

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

% Decided on: 18th November, 2019

+ **CS(COMM) 772/2017**

UNION OF INDIA

..... Plaintiff

Represented by: Mr. Rajesh Kumar, Ms. Santwana,
Advvs. with Mr. R.K. Rastogi, E.E.

versus

M/S SHARMA KALYPSO PVT. LTD.

..... Defendant

Represented by: Ms. Anusuya Salwan, Ms. Shreya
Sharma, Advvs.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

I.A. 2166/2018 (u/S 8 of the Arb. & Conciliation Act by D)

1. The present suit has been filed by the Union of India seeking a decree in its favour and against the defendant to pay a sum of ₹1,88,12,271/- towards the refund of recovery of compensation under Clause 2 of the General Conditions of Contract (in short GCC) along with the interest thereon till the date of realization besides the cost.
2. Immediately on receipt of the summons, the defendant entered appearance and filed the present application being I.A. 2166/2018 under Section 8 of the Arbitration and Conciliation Act claiming that the present suit was not maintainable in view of the agreement between the parties providing for a resolution of disputes through arbitration.
3. Case of the plaintiff based on the decision of the Supreme Court

reported as *AIR 1989 SC 952 Vishwanath Sood Vs. Union of India* is that Clause 2 of the GCC read with Clause 25 provide that the disputes with regard to awarding compensation under Clause 2 are outside the purview of arbitrator and that the compensation has to be determined under Clause 2 either by the Engineer Incharge or on further reference by the Superintendent Engineer and cannot be called in question before an arbitrator.

4. Learned counsel for the defendant on the other hand relying upon decisions reported as (2017) 7 SCC 716 *Hema Khattar and Ors. Vs. Shiv Khera* states that the disputes between the parties under Clause 2 would be an arbitrable dispute which is further fortified by the decision of Supreme Court reported as (2011) 5 SCC 758 *J.G. Engineers Pvt. Ltd. Vs. Union of India (UOI) & Anr.* She further contends that by mere allegations of fraud, resolution of disputes between the parties cannot be taken out of the purview of arbitration, if provided in the agreement and relies upon the decision of the Supreme Court in (2016) 10 SCC 386 *A. Ayyasamy Vs. A. Paramasivam & Ors.*

5. Learned counsel for the defendant further states that pursuant to an application filed under Section 11 of the Arbitration and Conciliation Act filed by the defendant, the disputes between the plaintiff and defendant were referred to the arbitrator, which also included the claim of the defendant under Clause 2 of the GCC between the parties.

6. The learned arbitrator has already returned a finding thereon and both the plaintiff and defendant have filed their objections against the award including to the finding in relation to the compensation in terms of Clause 2 of the GCC between the parties. She further states that the issue with regard

to the disputes under Clause 2 being not maintainable before the arbitrator was duly raised by the plaintiff which was rejected.

7. Learned counsel for the plaintiff rebutting the arguments however contends that the learned arbitrator having returned a finding that both the plaintiff and defendant were responsible for the delay under Clause 2 of the GCC still awarded compensation in favour of the defendant. He however fairly on instructions states that the plaintiff has challenged the award of the learned arbitrator on this count besides the other counts as well.

8. Before dealing with the issue it would be appropriate to note Clause 2 and Clause 25 of the GCC for CPWD works executed between the plaintiff and the defendant as under:

“CLAUSE 2

Compensation for delay:

If the contractor fails 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 shall, without prejudice to any other right or remedy available under the law to the Government on account of such breach, pay as agreed compensation the amount calculated at the rates stipulated below as the authority specified in schedule ‘F’ (whose decision in writing shall be final and binding) may decide on the amount of tendered value of the work for every completed day/ month (as applicable) that the progress remains below that specified in Clause 5 or that the work remains incomplete. This will also apply to items or group of items for which a separate period of completion has been specified.

- (i) *Compensation for delay of work: @ 1.5% per month of delay to be computed on per day basis.*

Provided always that the total amount of compensation for delay to be paid under this condition shall not exceed 10% of the Tendered Value of work or of the Tendered Value of the item or group of items of work for which a separate period of completion is originally given.

The amount of compensation may be adjusted or set-off against any sum payable to the contractor under this or any other contract with the Government. In case, the contractor does not achieve a particular milestone mentioned in schedule F, or the re-scheduled milestone in terms of Clause 5.4, the amount shown against that milestone shall be withheld, to be adjusted against the compensation levied at the final grant of Extension of Time. With-holding of this amount on failure to achieve a milestone, shall automatic without any notice to the contractor. However, if the contractor catches up with the progress of work on the subsequent milestone(s), the withheld amount shall be released. In case the contractor fails to make up for the delay in subsequent milestone(s), amount mentioned against each milestone missed subsequently also shall be withheld. However, no interest, whatsoever, shall be payable on such withheld amount.

CLAUSE 25

Settlement of Disputes & Arbitration

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during

the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter.

(i) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with this decision, the contractor shall within a period of 30 days from receipt of the decision, appeal before the Dispute Redressal Committee (DRC) alongwith a list of disputes with amounts claimed in respect of each such dispute and giving reference to the rejection of his disputes by the Chief Engineer. The Dispute Redressal Committee (DRC) shall give his decision within a period of 90 days from the receipt of Contractor's appeal. The constitution of Dispute Redressal Committee (DRC) shall be as indicator in Schedule "F". If the Dispute Redressal Committee

(DRC) fails to give his decision within the aforesaid period or any party is dissatisfied with the decision of the Dispute Redressal Committee (DRC), then either party may within a period of 30 days from the receipt of the decision of Dispute Redressal Committee (DRC) give notice to the Chief Engineer for appointment of arbitrator on prescribed proforma as per Appendix XV, failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

It is a term of contract that each party invoking arbitration must exhaust aforesaid mechanism of settlement of claims/disputes prior to invoking arbitration (added vide OM No.DG/MAN/255 Dt. 23.05.2011)

(ii) Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chief Engineer, CPWD, in charge of the work or if there be no Chief Engineer, the Additional Director General of the concerned region of CPWD or if there be no Additional Director General, the Director General of Works, CPWD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person, other than a person appointed by such Chief Engineer CPWD or Additional Director General or Director General of works, CPWD, as aforesaid, should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds ₹1,00,000/-, the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator

in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid.”

9. In Vishwanath Sood (supra) the Supreme Court held as under:

“9. The Division Bench has construed the expression in Clause 2 in parenthesis that “the Superintending Engineer's decision shall be final” as referring only to a finality qua the department; in other words, that it only constitutes a declaration that no officer in the department can determine the quantification and that the quantum of compensation levied by the Superintending Engineer shall not be changed without the approval of the Government. After referring to certain judicial decisions regarding the meaning of the word “final” in various statutes, the Division Bench concluded that the finality cannot be construed as excluding the jurisdiction of the arbitrator under Clause 25. We are unable to accept this view. Clause 25 which is the arbitration clause starts with an opening phrase excluding certain matters and disputes from arbitration and these are matters or disputes in respect of which provision has been made elsewhere or otherwise in the contract. These words in our opinion can have reference only to provisions such as the one in parenthesis in clause 2 by which certain types of determinations are left to the administrative authorities concerned. If that be not so, the words “except where otherwise provided in the contract” would become meaningless. We are therefore inclined to hold that the opening part of clause 25 clearly excludes matters like those mentioned in clause 2 in respect of which any dispute is left to be decided by a higher official of the Department. Our conclusion, therefore, is that the question of awarding compensation under clause 2 is outside

the purview of the arbitrator and that the compensation, determined under clause 2 either by the Engineer-in-charge or on further reference by the Superintending Engineer will not be capable of being called in question before the arbitrator.

10. We may confess that we had some hesitation in coming to this conclusion. As pointed out by the Division Bench, the question of any negligence or default on the part of the contractor has many facets and to say that such an important aspect of the contract cannot be settled by arbitration but should be left to one of the contracting parties might appear to have far reaching effects. In fact, although the contractor in this case might object to the process of arbitration because it has gone against him, contractors generally might very well prefer to have the question of such compensation decided by the arbitrator rather than by the Superintending Engineer. But we should like to make it clear that our decision regarding non-arbitrability is only on the question of any compensation which the Government might claim in terms of Clause 2 of the contract. We have already pointed out that this is a penalty clause introduced under the contract to ensure that the time schedule is strictly adhered to. It is something which the Engineer-in-charge enforces from time to time when he finds that the contractor is being recalcitrant, in order to ensure speedy and proper observance of the terms of the contract. This is not an undefined power. The amount of compensation is strictly limited to a maximum of 10 per cent and with a wide margin of discretion to the Superintending Engineer, who might not only reduce the percentage but who, we think, can even reduce it to nil, if the circumstances so warrant. It is this power that is kept outside the scope of arbitration. We would like to clarify that this decision of ours will not have any application to the claims, if any, for loss or damage which it may be open to the Government to lay against the contractor, not in terms of clause 2 but under the general law or under the Contract Act. As we have pointed out at the very outset so far as this case is concerned the claim of the Government has obviously proceeded in terms of clause 2 and that is the way in which both the learned Single Judge as well as the Division Bench have

also approached the question. Reading clauses 2 and 25 together we think that the conclusion is irresistible that the amount of compensation chargeable under clause 2 is a matter which has to be adjudicated in accordance with that clause and which cannot be referred to arbitration under clause 25.”

10. Decision of the Supreme Court in Vishwanath Sood notes that the Supreme Court kept the amount of compensation chargeable under Clause 2 out of the purview of arbitration and did not hold that the finding of the officer of the plaintiff as to who caused the delay would be not an arbitrable dispute. This issue was further clarified by the Supreme Court in J.G. Engineers Pvt. Ltd. (supra) wherein dealing with Clause 2 and Clause 25 of the GCC it was held:

“14. Thus what is made final and conclusive by Clauses (2) and (3) of the agreement, is not the decision of any authority on the issue whether the contractor was responsible for the delay or the department was responsible for the delay or on the question whether termination/rescission is valid or illegal. What is made final, is the decisions on consequential issues relating to quantification, if there is no dispute as to who committed breach. That is, if the contractor admits that he is in breach, or if the Arbitrator finds that the contractor is in breach by being responsible for the delay, the decision of the Superintending Engineer will be final in regard to two issues. The first is the percentage (whether it should be 1% or less) of the value of the work that is to be levied as liquidated damages per day. The second is the determination of the actual excess cost in getting the work completed through an alternative agency. The decision as to who is responsible for the delay in execution and who committed breach is not made subject to any decision of the Respondents or its officers, nor excepted from arbitration under any provision of the contract.

15. *In fact the question whether the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committed breach. That question can only be decided by only an adjudicatory forum, that is, a court or an Arbitral Tribunal. In State of Karnataka v. Shree Rameshwara Rice Mills MANU/SC/0177/1987 : 1987 (2) SCC 160 this Court held that adjudication upon the issue relating to a breach of condition of contract and adjudication of assessing damages arising out of the breach are two different and distinct concepts and the right to assess damages arising out of a breach would not include a right to adjudicate upon as to whether there was any breach at all. This Court held that one of the parties to an agreement cannot reserve to himself the power to adjudicate whether the other party has committed breach. This Court held:*

Even assuming for argument's sake that the terms of Clause 12 afford scope for being construed as empowering the officer of the State to decide upon the question of breach as well as assess the quantum of damages, we do not think that adjudication by the other officer regarding the breach of the contract can be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interests of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract. The position will, however, be different where there is no dispute or there is consensus between the contracting parties regarding the breach of conditions. In such a case the

officer of the State, even though a party to the contract will be well within his rights in assessing the damages occasioned by the breach in view of the specific terms of Clause 12.

We are, therefore, in agreement with the view of the Full Bench that the powers of the State under an agreement entered into by it with a private person providing for assessment of damages for breach of conditions and recovery of the damages will stand confined only to those cases where the breach of conditions is admitted or it is not disputed.

16. *The question whether the issue of breach and liability are excluded from arbitration, when quantification of liquidated damages are excluded from arbitration was considered by this Court in Bharat Sanchar Nigam Ltd. v. Motorola India Ltd. MANU/SC/4021/2008 : 2009 (2) SCC 337. This Court held:*

The question to be decided in this case is whether the liability of the Respondent to pay liquidated damages and the entitlement of the Appellant, to collect the same from the Respondent is an excepted matter for the purpose of Clause 20.1 of the General Conditions of contract. The High Court has pointed out correctly that the authority of the purchaser (BSNL) to quantify the liquidated damages payable by the supplier Motorola arises once it is found that the supplier is liable to pay the damages claimed. The decision contemplated under Clause 16.2 of the agreement is the decision regarding the quantification of the liquidated damages and not any decision regarding the fixing of the liability of the supplier. It is necessary as a condition precedent to find that there has been a delay

on the part of the supplier in discharging his obligation for delivery under the agreement.

It is clear from the reading of Clause 15.2 that the supplier is to be held liable for payment of liquidated damages to the purchaser under the said clause and not under Clause 16.2. The High Court in this regard correctly observed that it was not stated anywhere in Clause 15 that the question as to whether the supplier had caused any delay in the matter of delivery will be decided either by the Appellant/BSNL or by anybody who has been authorized on the terms of the agreement. Reading Clause 15 and 16 together, it is apparent that Clause 16.2 will come into operation only after a finding is entered in terms of Clause 15 that the supplier is liable for payment of liquidated damages on account of delay on his part in the matter of making delivery. Therefore, Clause 16.2 is attracted only after the supplier's liability is fixed under Clause 15.2. It has been correctly pointed out by the High Court that the question of holding a person liable for Liquidated Damages and the question of quantifying the amount to be paid by way of Liquidated Damages are entirely different. Fixing of liability is primary, while the quantification, which is provided for under Clause 16.2, is secondary to it.

Quantification of liquidated damages may be an excepted matter as argued by the Appellant, under Clause 16.2, but for the levy of liquidated damages, there has to be a delay in the first place. In the present case, there is a clear dispute as to the fact that whether there was any delay on the part of the Respondent. For this reason, it cannot be accepted that the appointment of the arbitrator by the

High Court was unwarranted in this case. Even if the quantification was excepted as argued by the Appellant under Clause 16.2, this will only have effect when the dispute as to the delay is ascertained. Clause 16.2 cannot be treated as an excepted matter because of the fact that it does not provide for any adjudicatory process for decision on a question, dispute or difference, which is the condition precedent to lead to the stage of quantification of damages.

(emphasis supplied)

17. *In view of the above, the question whether Appellant was responsible or Respondents were responsible for the delay in execution of the work, was arbitrable. The arbitrator has examined the said issue and has recorded a categorical finding that the Respondents were responsible for the delay in execution of the work and the contractor was not responsible. The arbitrator also found that the Respondents were in breach and the termination of contract was illegal. Therefore, the Respondents were not entitled to levy liquidated damages nor entitled to claim from the contractor the extra cost (including any escalation in regard to such extra cost) in getting the work completed through an alternative agency. Therefore even though the decision as to the rate of liquidated damages and the decision as to what was the actual excess cost in getting the work completed through an alternative agency, were excepted matters, they were not relevant for deciding claims 1, 3 and 11, as the right to levy liquidated damages or claim excess costs would arise only if the contractor was responsible for the delay and was in breach. In view of the finding of the arbitrator that the Appellant was not responsible for the delay and that the Respondents were responsible for the delay, the question of*

Respondents levying liquidated damages or claiming the excess cost in getting the work completed as damages, does not arise. Once it is held that the contractor was not responsible for the delay and the delay occurred only on account of the omissions and commissions on the part of the Respondents, it follows that provisions which make the decision of the Superintending Engineer or the Engineer-in-Charge final and conclusive, will be irrelevant. Therefore, the Arbitrator would have jurisdiction to try and decide all the claims of the contractor as also the claims of the Respondents. Consequently, the award of the Arbitrator on items 1, 3 and 11 has to be upheld and the conclusion of the High Court that award in respect of those claims had to be set aside as they related to excepted matters, cannot be sustained.”

11. Even otherwise as provided in Hema Khattar & Ors. (supra) a clause once permits reference of disputes to arbitration between the parties is a part of the contract whether the delay has been caused on behalf of the plaintiff or defendant to the contract would be an arbitrable dispute as it satisfies the four conditions as provided by the Supreme Court in (2000) 4 SCC 539 P. Anand Gajapathi Raju & Ors. Vs. P.V.G. Raju (dead) & Ors. and reported in Hema Khattar & Ors (supra) as under:

“26. In P. Anand Gajapathi Raju and Ors. v. P.V.G. Raju (Dead) and Ors. MANU/SC/0281/2000 : (2000) 4 SCC 539, it was held as under:

5. The conditions which are required to be satisfied under Sub-sections (1) and (2) of Section 8 before the court can exercise its powers are:

- (1) *there is an arbitration agreement;*
- (2) *a party to the agreement brings an action in the court against the other party;*
- (3) *subject-matter of the action is the same as the subject-matter of the arbitration agreement;*
- (4) *the other party moves the court for referring the parties to arbitration before it submits his first statement on the substance of the dispute.*

In view of the above, where an agreement is terminated by one party on account of the breach committed by the other, particularly, in a case where the Clause is framed in wide and general terms, merely because agreement has come to an end by its termination by mutual consent, the arbitration Clause does not get perished nor is rendered inoperative. This Court, in the case of P. Anand Gajapathi Raju (supra), has held that the language of Section 8 is peremptory in nature. Therefore, in cases where there is an arbitration Clause in the agreement, it is obligatory for the court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. Therefore, it is clear that in an agreement between the parties before the civil court, if there is a Clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator.

27. *In view of the above, we are of the considered opinion that in the present case, the prerequisites for an application Under Section 8 are fulfilled, viz., there is an arbitration agreement; the party to the agreement brings an action in the court against the other party; the subject matter of the action is the same as the subject-matter of the arbitration agreement;*

and the other party moves the court for referring the parties to arbitration before it submits his first statement on the substance of the dispute. We have come to the conclusion that the civil court had no jurisdiction to entertain a suit after an application Under Section 8 of the Act is made for arbitration. In such a situation, refusal to refer the dispute to arbitration would amount to failure of justice as also causing irreparable injury to the Defendant.”

12. Learned counsel for the defendant has also placed on record the award by the sole arbitrator dated 21st July, 2018 wherein the learned arbitrator in Para 14.8 and 14.9 returned a finding that the dispute under Clause 2 as to whether any compensation was payable is arbitrable as under:

“14.8. My Finding

1. *The Respondent in its application (RD-6) under Section 16 of the Arbitration and Conciliation Act 1996 submitted that action under Clause 2 was beyond the purview of arbitration in accordance with clause 25 of the agreement. It has further relied upon para10 of the case “Vishwanath sood Vs. Union of India”(RD-22), the relevant portion of which notes “reading clause 2 and 25 together we think that the conclusion is irresistible that the amount of compensation chargeable under clause 2 is a matter which has to be adjudicated in accordance with that clause and which cannot be referred to arbitration under clause 25””(emphasis added).*

It is therefore evident that the judgment only lays down that the quantum of compensation levied under clause 2 cannot be adjudicated under clause 25. It does not impose any restriction on the jurisdiction of the AT in adjudicating upon the justification of levying

compensation under clause 2. The objection of the Respondent therefore has no merit and is rejected.

- 2. The claimant in its reply has challenged the Respondent's contention and relied on a Supreme Court judgment in the case of M/s J.G. Engineers Pvt. Ltd. Vs. Union of India. The Court holds that Clause 2 does not make decision of any authority final and conclusive on the issue whether the contractor was responsible for the delay. Further, the question as to which party has committed breach cannot be decided by the party alleging breach. One party cannot be a judge to decide whether he committed the breach or the other party committed breach. Since no party can be a judge in its own case, the levy of penalty by the Respondent without adjudication by an Arbitral Tribunal cannot be said to be final and excepted matter.*
- 3. Notice under Clause 2 was served by the Respondent for the first time on 5.6.2015 (Ex.C-54) after the contract was terminated by the Respondent on 22.5.2015 (Ex.R-82). There is no record of any notice being served upon the claimant during the currency of contract. Upon termination of contract, all clauses cease to exist and only the arbitration clause 25 survives. The notice under clause 2 by the Respondent after termination of contract, therefore, has no legal sanctity. Consequently, any action taken under the aforesaid clause is also null and void.*
- 4. It has already been held in para 14.6. (supra) that the delay is attributable to both parties, and hence to hold the claimant responsible for the delay and liable for levy of compensation under Clause 2 is invalid and untenable.*

5. *The word compensation denotes mitigation of loss suffered by one party due to breach of contract by the other. In the instant case, the Respondent has not quantified any loss suffered by it due to the delay attributed by it to the claimant. The levy of compensation therefore is not justified and is void..*

14.9. CONCLUSION

There being no stay order or directions in the case filed by the Respondent in the Hon'ble High Court of Delhi and after examination of facts of the case and the ratio of judgments cited by the parties, I find no merit in the argument of the Respondent that the levy of compensation under Clause 2 is beyond the purview of arbitration. In view of the findings above, I hold that the action of the Respondent to levy compensation upon the claimant under Clause 2 of the agreement as invalid and illegal."

13. Learned counsel for the plaintiff states that despite having returned a finding in Para 14.6 of the Award that both plaintiff and defendant were equally responsible for the delay, the learned arbitrator awarded compensation in favour of the defendant. However, he further admits that to this extent the plaintiff has already filed its objections under Section 34 of the Arbitration and Conciliation Act.

14. Considering the fact that the disputes as to whether there was a delay on the part of the plaintiff or the defendant in conclusion of the contract being an arbitrable dispute and having been decided in the award, the present suit is not maintainable and in respect of grievance against the award the plaintiff has already taken his remedies.

15. Application is disposed of dismissing the suit as not maintainable.

CS(COMM) 772/2017

Suit is dismissed as not maintainable.

(MUKTA GUPTA)
JUDGE

NOVEMBER 18, 2019
‘ga’

