

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

+ **Date of Decision: 07.03.2011**

% **O.M.P. No. 539/2009**

DELHI DEVELOPMENT AUTHORITY Petitioner
Through: Mr. Bhupesh Narula, Advocate

versus

M/S S S JETELY Respondent
Through: Ms. Ginny J. Rautray, Advocate

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? : Yes
3. Whether the judgment should be reported in the Digest? : Yes

VIPIN SANGHI, J. (Oral)

1. These are objections preferred under Section 34 of the Arbitration and Conciliation Act, 1996 to the award dated 23.01.2009 and the corrigendum dated 03.02.2009 made by Shri S.S.Jain, Sole Arbitrator. The parties had entered into a contract whereunder the respondent-contractor had undertaken to construct Surbathing Ghat at downstream site of Wazirabad barrage on bank of river Yamuna, vide award letter dated 01.05.1995. The stipulated date of start of work was 11.05.1995 and the stipulated date of completion was 10.08.1996. The period of execution of the work under the contract was 15 months.

A formal agreement was executed between the parties on 04.05.1995. Admittedly, the respondent-contractor executed about 44.7% of the work. The contract was rescinded by the petitioner on 29.05.1998. Disputes arose between the parties as the petitioner claimed that the respondent was responsible for the delays and non-execution of the work. The petitioner sought to effect recoveries by levying compensation under clause 2 of the contract of Rs.37,38,790. On the other hand, the respondent alleged breach of contract by the petitioner and the termination of the contract as illegal. The respondent raised various claims under different heads.

2. The petitioner filed Civil Suit No. CS(OS) No.161/2000 to claim the amount of Rs.37,38,790. The said suit was contested by the respondent herein, and the respondent also preferred a counter claim for about Rs. 89 lakhs. The petitioner filed another suit being CS(OS) No.941/2001 claiming an amount of Rs.1,04,78,947/-, being the amount allegedly recoverable from the respondent for getting the work done at the risk and cost of the respondent. On an application moved by the respondent under Section 89 C.P.C, this Court vide order dated 23.05.2007 referred the matter to arbitration, and appointed Shri S.S. Jain, Retd. Superintending Engineer (Arbitration), DDA, as the Arbitrator. The petitioner, Delhi Development Authority was the claimant and the contractor M/s. S. S. Jetley was the counter claimant. The learned Arbitrator has rendered his award whereby he has partially allowed the counter claims made by the respondent-contractor, and disallowed the claims of the petitioner towards compensation under

Clause 2 and the claim for recovery of risk-cum-cost amount.

3. The learned Arbitrator firstly considered the issue whether the petitioner-claimant was entitled to levy compensation under clause 2 of the agreement to the tune of Rs. 37,38,790/- along with interest at the rate of 18% per annum. The right of the petitioner to levy compensation could arise only if it were established that there was delay in execution of the work, for which the respondent-contractor was responsible. Consequently, the learned Arbitrator considered the said issue and returned a finding that the petitioner was responsible for a fundamental breach of the contract inasmuch, as, the petitioner failed to provide the drawings without which the respondent could not have carried out the works.
4. The submission of Mr. Narula, learned counsel for the petitioner DDA is that the learned Arbitrator while dealing with the said aspect has failed to take into account the various letters issued by the petitioner to the respondent from time to time during the execution of the work, wherein the petitioner repeatedly called upon the respondent-contractor to execute the works expeditiously. He submits that even if some drawings were not available, various other works within the reach, where the contractual work was to be done, were possible to be executed by the respondent. However, the respondent did not carry out even those works which could possibly have been done without the drawings for the retaining wall abutting the MCD's settling tanks.
5. The aforesaid submission of Mr. Narula does not appear to be

correct. A perusal of the award shows that on internal page 10, the learned Arbitrator has generally discussed the correspondence issued by the petitioner wherein it was recorded that there was no hindrance in the execution of the work and whatever hindrances were pointed out had been sorted out. I may extract the relevant portion of the award from internal page 10 thereof, which reads as follows:-

“By reading the letters it was pointed out that there was no hindrance in the execution of the work and whatever hindrances were pointed out by the respondent those were sorted out. On the contrary on inspection of the site on the various dates it was observed by various authorities that the work was slow. So by the various letters as shown in the chart filed by the claimant, the respondent was informed of the slow progress and taking effective steps for executing the work. Respondent was also informed that sufficient labour to cope up with the situation were not deployed at the site.”

6. The discussion and the reasoning of the learned Arbitrator, while dealing with the aforesaid issue, is found on internal page 21 onwards of the award. The learned arbitrator takes note of the petitioner's own stand that, of the total delay of 657 days from 11.08.1996 to 21.05.1998, when the work was rescinded, the delay of 169 days was attributable to the petitioner herein and the remaining delay of 488 days was attributed to the respondent herein. The learned Arbitrator has digested the correspondence exchanged between the parties and the material brought before him in the following manner:-

“The admitted case of the claimant in Suit No. 161/2000 filed by them in Hon'ble Delhi High Court that till 11.8.1996 (the stipulated date of completion) there was no delay on the part of the respondent. The respondent referred para 14 of the plaint at page 66 of the paper book as extracted below:

“The extension of time case was submitted by

concerned Executive Engineer vide letter No.1335 dated 26.8.1998. As per the Extension of Time performa submitted by the Executive Engineer concerned, it was pointed out that against the delay of 657 days (from 11.8.1996 to 29.5.1998) when the work was rescinded, a delay of 169 days was on account of hindrances attributable to the plaintiff and the remaining delay of about 488 days was attributable to the defendant."

From the documents filed by both the parties and submissions made, it is clear that the respondent was interested to complete the work but could not do so because there were one after the other hindrances. It is also an admitted position that the drawings and designs of many items e.g. flooring and step pattern and more particularly drawings for retaining wall of Municipal Corporation of Delhi settling tank were issued on 21.5.1998. In fact the drawing given to the respondent was not final and was again revised by the claimant and issued to the subsequent agency only on 7.1.1999. This hindrance is recorded by the claimant. From the record it is also clear that Extension of Time was granted by the claimant suo moto up to 30.6.1998 by the letter dated 16.5.1998 after giving the show cause notice dated 1.5.1998 which was replied by the respondent by the letter dated 12.5.1998. On the one hand claimant by the letter dated 16.5.1998 unilaterally extended the time for completion of the work up to 30.6.1998 and on the other hand by the letter dated 29.5.1998 terminated the contract. The ground given for termination of the contract is that the respondent failed to complete the work by the extended date of completion. As per the claimant this date was 30.6.1998. Thus, there was no reason to terminate the contract prior to this date. Another important fact to be noticed is that the Executive Engineer in the letter dated 26.8.1998 addressed to the Superintending Engineer admitted the failure on the part of the claimant to make available the drawings for retaining wall near Municipal Corporation of Delhi boundary wall along with water channel. This hindrance was from 16.7.1995 to 20.5.1998. From the record it is also noticed that the wall was required to be provided on 16.7.1995 immediately after 1995 flood. The claimant also admitted in this letter that the value of work of retaining wall to be executed after the drawing was to be made available was of Rs.35.00 lacs. As per Executive Engineer for execution of this work minimum 45 days were required. It was submitted by the respondent that the consideration of

*period of 45 days by the claimant was wrong because other related works dependent upon the construction of retaining wall could be executed only thereafter. **Admittedly the drawing for Municipal Corporation of Delhi boundary retaining wall was to be issued on 16.07.1995. It has been established by the respondent through the drawings and also in my expert opinion the said drawing also led to hindrance of the work up to the mid-landing level. This is the work which was possible even during the flood season and would have also given the much needed space for stacking etc., continuity of work and access to the site which were the reasons also responsible for crippling the pace of the work from the very beginning. The claimant has not been able to give any reason for non-issuance of this drawing was non payment of the dues of the Consultant. The drawing was made available on 21.5.1998. From this date even as per the claimant minimum period of 45 days was required for execution of this work. This being so the termination of the contract by the claimant on the excuse that respondent failed to complete the work within the extended date is unjustified and illegal.*** (emphasis supplied).

7. The learned arbitrator was himself a retired engineer and an expert in the field of Civil engineering. He has returned a finding that the failure to provide the drawings for the MCD boundary retaining wall led to hindrance of the work up to the mid landing level. He has observed that work was not possible during the flood season, given the much needed space for stacking etc., continuity of work and access to the site. He observed that failure to provide the said drawings was the reason responsible for crippling the pace of the work from the very beginning.
8. The submission of Mr. Narula also cannot be accepted for the reason that the authority of the arbitral tribunal to conduct the proceedings in the manner it considers appropriate includes the

authority to determine the admissibility, relevance, materiality and weight of any evidence (Section 19(4) of the Act). Therefore, it was for the learned Arbitrator to have considered the evidence led by the parties. It is clear from the aforesaid extracts that he has considered the evidence brought before him and has also considered the aspect of admissibility, relevance, materiality and weight of the evidence. From the aforesaid extracts it certainly cannot be said, that the finding of the learned Arbitrator, that there was a fundamental breach of the contract on the part of the petitioner in not supplying the relevant drawings has been arrived at without any evidence.

9. The learned Arbitrator while discussing the aforesaid issue has also examined the aspect of the hindrance faced by the Contractor in carrying out the works as the water level was more than 203.25 G.T.S. The learned Arbitrator has noted that as per drawing No.1015, the execution of the work was possible only if the water level was at 203.25 G.T.S., and not above that. He refers to the letters dated 05.10.1996 and 21.11.1998 of the respondent and the letter dated 02.07.1996 of the claimant. I may only refer to para 6 of the petitioner's own letter dated 02.07.1996, wherein the petitioner had observed as follows:-

"6. Though the coffer dam was constructed up to 204 in good condition and pocklain machine was continuously passing over it, it is practically not possible always to keep the coffer dam workable. This can work only in the dry season when the river water remain always below RD 203.00. The river water level fluctuate with the time and raise the moisture contents in the coffer dam. No trucks with heavy loads never agreed to use the coffer dam to dump the building material. This difficulty was also to be considered. The proper case is however being taken to

protect the landings.”

10. The learned Arbitrator takes note of the water level registered from July 1996 onwards when the level was found to be more than 203.25 G.T.S. Consequently, the learned arbitrator holds that as the delay was attributable to the petitioner and not to the respondent, the levy of liquidated damages under clause 2 was not justified. This submission of Mr. Narula is, therefore, rejected. The finding of fact of the learned Arbitrator is based on the evidence brought before him and certainly cannot be said to be perverse.

11. The next submission of Mr. Narula pertains to the award made by the learned Arbitrator in respect of extra items No.2/(1)(a), 2/(1)(b) while considering issue No.2. The submission of Mr. Narula is that the learned arbitrator has allowed the payment for 7448 cu mtr and 6034 cu mtr for excavation in underwater for ordinary rock and hard rock. He submits that the entries in relation to the aforesaid quantities were made in pencil in the measurement book. He further submits that neither in its final bill prepared by the respondent, nor in the statement of claim, any claim was made in respect of the aforesaid quantities. At the time when these measurement books were produced, these entries were found in pencil and merely because these entries were present, the learned arbitrator has awarded the amounts, as if the aforesaid works had also been done. He submits that it is not explained as to where these entries came from. There is no record of the respondent having done the works to which these pencil entries relate. Had the respondent done the works, the respondent would have made a claim

therefor in the final bill, as also in the statement of claim.

12. On the other hand, learned counsel for the respondent submits that the measurement books are written and maintained by the petitioner, and it is for them to explain these pencil entries. The submission of learned counsel for the respondent in support of the award is that once these entries had been made in the measurement book, it could not be said that the works had not been done. As these entries are present, the learned Arbitrator was justified in allowing payment in relation to the said quantities as well.

13. Learned counsel for the respondent further submits that when the final bill was raised, the respondent was not aware of the quantities of work done between 18.03.1998, when the 18th RA bill was prepared, and 21.05.1998, when the contract was rescinded. The work had been done upto 21.05.1998. She submits that the quantities of 7488 cu mtr and 6034 cu mtr are the additional work done between the 18th RA bill and the date of recession for excavation in ordinary rock and hard rock.

14. I do not find any merit in the submission of the respondent, and in my view, there is patent illegality in the award insofar as the award made in items 2/1(a) and 2/1(b) for the quantity of 7488 cu mtr and 6034 cu mtr respectively is concerned. The respondent/contractor did not even raise a claim in respect of these quantities, neither in the final bill nor in the statement of claim. Had the respondent carried out the said works, the respondent certainly would have been aware of it and would have included these quantities in the final bill and the statement

of claim.

15. The submission that the entries relate to works done after the raising of the 18th RA bill and before the date of termination cannot be accepted for the reason that the final bill was raised by the respondent after the recession of the contract. The respondent did not even claim that the figures mentioned in the final bill were those taken from the 18th RA bill and that further work had been done between the date of 18th RA bill and the date of recession. The arbitrator could not have awarded the claim which was not even raised by the respondent. For the arbitrator to assume jurisdiction and make an award, there has to be a live dispute or claim.

16. A perusal of the award shows that while allowing the payment for the quantities mentioned in pencil as aforesaid, the learned arbitrator has placed heavy reliance on the instructions printed on the measurement book, that measurements should be recorded in ink and if made in pencil, the same may not be overwritten in ink.

17. An entry made in a measurement book in the ordinary course, may raise a presumption of its being a correct recording of the work done by the Contractor. But such a presumption cannot be made when an entry is disputed; not corroborated by any other material evidence; and, the Contractor does not even contemporaneously claim to have done the work to which such an entry relates. The entry should clearly reflect that they are intelligible, and should contain the details and particulars that routinely accompany such an entry. They should be complete. I have seen the two pencil entries and they

appear not to have been made in the ordinary course of book writing. They just stand out from the rest of the notings. It is not clear when, by whom, and for that purpose they were made. They are not intelligible. The instruction that entries made in pencil should not be overwritten in ink does not lead to the conclusion that the pencil entry made in the measurement book was necessarily made in the ordinary course. All that it means is that there could also be genuine entries made in the ordinary course in pencil in the measurement book. Therefore, the reasoning of the learned Arbitrator for relying on the two pencil entries is completely and fundamentally flawed.

18. So far as the quantity of 7488 cu mtr and 6043 cu mtr for ordinary rock and hard rock are concerned, these claims were never asserted at any point of time. The said claim would have been barred by limitation by the time the respondent asserted these claims during the course of the arbitral proceedings. In my view, the learned arbitrator has exceeded his jurisdiction in awarding these claims, which were never raised by the respondent. Accordingly, the award made on items 2/1(a) and 2/1(b) mentioned at Sl. Nos.13 and 14 of statement No.II at internal page 76 of award stands modified and reduced by Rs.6,36,480/- and Rs.7,18,046/- respectively.

19. The next submission of Mr. Narula is in relation to the award made on Item 2(a), which pertain to earth work done for banking. The learned arbitrator has awarded an amount of Rs.4,97,199.51 in Statement No.I of the award under this claim. The learned arbitrator has awarded the aforesaid amount for the quantity 2167.37 cu mtr @

Rs.23 per cu mtr. The discussion on the award on this particular aspect reads as follows:

"The Claimant in the final bill in respect of agreement item No.2(a) has shown only a quantify of 15,169.91 Cu. M. and out of this quantity 4788.00 Cu. M. is shown payable at the agreement rate of Rs. 23.00 per Cu. M. and another quantity of 10381.91 Cu. M. @ Rs. 16.44 per Cu.M.

It was explained by the respondent that the total quantity excavated by the Respondent is 31,098.98 Cu. M. under agreement item No. 1(a)(i), (ii), 1(b) and 1(c). Out of this total quantity 9481.61 Cu. M. is shown payable under extra item No. 3/l(b), having been transported up to a lead of 6 Km. thus, leaving the balance quantity of 21617.37. This quantity was disposed of by the Respondent as per item No.2 of the agreement. It was thus submitted that under agreement item No.2 the quantity payable is 21617.37 Cu. M. and not 15,169.91 Cu. M. The Claimant has not only shown the less quantity but also the rate of Rs.16.44 per Cu. M. payable for a quantity of 10381.91 Cu. M. in the final bill."

20. The submission of Mr. Narula is that in the 18th RA bill, quantity of 151611 cu mtr was paid vide MD 4484. This was accepted by the respondent by acknowledging that the bill and measurement are accepted. He submits that this work of banking had to be done with soft/loose soil excavated under item 1(a) and 1(b). However, it is not that the entire soft soil excavated under item 1(a) and 1(b) was utilized to carry out the work under item No.2(a). The respondent had taken out a part of the excavated soft earth from the work site, and under extra item 3(a) and 3(b), the contractor had been allowed the transportation charges for earth for leads upto 1 km and 6 km respectively. Mr. Narula submits that the earth which was transported upto 1 km and 6 km leads respectively should have been excluded from the quantity assumed to have been utilized for purpose of

banking under item 2(a). He submits that only those quantities which were removed under item 3(b) (i.e. upto a lead of 6 km), amounting to 9481.61 cu mtr had been excluded, and the earth removed under item 3(a) (i.e upto a lead of 1 km) amounting to 6148.11 cu mtr has not been excluded from the total quantity of earth work for banking, claimed to have been excavated by the respondent under item 2(a). He submits that the learned arbitrator has merely proceeded on approximations and has disregarded the actual quantity of banking work done under item 2(a) which amounted to 15169.91 cu mtr as per measurement. In this regard, he places reliance on the measurements recorded in the various running bills such as 14th, 15th, 16th, 17th and 18th RA bills, where, consistently, the said figure 15169.91 cu mtr has been mentioned and accepted by the respondent.

21. On the other hand, learned counsel for the respondent submits that under the contract in question, the respondent was required to carry out the work within the period of 15 months. Consequently, the respondent was expected to face only one flood. In reality, the respondent faced three floods as the work prolonged for over three years and the work in embankment had to be redone thrice over after each flood. She submits that the respondent had repeatedly raised a grievance with regard to the less recording and non recording of the quantities in the measurement book.

22. A perusal of the award made in respect of item 2(a) shows that the learned arbitrator has not examined various aspects, such as the recording made in the various RA bills with regard to the quantity of

work done under item 2(a); the issue whether the quantities allowed under item 3(a) should also have been excluded from the total quantity of earth work done or not for the purpose of item 2(a); whether the quantity claimed by the petitioner as 15169.91 cu mtr was the actual work done under item 2(a) or not, and; whether the quantity of ordinary rock covered by item 1(c) has been included and if so, whether it could have been included in the work under item 2(a).

23. Though learned counsel for the petitioner also raised a question about the rate of Rs.23 per cu mtr awarded by the learned arbitrator for the work done under item No.2(a), I am not inclined to agree with his submission on that aspect and the rate of Rs.23 per cu mtr appears to be correctly adopted as that was the contractual rate. Even for the extra quantity, the said rate would have been applicable under the contract.

24. As the submissions of the rival parties have not been properly examined by the learned arbitrator, the award made in respect of item 2(a), in my consideration, needs to be re-determined. The award made on item No.2(a) is remitted back to the learned Arbitrator for fresh adjudication.

25. The next submission of Mr. Narula is in respect of award made in relation to agreement Item No. 35. Item No. 35 of the agreement reads as follows:

“35. Providing and fixing in position 25mm dia and 1500mm long rock bolts conforming to I.S. 1786 including drilling up 1.5 m in rock, water jet cleaning and grouting, cutting etc. complete as per direction of Engineer in Charge.”

26. The contractual quantity of this item as shown in the B.O.Q., was 1734 Kgs. The contractual rate earlier fixed was Rs.70/- per Kg. However, the same was mutually reduced to Rs.60/- per Kg. Upto the 18 RA Bill, the total quantity of work done under Item No. 35 was shown as 7601.54 Kgs. Out of this 6542.38 Kgs. of the work was paid @ Rs.60/- and 1059.16 Kgs. was paid @ Rs.35/-. It is informed that the quantity paid @ 35/- per Kg. was on account of part-rate payment.

27. The submission of Mr. Narula is that in respect of rock bolts of length beyond 1500mm + 20% the said work had to be treated as falling under BOQ Item No. 13, which reads as follows:

"13. Reinforcement for R.C.C. work including straightening, cutting, bending binding and placing in position complete.

a) Cold twisted bars."

28. The submission of Mr. Narula cannot be accepted. As the learned Arbitrator has noted in his award, the petitioner itself had recorded the quantity of the work done under agreement Item No. 35 in the 18th RA Bill as 7601.54 Kgs. The reduction of the quantities in the 20th RA Bill to 3750.90 Kgs could possibly not have taken place. The two items, namely BOQ Item No. 35 & BOQ Item No. 13 are different and distinct works. Whereas Item No. 35 pertains to providing and fixing of 25mm dia and 1500 mm long rock bolts conforming to IS:1786 which includes drilling up to 1.5 metres waterjet cleaning and grouting, etc., the work to be done under BOQ Item No. 13 pertains to reinforcement for RCC work including straightening, cutting, bending binding and placing in position the cold twisted bars etc. Therefore,

the substantive work under Item No. 35 pertains to providing and fixing of rock bolts and the work in relation to the fixation of those bolts, whereas Item No. 13 pertains only to the work of reinforcement of RCC work and other related works.

29. When the size of the rock bolts exceeds 1500 mm length, there is no justification to reduce the rate at which the contractor should be paid for the work done in relation to the excess length of the rock bolt. Therefore, the rate applicable for the work done pertaining to the excess length of the rock bolt, i.e. beyond 1500 mm + 20% could not be reduced from Rs.60/-. The learned Arbitrator rightly awarded the contractual rate applicable to contract item No.35 for the quantity of 1059.16 kg. The view of the learned Arbitrator cannot be said to be either patently erroneous or implausible. I find no reason to interfere with the award made by the learned Arbitrator in relation to the BOQ Item No. 35.

30. Mr. Narula then submits that the quantity of work falling under BOQ Item NO. 35 which was treated by the petitioner as falling under Item No. 13 namely $3750.90 + 3850.64 = 7601.54$ Kgs. needs to be reduced. The total quantity for which payment under Item No. 13 of the BOQ had been made by the petitioner was 372692 Kgs. Ms.Rautray fairly does not object to the reduction in the quantity from 372692 Kgs by 7601.54 Kgs. Consequently, the quantity of agreement Item No. 13 in Statement No. 1 of the award stands reduced to 365090.46. The amount payable @ Rs.16.65/- would, therefore, come to Rs.60,78,756.16/-. The award stands modified to the aforesaid

extent as made on agreement Item No. 13 in Statement No. 1.

31. The next submission of Mr. Narula pertains to extra Item No. 1 and substituted Item No. 1, i.e. SIS No. 1. The submission of Mr. Narula is that the cost of sand to be supplied by the respondent-contractor was included in the rate fixed under agreement Item No. 4 which was substituted as extra item. A perusal of the award shows that the learned Arbitrator has, in depth, considered the facts of this case. The discussion in the award shows that the petitioner, as per the directions of the consultant, substituted the item of filling of excavated earth with sand filling. The respondent demanded a rate of Rs. 165 per cubic metre vide a letter dated 26.03.1996. Subsequently, on account of the fact that ban on excavating sand from the river Yamuna had been removed, the respondent reduced its demand from Rs.165 per cubic metre to Rs. 145 per cubic metre vide letter dated 30.04.1996. The respondent points out, and the learned Arbitrator takes note of the fact, that the subsequent agency appointed by the petitioner was paid @ Rs.161 per cubic metre for supply of sand and Rs.32 per cubic metre for filling. Thus, the claim of Rs. 145 per cubic metre demanded by the respondent was held to be justified.

32. The learned Arbitrator has taken into account the materials produced before him and concluded that the rate of Rs.145 per cubic metre demanded by the respondent was justified. He also observes that there is no dispute as to the quantity of sand consumed and utilized.

33. In the light of the aforesaid discussion found in the award, it

cannot be said that the award made by the learned Arbitrator on the item in question is without any reason. The view taken by him is a plausible view based on the materials and facts produced before him. I do not find any justification for interfering with the award made on this item either in respect of the quantity, or in respect of the rate.

34. The next objection raised by the petitioner is in respect of the award made on agreement Item No. 26. Item Nos. 25 & 26 in the BOQ read as follows:

“25. Supply of River Bed Boulders minimum size 22.5 cm in at least three directions including royalty carriage to the site of work, loading, unloading and stacking etc. complete.

26. Dumping of stone for making protection apron to the required saction including packing and dressing of top surface with all leads and lifts (from stack to the site of work) (excluding the cost of stone).”

35. The quantity mentioned against both these items in the BOQ is 3840 cubic metres. Whereas Item No. 25 pertains to river bed boulders of minimum size 22.5 cm, Item No. 26 pertains to the carrying out of the specific work mentioned therein with the river bed boulders referred to in Item No. 25. It is not disputed that no claim was made under Item No. 25 of the BOQ for supply of river bed boulders. The hard rock excavated at the site was used for carrying out works at item No. 26 of the BOQ.

36. The submission of Mr.Narula is that the quantity of work done under Item No. 26 was measured at 218.26 cubic meters as per the 20th RA Bill. Even in the 18th RA Bill, the same quantity was measured and paid to the respondent and accepted by the respondent. The

reasoning adopted by the learned Arbitrator while allowing the claim under Item No. 26 of the BOQ for the 1449.31 cubic meters is that 1449.31 cubic meters of hard rock was excavated and whole quantity was dumped by the contractor for making the protection apron as required under Item No. 26. The learned Arbitrator has proceeded on the basis that the petitioner had not shown any document that the quantity over and above 218.26 cubic metres (which quantity was used, even according to the petitioner, for carrying out works under Item No. 26) was taken away by the contractor from the site for use somewhere else. The submission of the petitioner is that it could not be assumed that the entire quantity of hard rock excavated under Item No. 1(d) of the BOQ was utilized for carrying out work under Item No. 26.

37. Ms. Rautray, learned counsel for the respondent, on the other hand has submitted that even the respondent had issued communications stating that the excavated hard rock has been dumped by the contractor for making the Cofferdam. Pertinently, the petitioner has not explained as to what happened to the balance quantity of the hard rock excavated by the respondent. It is also not disputed that 1449.31 cubic meters was the total quantity of the hard rock excavated. Pertinently, the quantity of river bed boulders as per the BOQ required for execution of the contract was 3840 cubic meters. How then the contractor could have constructed the Cofferdam with only 218.26 cubic meter of the rock, which is only a small fraction of the 3840 cubic metres, is difficult to understand. I, therefore, find that

the award made by the learned Arbitrator is plausible and reasonable and does not call for interference. This objection is rejected.

38. In relation to the award made on the item Sl. No. 17 in Statement No. 2 of the award, learned counsel for the respondent concedes that the said award may be set aside. Accordingly, the award made under Sl. No. 17 Statement No. 2 for Rs. 35797.50 is hereby set aside.

39. The submission of Mr. Narula, learned counsel for the petitioner in relation to the Award made on Item Serial No.15 is that the Agreement item provided for rich mix of concrete cement in the ratio of 1:2:4. According to him, the Agreement did not provide for laying of staircase with richer mix of concrete in the ratio 1:1.5:3 RCC. However, a perusal of the Award shows that the learned Arbitrator has relied upon the drawings provided by the petitioner to the respondent for execution of the works. The said drawing has also been shown by learned counsel for the respondent to Mr. Narula, and the same indeed shows that the staircase had to be constructed using the concrete mixture in the ratio 1:1.5:3 RCC. In view of this position, I find no merit in the objection raised by the petitioner. The same is accordingly rejected.

40. In relation to the Award made on Item Serial No.18, i.e. de-silting for excavation and de-watering after monsoon season for the year 1995, 1996 and 1997, the submission of Mr. Narula is that the stipulated date of start of work was 11.5.1995 and stipulated date of completion was 10.8.1996. Therefore, two monsoon seasons, that is, of the years 1995 and 1996 were covered under the contract and it

was the responsibility of the respondent/contractor to build and maintain the height of the Cofferdam so that the working area was not flooded. Mr. Narula has placed reliance on condition Nos. 21 and 34 of the Specifications and Special Conditions, which read as follows:-

“Condition No.21: Nothing extra shall be paid on account of de-watering sometimes at greater depth, the sub-soil water rushes out with great speed in form of springs, tides or river seepage, broken water mains/drain etc. Nothing extra shall be paid for bailing out that water other than the provision made in the schedule under different items.”

Condition No.34: Cofferdam shown in the drawing is indicative only. The contractor is advised to design his own section or suggest alternatives such that all key activities of raising the structures to appropriate heights before the onset of monsoon are completed.”

41. He submits that the learned Arbitrator, while making the Award, did not note the fact that two monsoon seasons were covered and, secondly, it was the responsibility of the respondent to make and maintain the coffer dam at the proper height. He submits that the petitioner never prevented the respondent from raising the height of the Cofferdam to prevent flooding in the working area.

42. On the other hand, the submission of learned counsel for the respondent is that the respondent was not permitted to raise the height of the Cofferdam. The petitioner was not willing to measure the height of the Cofferdam beyond 204 GTS. Ms. Rautray has referred to the communications dated 24.1.1998 and 4.4.1998 of the petitioner in this regard. She also refers to the communication dated 2.3.1998 of the respondent issued to the Engineer Member, DDA. In the communication dated 24.1.1998, the DDA, inter alia, recorded that *“The Cofferdam RL were fixed at 204 GTS and therefore in the*

circumstances when the water level was 203 GTS or near to it the work is possible to take up after protection of the cofferdam.” In the letter dated 4.4.1998, the petitioner had recorded *“the water level was noted down approx. 203.30 GTS. The height of the cofferdam shall be maintained at 204 GTS strengthen for which it was paid and dewatering shall be restarted.”* The communication dated 2.3.1998 of the respondent reads as follows:-

“Dear Sir

I personally wanted to meet you in respect of above said project earlier specifically wanted to send fax messages on Saturday & Sunday but your fax was off connection, **although the Cofferdam constructed in 1996 was raised up to 206 GTS level, inspite of repeated request & so verbally agreed by C.E, E.Z & S.E, C.C-10. The level was never again allowed to be raised beyond 204 GTS, because the instruction was not confirmed in writing. Only 10 days earlier the matter was reported to S.E,C.C-10 regarding flash flood increasing 204 level, but no remedial instruction were issued. On Saturday 28th of Feb when our excavation in last reach R.D.128 to 150 was complete, there came a flash flood, night of 28th Feb & 1st March with level 204.50 GTS which could only be saved if the Cofferdam is at least 205.50 GTS to avoid breach. I suffered a loss of ₹1.75 lacs over due to this negligence although the same has been suffered number of times earlier.**

No action has been taken so far regarding instructions & decisions to be taken by all concerned inspite of yours and Worthy V.C. instruction specifically meeting at site since 7.2.98, which is highly regretted. Request & an immediate interview in your office at the earliest.” (emphasis supplied)

43. A perusal of the impugned Award shows that the learned Arbitrator has observed that *“as per record placed before me that the respondent was not allowed to increase the height of the Cofferdam beyond 204 GTS and flood level in all these years was 207 GTS to 208.4 GTS.”*

44. The interpretation of documents falls within the realm of the Arbitrator. From the correspondence between the parties, it does indeed appear that the petitioner was insistent that the Coffer Dam level should be maintained at 204 GTS for which the respondent was being paid. It appears that the petitioner insisted on maintaining the level of the Coffer Dam at 204 GTS even though the flood in the years 1995, 1996 and 1997 was beyond 204 GTS, that is, 207 GTS to 208.4 GTS. The submission that the learned Arbitrator has ignored the factum that the contractor was obliged to maintain the Coffer Dam during the flood seasons of 1995 and 1996 appears to be meritless. After each flood (when the working area was flooded), the contractor had to resort to de-watering and de-silting which included the years 1995, 1996 and 1997. This objection is, therefore, rejected.

45. The next submission of Mr. Narula in relation to the Award made on Item Serial No.18 is that the learned Arbitrator has not given any basis for arriving at the awarded amount of Rs.2,50,000/- for the first year, that is, 1995 and Rs.1,50,000/- for the two subsequent years, that is, 1996 and 1997.

46. I may note that the learned Arbitrator is a technically qualified person having a Civil Engineering Diploma. He was a Superintending Engineer with the petitioner-DDA having sufficient experience. Moreover, the learned Arbitrator has taken note of the fact that M/s. Swastic Construction Company, who was subsequently awarded the balance work was paid Rs.22,91,330.78 for de-watering and de-silting, the same work site. Considering the aforesaid aspects, I am not

inclined to interfere with the Award made on Item Serial No.18 as it cannot be said that the Award made by the learned Arbitrator is without reasons or not plausible. This objection is, therefore, rejected.

47. The next submission of Mr. Narula is in relation to the Award made towards escalation under Clause 10cc. He submits that on account of a part of the Award being set aside, the calculation of the claim awarded under Clause 10cc needs to be re-determined. On the other hand, the submission of Ms. Rautray is that the claim made by the respondent towards escalation under Clause 10cc was only Rs.8,92,611.42, even though as per calculations the Award to which the respondent was entitled under Clause 10cc was Rs.13,15,011.45. She has referred to the brief submissions dated 19th August, 2008 of the respondent filed before the learned Arbitrator. She submits that even if the items on which the Award of the Arbitrator has been set aside were to be excluded, the Award made towards escalation under Clause 10cc would not call for re-calculation.

48. Having heard learned counsel for the parties, I am of the view that it would be appropriate that in view of the fact that the Award on some of the claims has been set aside and remanded back to the learned Arbitrator, the Arbitrator should re-calculate the amount due to the respondent towards escalation under Clause 10cc. Accordingly, the award made on claim under clause 10cc is set aside and remanded back for recalculation in the light of this judgment.

49. The next objection raised by Mr. Narula is to the award of ₹14,09,353/- under Issue No.7 which was to the effect:

“Whether the respondent is liable towards loss of profitability to the tune of ₹14,09,534.90?”

50. The value of the work awarded to the respondent was ₹3,53,32,387/-. The value of the work executed by the respondent was ₹2,12,36,837/-. The balance value of the work which could not be executed, because of the illegal recession of the contract by the petitioner was ₹1,40,95,550/-. The respondent claimed loss of profit to the extent of 10% of the balance value of the work which could not be executed on account of illegal recession, and the same has been awarded by the learned Arbitrator. The learned Arbitrator while awarding the said amount relied upon the decisions of **M/s. A.T. Brij Paul Singh & Bros. v. State of Gujarat**; AIR 1984 SC 1703 and also the decision of a Division Bench of this Court in **DDA Vs. Polo Singh**, 101 (2002) DLT 401.

51. The submission of learned counsel for the petitioner is that Clause 13 of the General Conditions prohibits the raising of any claim by the contractor on account of recession of the contract or part thereof, on the ground that the contractor could not execute the rescinded work. Clause 13 of the General Conditions of Contract reads as under:-

“Clause 13. If at any time after the commencement of the work the Authority shall for any reason whatsoever not require the whole thereof as specified in the tender to be carried out, the Engineer-in-Charge shall give notice in writing of the fact to the contractor who shall have no claim to any payment of compensation whatsoever on account of any profit or advantage which he might have derived from the execution of the work in full, but which he did not derive in consequence of the full amount of the work not having been carried out, neither shall he have any claim for compensation by reason of any alterations

having been made in the original specifications, drawings, designs and instructions which shall involve any curtailment of the work as originally contemplated.

Provided that the contractor shall be paid the charges on the cartage only of materials actually and bona fide brought to the site of the work by the contractors and rendered surplus as a result of the abandonment or curtailment of the work or any portion thereof and then taken back by the contractor provided however that the Engineer-in-Charge shall have in all such cases the option of taking over all or any such material at their purchase price or at local current rates whichever may be less. In the case of such stores having been issued from D.D.A. Stores and returned by the contractor to D.D.A. Stores, credit shall be given to him by the Engineer-in-Charge at rates not exceeding those at which they were originally issued to him, after taking into consideration and deduction for claims on account of any deterioration or damage while in the custody of the contractor and in this respect the decision of the Engineer-in-Charge shall be final." (emphasis supplied)

52. Mr. Narula places reliance on a decision of this Court rendered in ***M/s. Kalyan Chandra Goyal & Co. V. Executive Engineer, Southern Western Division-8, Delhi Development Authority***, CS (OS) No.765/2009 decided on 13.12.2010 which was also argued by Mr. Narula on behalf of the DDA. He submits that in that case, this Court had set aside the Award made by the Arbitrator whereby he awarded damages towards loss of profit on the quantum of work which remained to be executed on account of recession of contract by the DDA, which too was found to be illegal.

53. I had considered, in the course of that judgment, various decisions relied upon by the parties and held as follows:-

"25. Having considered the submissions and perused the judgments of the Supreme Court in ***Ramnath International Construction*** (supra) and ***G. Ramchandra Reddy*** (supra), I find merit in the submission of Mr. Narula. In my view, it cannot be said that the ratio in the judgment of ***G. Ramchandra Reddy*** (supra) is that the entitlement

to claim damages cannot be denied on the ground of contractual clauses. Moreover **G. Ramchandra Reddy** (supra) was rendered without considering the decision in **Ramnath International Construction** (supra) or the earlier decisions cited in that decision in the cases of **Associated Engineering Co.** (supra) or **Ch. Ramlinga Reddy** (supra). The decision in **Ramnath International** (supra), on the other hand, contains a detailed discussion on the very issue in question. I, therefore, reject the submission of Mr. Aggarwal founded upon decision in **G. Ramachandra Reddy** (supra).

26. A perusal of the judgment in **A.S. Sachdeva** (supra) shows that the court rejected the reliance placed on the decisions in **M.L. Mahajan** (supra); **J.C. Budhiraja** (supra); and **Republic Construction Co. v. DDA** in CS (OS) No.454/2009 decided on 13.07.2009, on the basis of, what the learned single Judge held, to be the ratio of the decision in **G. Ramachandra Reddy's** (supra) case. However, as I have already discussed, the decision in **G. Ramachandra Reddy** (supra), cannot be held to lay down that entitlement of damages cannot be denied on the ground of contractual clause. The decisions in **Ramnath International Construction** (supra), **Associated Engineering Co.** (supra) and **Ch. Ramlinga Reddy** (supra) were not brought to the notice of this court which decided **A.S. Sachdeva** (supra).

27. The decisions cited by Mr. Narula in the case of **J.C. Budhiraja** (supra) and **M.L. Mahajan** (supra), in my view, squarely apply in the facts of the present case.

28. Pertinently, Mr. Aggarwal has not, on a reading of clause 13, disputed that the said clause would bar the claim as made under claim no.5. In the face of clause 13 of the agreement, the award made on claim no.5 cannot be sustained, inasmuch, as, clause 13 specifically provides that *"the contractor shall have no claim to any payment of compensation whatsoever on account of any profit or advantage which he might derive from the execution of the work in full, but which he did not derive in consequence of the full amount of the work not having been carried out"*. The same is, accordingly, set aside.

29. In response of submission of Mr. Narula objecting to the award made on claim no.8, Mr. Aggarwal submits that this court in **A.S. Sachdeva** (supra) has also considered the same clauses of the contract and rejected the reliance placed thereon by the objector DDA.

30. I have already discussed hereinabove the decision in **A.S. Sachdeva** (supra). In the light of the decision of the Supreme Court in **Ramnath International Construction**

(supra), no reliance can be placed on **A.S. Sachdeva** (supra) for the proposition that the contract cannot provide for non-payment of damages if the same are allowable in law. The Plaintiff did not challenge the validity of any of the contractual clauses before the learned Arbitrator. This dispute cannot be raised at this stage. Consequently the clause 1 of the additional specifications and clause 10 of the conditions of contract are liable to be enforced and given effect to. As already noticed, clause 1 squarely provide that if a part of the site is not available for any reason, or there is some unavoidable delay in supply of materials stipulated by the department, the programme of construction shall be modified accordingly, and the contractor shall have no claim for any extras or compensation on this account. Clause 10 of the conditions of contract provides that the contractor shall in no case be entitled to compensation or damages on account of any delay in supply or non supply of any materials and stores. As the learned arbitrator has rendered his award in contradiction of the aforesaid clauses, he has acted beyond his jurisdiction and has misconducted himself. Consequently the award made on claim no.8 cannot be sustained. “

54. In support of his submission, Mr. Narula has also placed reliance on **M/s R.B.Chy.Ruchi Ram Khattar & Sons V. Delhi Development Authority**, 1997(1) Arb.LR 372 and decision of the Supreme Court in **Bharat Cooking Coal V.L.K.Ahuja**, (2004) 5 SCC 109. He submits that the award on issue no.7 is not founded on any material or evidence of actual loss, and is only premised on the finding of breach of contract by the petitioner and assumed loss of profit. He submits that the respondent should have pleaded and established that, had the contract not been rescinded, the Contractor would have utilized his time in carrying out another contract.

55. On the other hand, learned counsel for the respondent has submitted that the Division Bench decision in **Polo Singh** (supra) was not placed before this Court while deciding **M/s. Kalyan Chandra**

Goyal (supra). She submits that the said Division Bench judgment, in turn, inter alia, takes note of earlier judgments including the one rendered by the Supreme Court in **Karsandas H. Thacker V. The Saran Engineering Co. Ltd**, AIR 1965 SC 1981, wherein it was held that a party is liable to be compensated for breach of contract by the other party, on account of direct loss of profit. She further submits that clause 13 of the General Conditions of Contract contemplates a situation where the scope of the work itself is reduced, i.e. the employer DDA decided not to get a part of the work done-not just through one or the other contractor, but not at all. Clause 13 does not cover a case like the present, where the scope of the work remains unchanged but the Contractor is prevented from carrying out the entire work on account of illegal recession of the contract, and the work is then got executed through another contractor. She submits that in the present case there was no reduction in the scope of the work inasmuch, as, the petitioner did not take a conscious decision after the award of the contract to the respondent, to not to get certain part of the work done at all. In fact, after the illegal recession of the respondent's contract, the petitioner proceeded to get the balance work executed from another contractor.

56. Having considered the submission of learned counsels, I am of the view that the decision rendered by me in **Kalyan Chandra** (supra), in so far as it dealt with the award made by the learned Arbitrator towards loss of profit on the quantum of work which remained to be executed on account for illegal recession of the

contract, appears to be erroneous, for more than one reasons, and cannot come to the aid of the petitioner.

57. Firstly, the decision of the Division bench of this Court in **Polo Singh** (supra) was not brought to the notice of this Court, which specifically deals with the law on the aspect of award of damages on account of breach of contract by one of the parties under Section 73 of the Contract Act. In Polo Singh (supra), the Division Bench held as follows:

"15. The arbitrator, taking note of the fact that the rescission of the contract by the appellant-Authority having already been held in his earlier award dated 26.12.1992 as legally unjustified, allowed the claim of the respondent/claimant on account of loss of profit to the extent of Rs. 12,35,742/- in view of his finding as stated hereunder."

16. To justify award of damages on account of loss of profit, a finding adjudging rescission of the contract as illegal is essential. The quantum of damages to be awarded in a particular case is another point for consideration... .."

... ..
"18. The award dated 4.3.1998 clearly spells out the reasons for awarding the aforesaid amount on account of damages for loss of profit. The arbitrator took note of the entire relevant facts and the materials placed before him by the parties, and made his award in the light of observations occurring in the earlier judgment dated 30.5.1997 is evident on a bare perusal of the same. The plea to the effect that the award is base don no evidence is, therefore, totally unfounded.

19. Adverting to the point relating to award of compensation reference may be made to a decision in "A.T. Brij Paul Singh & Brothers v. State of Gujarat" AIR1984SC1703 , wherein while interpreting the provisions of Section 73 of the Indian Contract Act, 1872, the Supreme Court held that where the party entrusting the work commits breach of contract by improperly rescinding the contract, the contractor is entitled to claim damages for loss of profit which he expected to earn by undertaking the works/contract. Speaking on measure to evaluate the amount of damages, it was observed:

"What would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable

expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid..."

20. In "*Mohd. Salamatullah and Anr. v. Government of Andhra Pradesh*" AIR1977SC1481, where the trial court awarded damages for breach of contract @ 15% and the High Court, in appeal, reduced the same from 15% to 10% of the contract price, the Supreme Court held that the appellate court was not justified to interfere with the finding of fact given by the trial court regarding quantification of the damages even if it was based on guesswork.

21. In yet another decision in "*Dwarka Das v. State of Madhya Pradesh and Anr.*" [1999]1SCR524 , where the appellant was in response to the tenders invited by the respondent/State, allotted the work for construction of a hostel within a specified period, in different phase, failed to complete the work within the time schedule and the contract executed between the parties was rescinded by the respondent/State on the ground of non-completion of work within the stipulated time, and the appellant made a claim of Rs. 20,000/- as damages contending that the termination of the contract was in breach thereof and the suit in this respect was decreed by the trial court in favor of the appellant, which was, however, disallowed by the High Court, in appeal, as the appellant was found to have not placed the material on record to show that he had actually suffered any loss on account of the breach of contract, setting aside the judgment of the High Court, the Supreme Court held:

"The appellant had never claimed Rs. 20,000/- on account of alleged actual loss suffered by him. He had preferred his claim on the ground that had he carried out the contract, he would have earned profit of 10% on Rs. 2 lakhs which was the value of the contract....."

".....it follows, therefore, as and when the breach of contract is held to have been proved being contrary to law and terms of the agreement, the erring party is legally bound to compensate the other party to the agreement. The appellate Court was, therefore, not justified in disallowing the claim of the appellant for Rs. 20,000/- on account of damages as expected profit out of the contract which was found to have been illegally rescinded."

58. Section 73 of the Contract Act itself was not even alluded to, by

learned counsel for the respondent in that case, while making his submissions on the aforesaid issue.

59. Section 73 of the Contract Act reads as follows:-

“73. Compensation for loss or damage caused by breach of contract.-

When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Compensation for failure to discharge obligation resembling those created by contract.- When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.”

60. The parties cannot contract out of Section 73 of the Contract Act.

Section 73 is in imperative terms. Therefore Clause 13 of the General Conditions of Contract, for it to be saved from the vice of voidity under Section 23 of the Contract Act would have to be read down and would have to be read in the context.

61. The submission of Ms. Rautray that Clause 13 can be invoked in a case where the scope of the work that the DDA intends to get executed itself is reduced i.e. the DDA consciously takes a decision not to get the entire contracted work executed- not only through the appointed Contractor but through any other Contractor as well, appears to be a correct reading of the said clause. The purport of Clause 13 indeed appears to be to restrict the right of the Contractor to

claim damages in a situation where the DDA decides not to get the entire work executed at all. It does not pertain to cases where the contract is rescinded midway illegally, and on that account the Contractor is prevented from executing the balance work, and the said balance work got executed through another contractor.

62. Another important aspect which appears to have escaped the attention of the Court while deciding ***M/s. Kalyan Chandra Goyal*** (supra), is the fact that the line of decisions in ***Steel Authority of India v. J.C. Budhiraja***, AIR 1999 SC 3275; ***M.L. Mahajan v. Delhi Development Authority***, 76 (1998) DLT 701; ***Continental Construction Co. Ltd. v. State of Madhya Pradesh***, AIR 1988 SC 1166; ***Ramnath International Construction Pvt. Ltd. v. Union of India***, 1 (2008) SLT 82; ***Associated Engineers Co. v. Govt. of Andhra Pradesh***, 1991 (4) SCC 93; ***Ch. Ramalinga Reddy v. Superintending Engineer***, 1999 (9) SCC 610, relied upon by the Court, were cases where the right of the Contractor to claim damages for delay in performance of its obligations by the employer, which, in turn, resulted in delay in execution of the work, leading to extension of the contractual period had been limited contractually.

63. In my view, those are different situations, than the situation where the contract is illegally rescinded and the balance work is got executed through another contractor. A Contractor is not obliged to carry out the work beyond the stipulated date of contract. If the execution of the contractual work is delayed for reasons attributable to the employer or for reasons not attributable to the contractor, he has

two options. He may either choose to put the contract to an end and claim damages for breach of contract by the employer, or he may agree to continue to carry on the work by accepting the extension of time and giving up his right to claim damages for such delay, because he may find it more profitable to execute the balance work, even after delay, than to claim damages by putting the contract to an end. Therefore, a contractor who has opted to continue to execute the work, even though its execution is delayed for reasons attributable to the employer or for reasons not attributable to him may, contractually, be prohibited from claiming any damages due to the delays, as aforesaid. He cannot claim damages because he has been put to prior notice that he would not be entitled to claim damages for such delays and would be entitled only to claim extension of time for completion of the contractual work. He, therefore, exercises his option consciously, if he still chooses to carry out the work, despite the delays, as aforesaid. He is, therefore, bound down by the option he makes. However, when the contract is illegally determined, there is no option given to the contractor. He has no option but to claim damages.

64. The observations of the Supreme Court in **G. Ramachandra Reddy & Co. v. Union of India**, (2009) 6 SCC 414 to the effect: "*The question as to whether damages were payable for illegal termination of contract cannot be a subject matter of contract*" – have their genesis in Section 73 of the Contract Act. **G. Ramachandra Reddy** (supra) was, in fact, a case dealing with a similar situation, i.e. where claim of damages for illegal termination of contract was opposed by relying

upon a contractual clause. The Supreme Court brushed aside the said reliance by observing that as to whether damages are payable for illegal termination, cannot be contractually provided. Therefore, **G. Ramachandra Reddy** (supra) is squarely applicable to the present case. In **Kalyan Chandra Goyal** (supra), the distinction between G. Ramachandra Reddy on the one hand, and the other line of decisions (dealt with in para 62 above) on the other hand was not brought out and properly appreciated.

65. For the aforesaid reasons, reliance placed by Mr. Narula on **M/s. Kalyan Chandra Goyal** (supra) appears to be of no avail, as that decision appears to have proceeded on an erroneous premise.

66. The decisions in **Ruchi Ram** (supra) and **Bharat Coking Coal** (supra) are also of no avail. A perusal of **Ruchi Ram** (supra) shows that the claimant had raised a claim towards loss of damages due to delays, defaults and breaches of contract by the DDA. The said claim was divided into two parts, namely (a) loss of profit due to reduction in scope of the work; (b) loss of profit due to long stay at site. Pertinently, the Arbitrator had himself rejected the first part of the said claim i.e on account of loss of profit due to reduction in scope of work. It was only the second part of the claim i.e loss of profit due to longer stay at site which was the matter for consideration before the Court. Therefore, the issue with regard to the maintainability of claim (a) above did not even arise for consideration of the Court.

67. In **Bharat Coking Coal** (supra), the Supreme Court was considering the claim of a different nature than the one in question.

The claim under consideration was for loss of profit arising out of diminution in turnover on account of delay in the matter of completion of the work. It was not a claim for loss of profit on account of illegal recession of the contract midway, towards profit that the Contractor would have earned, had the Contractor been allowed to execute the entire contracted work. While dealing with the aforesaid claim, the Supreme Court held that what the Contractor should establish in such a situation is that, had he received the amount due under the contract, he could have utilized the same for some other business in which he could have earned profit. Unless such a plea is raised and established, claim for loss of profit could not have been granted. As aforesaid, that is a different head of claim from the one under consideration in this case. This aspect has been considered by the Division Bench in detail in ***Polo Singh*** (supra).

68. For the aforesaid reasons, the objection to the award of ₹14,09,535/- does not call for interference as it cannot be said that there is anything illegal, much less a patently illegality in the said award.

69. The next submission of Mr. Narula is in relation to the award made under issue no.5 i.e towards infructuous expenditure and overhead expenditure. The respondent-claimant had raised a claim of ₹6 lakhs under this head and has been awarded an amount of ₹4,50,000/- by the Arbitrator. The submission of Mr. Narula is that the said award could not have been made and was prohibited under clause 10 of the General Conditions as well as clause 1 of the specifications

and conditions. He further submits that the learned Arbitrator has not given the basis on which he has arrived at a figure of ₹ 4,50,000/- and there is no reason in the award in so far as this aspect is concerned.

70. I find no merit in the submissions of Mr. Narula. Clause 10 of the General Conditions deals with the aspect of stores to be supplied by the DDA. The second paragraph of Clause 10 inter alia states: *"Provided that the contractor shall in no case be entitled to any compensation or damages on account of any delay in supply or non-supply thereof all or any such materials and stores."*

71. The delay in the execution of the work was not only on account of non-supply of materials but also on account of non-supply of drawings by the petitioner to the respondent. The learned Arbitrator has found the non-supply of drawings to be a fundamental breach of the contract.

72. So far as clause 1 of the specifications and conditions are concerned, the same also has no relevance. The relevant part of that clause, on which reliance has been placed by Mr. Narula reads as *"if part of site is not available for any reason or there is some unavoidable delay in supply of materials stipulated by the Department, the programme of construction shall be modified accordingly and the contractor shall have no claim for any extras or compensation on this account."*

73. As aforesaid, the primary breach on the part of the petitioner was the non-supply of the drawings. The said aspect is not covered by Clause 1 of the specifications and conditions. The learned Arbitrator

has noted that the stipulated date of completion was 10.08.1996. However, the work continued thereafter till it was illegally rescinded on 29.05.1998. During this period, the respondent executed work of a substantial value of ₹1,04,67,349.91. As per the contractual terms it was mandatory for the respondent to keep a graduate engineer at site of work, apart from watch and ward at the site. The learned arbitrator has relied upon audited balance-sheets filed by the respondent after taking into account the financial statements filed by the respondent to substantiate the said claim. He has awarded an amount of ₹ 4.50 lakhs. In my view it cannot be said that the amount made by the learned Arbitrator is not founded on any evidence. He has taken into account relevant and germane material. I see no illegality, much less a patent illegality in the award made on issue no.5. This objection of Mr. Narula is therefore rejected.

74. The award made on other claims which are under challenge, have been challenged only on the aspect of rate awarded by the learned arbitrator. I may generally note that the learned Arbitrator has merely awarded as the final rate, the part rates granted to the Contractor. There is no meaningful or serious challenge raised by the petitioner. Accordingly all other objections are also rejected. The respondents shall be entitled to costs quantified at ₹ 10,000/-.

VIPIN SANGHI, J

MARCH 07, 2011
"AS/SR/BSR"