Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.3349 OF 2005

M/s. J.G.Engineers Pvt. Ltd. … Appellant

Vs.

Union of India & Anr. … Respondents

J U D G M E N T

R.V.RAVEENDRAN, J.

This appeal is directed against the judgment dated 8.2.2005 of the Guwahati High Court allowing Arbitration Appeal No.1/2004 filed by the respondents and setting aside the judgment dated 12.12.2003 passed by Additional District Judge, Kamrup, Guwahati (by which the District court had dismissed the petition filed by respondents filed under section 34 of

Arbitration & Conciliation Act, 1996 and affirmed the Award passed by the Arbitrator dated 5.9.2001, with clerical corrections made on 22.9.2001).

2. On 26.3.1993 the respondents awarded the work of "extension of terminal building" at Guwahati airport to the appellant. As per the contract, the date of commencement of work was 10.4.1993 and the period of completion of the work was 21 months, to be completed in different stages. As the appellant (also referred to as the 'contractor') did not complete the first phase of the work within the stipulated time, the respondents terminated the contract by order dated 29.8.1994. The termination was challenged by the appellant in a writ petition filed before the Gawahati High Court. By judgment dated 27.9.1994, the High Court set aside the termination and directed the respondents to grant time to the appellant till the end of January 1995 for completion of the first phase reserving liberty to the appellant to apply for further extension of time. As the work was not completed, the respondents granted an extension upto 31.7.1995 by letter dated 24.8.1995, without levying any liquidated damages. The contractor proceeded with the work even thereafter. However, as the progress was slow, the respondents terminated the contract on 14.3.1996 on the ground

of non-completion even after 35 months. The appellant filed a writ petition, challenging the cancellation. The High Court by order dated 25.6.1996, noticed the existence of the arbitration agreement and referred the parties to arbitration. In pursuance of it, on a request by the appellant, the respondents appointed Mr. C.Vaswani as the sole arbitrator on 14.2.1997.

3. On 17.4.1997, the appellant filed its statement of claims. Claims 1 to 11 aggregated to Rs.2,38,86,198.31 (subsequently, reduced to Rs.2,06,70,495/-). Claim 12 was for interest at 18% per annum on the total claim amount from 20.5.1996 to date of realization. Claim 13 was for Rs.2,13,729/- as cost of arbitration. On 3.2.1999, the respondents filed their reply and also filed their four counter claims before the arbitrator aggregating to Rs. 279,54,225/-.

4. By award dated 5.9.2001 (as amended on 22.9.2001) the Arbitrator awarded a sum of Rs.1,04,58,298/- with interest and costs in favour of the appellant and rejected the counter claims of the respondents. The particulars of the amounts claimed and the awards thereon are as under:

Claims by appellant

Claim No.	Particulars of Claim	Amount claimed by appellant	Amount awarded by Arbitrator
1	Claim for the balance payment of 34th Running account	Rs.11,26,518	Rs.11,26,518
2,4,5	2) Claim for the payment due under 35th Running Account bill	Rs.65,64,544	Rs.8,70,517
	4) Claim for the payment for Extra items of work executed		Rs.3,27,335
	5) Claim for escalation in rates for works executed after July 1995 till the date of termination		Rs.14,59,320
3	Claim for the refund of Security Deposit	Rs.1,00,000	Rs. 1,00,000
6	Claim for the difference in scale weight and sectional weight of steel	Rs. 37,608	Rs. 37,608
7 & 8.	7) Claim for "on site' overheads and establishment expenses during the extended period of 14 months beyond the stipulated date of completion.	Rs.25,57,295	Rs.17,50,000
	8) Claim for 'off-site' overheads and establishment expenses during the extended period of 14 months beyond the stipulated date of completion.		
9	Claim for loss of hire charges of machinery, shuttering materials etc. engaged for execution of the work for the period beyond the stipulated date of completion.	Rs.30,79,160	Rs.8,75,000
10	Claim for compensation for the unutilized proportionate expenses incurred for establishing the site, and setting-up of infrastructure required for performance of full value of work.	Rs.18,01,701	Nil
11	Claim for the loss of anticipatory profit @ 15% on the value of balance work which could not be executed due to termination of Contract	Rs.54,03,669	Rs.39,12,000
	Total	Rs.2,06,70,495	Rs.104,58,298

Counter Claims by respondents

Counter Claim No	Particulars of Counter Claim	Amount claimed by Respondents	Amount awarded by Arbitrator
1.	Excess cost of getting the work executed through an alternative agency - recoverable as per clause (3) of the agreement	Rs.1,46,69,227	Nil
2.	Liquidated damages levied under clause (2) of the agreement	Rs.56,84,998	Nil
3.	Escalation that would be payable to the alternative agency in regard to execution of remaining work (tentative).	Rs.75,00,000	Nil
4.	Cost of Arbitration	Rs.1,00,000	Nil
	Total	Rs.2,79,54,225	Nil

The Arbitrator awarded to the contractor, simple interest @ 9% per annum on Rs.38,21,298 for the period 14.9.1996 to 31.3.1997 and simple interest @ 15% per annum on Rs.1,04,58,298 for the period 1.4.1997 to date of payment (under Claim No.12). The Arbitrator also awarded Rs.39,610/- towards costs (under Claim No. 13). All the counter claims of respondents were rejected.

5. On 12.12.2001, the respondents filed an application (Misc. Arbn. Case No.590/2001) under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act') in the District Court, Guwahati for setting aside the aforesaid award. The respondents filed an additional petition in the said proceedings, under section 34 of the Act on 27.1.2003, raising

additional grounds of challenge. The learned District Judge, Guwahati dismissed the petition vide order dated 12.12.2003, holding that none of the grounds under section 34(2) were made out. This order was reversed by the Guwahati High Court, by the impugned judgment dated 8.2.2005, in Arbitration Appeal No.1/2004 filed by the respondents, recording the following findings: (i) The award on claim Nos.1, 3 and 11 related to 'excepted matters' which were beyond the scope of the arbitration agreement and could not be adjudicated by the Arbitrator. (ii) The award on Claim No.5 was contrary to the terms of price escalation clause (clause 10(cc) of the contract) and being patently illegal, required to be set aside. (iii) The rejection of the counter claims of respondent, by ignoring the agreed terms of contract and the legal provisions, was also patently illegal. As a consequence, the award was liable to be set aside fully, as the respondents would have been entitled to adjust the amounts found due and payable against claims 2, 4, 6, 7, 8, 9 against their counter-claims, if allowed. In view of the said findings the High Court directed as follows :

> "In view of the above, the appeal filed by the appellants is allowed. The award passed by the Arbitrator on 5.9.2001 and corrected on 22.9.2001 as well as the order dated 12.12.2003 passed by the learned Adhoc Additional District Judge No.2, Kamrup, Guwahati in Misc. (Arbitration) Case No.590/2001, are set aside. The arbitration proceeding is remitted back to the learned arbitrator for reconsideration of the counter claims of the respondents and for passing an award by making necessary adjustment of the amount payable to the contractor/claimant against his

> claim nos. 2,4,6,7,8,9 and 13 in terms of the finding recorded by this Court."

6. The respondents' contention that the arbitrator has considered and allowed some claims which were 'excepted matters' and therefore, inarbitrable, that grant of some other claims by the arbitrator violated the express provisions of clause 10(cc) of the agreement, and that the counter-claims of respondents have been erroneously rejected, have found favour with the High Court. The appellant contends that the award does not violate clauses (2) and (3) of the agreement making certain decisions of Superintending Engineer/Engineer-in-Charge final, nor clause 10(cc) of the agreement relating to escalations. It is also contended that respondents committed breach and the counter-claims were rightly rejected. The appellant contends the award is legal and not open to challenge under any of the grounds under section 34 of the Act.

Questions for consideration

7. A Civil Court examining the validity of an arbitral award under section 34 of the Act exercises supervisory and not appellate jurisdiction over the awards of an arbitral tribunal. A court can set aside an arbitral award, only if any of the grounds mentioned in sections 34(2)(a) (i) to (v)

or section 34(2)(b)(i) and (ii), or section 28(1)(a) or 28(3) read with section 34(2)(b)(ii) of the Act, are made out. An award adjudicating claims which are 'excepted matters' excluded from the scope of arbitration, would violate section 34(2)(a)(iv) and 34(2)(b) of the Act. Making an award allowing or granting a claim, contrary to any provision of the contract, would violate section 34(2)(b)(ii) read with section 28(3) of the Act. On the contentions urged, the following questions arise for our consideration :

(i) Whether the High Court was justified in setting aside the award in respect of claims 1, 3, and 11 on the ground that they related to 'excepted matters'?

(ii) Whether the High Court was justified in setting aside the award in regard to Claim Nos. 2, 4, 6, 7, 8 and 9?

(iii) Whether High Court was justified in holding that claim 5 for escalation was barred by clause 10(cc) of the contract?

(iv) Whether the High Court was justified in setting aside the award rejecting counter-claims 1 to 4?

Re : Question (i):

8. Claim No. (1) for Rs.11,26,518 relates to the payment due in regard to the 34th running bill withheld by the respondent. It comprises Rs.5,90,000/- levied as compensation under clause (2) of the agreement, Rs.3,17,468 withheld towards alleged risk cost in getting the work executed by an alternative agency and Rs.2,19,050 being the escalation in

regard to the period January 1995 to July 1995 which was admitted by the respondents to be due. The Arbitrator allowed the entire claim holding that the appellant was not responsible for the delay and consequently the rescission/termination was illegal and levy of liquidated damages and recovery of excess cost in getting the work completed through an alternative agency was not permissible, was bad.

9. Claim No.3 was for refund of security deposit of Rs.100,000/-. The respondents had encashed the bank guarantee for Rs.1 lakh which had been issued in lieu of security deposit and forfeited the same on the ground that the contractor was in breach. The arbitrator held the contractor was not in breach and the forfeiture was illegal and directed that the said sum of Rupees one lakh should be refunded to the contractor.

10. Claim No.11 was for Rs.54,03,669 being the loss of anticipated profit in regard to the value of the unexecuted work which would have been executed by the contractor if the contract had not been rescinded by the respondents. The contractor contended that the termination was in breach of the contract and but for such termination the contractor would have legitimately completed the work and earned a profit of 15%. The arbitrator held that the respondents were responsible for the delay, that the

contractor was not in breach and the termination was therefore illegal. He held that the value of the work which could not be executed by the contractor due to wrongful termination, was Rs.3,91,21,589 and 10% thereof would be the standard estimate of the loss of profits and consequently awarded Rs.39,12,000/- towards the loss of profits, which the contractor would have earned but for the wrongful termination of the contract by the respondents.

11. As per the arbitration agreement (contained in Clause 25 of the contract) all questions and disputes relating to the contract, execution or failure to execute the work, whether arising during the progress of the work or after the completion or abandonment thereof, "except where otherwise provided in the contract", had to be referred to and settled by arbitration. The High Court held that claims 1, 3 and 11 of the contractor were not arbitrable as they related to excepted matters in regard to which the decisions of the Superintending Engineer or the Engineer-in-Charge had been made final and binding under clauses (2) and (3) of the agreement.

12. We may refer to the relevant provisions of the said contract document, that is, clauses 2, 3(Part) and 25 (Part) to decide

whether the claims 1, 3 and 11 were excepted matters, excluded from Arbitration:

Clause (2):

"The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be deemed to be essence of the contract and shall be reckoned from the tenth day after the date on which the order to commence the work is issued to the contractor. The work shall throughout the stipulated period of the contract be proceeded with all due diligence and the contractor shall pay as **compensation an amount equal to one percent or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide** on the amount of the estimated cost of the whole work as shown in the tender, for every day that the work remains uncommenced or unfinished after the proper dates. And further to ensure good progress during the execution of the work, the contractor shall be bound in all cases in which the time allowed for any work exceeds, one month (save for special jobs) to complete one-eighth of the whole of the work before one-fourth of the whole time allowed under the contract has elapsed, three eighths of the works, before one-half of such time has elapsed and three-fourths of the work; before three-fourths of such time has elapsed. However for special jobs if a time-schedule has been submitted by the Contractor and the same has been accepted by the Engineer-in-Charge. The contractor shall comply with the said time schedule. In the event of the contractor failing to comply with this condition, he shall be liable to pay as compensation an **amount equal to one percent or such small amount as the Superintending Engineer (whose decision in writing shall be final) may decide** on the said estimated cost of the whole work for every day that the due quantity of work remains incomplete. Provided always that the entire amount of compensation to be paid under the provisions of this clause shall not exceed ten per cent, on the estimated cost of the work as shown in the tender."

Clause 3 :

"The Engineering-in-charge may without prejudice to his right against the contractor in respect of any delay or inferior workmanship or otherwise or to any claims for damage in respect of any breaches of the contract and without prejudice to any rights or remedies under any of the provisions of this contract or otherwise and whether the date of completion has or has not elapsed by notice in writing absolutely determine the contract in any of the following cases:

(i) If the contractor having been given by the Engineer-in-charge a notice in writing to rectify, reconstruct or replace any defective work or that the work is being performed in any inefficient or other improper or unworkmanlike manner, shall omit to comply with the requirements of such notice for a period of seven days thereafter or if the contractor shall delay or suspend the execution of the work so that either **in the judgment of the Engineer-in-charge (whose decision shall be final and binding) he will be unable to secure completion of the work by the date of completion** or he has already failed to complete the work by that date…

(ii) *x x x x* (not relevant)

(iii) If the contractor commits breach of any of the terms and conditions of this contract.

(iv) If the contractor commits any acts mentioned in Clause 21 hereof.

When the contractor has made himself liable for action under any of the cases aforesaid, the Engineer-in-Charge on behalf of the President of India shall have powers:

(a) To determine or rescind the contract as aforesaid (of which termination or rescission notice in writing to the contractor under hand of the Engineer-in-Charge shall be conclusive evidence) upon such determination or rescission the security deposit of the contractor shall be liable to be forfeited and shall be absolutely at the disposal of Government.

(b) x x x x (not relevant)

(c) After giving notice to the contractor to measure up the work of the contractor and to take such part thereof as shall be unexecuted out of his hands and to give it to another contractor to complete in which case any expenses which may be incurred in excess of the sum which would have been paid to the original contractor if the whole work had been executed by him (**of the amount of which excess the certificate in writing of the Engineer-in-Charge shall be final and conclusive**) shall be borne and paid by the original contractor and may be deducted from any money due to him by Government under this contract or on any other account whatsoever or from his security deposit

> or the proceeds of sales thereof or a sufficient part thereof as the case may be."
>
> In the event of any one or more of the above courses being adopted by the Engineer-in-Charge the contractor shall have no claim to compensation for any loss sustained by him by reason of his having purchased or procured any materials or entered into any engagements or made any advances on account or with a view to the execution of the work or the performance of contract. And in case action is taken under any of provisions aforesaid. The contractor shall not be entitled to recover or be paid any sum for any work thereof or actually performed under this contract unless and until the Engineer-in-Charge has certified in writing the performance of such work and the value payable in respect thereof and he shall only be entitled to be paid the value so certified.
>
> **Clause 25:**
>
> "***Except where otherwise provided in the contract*** all questions and disputes relating to the meaning of the specifications, designs, drawings, and instructions hereinbefore 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 of failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by the Chief Engineer, C.P.W.D. in charge of the work at the time of dispute or if there be no Chief Engineer the administrative head of the said C.P.W.D. at the time of such appointment. It will be no objection to any such appointment that the arbitrator so appointed is a Government servant, that he had to deal with the matters to which the contract relates and that in the course of his duties as Government servant he has expressed views on all or any of the matters in dispute or difference."
>
> *(emphasis supplied)*

13. Clauses (2) and (3) of the contract relied upon by the respondents, no doubt make certain decisions by the Superintending Engineer and Engineer-in-Charge final/final and binding/final and conclusive, in regard

to certain matters. But the question is whether clauses (2) and (3) of the agreement stipulate that the decision of any authority is final in regard to the responsibility for the delay in execution and consequential breach and therefore exclude those issues from being the subject matter of arbitration. We will refer to and analyse each of the 'excepted matters' in clauses (2) and (3) of the agreement to find their true scope and ambit :

(i) Clause (2) provides that if the work remains uncommenced or unfinished after proper dates, the contractor shall pay as compensation for everyday's delay an amount equal to 1% or such small amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the estimated cost of the whole work as shown in the tender. W*hat is made final is only the decision of the Superintending Engineer in regard to the percentage of compensation payable by the contractor for everyday's delay that is whether it should be 1% or lesser. His decision is not made final in regard to the question as to why the work was not commenced on the due date or remained unfinished by the due date of completion and who was responsible for such delay.*

(ii) Clause (2) also provides that if the contractor fails to ensure progress as per the time schedule submitted by the contractor, he shall be liable to pay as compensation an amount equal to 1% or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the estimated cost of the whole work for everyday the due

quantity of the work remains incomplete, subject to a ceiling of ten percent. *This provision makes the decision of the Superintending Engineer final only in regard to the percentage of compensation (that is, the quantum) to be levied and not on the question as to whether the contractor had failed to complete the work or the portion of the work within the agreed time schedule, whether the contractor was prevented by any reasons beyond its control or by the acts or omissions of the respondents, and who is responsible for the delay.*

(iii) The first part of clause (3) provides that if the contractor delays or suspends the execution of the work so that either in the judgment of the Engineer-in-Charge (which shall be final and binding), he will be unable to secure the completion of the work by the date of completion or he has already failed to complete the work by that date, certain consequences as stated therein, will follow. W*hat is made final by this provision is the decision of the Engineer-in-Charge as to whether the contractor will be able to secure the completion of the work by the due date of completion*, *which could lead to the termination of the contract or other consequences*. *The question whether such failure to complete the work was due to reasons for which the contractor was responsible or the department was responsible, or the question whether the contractor was justified in suspending the execution of the work, are not matters in regard to which the decision of Engineer-in-Charge is made final.*

(iv) The second part of clause (3) of the agreement provides that where the contractor had made himself liable for action as stated in the first part of that clause, the Engineer-in-Charge shall have powers to determine or

rescind the contract and the notice in writing to the contractor under the hand of the Engineer-in-Charge shall be conclusive evidence of such termination or rescission. *This does not make the decision of the Engineer-in-Charge as to the validity of determination or rescission, valid or final. In fact it does not make any decision of Engineer-in-Charge final at all. It only provides that if a notice of termination or rescission is issued by the Engineer-in-Charge under his signature, it shall be conclusive evidence of the fact that the contract has been rescinded or determined*.

(v) After determination or rescission of the contract, if the Engineer-in-Charge entrusts the unexecuted part of the work to another contractor, for completion, and any expense is incurred in excess of the sum which would have been paid to the original contractor if the whole work had been executed by him, the decision in writing of the Engineer-in-Charge in regard to such excess shall be final and conclusive, shall be borne and paid by the original contractor. *What is made final is the actual calculation of the difference or the excess, that is if the value of the unexecuted work as per the contract with the original contractor was Rs.1 lakh and the cost of getting it executed by an alternative contractor was Rs.1,50,000/- what is made final is the certificate in writing issued by the Engineer-in-Charge that Rs.50,000 is the excess cost. The question whether the determination or rescission of the contractor by the Engineer-in-Charge is valid and legal and whether it was due to any breach on the part of the contractor, or whether the contractor could be made liable to pay such excess, are not issues on which the decision of Engineer-in-Charge is made final.*

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 vs. Shree Rameshwara Rice Mills* (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. vs. Motorola India Ltd.* (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 Motorolla 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 Dmages 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.

Re : Question (ii)

18. The arbitrator had considered and dealt with claims (1), (2, 4 and 5), (6), (7 and 8), (9) and (11) separately and distinctly. The High Court found

that the award in regard to items 1, 3, 5 and 11 were liable to be set aside. The High Court did not find any error in regard to the awards on claims 2, 4, 6, 7, 8 and 9, but nevertheless chose to set aside the award in regard to these six items, only on the ground that in the event of counter claims 1 to 4 were to be allowed by the arbitrator on reconsideration, the respondents would have been entitled to adjust the amounts awarded in regard to claims 2, 4, 6, 7, 8 and 9 towards the amounts that may be awarded in respect of counter claims 1 to 4; and that as the award on counter claims 1 to 4 was set aside by it and remanded for fresh decision, the award in regard to claim Nos. 2, 4, 6, 7, 8 and 9 were also liable to be set aside. It is now well-settled that if an award deals with and decides several claims separately and distinctly, even if the court finds that the award in regard to some items is bad, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent. As the awards on items 2, 4, 6, 7, 8 and 9 were upheld by the civil court and as the High Court in appeal did not find any infirmity in regard to the award on those claims, the judgment of the High Court setting aside the award in regard to claims 2,4,6,7,8 and 9 of the appellant, cannot be sustained. The judgment to that extent is liable to be set aside and the award has to be upheld in regard to claims 2, 4, 6, 7, 8 and 9.

Re : Question (iii)

19. Section 28(3) of the Act provides that in all cases the arbitral tribunal shall decide in accordance with the terms of the contract and shall also take into account the usages of the trade applicable to the transaction. Sub-section (1) of section 28 provides that the arbitral tribunal shall decide the disputes submitted to arbitration in accordance with the substantive law for the time being in force in India. Interpreting the said provisions, this court in *Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd*. [2003 (5) SCC 705] held that a court can set aside an award under section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian Law; or (b) contrary to the interests of India; or (c) contrary to justice or morality; or (d) patently illegal. This Court explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy.

20. It is well-settled that where the contract in clear and unambiguous terms, bars or prohibits a particular claim, any award made in violation of the terms of the contract would violate section 28(3) of the Act, and would be considered to be patently illegal and therefore, liable to be set aside under section 34(2)(b) of the Act. Claim No.(5) is for payment of escalation under clause 10(cc) of the contract for work done beyond July, 1995 till the date of termination. Clause 10(cc) of the agreement reads thus:

> **Clause 10(cc)**
>
> "… subject to the condition that such compensation for the escalation in prices shall be available only for work done during the stipulated period of the contract including such period for which the contract is validly extended under the provisions of clause 5 of the contract without any action under clause 2 and also subject to the condition that no such compensation shall be payable for a work for which the stipulated period of completion is 6 months or less".

Thus, escalation in price shall be available only for the work done during the stipulated period of contract including such period for which the contract was validly extended under the provisions of clause (5) of the contract, without any action under clause (2) of the contract. The respondents contend that as the Superintending Engineer levied penalty (at 10% of the estimated cost of the work) for the period 10.1.1995 to 14.3.1996 under clause (2) of the contract, the contractor was not entitled

to payment of escalation under clause 10(cc). The arbitrator held that the contractor was not responsible for the delay and the respondents were responsible for the delay. If so, the contractor will be entitled to a valid extension under the provisions of the contract, without levy of any liquidated damages. If the contractor is entitled to such extension without levy of penalty, then it follows that under clause 10(cc), the contractor would be entitled to escalation, in terms of the contract for the work done during the period of extension.

21. As noticed above, the stipulated date for completion was 9.1.1995. The respondents granted the first extension upto 31.7.1995 without levy of liquidated damages, vide letter dated 24.8.1995. In fact the respondent had paid the escalation in prices under clause 10(cc) upto June 1995. The contractor was however permitted to continue the work without levy of any liquidated damages, until termination on 14.3.1996. It was only on 30.9.1999 after the contractor had submitted its statement of claim on 17.4.1997, the respondents chose to levy liquidated damages for the period 1.10.1995 to 14.3.1996. In view of the finding of the Arbitrator that the contractor was not responsible for the delay, the contractor was entitled to second extension from 1.8.1995 also without levy of penalty. In fact,

having extended the time till 31.7.1995 without any levy of liquidated damages, the respondents could not have retrospectively levied liquidated damages on 30.9.1999 from 10.1.1995. Be that as it may.

22. We extract below the reasoning of the Arbitrator for grant of escalation for the work done from 1.8.1995 to 14.3.1996 under clause 10(cc) of the contract :

> "The escalation upto July'95 has been covered under claim no.1. The respondent has not paid any further escalation beyond July, 95, since the extension thereafter has not been granted and the contract was rescinded…….. The respondent has denied the claim as the escalation is payable only for the stipulated period and period extended without levy of penalty. As I have already decided that the action of rescission of the contract and the action of levying the compensation/penalty under Clause 2 by the respondent is incorrect and the claimant was not responsible for the delay, the escalation for the total work done, automatically becomes payable."

The High Court therefore committed an error in setting aside the award in regard to claim No.5 on the ground that it violates clause 10(cc) of the contract.

Re : Question (iv)

23. Once the Arbitrator recorded the finding on consideration of the evidence/material, that the contractor was not responsible for the delay and

that the termination was wrongful and that the respondents were liable for the consequences arising out of the wrongful termination of contract, the question of respondents claiming any of the following from the contractor does not arise:

(i) Extra expenditure incurred in getting the balance of work completed through another contractor under clause 3 of the agreement [counter claim (1) for Rs.1,46,69,277].

(ii) Levy of liquidated damages under clause 2 of the agreement at 10% of estimated cost of work for the delay between 10.1.1995 to 14.3.1996 [counter claim No.(2) for Rs.56,84,998].

(iii) Claim on account of expected demand for escalation in rates payable to the alternative contractor in getting the work completed, in addition to the extra expenditure claimed under counter claim No.1 [counter claim No.(3) for tentative sum of Rs.75 lakhs to be ascertained after the work was actually completed and the bill of the new agency is settled].

(iv) Claim for cost of arbitration [counter claim No.(4) for Rs.100,000/-].

The High Court proceeded on the erroneous assumption that when clauses (2) and (3) of the agreement made the decisions of the Superintending Engineer/Engineer-in-Charge final as to the quantum of liquidated damages and quantum of extra cost in getting the balance work completed, the said provisions also made the decision as to the liability to pay such liquidated

damages or extra cost or decision as to who committed breach final and therefore, inarbitrable; and that as a consequence, the respondents were entitled to claim the extra cost in completing the work (counter claims 1 and 3) and levy liquidated damages (counter claim No.2) and the arbitration costs (counter claim No.4). Once it is held that the issues relating to who committed breach and who was responsible for delay were arbitrable, the findings of the arbitrator that the contractor was not responsible for the delay and that the termination of contract is illegal are not open to challenge. Therefore, the rejection of the counter claims of the respondents is unexceptionable and the High Court's finding that arbitrator ought not to have rejected them becomes unsustainable. The award of the Arbitrator rejecting the counter claims is therefore, upheld.

Conclusion

24. No part of the decision of the High Court is sustainable. The appeal is therefore allowed, the impugned order of the High Court is set aside and the order of the District Court dated 12.12.2003, is restored.

…….J.
(R V Raveendran)

New Delhi;
April 28, 2011.

…….J.
(Markandey Katju)