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

\+ **<u>CS(OS) No.1605/2007</u>**

% **28th April, 2016**

PUNJ LLOYD LTD. ..... Plaintiff

Through: Mr. Rajeev Mehra, Senior Advocate with Mr. Manish K. Jha, Advocate, Mr. Akhil Bhardwaj, Advocate and Ms. Shruti Agarwal, Advocate.

versus

GAIL INDIA LTD. ..... Defendant

Through: Mr. Abhinav Vasisht, Senior Advocate with Mr.N.L. Ganapathi, Advocate, Mr. Deepayan Mandal, Advocate, Ms. Priya Singh Chauhan, Advocate and Ms. Sonal Gupta, Advocate.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **YES**

<u>VALMIKI J. MEHTA, J (ORAL)</u>

1. This is a suit for recovery of Rs.29,15,07,084.80/- filed by the plaintiff/M/s Punj Lloyd Ltd against the defendant/Gail India Ltd. The suit amount claimed is the amount which the defendant has deducted towards interim liquidated damages as per Clause 57.2 of the Special Conditions of Contract (SCC). Putting it in other words the plaintiff claims through this suit the value of the work done by the plaintiff for the defendant but unpaid to the plaintiff on account of the liquidated damages deducted by the defendant for interim stages

delays in completion of works in exercise of defendant's rights under Clause 57.2 of the Special Conditions of Contract (SCC) from the bills of the plaintiff.

2. The facts of the case are that the defendant was to lay down gas pipelines for transportation of re-gasified natural gas originating from Petronet LNG Terminal at Dahej in the State of Gujarat and terminating at Vijaipur in the State of Madhya Pradesh. The laying of the pipelines and other associated facilities was called the DAHEJ-VIJAIPUR Pipeline Project (DVPL Project) and the same comprised of four spreads/parts. These four parts called spreads as per the invitation for bids were as under:-

SPREAD	**DETAILS**	**TOTAL LENGTH (IN KMS)**
I.	DAHEJ to Sherpura	169.9
II.	Sherpura to Jhabua	100.8
III.	Jhabua to Jagoti	152.3
IV.	Jagoti to Vijaipur	193.3

3. Plaintiff submitted its bid for spreads I, II and III from DAHEJ to Jagoti for a pipeline length of 423 kms comprised in spreads I, II and III. Plaintiff also submitted bids for overall commissioning of the four spreads for the DVPL Project. Plaintiff was awarded the laying of pipeline work for the spreads I, II and III. Spread IV was awarded to another bidder M/s RNGS. Plaintiff was however awarded the commissioning contract for the entire DVPL Project for all the four spreads. The defendant's Fax of Intent (FOI) intimating the plaintiff with respect

to grant of contract for laying of the pipelines for the three spreads and for the commissioning of the entire pipelines of the four spreads is dated 5.5.2003 (Ex.PW2/2). The detailed Letter of Acceptance is dated 14.5.2003 (Ex.PW2/3). The Contract Agreement is dated 31.5.2003 (Ex.PW2/4). As per the contract awarded to the plaintiff for spreads I, II and III for laying pipeline, the completion schedule/period prescribed was as under:-

SPREAD	**DETAILS**	**COMPLETION PERIOD**
I.	DAHEJ to Vemar	7 Months up to pre-commissioning
I.	Vemar to Sherpura	7½ Months up to pre-commissioning
II.	Sherpura to Jhabua	7½ Months up to pre-commissioning
III.	Jhabua to Jagoti	7½ Months up to pre-commissioning

The above period of commencement of seven months/seven and a half months is from 5.5.2003, the date of FOI.

4. So far as the commissioning of the DVPL Project is concerned, the completion period as per Clause 45.1 of the General Conditions of Contract (GCC) was prescribed as under:-

SPREAD	**DETAILS**	**COMPLETION PERIOD**
I.	Dahej to Vemar	3 weeks for overall commissioning

I.	Vemar to Sherpura	6 weeks for overall commissioning
II.	Sherpura to Jhabua	6 weeks for overall commissioning
III.	Jhabua to Jagoti	6 weeks for overall commissioning

5. Therefore the stipulated dates of completion upto the stage of pre-commissioning and the period added thereto for commissioning resulted in the final dates of commissioning of the DVPL Project with its four spreads as under:-

SPREAD	**DETAILS**	**COMPLETION PERIOD**
I.	DAHEJ to Vemar	4th December 2003 upto pre-commissioning & commissioning by 25th December 2003
I, II & III	Vemar to Jagoti	20th December 2003 upto pre-commissioning
I, II, III & overall commissioning of the project including spread IV	DAHEJ to Vijaipur	30th January 2004 upto pre-commissioning

6. As compared to the scheduled date for pre-commissioning being 19.12.2003 (seven or seven and a half months from 5.5.2003) and the scheduled date for commissioning of the entire DVPL Project as 30.1.2004, the actual completion date for spreads I, II and III to the pre-commissioning stage was 22.2.2004 and the actual date of completion of commissioning of all the spreads was 10.4.2004. It is therefore seen that with respect to pre-commissioning date

there is a delay from 19.12.2003 to 22.2.2004 i.e delay of approximately 65 days. So far as the date of final commissioning of the complete DVPL Project is concerned, the actual date of completion was 10.4.2004 instead of 30.1.2004 i.e a delay of 71 days approximately. Defendant has deducted liquidated damages on account of the failure of the plaintiff to complete the works at intermediate dates fixed for the spreads I, II and III of the pipelines laying project. Defendant has not deducted any damages on account of delay caused beyond the final date for commissioning of the work inasmuch as, and as given in detail below, the defendant has given extension to the plaintiff for completion of the project upto 10.4.2004 while simultaneously levying interim liquidated damages as per Clause 57.2 of the SCC for failure of the plaintiff to meet interim deadlines/dates. This aspect will become clear on the reference to the relevant clauses of the contract given hereinafter.

7. The defence of the defendant entitling it to levy liquidated damages for interim delays is stated in terms of para 16 of the written statement (and especially the second sub-para of para 16 of the written statement) and therefore this para 16 is reproduced as under:-

> "16. Para 16 of the Plaint is not only incorrect and frivolous, but the same is also an attempt on part of the Plaintiff to mislead this Hon'ble Court on fact. As a matter of fact, as per the records of contract performance maintained at site, there was a big Punch List towards pending works on part of the Plaintiff as on 05.02.2004 and the Plaintiff was attending Electrical/instrumentation/civil works at almost all SV stations during February/March, 2004. River protection works were pending at almost all crossing locations. Also pipe-line swabbing work (an activity required before Mechanical completion) was not done by the Plaintiff as per the specified Item in the contract, and therefore, the contention of the Plaintiff is not

correct that the Plaintiff's scope of work upto pre-commissioning stage was completed on 05.02.2004.

In fact in the present para, the Plaintiff has stated only about the delay in achieving the final completion of the contract by the Plaintiff, while suppressing the fact that the Defendant had levied only Interim Liquidated Damages to the extent of 5.425% of the value of the contract in terms of Clause 57.2, and that there was no Liquidated Damages levied on the overall performance of the contract by the Plaintiff. As a matter of fact, the contract between the parties duly provided for Interim Liquidated Damages applicable against delays by the Contractor in achieving the agreed stipulated targets, "in addition to" the Liquidated Damages applicable against any delay in performance of the overall contract. In any event, the contract was being performed under the direct supervision of the Engineer-in-charge, whose decision on the said issue was agreed by the parties to be final and binding against them. It is submitted at the cost of repetition that the Plaintiff has not challenged the decision of the Engineer-in-charge at all and the same is binding against the parties." (underlining added)

8. To put it in a nutshell, plaintiff claims moneys for the work done and which was not paid to the plaintiff on account of the defendant imposing liquidated damages, called as interim liquidated damages, in terms of Clause 57.2 of the SCC. The issue therefore between the parties is that whether the defendant was justified in levying interim liquidated damages in terms of Clause 57.2 of the SCC.

9. The following issues were framed in this suit on 15.12.2008:-

"1. Whether the suit is instituted and the plaint has been signed and verified by a duly authorized person on behalf of the plaintiff? OPP

2. Whether the plaintiff has no cause of action for filing the suit for the reason stated in para B of the preliminary objections in the written statement of the defendant? OPD

3. Whether the levy of the liquidated damages by the defendant was not in accordance with the agreement between the parties and the law and whether the plaintiff is entitled to recover the suit amount or any other amount from the defendant? OPP

4. Whether the engineer-in-charge of the defendant under the agreement had taken a decision in accordance with the agreement and whether the plaintiff is bound by the said decision? OPPr

5. Whether the defendant could deduct intermediate liquidated damages? OPP

6. Relief."

Issue No.1

10. Issue no.1 is decided in favour of the plaintiff inasmuch as the plaintiff has proved on record the relevant documents including its Resolution and the Power of Attorney as Ex.PW1/1 to Ex.PW1/4. There is no cross-examination by the defendant with respect to these facts and documents. Issue no.1 is therefore decided in favour of the plaintiff and against the defendant.

Issue No.2

11. Issue no.2 is not pressed and is therefore decided in favour of the plaintiff.

Issue Nos.3 to 5

12. Issue nos.3 to 5 can be decided together and are therefore dealt with together by this judgment. For the discussion with respect to issue nos.3 to 5, it will be necessary to refer to and reproduce the relevant clauses of the contract. The relevant clauses of the General Conditions of Contract (GCC) read as under:-

> "**26.1 CONDITIONS FOR FORCE MAJEURES**
> In the event of either party being rendered unable by Force Majeures to perform any obligations required to be performed by them under the CONTRACT the relative obligation of the party affected by such Force Majeure shall upon notification to the other party be suspended for the period during which Force Majeure event lasts. The cost and loss sustained by the either party shall be borne by respective parties.

The term 'Force Majeure' as employed herein shall mean acts of God, earthquake, war (declared or undeclared), revolts, riots, fires, floods, rebellions, explosions, hurricane, sabotage civil commotions and acts and regulations of respective Government of the two parties, namely the OWNER and the CONTRACTOR.

Upon the occurrence of such cause (s) and upon its termination, the party alleging that it has been rendered unable as aforesaid thereby, shall notify the other party in writing immediately but not later than 72(Seventy-two) hours of the alleged beginning and ending thereof, giving full particulars and satisfactory evidence in support of its claim.

xxxx xxxxx xxxxx

27.0 COMPENSATION FOR DELAY (LIQUIDATED DAMAGES):

27.1 Time is essence of the CONTRACT. In case the CONTRACT fails to complete the WORK within the stipulated period then, unless such failure is due to Force Majeure as defined in Clause 26 here above or due to OWNER's defaults, the CONTRACTOR shall pay to the OWNER, by way of compensation for delay and not as penalty, a sum @ 1/2% (Half Percent) of the VALUE OF CONTRACT for delay per week on pro-rata for part thereof subject to a maximum of 10% (Ten percent) of the VALUE OF CONTRACT. The parties agree that this is a genuine pre-estimate of the loss/damage which will be suffered on account of delay/breach on the part of the CONTRACTOR and the said amount will be payable on demand without there being any proof of the actual loss or damages caused by such delay/breach.

The decision of the ENGINEER-IN-CHARGE in regard to applicability of Compensation for Delay shall be final and binding on the CONTRACTOR.

27.2 All sums payable by way of compensation under any of the conditions shall be considered as reasonable compensation without reference to the actual loss or damages which shall have been sustained.

xxxx xxxxx xxxxx

57.0 WORK IN MONSOON AND DEWATERING:

57.1 The execution of the WORKS may entail working in the monsoon also. The CONTRACTOR must maintain a minimum labour force as may be required for the job and plan and execute the construction and erection according to the prescribed schedule. No extra rate will be considered for such work in monsoon.

57.2 During monsoon and other period, it shall be the responsibility of the CONTRACTOR to keep the construction work site free from water at his own cost."

13. The other relevant clauses are contained in the Special Conditions of Contract (SCC) and are as under:-

"**57.0** **COMPENSATION FOR DELAY/LIQUIDATED DAMAGES**

57.1 Clause No:27.0 of GCC, pertaining to Compensation For Delay (Liquidated Damages) stands modified to the following extent:

57.1.1 "Price Reduction/Liquidated Damages @ 2% of the total contract/order value per week or part thereof shall be levied for delay in delivery/completion of work subject to a maximum of 20% of total contract/order value."

14. The aforesaid clauses of the SCC underwent a change and the applicable clauses of Clause 57, additionally thereafter having Clauses 57.1.2, 57.2, 57.2.1, 57.2.2 and 57.3, read as under:

"**57.2** Intermediate Compensation for Delay/Liquidated Damages

57.2.1 Pipeline Laying Schedule as per Appendix-XV to SCC shall be considered as contractual schedule for the purpose of determining intermediate compensation for delay, to be paid by Contractor to Owner, which shall be calculated on the following basis:

1. No compensation for delay shall be payable in case the cumulative progress at the end of month in lowering of pipeline is less upto 5% of corresponding cumulative length as per the above mentioned schedule.

2. For every 1% additional slippage beyond 5% as mentioned above in monthly cumulative scheduled progress, compensation for delay shall be levied @0.5% of contract value subject to maximum of cumulative 10% of contract value. With this provision, the compensation for delay shall get re-adjusted with recovery/improvement in progress by the Contractor in subsequent months, within the contractual completion period.

For cumulative slippage resulting to compensation for delay exceeding 10% of contract value, other relevant provisions of contract document shall be applicable.

57.2.2 Intermediate compensation for Delay/Liquidated Damages stated in sub-clause 57.2.1 above shall be in addition to compensation for Delay/Liquidated Damages stated in sub-clause 57.1.1 of SCC.

57.3 The total liability of the contractor to Owner under sub-clause 57.1.1 of SCC on Compensation for Delay/Liquidated Damages and sub-clause 57.2 of SCC on Intermediate Compensation for Delay/Liquidated Damages shall not exceed 20% (Twenty Percent) of contract value. The compensation on account of

> any liability (ies) other than above shall be as per provisions of bidding document."

15. For completion of narration it is noted that Engineers India Limited was a consultant of the defendant for the project and the Engineer-in-Charge of the project as per the definitional Clause 1.3 of the GCC was the person who was authorized by the defendant and the defendant authorized the concerned person of Engineers India Limited as the Engineer-in-Charge of the DVPL Project.

16. Admittedly, there were delays on the part of the plaintiff to complete the project, and as already stated above. Delays exist because the scheduled date for pre-commissioning was 19.12.2003 whereas the actual date for pre-commissioning for spreads I, II and III (falling to the share of the plaintiff) was 22.2.2004 and whereas the scheduled date for completion or commissioning of the entire DVPL Project was 30.1.2004, and the actual date of commissioning was 10.4.2004. Whereas the case of the plaintiff is that it was entitled to and was granted extension of time by the defendant for completion of the project, the case of the defendant is that though plaintiff was granted extension upto 10.4.2004; on which date the project was actually commissioned; however, the defendant is entitled to interim liquidated damages in terms of Clause 57.2 of the SCC on account of the plaintiff failing to meet intermediate deadlines/timelines. I have already reproduced above para 16 of the written statement, and I will refer to the admitted documents between the parties hereinafter, but one thing is an undisputed fact between the parties that the liquidated damages which have been

levied upon the plaintiff by the defendant are not the liquidated damages as per Clause 57.1.1 of the SCC of delay beyond the final date of the complete project, but the liquidated damages are interim liquidated damages imposed in terms of Clause 57.2 with its various sub-clauses of the SCC as reproduced above. In sum and substance, the contract provided for liquidated damages upto a maximum of 10% as interim liquidated damages and further liquidated damages not exceeding 10% on account of the liquidated damages beyond the contract completion final date as per Clause 57.1.1 of the SCC. Clause 57.2.2 of the SCC clarifies that interim compensation and the interim liquidated damages accordingly payable in terms of Clause 57.2.1 would be in addition to the liquidated damages payable as per Clause 57.1.1 of the SCC. Effectively, therefore a total of 10% interim liquidated damages and 10% of overall liquidated damages with respect to the last date fixed for commissioning of the DVPL Project was fixed as per the aforesaid terms of the contract, totaling to the total liquidated damages of 20%. We are in the present case only concerned with the issue as to whether the defendant was entitled to levy the interim liquidated damages of 5.425% of the value of the contract in terms of Clause 57.2 of the SCC.

17. The law with respect to grant of monetary damages in cases of breach of contract is contained in Sections 73 and 74 of the Indian Contract Act, 1872. While Section 73 deals with grant of unliquidated damages, Section 74 deals with grant of liquidated damages. In cases falling both under Section 73 or

Section 74, two aspects are mandatory for the plaintiff for succeeding in claiming damages. The first aspect is that the defendant must be found to be guilty of breach/breaches of the contract, and the second aspect is that the monetary loss has been caused to the plaintiff on account of breach/breaches by the defendant of the contract. The language of Section 73 of the Indian Contract Act itself makes it clear that this provision is applicable when loss is suffered by the plaintiff and though a similar expression is not found in Section 74, but it is now settled law that Section 74 also will come into play only if losses are actually caused vide ***Fateh Chand Vs Balkishan Dass, AIR 1963 SC 1405.*** The difference between the grant of damages under Sections 73 and 74 of the Indian Contract Act, besides Section 73 dealing with unliquidated damages and Section 74 dealing with the liquidated damages, is that Section 74 provides the upper limit of damages which can be granted subject to the condition that the liquidated damages specified are not in the nature of penalty.

18. The issues which are strenuously argued before this Court on behalf of the plaintiff are that neither there are breaches of contract on behalf of the plaintiff inasmuch as time has been extended for overall completion of the contract by the plaintiff, nor the monetary loss has been caused to the defendant inasmuch as once there is an extension of time granted by the defendant to the plaintiff for overall completion of the project, the facts of the present case show that no monetary loss for the interim delays could have been caused to the

defendant and hence no interim liquidated damages can be deducted by the defendant once no monetary loss is caused.

19. This Court will have to firstly examine whether at all the plaintiff is guilty of breach of contract for the defendant to claim interim liquidated damages. In fact this first issue will coalesce into the second issue in the facts of the present case because though there are breaches with respect to delays caused qua interim completion periods of the three spreads of the project granted to the plaintiff upto the stage of pre-commissioning inasmuch as the contractual date for pre-commissioning was 19.12.2003 with actual date of pre-commissioning being 22.2.2004, actually there are no legal breaches and no losses have been caused for the delays in completion of interim stages of the project to the defendant and the defendant has extended the period of final completion of the project till 10.4.2004, and admittedly by which date the entire spreads I, II and III were constructed by the plaintiff and the entire project from spreads I to IV were commissioned by the plaintiff for the defendant. These aspects of existence of breaches of delays at interim stages of completion of the spreads I to III upto the stage of pre-commissioning and whether any loss would have been caused to the defendant merely on account of such preliminary delays/breaches by failing to meet the interim completion dates, and grant of extension of time by the defendant to the plaintiff for completion of the final stage of the work by commissioning all the spreads I to IV, are subject matter of the following

correspondences entered into between the Engineer-in-Charge of the project with the defendant; the defendant with the Engineer-in-Charge and the Engineer-in-Charge with the plaintiff:-

(i) Letter dated 21.4.2004 by the Engineer-in-Charge of the project to the defendant, Ex.PW2/6.

(ii) Letter dated 26/27.5.2004 of Engineer-in-Charge to the plaintiff, Ex.PW2/8.

(iii) Letter dated 3.7.2004 by the Engineer-in-Charge to the plaintiff, Ex.PW2/7.

(iv) Letter dated 5.7.2004 by the defendant to the Engineer-in-Charge, Ex.PW2/10.

(v) Letter dated 6.7.2004 by the Engineer-in-Charge to the plaintiff, Ex.PW2/11.

(vi) Letter dated 16.8.2004 by Engineer-in-Charge to the plaintiff, Ex.PW2/9.

(vii) Letter dated 1.8.2005 by the defendant to the plaintiff, Ex.PW2/14.

20. Out of the aforesaid relevant exhibited documents, portions are required to be reproduced of certain parts of the said communications/letters, and the same are accordingly reproduced as under:-

"**Letter dated 21.4.2004 (Ex.PW2/6)**

ENGINEERS INDIA LIMITED

GIDC Industrial Area, Vaghodia-391760. Dist. Vedodara, Gujarat, Phone:02668-262106, 262771

Fax No.:0265-2336241 extn:9998#   email:all_vaghodia@gail.co.in

Ref.EI/4844/002/01/4569/057 April 21, 2004

The General Manager (Constn.)
GAIL (India) Limited
DVPL Project, Vaghodia

Attn: Shri U.S. Jain

SUBJECT: LAYING OF PIPELINE AND ASSOCIATED FACILITIES FOR SPREAD I, II & III DVPL PROJECT-FINAL EXTENSION OF TIME FOR COMPLETION OF WORK EXECUTED BY M/S PUNJ LLOYD LIMITED (LOA No.GAIL/NOIDA/4844/02-188/012/C-369 DATED 14.05.2003)

Dear Sir,

This has reference to M/s PLL letter No.PLL/DVPL/PIIN01/101/361 dated 26th March, 2004, PLL/DVPL/PIIN01/101/393 dated 18th April 2004, and PLL/DVPL/PIN01/101/393a dated 16th April 2004 (received on 19 and 20th April, 2004 respectively) requesting for grant of time extension upto 15.04.2004 without levy of penalty/LD/Interim Liquidated Damages. The above request of M/s. PLL was reviewed by EIL and our observations/recommendations are summarized at para 7.0 below:

1.0 **INTRODUCTION**

Contract for Laying of pipeline and associated works for Spread I, II & III and overall commissioning of DVPL project was awarded to M/s Punj Lloyd Ltd. (PLL) vide FOI No.GAIL/NOIDA/4844/02-188/012 dated 5.5.03.

Laying of pipeline for Section-IV was awarded to a separate agency M/s RNGS consortium. However, commissioning of this section alongwith other sections was kept in the scope of PLL.

–The commissioning of pipeline was completed progressively by 10th April, 2004 against schedule requirement of 30th January, 2004.

Contract provides for LD/Commencement for delay to be levied at following two stages

(i) Intermediate delay for lowering: This day is linked with the pipeline laying schedule attached at Appendix XV of SCC which is prepared based on award of work by 1st of April'03. It also stipulates that in case of delay in award of work (Awarded on 5th May'2003) the schedule shall be revised accordingly. But in fact there has been delay in award of work but the above schedule was not revised during kick off meeting and only best effort schedule was prepared as advised by GAIL. But for analyzing the intermediate delays, the same schedule with shifting of zero date is considered.

(ii) Delay in completion of entire work.

xxxx xxxxx xxxxx

3.0 COMPLETION OF WORK AT SITE

3.1 The dates for scheduled completion and actual completion of major activities (Spread-wise) have been tabulated as per enclosed Attachment-II:

- Mainline Welding
- Lowering of Mainline
- Hydrotesting of Mainline
- Hydrotesting of Terminals and LSV
- Commissioning

3.2 The record of rains and days lost due to effect of rains (since welding or lowering of pipeline could not be carried out during the day) is enclosed as Attachment-III.

xxxx xxxxx xxxxx

4.0 DELAY ANALYSIS

PLL vide letters No.PLL/DVPL/PIIN01/101/361 dated 26th March, 2004, PLL/DVPL/PIIN01/101/393 dated 16th April 2004 and PLL/DVPL/PIIN01/101/393A dated 16th April 2004 (received on 19 and 20th April, 2004 respectively) requested EIL to grant time extension upto 15th April' 2004, without levying penalty/liquidated damage/interim liquidated damage. After review of related provisions in the contract and status of completion of various activities at site, EIL has analysed the delay in completion of work as given below.

4.1 INTERMEDIATE DELAY

4.1.1. <u>The intermediate delay is analysed based on progress of lowering of pipeline as per provisions indicated under para 2.2.2 above. From Attachment-I, it is evident that total pipeline lowering should have been completed by end of 30th Week from date of FOI i.e. by 30th Nov' 03. However as seen from Attachment-II, the mainline lowering of last spread of pipeline (Spread I-B) was completed on 29th Dec' 03 and Spur lines by 23.01.04 respectively. Accordingly, there is a delay in completion of lowering activities of 29 days for Mainline and 54 days for Spur lines.</u>

4.1.2 <u>The Intermediate delay not attributable to PLL has been analyzed as under.</u>

1. Effect of rains (Refer para 2.1.4)

Based on actual details recorded at site, effect of rain on welding/lowering activities of main pipelines has been indicated in enclosed Attachment-III. It has been observed from Attachment-V, that due to rains, completion of lowering for Spread I, II & III was stopped by 17 days, 1 day and 2 day respectively.

II. Delay in providing ROU including forest clearance (Refer para 2.1.5)

a) ROU at Wahiyal village in Spread 1A could not be provided to PLL, due to objection raised by villagers on the distribution of Crop Compensation. The work due to this was stopped for 2 days i.e. 8th Sept. (AN) to 10th Sept. (FN)' 03 for second welding crew.

b) There was hold in release of forest area in Spread-II. This affected the lowering of 20.179 KM of pipeline. The last lowering in the area could be completed on 15th Dec' 03. Accordingly, the delay in completion of lowering from scheduled date of 30th Nov.' 2003 to actual completion date of 15th Dec.'03 i.e 15 days is not attributable to PLL.

III. Delay in providing Free Issue Material

First lot of LR bends for main pipeline was issued on 19th August' 03 as against requirement of 15th July' 03 i.e. on lowering of pipeline. However, with the rescheduling of activities, the lowering of pipeline was not affected.

The impact of above delays on account of reasons not attributable to contractor has been summarized as per enclosed Attachment-V. As per Attachment-V, and para 4.1.2 above, extended due date for completion of lowering of pipeline works out to be 15th Dec.' 03.

4.2 DELAY IN COMPLETIONOF ENTIRE WORK

4.2.1 It has also been noticed that pre-commissioning of Spread I, II & III was completed on 22nd Feb'04 as against contractual completion date of 19th Dec' 03. This amounts to delay of 65 days for pre-commissioning by PLL.

The delay not attributable to PLL is as under:-

i.	Effect of rain	17 Days {Same as under para 4.1.2(i)}
ii.	Delay in providing ROU including forest	15 Days {Same as under para 4.1.2(ii)}

	clearance	
iii.	Delay in providing Free Issue Materials	68 Days (Refer Attachment-VI)

4.2.2 Commissioning of system was completed on 10th April' 04 as against contractual completion date of 30th January'04. The delay of 71 days in completion of commissioning has been analysed as follows:

i) The laying of pipeline for spread IV was carried out by different agency, i.e. M/s RNGS consortium. PLL were required to carry out commissioning of pipeline system on completion of pre-commissioning of pipelines for all the four spreads. It has been observed from Attachment-II that pre-commissioning of spread-IVA (carried out by RNGS) was completed on 27th March' 04.

ii) Gas required for commissioning (to be arranged by Owner), could be made available on 29th Feb' 04. Gas-in of pipeline was taken up by PLL on 29th Feb' 04 itself and was completed by 31st March' 04. The 72 hour performance test after stabilization (last activity of commissioning) was completed on 10th April' 04 against Contractual completion date of 30th January' 04, which amounts to delay of 71 days.

From above, it is observed that delay in completion of commissioning of pipeline system is not attributable to PLL.

4.3 EIL's observations on the other reasons of extension mentioned by PLL in their letter are as under:

i) Delay in award of contract

No firm date was committed to the bidders for award of work. Further, there is no provision in contract for extension on such grounds.

(a) Managing water crossing

No instruction was given by EIC to hold water crossing work during monsoon. Further, even during monsoon, some work was carried out. Also, the letter enclosed by PLL was not issued by EIC. Though on such grounds, major water crossing work was affected during monsoon, during post monsoon, sufficient time was available to complete the work before contractual completion.

(b) Delay in availability of hired equipment

No extension is applicable as per contract provision on such ground.

ii) Delay due to the monsoon

The duration qualified as per contract has been considered.

iii) Delay due to forest

Additional efforts have been put by PLL in liaisoning as well as in execution of work, in the absence of timely permit. Based on actual record of completion of lowering in forest stretch, permissible extension has been considered.

iv) ROW hold up and related delays

Actual work affected as per contract, has been considered.

v) Unlisted/Unforeseen above ground obstruction and U/G utility and issue of AFC drawing

Contractor was supposed to familiarize himself with the site conditions and obtain all necessary data before submission of bid. Further, all required AFC drawings were issued progressively, before start of related activity of PLL. Any time extension on this ground is not tenable as per provisions of contract.

vi) Delay in issue of Free Issue Material

Suitable extension of time on this account is considered as per provision of contract.

vii) Commissioning

Suitable extension in time period for the delay in availability of gas for commissioning is considered.

5.0 EXTENSION OF TIME SCHEDULE

The work of pipeline laying and commissioning was awarded to PLL under single contract. Though there are separate completion periods for laying of pipeline for spread I, II, III and for overall commissioning of pipeline system, the date of commissioning entire pipeline work, being last activity is considered as contractual date for completion of total work. Accordingly, extension of time schedule has been worked out w.r.t. last activity i.e commissioning of Pipeline System. Although pre-commissioning of Spreads in PLL scope (Spread I, II & III) was delayed by 65 days but it has not delayed the commissioning of pipeline system.

From para 4.2, following has been observed:

i) PLL has started Gas-in-activity on 29th February' 04 immediately after gas for commissioning was made available. The

<u>commissioning of pipeline system and Performance Test Runs were completed on 10th April' 04.</u>

<u>ii) The last section taken up for commissioning was Spread IVA. The commissioning for this section was taken up on completion of pre-commissioning activities by other contractor.</u>

<u>Therefore, completion of Pipeline System was governed by availability of gas from owner and readiness of spread IVA by other contractor.</u>

<u>**In view of above, we are of the opinion that the time schedule for completion of entire work shall be extendced to the actual date of completion of commissioning i.e upto 10th April' 04**</u>.

6.0 <u>**COMPENSATION FOR DELAY/LIQUIDATED DAMAGE**</u>

6.1 ***INTERMEDIATE COMPENSATION FOR DELAY/LIQUIDATED DAMAGE***

As on 15th Dec.' 03, the extended date worked out for completion of lowering of pipeline (as indicated under para 4.1.3 above), total 358.412 KM of lowering was completed in 425.905 KM length of pipeline. Accordingly, the progress of lowering of pipeline works out to be 84.15% as against scheduled requirement of 100%, which amounts to delay in lowering of pipeline by 15.85%.

In line with para 2.2.2 above, the liquidated damage shall be leviable on slippage above 5% i.e on 10.85% (15.85-5.00). Liquidated damage for this slippage works out to be 5.425% of contract value @ ½% of contract value for delay of 1% in lowering (with a ceiling of 10% of contract value).

6.2 **FOR DELAY IN COMPLETION OF ENTIRE WORK**

<u>**As seen under para 4.2.2. above, there is no delay in completion of commissioning activity by PLL. Therefore, no liquidated damage is leviable on this account.**</u>

xxxx xxxxx xxxxx

7.0 <u>**CONCLUSIN & RECOMMENDATIN**</u>

In view of what has been analyzed under para 6.0 above, EIL recommends the following:

7.1 Extension of time period to PLL for completion of pipeline lowering upto 15th Dec.'03 and entire work upto 10th April' 04 (till commissioning of entire systems) without compensation for extended stay or any other claim, may be granted.

7.2 No liquidated damage on account of delay in completion of commissioning is recommended.

7.3 Liquidated damage on PLL on account of intermediate delay equivalent to 5.425% of contract value is applicable.

xxxx xxxx xxxx xxxx

Keeping in view the best effort made by contractor for timely completion in line with project/commissioning requirement of pipeline for his own as well as other's (RNGS) scope of work in spite of various difficulties encountered during execution. And also considering our above recommendation for extension of contract for entire work completion upto 15.04.04 without levying compensation for delay/LD, GAIL may consider to condone the intermediate compensation for delay/liquidated damages as stated in para 7.3 above.

<u>While on the subject, it may be appreciated that the purpose of intermediate LD is basically to pressurize the contractor for achieving intermediate milestones which in turn ensures the final completion of job in time.</u>

GAIL may further examine the recommendation and take final decision on the issue at the earliest, considering the above and the fact that "Gas-in" as well as commissioning of entire pipe line was not delayed.

Thanking you and assuring you of our best services at all times,

Very truly yours,

Sd/-
(T.V. RAO)
RESIDENT CONSTRUCTION MANAGER"

"**<u>Letter dated 5.7.2004 (Ex.PW2/10)</u>**
GAIL/VAGH/CCO/DVPL/63 E/2004/3279 Date: 5th July, 2004

To,
RCM,
EIL,
CCO, Vaghodia

(Attn: Sh T.V. Rao)

<u>Sub:DVPL Project-Laying of Pipe Line and associated Works (Spreads I, II, III) awarded to M/s Punj Lloyd Limited-Time Limit extension</u>
<u>**Ref: Your letter No.** No.EI/4844/002/01/4569 dt. 21/04/2004 and subsequent correspondence/discussions.</u>

This has reference to your recommendations on the subject above, in response to the request of M/s PLL, (vide letters nos. PLL/DVPL/PIIN01/101/361 dated 26th March, 2004, PLL/DVPL/PIIN01/101/393 dated 16th April 2004, PLL/DVPL/PIIN01/101/393A dated 16th April 2004 etc) towards grant of time extension upto 15.04.2004 without levy of penalty/LD/Interim Liquidated Damages.

GAIL management has accepted your recommendations towards extension of contractual completion time period upto 10.04.2004 with an imposition of compensation for delay up to 5.425% of the executed contract value. Accordingly, the same may be communicated to M/s PLL.

Thanking You,
Yours faithfully

(U.S. Jain)
GM(Const.)

Cc: 1) ED(proj), GAIL, Noida
2) GM (F & A), GAIL, Noida- For information/records/needful please.

Letter dated 6.7.2004 (Ex.PW2/11)

Ref. EI/4844/004/5383 06th July 2004
M/s. Punj Lloyd Limited
DVPL Project,
401, 4th Floor, R.K. Centre,
Fatehgunj,
Vadodara Attention: **Sh. S. Khanna, PM**

Sub: DVPL Project-Spread I, II & III works-Time Extension

Dear Sir,

Please find enclosed the copy of Letter No GAIL/VAGH/CCO/DVPL/63E/2004/3278 dated 05.07.2004 received from GAIL regarding Time Extension which is self explanatory in respect of above referred works. This is for your information and records. You are advised to extend the Bank Guarantee for above works upto 10.07.2005 as per provisions of contract.

Thanking you,

Very truly yours,

Sd/-
(T.V. Rao)
RESIDENT CONSTRUCTION MANAGER

Encl. As above.

Letter dated 16.8.2004 (Ex.PW2/9)

EI/4844/004/01/5703 16.08.2004

M/s PUNJ LLOYD LIMITED,
17-18, Nehru Place,
New Delhi-110 019.

Attn: Sh. Atul Jain, ED.

Sub: Final Time Extension-Pipe laying & Association facilities-Sp-I, II & III.
Ref: LOA No.GAIL/NOIDA/C&P/4844/02-134-006/C-369 dated 14.05.03.

Dear Sir,

This has reference to your letter No.PLL/PROJ/PIIN01/116/099 dated 09.06.2004, PLL/PROJ/PIIN01/116/098 dated 09.06.2004 and PLL/DVPL/PIIN01/101/535 dated 14.07.04 regarding final time extension for aforementioned contract.

The following had been considered in recommending final extension of time for above referred contract in line with contract provisions.

1. The contract of Spread-I, II & III upto "GAS-IN" has been considered as one contract in line with ITB clause 34.3. The overall completion upto 10th April 2004 has been granted with intermediate compensation for delay/Liquidated Damages limited to 5.425% of contract value.

2. The delay due to rain has been considered as per contract provisions. The delay of Seventeen days has been considered for Dahej to Vemar Section. In spread II and III, the delay of one and two days respectively has been considered. All the above delays have been concurrent.

3. The delay of two days has been considered for stoppage of work in ROU in Dahej to Vemar Section.

4. The delay of fifteen days has been considered due to delay in forest clearance in Spread II.

5. Accordingly, the contractual completion time for lowering has been extended upto 15th Dec'03 in line with SCC Clause 4.5 and GCC Clause 45.1. The lowering completed on 15th Dec'03 was 358.412 KM against total 425.905 KM. The intermediate Compensation for Delay/LD against lowering works out to be 5.425% of contract value as per contractual provisions i.e. SCC Clause 57.2.

6. No price Reduction/Liquidated Damages against SCC Clause 57.1.1. have been levied for delay in overall completion of works.

7. The total liability under sub clause 57.1.1 of SCC on Compensation for Delay/Liquidated Damages and sub clause 57.2 of SCC on intermediate Compensation for Delay/Liquidated Damages has been restricted to 5.425% of contract value as per the provisions of the contract.

Thanking you,

Very truly yours,

Sd/-
(TV RAO)
Resident Construction Manager

Cc: M/s PLL, Baroda." (emphasis is mine)

21. A reading of the aforesaid relevant portions of the letters Ex.PW2/6, PW2/10, PW2/11 and PW2/9 shows two clear cut aspects:-

(i) No liquidated damages were imposed with respect to overall completion of the project/works.

(ii) Liquidated damages were only imposed in terms of Clause 57.2 of the SCC towards intermediate compensation for delay, and being restricted to 5.425% of the contract value.

22. The facts of the present case are very peculiar with respect to the issue as to whether or not legally, the liquidated damages being the interim liquidated damages for interim delays, ought or ought not to be imposed i.e whether such damages are legally allowable or not legally allowable as per Section 74 of the Indian Contract Act. In order to answer this issue, it is required to be noted that failure to meet intermediate compliance schedules of spreads I to IV with their scheduled dates of completion would not have caused monetary losses to the defendant as actual transportation of gas through the pipelines laid was not envisaged on completion of interim stages of spreads I to III. What is being stated by this Court is that it is not as if there was a commencement point at

the beginning of spread I with a point of delivery at the end of spread I or spread II or spread III, i.e commencement of delivery of gas to a customer by commencement of transportation at spread I with ending at end point of spread I or spread II or delivery point commencing for that matter at the beginning of spread II to end at spread II with the end point of spread II or spread III etc etc. Meaning thereby, there was no transportation of gas to be done at any midpoint between spreads I to IV and the supply of gas by the defendant to its customers was only to be at the end point of spread IV. Therefore unless the entire pipeline was laid down for the four spreads and commissioning of the same was also done, there was no question of gas being supplied by the defendant to its customer viz Petronet LNG and which was only at the end point of spread IV. In these peculiar facts, even if therefore there existed interim delays of completion of stages of spreads I to IV, once the defendant gives extension of time for completion of the project till the project was actually commissioned on 10.4.2004, intermediate dates of completion and breaches would not result in any loss of profits or any other monetary loss to the defendant on account of the facts that on account of these delays there was no failure of the transportation of the gas by the defendant to any of its customers including Petronet LNG i.e no loss of profits to the defendant. In my opinion, therefore, in the peculiar facts of this case, defendant was not entitled to fix and demand liquidated damages for interim delays from the plaintiff as interim delays have not caused any monetary loss to the defendant once the project completion date upto commissioning was extended upto

10.4.2004 by the defendant as evident from Ex.PW2/10, Ex.PW2/11, and Ex.PW2/9 dated 5.7.2004, 6.7.2004 and 16.8.2004 respectively as reproduced above. It is not the case of the defendant that liquidated damages have been levied for delay in final completion of works inasmuch as the final date of completion stands extended to 10.4.2004, and the case of the defendant is only of interim compensation for delays in not meeting interim timelines. This stand of the defendant becomes abundantly clear from paras 6 and 7 of Ex.PW2/9 dated 16.8.2004 of the Engineer-in-Charge to the plaintiff and para 16 of the written statement of the defendant. Thus two aspects emerge of firstly of the damage amount claimed by the defendant from the plaintiff being 5.425% of the contract and secondly that this is the figure of interim liquidated damages in terms of the written statement and the documents Ex.PW2/6, Ex.PW2/10, Ex.PW2/11 and Ex.PW2/9. Therefore, the only claim of the defendant is towards interim liquidated damages but interim breaches of contract in the facts of the case have not caused any monetary loss to the defendant and therefore for the defendant to claim interim liquidated damages from the plaintiff.

23. In view of the above, issue nos.3 to 5 are decided in favour of the plaintiff and against the defendant and it is held that since no monetary loss was caused to the defendant by any delay caused by the plaintiff for failure to meet interim timelines for the interim stages of performance during the spreads I to III of the contract, hence, plaintiff is not liable to pay any liquidated damages to the

defendant under Clause 57.2 of the SCC. For the sake of completion of discussion, I would like to note that there is no evidence led on behalf of the defendant with respect to any monetary loss suffered for any failure to comply with the interim timeline by the plaintiff, and which in my opinion, in any case, would not have been possible in the facts of the present case as stated above because the issue of transportation of gas was only after civil works of laying of the pipelines from commencement of spread I to spread IV was completed and also the commissioning took place of the entire DVPL Project by the transportation of gas in the pipeline from the commencement of spread I to the end of spread IV.

Relief

24. In view of the above, the suit of the plaintiff is decreed against the defendant for an amount of Rs.17,79,76,710/- plus Indian equivalent of US$ 7,79,536 as on the date of the filing of the suit i.e Rs.3,17,62,194.32/-. I may note that in view of the judgment of the Supreme Court in the case of ***Forasol Vs. Oil and Natural Gas Commission, AIR 1984 SC 241***, plaintiff has exercised the option of conversion of US dollar into Indian rupees as on the date of the filing of the suit. On the date of the filing of the suit the conversion rate of dollar into Indian rupees was Rs.40.7450/- for every US dollar. The suit is therefore decreed for a total amount of Rs.20,97,38,904.32/-. Plaintiff is also entitled to interest *pendente lite* and future till payment @ 6% per annum simple in view of Section

34 CPC. In the peculiar facts of this case, however, parties are left to bear their own costs. Decree sheet be prepared.

APRIL 28, 2016 **VALMIKI J. MEHTA, J.**

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