

type 'D' quarters comprised in 26 three storey buildings in the same campus at Aswapuram, Khammam District, Andhra Pradesh. The Respondent submitted its tender. Having found it to be the lowest bidder, on 27 November 2007, a Letter of Intent (LoI) was issued by the Petitioner to the Respondent. This was followed by a formal work order dated 28 December 2007. On 5 January 2008, the Respondent commenced the work at site. On 4 July 2009, the Respondent requested for extension of time upto 28 February 2010 for completion of the work. In between, correspondence ensued between the parties. The Petitioner took up a position that the progress of the work was not upto the mark and if proper progress was not made and the work was not completed in time, action for rescinding the contract would be initiated under Clause 3 of General Conditions of Contract ("GCC"). The Petitioner, nevertheless, by its order dated 31 August 2009, extended the time for completion of work upto 31 January 2010 subject to levy of compensation under Clause 2 of GCC. Finally, the work was completed by the Respondent on 15 June 2010. The Petitioner, on its part, granted extension of time upto that date, subject again to levy of compensation under Clause 2 of GCC. The mechanism for levy of compensation, including show cause notice under Clause 2 of GCC, was thereupon initiated by the Petitioner. Finally, by its letter dated 2 December 2010, the Petitioner informed the Respondent about the levy of compensation. The Respondent protested against such levy and signed the final bill prepared by the Petitioner under protest. Since the controversy pertaining to the Respondent's dues under the final bill and levy of compensation could not be resolved between the parties, the Respondent invoked the arbitration agreement forming part of the contract and that is how the reference was made to the sole arbitrator. The learned arbitrator,

by his award dated 18 January 2013, awarded the Respondent's claim in the sum of Rs.52,01,581/-. On 15 February 2013, a correction was made in the award. The corrected amount was Rs.52,03,619. There were in all ten claims made by the Respondent-contractor, out of which four were allowed in the sum referred to above. These related to refund of compensation levied for delay in completion of work, balance payment of escalation cost, interest and costs of arbitration. The Petitioner's counter claims were rejected by the learned arbitrator. This part of the award is the subject matter of challenge in the present petition.

3 Mr. Chavan, learned Senior Counsel appearing for the Petitioner, at the outset, submits that the Respondent-contractor not having made any demand for arbitration in respect of its claims in writing within 90 days of receipt of the intimation about the final bill being ready for payment, under Clause 25 of GCC, its claims are deemed to have been waived or absolutely barred and the Petitioner is discharged and released of all liabilities under the contract in respect of these claims. The arbitrator held that having regard to Section 28(b) of the Contract Act, the provision of discharge of liabilities contained in Clause 25 of GCC was void; the reference was accordingly governed by the ordinary law of limitation, i.e. Article 137 of the Limitation Act, which provided for a period of limitation of three years. The arbitrator held that the claimant having applied for reference and filed its claim within three years from the date of acceptance of the final bill (such acceptance being of 24 December 2010), the invocation was within time. The learned arbitrator has come to a perfectly reasonable conclusion having regard to the provisions of Section 28 of the Contract Act and Article 137 of the Limitation Act, read with Section 43 of the

Arbitration and Conciliation Act, 1996 (“Act”). Under Section 43 of the Act, the Limitation Act applies to arbitration, as it does to proceedings before a court. Arbitration is deemed to have commenced on the date referred to in Section 21 of the Act, i.e. the date on which a request for disputes to be referred to arbitration is received by the Respondent. It is not disputed that the date of commencement in the present case is “11 August 2011”. That date is within three years of payment of the final bill, i.e. 27 May 2011. There being no period of limitation provided elsewhere in the schedule, so far as the claim herein is concerned, Article 137 of the Schedule to the Limitation Act applies to the present case. The present reference, having been commenced within three years from the date of accrual of the right to sue is, thus, within time. Clause 25 of GCC, which provides for a restricted period of 90 days from the date of receipt of intimation from the employer that the final bill is ready for payment, for making of a claim, and for deemed waiver and absolute bar of such claim or discharge and release of liabilities on the part of the employer if the claims is not so made, is clearly void under Section 28 of the Contract Act. Under clause (b) of Section 28, every agreement which extinguishes the right of any party thereto, or discharges any party thereto from any liability under or in respect of any contract, on the expiry of a specified period so as to restrict any party from enforcing his right, is void to that extent. Clause 25 of GCC, to the extent it extinguishes the contractor's right or discharges the employer from any liability under or in respect of the contract on the expiry of 90 days from the date of notice of readiness of the final bill, is clearly void under clause (b) of Section 28.

4 Coming now to the individual claims and particularly, the claim for

refund of compensation levied for delay, learned Counsel for the Petitioner submits that having regard to Clause 2 of GCC, the learned arbitrator could not have awarded refund of compensation to the Respondent-contractor. The arbitrator's award in this behalf proceeds on the footing that though Clause 5 of GCC provides for extension of time, Clause 2, which provides for extended date of completion, gives an indication that time was not the essence of the contract and in the premises, the Petitioner's action in imposing levy of compensation at the final bill stage was in contravention, and against the basic spirit and tenet, of Clause 2 of GCC. The arbitrator held that compensation for delay, if at all, had to be levied at the relevant stages; only then the action would have the righteous connotations. The learned arbitrator relied on the judgment of Andhra Pradesh High Court in the case **T.A. Chaudhary Vs. State of A.P.**¹ and considered the extensions granted by the Petitioner to the Respondent in that light. The learned arbitrator, after taking into account evidence placed by the parties before him, came to a categorical conclusion that though the Petitioner had averred that compensation levied was as per the contractual provisions, ostensibly attributing delays on the claimant's part (i.e. on the part of the Respondent herein), it was silent on the delays not attributable to the claimant, which, according to their own submission, covered about five months. The arbitrator was also of the view that whilst working out such delays, the Petitioner had not made any allowance for the time for shifting of CI water line and had allowed a very marginal time for excavation of hard rock foundation; the arbitrator did not find this justifiable and was of the view that it would be reasonable to allow additional one month's time towards these two activities. The arbitrator essentially appears to have

1 2004(3) ALD 357(DB)

proceeded on the footing that time was not essence of the contract.

5 The arbitrator appears to have clearly disregarded the work order issued by the Petitioner to the Respondent on 27 December 2007, which stated in terms, in Clause 4.0, that time was of essence of the contract. The date of commencement of the work was to be reckoned from 15th day from the date of the work order and all works were to be completed in all respects within 18 calendar months from that date. The clause required the contractor to take immediate action for mobilisation of required men, machineries and materials and submit within two weeks of the date of the work order a bar chart representing each event in a proper sequence of occurrence in number of days. The work order formed part of the contract for the purposes of Clause 2 of GCC. Clause 2 of GCC required that if the contractor failed to maintain the required progress in terms of Clause 5 or to complete the work and clear the site on or before the contract or extended date of completion, he would, without prejudice to any other right or remedy available under the law to the employer on account of such breach, pay as agreed compensation the amount calculated at the rates stipulated or such smaller amount as the Superintending Engineer (whose decision in writing was to be final and binding) may decide on the amount of tendered value of the work for every completed day/week (as applicable) that the progress remained below what was specified in Clause 5 or that the work remained incomplete. The clause indicated that if the completion period (as originally stipulated) did not exceed three months, the compensation would be 1 per cent per day, provided always that the total amount of compensation for such delay should not exceed 10 per cent of the tendered value of the work. Schedule "F", forming part of the

contract, provided for detailed financial progress stage-wise and time allowed from the date of start for such stages. The financial progress and time allowed for stage-wise work were stipulated in the following terms :

Sr. No.	Financial Progress	Time allowed (from date of start)	Amount to be withheld in case of non achievement of milestone
1	1/8th (of whole work)	1/4th (of whole work)	In the event of not achieving the necessary progress as assessed from the running payments, 1 % of the tendered value of work will be withheld for failure of each milestone.
2	3/8th (of whole work)	1/2 (of whole work)	
3	3/4th (of whole work)	3/4th (of whole work)	
4	Full	Full	

6 In the face of these provisions, it was not open to the learned arbitrator to interfere with the levy of compensation by the Petitioner. The arbitrator's conclusion that time was not the essence of the contract can only be termed as an impossible conclusion. The conclusion appears to have been arrived at by completely disregarding crucial contractual documents, namely, work order providing for time as essence of the contract and Schedule 'F' providing for stage-wise progress of the contract work. These two documents, both having a crucial bearing on the controversy, have been wholly lost sight of by the arbitrator. These documents read with the contractual stipulation of Clause 2 of GCC make it clear that it was the Engineer whose decision in writing was to be final and binding so far as the amount of compensation to be levied under Clause 2 of GCC was concerned. In case the contractor did not maintain the required progress or delayed completion of work beyond the

contractual or extended date of completion, the Engineer could direct such levy upto a specified limit. It is not in dispute that the arbitrator did find delay on the part of the contractor. It is also not in dispute that whilst extending the date of completion, the Petitioner had put the Respondent-contractor to notice that extension was being granted subject to compensation to be levied under clause 2 of GCC. Each extension letter issued to the contractor did make a specific reference to Clause 2 of GCC and reserved the employer's right to recover compensation under its provisions. The compensation finally levied by the Engineer was communicated before the final bill was prepared and paid to the Respondent-contractor. The arbitrator, in the premises, could not have ordered refund of the compensation.

7 The contract did provide for a sum payable in case of a default and left it to the Engineer to decide its quantum whilst specifying an upper limit beyond which no levy was permissible. This was in keeping with the law of damages contained in Sections 73 and 74 of the Contract Act. The Engineer did take an informed decision and the arbitrator has not found the amount of compensation levied as excessive or unreasonable.

8 Coming now to the escalation awarded by the learned arbitrator to the Respondent, though Clause 10 CC of GCC made the escalation provision applicable only for work done during the stipulated period of contract and not for work executed in the extended period, the arbitrator held that the Special Conditions of Contract ('SCC') would have precedence over GCC and accordingly, under para 4.26 of SCC, the contractor became eligible for payment of escalation even during the extended period of

contract if the delays were not attributable to him. Clause 4.26 of SCC made it clear that Clause 10 CC of GCC was applicable to the period of construction and for application of Clause 10 CC, components of cement, steel, material, labour and POL indicated therein were pre-determined for building works including sanitary and water supply. The respective components and their percentages compared to the total value of work were outlined in Clause 4.26 of SCC. The note appended below these components and percentages required the bidder to note that *“the subject clause shall not be applicable for the period beyond stipulated period of completion if the delay is attributable to the contractor.”* What this clause, and particularly the caution note for the bidder stated in it, implied was that the subject clause was not applicable for the period beyond the date of completion, if the delay was attributable to the contractor. This negative command does not, however, indicate that if the delay is not attributable to the contractor, compensation under Clause 10 CC would become payable even if the work were to be executed during the extended period of the contract. Clause 10 CC, which governs field, makes it clear that no escalation costs shall be paid for the work executed in extended period even if such extension of time is granted without any action under Clause 2. Clause 10 CC also provides that no compensation shall be payable for work for which the stipulated period of completion is 18 months or less. In the present case, in the first place, the extension of time was granted with an action under Clause 2 and, secondly, the stipulated period of completion under the contract was 18 months and accordingly, no compensation was payable under under Clause 10 CC. In the face of this absolute restriction in the contract, which the arbitrator was necessarily bound to adhere to as a creature of the contract, no escalation could have been ordered for the

extended period of contract. The arbitrator was contractually restrained from awarding any compensation on this count. The arbitrator's conclusion that notwithstanding the mandate of Clause 10 CC of GCC, the escalation became payable under para 4.26 of SCC, the latter having precedence over the former, is clearly an impossible conclusion. No fair or judiciously minded person could have arrived at such conclusion on the basis of the contractual provisions referred to above.

9 Since the award of interest is clearly relatable to the two claims, i.e. claims for refund of compensation levied and escalation, ordered by the learned arbitrator, and the award on both these claims being liable to be set aside, the award on interest will also have to be set aside. So also, the award on the arbitration costs, since both claims of the Respondent-contractor are liable to be rejected.

10 In the premises, the arbitration petition is allowed by setting aside the impugned award.

ARBITRATION PETITION NO.1109 OF 2016

11 This companion petition is filed by the Respondent-contractor challenging the award on its rejected claims. At the hearing of the petition, the challenge is restricted to Claim No.6, i.e. overhead establishment expenses due to undue prolongation of work together with interest, which was rejected by the learned arbitrator. The claim was rejected on the ground that the claimant had not proved having deployed adequate resources by way of shuttering material, manpower, i.e. labour as well as technical/engineering staff, etc. This is essentially a matter of fact. The

arbitrator observed that submissions of the employer in this behalf were not disputed by the claimant contractor, particularly concerning the minutes of meeting and shortfall of progress. The arbitrator also noted that this position was brought to the notice of the claimant time and again and the claimant was party to the relevant minutes of meeting; and as such prolongation of work was also the result of inadequate deployment of resources by the claimant, apart from the delays attributable to the Respondent-employer. In the premises, the view taken by the learned arbitrator on the contractor's entitlement to receive compensation on account of overhead establishment expenses caused by undue prolongation of work, is clearly a possible view on the material placed before him. Such overhead establishment expenses could be granted to the contractor only if he could satisfy the arbitrator of having deployed adequate resources. This basic fact having been found by the arbitrator against the contractor, there was no question of allowing any claim towards infructuous overhead establishment expenses due to undue prolongation of work. Accordingly, this part of the award does not suffer from any infirmity within the parameters of Section 34 of the Act.

12 As regards Claim No.5, which was for interest on delayed payment of final bill, the contractor's claim was rejected on the ground that he was not in the habit of submitting monthly RA bills and did not even submit a final bill within time. The arbitrator observed that the employer had prepared the bill which was accepted by the contractor on 24 December 2010. The arbitrator found that payment of the final bill, which was made on 27 May 2011, was within six months of its preparation and acceptance and there was accordingly no delay in payment of the final bill. The refund

clause, namely, Clause 7, which provides for settlement of payment of final bill, requires the employer to pay the final bill within six months in case the final bill exceeds Rs.2 lacs. In the present case, it is not in dispute that the final bill exceeded Rs.2 lacs. Accordingly, there is no merit in the challenge.

13 In the premises, the companion petition, namely, Arbitration Petition No.1109 of 2016, is dismissed.

(S.C. GUPTE, J.)