

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

% *Judgment Reserved On : August 19, 2016*
Judgment Delivered On : September 07, 2016

+ **FAO (OS) 509/2015**

SILICON GRAPHICS SYSTEMS
INDIA PRIVATE LTD.

.....Appellant

Represented by: Mr.Rajender Prasad, Advocate for
Mr.Rajiv Tyagi, Advocate

versus

M/S STERLING & WILSON
ELECTRICALS PRIVATE LTD.

.....Respondent

Represented by: Mr.Anurag Kumar, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. We shall be referring to the appellant as the 'owner' and the respondent as the 'contractor'. It is a fight over an award passed by the majority in favour of the contractor and against the owner holding that the liquidated damages in sum of ₹13,58,927.60 deducted from the amount payable to the contractor be refunded to the contractor.

2. The owner had its office in a leased premises at A-30, Kailash Colony, New Delhi for which monthly rent in sum of ₹2,66,913/- was being paid. Besides, an interest free security deposit with the landlord in sum of ₹32,02,980/-. The owner found rent burden to be onerous and

therefore decided to purchase a property and the search led the owner to buy property bearing No.228, Udhyog Vihar, Phase I, Gurgaon. The building needed refurbishing as per the requirement of the owner. Bids were invited from contractors to execute civil and electrical works. The electrical works had two components. Installation of D.G. Sets and laying of electrical wires. It is apparent that the coordination had to be done by the owner of the works between the civil contractor and the contractor for the electrical works.

3. The respondent was the successful bidder for the electrical works. The time of completion admittedly was 4 months. Time was to reckon from the date of award of the contract which was August 06, 1998 for the electrical works and October 09, 1998 for the installation of D.G. Sets. Concededly the works were executed beyond the period of 4 months. The dispute pertained to only one issue. Liquidated damages levied by the owner of the works on the contractor.

4. There is a majority award in favour of the contractor decreeing the claim laid before the Arbitral Tribunal by the contractor and needless to state the sum awarded is the liquidated damages levied and adjusted from the amount payable to the contractor for the work done and as per the rate fixed under the contract. There is a minority award in favour of the owner rejecting the claim laid.

5. Vide impugned order dated March 24, 2015 challenge to the award has failed and we have in our lap a prolix appeal spanning 58 pages.

6. Regretfully, we find a practice emerging to challenge all and sundry findings returned in an award with a hope by the litigating party that something may stick. This makes the task of adjudicating objections

to the award very prolix and time consuming. This frustrates one of the many objects of an arbitration proceedings : timely resolution of the dispute between the parties.

7. We propose to succinctly note the controversy and thereafter highlight whether it would be permissible for a Court to re-appreciate the factual backdrop leading to the conclusion arrived at by the majority arbitrators, for if the exercise would be to sit as an Appellate Court over the majority award, it would suffice for us to state that the task required to be performed by us is prohibited by law. This exercise would be done by us by noting the issues which were discussed by the majority arbitrators and the minority as per the majority award penned on January 12, 2004 and the minority on January 14, 2004.

8. Notwithstanding the Arbitral Tribunal not formally settling issues for discussion, a perusal of the majority as also the minority award shows that before delving into the merits of the claim and the defence, two preliminary issues have been discussed in the two awards. The first is the bar of limitation pleaded by the owner. The second is whether the claim by the contractor was vague and not disclosing a cause of action and hence warranting a rejection on principles akin to Order 7 Rule 11 of the Code of Civil Procedure. Thereafter the majority has discussed the evidence and legal issues arising under three heads with the third head having various sub-heads. The minority has discussed the evidence and legal issues arising under six heads with the fifth and the sixth head having various sub-heads. We propose to note the rival viewpoints expressed by the minority and the majority under eight heads pertaining to the award relating to the electrical works and two heads pertaining to

the D.G. Sets. We do this to note the parallel tracks on which the majority and the minority award proceed.

9. Concerning the two preliminary issues, the first relating to the bar of limitation and the second whether the claim petition by the contractor was not disclosing a cause of action, on the issue of limitation the majority noted that the final payment certificate by the architect has been made a condition precedent for payment by the owner to the contractor vide clauses 86-88 of the contract dated August 06, 1998. The majority further noted that the contractor learnt that the liquidated damages had been levied for delay in completion of works under the contract only on May 10, 1999 and May 12, 1999 when the final payment certificates issued by the architect contained deduction in the form of liquidated damages from the amount held payable in gross. As per the majority the said dates had to be reckoned as the dates when the cause of action to sue accrued. The majority opined that limitation would thus commence from the date of issue of the final payment certificate being May 10, 1999 and May 12, 1999 and not from the date of the completion of the work on March 16, 1999 as claimed by the owner.

10. Relying upon the judgments of the Supreme Court reported as (1999) 8 SCC 122 Steel Authority of India Ltd. Vs. J.C. Budharaja, Govt. & Mining Contractors and (1988) 2 SCC 338 Major (Retd.) Inder Singh Rekhi Vs. Delhi Development Authority, the minority arbitrator held that the cause of action to sue for the contractor arose on March 16, 1999 when the architect of the owner informed the contractor of its decision to recommend recovery of liquidated damages and the same was disputed by the contractor. The minority arbitrator opined that as per Article 113

of the Schedule to the Limitation Act, 1963, the period of limitation for the contractor to raise a claim in respect of the cause of action arising to sue on March 16, 1999 expired on March 16, 2002 and that the contractor invoked the arbitration vide notice dated March 28, 2002. The minority arbitrator has also noted Article 18 of the Limitation Act, 1963 and has held that as per the same the cause of action to sue would actually accrue when the work was completed, which would be March 16, 1999. The minority arbitrator has held that as per Clause 98.1 of the contracts between the parties, any party aggrieved by any decision of the architect was required to issue a written notice through the architect, specifying the matters in dispute, to the other party within 28 days requiring that such dispute be referred to arbitration. As per the minority arbitrator it was the admitted position that the contractor became aware of the decision of the architect to recover liquidated damages in respect of the D.G. Set contract on March 09, 1999 and in respect of the electrical contract on March 16, 1999. The minority arbitrator has recorded that it was only on April 15, 2002 that the contractor issued a notice to the owner invoking the arbitration clause, which as per the minority arbitrator was beyond the period of 28 days provided in Clause 98.1 of the contract. The minority arbitrator has noted that the contractor could not claim that the cause of action to sue arose in May, 1999 when it became aware of the architect's decision to recover liquidated damages in March, 1999.

11. Having juxtaposed the reasoning by the majority and the minority arbitrator, suffice it to record that reliance by the minority arbitrator upon the decisions of the Supreme Court in J.C.Budharaja's case and Inder Singh Rekhi's case is misplaced because both did not deal with the issue

as it arose in the present case concerning when did the cause of action to sue accrue. In the former case the Court held that proceedings to initiate reference to the Arbitrator must commence before three years period of limitation to lay a claim expires. In the second the issue was as to when does a dispute arise for being made the subject matter of a petition under Section 20 of the Arbitration Act, 1940. It is trite that more often than not a question of limitation becomes more a question of fact than one of law. For a work done a claim for money due would require an unequivocal repudiation of the claim, in full or in part, for the cause of the action to sue accruing. It is settled law that cause of action comprises the entire bundle of facts if traversed by the opposite party required to be proved as also an infraction of a right. A mere threat to deny a right is not enough for a cause of action to sue accruing in a money claim. Besides, till the amount intended to be withheld is intimated to the opposite party it would not be possible for the party to lay a claim for a specific sum of money due. In the instant case the cause of action to sue would accrue when the claim towards liquidated damages was quantified by the owner and intimated to the contractor. Thus, the view taken by the majority arbitrator is sound in law and the learned Single Judge has correctly repelled the challenge to the majority award on the plea of bar of limitation.

12. On the second preliminary issue the majority arbitrators have referred to Section 23 of the Arbitration and Conciliation Act, 1996 and have opined that though the statement of claim did not clearly set out the facts, the points in issue and the remedy sought, it nonetheless disclosed a cause of action against the owner and could not be rejected applying the

principles of Order 7 Rule 11 of Code of Civil Procedure. The majority arbitrators have referred to Section 19 of the Arbitration and Conciliation Act, 1996 which stipulates that an Arbitral Tribunal is not bound by the Code of Civil Procedure, 1908 and have held that the contractor's claim was not liable to be summarily rejected as not disclosing a cause of action.

13. According to the minority arbitrator, while Section 19 of the Arbitration and Conciliation Act, 1996 provides that the Arbitral Tribunal will not be bound by the Code of Civil Procedure, 1908, it did not mean that the Code of Civil Procedure, 1908 would not apply to arbitration proceedings under any circumstances. The minority arbitrator has noted that the contractor's statement of claims was lacking in material particulars and did not disclose a cause of action and therefore did not meet the requirements of Section 23 of the Arbitration and Conciliation Act, 1996. The minority arbitrator highlighted the deficiencies in the contractor's statement of claims and recorded that despite the Arbitral Tribunal orally directing the contractor to furnish the missing particulars at the hearings held on September 19, 2003 and September 20, 2003, the contractor did not furnish the particulars. Thus, as per the minority arbitrator the claim was liable to be rejected because it did not disclose a cause of action.

14. Once again, as we did pertaining to the first preliminary objection, juxtaposing the two rival viewpoints one can safely say that whereas the learned minority arbitrator has taken too technical a view of the matter, the majority arbitrators have taken a liberal view. The award by the majority arbitrators on this aspect cannot be set aside for the simple

reason it would be a case where both views : a narrow view and a liberal view are equally possible. But we have more weighty reasons to support the award. The claim by the contractor was a simple claim for recovery of the amounts withheld after levying liquidated damages. As we would note hereinafter there were sufficient pleadings before the Arbitral Tribunal and we find the same even when we peruse the award by the minority arbitrator who has painstakingly referred to the pleadings and the evidence under six heads with the fifth and the sixth head having various sub-heads. This was only possible if there was clarity in the pleadings. A cause of action would be incomplete if there is lack of material pleadings. A deficiency here or there in the material pleadings will not make it a case of cause of action being not pleaded.

15. The award by the majority arbitrators cannot be faulted on this aspect and the learned Single Judge has correctly returned the finding to uphold the majority award qua the second preliminary objection.

16. The third issue discussed by the learned minority arbitrator is the first on merits. He captions the issue : **Evidence and Proof**. The majority arbitrators have not dealt with this issue separately.

17. The minority arbitrator noted that the contractor had not filed any evidence on affidavit (and we use the expression by the learned minority arbitrator) in support of its plea that the delay in completion of the contractual work under the Electrical Works Contract was attributable to the owner. The minority arbitrator has relied upon the judgment of the Supreme Court reported as (1968) 3 SCR 862 Gopal Krishnaji Ketkar Vs. Mohamed Haji Latif, to hold that an adverse inference could be drawn if a party withholds important documents related to the fact in issue in its

possession, even when the burden of proof does not lie with that party. According to the learned minority arbitrator since the contractor was in the best position to file evidence to support its plea, having failed to do so, its plea was liable to be rejected.

18. As learned counsel for the owner of the works explained, what the learned minority arbitrator wanted to convey was that by withholding important documents an adverse inference had to be drawn against the contractor on the issue as to whether the contractor was responsible for the delay in completion of the work. On fact there was no dispute that the contract was not completed within the stipulated date.

19. Now, we do not find the learned minority arbitrator having listed any material document supposedly withheld by the contractor. On a mere statement without supporting material the minority arbitrator has returned the aforementioned finding. Indeed, the finding is perverse. As would be evident from our further discussion hereinafter all relevant material was placed before the Arbitral Tribunal and therefrom the majority arbitrators could gather that the delay in completion of the works was attributable to the owner. Besides, in the instant case as to who was responsible for the delay was an issue where onus could not be placed on either party. Further, it is settled law that once evidence is led by the parties the issue of onus becomes irrelevant.

20. The content of issue No.4 decided by the majority arbitrators is the same as issues No.4, 5 and 6 decided by the minority arbitrator and we note that the broad head would be the claim of the contractor under the Electrical Works. At the outset we need to note that the majority arbitrators have repeatedly noted the contract stipulated date for the

electrical works to be completed as December 15, 1998 but concededly as a matter of fact the date would be December 05, 1998.

21. The majority arbitrators have noted that the work under the electrical contract, dated August 06, 1998, was to be completed within 4 months, i.e. December 06, 1998 and Clause 77.1 of the contract stipulated that time shall be of the essence to the contract and the contractor shall be liable to pay 0.25% of the contract sum per day of the delay after the stipulated date or the extended date of completion, subject to maximum of 10% of the contract sum. In view of the aforesaid, the majority arbitrators have noted that the owner continued to give orders for extra work throughout the subsistence of the contract and even after the completion date, till February, 1999. The contractor quoted rates for extra work and sought the architect's approval and confirmation thereof. The majority arbitrators have noted that the owner continued to give orders for extra works in complete disregard of the completion date and opined that by virtue of this conduct, the time period for performance of the contract had invariably been extended and the owner had waived its right to enforce Clause 77.1 of the contract for liquidated damages on account of delay. The majority arbitrators rejected the owner's contention based on Clause 76.1 which stipulated that the contractor has to apply for extension of time within 10 days of '*extras or variation ordered by the architect*' and opined that no extension of time could be contemplated under Clause 76.1 once extra works were ordered beyond the completion date i.e. December 15, 1998.

22. The majority arbitrators placed reliance on the decision reported as 1934 50 TLR 479 Miller Vs. LCCC and have held that retrospective

extension of time is invalid and is deemed to have been granted by conduct and the completion date or time would then cease to be of the essence of the contract. The majority therefore held that completion date once disregarded by ordering extra work cannot be relied upon for the purpose of levying liquidated damages on account of delay. The majority held that Clause 76.1 and Clause 78 were not applicable retrospectively i.e. for extra works ordered beyond the completion date. The majority arbitrators have noted the argument of the owner that extra work ordered was of a minor nature and was possible to be finished by the completion date i.e. December 15, 1998. The majority arbitrators have opined that the extra works amounted to ₹13,18,477/- and could not be termed minor. The majority arbitrators have also held that delay in completion of the works was additionally occasioned due to the failure of the owner in handing over the basement for installation of electrical works till the very end. The majority arbitrators have noted that interim certificates for payment had been issued without any deduction when admittedly work was delayed and the contractor was entitled to be put to notice that liquidated damages would be levied for time taken in executing the extra works. Referring to the treatise *Hudson's on Building and Engineering Contracts*, the majority arbitrators have observed that because the owner had allowed the completion date to pass and acquiesced in the extra work continuing it would be deemed to have waived compliance with the original date in the contract for completion of the works. The majority arbitrators have held that since the owner had ordered for extra work after December 12, 1998 this amounted to condoning the delay and the contractor was released from the obligation to pay liquidated damages for

delay in completion of works under clause 77 of the contract. The majority arbitrators further held that deduction could only be levied for delay of the work that was ordered within the completion date i.e. December 15, 1998 and since delay in completion was necessitated by extra work ordered by the owner, both before and after the completion date, levy of liquidated damages would be inequitable.

23. Noting that while it was the admitted position that there was delay in the completion of the work, the minority arbitrator held that the contractor failed to set out reasons for the delay in its statement of claims and its rejoinder and it was only in its written submissions that the contractor showed that the delay in completion of the work was attributable to the owner. The minority arbitrator recorded that the submissions of the contractor regarding the delay in completion of the work were contradictory. The minority arbitrator noted that on the one hand while site report Ex.14A dated October 22, 1998 recorded that the wiring work, installation of distribution boards and sub-station equipment, and laying of LT cables had not been achieved, this work was minor and the site progress report Ex. 14B dated November 16, 1998 clearly recorded that all pending work as per site report dated October 17, 1998 was on schedule except sub-station civil work. Further, site progress report Ex.14 dated November 11, 1998, which had been certified by the contractor, recorded that the wiring work and installation of distribution boards had been completed amounting to 80% of the total contractual work and a time schedule for completion of the remaining work was included in the report which envisaged the completion of the entire work within the timeline of the electrical works contract. The minority

arbitrator recorded that no evidence of the progress of the work thereafter was provided by the contractor except site report Ex.19 dated January 20, 1999 which recorded the hindrances in the completion of the work. In respect of the said site report, the learned minority arbitrator has opined that the hindrances mentioned in the said site report were of a minor nature, and thus not requiring much time to be completed, and in any case, site report dated January 20, 1999 was a unilateral document of the contractor that had not been countersigned by the architect or the site engineer nominated by the owner. It has been noted by the minority arbitrator that on the other hand as per the letter dated December 11, 1998 of the contractor it had executed only 50% of the work by December 11, 1998, 6 days after the scheduled date of completion, and no explanation for the delay was provided, despite it being on record that the drawings for the electrical works contract were provided to the contractor along with the contract. It has also been noted by the minority arbitrator that it was the admitted position that the contractor submitted the test certificates of the testing and commissioning of the electrical works only on June 20, 1999 even though the contractor claimed that the pre-commissioning test of the works was conducted on February 16, 1999. The minority arbitrator has concluded by holding that the contractor did not provide any reason for the 4 months' delay in submission of these certificates. The minority arbitrator has further held that in any case, if the contractor had actually faced hindrances, beyond its control, in the completion of the contractual work it was entitled to seek an extension for completion under sub-clauses (b), (c), (d), or (f) of Clause 76.1 of the contract. But, no such extension was ever sought by the contractor. The

minority arbitrator held that in light of its contradictory and inchoate submissions, the blame for the delay lay solely at the feet of the contractor.

24. On the question of delivery and installation of transformer, it has been noted by the minority arbitrator that the supply of the 11KV transformer by the contractor was an essential part of the electrical works contract. The minority arbitrator has recorded that the contractor neither pleaded nor placed any evidence on record that proved when the transformer was ready, delivered at the site and installed. The only plea raised by the contractor was that the transformer had not been brought at the site since no electricity was provided at the site by the owner till March, 1999. The minority arbitrator noted that on the other hand, the owner pleaded that the transformer was delivered in January, 1999 and installed in February, 1999. The minority arbitrator has relied upon the contractor's letter dated November 11, 1998 written to the owner which records that the transformer would be ready for inspection at M/s.Kirloskar's Bangalore works on December 25, 1998, to hold that even if the transformer had been dispatched on this date from Bangalore, it would have reached the site in Delhi in January and therefore, the claim of the owner that the transformer reached the site in January was proved. Additionally, the minority arbitrator noted that clause 6 of the electrical works contract and Clause 66 of the General Conditions of the Contract recorded that electricity was available at the site from the inception of the project. The minority arbitrator recorded that there was a contradiction in the arguments of the contractor, whereas on the one hand it claimed that the owner provided electricity at site only in March, 1999 while on the

other hand it claimed to have conducted the pre-commissioning test of the works on February 16, 1999. In light of these findings, the minority arbitrator held that the plea of the contractor that the transformer could not be brought on the site were liable to be rejected.

25. Thereafter, the minority arbitrator dealt with the subject of time being of the essence of the contract. The minority arbitrator noted that as per Clause 5 of the contract as well as Clauses 77, 76.1, 73.1, 78.3 and 78.6 of the Conditions of the Contract; time was the essence of the contract. The minority arbitrator recorded that the plea of the contractor that the delay in completion of the work was on account of the extra work ordered by the owner after the completion date, i.e. December 05, 1998 could not be accepted since as per the documents on record, the extra work ordered was of a minor nature and could not have affected the overall project completion date. The minority arbitrator reasoned that since the contractor had not proved that it had completed the work by December 05, 1998, the owner was entitled to order the contractor to complete additional work, especially since all the additional work ordered conformed to the definition of 'Works' under the contract. The minority arbitrator recorded that the schedule of quantities mentioned in Clause 15 of the contract was provisional and the owner had the right to increase or decrease the quantities mentioned therein under Clause 78 of the contract, subject to a cap of 25% of the original quantity, without any right for compensation accruing to the contractor. The argument of the contractor that extra work was being done by it even till February 04, 1999 was rejected by the minority arbitrator, who held that letters purporting to show extra work being carried out till February 04, 1999 pertained only

to approval of rates and not order for extra works, apart from the order for one additional MCCB, which was a minor work, and did not require much time to be completed. The minority arbitrator rejected the claim of the contractor that the delay in completion of the contract was additionally caused by the unhindered basement site not being handed over by the owner, on the ground that there was no evidence in support of this claim. The minority arbitrator also rejected the plea of the contractor that the delay in completion of the work arose on account of non-provision of certain items, since under Clause 21.1 of the contract it was the responsibility of the contractor to equip itself with necessary men, machinery and materials and make itself aware of the local conditions. The minority arbitrator held that in any case the contractor had not sought extension for completing the works as provided under Clause 76.1 of the contract. The minority arbitrator also held that the claims of the contractor as regards the progress and completion of the contractual work were contradictory, with the contractor giving contradictory dates of completion during the arbitral proceedings; and the contractor had not submitted a notice of completion of the contractual work as required under Clause 75.1 of the contract, till July 28, 1999.

26. On the issue of waiver, according to the minority arbitrator, the view of the majority arbitrators that the owner had waived its right to secure liquidated damages by its conduct could not be accepted. The minority arbitrator, relying upon the judgments of the Supreme Court reported as (1965) 2 SCR 221 Mademsetty Satyanaraya Vs. G. Yelloji Rao, AIR 1968 SC 933 Associated Hotels of India Limited Vs. S.B. Sardar Ranjit Singh, AIR 1988 SC 233 Municipal Corporation of

Greater Bombay Vs. Hakimwadi Tenants' Association and (1974) 2 SCC 725 P. Dasa Muni Reddy Vs. P. Appa Rao, has opined that the doctrine of waiver as understood in India was distinct from the English doctrine of waiver and required a positive relinquishment of a known right and a right could not be deemed to have been waived merely on account of delay in enforcing the right. The minority arbitrator, relying upon the judgment of the Supreme Court reported as AIR 1979 SC 621, Motilal Padampat Sugar Mills Co. Ltd. Vs. State of U.P., opined that a plea of waiver must be raised specifically in the pleadings in order to be allowed at the time of hearing. The minority arbitrator noted that no such plea of waiver had been raised by the contractor in its pleadings.

27. The minority arbitrator noted that even on merits the owner could only have recovered the liquidated damages upon raising of the final bill by the contractor and since the contractor raised the final bill on March 16, 1999, the intimation of the retention of the liquidated damages by the architect of the owner to the contractor on March 16, 1999 was justified.

28. We find that whereas the majority arbitrators have opined that the extra work ordered was not of such minor quantum as rendered completion date of December 05, 1998 impossible to be adhered to, the minority arbitrator has held to the contrary. Now, it fell within the domain of the Arbitral Tribunal to discuss and decide what was the impact of the variations ordered on the time schedule. It being a matter of fact coupled with an opinion, it cannot be said that the view taken by the majority arbitrators is perverse. Interestingly this aspect of the matter in the instant case brings out a very interesting situation in the field of arbitration. It is a paradox. If the view taken by the minority arbitrator

was the majority view the very argument to uphold the view of the majority arbitrators would have resulted in said view being accepted by the Court. More often than not it happens in life that one comes across situations where two views are possible and any one of the two taken cannot give birth to the argument that the other view is perverse. In the field of arbitration when parties choose a private forum to decide their disputes, inference on facts such as impact of extra works ordered on the stipulated time schedule and whether the percentage of extra work is so less that it can be completed within the original time schedule fixed or not have to be respected unless there is perversity. A Court cannot delve into the merits and demerits of the countervailing viewpoints.

29. We concur with the view taken by the learned Single Judge that the view taken by the majority in the aforementioned backdrop facts is correct. We only add one more reason. The learned minority arbitrator has completely eschewed reference to a very important fact noted by the majority arbitrators i.e. the owner of the works ordering execution of extra works after December 12, 1998; the contract stipulated date for completion of the work being December 05, 1998.

30. On the issue of liquidated damages and quantum thereof, the majority arbitrators have held that in this case liquidated damages constituted a penalty and hence the clause was unenforceable. And further that the owner had failed to prove any loss or damage suffered as a result of delay in the completion of the works, which as per the majority was in any event occasioned due to the owner's fault and since the owner by its conduct had waived its right to claim liquidated damages, none

could be awarded, meaning thereby the amount withheld as liquidated damages was payable to the contractor.

31. The minority arbitrator has relied on the decisions of the Supreme Court reported as (2003) 5 SCC 705 Oil & Natural Gas Corporation Vs. Saw Pipes Ltd. and AIR 1962 SC 1314 Chunilal Mehta & Sons Ltd. Vs. Century Spinning & Manufacturing Co. Ltd., to opine that in cases of breach of contract, the aggrieved party need not prove actual damages in order to claim a sum. Alternatively, according to the minority arbitrator, the owner has proved that it had suffered damages in the sum of ₹90 lacs and therefore, retention of ₹13,58,927.60 as liquidated damages was reasonable. As per the minority arbitrator the effect of the delay was that the owner was paying lease rental for the property taken on rent at Kailash Colony for which monthly rent in sum of ₹2,66,913/- was being beside loss of interest on the interest free security deposit with the landlord in sum of ₹32,02,980/-.

32. Now, we need not quibble with this aspect of the majority award and the minority award once the majority award is upheld on the basic aspect i.e. delay in completion of the works not being attributable to the contractor. Therefore, whether the clause in question was by way of penalty or was a reasonable pre-estimate of damages is irrelevant. But for sake of record it has to be held that the clause is penal inasmuch as the contract was not of the kind contemplated in the decision of the Supreme Court in Saw Pipes' case. Indeed, in the instant case damages were capable of being computed. The damages were the rent paid by the owner to the landlord for the tenanted premises in Kailash Colony + loss of interest on the interest free security deposit given to the landlord.

33. On the issue of liquidated damages concerning delay in installing, testing and commissioning the D.G. Sets for which there was a separate contract dated October 09, 1998, we note that the D.G. Sets were to be installed within 4 months i.e. by February 08, 1999. It was argued by the owner that the contractor was responsible to obtain permission for electricity supply at the site from the distributing company for 'supply, installation, testing and commissioning of generator sets for offices of Silicon Graphics Systems (India) Ltd.'. Further, it was argued that the owner had already supplied electricity, as mentioned in Clause 6 of the contract dated August 06, 1998 and Clause 66 of the General Conditions of the Contract thereof. The majority arbitrators have rejected this contention holding, that the electricity supplied, under Clause 6 of the contract dated August 06, 1998 and Clause 66 of the General Conditions of the Contract thereof was merely a temporary connection i.e. of such wattage as was necessary to execute the work, though not said specifically it means that it was not the electricity supplied which was warranted to test and commission the D.G. Sets. The majority held that the obligation to obtain a regular electricity connection for using or putting under operation the works under the contract was that of the owner, who had failed to prove on record that it had obtained any such permission. It has been noted by the majority arbitrators that the transformer was ready for inspection at Kirloskar's Bangalore works on December 25, 1998 as was evident from the contractor's letter dated November 26, 1998. The majority arbitrators further held that though an order had been placed on the manufacturer to supply the transformer and as a matter of fact was available at the site as would appear from

documents of Kirloskar and Andrew Yule, the owner had failed to obtain a regular electricity connection and hence the work was delayed. The majority arbitrators have specifically noted that permission from the Haryana State Electricity Board was obtained only on February 22, 1999. The contractor's affidavit along with an electricity bill dated April 20, 1999 of Haryana Vidyut Prasaran Nigam, confirming the same were highlighted by the majority arbitrators. The minority arbitrator noted that it was the case of the contractor that the scheduled date for completion as per the contract was 4 months from the date of award of the work, that is, February 08, 1998. According to the owner, the date of completion had been revised by the contractor itself, in its Letter of Intent dated October 09, 1998, wherein the contractor had agreed to complete the work by November 15, 1998. The minority arbitrator held that the contract superseded the Letter of Intent and therefore, the scheduled date of completion was February 08, 1998. The minority arbitrator noted that that while the contractor had initially pleaded that it had completed the work on February 08, 1999 within the stipulated timeline, it later filed an affidavit stating that the contractual work under the D.G. Sets contract was completed on March 09, 1999. The minority arbitrator noted that the plea of the contractor that the work was completed on March 09, 1999 was not denied by the owner and hence, would have to be accepted. Accordingly, the minority arbitrator levied liquidated damages @ 10% for a period of 29 days from February 09, 1999 and March 09, 1999 and directed refund of the excess amount.

34. Pertaining to the claim of expenses by the contractor for running the D.G. Sets the majority arbitrators opined that even though the claims

of the contractor of having incurred additional electricity expenses for running the D.G. Sets in the sum of ₹2,12,008.60 were proved, the same could not be held to be an unjust enrichment for the owner because the contractor had failed to prove a prior approval or written confirmation for running the D.G. Sets as required under the contract.

35. The contractor's claim for additional payments was therefore rejected.

36. Accordingly, the majority arbitrators had awarded a sum of ₹13,58,928/- in favour of the contractor, and against the owner.

37. In other words the award in favour of the contractor is limited to the liquidated damages levied and recovered by the owner.

38. The minority arbitrator has noted that it was the case of the contractor that the owner asked it to operate the D.G. Sets after shifting into the site on January 30, 1999 since there was no permanent power in the office and the contractor was claiming the amount expended on running the D.G. Sets. The minority arbitrator has accepted the plea of the owner that : i) the scope of the work under the D.G. Sets contract was limited to supply, installation, testing and commissioning of D.G. Sets and therefore, a claim on account of running the D.G. Sets was beyond the terms of reference to arbitration; and ii) no evidence proving that the owner had indeed asked the contractor to run the D.G. Sets was adduced by the contractor. The minority arbitrator noted that the contractor merely relied on their letter dated January 20, 1999 that purported to show the claimant asking the owner for rate approval to run the D.G. Sets. The minority arbitrator noted that no reply by the owner to the letter dated January 20, 1999 was brought on record by the contractor, and in any

case, the letter dated January 20, 1999 merely related to rate approval and no direction from the owner directing the contractor to run the D.G. Sets was contained therein. Further, it has been noted by the minority arbitrator that as per Clause 80.3 of the contract any claim not notified by the contractor in two consecutive monthly statements for two consecutive months would be deemed to be waived and no proof of any claim in the monthly statements regarding the running of the D.G. Sets was adduced by the contractor. Lastly, the minority arbitrator noted that as per Clauses 78.3, 78.4 and 78.6 of the Contract, no claim in respect of works not specifically approved by the respondent in writing would be allowed.

39. On this aspect of the matter since both the majority and the minority awards denied the claim of the contractor, we need not expand any further.

40. To bring the curtains down, the crystallized reasoning of the majority and the minority award at best brings out that two views could possibly emerge and thus it cannot be said that the majority award is liable to be set aside. At base was the question as to whether liquidated damages were recoverable on account of the contractor admittedly not completing the works within the contract stipulated date. As highlighted by us hereinabove, the majority award has noted that certain additional works were awarded beyond the contract stipulated date and this has not been noted by the minority arbitrator. There is a difference of opinion whether the quantum of the additional works was so meager that it did not warrant extra time for completion thereof. The majority has held that the additional works were not meager and warranted time to be extended for completing the works. The minority has held to the contrary. The

view taken by the majority on this aspect is based upon admitted facts i.e. additional works being awarded and as regards its quantum and impact on the time schedule the opinion rendered cannot be called perverse. Whilst the opinion of the minority on this aspect could equally be justified as a reasonable view, the problem with the minority opinion would be that it has not taken into account a very relevant fact. The relevant fact being that the extra works were awarded even beyond the contract stipulated date. Further, the minority has not kept into view the difference, which has been kept into view by the majority arbitrators, between electricity supplied for completion of the works and electricity required for testing and commissioning the D.G. Sets and the electrical works.

41. Within the confines of Section 34 of the Arbitration and Conciliation Act, 1996 we see no scope of any interference and would simply highlight that a dispute of ₹13,58,928/- is in issue and the fees paid to the arbitrator, and the lawyers who appeared before the arbitral tribunal, the learned Single Judge and in appeal before us far exceeds the amount in dispute.

42. Dismissing the appeal we direct the parties to bear their own costs.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

SEPTEMBER 07, 2016
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