed. He has also drawn attention to the hindrance register copies whereof have been filed on record and to the typed copy

thereof filed by the petitioner also containing the explanation therefor. He has also drawn attention to the copies of the internal notes submitted by the petitioner before the arbitrator under cover of letter dated 19<sup>th</sup> December, 2003 wherein the petitioner has also recorded that the major portion of the additional construction was completed by 31<sup>st</sup> December, 2000 and only some minor external works and rectification works could not be completed during the extended period and also praising the respondent for the works; in the said note it is also recorded that there were delays in getting the electric connection and the building licenses for various other reasons and owing to which inspite of the respondent completing the works the same could not be occupied; the worldwide slowdown in IT Sector due to the then recent development in USA was also cited as a reason for non-occupation of the software technology park. The senior counsel for the respondent has thus argued that even if there was any delay, no loss has been suffered by the petitioner for which penalty in the form of LD could be awarded. The senior counsel for the respondent has also contended that the findings of the arbitrator are factual in nature and non- interfereable under Section 34 of the Act.

18. The counsel for the petitioner in rejoinder has contended that the findings of the arbitrator with respect to the hindrance register are contrary to the admission of liability as aforesaid by the respondent.

19. This court had in the order dated 10<sup>th</sup> May, 2006 interpreted clauses 9, 11 and 30 of the contract. The said interpretation was binding on the arbitrator. Thus, the arbitrator was not required to

deal again with the said clauses and no flaw can be found with the award on this ground.

20. As far as the contention of the counsel for the petitioner of the arbitrator having misconducted himself is concerned, I do not find that the arbitrator has in any manner shown any obstinacy or insistence on sticking to his earlier award which had been set aside by this court. The arbitrator is not a person steeped in law or familiar with legal language. Thus by picking a word here and there in the reconsidered award it cannot be argued that the arbitrator inspite of earlier award having been set aside refused to budge from the same. The arbitrator had in the first award negatived the claim for LD holding time not to have been of the essence. Certain observations were made in that first award also of delay being on the part of the petitioner. However, as observed / held by this court in the order dated 10<sup>th</sup> May, 2006, the said observations were in passing in the first award and otherwise it turned on the reasoning of time not being of the essence. The arbitrator has in the reconsidered award, following the interpretation of the clauses aforesaid of the agreement permitting/making time to be of the essence even on award of additional work, held that the petitioner did not compute the said time while awarding the additional work. This finding of the arbitrator cannot be said to be inconsistent with the order dated 10<sup>th</sup> May, 2006 of this court.

21. This court in the order dated 10<sup>th</sup> May, 2006 had not adjudicated on the alternative provided in clause 9.2 of the contract whereunder the engineer-in-charge is entitled to fix additional time for completion after award of additional work. The arbitrator has interpreted the said clause of the contract and held that such additional time ought to have been fixed by the engineer-in-charge at the time of award of additional work, for the respondent to know the time of completion. The arbitrator has not and could not have controverted the finding of this court of upon such time being fixed, the same being of the essence of the agreement. The senior counsel for the respondent has in this regard rightly relied upon the judgment in ***McDermott International Inc. Vs. Burn Standard Co. Ltd.*** (2006) 11 SCC 181 holding that interpretation of a contract is a matter for arbitrator to determine and the court ought not to interfere with such interpretation unless the same is not possible at all on a reading of the contract. In the present case, I find the interpretation by the arbitrator of clause 9.2 of the contract to be a possible one and not such which could not have been arrived at by any reasonable prudent person. Clause 9.2 provides a formula for arriving at the extended time and in the alternative empowers the engineer-in-charge to fix the extended time. It is not the case of the petitioner also that the petitioner at the time of awarding the additional work intimated to the respondent that the completion time would be determined in accordance with the formula and would not be fixed by the engineer-in-charge. Thus no fault can be found with the reasoning of the arbitrator that the respondent did not know the date of completion. The situation can be compared to that of in a written examination hall. If the examination time is left to be determined by a convoluted formula or to be determined by the invigilator, the examinee would be unable to plan out the time to be

devoted to different questions and cannot be all of a sudden told that the time is up. That is what appears to have prevailed with arbitrator also.

22. As far as the letters of the respondent seeking extension of time are concerned, the stipulated completion period for the work originally awarded was 16 months. The said letters appear to have been written with reference to the said date and which admittedly, after the award of additional work was not the stipulated date of completion. It thus cannot be said that merely because the letters seeking extension were written by the respondent that the respondent was aware of the date of completion or that the award is inconsistent with the said conduct of the arbitrator. Similarly, no weightage can be given to the contents of the said letter or to the respondent having sought waiver of LD. The Supreme Court in ***National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd.*** AIR 2009 SC 170 has though in a different context, taken note of the practices prevailing in the government departments qua such construction contracts i.e. of insisting upon the contractors furnishing No Due Certificate before even admitted payments are released to them. I consider the letters in this case to have been written in the same fashion/circumstances.

23. Be that as it may, the finding of the arbitrator of there being no delay whatsoever on the part of the respondent in completing the works is factual in nature. It is not as if the stipulated date of completion could be fixed even on the basis of the formula given in clause 9.2. The petitioner itself admits that there were other hindrances to completion of the works and benefit whereof has been given to the respondent. The arbitrator on going through the said

hindrances register has come to the conclusion that the benefit of some days only given by the petitioner to the respondent is misplaced/arbitrary and the respondent is entitled to benefit of additional days. The question which arises is, can this court in exercise of jurisdiction under Section 34 of the Act, also say that such finding of the arbitrator is contrary to public policy. The answer can be in the negative only. Reference in this regard, can be made to i) ***State of U.P. Vs. Allied Constructions*** (2003) 7 SCC 396 where the conclusion of the arbitrator as to force majeure was held to be non-interferable u/S 30 of the 1940 Act; ii) ***NHAI Vs. Afcons Infrastructure Ltd.*** 152 (2008) DLT 24 where this court held that interpretation arrived at by the arbitral tribunal being not palatable to petitioner is no ground for setting aside of the award; iii) ***New Delhi Apartment Group Housing Society Vs. Jyoti Swaroop Mittal*** 2008 (100) DRJ 439 (DB) holding that unless the view taken by the arbitrator is grossly irrational or perverse, the court cannot substitute its own view and iv) ***MMTC Ltd. Vs. Irano Hind Shipping Co.*** 2008 III Ad (Delhi) 315 holding that appraisement of evidence by the arbitrator is never a matter which court questions, relied upon by the senior counsel for respondent in this regard.

24. The contention of the counsel for the petitioner of the arbitrator having not given any opportunity to the petitioner to explain the hindrance register is also not found to be correct. A perusal of the proceedings before the arbitrator shows that the arbitrator had in the proceedings on different dates noted the contentions of the parties with respect to the hindrance register. The arbitrator had in fact also given an opportunity to the petitioner to furnish its explanation for the various entries in the hindrance

register and it is thereafter that the typed copy of the hindrance register with the remarks of the petitioner came to be filed. Thus, the petitioner's version of the hindrance register was before the arbitrator and has been rejected by the arbitrator. The argument of the petitioner that it was not for consideration before the arbitrator as to whether there was any delay or not is also incorrect. The parties were aware that after the order dated 10<sup>th</sup> May, 2006 of this court, the question to be gone into before the arbitrator was this only. Though arguments were raised that the arbitrator ought to have directed the parties to file fresh pleadings but on inquiry as to whether the petitioner sought any such opportunity, the reply is in the negative.

25. Though the arbitrator has not dealt with the contention of the respondent qua the petitioner being not entitled to levy LD without proving loss I may notice that in the present case also it is the admitted position that no evidence of loss, if any, was produced before the arbitrator. Though the counsel for the petitioner has relied upon **ONGC Ltd. Vs. Saw Pipes Ltd.**, AIR 2003 SC 2629 a judgment of two judges of the Supreme Court, the fact remains that a five Judge Bench of the Supreme Court in **Fateh Chand Vs. Balkishan Das** AIR 1963 SC 1405 had held that proof of such loss is necessary. **Saw Pipes Ltd.**, (Supra) turned on its own facts. Though the counsel for the petitioner has contended that the clause in the contract in the present case is the same as that before the Supreme Court in **Saw Pipes Ltd.**, (Supra) the fact remains that there was also before the arbitrator the admission of the petitioner himself as aforesaid that in spite of completion of construction by the respondent the same could not be occupied for other diverse reasons. Thus, material existed before the arbitrator showing that

no loss had been suffered by the petitioner for the reason of the construction having been completed after the date which according to the petitioner was the date for completion. In these circumstances and in the light of the judgment in ***Fateh Chand*** (Supra), again it cannot be said that the award negating the claim for LD was not a possible award or is perverse or ought to shock the judicial conscience.

26. Thus no ground under Section 34 of the Act is found to have been made out. The petition is dismissed with costs of Rs.35,000/- payable by the petitioner to the Prime Minister's Relief Fund.

**RAJIV SAHAI ENDLAW  
(JUDGE)**

**August 21<sup>st</sup>, 2009  
M**