

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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|------------------------|------------|
| Judgment reserved on   | 19.11.2019 |
| Judgment pronounced on | 22.01.2020 |

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THE HONOURABLE Mr. JUSTICE **SENTHILKUMAR RAMAMOORTHY**

**O.P. No.145 of 2017**  
**and**  
**O.P.No.454 of 2018**

M/s.IRCON International Limited,  
(A Government of India Undertaking)  
Rep. by its Joint General Manager(South)  
Ground Floor, DRM Office Building,  
South Western Railway,  
Adjacent to City Railway Station,  
Bangalore – 560 023.

... Petitioner  
(in O.P.No.145 of 2017 and  
Respondent in O.P.No.454 of  
2018)

Vs.

The Government of Tamil Nadu  
Rep. by the Superintending Engineer(H),  
SCRD Circle, M.K.S. Building,  
4-A, Kanthaswamy Lay out,  
Second Street,  
Villupuram – 605 002.

... Respondent  
(in O.P.No.145 of 2017 and  
Petitioner in O.P.No.454 of  
2018)

**PRAYER IN O.P.NO.145 OF 2017:** Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Arbitral Award dated 18.05.2016 made in relation to disputes arising out of contract agreement No.13/98-00, dated 25.02.1999 in so far as it relates to claim No.6 towards idling charges of men and materials and claim No.8 towards increased cost of material, labour and POL not compensated by normal price variation are concerned.

**PRAYER IN O.P.NO.454 OF 2018:** Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Arbitral Award dated 18.05.2016 passed by the Sole Arbitrator Justice K.P.Sivasubramaniam(Retd), High Court, Madras.

For Petitioner : Mr.G.Rajagopalan  
in O.P.No.145 of 2017 Addl. Solicitor General  
Respondent in Asstd. by Mr.V.G.Suresh Kumar  
O.P.No.454 of 2018

For Respondent : Mr.S.R.Rajagopal  
in O.P.No.145 of 2017 Addl. Advocate General – VI  
Petitioner in Asstd. by  
O.P.No.454 of 2018 Mr.M.Sricharan Rangarajan  
Special G.P.(C.S)

**COMMON ORDER**

The claimant in the Arbitration Proceeding is the Petitioner in O.P.No.145 of 2017 and the Respondent in O.P.No.454 of 2018. The respondent in the Arbitration proceeding is the Petitioner in O.P.No.454 of

2018 and the Respondent in O.P.No.145 of 2017. The dispute arises out of a contract for the design and construction/re-construction of various bridges, including the approach roads, and for improvements to junctions, etc.(the Contract). The bid that was submitted by M/s.IRCON International Limited (a Government of India Undertaking) (the Contractor) was accepted by the Government of Tamil Nadu (the Employer) and the Contract for a total value of Rs.18,88,21,844/- was awarded to the Contractor. The work was completed on 30.01.2002 after several extensions of time. Pursuant thereto, the final bill was submitted by the Contractor on 02.04.2002 for a gross sum of about Rs. 19,65,29,973/- and an incremental or net sum of about Rs.59 lakhs, which included additional work claims. This net sum included a sum of about Rs.27,36,191/- towards bill of quantities (BoQ) items. Out of the sum of Rs.27,36,191/-, an aggregate sum of about Rs.10,74,598/- was paid on 21.04.2005 and 03.08.2005. Meanwhile, disputes arose between the parties, a notice was issued on 12.07.2004 by the Contractor(Ex.C-8), which the Contractor claims is a Section 21 notice but this position is contested by the Employer, and the Arbitral Tribunal was constituted pursuant to the orders in a Section 11 Petition. Before the Arbitral Tribunal, the Contractor made claims for an aggregate sum of Rs.14,58,81,219/-. The claims were made under the heads of final bill balance amount, price variation till actual completion of work, additional

items of work, refund of retention money with interest thereon, bank charges in relation to the bank guarantees, idling charges for men and machinery, losses on account of overheads and profits, loss due to increased cost of materials, labour and POL not compensated by normal price variation, interest and costs. Upon completion of pleadings, the Arbitral Tribunal framed 19 issues, which are set out at paragraph 21 of the Award. Both parties adduced documentary evidence but no oral evidence: the Contractor filed 108 documents, which were exhibited as Exs.C-1 to C-108, and the Employer filed three documents, which were exhibited as Exs.R1 to R-3. By Arbitral Award dated 18.05.2016 (the Award), the Contractor was awarded a sum of Rs.7,05,47,000/- as against the aggregate claim of Rs.14,58,81,219/-. The said Award is impugned by both the Employer and the Contractor by filing Petitions under Section 34 of the Arbitration and Conciliation Act, 1996(the Arbitration Act).

2. In the Petition filed by the Contractor, namely, O.P.No.145 of 2017, the rejection of claim No.6(idling charges for men and materials) and Claim No.8(increased cost of materials, labour and POL) is challenged by the Contractor. In O.P.No.454 of 2018, the entire Award is under challenge by the Employer.



3. I heard the learned Additional Solicitor General(ASG), Mr.G.Rajagopalan, on behalf of the Contractor and Mr.S.R.Rajagopal, the learned Additional Advocate General(AAG) on behalf of the Employer.

4. The learned ASG first addressed submissions with regard to the rejection of Claim Nos.6 and 8 in the Award. By referring to paragraph 136 of the Award, the learned ASG pointed out that the Arbitral Tribunal recorded a categorical finding that the Employer caused the delay in completion of work under the contract. Notwithstanding such conclusion, he pointed out that in paragraphs 137 to 140, the Arbitral Tribunal erroneously rejected claim No.6 on the basis that the Contractor failed to provide detailed particulars supported by proper oral and documentary evidence. Similarly, as regards Claim No.8, which is the claim towards increased cost of materials, labour and POL, he pointed out that the Arbitral Tribunal rejected the claim by concluding that there are no materials from the Contractor to justify the claim under Claim No.8 and that such claim cannot be awarded merely because there is no proper denial or contra material. The learned ASG referred to Section 73 of the Indian Contract Act, 1872 (the Contract Act) and judgments of the Hon'ble Supreme Court in **Oil & Natural Gas Corporation Ltd vs. Saw Pipes Ltd (ONGC)(2003)5 SCC 705** and, in particular, paragraph 68 thereof and in **Assam State Electricity Board and others vs.**

**Buildworth Private Limited(Assam SEB)(2017) 8 SCC 146** and, in particular, paragraph 14 and 20 thereof so as to contend that there is no need to prove the losses once it is established that the counter party is responsible for the breach of contract.

5. This was followed by the submissions of the learned AAG in O.P.No.454 of 2018, i.e. the Petition filed by the Employer. The first submission of the learned AAG was that the final bill was submitted on 02.04.2002 after the work of design and construction of all the bridges was completed on 30.01.2002. The completion certificate had been issued a little earlier on 08.02.2002 and final payment was made in 2005. While making final payment, he pointed out that a gross sum of about Rs.19.12 crore was paid. Consequently, he submitted that the dispute, if any, between the parties should have been confined to the unpaid sum of about Rs.53 lakhs. By contrast, he submitted that the Petitioner made an aggregate claim for a sum of Rs.14,58,81,219/-. He also pointed out that Clause 4.62 of the Contract provides that any claim should be made within 90 days from the date when the Engineer provides a decision in respect thereof. By referring to the said Clause 4.62, he submitted that it provides, inter alia, as follows:

“If any dispute or difference of any kind  
whatsoever (the decision whereof is not herein otherwise

provided for) shall arise between the Engineer and the contractor in connection with, or arising out of the contract, or the execution of the works, whether during the progress of the works or after their completion and whether before or after the termination, abandonment or breach of the contract, it shall, in the first place, be referred to and settled by the Engineer who shall, within a period of 60 days after being requested in writing by the contractor to do so, give written notice of his decision to the contractor. Subject to arbitration, as hereinafter provided, such decision in respect of whatever matter so referred shall be final and binding upon the Employer and the contractor and shall forthwith be given effect to by the contractor, who shall proceed with the execution of the works with all due diligence whether he or the employer requires arbitration, as hereinafter provided, or not. If the Engineer has given written notice of his decision to the contractor and no claim to arbitration has been communicated to him by the contractor within a period of 90 days from receipt of such notice, the said decision shall remain final and binding upon the contractor. If the Engineer shall fail to give notice of his decision, as aforesaid, within a period of 60 days after being requested as aforesaid or if the contractor is dissatisfied with any such decision, then and in any such case, the contractor may within 90 days of receiving notice of such decision, the contractor may within 90 days of receiving notice of such decision, as the case may be, require that the matter or matters in dispute be

referred to arbitration as hereinafter provided.

If the contractor does not make any demand for arbitration in respect of any claims based upon the decision of the Engineer within 90 days of receipt of such decisions, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Employer shall be discharged of all liabilities under the contract in respect of such claims."

Thus, he submitted that the Contract envisages that all the claims should first be referred to the Engineer who shall, within a period of 60 days, give his decision. If the decision of the Engineer is not challenged in arbitration within 90 days of communication thereof, it becomes final and binding both on the Contractor and Employer. If the Contractor is not satisfied with the said decision, he is required to refer the dispute for arbitration within 90 days from the date of receipt of the decision of the Engineer. In this case, he submitted that the Section 11 petition requesting for the appointment of an arbitrator was admittedly filed in November 2006, which is much beyond the stipulated period of 90 days. Consequently, he contended that all the claims are barred as per Clause 4.62 of the Contract. He submitted that this issue was raised before the Arbitral Tribunal and, therefore, the Arbitral Tribunal framed Issue No.14 as to whether the claims are barred by limitation. He also pointed out the contentions of the Employer with regard to the prohibition on making



further claims after the submission of the final bill by adverting to paragraphs 16 and 17 of the Award.

6. He, thereafter, pointed out the findings of the Arbitral Tribunal on the issue of limitation. By referring to paragraphs 23 to 27 of the Award, the learned AAG contended that the findings therein to the effect that the Contractor can enlarge its claims before the Arbitral Tribunal by verifying the accounting are patently incorrect. In specific, he pointed out that the Arbitral Tribunal took note of the fact that the Contractor claimed a sum of Rs.78,32,851/- before the Employer, a sum of Rs.8,40,71,876/-, in the Section 11 Petition, whereas a sum of Rs.14,88,81,219/- was claimed in the Arbitration. In spite of noting the fact that the claims were substantially increased from stage to stage, he pointed out that the Arbitral Tribunal rejected the objection of the Employer on the ground that the claims cannot be dismissed for this reason and that the Contractor is entitled to suitably modify claims on proper accounting and verification. By referring to the completion certificate dated 08.02.2002(Ex.C-61), at Page No.120 of Volume – II, he submitted that the findings at paragraph 27 that the last of the completion certificates was issued on 22.10.2003 is patently incorrect. With regard to the finding that part of the amount due was paid on 08.03.2007, he referred to the relevant exhibit, namely, Ex.C-93, which relates to the

repayment of retention money after the defect liability period ended under the contract. Both the release of the retention money and bank guarantee and indemnity bonds are irrelevant for the purposes of computing the period of limitation because they relate to the expiry of the defect liability period. Consequently, he submitted that it cannot be said that the cause of action commenced only after the retention money or bank guarantees were released.

7. Without prejudice to the preliminary objections, the learned AAG turned to the merits of the dispute and the Award thereon. By referring to the alleged additional work claims, namely, Claim No.3, he submitted that these claims were made for the first time before the Arbitral Tribunal. In this regard, he further submitted that the contract was awarded to the contractor on turnkey basis. Therefore, Clause 2.1.2 of the Contract specified the scope of work illustratively and not exhaustively. In this connection, he referred to the said Clause 2.1.2 at Pages 281 and 282 at Volume – II wherein it is stated that “the work shall, inter alia, include the following”, thereby indicating that it is illustrative and not exhaustive. Further, he pointed out that the sub clause – (s) under clause 2.1.2 is a residuary clause which reads as follows:

“Any other item of work as may be required to be carried out for completing the bridge in all respects in accordance with the provisions of the contract and/or to ensure structural stability and safety of the bridge during and after construction.”

He contended that the said residuary clause, once again, indicates that the scope of work is all inclusive and, therefore, it is not open to the Contractor to make any claims for additional work. In spite of this contractual stipulation, he pointed out that the Arbitral Tribunal erroneously concluded in paragraphs 31 to 34 of the Award that the project does not seem to be a turnkey project on account of the subsequent events and the conduct of both parties. He also referred to paragraph 99 of the Award at Page 213 of Volume – I, wherein the Arbitral Tribunal concluded that the additional work claims are allowed because the Employer had not controverted these claims by producing documentary or oral evidence. In order to emphasize the fact that the Contractor made arbitrary claims as an after thought, he referred to the completion certificate(Ex.C-61), which specifies that the actual value of work done is Rs.19.31 crores. Therefore, he submitted that no further payments should have been awarded to the Contractor. He also pointed out that each time the contract period was extended, the Contractor was put on notice that no compensation would be paid. According to the

learned AAG, this is an additional reason as to why the claims should have been rejected. In addition, a number of judgments were circulated with the written submissions and these relate to limitation, the scope of Section 34 of the Arbitration Act and the scope of Section 28 of the Contract Act. Out of these, it is sufficient to mention a few: on limitation, **J.C. Budhraja v. Chairman, Orissa Mining Corporation (J.C.Budhraja) AIR 2008 SC 1363** and **Inder Kumar Rekhi v. DDA (1988) 2 SCC 338**; on prohibition of claims, **General Manager, Northern Railway v. Sarvesh Chopra (2002) 4 SCC 45**; and on Section 28 of the Contract Act, **National Insurance Company v. Sujir Ganesh AIR 1997 SC 2049** and **H.P. State Forest Company Ltd. v. United India Insurance Company (2009) 2 SCC 252**.

8. In response to these submissions, the learned ASG relied upon the judgment of the Hon'ble Supreme Court in **Amar Nath Dogra v. Union of India AIR 1963 SC 424**, wherein, at paragraph 11, the Hon'ble Supreme Court held that the notice under Section 80 CPC is not a pleading and, therefore, no particular form is prescribed for such notice. By drawing an analogy from the said principle, he submitted that the Section 21 notice is also not required to be in a particular form or contain all the claims that the Contractor intends to make. Therefore, he submitted that the Contractor is entitled to make claims that are not set



out in the Section 21 notice. He also relied upon the judgment of the Hon'ble Supreme Court in **State of Goa v. Praveen Enterprises(State of Goa) (2012) 12 SCC 581**, and, in particular, paragraph 26 thereof in support of the contention that the claimant is not bound to restrict his statement of claim to the claims already raised by him by in the Section 21 notice unless the parties have otherwise agreed. With regard to Clause 4.62 of the Contract, which prescribed a period of 90 days for making a demand for Arbitration, he submitted that the said clause is void as per Section 28(b) of the Contract Act as amended in the year 1994. The said Section 28(b) of the Contract Act specifies that any clause in a contract which extinguishes the claims of a party or discharges a party from liability unless the claims are made within the time stipulated in such clause is void. With regard to the additional work claims, he submitted that these claims are not covered in the BOQ as would be evident from pages 203 to 215 of Volume II, wherein the probable bill of quantities is set out. Accordingly, he submitted that the finding of the Arbitral Tribunal, at paragraph 99 of the Award, does not warrant interference. With regard to the extensions of time, he submitted that the Employer admitted that the delay was on its account and, therefore, recommended extension of time up to 31.12.2000. When the extension of time is admittedly on account of delay on the part of the Employer, he submitted that the Contractor is entitled to compensation. In this connection, he relied upon

Ex.C-25, which is a letter dated 07.04.2000 from the Divisional Engineer of the Employer to the Superintending Engineer. In addition to the authorities relied upon during oral arguments, a large number of judgments were circulated with the written submissions. These judgments pertain to the scope of Section 34 of the Arbitration Act, no claims certificates, escalation, limitation, interest and damages. Out of the above, it is sufficient to mention a few on the scope of Section 34, namely, **ONGC, Associate Builders v. DDA(Associate Builders) (2015) 3 SCC 49** and **M.P. Power Generation Company Ltd. v. Ansaldo Eneria Spa (2018) 16 SCC 661**. As regards "no claims" certificates, mention may be made of **Managing Director, NTPC Ltd. v. Reshmi Constructions, Builders and Contractors (Reshmi Constructions), Ambika Construction v. Union of India (Ambika Construction)(2006) 13 SCC 475** and **R.L. Kalathia v. State of Gujarat (Kalathia) (2011) 2 SCC 400**. On escalation, **K.N. Sathyapalan v. State of Kerala (Sathyapalan) (2007)13 SCC 43**. On limitation, **Punjab State v. Dina Nath (2007) 5 SCC 28**. On payment of compound interest, **State of Haryana v. S.L. Arora (State of Haryana) (2010) 3 SCC 690**. On damages, **McDermott International Inc. v. Burn Standard Co. Ltd. (McDermott)**. On the above basis, the learned ASG submitted that O.P.No.145 of 2017 is liable to be allowed and O.P.No.454 of 2018 is liable to be dismissed.

9. The oral and written submissions of both sides were considered carefully and the records were examined. The preliminary questions to be considered are whether the claims are liable to be rejected either on account of statutory limitation or contractual waiver or discharge and the question of statutory limitation is examined first. In this case, it is the admitted position that the work was completed on 30.01.2002 and that the final bill was submitted, thereafter, on 02.04.2002(Ex.C-1). In light of the fact that the work was completed on 30.01.2002 and the final bill was submitted on 02.04.2002, the cause of action for all claims that were rejected when final bill payment was made would arise from the date of payment of the final bill. In this case, it appears that some payments were made towards the final bill on 19.05.2005(Ex.C-12, Volume II, page 32) and 03.08.2005(Ex.C-11, Volume II, pages 30-31). Consequently, as regards the unpaid amount under the final bill, the period of limitation would commence from the year 2005 and the limitation clock would stop ticking on the date when the Section 21 notice was received by the Employer. In this case, the Section 21 notice was allegedly issued on 12.07.2004(Ex.C-8, Volume II, pages 21-23). This contention is refuted by the Employer on the ground that this letter states that the arbitration clause would be invoked if the dues are not paid within 30 days. The Contractor has also not exhibited or relied upon any other document that would qualify as a Section 21 notice.

Therefore, there is merit in the contention of the Employer and even the Arbitral Tribunal has, at paragraph 27 of the Award, proceeded on the basis that the cut-off date is the date of filing of the Section 11 petition in November 2006. Even if one reckons the start date from the date of payment in May and August 2005 and the end date as the date of the Section 11 petition in November 2006, as regards claims that were included in the final bill, there is no doubt that the said claims were filed within the period of limitation. As regards claims that were not included in the final bill, Article 18 of the Limitation Act, 1963 (the Limitation Act) would apply and the period of limitation would have to be computed from the date when the respective work was completed. By reckoning the date of completion of work as the starting date, one has to examine whether the claim was within limitation as of November 2006, when the Section 11 petition was filed by the Contractor. In this case, the relevant materials as to when the additional work was completed are not available and cannot be discerned either from the Award or the documentary evidence on record. Therefore, the computation cannot be made from the date of completion of the respective work but may be done from the date of overall completion of work. Before undertaking such exercise, it is necessary to consider whether the period of limitation for these claims can be computed from the date of payment of the final bill in 2005 or from the date of release of retention money and the bank guarantees on



08.03.2007(Ex.C-93, Volume II, pages 172-173) and 23.04.2007(Ex.C-95, Volume II, page 176), respectively, as held by the learned Arbitrator at paragraphs 27 of the Award. In this regard, in **Budhraja**, the Hon'ble Supreme Court held, at paragraph 15, that an acknowledgment of liability under Section 18 of the Limitation Act, including by way of payment, would extend the period of limitation for that claim but not for fresh or additional claims. This principle is, undoubtedly, applicable to this case as regards claims that were not included in the final bill, excluding, however, claims for which the period of limitation would not run from the date of completion of work, i.e. 30.01.2002. To put it differently, the payments in 2005 towards the final bill would extend the limitation period, as regards the final bill and, likewise, the release of retention money on 08.03.2007 would extend the period of limitation in respect of a claim for retention money and the release of the bank guarantee on 23.04.2007 would extend the period of limitation for the bank guarantee related claims but not in respect of other claims. If the period of limitation is computed on this basis, subject to the above exclusion, for all claims that were not included in the final bill, it would run from the date of completion, namely, 30.01.2002 up to the date of filing of the Section 11 petition, namely, November 2006. If so computed, all such claims are barred by limitation.

10. In view of the above conclusion, the material relevance of the contention based on contractual waiver and discharge of liability would be limited to claims that were included in the final bill. Clause 4.62 was relied upon by the learned AAG to contend that claims that were not made within 90 days from the date of the decision of the Engineer shall be deemed to have been waived and absolutely barred and that the Employer shall be discharged of all liabilities under the Contract in respect of such claims. The question that arises for consideration is whether this clause is void as per Section 28(b) of the Indian Contract Act, 1872 (the Contract Act). Section 28(b) of the Contract Act reads as under:

"Every agreement which extinguishes the rights 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 rights, is void to that extent."

On perusal of Section 28(b) of the Contract Act, which was introduced by an amendment in 1994, it is clear that contractual clauses which extinguish the right of a party thereto, or discharge a 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 its rights, is void to that extent. In this case, Clause 4.62 clearly stipulates that the claim of the Contractor shall be deemed to be absolutely barred and that the Employer shall be discharged of liability under the Contract in respect

of such claims. Even on a plain reading, it is clear that the portion of Clause 4.62 that provides that the claim would be absolutely barred and that the Employer would be discharged of all liabilities unless the claims are made within 90 days from the date of decision of the Engineer violates Section 28(b) of the Contract Act. In this connection, the learned AAG relied on the judgments of the Hon'ble Supreme Court in **National Insurance Company** and **H.P. State Forest Company**, which pertained to the unamended Section 28, i.e. before the introduction of clause (b) thereto, so as to contend that Section 28 only proscribes contractual clauses that curtail the period of limitation. This contention was valid until the amendment; however, thereafter, any clause that extinguishes contractual rights or discharges a party of liability unless such rights are exercised within the contractually stipulated period is also void. As stated earlier, on perusal of Clause 4.62, it is abundantly clear that the said clause is void in so far as it provides that the claims would be barred and the Employer's liability would be discharged unless the claims are made within 90 days from the date of decision of the Engineer.

11. This leads to another question of significance, namely, whether a claim that was not raised before the Engineer, as per Clause 4.62, can be raised before the Arbitral Tribunal. However, I do not propose to deal with it because it was not raised before the Arbitral Tribunal. The

next contention that was raised and, therefore, should be examined is whether the claims are also liable to be rejected because they were not included in the final bill. In this regard, Clause 4.58 is relevant and reads as follows:

"4.58 Acceptance and Final payment.

4.58.1 The contractor shall submit the final bill within three months on physical completion of the works as certified in Clause 4.63.1. No further claims shall be made by the contractor after submission of the final bill.

4.58.2 On receipt of final account the Engineer shall prepare the final bill and payment certificate for all undisputed items and certify payment of further monies due to the contractor. In the event of non-payment within 60 (sixty) days interest shall accrue to the contractor at the rate of 1/30 of one percent compounded per day or delay after the expiry of 60 (sixty) days mentioned above.

4.58.3 After completion of work and prior to final payment the contractor shall furnish to the Engineer a release on stamp paper for claims against the Department arising out of the contract other than claims specifically identified, evaluated and accepted from the operation of the release by the contractor.

4.58.4 The contractor shall submit a list of disputed items for which he has made claims with the



Engineer but not disposed either by Engineer or employer along with the final bill.”

Clause 4.58.1 categorically states that the final bill shall be submitted within three months of physical completion of the work. Moreover, it states categorically that no further claims shall be made by the Contractor after submission of the final bill. It also provides that the Contractor shall furnish to the Engineer release on stamp paper for claims against the department arising out of the Contract other than claims specifically identified, evaluated and exempted from the operation of the release by the Contractor. Interestingly, the said clause also provides that the Contractor may submit a list of disputed items for which he has made claims to the Engineer which were not disposed of either by the Engineer or the Employer. Indeed, by relying on the said clause 4.58.4, the Contractor submitted a list of disputed claims aggregating to Rs. 31,87,238.44 as an annexure to letter dated 31.03.2004(Ex.C-56, Volume II, page 100). In view of the aforesaid clause, is the Contractor entitled to raise these claims before the Arbitral Tribunal after not adhering to the contractual machinery and process in this regard? It is clear that Clause 4.58 provides a comprehensive regime for dealing with the Contractor's work related claims, including disputed claims. The Contractor, in this case, did not contend that clause 4.58 is void under Section 23 of the

Contract Act or any other provisions. Consequently, one should proceed on the basis that Clause 4.58 is binding on the Contractor.

12. In light of clause 4.58, the question that arises for consideration is whether the claims that were not included in the final bill or submitted as a list of disputed items can be claimed subsequently in arbitration proceedings. The judgment of the Hon'ble Supreme Court in **State of Goa** lays down the principle that it is not necessary to restrict claims in arbitration to those specified in the Section 21 notice. Nevertheless, it does not deal with the question as to whether claims that were not included in the final bill, as required by the contract in question, either as a regular claim or disputed claim, can, nonetheless, be claimed in arbitration proceedings. The object and purpose of clauses such as clause 4.58 is to ensure that claims are made on or before the date of submission of the final bill so as to ensure that there is certainty both for the Employer and Contractor. Moreover, it enables the Engineer/Consultant to verify the claims within a reasonable time after the relevant work is completed so as to ascertain whether and how much work was done. In light of the clear language of clause 4.58, I see no reason why the Contractor should be permitted to make claims relating to execution of work in spite of not including such claims either in the list of regular claims or disputed claims as per clause 4.58. Needless to say, clauses

such as clause 4.58 would not preclude the Contractor from making claims that are not directly related to the execution of work such as termination related claims or claims that would arise after the final bill is submitted such as retention money claims or bank guarantee claims. However, in this case, the Contract was not terminated and, therefore, there are no termination related loss of profit claims. The claims relate to unpaid final bill, escalation, additional work, refund of retention money, bank guarantee charges, idling, losses on account of overheads and profits and increased escalation. Except for retention money and bank guarantee charges, these claims relate directly to the execution of work and, consequently, could and should have been made on or before the date of submission of the final bill. Moreover, in this case, the relevant clause even enables the submission of a list of disputed items and recourse was taken to this clause under Ex.C-56 as mentioned earlier. Unfortunately, the learned Arbitrator failed to take this aspect into account while considering the claims. Instead, the objections of the Employer on the basis of Clauses 4.58 and 4.62 were rejected on the basis that there is no bar on making larger claims before the Arbitral Tribunal. In this regard, I find that the Arbitral Tribunal noted in paragraph 23 of the Award that the claim increased, in stages, from Rs.78,32,851 before the Employer to Rs.8,40,71,876/- in the Section 11 Petition to a final figure of Rs.14,88,88,219/- before the Arbitral Tribunal. After noting this

staggering increase in the size of the claim, at paragraph 25 of the Award, the Arbitral Tribunal justifies this on the specious and ex facie erroneous reasoning that the Contractor/Claimant is entitled to suitably modify its claims on proper accounting on verification.

13. In addition, at paragraphs 71 and 72 of the Award, the learned Arbitrator relied upon judgments of the Supreme Court in **Reshmi Constructions, Ambika Construction** and **Kalathia** to conclude that claims that were not included in the final bill could be raised subsequently. However, in those cases, the claims were resisted largely on the basis of a “no claim” certificate and it was held that the issuance of a “no claim” certificate as a contractual condition precedent for processing the final bill would not preclude subsequent claims because necessity knows no law. By contrast, in this case, the Contract enables the Contractor to even list disputed claims in the final bill and such a list was provided, there is no contractual requirement of providing an unqualified “no claim” certificate and there is neither pleading nor evidence of undue influence or coercion. On this basis also, in addition to limitation, the Award in respect of all the extra work claims which were not raised with the final bill, the escalation claims, and the claims towards losses on account of overheads and profits are liable to be set aside. As admitted in the written submissions of the Employer before the Arbitral Tribunal at page 134 of Volume 1, this would not apply to claim No.1, which relates to the final bill; Claim 3.5 ,



which relates to Talus Apron; Claim 3.20, which relates to the Pagnate Road construction; and Claim 3.21, which relates to the construction of the access road to the burial ground, because all these claims were included in the final bill as is also evident from the final bill (with annexures)(Ex.C-1, Volume II, pages 1-8). It would not apply to Claim No.4 which relates to the release of the retention money because the retention money was required to be and was released on 08.03.2007(Ex.C-93) after the completion of the defect liability period, which is subsequent to the date of the final bill. Therefore, this claim could not have been included in the final bill. Similarly, Claim 5 relates to the bank guarantee, which was required to be released in two installments, i.e. 2.5% while paying the final bill and another 2.5% upon the expiry of two years from the date of completion of work. Once again, this claim could not have been included in the final bill. In effect, Claims 1, Sub-Claims 3.5, 3.20, 3.21, 4 and 5 are neither barred by limitation nor by Clause 4.58. As regards all other claims and the Award in relation thereto, such claims were not maintainable in light of clause 4.58 of the Contract. Furthermore, in view of the above analysis and conclusion, it is not necessary to deal, in detail, with those individual claims and the decision thereon by the Arbitral Tribunal. Nonetheless, Claims 3(additional work) and 7 (overheads and profits) are also dealt with specifically because they are the most significant.

14. Claim 3, including the many sub-claims therein, pertains to alleged additional work. The principal defence of the Employer, in this regard, is that it is a design and build contract that was awarded on turnkey basis and, consequently, it is the Contractor's responsibility, as the expert, to carry out all the work necessary to complete the project in such a manner as to be fit for purpose and, thereafter, hand over the key to the Employer. Therefore, the learned AAG pointed out that the scope of work was set out illustratively and not exhaustively in Clause 2.1.2 of the Instructions to Bidders, which also included a residuary sub-clause 2.1.2(s) that covered all ancillary and incidental items of work. As a corollary, according to the learned AAG, the work that was carried out cannot be characterized as additional work. On this issue, the learned Arbitrator concluded, at paragraphs 31 and 33 of the Award, that the project is not a turnkey project. In order to reach this conclusion, the learned Arbitrator refers generically to both sides altering the conditions of contract and the time schedule and infers, on that basis, that the character of the project, as a turnkey project, would be erased. When the Contract is expressly referred to as a design and build turnkey project, the above conclusion by the learned Arbitrator is fundamentally misconceived and ex facie erroneous. Further, such conclusion cannot be drawn merely because there was considerable delay in execution of work irrespective of the person responsible for such delay. In specific, without appraising and

citing specific and clear evidence, it cannot be concluded that the project ceased to be a turnkey project. If it remained a turnkey project, the additional work claims would, in principle, be unsustainable unless it can be demonstrated that these claims arise out of work that is clearly outside the scope of the turnkey project. Except with regard to Claims 3.5, 3.20 and 3.21, I do not find that even the Contractor made additional work claims before the Employer on the ground that they are outside the scope of the project. As regards the Award on Claims 3.5, 3.20 and 3.21, I am not inclined to interfere with the Award because the Contractor took the position that these claims were outside the scope of the turnkey project even during execution of work and made claims along with the final bill and by way of Ex.C-56. Besides, the Arbitral Tribunal allowed these claims by appraising evidence as would be evident from paragraphs 93,97 and 98 of the Award. Consequently, as per principles laid down in **ONGC, Associate Builders** and **M.P. Power Generation Company**, no interference is warranted.

15. However, even in a turnkey project, subject to proof, claims for idling, additional overheads or loss of profits could be made, as appropriate, during periods of disruption or prolongation and, therefore, the additional overheads and profits claim is considered separately next.

The claim of Rs.4,29,88,989/- towards overheads and profits (Claim 7)

during the extended period was allowed by applying Hudson's formula. However, prolongation claims of this nature can and should be proved by adducing hard evidence of actual site office expenditure towards manpower and equipment and also by adducing evidence of off-site project-specific expenditure such as project specific insurance, project specific personnel at the head office, etc. As regards formulae such as Hudson's, Emden's and Eichleay's, they are relevant only in respect of head office overheads, which are required to be apportioned across all the projects of the Contractor on a reasonable and proportionate basis. This is also evident from paragraph 104 of the judgment in **McDermott** where the said formulae are extracted. Therefore, awarding this claim entirely on the basis of Hudson's or Patil's formula is a patent illegality.

16. The rejection of Claim 6 towards idling and Claim 8 towards additional escalation on the basis of lack of evidence is fully justified because Claim 6 is a claim for unliquidated damages and Claim 8 is for additional escalation. The reliance by the learned ASG on the judgments in **ONGC** and **Assam State SEB**, in that regard, is misplaced because **ONGC** dealt with a claim for liquidated damages and **Assam State SEB** turned on the limited scope for interference under Section 34 of the Arbitration Act especially as regards appraisal of evidence. Therefore, this conclusion of the Arbitral Tribunal is perfectly in order and no interference is warranted.



17. As stated earlier, neither Claim 4 (retention money) nor Claim 5(bank guarantee claims) could have been included in the final bill because of the nature of the claims. Moreover, the period of limitation for these claims would run from the dates of payment on 08.03.2007 and 23.04.2007, respectively. Therefore, these claims are maintainable and are not barred by limitation. I also find that the Arbitral Tribunal examined the relevant contract clauses, namely, 3.3.1 and 3.3.2, and appraised the evidence (Exs.C-92 and C-93), at paragraphs 114 to 118 of the Award, and allowed Claim 4. There is no reason to interfere with the same except as regards the application of compound interest. Similarly, on Claim 5, the Arbitral Tribunal appraised the evidence (Exs. C-100 to C-105), at paragraphs 119 to 124 of the Award, before drawing the conclusion at paragraphs 125 to 127 thereof. Once again, I find no reason to interfere except with regard to the grant of pre-reference and pendente lite interest on compound interest basis. The reason for interfering with the award of compound interest on Claim 4 and 5 is explained next while dealing with interest.

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18. One more issue remains to be considered, namely, the award of compound interest on the basis of Clause 4.58.2. On perusal of Clause 4.58.2, it is clear that it would apply to certified and undisputed amounts from the final bill that remain unpaid. Therefore, as held in

**State of Haryana**, it would only justify the grant of compound interest on undisputed claims that were included in the final bill and certified for payment by the Engineer. In this case, none of the Claims, including Claim 1, 3.5, 3.20, 3.21, 4 or 6, were certified for payment but not paid. Therefore, simple and not compound interest would apply on those Claims from the due date. Consequently, the award of interest of Rs.20,83,701/- on the retention amount from the due date up to 12.03.2007 on compound interest basis cannot be sustained and the said interest component would have to be re-worked at simple interest. In view of the fact that there is no contractual rate of interest for uncertified and disputed claim and keeping in mind two aspects, namely, (i) it is a commercial transaction; and (ii) the prevailing interest rates at the relevant point of time, those Claims shall carry interest at the rate of 12% per annum during the pre-reference and pendente lite period. Even as regards the post-Award period, the rate of 18% per annum is no longer (i.e. after the 2015 amendment) the default rate of interest under Section 31(7)(b) of the Arbitration Act and the award of interest at 18% per annum in the Award, without basis, is unreasonable given the interest rate environment. In fact, the amendment was made in view of the declining interest rates. Consequently, the amounts payable shall carry interest at 12% per annum in the Post-Award period also.

19. In the result, the Award dated 18.05.2016 is set aside as regards Claim No.2, Claim Nos.3.2, 3.3, 3.6, 3.7, 3.9, 3.12, 3.14 and 7, whereas it is upheld as regards Claims 1, 3.5, 3.20, 3.21, 4 and 6. These Claims shall carry interest at the simple interest rate of 12% per annum in the pre-reference, pendente lite and Post-Award period but subject to that revision, no interference is necessary. In addition, the rejection of Claims 6 and 8 and the other sub-claims in Claim 3 are upheld. Claim 4 and the award thereon consists of interest for belated payment and the unpaid principal sum of Rs.5,88,277/-. As regards the belated payment of retention money of Rs.47,67,896/-, interest shall be computed thereon at simple interest of 12% per annum from 19.03.2004 till 12.03.2007 and paid. Consequently, from 13.03.2007 onwards, including the Post-Award period, interest will be payable only on the unpaid principal sum of Rs.5,88,277/- at the simple interest rate of 12% per annum. Thus, O.P. No.454 of 2018 is disposed of on the above terms and O.P.No.145 of 2017 is dismissed. No costs.

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**22.01.2020**

Speaking order  
Index: Yes  
Internet: Yes  
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O.P.No.145 of 2017 and  
O.P.No.454 of 2018

**SENTHILKUMAR RAMAMOORTHY, J.**  
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**Pre Delivery order**  
**in**  
**O.P.No.145 of 2017**  
**and**  
**O.P.No.454 of 2018**

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**22.01.2020**