IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Date of Decision: April 7th, 2017

Welspun Enterprises Limited, Gujarat

...Petitioner

Versus

Indian Oil Corporation Limited, New Delhi & another

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL, JUDGE

Present: Mr.Gurmohan Singh Bedi, Advocate,
for the petitioner.

Mr.Ashish Kapoor, Advocate,
for respondent No.1.

Mr.P.K.Mutneja, Advocate,
for respondent No.2.

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AMIT RAWAL, J.

The main question involved in the present writ petition is as to whether the respondents, in view of the extension granted from time to time vide Annexures P-6 dated 2.4.2009, P-7 dated 13.7.2010, P-10 dated 16.12.2010 and P-11 dated 31.5.2011, could resort to deduction/discount of 10% on the total amount of the project undertaken by the petitioner for the work done in completing the Non Plant Building EPCC 12-A Package for Panipat Naphtha Cracker Project.

In order to decide the question aforementioned, it would be apt to give brief preface of the matter.

The petitioner (formerly known as Welspun Projects Limited) participated in a bid floated by respondent No.1, namely, Indian Oil

Corporation in November, 2007 for construction of the aforementioned project on lump-sum turn-key (LSTK) basis and respondent No.2 was appointed as the Project Management Consultant. The detailed scope of the project was enumerated under Clause 2.0 of Part C of Section C-1 of the bidding documents and the scope of the Project to be carried out on the construction of the various buildings/facilities, is as under:-

a. Administration Building with covered parking facilities;

b. Training Centre;

c. VAR Building Sub-Station 16;

d. Air Conditioning Work/pressurization work;

e. All electrical work as specified;

f. All fire Alarms, Data Communication, LAN work;

g. IBMS (Intelligent Building Management System) for the Administration building as defined in detail in the bidding document;

h. Video Conferencing system for Administration Building including maintenance for 2 years after commissioning;

i. Furniture for all the building (except Laboratory Building);

j. Kitchen equipments/appliances as specified elsewhere in the bidding document;

k. Boundary Wall, Roads, Drains, Culverts, parking facilities and other General Civil Works including Grading Micro grading, Landscaping as per detail scope of work specified elsewhere in the bidding document;

l. Water supply distribution/sanitary sewerage as specified elsewhere in the bidding document; Utility distribution lines.

Vide letter dated 22.10.2008 (Annexure P-3), the bid of the petitioner was accepted for a contract price of Rs.153,99,99,999/- on various terms and conditions. Respondent No.1 has issued Letter of Acceptance dated 12.11.2008 (Annexure P-4) and the time schedule for achieving Mechanical Completion of Works covered under the Contract was 20 months from the date of issuance of acceptance, i.e., 21.6.2010.

It is the conceded position on record that during the execution/ subsistence of the works, petitioner had to carry out additional works as per the requirements and instructions of respondent No.1 owing to the change of the original bid conditions, thus, the mechanical completion could be achieved only on 7.7.2011, which fact is evident from the certificate (Annexure P-5). Reference to four change orders leading to the achievement of the mechanical completion report beyond the date, as indicated above, has been referred to in paragraphs 13 onwards of the writ petition.

Vide letter dated 2.4.2009 (Annexure P-6), respondent No.1 had issued change order for carrying out additional works towards design, engineering, procurement, construction and installation of telephone exchange building as an extra item of work being part of the same project and the lump-sum price of the additional work was Rs.94,05,950/- and the time allowed for execution of the additional work was 7.5 months from the date of letter of acceptance of Change Order-1, i.e., upto 17.11.2009. However, there was no effect on the original schedule Mechanical Completion date of 21.6.2010 as the change order was to be completed beyond that date.

Respondent No.1 also issued another Change Order-2 dated 13.7.2010 (Annexure P-7) for additional work of procuring and installing the lifts for administrative building as extra items to the Project and the time schedule for completion of the work under Change Order-2 was 10 months from the date of issuance of Change Order, i.e., 12.5.2011 and the price fixed for additional order was Rs.72,60,197/-. Resultantly, the schedule for mechanical completion date to be reckoned from the entire project stood extended to 12.5.2011.

After the award of the works, the petitioner is stated to have carried out soil survey of the site area for preparing its drawings for the architectural work, to be undertaken for the construction of the building. As per the bidding documents, respondent No.1 had notified that the soil bearing capacity of the building site was 12 tones per square meters. However, as per the report dated 9.2.2009 (Annexure P-8), it was found that the bearing capacity of the buildings site was 7.5 tons per square meters against the prescribed capacity of 12 tons per square meters.

Respondent No.2 approved the cost implication with reference to the claim for time extension as per letter dated 17.3.2010 (Annexure P-9 colly) and it was stated that the time extension claims would be taken up only after the completion of the project. Since there was a variation from the original bid conditions, respondent No.1 issued another Change Order-3 dated 16.12.2010 (Annexure P-10) for extension of civil works of foundation due to change in the soil bearing capacity in buildings and the lump-sum price of the project stood revised to Rs.158,40,63,500/-.

Respondent No.1 issued another Change Order-4 dated 31.5.2011 for the supply of modular furniture in the buildings being constructed by the petitioner and the lump-sum price of the project stood revised to Rs.161,02,82,316/-. However, it was mentioned that there was no time schedule. According to Mr.Gurmohan Singh Bedi, learned counsel for the petitioner, the aforementioned issuance of the Change Order was necessitated due to the fact that there was increased manpower occupancy as originally approved by respondent No.1 and the reason for issuance of the Change Order-4 dated 31.5.2011 was with regard to the space requirement of the administrative building. The reasons for issuance of Change Order-4 and the nature of the work to be undertaken by the petitioner are specified in sub-paras (a) to (d) of Para 23 of the writ petition.

Mr.Bedi further submitted that on account of respondent No.1 demand for increased manpower occupancy requirement leading to construction of increased area, the petitioner incurred additional cost of Rs.62,61,54,230/- including the interest, detail of which has been given in para 25 of the writ petition, which reads as under:-

Increase in Manpower and Built up Area

Sr.No.	*Particulars*	*As per Selected Drawing A*	*As per As built Drawing*	*Increase*	*Increase in (%)*
1	Manpower (Nos.)	136	248	112	82.35
2	Total project Built Up Area (Sq.metres)	12679	16447	3768	29.72

Pro rata increase in additional costs

Sr.No.	*Particulars*	*Amount (Rs.)*
A	Total Contract Price (Lump sum) price	153,99,99,999
B	Less-price allocated towards Furniture included in total Contract Price	4,20,00,000
C	Total Contract Price excluding Furniture	149,79,99,999
D	Percentage increase in built up area of Project (as elaborated above)	29.72%
E	Hence, Pro rata increase in Contract Price (c x d)	44,52,05,599
F	Interest @ 15% from 16-12-2013 up to 27.02.2017 (i.e.for 1170 days)	21,40,64,610
Total (E + F)		65,92,70,209/-

Under the Change Order-4, there was no time schedule for completion of works.

It has been further submitted that the petitioner completed its part of the contract and attained the Mechanical Completion for the project as notified by respondent No.1 as on 7.7.2011, which was before the expiry of the period of 45 days from the issuance of Change Order-4, in essence, the delay of 381 days in achieving Mechanical Completion, according to the submission, was solely attributable to respondent No.1 on account of the alleged omissions and commissions on the part of respondent No.1, i.e., increased quantities of foundation in Soil Bearing Capacity provided in bidding documents, delay in finalisation of layout drawing, modifications in space requirements and manpower, putting a hold on foundation drawings of administrative building, additional time required towards executing additional RCC work, effect of unauthorised deduction from the bills, time required for execution of additional works, delay due to changes/ extra items etc. and accordingly the petitioner had a legitimate expectation that they were entitled to extension of time till 15.7.2011 and in this regard, written many letters, reference of which has been given in sub-paras (i) to (vii) of para 30 of the writ petition.

It has been submitted that respondent No.2, vide letter dated 2.11.2011, instructed the petitioner to submit its time extension proposal, which was submitted, the factum of which is evident from the letters dated 2.11.2011, 21.2.2012 and 10.4.2012 (Annexure P-13 colly). Respondent No.2 arbitrarily rejected the claim for additional costs vide letter dated 21.5.2012 (Annexure P-14). However, the petitioner received a letter from respondent No.2 that the extension of time was approved subject to levy of the Price Reduction Clause for the maximum amount vide letter dated

30.7.2012 (Annexure P-15).

Petitioner is stated to have submitted a letter dated 23.8.2012 (Annexure P-16) intimating the entitlement for its claim for additional costs. Reminder/request is dated 6.9.2012 (Annexure P-17). It has been stated that the respondents by misinterpreting Clause 4.4.0.0 of the GCC allegedly claiming price deduction @ 10% for delay in achieving the mechanical completion, had withheld Rs.16,10,28,232/-.

The petitioner submitted a final bill on 23.9.2013 for supply and services part, which also provided for the release of deducted amounts against time extension, but the same was declined by respondent No.1. The final bill of Rs.43,61,21,739/- was unjustifiably held back on account of non-submission of unconditional no claim certificate and, therefore, the petitioner had no other option but to submit the no claim certificate on 10.1.2014 (Annexure P-19) and yet, according to the petitioner, the respondents did not release the payments and vide letter dated 24.1.2014, respondent no.2 rejected the claims made by the petitioner and mandated that the payments in favour of the petitioner under the final bill shall be paid only if it submits an unconditional no claim certificate. Copies of the letter dated 24.1.2014 and 26.2.2014 have been annexed as Annexure P-20 collectively. Accordingly, petitioner was forced to submit a no claim certificate and a part payment, as indicated in para 39 of the writ petition, was released by respondent No.1 on 31.3.2014 and 3.2.2016.

It has been submitted that the petitioner submitted no claim certificate under duress and coercion and this fact was notified to respondent No.1 vide letter dated 9.4.2014 (Annexure P-21) and further made a representation dated 16.4.2014 (Annexure P-22). It has been stated that the delay in completion of the project was totally attributable to respondent no.1 and the total amount receivable, according to the petitioner, from the respondent excluding interest @ 15% is the one given in paragraph 44 of the writ petition. Even representations dated 24.8.2016 and 14.2.2017, according to the petitioner, have been rejected vide letter dated 4.11.2016 and 22.2.2017 as handed over by Mr.Ashish Kapoor, learned counsel for Indian Oil Corporation and, thus, urges this Court for striking down the alleged decision of the respondents and directing them to release the amount.

This Court while considering the contention of the learned counsel for the petitioner, had issued notice of motion on 2.3.2017.

Mr.Ashish Kapoor Advocate had put in appearance on behalf of respondent No.1 and filed a short reply dated 20.3.2017 and respondent no.2 is being represented by Mr.P.K.Mutneja, Advocate.

Mr.Ashish Kapoor has raised preliminary objection with regard to territorial jurisdiction of this Court by referring to Article 4 of the Contract No.:HQ/PJ/PNCP/2008-09/EPCC-12 (A), which deals with jurisdiction and governing law, on the ground that there were two contracts entered between the petitioner and respondent No.1, i.e., EPCC-12 (A) and another EPCC-15. Article 4 reads thus:-

> "*4. Notwithstanding any other Court or Courts having jurisdiction to decide the question (s) forming the subject matter of the reference if the same had been the subject matter of a suit, any and all actions and proceeding arising out of or relative to the contract or any award arising therefrom, shall lie only in the Court of competent civil jurisdiction in this behalf at New Delhi (where this Contract has been signed on*

> *behalf of OWNER) and only the said Court(s) shall have jurisdiction to entertain and try any such action(s) and/or proceeding(s) to the exclusion of all other Courts."*

As regards other contact No.EPCC-15, to be performed at Panipat Refinery of respondent No.1 in the State of Haryana, the petitioner had approached Delhi High Court by filing CS(COMM) 1562/2016, but yet the petitioner has chosen to approach this Court, which is violation of the contract and is a contemptuous act.

He has also submitted that the writ petition is not maintainable in view of the arbitration clause contained in the contract entered between the petitioner and the answering respondent. Section 9.0.0.0 of the General Conditions of the Contract provides a remedy of arbitration, which should have been resorted to by appointment of an arbitrator. In this regard, he has relied upon the judgment rendered by the Hon'ble Supreme Court in **M/s. Swastik Gases P. Ltd. Versus Indian Oil Corp., 2013 (9) SCC 32** to contend that where for the purpose of adjudication of an application under Section 9 of the Arbitration and Conciliation Act, 1996, agreement provided a clause that the agreement shall be subject to jurisdiction of Courts at Kolkatta, word `alone', `only' `exclusive' or `exclusive jurisdiction' have not been used, then such words is not decisive and does not make any material difference. Existence of an agreement is quite clear and should not be read as a statute. He has also relied upon the decision rendered by this Court on 12.2.2016 in **FAO No.7387 of 2015 (M/s Saksham Filling Station Versus Area Sales Manager and others).** Regarding the jurisdiction of this Court, has relied upon the judgment rendered by the Patna High Court in **Bhagwati Coke Industries Pvt.Ltd.and Ors.Versus The Central Coalfields Ltd.and Ors., 2017 (1) PLJR 16.**

He has further submitted that as per the letters, reference of which has been made during the course of the hearing of this petition, i.e., 4.11.2016 and 22.2.2017, the petitioner had already been conveyed that point raised in the letter had already been concluded by the Panipat Refinery and accordingly the final payment has also been released long time back. For the sake of brevity, letter dated 4.11.2016 reads thus:-

> "*Indian Oil Corporation Limited*
> *Refineries Division: SCOPE Complex, Core-2*
> *7, Institutional Area, Lodhi Road, New Delhi-110 003*
> *Gram: OILREFIN Telex: 031-65675*
> *Internet site: www.indianoilcorp.com*
>
> *Dated: 04.11.2016*
>
> *To,*
> *Asim Chakraborty, Director*
> *Welspun Enterprises,*
> *Welspun House, Kamala City,*
> *Senapati Bhapat Marg, Lower Parel (West),*
> *Mumbai, India.*
> *Ref: Panipat Naphtha Cracker Project (EPCC-Package 12A and 15 executed by Welspun Enterprises Ltd.)*
> *Subject: Settlement of dues*
> *Dear Sir,*
> *Please refer your letter dated 14.10.2016 regarding the subject matter. This may please be noted that the points raised in the above referred letter, had already been concluded by Panipat Refinery and accordingly final payment has also been released long time back.*
> *Since, this issue had already been evaluated numerous times and discussed at a great length on various occasions now there is no further scope of discussion in this regard."*

Mr.P.K.Mutneja, learned counsel representing respondent No.2 has raised an objection with regard to the limitation by contending that the final bill was prepared in 2013 and as such the petitioner has lost right either through arbitration or civil court and, therefore, jurisdiction of this Court, which is a thing, which cannot be achieved in the manner and mode by invoking Article 226 of the Constitution of India and, thus, prays for dismissal of the writ petition.

In rebuttal, learned counsel for the petitioner has relied upon the ratio decidendi culled out in **Harbanslal Sahnia and another Versus Indian Oil Corpn.Ltd.and others, 2003 AIR (SC) 2120** to contend that even if the petitioner has an alternative remedy, but if the decision of respondent no.1 is found to be without jurisdiction and attracts two contingencies, i.e., enforcement of any of the fundamental rights and failure of principles of natural justice, the writ petition can be entertained. He has also relied upon the ratio decidendi culled out in **Union of India & Ors.Versus Tantia Construction Pvt.Ltd., 2011 (5) SCC 697= 2011 (3) R.C.R. (Civil) 821** and as regards the territorial jurisdiction has relied upon the judgment of the Division Bench of Allahabad High Court in **M/s.P.R. Transport Agency Versus Union of India, 2006 AIR (Allahabad) 23,** wherein, by relying upon the decision rendered by the Hon'ble Supreme Court in **A.B.C. Laminart Pvt.Ltd. Versus A.P.Agencies, AIR 1989 Supreme Court 1239,** held that parameters/provisions of Section 20 of the Civil Procedure Code vis-a-vis Article 226 of the Constitution of India where the cause of action wholly or in part arises within their territories, the expression “only” or `alone' would not take away the jurisdiction of Article 226 of the Constitution. It is only meant for arbitration and civil court and, thus, urges this Court for striking down the alleged decision of the respondents and directing them to release amount for which the petitioner was forced to give no claim certificate as respondent No.1 indisputably and admittedly ordered for change orders and, therefore, could not have deducted 10% amount by allowing the writ petition.

I have heard the learned counsel for the parties and appraised the paper book.

The bidding documents for non plant buildings is at page 56 of the paper book.

On perusal of clause (xv), it has been provided for Mechanical Completion of the project, that expression `may be' achieved within 15 weeks of the starting date for discount calculation, 10% of the lump-sum price. It has been mentioned that the lump-sum price specified in the contract is based upon the mechanical completion of the unit by the contractor within the time specified in the time schedule, the lump-sum price shall be subject to adjustment by way of discount specified, if the unit is not mechanically completed by the contractor or if the unit is mechanically completed subsequent to the date of mechanical completion specified in the time schedule. However, it has been provided that as per Clause 4.4.2.0, if mechanical completion of the unit is not achieved by the date specified in the time schedule or if any works for which a separate progress schedule has been established is not achieved by the date of completion thereof specified in the relevant progress schedule (each of the said date(s), i.e., starting date for discount calculation, the owner shall be entitled to discount in the lump-sum price in a sum equivalent to the lump-sum price for each week or part thereof that the work remains incomplete beyond the starting date for discount calculation and as per Clause (xv), 10% of the lump sum price.

Before I could comment on the merits of the matter, the objections raised by the respondents regarding maintainability and the availability of the alternative remedy have to be dealt with.

Article 226 of the Constitution gives the power to issue certain writs, including writ of habeas corpus, mandamus, prohibition, quo-warranto and certiorari etc. by holding the power throughout in relation to which it exercises the jurisdiction to issue any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs or any of of them, for the enforcement of any of the rights conferred by Part III and for any other purpose and in respect of a cause of action wholly or in part arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

Concededly the work assigned to the petitioner is in respect of the Non Plant Buildings EPCC 12 A Package for Panipat Naphtha Cracker Project, i.e., within the jurisdiction of this Court and, therefore, the expression `exclusively alone' and as referred to in Clause 4.1 of Article 4 as extracted above, would only deal with respect to the issue regarding the arbitration or civil suit.

Aforementioned view of mine is reiterated from the judgment in **M/s P.R.Transport Agency case (supra),** rendered by the Allahabad High Court by relying upon **A.B.C. Laminart Pvt.Ltd.'s case (supra)**. Paras 14 to 18 of the said judgment would be relevant and the same are extracted herein below:-

"14. Generally, the courts are reluctant to accept ouster of the jurisdiction of the civil courts and, therefore, ouster clauses in agreement are construed strictly and jurisdiction is field to be

excluded only when it is inevitable result of the agreement. In this light the Supreme Court in the case of A.B.C. Laminart Pvt. Ltd and Anr. v. A.P. Agencies, laid down that either the agreement ousting jurisdiction of some courts and confining the jurisdiction to one or more courts should use the words like 'alone', 'only', 'exclusive' etc. in the ouster clause with regard to the courts to which jurisdiction has been confined; or in the alternative where such isolating words have not been used, the maxim 'expressio unius est exclusio alterius' meaning 'expression of one is the exclusion of another' may be applied in appropriate cases where the facts so demand.

15. After considering the facts of the said case as well as the alleged ouster clause which said "any dispute arising out of this sale shall be subject to Kaira jurisdiction", the Supreme Court held that it would not oust the jurisdiction of other courts which had territorial jurisdiction under Section 20(c) of the Code of Civil Procedure.

16. But, more fundamental question needs to be examined, viz. whether the ouster clauses can exclude the jurisdiction of civil courts only or whether such clause can exclude the jurisdiction under Article 226 of the Constitution of India also.

17. Section 20 C.P.C. for the civil court and Article 226 of the Constitution of India for the High Courts permit the exercise of territorial jurisdiction where the cause of action wholly or in part arises within their territories. To that extent, the words used in the two provisions are similar.

18. But, there is one vital difference, namely, that while the jurisdiction to pass a decree accrues to the civil court only upon institution of suit by filing of a plaint and the civil court cannot act suo motu, but under Article 226 of the Constitution of India the power to issue writs, orders or directions is not necessarily dependant upon filing of a writ petition. The High Court has the power to act suo motu if an appropriate matter comes to its knowledge calling for intervention by it. Such *knowledge may be received by the High Court by means of a writ petition or otherwise."*

Thus, this Court would have definitely territorial jurisdiction to decide the matter.

Now deal with the second objection with regard to alternative remedy by arbitration or civil suit. In respect of the aforementioned objection, it is the conceded position on record that there is no dispute with regard to the release of the payment, which is evident from the letter dated 24.1.2014, whereby the Indian Oil Corporation informed the petitioner that while rejecting the claim of the additional cost, final payment has been checked and it would be released on the receipt of the following two items:-

a) Factory inspector clearance for building under this contract; and

b) Un-conditional no claim certificate."

The relevant portion of the letter dated 24.1.2014 reads thus:-

"*It is to be mentioned that your final bill has been checked and will be released on receipt of the following documents:*

1. Factory inspector clearance for building under this contract.

2. Un-conditional no claim certificate."

The petitioner has submitted no claim certificate vide letter dated 26.2.2014 (Annexure P-20) which reads thus:-

" *NO CLAIM CERTIFICATE*

Name of Work: Construction of Non-Plant Building (EPCC-12A) for Naphtha Cracker Project of Indian Oil Corporation Limited at Panipat.

Name of Consultant: Engineers India Limited.

Name of owner: Indian Oil Corporation Limited

Work Order No:- HQ/PJ/PNCP/2008-09/EPCC-12(A)/FOA/

12(A) Dated: 12.11.2008.

This is to certify that we hereby accept the Certified Final Bill pertaining to the subject works as full and final settlement of all dues under the above mentioned contract. We have no other claims, whatsoever against the owner, Indian Oil Corporation Limited.

For Welspun Projects Ltd.
Authorised Signatory
Date:26.02.2014"

The release of the final payment is reflected from the letter dated 16.4.2014 (Annexure P-22), the relevant portion of which reads thus:-

"*Dear Sir,*

This is in reference to your letter No.WPL/EPCC-12A/2014/14 dated 09.04.2014, original received in our office on 16.04.2014 on the subject Matter. The final bill has been processed based on the submission of un-conditional no claim certificate by M/s Welspun Projects Ltd. The final bill payment has also been released. Therefore, the matter is considered as closed & no further correspondences will be entertained on the subject issue.

This is for your information please.
Thanking you,
Very Truly Yours,
(R.Sampath)
Resident Construction Manager"

Thus, there is no dispute with regard to the payment of the final bill. Only the letters dated 21.5.2012 (Annexure P-14) and as well as 30.7.2012 (Annexure P-15) reflect that the time extension of EPCC 12-A has been approved by competent authority upto 7.7.2011 alongwith imposition of 10% price discount as per G.C.C.Clause No.4.4.0.0. with regard to the Change Orders 1 and 2. The detail of the same reads thus:-

" ENGINEERS
INDIA LIMITED
(A Govt.of India Undertaking)
Panipat Naphtha Cracker Project
P.O.PANIPAT REFINERY-132 140

ES-CS-6556-EPCC-12A/L/609 July 30, 2012

M/s WELSPUN Projects Ltd.
Panipat Naphtha Cracker Project,
Panipat.

Kind Attn:- Sh.A.L.Patel, RCM

Subject: Non Plant Buildings (EPCC-12A) for Naphtha Cracker Project of Indian Oil Corporation Limited at Panipat (Haryana)
-Final Time Extension

Dear Sir,

This is in reference to your letter No.WPL/EPCC-12A/L/11-12/828 dated 21.02.2012 and presentation given by you on 23.02.2012 at PNCP-Panipat on the subject matter.

As intimated by IOCL, the time extension of EPCC-12A has been approved by competent authority upto 07.07.2011 alongwith imposition of 10% price discount as per G.C.C. Clause No.4.4.0.0. The price reduction in respect to Change Orders viz.-

1) Change Order-1: Construction of Telephone Exchange Building
2) Change Order-2 :Supply & Installation of 2 nos. of Capsule lift.

completed by you within contractual schedule shall worked out at later date after finalization of all Change Orders/Extra Works/Extra items.

This is for your information & record please.

Thanking you,
Very Truly Yours,
(B.C.Pant)
Resident Construction Manager."

It is in this aspect of the matter, this Court has formulated the question as to whether for changed orders, the stand of the Corporation in imposition of 10% discount is justified or not. Rest of the controversy with regard to the completion of the work and mechanically achievement is not in dispute, therefore, the objections, while relying upon the judgments, *ibid*, heavily relied upon by Mr.Kapoor, are not sustainable and not able to cut the ice and hereby rejected.

Coming to the merits of the matter, it would be apt to reproduce the contents of the letters Annexure P-6 dated 2.4.2009, P-7 dated 13.7.2010, P-10 dated 16.12.2010 and P-11 dated 31.5.2011, i.e., the four changed orders:-

ANNEXURE P-6

" ***(FAX NO. 0265-2341642)***

No. HQ/PJ/PNCP/2008-09/EPCC-12(A)/ April 02, 2009

M/S MSK PROJECTS (INDIA) LIMITED
707, Sterling Centre,
R C Dutt Road, Alkapuri
Baroda-390005
Kind Attn: Mr. Ashok Khurana, Director

Name of work:		***Non Plant Building (EPCC-12A Package) for PNCP***
FAO No.	***:***	***HQ/PJ/PNCP/2008-09/EPCC-12(A)/ FOA/12(A) dated 22.10.2008***
Subject	***:***	***Change Order No.1: Design, Engineering, Procurement, Construction and installation of Telephone Exchange Building for PNCP as an extra item (additional Scope of work) under EPCC 12-A package.***
Reference:		***Your offer no. Project: epcc-12A:execu.***

telexch.letter.p.1 dated 18.11.2008, Project: epcc-12A:execu.telexch.letter.p.2 dated 30.01.2009 and letter dated 27.02.2009.

Dear Sirs,

With reference to the above, please note that your offer for the subject additional scope of work has been accepted on behalf of Indian Oil Corporation Ltd. (Refineries Division) for the Design, Engineering, Procurement, Construction and installation of Telephone Exchange Building for PNCP as an extra item of work (additional Scope of work) under EPCC 12-A package subject to the following terms and conditions:

1 LUMPSUM PRICE FOR ADDITIONAL SCOPE OF WORK:

1.1 The Lump-sum price for the subject additional work shall be INR 94,05,950/- (Rupees Ninety Four lakhs Five Thousand Nine Hundred Fifty only) with the following break-up:

Sr. No.	*Description*	*Indian Rupees (INR)*
1	*Price of Material as per Form SP 1*	*54,45,550*
2	*Price of Material as per Form SP1*	*39,60,400*

1.2 The above price is firm and fixed till execution of the entire contract performance for the subject additional scope of work and will not be subject to variations on any account except the following:

Subject : Change Order No.1 : Design, Engineering, Procurement, Construction and installation of Telephone Exchange Building for PNCP as an extra item (additional Scope of work) under EPCC 12-A package.

1) Statutory variation in taxes & duties as per Clause 6.10.0 of SCC.

2) Price variation on account of variation in price of structural steel materials for site fabrication/ construction i.e for *structural steel, reinforcement bars and steels grating/ chequered plates as per Clause 6.11.0 of SCC.*

1.3 The Lumpsum Price as mentioned under Para 1.1 above includes all taxes, duties and levies as per the provisions of Bidding Document except for the following:

1) Value Added tax (VAT) on any indigenous material sold and supplied by the contractor to owner under the contract as per Clause 6.2.0 of SCC.

2) Entry & terminal taxes as per Clause 6.3.0 of SCC.

3) Excise Duty levied on and paid by the Contractor or any of the contractor's suppliers of indigenous materials sold and supplied to the owner under the contract as per Clause 6.4.0 of SCC.

4) Service Tax levied on and paid by the contractor on any services performed by the contractor under the contract as per Clause 6.8.0 of SCC

5) Works contract Tax is not envisaged in this contract as per Clause 6.9.0 of SCC.

It being clearly and expressly understood that the Lumpsum Price shall be inclusive of all type of taxes, duties including sales tax, excise duty, for all materials required and no additional payment shall be made for the same.

1.4 The base date for Statutory Variations in taxes and duties as per Clause 6.10.0 of SCC and for Price variation as per Clause 6.11.0 of SCC shall be 18.11.2008 for this additional scope of work.

1.5 The above amount is inclusive of CST.

1.6 The Lumpsum Price mentioned under para 1.1 includes cost of all items included in the scope of work, technical specifications, specific requirements, drawings and/or under any other heads of Contract Documents and to complete the subject additional scope of work on turnkey basis, irrespective of whether all the items of engineering, supply and erection are categorically listed out/ brought out elsewhere or not. The Lumpsum Price as mentioned above *includes all activities of work such as design, engineering, procurement, supply, transportation, fabrication, erection, installation, painting, insulation, construction, inspection, testing and commissioning and performance testing of this additional scope of work as per the scope of work in the contract*

Subject : Change Order No.1 : Design, Engineering, Procurement, Construction and installation of Telephone Exchange Building for PNCP as an extra item (additional Scope of work) under EPCC 12-A package.

1.7 The Lumpsum Price includes cost of all works which are required to be performed executed and supplied by the contractor as stipulated in the contract and the cost thereof has been covered suitably and appropriately assigned to various available heads and categories in the Schedule of Prices. Non-identification of any works in the description of items included in Schedule of Prices and the Schedule of break-up of Lumpsum Prices shall not be considered a reason either for extra claims or not carrying out the work in strict conformity with drawings, specifications and instructions of Engineer-in Charge.

1.8 The break-up of Lumpsum prices shall be used for preparation and submission of detailed Billing Schedule (Schedule of Activities and Bill of Material) for release of progressive payments. Notwithstanding the amounts shown in the Billing Schedule (Schedule of Activities and Bill of Material) under various heads, the total payment to the Contractor for performance of this contract shall be limited to Lumpsum Price mentioned at para 1.1 above.

1.9 The price at 1.1 above also includes all consumable.

1.10 ***With this change order no.1, the lump sum price of EPCC-12 (A) package stands revised to Rs. 1,54,94,05,949 (INR One Hundred Fifty Four Crore Ninety Four Lakhs Five Thousand Nine Hundred Forty Nine only).***

2. TIME SCHEDULE FOR ADDITIONAL SCOPE OF

WORK:

2.1 The time schedule for completion of building works under this additional scope of work shall be 6 (six) months reckoned from the date of issue of this Letter of Acceptance for this extra scope of work. The building shall be made ready internally to facilitate installation of the Telephone Exchange Equipment and UPS.

2.2. The time schedule for overall completion of the work shall be 7.5 months from the date of this Letter of Acceptance.

2.3 This change order will not in any way affect the contractual time schedule for completion of works covered under original contract which will remain as mentioned in DLOA No. HQ/PJ/PNCP/2008-09/EPCC-12(A) dated 06.11.2008

3 ***SPECIFIC TERMS AND CONDITIONS FOR ADDITIONAL SCOPE OF WORK***

3.1 The Telephone Exchange Equipment and UPS will be provided, installed and commissioned by EPCC-8.

3.2 The document such as drawings, P&ID, Prs, QAPs, etc. will be cleared within 10 days after submission to EIL>

Subject : Change Order No.1 : Design, Engineering, Procurement, Construction and installation of Telephone Exchange Building for PNCP as an extra item (additional Scope of work) under EPCC 12-A package.

All other terms and conditions will remain as per original contract for EPCC 12-A i.e contract no. HQ/PJ/PNCP/2008-09/EPCC-12(A).

Thanking you,

(For and on behalf of
Indian Oil Corporation Ltd.
(R.Kataria)
DGM (PJ)

CC: Shri KP Tandon, ED (PJ), EIL HO

CC: Shri TS Ramchandran, GM(PNCP), IOCL, RHQ

CC: Shri S.P.S. Jolly, GM(PNCP), IOCL, Site

CC: Shri PK Bhattacharya, RCM, EIL Site"

ANNEXURE P-7

No. HQ/PJ/PNCP/2008-09/EPCC-12(A) July 13, 2010

M/S MSK PROJECTS (INDIA) LIMITED

707, Sterling Centre,

R C Dutt Road, Alkapuri

Baroda-390005

FAX No. 0265-2341642

Kind Attn: Mr. Ashok Khurana, Director

Name of work: Non Plant Building (EPCC-12A Package)for Panipat Naphtha Cracker Project of M/s. Indian Oil Corporation Ltd.

FAO No. : HQ/PJ/PNCP/2008-09/EPCC-12(A)/FAO/12(A) dated 22.10.2008

Subject : Change Order No.2: Supply & Installation of 2 nos. capsule lifts in Administration Building as an extra item (additional Scope of work) under EPCC 12-A package.

Reference : Monthly Review Meeting MOM dated 11.05.09 and MOM dated 17.06.10 at EIL HO & your letter no EPCC-12A:letter.doc:p.11 dtd 04.01.2010

Dear Sirs,

With reference to the above, please note that your letter for the subject additional scope of work has been accepted on behalf of Indian Oil Corporation Ltd. (Refineries Division) for the supply and installation of 2 nos. capsule lifts in Administration Building for PNCP as an extra item of work (additional Scope of work) under EPCC 12-A package subject to the following terms and conditions:

1 ADDITIONAL SCOPE OF WORK:

The additional scope of work includes

1. *Supply and completion of all civil and architectural finish works, electrical works for 2 nos. lifts in Administration Building.*

2. Supply and installation of 2 nos. OTIS make Electric Traction Passenger Elevators with five side Glass Panels, Model Code IND-127-2-5.5 M OPTIMUS including testing & commissioning.

2. LUMPSUM PRICE FOR ADDITIONAL SCOPE OF WORK

2.1The Lump-sum price for the subject additional work shall be INR 72,60,197/- (Rupees Seventy Two Lakhs Sixty Thousand One Hundred Ninety Seven only) with the following break-up:

	Description	*Indian Rupees (INR)*
	Price of Material as per Form SP 1	*45,33,305*
	Price of Material as per Form SP1	*27,26,892*

Subject : Change Order No. 2: Supply & Installation of 2 nos. capsule lifts in Administration Building as an extra item (additional Scope of work) under EPCC 12-A package.

2.2The above price is firm and fixed till execution of the entire contract performance for the subject additional scope of work and will not be subject to variations on any account.

2.3The Lumpsum Price as mentioned under para 2.1 above includes Excise, CST on elevator cost, service tax on installation cost. It is exclusive of other taxes.

2.4The Lumpsum Price mentioned under para 2.1 includes cost of all items included in the scope of work, technical specifications, specific requirements, drawings and/or under any other heads of Contract Documents and to complete the subject additional scope of work on turnkey basis, irrespective of whether all the items of engineering, supply and erection are categorically listed out/ brought out elsewhere or not. The Lumpsum Price as mentioned above includes all activities of work such as design, engineering, *procurement, supply, transportation, fabrication, erection installation, painting, insulation, construction, inspection, testing and commissioning and performance testing of this additional scope of work as per the scope of work defined in the contract.*

2.5 The Lumpsum Price includes cost of all works which are required to be performed, executed and supplied by the contractor as stipulated and the cost thereof has been covered suitably and appropriately assigned to various available heads and categories in the Schedule of Prices. Non-identification of any works in the description of items included in Schedule of Prices and the Schedule of Break-up of Lumpsum Prices shall not be considered a reason either for extra claims or not carrying out the work in strict conformity with drawing, specifications and instructions of Engineer-in Charge.

2.6 The price at 2.1 above also includes all consumable

3. TERMS OR PAYMENT FOR ADDITIONAL SCOPE OF WORK:

For Supplies of Materials:

Subject to the other provisions of Contract documents, on account payment for the supplies will be made as follows:

i) Against proof of shipment/ Dispatch of materials

50% (fifty percent) of the price of materials plus procurement and other charges for relative materials as indicated in the Bill of Materials.

Stage payment against " Proof of despatch of Materials" shall be released (on prorata basis) on submission of the following documents with the CONTRACTOR's invoice.

a) Signed Invoice(s)

b) Packing list.

c) Inspection Release Note by Third Party Inspection Agency.

d) Photocopy of Railway Receipt/LR.

Subject : Change Order No. 2: Supply & Installation of 2 nos. capsule lifts in Administration Building as an extra item (additional Scope of work) under EPCC 12-A package.

ii) On Issue of Certificate of Verification and Good Condition at Site, Against Contractor's Certified Running Account Bill(s) :

30% (Thirty percent) of the Ex-Factory value of materials and procurement and other Charges for relative materials as indicated in the Bill(s) of Material on submission of:

(a) Verification of Third Party Inspection certificate as per QAP approved by OWNER/PMC alongwith test certificate.

(b) Cenvatable documents on account of Countervailing Duty.

(c) Certificate of verification and Good Condition after receipt of material at site.

(iii) 20% (Twenty percent) of the Ex-Factory value of material and procurement and other charges for relative materials as indicated in the Bill(s) of Material issue of Completion Certificate against Commissioning of Lift.

For Installation & Commissioning Services :

i) 50% (Fifty percent) on pro-rata basis against the CONTRACTOR's certified Running Account Bill(s) on completion of RCC works.

ii) 40% (Forty percent) on completion of installation of lift against the Contractor's certified Running Account Bill(s),

iii) 10% (Ten percent) against commissioning of lift.

4. TIME SCHEDULE FOR ADDITIONAL SCOPE OF WORK:

4.1The time schedule for completion of all works under this additional scope of work shall be 10 months reckoned from the date of issue of this Change Order No2.

4.2 This change order will not in any way affect the contractual time schedule for completion of works covered under original contract which will remain as mentioned in DLOA No. HQ/PJ/PNCP/2008-09/EPCC-12(A) dated 06.11.2008

With this change order no.2, the lump sum price of EPCC-12 (A) package stands revised to Rs. 1,55,66,66,146 (INR One Hundred Fifty Five Crore Sixty Six Lakhs Sixty Six Thousand

One Hundred Forty Six only).

Subject : Change Order No. 2: Supply & Installation of 2 nos. capsule lifts in Administration Building as an extra item (additional Scope of work) under EPCC 12-A package.

All other terms and conditions will remain as per original contract for EPCC 12-A i.e contract no. HQ/PJ/PNCP/2008-09/EPCC-12(A).

Thanking you,

(For and on behalf of
Indian Oil Corporation Ltd.)

(D.S. Sehgal)
Chief Project Manager(PNCP)

Shri K.P. Tandon, ED(PJ), EIL HO
Shri T. S. Ramachandran, GM(PNCP), IOCL RHQ
Shri S. P. S. Jolly, GM (PNCP), IOCL, Site
Shri P.K. Bhattacharya, RCM, EIL Site"

ANNEXURE P-10

No. HQ/PJ/PNCP/2008-09/EPCC-12(A)/

M/S MSK PROJECTS (INDIA) LIMITED

707, Sterling Centre,
R C Dutt Road, Alkapuri
Baroda-390005
FAX No. 0265-2341642
Kind Attn: Mr. Ashok Khurana, Director

Name of work: Non Plant Building (EPCC-12A Package) for Panipat Naphtha Cracker Project of M/s. Indian Oil Corporation Ltd.

FOA No. : HQ/PJ/PNCP/2008-09/EPCC-12(A)/ FOA/12(A) dated 22.10.2008

Subject : Change Order No.3: Civil works of foundations due to the change in Soil Bearing Capacity

(extra claim) under EPCC 12-A package.

Reference :1) MSK letter no. Epcc-12A letter.doc:p:7 dated 28.12.2009.

2) MSK letter no. NIL dated 20.07.2010.

Dear Sirs,

With reference to the above, please note that your extra claim for the civil works of foundations due to the change in soil bearing capacity in Buildings accepted as an extra item of work under EPCC 12-A package of PNCP subject to the following terms and conditions:

1. LUMPSUM PRICE FOR EXTRA WORK:

1.1The Lump-sum price for the subject additional work shall be INR 2,73,97,354/- (Rupees Two Crores Seventy Three Lakhs Ninety Seven Thousand Three Hundred and Fifty Four only) with the following break-up:

Sr. No.	*Description*	*Indian Rupees (INR)*
1	*Price of Material as per Form SP 1*	*1,17,37,356*
2	*Price of Material as per Form SP1*	*1,52,87,375*
3	*Price as per form SP1 A (CST)*	*3,72,623*

1.2The above price is firm and fixed till execution of the entire contract performance for the subject extra work and will not be subject to variations on any account.

1.3 The Lumpsum Price as mentioned under para 1.1 excludes Excise duty and service tax. The payment against CST shall be reimbursed at actual against production of documentary evidence

1.4The Lumpsum Price mentioned under para 1.1 includes cost of all items included in the extra work, technical specifications, specific requirements, drawings and/or under any other heads of Contract Documents and to complete the subject extra work on turnkey basis *irrespective of whether all the items of engineering, supply and erection are categorically listed out/ brought out elsewhere or not. The lumpsum price as mentioned above includes all activities of work such as design, engineering, procurement, supply, transportation, fabrication, erection, installation, construction, inspection, testing of this extra work as per the scope of work defined in the contract.*

1.5 The lumpsum Price includes cost of all works which are required to be performed executed and supplied by the contractor as stipulated and the cost thereof has been covered suitably and appropriately assigned to various available heads and categories in the Schedule of Prices. Non-identification of any works in the description of items included in Schedule of Prices and the Schedule of Break-up of Lumpsum Prices shall not be considered a reason either for extra claims or not carrying out the work in strict conformity with drawings, specifications and instructions of Engineer-in Charge.

1.6The price at 1.1 above also includes all consumable.

2. TERMS OF PAYMENT FOR EXTRA WORK:

2.1The terms of payment shall be clubbed for various stages of payment of the existing contract up to 80% on completion of work at site and balance 20% payment in stages as per the relevant payment terms of the existing contract.

3.0TIME SCHEDULE FOR COMPLETION OF EXTRA WORK:

3.1 The request for time extension due to above claim will be examined after completion of job.

With this change order no.3, the lump sum price of EPCC-12 (A) package stands revised to Rs. 158,40,63,500 (INR One Hundred Fifty Eight Crore Forty Lakhs Sixty Three Thousand Five Hundred only).

All other terms and conditions will remain as per original contract for EPCC 12-A i.e contract no. HQ/PJ/PNCP/2008-09/EPCC-12(A).

Thanking you,

(For and on behalf of
Indian Oil Corporation Ltd.)

(D.S. Sehgal)
Chief Project Manager(PNCP)"

ANNEXURE P-11

No. HQ/PJ/PNCP/2008-09/EPCC-12(A)/

M/S MSK PROJECTS (INDIA) LIMITED
707, Sterling Centre,
R C Dutt Road, Alkapuri
Baroda-390005
FAX No. 0265-2341642
Kind Attn: Mr. Ashok Khurana, Director
Name of work: Non Plant Building (EPCC-12A Package) for Panipat Naphtha Cracker Project of M/s. Indian Oil Corporation Ltd.
FOA No. : HQ/PJ/PNCP/2008-09/EPCC-12(A)/ FOA/12(A) dated 22.10.2008
Subject : Change Order No.4: Extra Claim for increased scope of supply of modular furniture in Non Plant Buildings under EPCC 12-A package.
Reference : Your letter no. Nil dated 18.02.2011.
Dear Sirs,
With reference to the above, please note that your extra claim for the increased scope of supply of Godrej make modular furniture in Non Plant Buildings under EPCC 12-A package accepted as an extra item of work under EPCC 12-A package of PNCP subject to the following terms and conditions
1. LUMPSUM PRICE FOR EXTRA WORK :

1.1The Lump-sum price for the subject additional work shall be INR 2,62,18,816/- (Rupees Two Crore Sixty Two Lacs Eighteen Thousand Eight Hundred and Sixteen only) (Refer Annexure 1&2) with the following break-up:

Sr. No.	*Description*	*Indian Rupees (INR)*
1	*Price of Material as per Form SP 1*	*2,57,25,337*
2	*Price of services as per form SP 2*	*NIL*
3	*Price as per form SP 1 A (CST)*	*4,93,479*

1.2The Lumpsum Price as mentioned under para 1.1 above includes CST and exclusive of other taxes and duties. The payment against CST shall be reimbursed at actual against production of documentary evidence.

1.3 The Lumpsum Price mentioned under para 1.1 includes cost of all items included in the extra work, technical specifications, specific requirements, drawings and/or under any other heads of Contract Documents and to complete the subject extra work on turnkey basis, irrespective of whether all the items of engineering, supply and erection are categorically listed out/ brought out elsewhere or not. The Lumpsum Price as mentioned above includes all activities of work such as design, engineering, procurement, supply, transportation, fabrication, erection, installation, painting, insulation, construction, inspection, testing of this extra work as per the scope of work defined in the contract.

1.4The Lumpsum Price includes cost of all works which are required to be performed executed and supplied by the contractor as stipulated and the cost thereof has been covered suitably and appropriately assigned to various available heads and categories in the Schedule of Prices. Non-identification of any works in the description of items included in Schedule of prices and the Schedule of Break-up of Lumpsum Prices shall not be considered a reason either for extra claims or not carrying out the work in strict *conformity with drawings, specifications and instructions of Engineering-in Charge.*

1.5 The price at 1.1 above also includes all consumable.

1.6 The price at 1.1 includes furniture cost worked on the basis of following:

Detailed observations on change in quantities of furniture from quantities as per tender & those considered in claim for various rooms/halls etc. of admin building & training centre are provided by EIL in their recommendation (copy enclosed as annexure-4) & reference to this annexure shall be made by site to verify the actual provision of furniture prior to release of payment to contractor.

For extra partitions, the following guideline has been adopted :

As against 3759 sqm quantity calculated on the basis of contract drawings/specifications for full height partitions a quantity of appx 3996 Sqm quantity of full height & half height partitions (Actual qty details enclosed to be verified at site for completion of scope under change order) has been estimated for the purpose of processing the claim.

The extra 237 sqm quantity, over 3759 sqm tender quantity, consists of (1) 3789 sqm quantity for Admin building as per actual installed and measured quantity(Attached as Appendix "A") & (2) 207 sqm quantity in training center as estimated since the installation in training center is yet to be completed. Once the partitions in training centre completed, any difference from above quantity (207sqm) for training centre partition will be adjusted at the time or release of claim payment to agency. Summery sheet for extra partition is attached as Annexure 3.

*2.0**TERMS OF PAYMENT FOR EXTRA WORK** :*

2.1 The terms of payment shall be clubbed for various stages of payment of the existing contract up to 80% on completion of work at site and balance 20% payment in stages as per *the relevant payment terms of the existing contract.*

3.0TIME SHCHEDULE FOR COMPLETION OF EXTRA WORK:

3.1 This change order will not in any way affect the contractual time schedule for completion of works covered under original contract which will remain as mentioned in DLOA No. HQ/PJ/PNCP/2008-09/EPCC-12(A) dated 06.11.2008

With this change order no.4, the lump sum price of EPCC-12 (A) package stands revised to Rs. 161,02,82,316 (INR One Hundred Sixty One Crore Two Lacs Eighty Two Thousand Three Hundred and Sixteen only).

All other terms and conditions will remain as per original contract for EPCC 12-A i.e contract no. HQ/PJ/PNCP/2008-09/EPCC-12(A).

Thanking You,

(For and on behalf of
Indian Oil Corporation Ltd.)

(Rajat Gupta)

Senior Electrical Engineer(Project)

On conjoint reading of the aforementioned letters, it reveals that the petitioner was assigned extra work for undertaking the original contract and the time, as submitted by Mr.Bedi, was also fixed, much less in two changed orders, i.e., 7.5 months from the date of letter of acceptance, whereas in the letter Annexure P-10, it was undertaken that the extension of time will be examined after completion of job. For the last extension, no time schedule was given. Now whether in such circumstances, the Corporation, while releasing the final payment, could impose 10% price discount as per G.C.C. 4.4.0.0. or not. The answer is `No'.

A question would also come in the mind of every prudent person whether a writ under Article 226 of the Constitution can be entertained by invoking the doctrine akin to judicial review/interference, to enforce civil suit arising out of a breach of a contract or a tort to pay an amount of money due to the claimants, but for ordering payment of money can be made in writ proceedings, in enforcement of statutory functions of the State or its officers. Reference has been made to the judgment of the Hon'ble Supreme Court in **Godavari Sugar Mills Limited Versus State of Maharashtra and others, (2011) 2 Supreme Court Cases 439.** The view in the said judgment is the basis of the judgment rendered by the Hon'ble Supreme Court in **Suganman v. State of M.P., AIR 1965 SC 1740.** For the sake of brevity, Para 8 of the judgment in **Godavari Sugar Mills Ltd. (supra)** reads thus:-

> *"8. The observations in Suganmal related to a claim for refund of tax and have to be understood with reference to the nature of claim made therein. The decision in Suganmal has been explained and distinguished in several subsequent cases, including in UP* ***Pollution Control Board v. Kanoria Industrial Ltd - 2001 (2) SCC 549*** *and* ***ABL International Ltd v. Export Credit Guarantee Corporation of India Ltd. - 2004 (3) SCC 553.*** *The legal position becomes clear when the decision in Suganmal read with the other decisions of this Court on the issue, referred to below :*
>
> > *(i) Normally a petition under Article 226 of the Constitution of India will not be entertained to enforce a civil liability arising out of a breach of a contract or a tort to pay an amount of money due to the claimants. The aggrieved party will have to agitate the question in a civil suit. But an order for payment of money may be made in a writ proceeding, in enforcement of statutory*

functions of the State or its officers. [vide ***Burmah Construction Co. v. State of Orissa - (1962) Supp 1 SCR 242]****.*

(ii) If a right has been infringed - whether a fundamental right or a statutory right - and the aggrieved party comes to the court for enforcement of the right, it will not be giving complete relief if the court merely declares the existence of such right or the fact that existing right has been infringed. The High Court, while enforcing fundamental or statutory rights, has the power to give consequential relief by ordering payment of money realised by the Government without the authority of law (vide ***State of Madhya Pradesh v. Bhailal Bhai - AIR 1964 SC 1006).***

(iii) A petition for issue of writ of mandamus will not normally be entertained for the purpose of merely ordering a refund of money, to the return of which the petitioner claims a right. The aggrieved party seeking refund has to approach the civil court for claiming the amount, though the High Courts have the power to pass appropriate orders in the exercise of the power conferred under Article 226 for payment of money. (vide ***Suganmal v. State of Madhya Pradesh - AIR 1965 SC 1740).***

(iv) There is a distinction between cases where a claimant approaches the High Court seeking the relief of obtaining only refund and those where refund is sought as a consequential relief after striking down the order of assessment etc. While a petition praying for mere issue of a writ of mandamus to the state to refund the money alleged to have been illegally collected is not ordinarily maintainable, if the allegation is that the assessment was without a jurisdiction and the taxes collected was without authority of law and therefore the respondents had no authority to retain the money collected without

> *any authority of law, the High Court has the power to direct refund in a writ petition [vide **Salonah Tea Co.Ltd. v. Superintendent of Taxes, Nangaon (1988) 1 SCC 401].***
>
> *(v) It is one thing to say that the High Court has no power under Article 226 of the Constitution to issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. For instance, where the facts are not in dispute, where the collection of money was without the authority of law and there was no case of undue enrichment, there is no good reason to deny a relief of refund to the citizens. But even in cases where collection of cess, levy or tax is held to be unconstitutional or invalid, refund is not an automatic consequence but may be refused on several grounds depending on facts and circumstances of a given case. (Vide **U.P. Pollution Control Board v. Kanoria Industrial Ltd - 2001 (2) SCC 549).***
>
> *(vi) Where the lis has a public law character, or involves a question arising out of public law functions on the part of the State or its authorities, access to justice by way of a public law remedy under Article 226 of the Constitution will not be denied. [Vide **Sanjana M.Wig v. Hindustan Petroleum Corporation Ltd. (2005) 8 SCC 242.]***

We are therefore of the view that reliance upon Suganmal was misplaced, to hold that the writ petition filed by the appellant was not maintainable."

It leads to an irresistible conclusion that this Court has the power to exercise sparingly depending on the facts and circumstances of each case, i.e., when the facts are not in dispute. However, in this case also, allotment of extra work by issuing the changed orders and release of the payment is not in dispute. The only thing is whether the respondents could impose 10% deduction or not.

In my view, once the respondents have already acknowledged and admitted the acceptance of the change orders, it could not impose 10% deduction/discount by imposing clause 4.4.0.0 and, therefore, the argument of the respondents that since the petitioner had availed the remedy by filing a civil suit by invoking the original jurisdiction of the Delhi High Court in respect of the work EPCC-15 would not apply as in the other case, additional works carried out only due to “force majeure” events and instructions of Indian Oil Corporation Limited vis-a-vis issuance of four change orders withdrawing from the original contract, i.e., additional works carried out for many reasons. For the reasons given in the four change orders, thus, it cannot have the same pedestal and parity by filing writ and as well as the civil suit pending qua other contract. The petitioner has no other option but to issue the no claim certificate for the purpose of releasing the final payment, in essence the petitioner had under the economic duress has no other option but to issue no claim certificate despite there being no contractual mandate, in essence there was no requirement under the contract to provide no claim certificate.

The Indian Oil Corporation vide letter dated 17.3.2008 (Annexure P-9 colly) had given a hope/rather put the petitioner on a ventilator by informing that the time extension claims will be taken up only after completion of the project, but thereafter volte-faced and rejected the same by branding it to be not tenable. The contents of the letter dated 17.3.2010 read thus:-

"ENGINEERS

INDIA LIMITED

(A Govt.India Undertaking)

No.ELC/MB/L/6556/EPCC-12A/318/ March 17, 2010

M/S MSK PROJECTS (INDIA) LIMITED

707, Sterling Centre,

R.C.Dutt Road, Alkapuri,

Baroda-390005

ATTN: Mr.Ashok Khurana, Director.

Sub:- Non Plant Buildings (EPCC-12A)-PNCP-Job No.6556-Extra Claim for civil works of foundations due to change in Soil Bearing Capacity.

Dear Sir,

This has reference to your letter no.EPCC:12A:letter.doc:p:7 dated 28.12.2009 submitting extra claim for civil works due to the change in the soil bearing capacity.

In this regard, please note that your Time Extension claims will be taken up only after completion of the project.

You are also required to provide the adopted Soil Bearing Capacity in the Design Philosophy of all the four buildings in the EPCC 12A package to enable processing of your claim on extra cost.

This is for your information and necessary action at your end.

Thanking you,

Very truly yours,

(M.Banerjee)

Sr.Manager (P)."

It is clear cut violation of doctrine akin to legitimate expectation.

The chart, which is being reproduced herein below, is indicative of the fact that the petitioner had incurred additional cost owing to the demand of respondent No.1 for supply of increased manpower occupancy requirement leading to construction of the increased area, which have not been denied by the respondents in any of the letters, but in one line that it is not tenable:-

S.No.	*EPCC 12 A*
1	Construction of Non-Plant Buildings (for Panipat Naphrtha Cracker Project, Panipat
2	FOA issued on 22nd October, 2008
3	Contract Duration: 20 months
4	Contract value of Rs.161,02,82,316/-
5	Additional works carried out for many reasons mainly due to issuance of 4 Change orders differing from the original contract schedule and works
6	IOCL levied Price Reduction of 10% of contract value i.e. Rs.16,10,28,232
7	EIL's stand was that final bill was processed and no further correspondence would be entertained.
8	This final bill unjustifiably held back by IOCL until submission of an unconditional No claim certificate. We submitted No claims certificate ate under duress and coercion
9	Administrative Building received 1Greem Building' award from Indian Green Building Council (GBC) in October 2012

Thus, there cannot be any disputed question of fact on the amount also. A cumulative reading of the aforementioned facts, leads to an irresistible conclusion that the respondents, in my view, have not been justified in imposing 10% deduction/cut on the final payment, resulting into incurring of extra cost at the behest of the petitioner.

Resultantly, the stand of the respondents in the written statement and as well as the letters, particularly letter dated 4.11.2016, is thus not tenable and not justified in law. The same in my view is opaque and against the doctrine akin to legitimate expectation. Thus, in terms of the observations given in **Godavari Sugar Mills Ltd. (supra),** a direction is issued to the respondents for payment of money as it is an enforcement of the statutory function of the State or its officers as sought in the representation Annexure P-23 dated 24.8.2016 and Annexure P-24 dated 14.2.2017 along with interest @ 9% per annum.

The writ petition stands allowed.

April 7th , 2017 **(AMIT RAWAL)**
ramesh **JUDGE**

Whether speaking/reasoned **Yes/No**

Whether Reportable: **Yes/No**