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

+ **Date of Decision: 10.02.2011**

% **CS(OS) No. 20/2008**

CCI Ltd. Petitioner
Through: Mr. B.B. Sawhney, Senior Advocate
with Mr. Lakshay Sawhney and
Mr. Sunil Kumar, Advocates

versus

ALSTOM POWER BOILERS LTD. Respondent
Through: Mr. Sanjay Sarin, Ms. Gagan Deep
Kaur & Ms. Ashima, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

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

VIPIN SANGHI, J. (Oral)

1. These are objections under Section 30 read with Section 33 of the Arbitration Act, 1940 to challenge the arbitral award dated 22.12.2007 passed by the Arbitral Tribunal consisting of Mr. Justice P.K. Bahri (Retd.) & Mr. A.K. Ozha. The challenge to the said award is only in respect of the award made under Claim No. 1 (which has five sub-

heads), and to the computation of the claim made under claim No. 3 on the ground of typographical error.

2. At the outset, I may note that so far as the award made on fifth sub-head of claim no.1, namely Claim No. 1(5) is concerned, no objection to the same is pressed by the petitioner. At the same time, learned counsel for the respondent does not dispute the typographical error made in respect of claim No. 3(C)(3), and admits that the figure of Rs.20,000/- awarded under the said claim ought to be read as Rs.20 Lakhs. To the aforesaid extent, the award stand modified.

3. Now, I come to the objections raised by the petitioner under claim No. 1 sub-heads 1 to 4. These were claims made by the petitioner to claim liquidated damages. These claims were made for the following amounts, on account of delay in the execution of the different aspects of the work under the contract, by the respondent.

	Description	Amount Claimed
1.	Liquidated damages on account of delay in completion of engineering	Rs. 120 Lac
2	Liquidated damages on account of delay in supply of equipment	Rs. 172.06 Lac
3	Liquidated damages on account of delay in erection and commissioning	Rs. 697.92 Lac
4	Liquidated damages on account of delay in performance/guarantee output	Rs. 397.06 Lac

4. Under Clause 12.2 of the LOI, the overall liquidated damages in respect of delay in supply, erection and commissioning and shortfall in guaranteed output/performance could, at the most, be 12.5% of the total final contract price, which comes to Rs.496.34/- Lakhs.

5. The submission of Mr. B.B. Sawhney, learned senior counsel for the petitioner is that while discussing the various claims for liquidated damages, the learned Arbitrators have concluded that the delay in the completion of the various stages of work was attributable to the petitioner and also to the respondent. The learned Arbitrators have declined to grant the claim for liquidated damages on the basis that the respondent-contractor was not solely responsible for the delay and that the petitioner was also responsible therefor.

6. The petitioner places reliance on Clauses 10.5 & 6.2 of Schedule 7 of the contract. These contractual clauses read as follows:

“10.5 For determining the period of delay in supply of drawings and data as well as delay in erection and commissioning of the plant covered under this package by the supplier, the delay(s) occurred, if any, due to failure of the purchaser in fulfilling his obligations as per contract provisions shall be taken into account.”

“6.2 The import licence will be arranged by the purchaser within September,1982. In case of delay in arranging the import licence by the purchaser within 3 months from the date of acceptance of LOI, contractual delivery period for the imported items and completion period for the package shall be extended by correspondent period of delay beyond 3 months.”

7. The submission of Mr. Sawhney is that under these clauses, for the delay caused by the petitioner, the respondent was entitled to get extension of time. He submits that a reading of the impugned award shows that the Tribunal has returned findings of fact that the petitioner was responsible for some delays, whereas the respondent was also liable for other delays. He submits that the Tribunal has not apportioned the quantum of delays between the parties, and thereafter arrived at the quantum of delay for which the respondent was liable to pay liquidated damages in terms of Clause 10 of the contract, which reads as follows:

"10.0 Liquidated Damages/Bonus-cum-Penalty

10.1 For purpose of levying liquidated damages for delay in completion of (i) supply, (ii) erection and commissioning and (iii) shortfall in performance guarantees, the plant covered under this package shall be divided into different sections as specified for the respective purposes in the following clauses.

10.2 x x x x x x x x x

10.3 x x x x x x x x x

10.4 x x x x x x x x x

10.5 For determining the period of delay in supply of drawings and data as well as delay in erection and commissioning of the plant covered under this package by the Supplier, the delay(s) occurred, if any, due to failure of the Purchaser in fulfilling its obligations as per the contract provisions shall be taken into account

10.6 The liquidated damages/penalty shall be leviable irrespective whether the Purchaser has suffered any demonstrable loss or not.

10.7 Liquidated damages for delay in completion of supply.

10.7.1 For the purpose of levy of liquidated damages for delay in supply of the individual section, the plant covered under this package shall be divided into the following four sections:-

x x x x x x x x x x

10.7.2. The liquidated damages leviable for delays occurred in sectionwise agreed schedule shall be 0.5% (half of one percent) of the final contract price of the respective section, as determined under sub-clause 10.3.1 above, for delay of every 15 days or part thereof.

10.7.3 Ceiling:

The total liquidated damages leviable for delay in delivery shall be limited to a ceiling of 5% (Five percent) of the total final contract price for the supply portion under this package.

10.8 Liquidated damages for delays in erection and commissioning.

10.8.1. For the purpose of levy of liquidated damages for delay in erection and commissioning of the individual section, the plant covered under this package shall be divided into the same sections as indicated in sub-clause 10.7.1 above.

10.8.2 The liquidated damages leviable for delays occurred in sectionwise agreed schedule shall be 2% (two percent) of the final contract price of the respective sections as determined under Sub-clause 10.3.2 above, for delay of every 15 (fifteen days) or part thereof.

10.9 a) In case of delay in supply, sectionwise, the liquidated damages will be levied as per sub-clause 10.7.2. But in case the Supplier makes up and completes the erection as per agreement, sectionwise erection and completion schedule, the liquidated damages levied for delay in supply for that section shall be refunded.

b) In case there is delay both in sectionwise supply and sectionwise erection but the plant as a whole is commissioned as per the agreed over all schedule, the

liquidated damages will not be levied.

c) in case of overall delay, then the penalty as per sub-clause 10.11.1 or liquidated damages leviable as per sub-clauses 10.7 and 10.8 for sectionwise delay in supply or erection and/or both, whichever is higher will be levied.

d) Recovery of liquidated damages for delay in supply, erection and submission of drawings will be adjusted from escalation claims to the extent possible.

10.10 Liquidated damages for shortfall in sectionwise guaranteed output/performance of individual equipment.

10.10.1 For the purpose of levy of liquidated damages for shortfall in sectionwise guaranteed output the plant covered under this package shall be divided into the following five sections.

x	x	x	x	x	x	x	x	x	x
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10.10.2	x	x	x	x	x	x	x	x	x
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10.10.3 Liquidated damages for shortfall upto 5% in sectionwise guaranteed outputs

(i) 0.5% (half of one percent) of the respective final contract price as determined under sub-clause 10.3.3 above for every 1% (one percent) shortfall or part thereof in respect of sections 'A', 'B', 'D' & 'E' defined in sub-clause 10.10.1 above.

(ii) 1% (one percent) of the sectional final contract price as determined under sub-clause 10.3.8 above, for every 1% (one percent) shortfall or part thereof in respect of Section 'C' defined in sub-clause 10.10.1 above.

10.10.4 Liquidated damages for shortfall beyond 5% but upto 10% in sectionwise guaranteed output.

Liquidated damages will be twice the rates specified in sub-clause 10.10.3 above for the portion in excess of initial 5%.

10.10.5 Liquidation damages for excess fuel consumption.

Rs.31,60,000 (Rupees Thirty One Lakhs sixty thousand) for every 10 K.Cal/kg clinker or accordingly pro-rated for part

thereof for the fuel consumed in excess of the guaranteed figure.

10.10.6 Liquidated damages for excess power consumption
Rs.28,80,000 (Rupees Twenty eight lakhs, eighty thousand) for every one KWH or accordingly pro-rated for part thereof, for excess power consumed per tone of clinker with reference to the overall guaranteed power consumption for the plant as a whole covered under this package.

10.10.7 Liquidation damages for shortfall in guaranteed performance of individual equipment.

x	x	x	x	x	x	x	x	x	x
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10.10.8		x	x	x	x	x	x	x	x
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10.11		x	x	x	x	x	x	x	x
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10.12 Overall ceiling for liquidated damages/penalty for delay in supply, erection and commissioning and shortfall in guaranteed output/performance.

The overall ceiling for liquidated damages/penalty for delays in supply, erection and commissioning and shortfall in guaranteed output/performance, as specified in sub-clauses 10.7, 10.8, 10.10 and 10.11 above, together, shall be limited to 12.5% (twelve and half percent) of the total final contract price for supply, erection and commission of the plant as a whole covered under this package.

10.13. Liquidated damages for delay in supply of drawings and data

The liquidated damages leviable for delay in supply of engineering drawings and data as per the agreed schedule shall be Rs.2,00,000/- (Rupees two hundred thousand) for delay of every 15 days or part thereof. This liquidated damages is independent of the liquidated damages/penalty specified in sub-clauses 10.7, 10.8, 10.10 and 10.11 above."

8. Mr. Sawhney submits that this exercise of apportionment of the respective delays and defaults has not been done by the Tribunal, even though from the discussion of the award it is evident that the

Tribunal was possessed of all the materials to make the said computation. He submits that the reason (which emerges from the award) for this computation not being made by the learned arbitrators is that they have proceeded on the premise that unless the respondent was solely responsible for the delays, the petitioner's claim for liquidated damages could not be sustained. Mr. Sawhney submits that on a reading of Clause 10 of the contract, which stipulates the liquidated damages payable by the contractor for the delay and default in execution of the various aspects of the work, along with Clause 10.5 of the main contract and Clause 6.2 of the Schedule 7, it cannot be said that the liability of the respondent to pay the liquidated damages would arise only if the respondent is solely responsible for the delays, and not otherwise.

9. Mr. Sawhney submits that the said erroneous approach is in the teeth of the contractual terms aforesaid, and the Arbitrators have mis-conducted themselves by acting contrary to the contractual terms, thereby rendering their award made on claim Nos. 1(1) to 1(4) liable to be set aside. In support of his submission that the Arbitral Tribunal has returned a finding of fact that both parties were responsible for certain delays, and that the respondent had not met the operational standards, specifications and rated capacities of the various equipments/operations, Mr. Sawhney has referred to paragraphs 95, 97, 103, 111 & 132 of the award. The same reads as follows:

*“95. In initial stipulated period of completion it is evident that delay occurred on failure of CCI to arrange payments to MMCC with which the tripartite agreement was executed in 1984, but first payment was released to MMCC in February 1985. A modern automatic system plant with sophisticated technology was being constructed. It is self evident that MMCC of Japan who was to render highly technical assistance in areas of planning of the plant. It is true that even before any payment was released to MMCC as goodwill gesture having some good relations with Alstom, MMCC was rendering assistance but it is only after the payment was received by MMCC that they had sent their experts to India for giving on the spot advise and consultation. Certain engineer drawings which have been prepared prior to such in-depth consultation were required to be modified that also resulted in delay in not only planning import of the desired machinery but also in executing job at the spot. There has been also some delay by CCI in procuring the permission from the authorities for importing necessary machinery that is why CCI had not served any notice on Alstom for claiming any liquidated damages for delay in supply of engineer drawings and the supply of machinery at the site. The parties have by mutual agreement as per joint minutes already referred set up dates, target dates beyond the stipulated date of completion for various works to be completed either by CCI or by Alstom. The facts show that CCI also defaulted in meeting those freshly settled dates in respect of works falling within scope of the work of CCI. It is self evident that in case civil works were not to be completed and handed over, Alstom could not have done the job of erection of machinery etc. **So, delay which has occurred, was attributable to some extent to CCI. Alstom is responsible for some delay in some areas, but the parties did not take any action under the provisions of section 55 of the Indian Contract Act**” (emphasis supplied)*

“97. From the facts, culled out from the correspondent exchanged contemporaneously between the parties, it can be seen that foreign consultant, MMCC came to be paid its initial fee only in February 1985. It is true as is even evident from the letters dated R-176 dated 21st December, 1984 that Alstom has been availing technical services of MMCC even prior to release of first payment to MMCC. In that letter it was given out by Alstom that 80% of technical

services to be rendered by MMCC have been made available. It is true that some advance payment was made to MMCC on 23rd June, 1983 (R-23), but the fact remains that till the tripartite agreement was to be executed formal obligation of MMCC to render consultation and assistance could not be come into force. It is also evident that till payment as per tripartite agreement has been released, MMCC would not have been prompt in rendering technical services by deputing certain experts at the site. It is also clear from the facts only after receipt of payment in February 1985 that MMCC had sent its experts and on the advise given by such experts Alstom was perforce made to revise already prepared drawings. Engineering drawings were to be completed at different stages in between 10th July 1982 to 10th June 1983 and admittedly some advance payment was made to MMCC on 23rd June 1983. It is on 21st December 1984 (R-176) that Alstom pointed out that 80% of the technical services have been rendered by MMCC. This was much after the stipulated date of completion of this job of preparing and making available engineer drawings as per contract. It is thus obvious that delay occurred on the part of CCI in performance of its obligation of entering into tripartite agreement with MMCC and making payment to said foreign consultant in time”.

“103. Claim No.1(2) Rs.1,72,06,000/- is claimed as liquidated damages on account of delay in supply of equipments.

As per bar chart given in contract, entire supply was supposed to be completed by 10th August 1984. As per MOM dated 23rd February, 1987 (C-446), Alstom had supplied 3100 metric ton of equipments valued at Rs.12.70 crore against total tonnage 5400 metric ton valued at Rs.26.05 crore. Alstom has pleaded that delay occurred due to failure of CCI to obtain requisite import licenses within stipulated period. Mere fact that 20% foreign exchange has been released on 21st September, 1983 (R-204-205) does not mean that Alstom was free to enter into contracts with the foreign vendors in absence of having in hand import licenses. There is failure of CCI in sticking to the time schedule in which import licenses were to be obtained. Reference is made to letters dated 24th May, 1983 and 25th May, 1983 (C-1145 to 1149) in which CCI informed about release of 20% foreign exchange for payment to the vendors on whom orders were to be placed.

Of course, there has been some delay on the part of Alstom in supplying certain equipments like back up panels and supply of PLC, RTU and VDU which were agreed to be supplied by Alstom by end of September 1985 (C-MOM dated 20th March, 1985, C-1105 onwards). It is self evident from C-34 to 48 that supply continued up to March/April 1986".
(emphasis supplied)

"111. It has become clear from the correspondence so far discussed that the time schedules were not maintained and Alstom was not solely responsible for the time schedules being not maintained. CCI was equally responsible for the delays, which occurred. There was no fresh time schedule fixed for completing various aspects of the plant. Apparently, even after CCI served notice under clause 13.1 of the contract various activities with regard to commissioning of the plant were taken into hand by both the parties. There were found certain defects and deficiencies in the performance of the equipments, which were being remedied, by Alstom and suppliers of the equipment at the behest of the Alstom. Alstom and CCI were under the control of Union of India at that point of time and a meeting was sought to be arranged amongst the Managing Directors of ABL (Alstom) and representatives of CCI with Sh. K.P. Singh, Director Ministry of Industries, Department of Public Enterprises vide letter dated February 3, 1987 (C-80) and agenda for discussions (C-81) as follows:-

- (i) A time-bound programme for completion of balance works for operation of plant on rated capacity.*
- (ii) Commissioning of precalcinator system with the help of M/s. Mitsubishi of Japan.*
- (iii) Commissioning of Dust Collectors and ESPs.*
- (iv) Commissioning of computerized control system and on line 'X' Ray analyzer.*
- (v) Posting of adequate supervisory engineers and experts for stabilization of the plant.*
- (vi) Discharge of liabilities of ABL to their vendors*

for suppliers and services to get their co-operation in stabilization of the plant.

(vii) Time-bound programme for giving performance guarantee tests for outputs and power and fuel consumption". (emphasis supplied)

"132. In light of the facts coming out from various documents already examined, it cannot be said that Alstom had commissioned the plant in accordance with terms of the contract. As already noticed CCI had taken over the installed equipment and had commissioned the plant in 1986 itself and production of cement also commenced in about December 1986. Thereafter, Alstom came under the control of Govt. of India due to proceedings in liquidation having commenced of the Alstom company and under overall control of Union of India the parties continued to address various problems arising in running of the plant. Time was set at large so that plant could start functioning to its rated capacity by addressing various problems faced in the plant. It has also come out that certain problems in the equipment arose due to mal-operation of the equipment by the operators of CCI". (emphasis supplied)

10. The legal principle adopted by the learned Arbitrators, to the effect that the respondent would have been liable for the liquidated damages, only if the respondent was solely responsible for the delay, is contained in paragraph 102 (while dealing with claim No. I(1)) and para 104 (while dealing with claim No. I(2)) and also in para 111 of the award. Paragraphs 102 and 104 are reproduced below:

"102. As far as liquidated damages being claimed under present head CCI has failed to prove that delay had occurred solely on the part of Alstom in supplying engineering drawings etc. This claim is thus rejected." (emphasis supplied)

"104. However, liquidated damages could be claimed

by CCI only if it is to be held that Alstom was wholly responsible for the delay occurring in supply of equipments, that is not so. As already mentioned earlier after the stipulated period in which such work was to be completed, CCI did not respond to the request of Alstom for giving extension in time for the reasons detailed out by Alstom in its request letter. CCI ought to have either refuted the facts given in that request letter and at least should have communicated its response either rejecting request or acceding for extension of time. The facts given in the request letter of Alstom on the face of it show that delay, which has occurred in meeting the contract dates, was not wholly imputable to Alstom. Thus, this claim for liquidated damages is also rejected". (emphasis supplied)

Paragraph 111 has already been quoted herein above.

11. I may also note that in para 127, the learned Arbitrators returned a finding that time was not kept as of the essence of the contract for carrying out remaining jobs under the project, and that the parties went ahead with the contract without any conditions or reservations.

12. Mr. Sawhney submits that the Tribunal has erred in recording that because the time was set at large, there was waiver of its contractual rights by the petitioner to claim liquidated damages. Similarly, in para 109, the learned arbitrators concluded that because the petitioner had taken over the machinery and equipment without subjecting the same to required tests, by its conduct the petitioner had waived the requirement of tests being conducted. He submits that under Clauses 28 & 37.3 of the contract, there could be no waiver of rights, unless so expressly made. Clauses 28 & 37.3 read as follows:

"28. NO WAIVER OF RIGHTS

Neither the inspection by the Purchaser nor the Engineer or any of their officials, employees, or agents nor any order by the Purchaser or the Engineer for payment of money or any payment or acceptance of the whole or any part of the work(s) by the Purchaser or the Engineer, nor any extension of time, nor any possession taken by the Engineer, shall operate as a waiver of any provision of the Contract, or of any power herein reserved to the Purchaser or any right to damage herein provided, nor shall any waiver of any breach in the contract be held to be waiver of any other or subsequent breach.

37.3 If by reason of any default on the part of the Supplier a Taking Over Certificate has not been issued in respect of every portion of the Works within one month after the date fixed by the Contract for the completion of the Work, or if no time be fixed, within a reasonable time, the purchaser shall be at liberty to use the Works or any portion thereof in respect of which a Taking Over Certificate has not been issued, if and so long as the Works or the portion so used as aforesaid shall be reasonably capable of being used and that the Supplier shall be afforded reasonable opportunity of taking such steps as may be necessary to permit the issue of the Taking Over Certificate".

13. Mr. Sawhney further submits that the Tribunal proceeded on the assumption that there was no response from the side of the petitioner to the respondent's letter dated 25.01.1990 wherein the respondent had recorded the various aspects on which there was a delay on which there was delay on the side of the petitioner, and it also recorded the discussions which had taken place on 06.06.1989. He points out that in concluding part of paragraph 135 of the award, the learned Arbitrators have sought to accept the contentions of the respondent as contained in the aforesaid letter by observing that there was no

answer to the facts highlighted by the respondent in this letter. He submits that a perusal of the letter dated 25.01.1990 shows that the same was not even addressed to the petitioner. It was, in fact, addressed by the respondent to Sh. Raj Gopal, the then Secretary (Power), Government of India. He submits that there was no occasion for the petitioner to respond to the said communication and the failure to respond to the said communication could not be taken adversely against the petitioner. He has also drawn attention of the court to various communications of the Consultant, Mitsubishi Mining Cement Corporation (MMCC), Japan and the respondent's letter dated 27.10.1987 which show that the rated capacity of the cement plant, as per the contract, had not been achieved.

14. Mr. Sawhney submits that the objections have been preferred in time. I may note that even though the argument that the objections are barred by limitation has been raised by the respondents in their reply, at this stage the same is not pressed.

15. On the other hand, learned counsel for the respondent submits that the learned Arbitrators have examined the evidence led by the parties, including the correspondence exchanged between them and the minutes of the various meetings held between them threadbare, and on that basis concluded that no liquidated damages were liable to be paid by the respondent as the obligations under the contract were

reciprocal and there were delays on the part of the petitioner in discharging its obligations. Reference is made to para 28 of the award in support of this submission. He submits that the Tribunal has recorded findings of fact in relation to the various sub-heads under claim No.I, that the respondent was not able to fulfill its obligations on account of the delays of the petitioner.

16. In this respect he places reliance on the detailed discussion contained in the award in paragraph 50 onwards. The correspondence between the parties has been digested by the Tribunal, inter alia, in para 95 of the award which reads as follows:

"95. In initial stipulated period of completion it is evident that delay occurred on failure of CCI to arrange payments to MMCC with which the tripartite agreement was executed in 1984, but first payment was released to MMCC in February 1985. A modern automatic system plant with sophisticated technology was being constructed. It is self evident that MMCC of Japan who was to render highly technical assistance in areas of planning of the plant. It is true that even before any payment was released to MMCC as goodwill gesture having some good relations with Alstom, MMCC was rendering assistance but it is only after the payment was received by MMCC that they had sent their experts to India for giving on the spot advise and consultation. Certain engineer drawings which have been prepared prior to such in-depth consultation were required to be modified that also resulted in delay in not only planning import of the desired machinery but also in executing job at the spot. There has been also some delay by CCI in procuring the permission from the authorities for importing necessary machinery that is why CCI had not served any notice on Alstom for claiming any liquidated damages for delay in supply of engineer drawings and the supply of machinery at the site. The parties have by mutual agreement as per joint minutes already referred set up

dates, target dates beyond the stipulated date of completion for various works to be completed either by CCI or by Alstom. The facts show that CCI also defaulted in meeting those freshly settled dates in respect of works falling within scope of the work of CCI. It is self evident that in case civil works were not to be completed and handed over, Alstom could not have done the job of erection of machinery etc. So, delay which has occurred, was attributable to some extent to CCI. Alstom is responsible for some delay in some areas, but the parties did not take any action under the provisions of section 55 of the Indian Contract Act”

17. Learned counsel for the respondent submits that in these proceedings, this court would not interfere with the findings of fact returned by the Tribunal and the findings of the fact cannot be said to be without any basis or evidence. Even if two views are possible, and the Tribunal has taken one of these views, the court would not interfere with the said findings even though the court is of the view that the finding returned by the Arbitrators is not correct. In this regard, he places reliance on the decisions of the Supreme Court in ***Indu Engineering & Textiles Limited Vs. D.D.A.***, 2001 5 SCC 691 and ***K.V. Mohammed Zakir Vs. Regional Sports Centre***, 2009 9 SCC 357.

18. Having heard the learned counsel for the parties, I am of the view that while making the award on Claim No.1, the learned Arbitrators have misconducted themselves, inasmuch, as, the award is contrary to the contractual conditions, and they have not been taken into consideration by the learned arbitrators. Moreover, the principle

of law, which forms the basis of the award on claim nos.1(1) to 1(4) is, with respect, erroneous.

19. No doubt, the findings of fact returned by them with regard to the delay on both the sides would not be interfered by this court as they are based on evidence brought before them. However, that is not the end of the matter. Clauses 10.5 and 6.2, as aforesaid, entitle the respondent-contractor for extension of time for the period for which the petitioner has caused the delay. The liquidated damages to which the petitioner is entitled has been set out in Clause 10 of the contract, as extracted above. The learned Arbitrators have themselves returned a finding that the respondent was also liable for some delays. However, the learned Arbitrators have disallowed the claim for liquidated damages on the assumption that the said damages could be awarded to the petitioner only if the respondent was solely responsible for the delay. With due respect to the Tribunal, there is no basis for such an assumption. The meaning of the expression 'delay' in the context of Clause 10.5 & 6.2, as aforesaid, would mean the delay over and above the delay for which the petitioner was responsible, i.e., the total delay vis-à-vis the contractual period minus the delay for which the petitioner was responsible. As the Tribunal has proceeded on the assumption that liquidated damages would be payable by the respondent-contractor only if the contractor was solely responsible for the delay, even though the tribunal finds that the delay was on both

sides, it has not proceeded to apportion the delays for which the petitioner was responsible and the delays for which the respondent was responsible. The claim of the petitioner for liquidated damages ought to have been considered after quantification of the quantum of delay for which the respondent was responsible, and for which the petitioner was not responsible. For the sake of clarity, I may take an illustration. Supposing, under the contract, a particular aspect of the work had to be completed in a span of four weeks. The petitioner by not performing its obligations (which, in turn, prevented the respondent from performing its obligations) caused a delay of two weeks, and the said aspect of work gets completed in eight weeks, then by application of clauses 10.5 and 6.2, the respondent contractor would be entitled to extension of time by two weeks. The delay attributable to the respondent would then be: total time taken, i.e. eight weeks minus (originally stipulated period, i.e. four weeks plus the extension of time granted, i.e. two weeks), equal to two weeks.

20. The finding that time was set at large and was not of the essence of the contract, does not militate against the right to claim liquidated damages which are contractually provided. As a legal proposition, it cannot be said that liquidated damages would be payable in terms of the contract, only if time is of essence and not otherwise. The Tribunal has adopted an incorrect principle of law and on that basis also the claim for liquidated damages has been disallowed.

21. The decisions cited by the learned counsel for the respondent in my view are of no assistance in the light of the above discussion. In para 5 of the decision in ***Indu Engineering & Textiles Ltd.*** (*supra*), the Supreme Court enumerated the various grounds for setting aside the award under Section 30 of the Arbitration Act. These grounds, inter alia, include the ground that “*the award on the face of it is based on proposition of law which is erroneous*”.

22. As already noticed hereinabove, there are two erroneous proposition of law on which the learned Arbitrators have passed their award. The first is that unless the respondent-contractor was solely responsible for the delay, the petitioner could not claim liquidated damages under the contract, and the second is that as time was set at large and was no longer of the essence of the contract, the petitioner was entitled to liquidated damages.

23. In ***K.V. Mohammed*** (*supra*), the Supreme Court observed that a court cannot scrutinize the reasonableness of the reasons given by the Arbitrator. However, if the reasons are such that no person of ordinary prudence could ever approve of, or if the reasons are so outrageous in their defiance of logic, that they shock the conscious of the court, then it would be a different situation and in an appropriate case, the court may interfere.

24. In my humble view, with due respect to the learned Arbitrators,

the reasoning adopted by them as aforesaid cannot be approved and adopted. Consequently, I set aside the award made by the learned Arbitrators to Claim No. I and remand the award on Claim No. I to the learned Arbitrators under Section 16 of the Act as, in my view, the award has left undetermined the matter as to the quantum of delay for which the respondent was responsible in carrying out the various works under the contract in question for which the contract provides for levy of liquidated damages. The learned Arbitrator shall, after hearing the parties, render their decision within six months.

25. At this stage, learned counsel for the respondent submits that the award made on Claim No. I cannot be separated from the rest of the award and, therefore, the remaining award should not be made a rule of the court. I do not agree with this submission as the said claim for liquidated damages has been made only by the petitioner, and there is no counter-claim by the respondent. Even if the award on Claim No. I were to go against the petitioner on it being re-considered by the learned Arbitrators, their right to receive the amounts under the rest of the award would not in any way be affected. The respondent has not assailed the award on any ground, in respect of any of the claims awarded by the learned arbitrators. This submission is, therefore, rejected.

26. It is made clear that after making the correction as aforesaid in

respect of Claim No. III(c)(3), the award is otherwise made a rule of the court, except in respect of Claim No. 1, which stands remanded.

27. The objections stand disposed of with the aforesaid directions.

VIPIN SANGHI, J

FEBRUARY 10, 2011

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