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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment Reserved on : April 27, 2012*
Judgment Pronounced on: May 16, 2012

+ **FAO(OS) 221/2002**

GAS AUTHORITY OF INDIA LTD. (GAIL) Appellant
Represented by: Mr. Dinesh Agnani, Senior Advocate
instructed by Ms. Leena Tuteja and
Mr. Archit Vasudeva, Advocates

versus

M/S. BHAGEERTHA ENGINEERING LTD. Respondent
Represented by: Mr. Amit George, Advocate for
Mr. George Thomas, Advocate.

FAO(OS) 234/2002

M/S. BHAGEERTHA ENGINEERING LTD. Appellant
Represented by: Mr. Amit George, Advocate for
Mr. George Thomas, Advocate.

versus

GAS AUTHORITY OF INDIA LTD. (GAIL) Respondent
Represented by: Mr. Dinesh Agnani, Senior Advocate
instructed by Ms. Leena Tuteja and
Mr. Archit Vasudeva, Advocates

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. The two captioned intra-court appeals were decided vide judgment and order dated April 02, 2003. Whereas FAO(OS) No.234/2002 filed by M/s. Bhageertha Engineering Ltd.

(hereinafter referred to as 'Bhageertha') was dismissed, FAO(OS) No.221/2002 filed by Gas Authority of India Ltd. (hereinafter referred to as 'GAIL') was partially allowed and apart from claims No.1(b) and 2 allowed by the learned Arbitrator which were set aside by the learned Single Judge, even claim No.3 allowed by the learned Arbitrator and not set aside by the learned Single Judge was set aside.

2. The said decision was challenged by Bhageertha before the Supreme Court and upon Leave to Appeal(s) being granted, C.A.No.4125/2003 and C.A.No.4126/2003 were disposed of by the Supreme Court vide order dated July 22, 2009. The appeals were restored for fresh disposal.

3. The reason recorded in the order dated July 22, 2009 for remanding the matter and requiring the two appeals to be re-decided, may be noted by extracting the relevant part of the order dated July 22, 2009. It reads as under:-

"The respondent – Gas Authority of India Ltd. had floated a tender against which the appellant inter-alia also bid. The appellant submitted its tender on 25.10.1995 in which it had mentioned that in addition to the price quoted, it was also opting for a price escalation for overstay compensation. However, subsequently the appellant sent a letter dated 28.9.1996 in which it withdrew the stipulation for compensation for overstay and escalation. Thereafter it appears that the respondent by its letter dated 3.10.1996 directed the tenderers to reduce the price of the bid and accordingly the price was reduced by the appellant also. Subsequently, also there was some correspondence between the parties and ultimately the respondent by its letter dated 24.1.1997 awarded the contract to the appellant wherein it was specifically mentioned that the contract documents would mean only the following documents:

- “A. The tender document.
- B. The Fax of intent dated 20 December, 1996.
- C. The Letter of Award including all annexure.
- D. The contract agreement of stamp paper.”

It was specifically mentioned in the said letter of award of contract that all other correspondence exchanged between the parties prior to 20.12.1996 shall be treated as null and void.

Certain disputes arose between the parties because although the contract had to be completed by 19.1.1998, in fact, it was actually completed on 15.11.1998. Hence, the appellant claimed overstay compensation and escalation.

The matter was referred to an arbitrator who decided five (5) claims in favour of the appellant, namely, claim Nos.1(b), 2, 3, 6 and 9. As regards claims No.6 and 9, the respondent has not disputed the same and has made payments of the amounts relating thereto. Hence, the present dispute relates to claim Nos.1(b), 2 and 3 only.

Both the learned Single Judge and the Division Bench were of the view that the letter dated 28.9.1996 by which the appellant withdrew the stipulation for overstay compensation and escalation cannot be treated as null and void. The tenor of the judgment of the High Court is that the letter dated 28.9.1996 of the appellant should have been taken into consideration and continues to bind the appellant. We do not agree with the reasoning given by the High Court inasmuch as there was a letter dated 3.10.1996 of the respondent directing the tenderers to reduce the price, and also the award of the contract on 24.1.1997.

Considering the chronology of the events, we are of the opinion that the High Court should reconsider the applicability or otherwise of the letter dated 28.9.1996.”

4. The decision of the Supreme Court records that the Supreme Court had not agreed with the reasoning of the Division Bench with reference to Bhageertha's letter dated September 28, 1996 in view of GAIL's subsequent letter dated October 03, 1996 followed by the tenderers, including Bhageertha, lowering the price bid and thereafter the contract being awarded by GAIL to Bhageertha on January 24, 1997. But, we would highlight that the Supreme Court has not conclusively rendered a final opinion on the issue inasmuch as it has been specifically observed by the Supreme Court that at the remanded stage : '*Considering the chronology of the events, we are of the opinion that the High Court should reconsider the applicability or otherwise of the letter dated 28.9.1996*'.

5. It is in the aforesaid backdrop that we are reconsidering the matter.

6. The law governing judicial interference to an award under Section 34 of the Arbitration and Conciliation Act, with reference to Section 34(2)(a)(vi) was noted by the Division Bench in paragraphs 8 to 11 of the decision dated April 02, 2003, and we reproduce the same. The paragraphs read as under:-

"8. Section 34(2)(a)(iv) of the Act reads as under:-
34. Application for setting aside arbitral award:-

- (1)
- (2) An arbitral award may be set aside by the Court only if:-
 - (a) the party making the application furnishes proof that:-
 - (i)

- (ii)
- (iii)
- (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside;"

9. What is the precise meaning and content of the words "dispute not contemplated by or not falling within the terms of the submission to arbitration". We may note that in the "STATEMENT OF OBJECTS & REASONS" to the Act, one of the object of the Act has been stated to be "to ensure that the Arbitral Tribunal remains within the limits of its jurisdiction." Further, as per Section 28(3), the Arbitral Tribunal "shall decide in accordance with the terms of the contract" and shall take into account the usages of the trade applicable to the transaction." Thus, it would be the obligation of an Arbitral Tribunal to decide a dispute referred to it for adjudication in accordance with the terms of the contract. Since one of the objects of the Act is to ensure that the Arbitral Tribunal remains within the limits of its jurisdiction, while interpreting Section 34(2)(a)(iv), the aforesaid has to be kept in view.

10. The allegation that an Arbitral Tribunal has overstepped its authority may be of two kinds. The first type of the allegation is that the Arbitral Tribunal has decided a dispute which does not fall within the scope of the arbitral clause. The second type of allegation is that the Arbitral Tribunal has decided the matter which is beyond or outside the question submitted to it by the parties, which may be called the arbitrator's mandate. The latter type of allegation usually concerns the allegations that

the Arbitral Tribunal has awarded differently from what was contracted by the parties. The difference between the two types of the allegations is that the first is based on the arbitral clause itself whereas the second is based on the mandate given by the parties to the Arbitral Tribunal.

11. The relevance of this distinction is that the mandate may comprise less than the arbitral clause. This has as consequence, that in the case of the arbitral clause it depends upon the type of allegations made whether the arbitral clause or the mandate must be taken as a measuring standard for determining the question whether the Arbitrator has exceeded his authority. In the case of the submission agreement, on the other hand, there is no need to distinguish between the agreement and the mandate since the mandate is defined in the agreement itself. Thus, in our opinion, the words "terms of the submission to the arbitration" must be deemed to have two meanings. The first meaning is in reference to the arbitral clause and the second meaning is in reference to the Arbitrator's authority (the Arbitrator's mandate) being determined and governed by the terms of the contract governing the relationship between the parties. The second meaning would also include provisions in the contract between the parties which contained directives as to what would be taken into account and what would be excluded while determining the rights and liabilities of the parties."

7. Thereafter, in paragraph 12, three decisions of the Supreme Court were noted on the subject as to when could it be said that the decision is beyond the scope of the reference or beyond the subject matter of the reference. The three decisions noted were : (i) 1997 (4) SCC 121 T.N.Electricity Board v. Brij Tunnel Constructions & Ors., (ii) 1999 (9) SCC 283 Rajasthan State Mines & Minerals Ltd. v. Eastern Engg.

Enterprises, and (iii) 1997 (7) SCC 123 DCM Ltd. v. Municipal Corporation of Delhi. The ratio extracted was that being the creature of a contract, the arbitrator cannot ignore the specific terms of the contract and if he does so, the error would be jurisdictional. If a formula or a method is prescribed to determine the commercial terms, the arbitrator cannot deviate from the same.

8. When the Division Bench decided as aforesaid, it did not have the benefit of the decision of the Supreme Court delivered on April 17, 2003 reported as 2003 SC 2629 ONGC v. Saw Pipes in which it was held, with reference to Sections 24 and 28 of the Arbitration and Conciliation Act 1996 that there is a mandate under the Act to the arbitral tribunal to decide the dispute in accordance with the substantive law in force in India. In paragraph 12 of the opinion, it was specifically held by the Supreme Court (Quote) : *'Similarly, under sub-section (3), Arbitral Tribunal is directed to decide the dispute in accordance with the terms of the contract and also after taking into account the usage of the trade applicable to the transaction. If Arbitral Tribunal ignores the terms of the contract or usage of the trade applicable to the transaction, whether the said award should be interfered? Similarly, if the award is non-speaking one and is in violation of S.31(3), can such award be set aside? In our view, reading S.34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn't be set aside by the Court. If it is held that such award could not be interfered, it would be contrary to basic concept of justice.'*

9. As noted by us in paragraph 1 above, claims No.1(b), 2 and 3 were the subject matter of debate before the learned Single Judge, whereas the first two i.e. claim No.1(b) and 2 which had been awarded by the learned Arbitrator had been set aside by the learned Single Judge, challenge by GAIL to claim No.3 had failed and this was the reason why two intra-court appeals were filed; one by GAIL and the other by Bhageertha.

10. We therefore note, in brief, claims No.1(b), 2 and 3 raised before the learned Arbitrator by Bhageertha. They read as under:-

“1b) Additional expenditure incurred for execution of work in prolonged period of contract.

Amount Claimed: ₹2,07,74,925/-

Amount Awarded: ₹1,19,09,000/-

2. Overstay compensation.

Amount Claimed: ₹60,00,000/-

Amount Awarded: ₹26,40,000/-

3. Compensation for increase in prices of materials, labour etc. in the prolonged period of contract.

Amount Claimed: ₹23,40,420/-

Amount Awarded: ₹11,86,959.27”

11. GAIL floated a tender for execution of works at Lakwa (Assam). Bids were invited as per the tender documents. The tender documents were classified under 12 categories, three of them being : (i) 'Instructions to Bidders'; (ii) 'General Conditions of Contract'; (iii) 'Special Conditions of Contract'. Under the chapter 'Instructions to Bidders', two

clauses i.e. clause No.7.3 and clause No.7.4 drew the attention of the bidders that the bid submitted should be as per the stipulations contained in the tender documents, and if the bidders stipulated deviations to the tender requirements, same had to be indicated separately in a proforma enclosed and that no compensation for extended stay would be paid as per Special Conditions of Contract, unless the bidder specifically stipulates such compensation in the offer. Clause 7.3 and 7.4 under the heading 'Instructions to Bidders' read as under :

"7.3 DEVIATIONS TO TENDER REQUIREMENTS

7.3.1 The bidders are required to submit offers strictly as per the terms and conditions/specifications given in the tender document and not to stipulate any deviation. The offers of Bidders stipulating deviations to the following tender conditions shall not be considered for price opening:

- i) Security Deposit.
- ii) Mobilisation Advance in excess of 10% of contract value.
- iii) Defect Liability period.
- iv) Schedule of Rates
- v) Time Schedule.
- vi) Scope of work & Scope of supply
- vii) Validity of offer.

7.3.2 In case Bidders wish to stipulate any deviations to tender requirements other than those stated above, they shall indicate the same as per the proforma enclosed in Tender Document. Bidder shall note that clarifications/queries/ deviations mentioned elsewhere in the offer shall not be given any cognizance.

7.3.3 Bidder shall however note that no revision in quoted price shall be allowed should the deviations stipulated by him are not accepted by the Owner and are required to be withdrawn by the bidder in favour of stipulations of the Tender Document.

7.4 COMPENSATION FOR EXTENDED
STAY/OVERRUN CHARGES:

7.4.1 It is to be noted that no compensation for extended stay shall be paid as per Special Conditions of Contract.

7.4.2 However, if the Bidder specifically stipulates in their offer that compensation for extended stay/overrun charges, due to reasons solely attributable to Owner shall be paid to them, then Bidder should indicate the weekly rate of compensation for extended stay/overrun period. However grace period of 1/5th of Contract period shall be applicable for execution of the contract purposes and compensation shall be paid only if the extended stay is beyond the contract period plus the grace period as mentioned above. Bidder shall indicate overall ceiling on this account. In case bidder doesn't indicate the rate for extended stay compensation in UNPRICE PART, it will be presumed that no extended stay compensation is required to be paid to the contractor.”

12. The General Conditions of Contract, inter-alia, contained a clause pertaining to 'Schedule of Rates and Terms'. The clause stipulated that the price to be paid for whole of the work and required that the price shall remain firm till the issue of final certificate and would not be subject to escalation. The clause reads as under :

"87.0 SCHEDULE OF RATES AND PAYMENTS:

(i) CONTRACTOR'S REMUNERATION:

The price to be paid by the OWNER to CONTRACTOR for the whole of the WORK to be done and for the performance of all the obligations undertaken by the CONTRACTOR under the CONTRACT DOCUMENTS shall be ascertained by the application of the respective Schedule of Rates (the inclusive nature of which is more particularly defined by way of application but not of limitation, with the succeeding sub-clause of this clause) and payment to the (sic. be) made accordingly for the WORK actually executed and approved by the ENGINEER-IN-CHARGE. The sum so ascertained shall (excepting only as and to the extent expressly provided herein) constitute the sole and inclusive remuneration of the CONTRACTOR under the CONTRACT and no further or other payment whatsoever shall be or become due or payable to the CONTRACTOR under the CONTRACT.

(ii) SCHEDULE OF RATES TO BE INCLUSIVE:

The prices/rates quoted by the CONTRACTOR shall remain firm till the issue of FINAL CERTIFICATE and shall not be subject to escalation. Schedule of Rates shall be deemed to include and cover all costs, expenses and liabilities of every description and all risks of every kind to be taken in executing, completing and handing over the WORK to the OWNER by the CONTRACTOR. The CONTRACTOR shall be deemed to have known the nature scope, magnitude and the extent of the WORK and materials required though the CONTRACT DOCUMENT may not fully and precisely furnish them. Tenderer's shall make such provision in the Schedule of Rates as he may consider necessary to cover the cost of such items of WORK and materials as may be reasonable and necessary to complete the WORK. The opinion of the ENGINEER-IN-CHARGE as to the items of

WORK which are necessary and reasonable for COMPLETION of WORK shall be final and binding on the CONTRACTOR, although the same may not be shown on or described specifically in CONTRACT DOCUMENTS.

Generality of this present provision shall not be deemed to cut down or limited in any way because in certain cases it may and in other cases it may not be expressly stated that the CONTRACTOR shall do or perform a work or supply articles or perform services at his own cost or without addition of payment or without extra charge or words to the same effect or that it may be stated or not stated that the same are included in and covered by the Schedule of Rates.

(iii) SCHEDULE OF RATES TO COVER CONSTRUCTION EQUIPMENTS MATERIALS, LABOUR ETC.

Without in any way limiting the provisions of the proceeding sub-clause the Schedule of Rates shall be deemed to include and cover the cost of all construction equipment, temporary WORK (except as provided for herein), pumps, materials, labour, insurance, fuel, consumables, stores, and appliances to be supplied by the CONTRACTOR and all other matters in connection with each item in the Schedule of Rates and the execution of the WORK or any portion thereof finished, complete in every respect and maintained as shown or described in the CONTRACT DOCUMENTS or as may be ordered in writing during the continuance of the CONTRACT.

(iv) SCHEDULE OF RATES TO COVER ROYALTIES, RENTS AND CLAIMS:

The Schedule of Rates (i. e. VALUE OF CONTRACT) shall be deemed to include and cover the cost of all royalties and fees for the articles and processes, protected by letters, patent or otherwise incorporated in or used in

connection with the WORK, also all royalties, rents and other payments in connection with obtaining materials of whatsoever kind for the WORK and shall include an indemnity to the OWNER which the CONTRACTOR hereby gives against all actions proceedings, claims, damages, costs and expenses arising from the incorporation in or use on the WORK of any such articles, processes, or materials octroi or other municipal or local Board Charges, if levied on materials, equipment or machineries to be brought to site for use on WORK shall be borne by the CONTRACTOR.

(v) SCHEDULE OF RATES TO COVER TAXES AND DUTIES:

No exemption or deduction of Customs Duties, Excise Duties, Sales Tax, Sales Tax on works Contract quay or any port dues, transport charges, stamp duties or Central or State Government or local Body of Municipal Taxes or duties, taxes or charges (from or of any other body), whatsoever, will be granted or obtained, all of which expenses shall be deemed to be included is as covered by the Schedule of Rates. The CONTRACTOR shall also obtain and pay for all permits or other privileges necessary to complete the WORK.

(vi) SCHEDULE OF RATES TO COVER RISKS OF DELAY:

The Schedule of Rates shall be deemed to include and cover the risk of all possibilities of delay and interference with the CONTRACTOR's conduct of WORK which occur from any causes including orders of the OWNER in the exercise of his power and on account of extension of time granted due to various reasons and for all other possible or probable causes of delay.

vii) SCHEDULE OF RATES CANNOT BE ALTERED:

For WORK under unit rates basis, no alteration will be allowed in the Schedule of Rates by

reason of work or any part of them being modified altered, extended, diminished or committed. The Schedule of Rates are fully inclusive of rates which have been fixed by the CONTRACTOR and agreed to by the OWNER and cannot be altered.

For lump sum CONTRACT's, the payment will be made according to the WORK actually carried out, for which purpose an item wise, or workwise Schedule of Rates shall be furnished, suitable for evaluating the value of WORK done and preparing running account bill.

13. The Special Conditions of Contract which were placed after the General Conditions of Contract, relevant for the purpose of present decision, are conditions No.1.1, 18 and 21. Special Condition 1.1 stipulated that Special Conditions of Contract would be read in conjunction with the General Conditions. Clause 18 provided for labour escalation and stipulated a formula as per which labour escalation had to be worked out. However, bidders were to indicate in the offer that they would be claiming price escalation on account of labour and work to indicate a ceiling for price escalation. The clause clearly stipulated that in the event bidders fail to indicate the ceiling for price escalation on account of labour, it will be presumed that price quoted is firm and thus no escalation on said account would be payable. Clause 21 of the Special Conditions of Contract modified clause 87 of the General Conditions of Contract in the matter pertaining to 'compensation for extended stay'. The clause required the bidders to mention the rate for such extended stay compensation per week with clear instructions that if the bidder does not indicate the rate, it will be presumed that no

extended stay compensation is required to be paid to the contractor. Condition No.1.1, relevant part of condition No.18 and complete condition No.21 under the Special Conditions of Contract read as under :-

“1.1 Special Conditions of Contract shall be read in conjunction with the General Conditions of Contract, specifications of work, drawings and any other document forming part of this contract wherever the context so requires.”

18.0 LABOUR ESCALATION

The contract value shall be adjusted for variation in the prices of labour if the wages of minimum paid unskilled labourer required for execution of works increases pursuant to any statutory notification in this regard during the currency of the contract, the Contractor shall be compensated for such increase as per provision detailed below and the amount of contract shall accordingly be varied subject to the condition that such compensation for escalation in prices shall be available only for the work done during the period of contract including such period for which contract is extended on account of reasons solely attributable to Owner.

In the event the bidder fails to indicate the ceiling for price escalation on account of labour it will be presumed that prices quoted are firm and no escalation is payable.

21.0 COMPENSATION FOR EXTENDED STAY

The clause No.87(vi) of GCC is modified to the following extent:-

In case the time of completion of work is delayed beyond the time schedule indicated in the tender document plus a grace period equivalent to 1/5th of the time schedule or 2

months whichever is more, due to reasons solely attributable to Owner, the contractor shall be paid extended stay compensation in order to maintain necessary organisational set up and construction tools, tackles, equipments etc. at site of work. The bidder shall mention the rate for such extended stay compensation per week in the "UNPRICED PART" which will be considered for evaluation for 1/5th of the time schedule or 3 (Three) months, whichever is less. In case bidder does not indicate the rate for extended stay compensation in UNPRICED PART, it will be presumed that no extended stay compensation is required to be paid to the contractor.

In case the completion of work is delayed beyond a period of 3 months after the grace period then both the Owner and the Contractor shall mutually decide the future course of action including payment of further extended stay compensation.

14. As per the contract, the contract completion period was 13 months from the date of issuance of letter of intent. The respondent made its offer for the listed works as per the tender and in its offer sought labour escalation and extended stay compensation in terms of clause 18 and 21 of the Special Conditions of Contract. After it had made the offer, on September 28, 1996, the respondent issued a letter withdrawing the conditions of its offer, claiming labour escalation and extended stay compensation.

15. It is this letter dated September 28, 1996 which requires to be reconsidered by us, in view of the decision of the Supreme Court remanding the matter.

16. It is the case of Bhageertha that after it had withdrawn the letter dated September 28, 1996, GAIL had directed the tenderers as per GAIL's letter dated October 03, 1996 to re-quote the prices and the tenderers, to bag the contract, reduced the bid amounts. The argument is premised on the logic that when Bhageertha reduced the price bid, it would obviously mean that its letter dated September 28, 1996 stood withdrawn.

17. The reduced price bid of Bhageertha was accepted and on December 20, 1996, with GAIL informing Bhageertha as under:-

"PLEASE REFER TO YOUR OFFER NO.BES/AE-172/95:1348 DATED 25.10.96 AND SUBSEQUENT CORRESPONDENCES INCLUDING AND UPTO YOUR LETTER NO.BES AE 187/96-2226 DATED 21.11.96 AGAINST OUR TENDER NO.3030T-30/95-96 SKD 27 FOR MECHANICAL WORKS FOR LPG PROJECT AT LAKWA(.) WE HEREBY ISSUE FAX OF INTENT FOR THE JOB OF MECHANICAL WORKS AT A TOTAL ORDER VALUE OF RS.6,20,11,954.30 INCLUSIVE OF ALL TAXES AND DUTIES(.) THE COMPLETION PERIOD OF 13 MONTHS SHALL RECKON FROM THE DATE OF THIS FAX OF INTENT(.) THE ITEMS COVERED UNDER ENCLOSED LIST ANNEXURE-1 SHALL BE GOVERNED BY AHR CLAUSE OF THE TENDER(.) ALL OTHER TERMS AND CONDITIONS SHALL BE AS PER OUR TENDER DOCUMENT AND AS AGREED TILL DATE(.) PLEASE CONVEY YOUR ACCEPTANCE TO THIS FAX OF INTENT PER RETURN TELEX/FAX(.) ALSO PLEASE SUBMIT INITIAL SECURITY DEPOSIT AS PER PROVISIONS OF THE TENDER DOCUMENT(.) REGARDS."

18. It was followed by a formal Letter of Award dated January 24, 1997 issued by GAIL which reads as under:-

“With reference to the subject tender and to your offer No.BES/AE-172/95:1348 dated 25th October,95 and subsequent correspondence including and upto your letter No.BES/AE-187/96-2226 dated 21st November,1996 and in continuation to the Fax of Intent dated 20th December,96, we are pleased to issue this Letter of Award as detailed below :

1.0 CONTRACT VALUE :

The estimated value of the contract works out to Rs.6,20,11,954.30 (Rupees six crores twenty lakhs eleven thousand nine hundred & fifty four and paise thirty only) on the basis of the unit rates included in the Schedule of Rates attached as Annexure-B, after taking into account a discount of 14.07% (Fourteen point zero seven percent) applicable on all unit rates, and a lumpsum discount of Rs.50,000/- (Rupees fifty thousand only). However, the estimated contract value shall be subject to variation depending on the terms and the quantities in the Schedule of Rates actually executed, measured and accepted for payment.

2.0 TIME SCHEDULE

The entire work covered under this contract shall be completed in thirteen months from 20th December,1996 i.e. by 19th January,1996.

3.0 SECURITY DEPOSIT

You are requested to deposit Initial Security Deposit/Security Deposit in terms of Cl.240 of General Conditions of Contract within ten days from the date of issue of this letter.

4.0 CONTRACT AGREEMENT

You are requested to execute an agreement with us on Non-judicial stamp paper of Delhi State of appropriate value as per the proforma enclosed in tender document. The cost of stamp paper shall be borne by you.

5.0 CONTRACT DOCUMENTS

The following shall form the contract documents:

- A. The tender document.
- B. The Fax of Intent dated 20-Dec-96.
- C. The Letter of Award including all annexures.
- D. The Contract agreement on stamp paper.

6.0 ENGINEER-IN-CHARGE

Engineers India Limited shall be the Engineer-in-Charge for this contract. You are requested to contact their representative at site for further instructions regarding commencement of work.”

19. Suffice would it be to state that the Fax of Intent dated December 20, 1996 incorporates by reference all correspondence up to November 21, 1996 as a part of the contract documents and needless to state the Letter of Award, vide clause No.5, clearly refers to the fact that the contract documents shall comprise not only the tender documents but the Fax of Intent dated December 20, 1996 as well.

20. The Letter of Award dated January 27, 1997, in the concluding paragraph refers to the annexures, and suffice would it be to state that Annexure-A, contains the statement of agreed variations, and reads as under:-

<i>SUBJECT</i>	<i>AGREED VARIATIONS</i>
CONTRACT VALUE	The estimated value of the contract works out to Rs.6,20,11,954.30 (Rupees six crores twenty lakhs eleven thousand nine hundred and fifty four and paise thirty only) on the basis of the unit rates included in the Schedule of Rates attached as Annexure-B, after taking into account a discount of 14.07% (Fourteen point zero seven percent) applicable on all unit rates, and a lumpsum discount of Rs.50,000/- (Rupees fifty thousand only). However, the estimated contract value shall be subject to variation depending on the items and the quantities in the Schedule of Rates actually executed measured and accepted for payment.
SCHEDULE OF LABOUR RATES	The Schedule of Labour Rates enclosed in the tender document shall be replaced by the Schedule of Labour Rates attached as Annexure-C.
MOBILIZATION ADVANCE	The contractor shall be paid Mobilization Advance of 10% (Ten percent) of contract value i.e. Rs.62,01,195.43 (Rupees sixty two lakhs one thousand one hundred and ninety five and paise forty three only) in terms of Cl.19.0 of SCC.
AHR ITEMS	The Abnormally High Rated items are listed in Annexure-D attached. All payments towards these AHR items shall be regulated as per the provisions of Cl.42.0 of SCC.
PIPING	Replace the words “by the owner” appearing at line 4 of existing clause by the words “by the Contractor from the pipes and plates issued by owner”.

<i>SUBJECT</i>	<i>AGREED VARIATIONS</i>
SCOPE OF WORK	Replace the words "Supply & Erection" appearing at Line 1 by the word "Erection".
SCHEDULE OF RATES	The Schedule of Quantities enclosed in the tender document shall be replaced by the Schedule of Rates attached as Annexure-B.
SITE ORGANISATION	The Contractor shall mobilize and deploy technical/non-technical staff and manpower as detailed in Annexure-E attached. The Contractor shall also deploy additional numbers and/or other categories of manpower as may be required as per exigencies of work and as directed by Engineer-in-charge, so as to complete the works in all respects within the time scheduled at no additional cost to owner.
EQUIPMENT	The Contractor shall mobilize and deploy equipment as listed in Annexure-F attached. The Contractor shall also deploy additional and/or other equipments, as may be required as per exigencies of work and as directed by Engineer-in-charge, so as to complete the works in all respects within the time schedule at no additional cost to owner.

21. We highlight that Annexure-A makes it clear, in its concluding part, that the agreed variations listed above, the tender documents, the Fax of Intent dated 20 Dec.1996, the Letter of Award along with all annexures shall form the contract documents.

22. Thus, it cannot be said that Bhageertha would be treated as having withdrawn its letter dated September 28, 1996.

23. In any case, as noted herein above, the instructions to the bidders clearly required deviations to tender requirement to be stated expressly by annexing the same as an annexure.

24. Annexure A to the Letter of Award contained the statement of agreed variations. Thus, de-hors the controversy which Bhageertha is attempting to generate by highlighting that since the tenderers were called upon to subsequently quote fresh financial bids, its letter dated September 28, 1996 should be treated as withdrawn, in view of the Letter of Award and the statement of agreed variation annexed therewith, the inevitable conclusion has to be that Bhageertha's claims would be contrary to the terms of the contract save and except its claim to be paid ₹75,000/- (Rupees seventy five thousand) per week.

25. We need not make our decision lengthy inasmuch as the remainder controversy, with reference to what was debated before the learned Arbitrator and before the learned Single Judge, stands extracted in para 25 onward of the decision dated April 02, 2003, and suffice would it be to state that with the clarification afore-noted, we may incorporate paragraphs 25 to 33 of the decision dated April 02, 2003. They read as under:-

“25. GAIL not only refuted the said three claims but pleaded before the arbitrator that under the contract, on a reference to clause 7.3 and 7.4 of the instructions to bidders, clause 87 under the general conditions of contract and Clause 1.1, 18 and 21 of special conditions of contract, the respondent was prohibited from making the said claims. It was pleaded that on an application of

the said clauses to the contract, nothing was payable in respect of the said three claims.

26. The arbitrator has noted the submissions of the appellant in the award and we may reproduce the same as recorded by the arbitrator himself as under :

“The learned counsel for GAIL has argued that all the claims by BEL are an after thought as no claim for compensation was raised by them when they submitted the final bill. Therefore, by their conduct, they waived the right to claim compensation. He has also pointed out that the compensation claimed is abnormally high-almost 85% of the total value of the contract. The learned counsel has further argued that clause 45 of the General Conditions of the Contract (hereafter referred to as GCC) specifically states that the grant of an extension of time shall not entitle the contractor to claim any adjustment in the contract price. Also, clause 87 (vi) of GCC clearly states that “the Schedule of Rates shall be deemed to include and cover the risk of all possibilities of delay and interference with the CONTRACTOR's conduct of WORK which occur from any causes including orders of the OWNER in the exercise of his power and on account of extension of time granted due to various reasons and for all other possible or probable causes of delay”. Thus, the contract itself rules out any compensation for delay for whatever reasons, EXCEPT, under Cl.21 of S.C.C. Which modifies the above clause 87 (vi) of G.C.C. And provides for extended stay compensation. But this clause imposes two essential conditions for any such payment -

(i) The delay should be due to reasons solely attributable to the owner, &

(ii) The contractor should have indicated the rate

for extended stay compensation in the “UNPRICED PART” of his bid.

Neither of these conditions is fulfilled in this case, according to the learned counsel for GAIL. Reg (ii) the contractor did indicate the rate in his bid, but later on withdrew this stipulation vide their letter dt. 28 Sept. 96 (Ex R101).”

27. Dealing with the issue, the arbitrator held as under :

17. As far as Extended Stay Compensation under Cl.21 of SCC is concerned, the claimant clearly complies with the precondition regarding quotation for rate of such compensation. The position is not so clear regarding the other precondition that the delay should have been due to reason 'solely' attributable to the owner. 'Solely' is a strong word, it means that the other party did not contribute at all to the delay. Considering the evidence before us it does not seem possible to state categorically that BEL did not slip up at all at any stage and the respondent was 'solely' responsible for the delay. But the fact that on the scheduled date of completion, the contractor was just 8% behind the release of work fronts shows that inspite of all the voluminous correspondence on the faults and failures of each side, the contractor would be quite justified in claiming that if he had got the work fronts in time, he could have completed the work in time or within the grace period at the most. Thus, the reason for delay may not, strictly speaking, be 'solely' attributable to the owner but they are definitely substantially attributable to him. In view of this, while the claimant's right to compensation for their losses and damages accrues under Sections 55 and 73 of the Indian Contract Act, the provisions of Cl.21 of the SCC can be used as guide lines while computing such compensation.
19. Claims 1b and 2 relate to the period after the schedule date of completion of the work i.e. for the period for which the contract had to be prolonged.

Here I would like to use the provisions of Cl.21 of SCC as guide lines. First of all, I take note of the claimants quoted rate of extended stay compensation which is Rs.75,000/- per week and take it as an admitted estimate of the losses and damages incurred by the claimant. It is quite clear that this compensation should be paid to him w.e.f. 19.01.1998 itself as Cl.21 of SCC does not prohibit the payment of extended stay compensation for the grace period, once the contract gets prolonged beyond the grace period. The question is whether the same rate should be applied to the entire period of prolongation i.e. upto 15 Nov.1998. The claimants plead that this quoted rate is very low and they can at best be bound by it only during the grace period and 3 months beyond it. We again seek guidance from cl.21 of the SCC according to which if the contract gets prolonged beyond 3 months after the grace period. 'The owner and the contractor shall mutually decide the future course of action including payment of further extended stay compensation". The claimants plea above is accordingly accepted and it is decided that the rate of Rs.75,000/- per week shall be applicable for the period 19.1.1998 to 7.7.1998 i.e. for 168 days or 24 weeks.

20. After 7 July,1998, till the completion of works, the period is 132 days or 19 weeks. For this period, the two parties were expected to mutually decide the compensation but they could not, and so the claimant prays for an award by this forum. The claimant's plea is that, for this period, the losses and damage actually suffered by him as per calculation given by him should be allowed. This comes to Rs.1,01,09,000/- under claim 1(b) and Rs.26,40,000 under claim 2 totally up to Rs.1,27,49,000. This works out to Rs.6,71,000 per week, which is 8.95 times the rate of Rs.75,000/- per week applicable till 7 July,1998 and appears to be on the high side. But it has to be considered that at the time of tendering, the rate quoted must have been at the rock bottom in an effort to win

the contract. Also, the rates are quoted in the expectation that the delay is not likely to be more than a few weeks whereas in this case, it has been 43 weeks. It would, therefore, be unfair to peg their claim to the quoted rate during this period. The respondents have not commented on the figures of these claims, they have denied the claim itself and in the process have not provided any scrutiny of the amounts claimed. Under the circumstances, the computation given by the claimants is accepted as reasonable.

21. The following compensation is accordingly awarded as payable to the claimant :

Under Claim 1(b), Rs.75,000.00 X 24 weeks =
Rs.18,00,000.00 + Rs.1,01,09,000.00 =
Rs.1,19,09,000.00 &

Under Claim 2, Rs.26,40,000.00.”

28. These were the findings pertaining to claims No.1(b) and 2. Decision on claim No.3 is as under:-

“CLAIM NO.3 :

25. This is a claim for compensation for increase in cost of labour and material. Initially the claim was Rs.8 lakhs for price increases in the prolonged period of contract. Later at the time of arguments (13.11.2000) it was amended to include the increase in the cost of labour during the stipulated contract period in addition to the prolonged period and the claim was raised to Rs.23,40,420. GAIL raised a preliminary objection to the amendment on the ground that the amended claim does not form part of the disputes referred to the arbitrator. The learned counsel for BEL has drawn attention to a Supreme Court Ruling in Union of India VS. L.K.Ahuja & Co. (AIR 1988 Supreme Court 1172). In this case the contractor had accepted final payment and given a no-claim declaration yet when he submitted a claim for arbitration, the Supreme Court held that the claim is arbitrable as it was made within the limitation period of 3 years. In this case also the claim has been made within 3

years from the date of completion of works hence the objection is overruled.

26. As the letter of withdrawal dated 28.09.1996 is being ignored, the respondents are bound by the contract-Cl.18 of SCC, to compensate the claimant on the basis of a formula based on consumer price indices. As required by cl.18, the contractor has given the ceiling for such price escalation at 5% of the contract price. While the claimant has argued that the price escalation applies for the entire period of the execution of the contract, the learned counsel for respondents has argued that escalation under cl.18 can be claimed only for the contract period and not for the extended period unless the extension was for reasons solely attributable to the owner.

27. As discussed earlier, the reasons for the extension are substantially, though not strictly, solely attributable to the owner. The fact that the claimant has been awarded compensation for the period July, to November on the basis of actual costs and losses, has also to be kept in view. Considering all these factors, escalation on account of labour costs is allowed only for the period Jan.1997 to June,1998 i.e. for the contract period and the extended contract period for which compensation under claims 1 & 2 has been pegged at Rs.75,000/- per week. According to the calculation given by the claimant (Annexure A to C-289), which is not challenged by the respondent, this works out to Rs.11,86,959.27 and this amount is awarded to the claimant under claim No.3."

29. From a perusal of the decision of the arbitrator, it is apparent that the arbitrator has ignored the letter dated 28th September,1996 issued by the respondent. The arbitrator has held that compensation was not payable under clause 21 of the special conditions of the contract but held it was otherwise payable and determined the same by applying the principle of clause 21.

30. We have noted above the terms of the tender. Following position emerges :

(I) If there is any deviation in the tender, bidder was to separately state the deviation in the proforma attached and quote the price separately.

(II) If the bidder was to claim extended stay compensation, same had to be specifically claim for and the rate provided. In the absence of any rate, it is to be presumed that no extended stay compensation is claimed.

(III) "Schedule of Rates" was firm and was there to gather all costs and risks including delay in completion of works. No addition or alteration had to be allowed.

(IV) If the tenderer was to claim labour escalation, it had to be for reasons solely attributable to GAIL and the tenderer had to stipulate clearly that it would claim labour escalation and had to indicate a ceiling. Failed to so indicate would amount that the bidder was not claiming any labour escalation.

(V) For extended stay, if compensation was claimed, it had to be so stated in the offer. Failure to so indicate would amount that no extended stay compensation was to be claimed. Admittedly, the respondent, in the initial offer had claimed labour escalation but had withdrawn the same by its letter dated 28th September,1996. This letter was never withdrawn. In law, the offer of the respondent became the offer as modified by the letter dated 28th September,1996. The Letter of Award which resulted in the conclusion of the contract has been noted above. The Letter of Award clearly shows that it was a firm price contract.

(VI) Annexure A to the letter of award containing the "agreed variations" stated the contract value and did not include an escalation or over stay compensation.

31. The learned Single Judge has held in favour of the appellant on the reason aforesaid and on an interpretation of the clauses, which we have referred, held that the arbitrator could not ignore the contractual clause and, therefore, has set aside claims No.1(b) and 2. There is no discussion in the impugned judgment as to on what basis claim No.3 of the respondent should be segregated in sum and substance from the substratum it excluded claims No.1(b) and 2. Claim No.3 was for compensation for increase in the price of material, labour etc. in the prolonged period of contract. Reasoning applicable to claims No.1(b) and 2 would apply with equal force to claim No.3.

32. We agree with the submissions made by GAIL. Tender clauses clearly required the contractor to quote for labour escalation and extended stay compensation by listing out the rates separately and in the absence of rates being quoted it was to be presumed that none were being claimed. Tender conditions show that GAIL wanted a "firm price" to be quoted. By quoting extra for labour escalation and price for extended stay compensation, GAIL wanted a firm price for said extra claims. They could not be left as fluctuating claims to be determined and worked out later on. Contractor, in its initial offer quoted for the same but under cover of letter dated 28.9.1996 withdrew the same thereby amending its offer. Not to be left later on to be interpreted, the statement of agreed variations (Annexure A to the letter of award dated 24/27.1.1997) set out the price to be paid to the contractor. Nothing remained to be interpreted. It was a simple task of applying the contract clauses and the contract price. Even the last para of Annexure A to the letter of award on which the contractor relies stated that "agreed variations listed above shall form the contract document". Thus, the decision of the learned Single Judge is correct and has to be affirmed regarding claims 1b and 2. The arbitrator went beyond his mandate and hence exceeded his jurisdiction.

Unfortunately, the learned Single Judge has given no reason as to how he was drawing a distinction between claim No.3 on the one hand and claims 1b and 2 on the other. Indeed, both counsel in appeal agreed that earlier all the three claims had to be sustained or none. They have a common substance namely delay in completion of the work. Thus, impugned judgment, in so far it accepts the award pertaining to claim No.3 has to be set aside.

33. There is an additional reason to set aside the award pertaining to claims 1b, 2 and 3. As noted from the pleadings and the award, the three claims arise due to prolongation of the contract beyond the stipulated date. If at all (if quoted) any extended stay compensation was payable, it was under clause 21 of the "special conditions of contract". This was payable, as noted by the arbitrator, if delay was solely attributable to the owner (GAIL). Similarly, clause 18 of the "special conditions of contract" provided for labour escalation (if quoted). Again, it was payable for the contract period. For the extended period, it was payable if the contract was extended due to reasons solely attributable to the owner. Arbitrator could not thus make out a new contract by holding that clause 21 was not attracted but he would award damages for extended stay by applying the principles of clause No.21. By the impugned award the arbitrator has held that delay was not solely attributable to GAIL. In holding that clause 21 did not come into operation, the arbitrator came to a right conclusion on facts. Thereafter by stating that he was applying the principle of clause 21, arbitrator nullified his finding. Arbitrator made a novation to the contract which he could not do. Same applies to labour escalation during extended period of contract."

26. But, we find an error committed when the decision dated April 02, 2003 was penned and this is with respect to

Bhageertha's entitlement to be recompensed @₹75,000/- per week for the period the contract got prolonged and for which three months' grace period had to be discounted for and thus qua claim No.1(b) Bhageertha would be entitled to ₹75,000/- x 19 (weeks of delay) = ₹14.25 lakhs for the reason as per clause No.21 of the Special Conditions of Contract, clause No.87(vi) of the General Conditions of Contract was modified requiring : *'In case the completion of the work is delayed beyond a period of three months after the grace period then both the owner and the contractor shall mutually decide the future course of action including payment of further extended stay compensation.'* And, in respect of which admittedly Bhageertha had quoted to be paid a weekly compensation of ₹75,000/-.

27. Accordingly, both appeals stand disposed of modifying the impugned order passed by the learned Single Judge and disposing of Objections filed by GAIL to the award by setting aside, in addition to claim No.2, even claim No.3 raised by Bhageertha and as regards claim No.1(b), hold that Bhageertha would be entitled to only ₹14.25 lakhs pertaining to said claim.

28. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

MAY 16, 2012
dk