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

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Date of decision: 13.11.2019

+ O.M.P. (COMM) 469/2019

KHAZANA PROJECTS & INDUSTRIES

..... Petitioner

Through: Mr. Rajshekhar Rao, Mr. Siddharth
Joshi & Mr. Akshay Ringe, Advocates

versus

INDIAN OIL CORPORATION LIMITED

..... Respondent

Through: Mr. Raman Kapoor, Sr. Advocate
with Ms. Tannishtha Singh & Mr.
Abinash Agarwal, Advocates.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J. (ORAL)

I.A. 15661/2019

Exemption allowed, subject to all just exceptions.

Application stands disposed of.

I.A. 15662/2019

1. This application has been filed seeking condonation of 24 days delay in re-filing the petition.
2. For the reasons stated in the application, the same is allowed and the delay of 24 days in re-filing the petition is condoned.
3. Application stands disposed of.

O.M.P. (COMM) 469/2019

1. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') seeking to set aside the award dated 28.08.2012 passed by the learned Sole Arbitrator.
2. The petitioner and the respondent entered into a contract dated 11.06.1996 for carrying out the work of 'area development work in tank farm and pump station premises at Haldia'.
3. Petitioner is a Company incorporated under the Companies Act and the respondent is the Indian Oil Corporation Limited. Disputes having arisen between the parties, Arbitrator was appointed by an order dated 20.02.2001 in AA No. 376/1998. In the statement of claim filed by the petitioner, the following claims were made:-

SL. NO.	DESCRIPTION OF CLAIM	CLAIM AMOUNT (in Rs.)
1.	Claims on account of delay in handing over the clear sites of work to the Petitioner by the Respondent.	1,09,96,500.00
2.	Claims for reimbursement of royalty.	3,13,675.00
3.	Claims for reimbursement of rates.	59,84,857.00
4.	Claim towards outstanding accepted dues of the fourth R. A. Bill.	14,96,214.00
5.	Claim towards partly executed quantity under Item 2.	11,10,435.56
6.	Claim towards refund of Security Deposit/Retention Money.	19,83,063.00
7.	Claim towards losses and	60,00,000.00

	damages suffered due to illegal and wrongful termination of the Contract.	
8.	Claim towards loss of profit.	15,75,008.00
9.	Claim on interest.	As Accrued

4. The respondent had raised certain counterclaims which are as under:-

- a) Respondent claimed a sum of Rs. 88.63,068.03/- towards the difference between the total cost of the work executed and the value of the work if the petitioner would have completed the work;
- b) The respondent sought Rs. 35,10.699.36/- towards respondent's supervision charges for getting the work done at the risk and cost of the petitioner;
- c) The respondent sought Liquidated Damages @10% according to Clause 4.4.0.0 of the GCC, which amounted to Rs. 38,36,680.96/-;
- d) The respondent adjusted an amount of Rs. 14,96,214.96/- due towards the 4th RA Bill of the petitioner;
- e) The respondent claimed interest @14% from 04.12.1999 till institution of the counter claims;
- f) The respondent claimed *pendente lite* interest @ 21% per annum;
- g) The respondent claimed interest on the amount awarded @ 21% per annum from the date of the Award till the date of payment in full;
- h) Further, cost of the arbitration proceedings was also claimed by the respondent.

5. The learned Arbitrator after hearing the parties and examining the documents and evidence on record, passed an Award on 28.08.2012.

6. As the case of the petitioner goes, the tender conditions required the work to be executed within a period of 10 months. The petitioner was declared a successful bidder and was awarded the work through a Letter of Acceptance dated 31.05.1996. The Letter Of Acceptance (hereinafter referred to as 'LOA') contained the value of the security deposit required to be deposited as well as the time period of completion of the work to be eight months reckoned from the date of issue of specific notice of commencement of work by the Engineer-in-Charge.

7. As per the petitioner the obligation to complete the work within the period stipulated necessarily implied that the entire site together with necessary drawing would be made available to the petitioner on the date of commencement of the work and there would be no hinderances on account of the respondent. Prior to the LOA there were discussions between the parties and it was decided that the work would be completed within eight months from the date of handing over of the clear site to the petitioner for earth filling. The same being subject to other conditions in the LOA.

8. The respondent through its letter dated 17.08.1996, after two and a half months of the LOA intimated that commencement of work would be reckoned from 17.08.1996 though the site had not been handed over by then. The petitioner through letter dated 28.08.1996 immediately informed the petitioner that the petitioner would not in a position to commence the work as per the dead line since the clear site had not been handed over and there were certain other hindrances on the site. In fact, the petitioner avers that throughout the period of the work, clear site was not handed over and in major duration of the work, the site was submerged under water. Correspondences were thereafter exchanged between the parties with respect

to hindrances on the site.

9. As per the petitioner, the disputes were finally resolved only on 17.12.1996 and it was agreed that filling was to start from 25.09.1996 and the work in full swing from 01.01.1997. The petitioner assured completion of the work by end of May, 1997. The Petitioner avers that it commenced the work of initial ground levels in the last week of December, 1996 which is substantiated by respondent's own letter dated 10.01.1997. Thereafter, however, there was unprecedented rain and the entire site was submerged in water, which led to the stopping of the work. After the said hinderance subsided, the transport vehicles of the petitioner were seized by the local police, without any reason. The petitioner also avers that, thereafter, certain disputes arose with regard to variation in certain drawings and this prevented the petitioner from completing the work.

10. The respondent however issued a notice dated 29.03.1997, calling upon the petitioner to show cause why the contract be not terminated and the balance work executed through another agency, at the risk and cost of the petitioner.

11. The petitioner responded pointing out that the delay was on account of the hinderances by the respondent and non-availability of site. The petitioner vide its letter dated 02.05.1997 requested the respondent to consider the date of commencement as 25.12.1996 when the actual site was handed over and sought the release of legitimate payments on the basis of joint measurements. The petitioner also simultaneously resumed work at site but faced another problem wherein the Kolkata Port Trust refused to provide the earth for filling the adjoining areas.

12. The respondent finally repudiated the contract which was accepted by

the petitioner vide its letter dated 09.07.1997, but the petitioner offered to execute the further work on modified rates. By letter dated 17.07.1997 the respondent informed the petitioner that the last chance was being afforded to mobilise and commence the work within 7 days. Finally, the contract was terminated by the respondent vide letter dated 30.08.1997. The respondent without carrying out any final measurements of the work executed by the petitioner awarded the balance work to two other contractors.

13. The petitioner vide its letter dated 11.09.1997 sought reference of dispute to arbitration and on their failure approached this Court for appointment.

14. The learned arbitrator vide its award dated 28.08.2012 disallowed all the claims of the petitioner and awarded a sum of Rs. 12,10,868.51/- against the counterclaims raised by the respondent with interest @ 10% thereon with effect from 04.12.1999 till the date of payment and also awarded cost of Rs. 5,29,440/- in favour of the respondent.

15. Learned counsel for the petitioner contends that the Arbitrator has erred in its order dated 03.10.2003 in holding that all claims of the petitioner other than claim No. 7 were arbitrable so far as they related to a period with effect from 10 days prior to the notification of the claim. He submits that this is against the contractual provisions. The Arbitrator failed to appreciate that Clause 6.6.1.0 on which it has placed reliance is void under Section 28 of the Contract Act. As per Section 28 any clause in a contract which extinguishes the right of any party to enforce its rights is void to that extent. Clause 6.6.1.0 provides that if the claims are not notified within 10 days the rights extinguish and this is exactly what Section 28 prohibits.

16. The next contention of the petitioner is that the contract was of a

nature which involved reciprocal obligations of both parties. The respondent failed to provide a clear and hinderance free site to the petitioner. The Arbitrator did not take cognizance of the various letters written by the petitioner dated 28.08.1996, 06.09.1996 and 11.09.1996 showing non-availability of clear site either on account of flooding or occupation by cultivators of paddy crops. Since there were impediments created by the respondent, the petitioner could not be penalized for not adhering to the timelines. The event of flooding of the site was beyond the control of the petitioner. It was not on account of a normal monsoon effect but much beyond that. This prevented not only the excavation work but also carrying out spot measurements.

17. It is further argued that the Arbitrator has erred in proceeding on the basis that the period of completion of work was 8 months from the date of notice of commencement of work issued by the respondent on 17.08.1996 and that the petitioner had failed to adhere to the time line. It is submitted that this finding is contrary to the records in as much as in the bid documents it was clearly mentioned that the period of completion was 10 months. Thus, the Letter of Acceptance which provided a period of 8 months could not be the basis of coming to a finding that the timeline was 8 months.

18. Learned counsel next contends that the counterclaims have been wrongly awarded to the respondent, although the procedure of awarding the risk and cost contract has not been followed. The respondent on termination of the contract was required to carry out final measurements under Clause 7.0.4.0 and prepare a final Bill indicating the final extent of the work executed by the petitioner. In the absence of this, no contract for balance work could have been awarded.

19. The further argument pressed by the learned counsel for the petitioner is that the counterclaim of Liquidated Damages has been wrongly allowed in favour of the respondent. The claim for Liquidated Damages arises out of Clauses 7.0.9.0 read with clauses 4.4.0.0 and 4.4.1.0 and was pre-estimated at 5% of the total contract value. It is submitted that the Arbitrator has given no reason or justification for awarding Liquidated Damages and the cardinal principles of Sections 73 & 74 of the Contract Act have been overlooked. Liquidated damages can be awarded for breach of contract and must be a genuine pre-estimate of the damages. A penal stipulation cannot be enforced in view of the fact that the essence of penalty is a payment of money in terrorem of an offending party.

20. No other argument was addressed by the petitioner.

21. Learned counsel for the respondent on the other hand argues that, in so far as the decision of entertaining the notified claims for a period beyond 10 days is concerned, the said order was passed by the Arbitrator way back in the year 2003 and was never challenged by the petitioner. Learned senior counsel further submits that all the arguments which are being sought to be argued are in the nature of appreciating the evidence before the Arbitrator or interpreting the clauses of the contract, which is beyond the domain of this Court, in a petition under Section 34 of the Act. The parameters of the judicial review in a petition under Section 34 of the Act have been clearly laid down in various judgments by the Supreme Court and various High Courts. Reliance is especially placed on the judgment of the Supreme Court in the case of *McDermott International Inc. vs. Burn Standard Co. Ltd. and Ors.* (2006) 11 SCC 181 and *Associate Builders vs. Delhi Development Authority* (2015) 3 SCC 49.

22. I have heard the learned counsels for the parties.

23. The learned Arbitrator by its detailed order dated 03.10.2003 had adjudicated the objection of the respondent that all the claims referred by the petitioner were not arbitrable as they were neither notified claims nor included in the petitioner's final bill in terms of clause 6.6.3.0. Claim No. 1 was notified on 27.11.1997, Claim No. 3 was notified on 06.05.1997 and was held arbitrable with effect from 10 days before 06.05.1997. Claim Nos. 2, 4, 5 and 6 were held arbitrable but claim No. 7 was not held arbitrable. The Arbitrator had passed this order on 03.10.2003 but the petitioner did not challenge the said order and proceeded with the arbitration on the said basis. In my view it is rightly contended by the respondent that it is not even open to the petitioner at this stage to contest the question of arbitrable claims, having accepted the said order of the Arbitrator in 2003. There is thus no merit in the first objection of the petitioner.

24. As regard the arguments that Clause 6.6.3.0 is contrary to Section 28 of the Contract Act as the rights of a party to raise claims cannot be extinguished, suffice would it be to state that the parties entered into the contract with open eyes. It was agreed that certain claims would be treated as notified claims and the time line for their notification was also fixed. If the petitioner chose not to notify the claims in the manner stipulated in the contract and include the same in the final bill, as per the time stipulated, no error can be found with the order of the Arbitrator. The contract was entered into by a mutual agreement between the parties and it is thus not open to the petitioner to now challenge that the said provision is contrary to Section 28 of the Contract Act. Even otherwise there is no merit in this contention. In this context, it is significant to note that two Co-ordinate Benches of this

Court have held that claims which are required to be notified under the provisions of the contract and included in the final bill but are not so notified by the claimant cannot be referred to arbitration. The said judgments are in the case of *Srico Projects vs. IOCL*, 2017 SCC OnLine Del 6446 and *Institute of Geoinformatics vs. IOCL*, 2015 SCC OnLine Del 9562.

25. A Division Bench of this Court in the case of *Indian Oil Corporation Limited vs. Institute of Geoinformatics Pvt. Ltd.* 2018 VIII AD (Delhi) 148 was examining the issue whereby the Arbitrator had adjudicated the claims which were not 'notified' in terms of the provisions of the contract between the parties. The Court held that the Arbitrator had no jurisdiction to adjudicate the claims which are not 'notified' and the relevant portion of the judgment reads as under;-

"6. ...15. It is quite clear that the disputes which are subject matter of claims No. 1, 3, 4 and 5 were not arbitrable. This court while disposing of the arbitration petition under Section 11(6) of the Act on 19.05.2015 had specifically held so. In the light of this, there was no reason for the learned Arbitrator to have gone ahead and adjudicated upon those disputes. The impugned Award to the extent that it deals with claims No. 1, 3, 4 and 5 is held to be entirely illegal. The same has been passed contrary to the provisions of the Act. The Award to the extent it deals with claims No. 1, 3, 4 & 5 is set aside. Rest of the Award is upheld.

16. Petition stands disposed of. Liberty is granted to the respondent to take steps as per law regarding its claims No. 1, 3, 4 & 5."

7. The IOC, which is the appellant, urges that though its argument with respect to arbitration by the tribunal of excluded matters, succeeded, the result is piquant; it is left facing an adverse award to the tune of ` 4.2 lakh and costs in

excess of ` 32 lakhs, for which no reason is ascribed by the tribunal. Learned counsel for the respondent Institute urged that the IOC's submissions were long drawn and it was compelled to engage counsel and incur significant expense. He also urged that the tribunal, in the award has indicated sufficient reasons for granting the costs in this case.

8. This court notices that there was practically no controversy with respect to the phraseology of the subject matter exclusion; clearly the plain words of the terms (of contract) and the interpretation given by this court referring the dispute, precluded any adjudication in arbitration. If the claimant Institute had a grievance, it was well within its right to have sought remedies in accordance with law. The tribunal's reasoning in brushing aside the non arbitrability conditions were specious; the learned Single Judge therefore was justified in holding otherwise, as the findings amounted to patent illegalities within Sections 28 and 34 of the Act. The tribunal unfortunately proceeded to ignore the clear and express terms and gloss over this court's order; in doing so, and in adjudicating claim nos. 1, 3, 4 and 5, it fell into error, because it never had the jurisdiction to decide those in arbitration. Such being the case, it was not justified at all in penalizing IOC with substantial and heavy costs for such adjudication-to the extent of ` 32,89,924/-; the same is hereby set aside. The appeal FAO (Comm.) 189/2017 is allowed to the above extent. FAO (Comm.) 197/2017 is for the above reasons, dismissed."

26. Thus, in my view there is no merit in this contention of the petitioner.

27. In so far as the contention of the petitioner that the stipulated period of completion should have been 10 months and not 8 months is concerned, the same only deserves to be rejected. No doubt in the bid documents, the period of completion was referred to as 10 months and in the Letter of Acceptance the time stipulated was 8 months but there cannot be any doubt on the proposition that once the bids are invited and any negotiations between the

parties result into an issue of Letter of Acceptance with certain conditions, the conditions in the Letter of Acceptance cannot be given a go by. The petitioner can hardly argue that the stipulations in the Letter of Acceptance which came after the bid documents would be meaningless. In any case, the Arbitrator has analysed the question of what was the time period for completion of the work. The finding and observations of the Arbitrator on this aspect is as under:-

“And what was the time period for completion of the work? The letter of Acceptance dated May 31, 1996 stated that it would be 8 months including monsoon and mobilization and was to be reckoned from the date of issue of specific notice of commencement of work by the Engineer-in-charge”. However by letter Exhibit C- dated May 31, 1996 the Claimant took the position that the contracted work will be completed within 8 months from the date of handing over clear site to us for earth filling”. Obviously. The stand so taken in the letter was at variance with what was stated in the above referred Letter of Acceptance of May 31, 1996. This is not all, if we look at the Special Condition of Contract in Clause 6.1.0 makes it amply clear that:

"Time for completion of works shall be thus 10 (Ten) calendar months. This time schedule shall be inclusive of any monsoon falling in between and to be reckoned from the date of issue of fax/telegram/letter of acceptance of tender"

28. The Arbitrator concluded that the petitioner had himself assured that he would complete the work in 8 months from the date of handing over the site. This Court finds no reason to interfere with this finding of the Arbitrator in the present petition.

29. On the issue raised by the petitioner with regard to the delay and

hinderances in handing over the site, the learned Arbitrator has in great details analysed the contention and based on the documents and evidence on record has held as under:-

It appears that meetings at site has also taken place between the parties but to no effect and that is why on January 27, 1997 the Respondent Corporation felt convinced that Claimant commitment into practice". This is what is borne out from the letter of the Respondent Corporation dated January 27, 1997. Through that letter the Claimant was asked to spell out its action plan on the following :-

- (i) Mobilization of equipment, manpower.*
- (ii) Identification of borrow pit. Schedule of filling and all other activities with minute break-ups.*
- (iii) Testing of soil and getting approval of EIC.*

It appears that thereafter work did start but the claimant was told that it was lagging behind the schedule and therefore was called upon to step up the progress by engaging a fleet of 43 Dumpers with a further addition of equal number of trucks within 4 or 5 days. On March 13, 1997. The Respondent Corporation once again requested the Claimant to increase rate of earth filling preferably before the onset of monsoon and pointed out that any delay in completion of the work would in turn affect the activities of different agencies in the station area. On 29th and 31st of March, 1997 the Respondent Corporation brought it to the notice of the Claimant that as on March 31, 1997 only 35000 M3 (Approximately) of earth could be brought as against targeted earth and that the short fall was 26% thereby shooting up the asking rate to 5400 M3 day to complete the work by May 1997 as promised and that the Claimant had also failed to deploy 3 Nos. Of excavators by February 15, 1997 "as promised" and that under the circumstances it was quite "virtually impossible" for the Claimant to complete the

work within the contractual time. The Respondent Corporation thus gave "last opportunity" to show cause in writing within seven days of the receipt of the communication as to why the contract be not terminated and the balance unfinished work be not awarded to another agency at Claimant's risk and cost. It is not that the Claimant gave no reply. It did and it was on April 10, 1997. It claimed that by March, 1997 it had completed earth work in excess of 1,03,000 cubic meters and took the plea that the date of commencement of the contract could be only from end of December, 1996. What is further important to note is that through that reply to the show cause notice the Claimant took the stand that the monthly output would be increased to 85000 cubic meters subject to land from C.T. being made available. This reply was followed by further mutual discussions which took place on May 22, 1997. As is borne out from the letter of the Respondent Corporation of June 10, 1997. Two things clearly emerge out from the said letter. First, the claimant had agreed to handover filled-in portion of a road and so also a portion of an adjacent road by the end of May, 1997 and that the parties had agreed to chalk out a revised work plan at a subsequent meeting. However significantly what is further borne out from that letter is that the Claimant had still not resumed work. Subsequent to the said letter a meeting took place between the parties on June 13, 1997. The position at the time of the said meeting is clearly spelled out by the letter of June 18, 1997 written by the Respondent Corporation. It shows that the work was at a stand still and that although the Claimant had committed to complete the work by May 31, 1997 but till date the Claimant had worked upto only 1,65,000 cubic meters against the target of 3,12,000. The Claimant came up with its own reasons and those are spelled out in its letter of July 9, 1997. It speaks of demand of upward revision of tender rates. It also speaks of how refusal by Calcutta Port trust to release their land for obtaining earth had escalated the cost and how the claimant had also been

effected by all round increase in the wages of labours. P.O.I. etc" it also spoke of delay in commencement of the work on account of standing crops and approach road to the work being still under construction. The Claimant also pointed out that it had reached a situation when it is no longer possible to support the job site costs. It thus asked for enhancement by 40% in the rates for the item no. 2.

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I have referred to above in some detail what transpired before the letter of termination of contract. What emerges out from the evidence on the record and more so from the contemporaneous record is that the Claimant had failed repeatedly to honour its commitments not only under the contract but made during mutual discussions to commence the work in right earnest and to complete the same. Even if it be taken that there were some impediments before December 17, 1996. The Claimant had agreed to commence the work and complete the same by May 31, 1997 but then instead of fulfilling its commitment the Claimant Corporation stopped work on May 23, 1997 and demobilized the site in the first week of June, 1997 and thereafter did not remobilize despite repeated reminders by the Respondent corporation. What further emerges out is that by letter of July 9, 1997. (C-14) the Claimant demanded a "minimum increase" of tender rates for item No. 2 by 40 % and that this was a sine-qua-non to enable us to complete balance work" thereby making it further clear that the work would be commenced only on receipt of sanction of those rates. This may be taken as repudiation of the contract.

30. This Court finds no reason to interfere and deviate from the said finding. The Supreme Court in the case of **McDermott International Inc. vs. Burn Standard Co. Ltd. and Ors. (2006) 11 SCC 181** and **Associate Builders vs. Delhi Development Authority (2015) 3 SCC 49** has clearly laid

down the parameters for judicial review under Section 34 of the Act. This Court in judicial review cannot upset the detailed findings of the Arbitrator in the award impugned herein.

31. The next contention of the petitioner that requires to be dealt with is that the respondent illegally awarded the contract for the balance unfinished work. The Arbitrator has analysed the entire correspondence between the parties for carrying out the work that was to be initially executed by the petitioner, including the various meetings that the parties had in which the petitioner assured that the work would be completed. In particular, reliance is placed on a letter dated 04.08.1997 in which the representative of the petitioner assured that a commitment in writing would be given for the balance work failing which the respondent was at liberty to get the job done at the risk and cost of the petitioner. The Arbitrator has come to a finding from a perusal of the record that in fact no such commitment was received in writing from the petitioner and therefore the respondent was justified in taking the view that the petitioner was no longer interested and therefore rightly took action to award the balance work at the cost of the petitioner. Relevant part of the award is as under:-

It appears from the record that the Claimant had sent a letter to the Respondent Corporation on June 27, 1997 making an effort at justifying the failure to adhere to its commitment. It was responded to by Respondent Corporation through its letter of July 17, 1997, it is a detailed reply showing how the Claimant had failed to fulfil its contractual obligations and commitments made. Through the said letter the Respondent Corporation gave the Claimant "last and final chance" to mobilize and commence the work within seven days of the receipt of the letter failing which the Respondent Corporation would have no option but to execute the balance unfinished work by awarding to

other agencies at the risk and cost of the Claimant. The said letter was followed by yet another letter of 19/26 July, 1997. The said letter again detailed the failure on the part of the Claimant to adhere to its contractual obligations and commitments made from time to time. The letter shows that there was a mutual discussion once again on August 4, 1997 in which the representative of the Claimant had assured that a commitment in writing would be given for filling of 50,000 cubic meters during the month of August, 1997 failing which Respondent Corporation would be at liberty to get the job done at the risk and cost of the Claimant but no such commitment had been received in writing and that under the circumstances the Respondent Corporation was of the view that the Claimant was no longer interested in commencing the work and that the Respondent Corporation was at liberty to take a appropriate action as deemed fit in the interest of work. The Respondent Corporation wrote yet another letter and it is of August 14, 1997. The letter again deals with all the issues and failure of the Claimant to honour its commitments made from time to time including the last one of August 4, 1997 relating to filling of 67,000 cubic meters in August, 1997. It appears that though on August 4, 1997 this commitment was made but no work was started. The Respondent Corporation again offered to hold a meeting on August 16, 1997. The Respondent wrote back on August 22, 1997 asserting again that full site had never been handed over of Phase - II or Phase - III and that as far as Phase - I was concerned work had been "substantially completed". It also spoke of water logging and flooding in the coastal areas of Midnapore District, thus making it clear that it was impracticable to proceed with the earth filling works. It once again made complaint that its request for upward revision of the rates had been declined and invoked arbitration clause. The record shows that even thereafter some discussion had taken place on August 6, 1997 as is borne out from the letter of the Respondent Corporation dated August 28, (illegible). What is borne out from the said letter is that the Claimant was once again requested to remobilize and start with immediately which the Claimant had agreed to confirm by

fax latest by 3:30P.M. on August 28, 1997 leading the Respondent corporation to believe that the Claimant was no longer interested resuming the work. On August 30, 1997 followed the letter of termination by the Respondent Corporation.

32. The finding of the Arbitrator is not only a possible but a plausible finding. If the petitioner failed to fulfil its commitments despite several assurances, this Court does not feel the need to interfere with the finding of the Arbitrator which is even otherwise justified in the facts of the case and under the realm of contract law.

33. Lastly, this Court is required to deal with the contention that the Arbitrator has wrongly allowed the counterclaim of the respondent on account of Liquidated Damages and the same is against Sections 73 & 74 of the Contract Act. The contract between the parties incorporated Clause 4.4.0.0 which enabled the respondent to levy a pre-estimated sum of damages to the extent of 10 % of account of delay on the part of the petitioner. The said Clause reads as under:-

“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 Schedule has been established, beyond the date for the final completion or the work or works aforesaid at the job site as stipulated in the Progress schedule, the Owner shall (without prejudice to any other right of Owner in this behalf) be entitled to reduction in price 1/2% {one-half percent) of the total contract value for each week of delay or part thereof limited to a maximum of 10% (Ten percent) of the total contract value.”

34. The arbitrator has come to a finding that the petitioner has failed to complete the work awarded within the stipulated period. The Arbitrator also analysed the affidavit filed by the respondent, which indicated the total

executed value of the contract as Rs. 3,83,66,805.64/-. The respondent had claimed 10 % of the said value in terms of the provisions of the GCC. Having held that the petitioner was responsible for the delay in execution, the Arbitrator has nevertheless reduced the damages claimed from 10% to 5% taking into account that there was rainfall at the site and this reduction would meet the ends of justice and balance the level playing field between the parties. Relevant para of the award reads as under:-

“As already found above the Claimant Company failed to complete the awarded contract within the stipulated period. This invited clause 7.0.9.0 GCC which entitled the Respondent Corporation to compensation in terms of provisions of Clause 4.4.0.0. keeping of course. The total contract value as defined in Clause 4.4.1.0 the Respondent Corporation is entitled to reduction in price (of the total contract value) for each week of delay or part thereof limited to a maximum of 10% of the total contract value. The record shows and this finds support from the affidavit of Shri S. Das Deputy General Manager of the Respondent Corporation that the total executed value of the contract was Rs. 3,83,66,805.64. The Respondent Corporation has claimed a sum of Rs. 38,36,680.96 as 10% of the said total executed value of the contract. This ofcourse is in terms of the provisions of the GCC as noted above. However, keeping in view the totality of the circumstances as already noticed above and keeping in view that the Claimant Corporation was, undoubtedly faced with certain teething problems including impediments like rainfall and inability to get earth from the earlier considered site I do feel that the claim for maximum of 10% needs to be toned down (illegible) so because the Respondent Corporation has been amply compensated on account of having got the work completed from other sources. I may however hasten to add that though rainfall did not provide any justification as far as delay in completion of the work is concerned but it does invite consideration as far as awarding of compensation in terms

of 4.4.0.0 is concerned. Keeping all these factors in view I hope that reducing the limit from the maximum of 10% to 5% in the present case would rather meet the ends of justice I therefore direct accordingly. “

35. This contention of the petitioner also therefore merits rejection.

36. In view of the above I find no merit in the present petition and the same is hereby dismissed.

JYOTI SINGH, J

NOVEMBER 13, 2019/yo /

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