

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION PETITION NO.368 OF 2012

Punj Lloyd Ltd.)
A company incorporated in India,)
and having its Registered Office at)
17-18, Nehru Place,)
New Delhi – 110 019) .. Petitioner

Vs.

Hindustan Petroleum Corporation Ltd.)
Through its Chief Manager,)
MPSPL(Mumbai Pune Solapur Pipeline Project)
H.P. Fuels Refinery, B.D. Patil Marg,)
Mahul, Mumbai- 400 074.) .. Respondent

Mr.Kevic Setalwad, Senior Advocate a/w Mr. Sidharth Sethi a/w Mr.
Sumit Patni i/by M/s. J.Sagar Associates for the petitioner.
Mr.Minoo Siodia a/w Ms.Raksha Thakkar i/by M/s. Rustamji &
Ginwala for the respondent.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 25th February 2015
PRONOUNCED ON : 24th March 2015

JUDGMENT :-

. By this petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short “the said Arbitration Act), the petitioner has impugned the arbitral award dated 26th November 2011 passed by the learned arbitrator rejecting the claims made by the petitioner and holding that the respondent was entitled for deduction

from the running account bills of the petitioner in line with price reduction clause and accordingly rejected the claims of the petitioner in the sum of Rs.3,28,73,691/-. Some of the relevant facts for the purpose of deciding this petition are as under :

2. The petitioner was the original claimant in the arbitration petition whereas the respondent herein was the original respondent. Some time in the month of April 2005, the respondent no.1 invited bids for laying of pipeline and associated facilities for Pune Solapur Pipeline Project. Pursuant to the said bidding document, the petitioner submitted its offer dated 18th June 2005. On 28th October 2005, the respondent issued a Letter of Intent in favour of the petitioner. The letter of intent was followed by a Purchase Order/Detailed Letter of Acceptance (DLOA) dated 28th October 2005. The scope of work included (a) laying of pipeline of outside diameter 355.6 mm for 182 km (Spread I) and (b) laying of pipeline of outside diameter 323.9 mm for 161 km (Spread II) from the terminal of the respondent at Loni near Pune to the receipt station at Pakni near Solapur. The pipeline was to pass through the existing terminal of respondent at Hazarwadi. The envisaged work also included laying of Optical Fibre Cable (OFC) from Trombay to Loni.

3. The estimated contract value under the said Letter of Intent was Rs.88,60,38,279/-. Time of completion provided was 10 months upto pre-commissioning from the date of issue of Letter of Intent for pipeline of outside diameter 355.6 mm, including Terminal and SV station and 6 months upto pre-commissioning from availability of first pipe at Dumpsite for Pipeline of outside diameter 323.9 mm.

Clause 9 of the said Letter of Intent provided for the price reduction in case of works getting delayed. M/s.Engineers India Ltd. was appointed as Engineer-in-Charge for the said project.

4. On 28th October 2005, the petitioner mobilized on the site and commenced the activity of ROW/site grading etc. for completion of works contemplated in Spread I. On 15th January 2006, the petitioner mobilized on the site and commenced the activity of ROW/site grading etc. for completion of works contemplated in Spread II.

5. By letter dated 27th July 2006, the respondent alleged delay and serious lapses on the part of the petitioner resulting out of the inexperience of site team. On 24th August 2006, the petitioner submitted a request for extension of time to M/s. Engineers India Ltd., the Engineer-in-Charge of the project (for short “the said EIL”) for extension of time for both Spread I and II on the grounds set out in the said letter.

6. On 8th September 2006, the said EIL sent a letter to the petitioner informing that any works completion getting extended or delayed beyond 29th October 2006 will be dealt with as per the provisions of the contract for price reduction. On 8th September 2006, the said EIL allowed the request of the petitioner for extension of time for both Spread I and II upto 28th October 2006 without any financial implication. On 20th October 2006, OISD report was submitted by the said EIL pointing out the balance scope of work to be completed by the petitioner.

7. On 21st October 2006, the petitioner submitted another

request for extension of time in respect of Spread II upto 3rd January 2007. On 24th October 2006, the petitioner submitted a request for extension of time in respect of Spread I. On 26th October 2006, the said EIL rejected the request of the petitioner for further extension of time in respect of Spread I. By letter dated 28th October 2006, the said EIL granted extension of time in respect of Spread II upto 12th December 2006. It is the case of the petitioner that though the respondent had rejected the request of the petitioner for further extension of time in respect of Spread I, the petitioner completed the activities contemplated under clause 3 of the DLOA within the extended completion date of 28th October 2006.

8. By letter dated 26th October 2006, the said EIL informed the petitioner that the request of the petitioner for exclusion of CPL survey from definition of 'Time Schedule' was out of place and was not at all acceptable. The said EIL had refused to give time beyond 28th October 2006. On 29th October 2006, the said EIL informed the petitioner about the balance works list for Spread I related to pipeline and SV stations I to IV. On 30th October 2006, the said EIL enclosed comments of OISD and forwarded the same to the petitioner with a request to attend the balance points for making the pipeline and SV stations of Spread I ready for commissioning.

9. On 2nd November 2006, the said EIL addressed a letter to the petitioner expressing grave concern about the works of SV stations VI to IX not progressing at all since last one month and stating that the huge quantum of work was still pending. The said EIL enclosed all lists of activities to be completed by the petitioner. On 4th November

2006, the said EIL enclosed another list of balance work for pipeline laying activities to the petitioner as on 28th October 2006. On 4th November 2006, the said EIL enclosed list of balance work at IP and RT stations as on 28th October 2006 to the petitioner. On 12th November 2006, the said EIL addressed a letter to the petitioner pointing out that no spread in-charge was available for Spread I from the petitioner and also enclosed a list of balance work related to the pipeline for Spread I. On 6th November 2006, Test Report for SV-II was prepared. On 3rd December 2006, Test Report for SV-VII and SV-VIII was prepared. On 5th December 2006, the said EIL informed the petitioner about the list of balance activities of pipeline for Spread I. On 6th December 2006, OISD Report was submitted to complete certain works. On 12th December 2006, Test Report for SV-IX was prepared.

10. It is the case of the petitioner that on 2nd November 2006, the respondent commissioned the pipeline in Spread I i.e. just 4 days after the petitioner had completed the activities falling within its scope in respect of Spread I. The petitioner placed reliance on the Annual Report of the Ministry of Petroleum and Natural Gas in support of this contention. On or about 30th November 2006, the petitioner submitted RA Bill No.12A for Rs.6,28,47,493/- to the respondent.

11. By a letter dated 2nd January 2007, the said EIL informed the petitioner that the progress of job front was sluggish and far from meeting target dates. On 29th January 2007, format IV listing out pending jobs for Spread II and Spread I was submitted.

12. On 6th February 2007, the said EIL addressed a letter to

the petitioner expressing its concern regarding liquidation of check list and completion of balance works on pipeline, SV stations, IP/RT stations regarding Pune Solapur pipeline for Spreads I and II. On 6th February 2007, the said EIL enclosed Handing Over Format IV for Spread II by the respondent.

13. On 23rd February 2007, the petitioner forwarded Format III to the said EIL and informed that the same was ready for pre-commissioning certificate for OFC work. It is the case of the respondent that on 27th February, 2007, Format IV for Spread I showing that the work was incomplete.

14. It is the case of the petitioner that on 7th March 2007, the respondent no.1 under RA Bill No.12A paid only Rs.4,97,41,325/- to the petitioner and deducted Rs.1,06,18,358/-. According to the petitioner, the said amount withheld by the respondent was shown as liquidated damages even though there was no provision in the DLOA for such liquidated damages.

15. By letter dated 12th March 2007, the said EIL addressed a letter to the respondent enclosing Format IV for Spread I along with details of minor points to be attended by the petitioner. On 16th March, 2007, the respondent addressed a letter to the petitioner pointing out that the petitioner had assured on 15th February 2007 for completing all balance activities but had not kept the promise. The respondent pointed out that it was not possible to retain the services of the EIL nor the officer of the respondent indefinitely.

16. On 23rd March 2007, the petitioner submitted liquidated check list for pipeline Spread I to the said EIL. On 24th March 2007, the said EIL addressed a letter to the respondent enclosing Format IV for Spread I (OFC work) along with details of minor points to be attended by the petitioner.

17. On 27th March 2007, the said EIL addressed a letter to the respondent to keep bill amount on hold due to non completion of all/total work for Spread I against each item. On 27th March 2007, the said EIL addressed another letter to the respondent recommending to keep bill amount on hold due to non completion of all/total work for Spread I and also levy price reduction on account of delay on the part of the petitioner.

18. On 5th April 2007, the petitioner objected to the deduction made by the respondent and requested to release the amount so withheld against the liquidated damages.

19. On 9th April, 2007, the petitioner enclosed PCP Commissioning Report for Spread II to the said EIL. By letter dated 14th April 2007, the respondent informed the petitioner that since the said EIL had negated the request of the petitioner for time extension for Spread I sought by the petitioner vide letter dated 24th October 2006, the respondent had levied price reduction in line with clause 9 of the DLOA. It is the case of the petitioner that in addition to the amount withheld by the respondent from RA Bill No.12 A of the petitioner, the

respondent had also withheld certain amounts from pre-final bills dated 12th January 2007 and 10th March 2007 of the petitioner for Spreads I and II respectively.

20. By an e mail dated 17th April 2007, the said EIL forwarded a draft copy of the recommendations dated 13th April 2007 to the respondent against the request letter submitted by the petitioner for time extension for Spreads I and II. On 27th April 2007, the petitioner gave a reply to the letter dated 27th April 2007 of the said EIL. On 28th April 2007, the respondent addressed a letter to the said EIL pointing out the reason for not sending the approved draft to the petitioner.

21. On 3rd May 2007, the said EIL addressed a letter to the respondent pointing out that activities for CPL and interference survey for Spread I would be completed by mid April 2007 and balance check list point would be completed by 30th June 2007 and for Spread II would be completed by mid April 2007 and balance check list point would be completed by 30th June 2007. In the said letter, the said EIL alleged that it can be seen that all the works upto pre-commissioning except for minor check list points for Spreads I and II work were completed with time extension granted to the petitioner.

22. On 15th May 2007, a meeting between the petitioner, the respondent and the said EIL took place. In the Minutes of meeting, it was recorded that CPL survey for Spread II had been completed on 10th May 2007; OFC reconciliation would be completed on 17th May 2007. Warranty Certificate for DG sets would be submitted by 21st May 2007. Tree cutting in ROU would be completed by 31st May 2007 etc.

23. On 21st May 2007, the said EIL informed the petitioner that the petitioner's claim of extra work or cost of rework for Bhima river was not tenable.

24. On 11th July 2007, a meeting came to be held between the parties along with the said EIL. In the Minutes of meeting, it was confirmed that the petitioner would complete the job for ROU marker on 31st August 2007. All rectification job including obtaining NOC to be completed latest by 31st August 2007. On 27th July 2007, Format III for Spreads I and II came to be submitted. On 20th August 2007, the said EIL submitted a completion certificate. On 29th August 2007, the respondent addressed a letter to the said EIL pointing out that the extension of time completion could only be in accordance with clause 3.1 of the Document No.6545-04/41-TS-02. The respondent further pointed out that the said EIL had issued a completion certificate mentioning the date of completion as 30th June 2007. However, the Cathodic Protection (CP) system had not been handed over till date as the activities were still in progress. Format IV had not been signed by the respondent. The respondent pointed out that major job of coating was in part of the scope of the petitioner. Completion date could only be established after work was completed. The respondent also pointed out that as built document pertaining to CP had not been submitted. CPL survey reports had not been authenticated by the said EIL. The respondent returned the original completion certificate to the said EIL for correction.

25. In the month of August 2007, the petitioner submitted its final bill for Rs.6,58,07,064/- to the said EIL. The said amount was

claimed in addition to the amounts withheld by the respondent no.1 from RA Bill No.12A of the petitioner and requested the respondent to pay a total amount of Rs.9,68,19,731/-.

26. On 20th September 2007, the respondent addressed a letter to the said EIL alleging that the statement of the said EIL that activities covered under clause 3.1.1 had been completed for Spread II was absolutely wrong, baseless, far from truth and contradictory. The respondent alleged that the completion date mentioned by the said EIL was out of extraneous reasons without having any relation to the contractual provisions. The dates for completion could only be established by joint inspection of the said EIL and the petitioner or the dates of handing over of any system. In the said letter, the respondent further stated that OISD had categorically mentioned that the activities like installation of warning board, direction markers, cathodic protection system, communication which were forming part of clause 3.1.1 had not been completed as on the date of inspection of OISD. The respondent also contended that the said EIL could not point out to the respondent any clause in the contract which provides for post pre-commissioning activity. It was contended that CP during pre-commissioning stage certainly means permanent CP and not limited to temporary CP.

27. It was stated that the view of the said EIL of job completion by 12th December 2006 was not based on any material facts and contractual terms and conditions. The respondent requested the said EIL to include some of the works which were beyond pre-commissioning were still not yet completed. The respondent pointed out that the said EIL had arbitrarily fixed the date of 30th June 2007. The said EIL did

not reply to the letters of the respondent dated 21st July 2007, 31st July 2007 and 21st August 2007. The respondent made it clear that CP which was one of most important safety feature of pipeline and current drainage/ coating damages could not be treated as minor check list points and thus the completion certificate was incorrect. The respondent returned the said completion certificate to the said EIL since the same was not in accordance with the terms and conditions according to the respondent.

28. On 10th October 2007, there was a meeting held. In the Minutes of meeting, the petitioner committed that CP related activities would be completed by 31st October 2007. The petitioner requested that the painting job for warning board be deleted from its scope. The petitioner agreed to provide identification marker for SV I, II, III, VII and IX by 25st October 2007 and fencing at SV IV, V and VIII by 30th November 2007.

29. On 1st December 2007, the respondent paid a sum of Rs.5,13,51,759/- under the final bill to the petitioner and made various deductions which were shown as 'Temporary Hold' and 'Permanent Hold.'

30. On 7th December 2007, the petitioner while acknowledging the receipt of the amount of Rs.5,13,51,759/- objected to various deductions made by the respondent. The petitioner requested the respondent to release all the outstanding payment without any further delay. The petitioner also furnished a detailed break up of the withheld amount.

31. On 8th December 2007, the said EIL forwarded the final bill and revised completion certificate to the respondent. The said EIL, however, informed the respondent that the said EIL had not issued any completion certificate from its end. According to the said revised completion certificate, the activities pertaining to CPL survey attending to current drainage at SV stations were completed on 9th October 2007.

32. It is the case of the petitioner that in response to the request of the petitioner, the said EIL issued a copy of the completion certificate to the petitioner on 1st March 2008. In the said letter, the said EIL recorded that it had sent to the respondent the said certificate along with final bill of the petitioner. According to the petitioner, the said completion certificate dated 1st March 2008 issued by the said EIL would indicate that the petitioner had completed the activities in terms of clause 3 of the DLOA in respect of both Spreads I and II within the respective extended completion dates.

33. On 15th September 2008, the petitioner issued to the respondent a notice under Article 14 of the General Conditions of Contract to commence arbitration. On 14th October 2008, the respondent appointed Shri. R. Krishnan, a retired officer of the respondent as the sole arbitrator.

34. Pursuant to the directions issued by the learned arbitrator, the petitioner filed a statement of claim, inter alia, praying for recovery of Rs.3,28,73,691/- alleged to have been wrongfully recovered by the respondent though the petitioner had alleged to have been completed

the activities contemplated under clause 3 of the DLOA. The petitioner had also applied for recovery of extra amount alleged to have been incurred while executing the work of Bhima river crossing and also a sum of Rs.1,13,56,350/- as extra for carrying out re-routing of pipeline alignment pursuant to the alleged instructions by the said EIL/the respondent. The petitioner demanded interest @18% p.a. The said arbitrator Shri. R. Krishnan appointed by the respondent, however, withdrew from the office of the arbitrator. Later on, Shri S.V. Narvekar was appointed by the respondent as the sole arbitrator in the arbitration proceedings from the stage of arguments.

35. By an arbitral award dated 26th November 2011, the learned arbitrator held that the respondent was entitled for deductions from running account bills of the petitioner in line with price reduction clause amounting to Rs.3,28,73,691/- and accordingly, rejected the claim for recovery made by the petitioner and for interest. The learned arbitrator directed both the parties to bear the cost of arbitration equally. The said arbitral award has been impugned by the petitioner in this petition under Section 34 of the Arbitration and Conciliation Act, 1996.

36. Mr. Setalwad, learned senior counsel for the petitioner submits that the time for completion of works was provided as per clause 3 of DLOA. The extended dates for completion of activities in Spreads I and II were 28th October 2006 and 12th December 2006 respectively. The petitioner was obliged to complete pre-commissioning activities within the said extended completion dates. The activities forming part of 'Pre-commissioning' were enumerated in the 'Technical

Specifications for Pre-commissioning and Commissioning.’ He submits that all pre-commissioning activities set out in the specifications were completed within the extended completion dates and in support of this contention, he placed reliance on the completion certificate issued by the said EIL. He submits that the said completion certificate issued by the said EIL was final and binding on the parties and could not be questioned about its correctness by the respondent.

37. Learned senior counsel submits that a final certificate issued by an Engineer/Architect is final and binding on the parties and cannot be challenged except on the ground of fraud, collusion or misconduct and except in the cases where the same had been issued at a time when there were disputes formulated between the parties or referred to arbitration. He submits that finding of the learned arbitrator that such completion certificate issued by the said EIL was not binding on the respondent is contrary to the law. In support of this submission, learned senior counsel placed reliance on the judgment of this Court in the case of **Motilal Tajsi & Co. Vs. Ramchandra Gajanan Kherodkar**, reported in **AIR (29) 1942 Bombay 334** and in particular the following portions thereof which read thus :-

“Therefore, even assuming that Clause (4) of the contract amounts to an arbitration clause, it would not ipso facto oust the jurisdiction of the architects to give a certificate under Clause (36) of the conditions of the contract unless Mr. Somjee satisfies me that there were disputes between the parties which were formulated and which were referred to the architects as arbitrators. If there were no disputes or if they were not formulated or if they were not referred to the architects, the jurisdiction of the architects to give a certificate continued unimpaired, and if they did give a certificate, it would be final and binding upon the

parties. As I have already stated, in my opinion it was not the intention of the parties to constitute the architects as arbitrators, and any difficulty that one may feel in construing Clause (4) of the contract because of the words "the decision of the architects shall be final and binding on both parties and may be made a rule of the Court" is removed by consideration of the decision in (1909) Hudson's Building Contracts, Vol. II, (4th Edn.), page 411. The clause there which the Court considered was if anything much more favourable to the view advocated by Mr. Somjee than the clause here. The architect was described as the "judge", and with regard to the final certificate he was to issue, it was provided that it was to have the force and effect of an award and may be made a rule of His Majesty's High Court of Justice, or any division thereof, at the instance of either party hereto. In his judgment Lord Justice Buckley says (page 418) :-

"It is quite true that the architect is to be an impartial person, no doubt; he is to determine the construction of the contract, and he must not "seek to construe it in favour of the corporation as distinguished from in favour of the contractors; he must act fairly as between the parties. Therefore he owes a duty to the contractors as well as a duty to the corporation, but he, I think, does not hold any judicial duty to one or to the other. Then if you add to that the last words of Section 33, all that you find there is that his certificate as to the work done, the money to be paid and so on, 'shall have the force and effect of an award, and may be made a rule of His Majesty's High Court of Justice, or any division thereof, at the instance of either party hereto'. I do not think that adds anything to it. It is not that this certificate is an award, but it is to be treated as something which it is not, and it is treated as if it were an award. That is the conclusion I come to upon the construction of that clause".

My conclusion on the construction of Clause (4) of the contract is the same. The mere fact that Clause (4) provides for the decision of the architects being made a

rule of the Court does not alter their capacity in giving their decision which is not judicial but administrative, and in giving their decision under Clause (4) they do not act as arbitrators at all. If their decision is not an award, the mere fact that the parties provide that it may be made a rule of the Court would not any more make it an award. Assuming I am wrong in my construction of Clause (4) and that Clause (4) is an arbitration clause, the next question that arises is whether there were any disputes between the parties before the issuing of the certificate which were referred to the arbitration of the architects within the meaning of Clause (4). Mr. Somjee has tendered four letters which his client wrote to the architects. In the first letter of June 7, 1938, he drew the attention of the architects to certain defects in the sanitary works and he called upon the architects to arrange to remove the present defective fittings and to replace them, with new ones. It is to be noted that in this letter the defendant wanted the architects to act administratively and do certain administrative acts. The decision of the architects was not sought on any dispute between the parties. The next letter of August 11, 1938, makes a grievance of various works which were left incomplete, and these incomplete works are set out seriatim. Here again the request made to the architects is that they should ask the contractors to complete the incomplete works. On January 14, 1939, a reminder was sent, and the architects were again called upon to request the contractors to attend to the defective and incomplete works. A final reminder was sent on June 26, 1939, and there again the grievance was that the architects had not yet got the contractors to complete the incomplete portions of the work and they were further asked to get the contractors to settle the claim of one Thakorlal & Co. in respect of some plumbing and sanitary works. Therefore it would be noted that in all these four letters the defendant was seeking the assistance of the architects to get the contractors to do certain things which he had the power to do under the contract and was making a complaint about various incomplete works which, according to him, the plaintiffs were bound to complete

under the terms of the contract. But nowhere do these letters even suggest that there were any disputes between the defendant and the plaintiffs --let alone formulating these disputes, and I fail to understand how these letters can be possibly read as calling upon the architects to take upon themselves the burden of arbitration under Clause (4) of the contract and resolve the disputes between the parties. I therefore hold that assuming Clause (4) of the contract is to be read as an arbitration clause, on the evidence before me there were no formulated disputes between the parties which were referred to arbitration under Clause (4) and, therefore, the jurisdiction of the architects to issue a final certificate under Clause (36) of the conditions of the contract was not in any way ousted.”

38. Learned senior counsel submits that it was not the case of the respondent before the learned arbitrator that the completion certificate was procured by the petitioner either by fraud, collusion or misconduct. The completion certificate issued by the said EIL was binding on the respondent and could not have been ignored by the learned arbitrator. The impugned award is thus contrary to law and also contrary to the terms of the contract.

39. Learned senior counsel placed reliance on the judgment of the Court of Appeal in the case of ***Arenson Vs. Arenson and Anr.***, reported in ***(1973) 2 All E R 235*** and would submit that none of the parties could impeach such certificate issued by the said EIL. Under clause 5.1 of the General Conditions of Contract, the said EIL who was authorised to issue such completion certificate and who was appointed as the Engineer-in-Charge had rightly issued such certificate. The respondent could not ignore such completion certificate issued by the

said EIL who was appointed by the respondent itself on such flimsy ground.

40. Learned senior counsel submits that the report of the said EIL that the balance works and post commissioning works were not within the scope of the petitioner could not be faulted with by the learned arbitrator. The said opinion of the said EIL was binding on the respondent. The said EIL had also certified that the petitioner had completed all pre-commissioning works. The learned arbitrator while rejecting the said report certified by the said EIL had relied upon the alleged established practice without there being any evidence on record. The respondent did not lead any oral evidence to prove any established practice before the learned arbitrator. He submits that the established practice is a matter of fact and has to be pleaded and proved. The petitioner had already completed the activity of CP before commissioning. The respondent had not made any deductions for OFC laying works.

41. Learned senior counsel submits that in any event, since no loss was suffered by the respondent even if there was a delay in completion of work, no amount towards liquidated damages could have been recovered from the running account bills of the petitioner without the respondent having proved such loss. In support of this submission, he placed reliance on the judgment of this Court in the case of ***Smt. Panna Sunit Khatau and Ors. Vs. Dilip Dharmsey Khatau delivered on 12th April 2013 in Arbitration Petition No.4 of 1986*** and in particular paragraphs 2 and 27 to 30 thereof which read thus :-

“2. Some of the relevant facts for the purposes of deciding this petition are as under:

Mr. Sunit Chandrakant Khatau, Kiran Chandrakant Khatau, Dilip Khatau, Abhay Khatau L. Khatau and Kishore Khatau were co-owners of the immovable property known as Khatau Bungalow, Manav Mandir Road, Mumbai 400 006. Under the family arrangement dated 10th August, 1983, the company known as Khatau Company Limited and certain other concerns were allotted to petitioners' group. In respect of the immovable property known as Khatau Bungalow, the Memorandum of Understanding dated 12th July, 1984 (for short "MOU") was executed between Kishore Dharamsey Khatau, Dilip Dharamsey Khatau and Abhay Laxmidas Khatau (hereinafter referred to as "DMK GROUP" and Mr. Sunit Chandrakant Khatau and Kiran Chandrakant Khatau (hereinafter referred to as "CMK GROUP"). The Petitioners in this petition would be referred to as CMK group whereas respondents would be referred to as DMK group. The main object of the said MOU was to implement the desire of the parties i.e. to divide and/or partition of the immovable property by metes and bounds. It was agreed that the DMK group should have physical possession and ownership of two thirds of the said immovable property and CMK group shall have physical possession and ownership of the remaining one-third of the said immovable property. It was further agreed that in order to effectuate said desire and intention of the parties, two third of the total FSI in respect of the immovable property would be available to and for the beneficial enjoyment of the said two third portion given to DMK group and the one-third of the total FSI would be available to and for the beneficial enjoyment of one third coming to the share of the CMK group. Under clause 3 of the said MOU it was agreed that on the CMK group, their family members and personal servants and others handing over vacant possession to the DMK group of the portion of the said immovable property coming to the share of the DMK group, the DMK group shall pay to the CMK group a sum quantified at Rs. 55,00,000/- (Rupees Fifty Five Lacs) in consideration of the CMK group agreeing to take the portion of the immovable property coming to their share. Clause 4 of the said MOU provided for the respective FSI for the beneficial enjoyment of

the respective portion of the CMK and DMK group. Clause 5 of the said MOU provided that for implementing the said MOU regarding the division of FSI in manner specified in the immediately preceding clause, the party concerned shall demolish any structures or any part or parts thereof on the portion of the said immoveable property coming to such party so that the other party may have the enjoyment and beneficial use of that portion of the FSI allocable to such party's share or portion of the said immoveable property. Clause 6 provided that the DMK group shall ensure that they and the respective members of their families and personal servants are removed from that portion of the said immovable property, shaded yellow on the said plan, within six months from the date of the said MOU and procure in favour of the CMK group a proper performance Guarantee of authorized family members and guaranteeing the payment of Rs. 5,000/- per day. There was similar obligation cast upon CMK group. Clause 6 and 7 of the said MOU which are relevant for the purpose of deciding this petition are extracted below:

“6. DMK Group shall ensure that they and the respective members of their families and personal servants are removed from that portion of the said immovable property/shaded yellow on the said plan within six months from the date hereof. The cost of removing all their family members and personal servants shall be borne wholly by the DMK Group and the responsibility will be of the DMK group. The DMK Group shall procure in favour of the CMK group a proper performance Guarantee of Hiten A. Khatau, Mahendra K. Khatau and Anil K. Khatau guaranteeing the performance by the DMK Group of the condition of this clause and guaranteeing the payment of Rs. 5,000/- (Rupees Five Thousand) per day in the event of any willful default or delay on the part of the DMK Group in performance of the said obligation.

7. CMK Group shall ensure that they and the respective members of their families and personal servants are removed from that portion of the

property shaded green on the said plan within six months from the date hereof. The cost of removing all their family members and personal servants shall be borne wholly by the CMK Group and the responsibility will be of the CMK Group. The CMK Group shall procure in favour of the DMK Group a proper Performance Guarantee of Shri. Chandrakant M. Khatau guaranteeing the performance by the CMK Group of the condition of this clause and guaranteeing the payment of Rs. 10,000/- (Rupees ten thousand) per day in the event of any willful default or delay on the part of the CMK Group in performance of the said obligation.”

27. *In my view on reading this clause as a whole with other obligations of parties and considering the intention and object of the executing of MOU, it reveals that the said clauses provided for payment of Rs. 10,000/- per day is in the nature of penalty. The clause does not indicate that both the parties had agreed that the said amount was correct, genuine pre estimate of damages. The Supreme Court in the case of ONGC Vs. Saw Pipes (supra) has considered a clause by which both the parties had agreed that the purchaser would recover from the contractor as agreed liquidated damages and it was not by way of penalty sum equivalent to 1% of the contract price of the whole unit per week for such delay or part thereof. It was agreed that the said sum was genuine pre-estimate of damages duly agreed by the parties. The Supreme Court construed such clause and held that it would be difficult to prove the exact loss or damage each party had suffered because of breach thereof and in such situation if the parties had pre estimated such loss after clear understanding, it would be unjustified to arrive at the conclusion that the party who had committed breach of the contract is not liable to pay compensation and it would be against the specific provisions of section 73 and 74 of the Indian Contract Act. The Supreme Court held that in the said clause, it was specifically mentioned that it was agreed genuine pre estimate of the damages duly agreed by the parties. It was also mentioned that the liquidated damages was not by way of penalty. With these facts under consideration, the Supreme Court held that there was no reason for the*

tribunal not to rely upon the clear and unambiguous terms of the agreement stipulating pre estimated damages caused for delay in supply of goods. The Supreme Court also considered that while extending the time for delivery of the goods, the respondent was informed that it would be required to pay stipulated damages. In paragraph 68 of the said judgment the Supreme Court it is held that the terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same. If the terms are clear and unambiguous stipulating liquidated damages, unless it is held that such estimate of damages/compensation is unreasonable, or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided under section 73 of the Contract Act. The Supreme Court also held in some cases that it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation. The Supreme Court held that the Court is competent to award reasonable compensation in the case of breach even if no actual damage is proved to have been suffered in consequence of the breach of the contract.

28. *The Division Bench of this court in the case of Board of Trustees of Port Vs. Pioneer (supra) has interpreted the judgment of the Supreme Court in the case of ONGC Vs. Saw Pipes by holding that the observations made by the Supreme Court will have to be read in the context of the facts of that case. The Division Bench held that the view of the Supreme Court that there was agreed genuine pre-estimate of damage duly agreed by the parties and there was no need to prove then was based on the relevant terms of that contract which stated that in the case of breach of contract purchaser can recover from the contractor as agreed liquidated damages and not by way of penalty sum equivalent to 1% of the contract price or part thereof on which the contractor had failed to deliver within the fixed period. In my view the clause considered by the Supreme Court in the case of ONGC Vs. Saw Pipes is totally different. It is the case of the respondent themselves that*

it is not possible to prove the loss suffered by the respondent, if any, in view of the petitioner not handing over the possession of their one third portion to the respondent. Even if the finding of willful default was correct, in my view, the learned arbitrator at the most could have awarded reasonable compensation and not the entire amount as calculated based on clause which is in the nature of penalty. None of the parties led any evidence before the learned arbitrator to prove as to what amount should be reasonable for grant of compensation. On perusal of the impugned award, it is clear that the learned arbitrator has awarded the entire amount of Rs. 10,000/- per day for the alleged willful default not only from 27th January, 1985 to 4th December, 1985 but also from 5th December, 1985 till the petitioners hand over possession to the respondent vacant possession.

29. *In my view, award of Rs. 10,000/- per day as claimed which is in nature of penalty shows patent illegality on the face of award. Though the impugned award is a non speaking award, perusal of relief granted clearly reveals that the learned arbitrator had granted the entire relief as claimed by awarding Rs. 10,000/- per day by way of compensation. In my view grant of such relief by way of compensation is contrary to the judgment of the Supreme Court in the case of Fatechand Vs. Balkishandas (supra) AIR 1963 SC 1405, Maulabux Vs. Union of India (supra), ONGC Vs. Saw Pipes, judgment of Single Judge of this Court in the case of O.N.G.C. Vs. Country Tabular and Jagson Vs. O.N.G.C. (supra) and judgment of Division Bench in the case of Board of Trustees of Part Vs. Pioneer Engineer.*

30. *In my view as the error committed by the learned arbitrator in awarding the compensation at the rates as claimed though the said clause was in the nature of penalty, is error apparent on the face of the award, the arbitrator has committed legal misconduct in making the award, the court is empowered to interfere with the said award under section 30 and 33 of the Arbitration Act, 1940 even in the case of non speaking award. Reliance thus placed by Mr. Rustomjee on nine judgments on the scope of section 30 read with section 33 of the Arbitration Act, 1940 is of no assistance to the respondents.”*

42. Learned senior counsel submits that since the respondent had not issued any completion certificate, the petitioner had applied for such completion certificate to the said EIL. The said EIL had accordingly issued such completion certificate which is binding on both the parties.

43. In so far as the claim no. II is concerned, the learned senior counsel submits that the petitioner had carried out extra work while carrying out the work of Bhima river crossing. He submits that clause 2.13 of the Job Specific Requirements provided specifications for laying pipelines in the river crossing. The said clause stipulated that 'Pipelines in all river crossings were intended to be installed by open cut method.' However, the petitioner had realised that the depth of water, while working across the river, was possible only when a flow of water had been stopped or sufficiently reduced. This was because the pipelines had to be buried well below the maximum scour depth. He submits that in view of unforeseen problems encountered by the petitioner, the petitioner had to incur additional cost for mobilization and demobilization repeatedly to complete the work and thus the petitioner was entitled to recover a sum of Rs.2,00,80,699/- from the respondent. The learned arbitrator, however, has rejected the said claim without any basis and without any reasons. He submits that the findings rendered by the learned arbitrator are erroneous and are also contrary to the law.

44. In so far as the claim no. III is concerned, learned senior counsel submits that in view of the instructions given by the respondent and the said EIL while executing the project, the petitioner had to carry out re-routing of pipeline alignment from KP 170 to KP 176 and on

account of such instructions, the petitioner had to divert its resources which resulted in the petitioner incurring an additional cost and seeking an extension of time from the respondent. The new route/re-route was longer resulting in additional time and cost. He submits that the respondent had acknowledged the problems faced by the petitioner on account of re-routing while considering the request of the petitioner for extension of time. Reliance is placed on Section 70 of the Indian Contract Act 1872 and it is submitted that the learned arbitrator ought to have allowed the said claim on the principles of Quantum Meruit. In support of this submission, learned senior counsel placed reliance on the judgment of the Supreme Court in the case of **Food Corporation of India & Ors. Vs. Vikas Majdoor Kamdar Sahkari Mandli Ltd.**, reported in **2007 (13) SCALE 126** and in particular paragraph 13 thereof which read thus :

“13. If a party to a contract has done additional construction for another not intending to do it gratuitously and such other has obtained benefit, the former is entitled to compensation for the additional work not covered by the contract. If an oral agreement is pleaded, which is not proved, he will be entitled to compensation under Section 70. Payment under this section can also be claimed for work done beyond the terms of the contract, when the benefit of the work has been availed of by the defendant.”

45. Mr. Siodia, learned counsel for the respondent, on the other hand, invited my attention to the relevant correspondence exchanged between the parties as also between the said EIL and also invited my attention to the relevant provisions of the Contract to point out that the scope of work of the Contract awarded to the petitioner. Learned counsel submits that the work awarded to the petitioner included laying of OFC

from Trombay to Loni and also the work of CP.

46. Learned counsel for the respondent placed reliance on clause 2.1 of the General Terms and Conditions of the Works Contract and would submit that the said provision provides for scope of work upto pre-commissioning stage. Learned counsel submits that clause 10 of the Notice Inviting Tender which provided for liquidated damages was subsequently replaced by another clause under which the respondent was permitted for price reduction by ½% (half percent) per week of delay or part thereof subject to ceiling of 5% (five percent) of the contract value of all the works in case of delay in completion of works due to reasons not attributable to the respondent. Learned counsel submits that thus the reduction made by the respondent from running account bills of the petitioner in view of delay in completion of work was not in the nature of the liquidated damages or in the nature of penalty. Learned counsel submits that under clause 5.1, it was provided that the Contractor shall issue a notice to the Site In-charge within thirty days for issuance of Completion Certificate. He submits that such certificate issued by the Site In-charge, however, was not final and binding on the respondent. Under clause 25.1 of the Contract, a notice to rectify defects and for final inspection was required to be issued.

47. Learned counsel submits that the petitioner by its letter dated 21st October 2006 itself had applied for extension of time for Spread I till 27th November 2006 and for Spread II till 3rd January 2007. The petitioner had also requested for exclusion of CPL survey from definition of 'Time Schedule.' The said EIL by its letter dated 26th

October 2006 rejected the request for exclusion of CPL survey from definition of 'Time Schedule' on the ground that the said work was a part of pre-commissioning. Even as per the certificate of the EIL, the petitioner had carried out CPL survey only on 9th October 2007 which was beyond the extended period. He submits that the respondent had considered the date of completion as 12th January 2007 for Spread I and 11th February 2007 for Spread II on the basis of completion of OFC though the respondent could have taken the date of completion as 9th October 2007 when CPL survey was completed and could have reduced the contract amount further.

48. Learned counsel placed reliance on the letter of the said EIL dated 28th October 2006 thereby refusing to grant extension of time for Spread II beyond 12th December 2006 and making it clear that the delay would be dealt with as per the provisions of the Contract for price reduction. Even according to the letter of 29th October 2006 from the said EIL to the petitioner, various works for Spread I were pending as on 29th October 2006. The said EIL had also pointed out that by letter dated 2nd November 2006, even the work of the petitioner for Spread II was not complete. The said EIL on 4th November 2006 had also observed that on 28th October 2006, the PCP and OFC work was not completed. The said EIL had noticed the same situation about non-completion of OFC and various other works in its letters dated 12th November 2006, 5th December 2006 and 2nd January 2007. The OFC testing report was signed by both the parties only after completion of work on 12th January 2007.

49. Learned counsel for the respondent submits that only on 23rd March 2007, the petitioner had submitted liquidated check list for pipeline Spread I. On 24th March 2007, the said EIL had informed the respondent that the OFC work was handed over. On 27th March 2007, the said EIL had advised that the work of the petitioner was not completed and various amounts payable to the petitioner should be kept on hold. The said EIL has also recommended for price reduction.

50. Learned counsel for the respondent invited my attention to the letter dated 27th April 2007 from the said EIL to the petitioner asking the petitioner to forward back up details in the attached format summarizing the pre-commissioning activities. On the same date, the petitioner had purported to have written a letter to the said EIL providing various details in the format suggested by the said EIL.

51. Learned counsel for the respondent invited my attention to the letter dated 3rd May 2007 from the said EIL to the respondent alleging that the pre-commissioning activities were completed by the petitioner within 28th October 2006 except the minor check list points, commissioning of PCP/CPL survey and mitigating measures. In the said letter, the said EIL further alleged that the commissioning of OFC for communication system and providing assistance for commissioning of pipeline were post pre-commissioning activities. The said EIL recommended that the amount of Rs.72,27,229/- in addition to the recoveries to be made by the respondent for material shortage was to be held in the pre final bill against completion of those activities. The said EIL opined that those activities shall be completed by the petitioner as per its final letter i.e. CPL and interference survey for Spread I would be

completed by mid April 2007 and balance check list points would be completed by 30th June 2007. The similar recommendation also made for Spread II. Learned counsel submits that even according to the said letter, in so far as Spread I is concerned, CPL and interference survey which were agreed to be completed by the petitioner by mid April 2007 were completed only on 9th October 2007. In so far as the Spread II is concerned, learned counsel for the respondent submits that as against the date of completion, even according to the petitioner, CPL and interference survey would be completed by mid April 2007, however, the same was completed on 9th October 2007. Even in the minutes of meeting dated 15th May 2007, the petitioner had informed that the OFC reconciliation would be completed by 17th May 2007.

52. Learned counsel submits that the said letter dated 3rd May 2007 addressed by the said EIL was contrary to the provisions of the Contract entered into between the parties and was showing several contradictions in taking a false and inconsistent stand than the stand taken by the said EIL in the earlier correspondence for various issues about the scope and part of the commissioning activities and also the scope of balance work left incomplete. Learned counsel submits that since the petitioner has not even handed over SPI for commissioning, question of the respondent commissioning in the month of November 2006 did not arise.

53. In so far as the reliance placed by the petitioner on the Annual Report of the respondent on the issue of commissioning of the project is concerned, the learned counsel invited my attention to various averments in the written statement and would submit that the respondent

had clarified this aspect before the learned arbitrator that the date mentioned in the said Annual Report could not have been considered as conclusive. He submits that even according to the petitioner, the petitioner had not completed the work on the date mentioned in the said Annual Report.

54. Learned counsel invited my attention to the correspondence exchanged between the parties and the said EIL pointing out inconsistent and contradictory stand taken by the said EIL and alleging fraud and collusion between the parties and the said EIL. Learned counsel submits that Mr. V.N. Prasad, the then General Manager of the said EIL had joined the services of the petitioner. Mr. Thakur who had issued the revised certificate on behalf of the said EIL had issued such certificate much after he had left the EIL in the month of December 2007. He invited my attention to some of the paragraphs of the written statement bringing these facts on record. There was no denial to the said averments made by the respondent. He submits that once the respondent had pointed out an objectionable conduct of the said EIL and inconsistencies in its stand for extraneous consideration, the said EIL could not have issued a completion certificate belatedly in favour of the petitioner. Learned counsel submits that even in the completion certificate issued by the said EIL to the petitioner as well as to the respondent, date of completion was different. No such reliance thus could be placed on the completion certificate issued by the said EIL.

55. Learned counsel submits that even if the completion certificate issued by the said EIL is considered as correct, even

according to the said certificate, the work of CPL survey was completed only on 9th October 2007 which was much beyond the date of extended period of contract. The said EIL itself has stated that the said CPL survey was a part of the pre-commissioning work. The respondent was thus entitled to price reduction under the provisions of the Contract. Learned counsel submits that the respondent had exercised that right and had deducted the price reduction only upto OFC period and not upto 9th October 2007. Learned counsel submits that thus the learned arbitrator has rightly rendered various findings in favour of the respondent. Learned arbitrator after considering the evidence on record and after interpreting the terms of the Contract has justified the deductions made by the respondent from the running account bills of the petitioner as and by way of price reduction. The said price reduction was contractual and was proper. The findings rendered by the learned arbitrator are not perverse and cannot be interfered with under Section 34 of the said Arbitration Act. Learned counsel submits that no case is made out by the petitioner for impugning any part of the award.

56. In so far as the claim no. II is concerned, learned counsel submits that the petitioner had already anticipated that the river flow was not a perennial flow. The same was also contemplated under the terms of the Contract. Learned arbitrator has interpreted the terms of the Contract. The petitioner had failed to prove its entitlement as well as quantum. Learned arbitrator has rightly rejected the said claim. Question of making any payment under Section 70 of the Indian Contract Act 1872 thus on the basis of Quantum Meruit did not arise.

57. In so far as the claim no. III is concerned, it is submitted by the learned counsel for the respondent that the said claim was also contrary to the terms of the Contract. Learned arbitrator has rightly rejected the said claim as the petitioner neither proved its entitlement nor the quantum in respect of the said claim. Learned arbitrator has rendered a finding of fact which is not perverse and cannot be interfered with under Section 34 of the said Arbitration Act.

58. Learned counsel placed reliance on the judgment of the Supreme Court in the case of ***Oil and Natural Gas Corporation Vs. Saw Pipes***, reported in **2003(5) SCC 705** and in particular paragraphs 64 and 74 of the said judgment in support of the action of the respondent for deductions of the contract amount. Paragraphs 64 and 74 of the said judgment in the case of *Oil and Natural Gas Corporation (supra)* read thus :

“64. It is apparent from the aforesaid reasoning recorded by the arbitral tribunal that it failed to consider Sections 73 and 74 of the Indian Contract Act and the ratio laid down in Fateh Chand's case (supra) wherein it is specifically held that jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; and compensation has to be reasonable. Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This Section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia [relevant for the present case] provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract

reasonable compensation not exceeding the amount so named. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre- estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach. Take for illustration: if the parties have agreed to purchase cotton bales and the same were only to be kept as a stock-in-trade. Such bales are not delivered on the due date and thereafter the bales are delivered beyond the stipulated time, hence there is breach of the contract. Question which would arise for consideration is - whether by such breach party has suffered any loss. If the price of cotton bales fluctuated during that time, loss or gain could easily be proved. But if cotton bales are to be purchased for manufacturing yarn, consideration would be different.

74. For the reasons stated above, the impugned award directing the appellant to refund US \$ 3,04,970.20 and Rs. 15,75,559/- with interest which were deducted for the breach of contract as per the agreement requires to be set aside and is hereby set aside. The appeal is allowed accordingly. There shall be no order as to costs."

59. Mr. Setalwad, learned senior counsel in the rejoinder submits that the respondent cannot be permitted to challenge the completion certificate unless it is proved that a fraud was committed by the Site In-charge. The respondent had neither pleaded such fraud as contemplated under Order VI Rule 4 of the Code of Civil Procedure, 1908 nor has

proved such alleged fraud. Learned arbitrator has not rendered any finding on fraud. Allegations of fraud cannot be made for the first time in these proceedings under Section 34 of the said Arbitration Act. The respondent had never disputed the completion certificate issued by the said EIL. He submits that the Site In-charge had already rejected the claim nos. II and III which deductions have been approved by the respondent itself. It cannot be thus alleged by the respondent that the said Site In-charge was in collusion with the petitioner and had committed a fraud in issuing completion certificate.

60. Learned senior counsel submits that the completion certificate issued by the said EIL was based on the letter dated 3rd May 2007 which was issued by the said EIL to the respondent. The respondent not having disputed the contents of the said letter dated 3rd May 2007 issued by the said EIL, the respondent now cannot challenge the said certificate. He submits that even in the admission and denial statements filed by the respondent, the respondent had not disputed the completion certificate.

61. Learned senior counsel submits that since the respondent did not dispute the contents of the letter dated 3rd May 2007 in which the said EIL had opined that since some of the activities were not completed by the petitioner were post pre-commissioning activities, the respondent cannot be allowed to urge that those activities were forming part of scope of the work of pre-commissioning work.

62. Learned senior counsel submits that if the respondent had pleaded fraud on Mr.R.G. Thakur, the respondent could have summoned

him before the learned arbitrator. Mr.Thakur was competent and authorised person. When the said Mr.Thakur addressed a letter dated 3rd May 2007, he was in the office.

63. Learned senior counsel placed reliance on the judgment of the Supreme Court in the case of ***M/s.Kailash Nath Associates Vs. Delhi Development Authority decided on 9th January 2015 in Civil Appeal No.193 of 2015 reported in 2015 SCC OnLine SC 19*** and in particular paragraphs 33 and 43 and would submit that even if the provision for price reduction was considered as liquidated damages, since the loss suffered by the respondent is capable of being calculated, the respondent not having suffered any loss could not have recovered any amount from the running account bills of the petitioner. Learned counsel submits that neither there was any pleadings nor any evidence led by the respondent as to how much loss the respondent had suffered because of the alleged delay on the part of the petitioner. Paragraphs 33 and 43 of the said judgment in the case *M/s.Kailash Nath Associates(supra)* read thus :

“33. Section 74 occurs in Chapter 6 of the Indian Contract Act, 1872 which reads “Of the consequences of breach of contract.” It is in fact sandwiched between Sections 73 and 75 which deal with compensation for loss or damage caused by breach of contract and compensation for damage which a party may sustain through non-fulfillment of a contract after such party rightfully rescinds such contract. It is important to note that like Sections 73 and 75, compensation is payable for breach of contract under Section 74 only where damage or loss is caused by such breach.

43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be

stated to be as follows :-

Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.

The Section applies whether a person is a plaintiff or a defendant in a suit. The sum spoken of may already be paid or be payable in future.

The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction

before agreement is reached, Section 74 would have no application.”

REASONS AND CONCLUSIONS

Whether there was delay on the part of the petitioner to complete all the works within stipulated completion period/extended period.

64. In so far as work awarded under Spread I is concerned, the original date of the completion stipulated in the contract was 28th August, 2006. The petitioner had applied for extension of time upto 27th September, 2006. The said EIL had granted time extension vide his letter dated 8th September, 2006 upto 28th October, 2006. As regards work under Spread II, the original completion period was 15th July, 2006. The petitioner had applied extension upto 27th August, 2006. The extension was granted upto 27th August, 2006. The petitioner had applied for second extension upto 27th November, 2006. The extension was however granted upto 28th October, 2006. The petitioner had applied for extension for the third time upto 3rd January, 2007. The extension was however granted upto 12th December, 2006.

65. A perusal of the record and more particularly letter dated 24th October, 2006 addressed by the petitioner clearly indicates that certain jobs were not completed by the petitioner by the extended date of completion and they had applied for extension of time upto 3rd January, 2007. The jobs which were not completed by the extended date mentioned in the said letter of the petitioner were cathodic protection, corrosion monitoring and fire alarm system which were integrated part of

the contract. CIPL survey and interference survey which were integral part of PCP system and required to establish health of CP system was completed in the month of October 2007. The petitioner could complete fire alarm system and its stations in December 2007.

66. A perusal of the contract entered into between the parties clearly indicates that the time for completion for entire work including laying 355.6 mm OD pipeline and associated works including terminals at Hazarwadi and Pakni and all SV stations except laying of 323.9 mm OD pipeline and its associated works like OFC Laying, CP and installation of sectionalizing valve etc. was to be reckoned from the date of issue of fax/telegram/letter of intent. The time for completion of laying of 323.9 mm OD pipeline and its associated works like OFC laying, CP and installation of sectionalizing valve etc. was to be reckoned from the availability of first pipe at dump site. The specification for pre-commission provided for various activities required to be completed by the petitioner.

67. A perusal of the award indicates that the learned arbitrator has rendered a finding that the completion certificate issued by EIL was binding on the respondent. The said EIL had issued copy of the completion certificate contrary to their own stand and advise to the petitioner that the same should be obtained from the respondent. It is held that the EIL had revised their their recommendations contrary to their original stand vide letter dated 26th October, 2006 that the price reduction clause was applicable on the basis of the details provided by the petitioner vide their letter dated 27th April, 2007. The learned arbitrator

has held that the said EIL had certified that the petitioner had completed all activities before the extended date of completion, even though the dates given by the petitioner in their letter dated 27th April, 2007 for activities such as PTs, fencing around SV stations etc. were beyond extended date of completion. The said EIL had relied upon dates given by the petitioner who in turn has based the same on OISD pre-commissioning audit. In the said OISD audit report dated 20th October, 2006, various activities were shown as not completed. Even in the OISD report dated 6th December, 2006, various activities were shown not completed. The learned arbitrator has rendered a finding that OISD report mentioned non-completion of certain pre-commissioning activities which the petitioner chose not to bring out in their chart attached with letter dated 27th April, 2007. It is held that the reliance placed by the petitioner on OISD for establishing the dates of completion for certain activities is misleading. The learned arbitrator relied upon the established practice preceding pre-commissioning and resultant completion of activities.

68. The learned arbitrator has held that the petitioner had submitted Format I and III in innumerable activities during course of execution of the contract. The Format I submitted by the petitioner has as part of additional documents dated 14th April, 2009 which shows that the jobs were completed after extended dates of completion, including major activities like Cathodic Protection and Optical Fibre cable. The petitioner however did not submit Format II to Format IV for those activities in the additional documents and chose to object the very same documents when submitted by the respondent as part of their additional documents.

69. The learned arbitrator has rendered a finding that even the completion certificate/revised recommendation of the said EIL, relied upon by the petitioner also states that the work except for minor check list points was complete implying that the petitioner had not completed all the activities in line with DLOA. The petitioner had not completed the critical activities such as Permanent Cathodic Protection, Fire Alarm System, Electrical works at SV stations and pipeline stations and Optical Fibre Cable Link till the extended date of completion. The said activities were required to be completed in all respect for their intended usage and were in addition to minor activities such as installing route markers, warning boards, kilometer posts etc.

70. It is held that since the petitioner had handed over optical fiber cable link on 12th January, 2007 for Part I and 11th February, 2007 for Part II, the respondent was entitled to enforce price reduction clause mentioned in the contract. The delay in completion of the contractual activities of Part I was more than ten weeks. The respondent was entitled for deduction of 5% of the value of the contract in line with price reduction clause. In so far as activities of Part II was concerned, it is held that the delay in completion of those activities was more than eight weeks and thus the respondent was entitled for deduction of 4 ½ % in line with price reduction clause. Learned arbitrator held that the contract did not stipulate completion of Part I or Part II. It actually stipulates completion of all activities in Part I and II excluding laying of pipeline of 12.75” dia pipeline II and allied activities.

71. The learned arbitrator has also rendered a finding that the intention of both the parties was to entrust upon all jobs upto pre-commission stage so that the petitioner could be mechanically and commissionally commissioned. The learned arbitrator has rejected the submission of the petitioner that they have not completed all contractual obligations in line with the scope of work.

72. In so far as the issued raised by the petitioner that the completion certificate issued by the said EIL was binding upon the respondent is concerned, it is held by the learned arbitrator that nowhere in the contract between the petitioner and the respondent, the respondent had agreed to abide by the certificate of the said EIL. The learned arbitrator placed reliance on the conditions of contract which provided that the owner agreed with the contractor to pay the contractual respective amount for the working actual days by him and approved by the owner as per payment terms accepted in the contract and payable to the contractors under the provisions of the contract. The learned arbitrator rejected the argument of the petitioner that the said completion certificate issued by the said EIL was binding on the respondent for various reasons recorded in the impugned award.

73. A perusal of the correspondence entered into between the parties including correspondence with the said EIL clearly indicates that the said EIL themselves had addressed various letters to the petitioner pointing out the balance work related to the work in question from time to time. The said EIL had also informed the petitioner that the progress of job front was sluggish and far from meeting target dates. By the letter

dated 27th March, 2007, the said EIL had recommended the respondent to keep the bill amount on hold due to non completion of all/total work for Part I against each item. The said EIL had also recommended to levy price reduction on account of delay on the part of the petitioner. In the meeting held on 11th July, 2006 which was also attended by the said EIL, the petitioner had confirmed that they would complete the job for ROU marker on 31st August 2007 and all rectification job including obtaining NOC would be completed latest by 31st August 2007.

74. A perusal of the correspondence exchanged with the said EIL by the respondent, makes it clear that the respondent had alleged that the completion date mentioned by the said EIL was contrary to their earlier recommendation and contrary to contractual provisions. The respondent had brought to the notice of the said EIL that the activities like installation of the warning board, direction markers, cathodic protection system, communication which were forming part of clause 3.1.1 had not been completed as on the date of inspection of OISD. On 10th October, 2007 in the meeting, the petitioner committed that CP related activities would be completed by 31st October 2007.

75. A perusal of the record indicates that at one stage the petitioner had requested the said EIL to exclude CPL survey from the definition of time schedule which request was rejected by the said EIL. The said EIL themselves recommended to deduct the contract amount in terms of the contract from the running account bill of the petitioner. A perusal of the letter addressed by the petitioner themselves indicates that the completion certificate issued by the said EIL to the petitioner and to

the respondent was showing different dates of completion of various activities. The last such completion certificate issued by the said EIL was also contrary to their own earlier report and what they had indicated in their correspondence prior thereto. The learned senior counsel for the petitioner could not dispute the allegations of the respondent that Mr.V.N.Prasad, the then General Manager had joined the service of the petitioner. The said Mr.Thakur who had issued revised certificate on behalf of the EIL in favour of the petitioner had issued such certificate much after he had left the said EIL in the month of December 2007.

76. A perusal of the record also indicates that the respondent had already lost confidence in the said EIL in view of the inconsistent and prejudicial activities. Even according to the said EIL till the month of April 2007, the petitioner had not completed all the pre-commissioned activities as was apparent from their own correspondence addressed to the respondent. The said EIL themselves had recommended the recovery of amount of Rs.72,27,229/- in addition to the recoveries to be made by the respondent for material shortage and was to be held in the pre-final bill against completion of those activities.

77. A perusal of the completion certificate issued by the said EIL also indicates that some of the activities which were within the scope of pre-commissioning activities were not completed within the extended period by the petitioner but were completed much later. The respondent however did not reduce the contractual amount till the completion of such work by the petitioner but made deduction for part of the period. The learned arbitrator has considered all these details at length in the

impugned award and has rendered a finding that the completion certificate issued by the said EIL was not conclusive and was not binding upon the respondent.

78. A perusal of the provisions of the contract entered into between the parties does not indicate that the parties had agreed that such certificate issued by the said EIL would be binding or conclusive on any of the parties to the contract. In any event, since the said EIL had issued a completion certificate inspite of the strong protest raised by the respondent pointing out inconsistency in the stand of the said EIL and had alleged that such inconsistent stand taken by the said EIL was for extraneous consideration, the said EIL issued a completion certificate contrary to their own record and stand taken prior thereto. In my view the learned arbitrator has rightly rendered a finding of fact that such completion certificate was not binding upon the respondent and has rightly rejected the said certificate. Such finding of fact rendered by the learned arbitrator is not perverse and does not warrant any interference.

79. In so far as submission of the learned senior counsel for the petitioner that unless fraud, collusion or misconduct on the part of the consultant/architect is pleaded and proved by a party to the contract, such certificates are binding on the employer is concerned, a perusal of the correspondence clearly indicates that the respondent had disputed such certificate on the ground of extraneous consideration and inconsistency. In the written statement filed before the arbitral tribunal, the respondent had made various such allegations pointing out the objectionable conduct on the part of the said EIL.

I am thus not inclined to accept this submission of the learned senior counsel that there was no proper pleading on this issue by the respondent. In my view, the judgment of Delhi High Court in case of ***Motilal Tajsi & Co. (supra)*** and judgment of this court in case of ***Arenson (supra)*** does not assist the petitioner and are clearly distinguishable with the facts of this case.

80. In so far as submission of the learned senior counsel for the petitioner that the respondent not having disputed letter dated 3rd May, 2007 from the said EIL alleging that the pre-commissioning activities were completed by the petitioner within 28th October, 2006 except the minor check list and therefore the respondent could not dispute the completion certificate which was based on such letter dated 3rd May, 2007 is concerned, a perusal of the entire record indicates that the respondent had disputed the final certificate and dispute had already arisen between the petitioner and the respondent on one hand and the said EIL and the respondent on the other hand prior to 3rd May, 2007. There is thus no merit in this submission of the learned senior counsel for the petitioner.

81. The question that now arises for consideration is whether respondent could have deducted any amount from the running account bill of the petitioner towards price reduction for delay in completion of work within the stipulated completion period under clause 22.0 of special conditions of contract.

It is not in dispute that clause 10 of the General Conditions

of Contract which provided for liquidated damages was replaced by clause 22 of Special Conditions of Contract which is extracted as under :-

price reduction for delay Contractors shall make all efforts to complete all the works within stipulated completion period. In case of delay in completion of works due to reasons not attributable to Owner, the contract price shall be reduced as per the following :

a) Price Reduction for all works except mentioned in ii) and iii) below

In case all works except mentioned in ii) & iii) below are delayed, the prices shall be reduced by ½ % (half percent) per week of delay or part thereof subject to ceiling of 5% (five percent) of contract value of all works except mentioned in ii) & iii) below.

b) Price Reduction for Optical Fibre Cable works from Trombay to Loni (SOR item no. Y006.09.00)

In case laying of Optical Fibre Cable works (as per item no.Y006.09.00 of SOR) from Trombay to Loni is delayed, the prices shall be reduced by ½% (half percent) per week of delay or part thereof subject to ceiling of 5% (five percent) of the value of these works.

c) Price Reduction for laying of 323.9 mm OD pipeline and its associated work like OFC laying, CP, installation of sectionalizing valve etc.

In case of laying of 323.9 mm OD pipeline and its associated work like OFC laying, CP, installation of SV etc. is delayed, the prices shall be reduced by ½% (half percent) per week of delay or part thereof subject to ceiling of 5% (five percent) of contract value of these works.

82. A perusal of the record indicates that even the said EIL had recommended to exercise that right of the respondent under clause 22 of the Special Conditions of Contract in view of the gross delay on the part of the petitioner to complete the work within the stipulated period of

contract duly extended. A perusal of the impugned award indicates that the learned arbitrator on this issue has held that there was delay in completion of activities of Part I for more than ten weeks for which respondent was entitled for deduction of 5% of the value of the contract and in completion of activities of Part II for more than eight weeks and thus the respondent was entitled for deduction of 4 ½ % under the price reduction clause. The learned arbitrator held that the said price reduction clause was inherent part of contract which was of penal nature and the respondent adhered to the same. Learned arbitrator placed reliance on Section 74 of the Indian Contract Act, 1872 while dealing with this claim and held that the deduction from the bill of the petitioner was in line with the price reduction clause which was integrated part of the contract between the petitioner and the respondent and thus they were entitled to deduct such amount from the bills of the petitioner.

83. The submission of the learned senior counsel for the petitioner on this issue is that though the learned arbitrator has rendered a finding that the said clause in the Special Conditions of Contract was in the nature of penalty, though the respondent had not suffered any loss or damages, the learned arbitrator had allowed recovery of the entire amount as valid. It is submitted that the said penalty clause could not be enforced and the party complaining of breach would be atmost entitled to a reasonable compensation under section 74 of the Indian Contract Act, 1872. In support of this submission, learned senior counsel has placed reliance on the judgment of Supreme Court in case of ***M/s.Kailash Nath Associates (supra)*** and on the judgment of this court in case of ***Panna Sunit Khatau (supra)***.

84. In case of *M/s.Kailash Nath Associates (supra)* Supreme Court after adverting to the several judgments of the same Court, held that where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. It is held that in case where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation. It is held that the expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

85. It is not in dispute that the clause 10 of the general conditions which provided for payment of liquidated damages was replaced by clause 22 of the Special Conditions of the contract which provided for price reduction for delay in completion of work due to reasons not attributable to the owner at the rate prescribed therein. The learned arbitrator has rendered a finding that the delay was caused by the petitioner which were not attributable to the respondent and had justified the amount of recovery by the respondent under the said clause 22.

86. A perusal of the award indicates that the learned arbitrator has rendered a finding on interpretation of the said clause 22. The said clause 22 was of penal nature. The Supreme Court in case of ***Kailash Nath Associates (supra)*** has held that where amount fixed were in nature of penalty only reasonable compensation can be awarded not exceeding the penalty so stated. A perusal of the pleadings as well as impugned award clearly indicates that it was neither the case of the respondent that the percentage at which the recovery was permissible under the said clause 22 of the Special Conditions of Contract subject to ceiling of 5% was reasonable compensation nor the learned arbitrator has rendered a finding that the said amount recovered by the respondent was reasonable compensation. It is also neither pleaded nor the learned arbitrator has rendered a finding that the amount mentioned in clause 22 was a genuine pre-estimate of damage or loss. In my view by allowing recovery of the respondent to the extent of the ceiling amount by the learned arbitrator, the learned arbitrator has acted contrary to the principles laid down by the Supreme Court in case of ***M/s.Kailash Nath Associates (supra)*** and several other judgments adverted in the said judgment.

87. This court in case of ***Panna Sunit Khatau (supra)*** has also taken a similar view and has held that even if the findings of willing default was correct, the learned arbitrator could have awarded only a reasonable compensation and not the entire amount calculated based on the clause which was in the nature of penalty. This court held that none of the party has led any evidence to show that the amount contemplated in the contract was reasonable compensation, hence no such recovery of the entire amount made by the party complaining breach could be

sustained. I am respectfully bound by the judgment of the Supreme Court in case of *M/s.Kailash Nath Associates (supra)* and judgment of this court in case of *Panna Sunit Khatau (supra)* which in my view squarely applies to the facts of this case. The award in so far as claim no.1 is concerned is accordingly set aside.

88. Insofar claim No.II i.e. for payment of additional work or Bhima river crossing is concerned, the learned arbitrator has rejected the said claim made by the petitioner. It was the case of the petitioner that the rates quoted by the petitioner for Bhima river was based on survey drawings enclosed with the tender document. The said survey drawings indicated that the river was non-perennial. According to the petitioner, the said Bhima river however, turned out to be a perennial river and as a result thereof, the petitioner had incurred an additional cost of Rs.2,00,80,699/- for the said Bhima river. It is the case of the petitioner that due to unforeseen problem encountered by the petitioner, the petitioner was entitled to claim extra for additional expenses incurred by the petitioner.

89. A perusal of the contract document clearly discloses that SOR item No.80.01.00 of 6545-00-16-55-SR-0022 specifically made for Bhima river crossing envisaged all types of methods that were required for crossing the river in any condition with or without diversion etc. Under clause 3.1 of tender condition of contract, the tenderers were required to make site visits and satisfy with the nature of work and obtain information on all matters for execution of work. The said clause prohibits the contractor from raising any dispute about the nature of river.

Under clauses 6 and 6.1 of detailed specifications for river crossing, the petitioner was required to arrange temporary installation of diversions as may be necessary to ensure the effective functioning of these water courses crossed. It is matter of record that when the petitioner applied for extension of time on account of the work carried out in Bhima river thrice, it was with express understanding that there would not be any financial implications.

90. A perusal of the award on this issue indicates that the learned arbitrator has considered all these aspects and has interpreted the terms of the contract and has held that the petitioner was required to make site visits and satisfy with the nature of work and obtain information on all matters for execution of work. The pipeline was to be installed on any or all river crossings by HDD or any peculiar method instead of open cut and the same was to be done by the petitioner at his own risk, time and cost. The petitioner had confirmed that they had understood the scope and quantum of work as specified in bid document thoroughly and was satisfied by careful examination before submitting their bid. The petitioner was deemed to have understood nature and location of site and local conditions, quantifies, nature and magnitude of work, availability of labour, materials and equipment necessary for the execution of work etc.

91. The petitioner had made local and independent enquiries and had obtained complete information as to the matters and things referred to, or implied in the bid document or having any connection therewith. The petitioner had also considered the nature and extent of all probable and possible situations, delays, hindrances or interferences to or with the

execution and completion of work to be carried out by the petitioner. After considering all these provisions and after interpretation of the terms of the contract, the learned arbitrator has rendered a finding that the petitioner had executed the activity of river crossing in line with the contract between the parties. The learned arbitrator has rejected the contention of the petitioner that the river was perennial. The petitioner had envisaged diversion of water in their bid document and had accordingly quoted rates for the said item. The respondent did not derive any extra benefit by the river crossing work done by the petitioner for which additional payment had been claimed.

92. In my view, the interpretation of the learned arbitrator is not only possible interpretation but is a correct interpretation. This claim made by the petitioner is contrary to the terms of the contract. The petitioner failed to prove their entitlement for the said claim. I do not find any infirmity with the award insofar as this claim is concerned.

93. Insofar as claim No.III i.e. additional payment for re-routing is concerned, the learned arbitrator has rejected this claim also. It was the case of the petitioner that the petitioner was required to carry out re-routing of the pipeline alignment from KP 170 to 175 pursuant to instructions by the respondent or through consultant, the said EIL, which involved extra work resulting in the petitioner incurring additional cost. It is the case of the petitioner that since the respondent had granted extension of time on this ground, the respondent had acknowledged the problems faced by the petitioner on account of re-routing and thus the learned arbitrator ought to have allowed this claim for incurring

additional cost of Rs.1,13,56,350/- incurred by the petitioner.

94. A perusal of the award on this claim indicates that the learned arbitrator has rendered a finding that the petitioner had actually benefited due to such re-routing. It is held that the petitioner had quoted the rate of pipeline laying in terms of length considering different types of terrain throughout the pipeline length. The learned arbitrator while rendering this finding has also interpreted the description of item for pipeline works. In my view, the learned arbitrator has interpreted the terms of the contract and thus has rightly come to the conclusion that the petitioner was not entitled to make any such claim. In my view the interpretation of the learned arbitrator is a possible interpretation and cannot be substituted by another interpretation under section 34 of the Arbitration & Conciliation Act, 1996. There is no merit in the submission of learned senior counsel for the petitioner insofar as this claim is concerned. No interference is thus warranted with the findings of fact rendered by the learned arbitrator and with the possible interpretation on the terms and conditions of the contract.

95. I therefore, pass the following order :-

- a). The arbitration petition is allowed partly. The arbitral award in respect of Claim No.I is set aside. The arbitral award in respect of claim Nos.II and III is upheld.
- b). There shall be no order as to costs.

(R.D. DHANUKA, J.)