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

+ **O.M.P. 654/2009**

INDIAN OIL CORPORATION

..... Petitioner

Through: Mr. Rajshekhar Rao, Mr. Tanuj Bhushan,
Ms. Gauri Puri & Mr. Aneesh Gupta,
Advocates.

versus

G.S. ATWAL & CO. (ENGINEERS) PVT. LTD.

..... Respondent

Through: None.

CORAM: JUSTICE S. MURALIDHAR

ORDER

25.01.2017

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1. The challenge in this petition under Section 34 of the Arbitration & Conciliation Act, 1996 (Act) filed by the Indian Oil Corporation Ltd. (IOC) is to the Award dated 10th July, 2009 passed by the learned sole Arbitrator in the disputes between IOC and G.S. Atwal & Co. (Engineers) Private Limited arising out of a contract awarded to the Respondent for civil works at the Panipat Marketing Terminal of IOC.

2. According to IOC, the Respondent delayed the work by 247 days, i.e., 8 months 5 days, beyond the contractual time period. According to IOC, it was entitled to recover liquidated damages (LD) as mandated by Clause 4.4.0.0 of the General Conditions of the Contract (GCC) in the tune of 10% of the contract value from the last and 10th Running Account (RA)/final bill.

3. By the impugned Award, the learned Arbitrator has held that IOC was not entitled to claim LD and has held that the said amount is to be paid to the Respondent together with simple interest both for the *pendente lite* and post Award periods.

4. Mr. Rajshekhar Rao, learned counsel appearing for IOC, first pointed out that the Award was reserved on 20th January, 2007, whereas it was pronounced only on 10th July, 2009. This according to him vitiates the Award. Secondly, on merits it was submitted that the learned Arbitrator erred in holding that withholding of LD by IOC was contrary to Clause 4.4.0.0 of the GCC. Mr. Rao submitted that there was a requirement for the learned Arbitrator to have decided the dispute in terms of the contract as mandated by Section 28(3) of the Act.

5. None appeared on behalf of the Respondent. Its written synopsis has been considered by the Court.

6. Clause 4.4.0.0 and clause 4.3.5.0, which are relevant in the present case read as under:

“Clause 4.4.0.0

If there is any delay in the final completion of the work at any job site or specific works in respect of which a separate Progress Scheduled has been established, beyond the date for the final completion of the work or works aforesaid at job site as stipulated in the Progress Scheduled. The owner shall (without prejudice to any other right of Owner in this behalf) be entitled to reduction in price 1/2% (one-half per cent) of the total contract value for each week of delay or part thereof limited to a maximum of 10% (ten per cent) of the total contract value.”

“Clause 4.3.5.0

Within 7 (seven) days of the occurrence of any act, event or omission which, in the opinion of the Contractor, is likely to lead to delay in the commencement or completion of any particular work(s) or operations(s) or the entire work at any job site(s) and as such it would entitle the Contractor for an extension of the time specified in this behalf in the Progress Schedule(s), the Contractor shall inform the Site Engineer and the Engineer-in-Charge in writing of the occurrence of the act, event or omission and the date of commencement of such occurrence. Thereafter, if even upon the cessation of such act or event or the fulfilment of the omission, the Contractor is of opinion that an extension of the time specified in the Progress Schedule relative to any particular operation(s) or item(s) of work of the entire work at any job site is necessary, the Contractor shall within 7 (seven) days after the cessation or fulfilment as aforesaid make a written request to the Engineer-in-Charge for extension of the relative time specified in the Progress Schedule, and the Engineer-in-Charge may at any time prior to completion of the work extend the relative time of completion in the Progress Schedule for such period(s) as he considers necessary, if he is of opinion that such act/event/omission constitutes a ground for extension of time in terms of the Contract and that such act/event/omission has in fact resulted in insurmountable delay to the Contractor. The opinion/decision of the Engineer-in-Charge in this behalf and as to the extension necessary shall, subject to the provisions of Clause 4.3.6.0 hereof be final and binding upon the Contractor.”

7. Apart from the above clause 4.3.6.0 provides that IOC could on its own grant extension of time (EOT).

8. A letter dated 20th February, 1996, was addressed by the Respondent to the Resident Construction Manager, Engineers India Limited, Panipat, listing out the reasons why the work could not proceed. This included unprecedented heavy monsoon; delay in handing over of the areas; non-

availability of truck parking area; non-availability of earth from the local excavation site and so on. Extension was granted in the first phase till 31st May, 1996 and thereafter till 30th September, 1996 on condition of furnishing provisional bank guarantee. However, from the letters of grant of EOT it was clear that there was no waiver of the LD.

9. The learned Arbitrator did not come to a finding that IOC was wholly responsible for the delay in completion of the works. On the other hand, the learned Arbitrator found that “delay has been on the part of the claimant as well as on the part of the Respondents.” The act of the IOC reserving to itself the right to claim damages while granting EOT was termed by the learned Arbitrator as “routine.” It was then observed that “.....but when partly blame is also on the Respondent and work sites were not clear, areas were not made available the claimant could not be expected to adhere to the time schedule.” It was held that in such circumstances IOC would not be entitled to enforce its right under clause 4.4.0.0 and it could not seek to recover damages.

10. In coming to the above conclusion, the learned Arbitrator appears to have deviated from the wording of Clause 4.4.0.0. Under Section 28(3) of the Act, the Arbitrator was to be conscious of and give a decision consistent with the terms of the contract. Unless the parties have authorised him to do so, the learned Arbitrator cannot in terms of Section 28(2) of the Act decide the issue *ex aequo et bono* or as *amiable compositeur*.

11. In that view of the matter the Court holds denial by the learned

Arbitrator of the right of the IOC to recover LD was not supported by the express terms of the contract or by the statute. In view of the above finding on merits, the Court does not consider it necessary to examine whether the time period of two years in pronouncing the Award is such as to vitiate the Award.

12. The Court, therefore, sets aside the impugned Award in so far as it has allowed the claim of the Respondent on the aspect of LD. The corresponding grant of interest on such amount to IOC by the learned Arbitrator is also hereby set aside.

13. The petition is disposed of in the above terms but in the circumstances with no orders as to costs.

S. MURALIDHAR, J.

JANUARY 25, 2017

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