REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.5511 OF 2012

M/S. MITRA GUHA BUILDERS (INDIA) COMPANY **...Appellant**

VERSUS

OIL AND NATURAL GAS CORPORATION LIMITED **…Respondent**

WITH

CIVIL APPEAL NO.5512 OF 2012

J U D G M E N T

R. BANUMATHI, J.

These two appeals arise out of the judgment dated 16.02.2009 passed by the High Court of Delhi in FAO(OS) No.6 of 2008 and FAO(OS) No.7 of 2008 in and by which the Division Bench of the High Court has set aside the order of the learned Single Judge and also of the learned Arbitrator by holding that the levy of liquidated damages is an "excepted matter" under Clause 2 read with Clause 25 of the contract and the same is not arbitrable.

2. Brief facts which led to filing of these appeals are as follows:-

Appellant-M/s. Mitra Guha Builders (India) Company and the respondent-Oil and Natural Gas Corporation Limited (ONGC) entered into a contract on 05.01.1996 bearing No.DHL/Civil/NOIDA/6/94 for construction of Multi-storeyed Residential flats 28 Nos. 'C' type guest house multipurpose hall service block underground water tank etc. and other work for ONGC. The appellant-claimant raised certain claims which were refuted by the respondent and thus, the claimant invoked the arbitration Clause 25 of the General Conditions of the contract vide letter dated 07.09.2001. The appellant-claimant had also entered into a contract dated 05.01.1996 bearing No.DHL/Civil/NOIDA/5/94 for construction of Multi-storeyed Residential flats 20 Nos. 'B' type for ONGC. The appellant-claimant raised certain claims which were refuted by the respondent and here again, the claimant invoked the arbitration Clause 25 of the General Conditions of the contract vide letter dated 07.09.2001.

3. The designated authority vide its order dated 03.01.2002 appointed Justice P.K. Bahri (Retd.) as the sole Arbitrator to adjudicate upon the claims of the parties. The learned Arbitrator vide award dated 01.07.2005 allowed the claim of the claimant and disallowed the liquidated damages/compensation and rejected the

counter claim of respondent-ONGC. Various claims made by the contractor and the amount awarded by the learned Arbitrator in both the arbitration cases are as under:-

Arbitral Award in Arbitration Case No.297/2002 dated 01.07.2005

Claim No.	Particulars of claim of the Petitioner before the Ld. Arbitral Tribunal	Amount claimed by the Petitioner	Amount awarded by Ld. Arbitrator
1.	Balance payment claimed by the Petitioner towards Final Bill	Rs.21,22,249/-	Rs.21,18,975/-
2.	Amount allegedly withheld by ONGC	Rs.9,00,000/-	Rs.9,00,000/-
3.	Escalation claimed by the Petitioner as per provisions of the contract	Rs.27,92,189/-	Rs.27,92,189/-
4.	Losses and damages incurred by the Petitioner in the shape of overheads due to prolongation of contract	Rs.21,60,375/-	Claim rejected by the Ld. Arbitrator
5.	Loss of turnover suffered by the Petitioner due to prolongation of contract	Rs.55,58,428/-	Claim rejected by the Ld. Arbitrator
6.	Declaration sought by the Petitioner that the penalty under Clause 2 imposed by ONGC was illegal and unwarranted and the amount withheld by ONGC was payable to the Petitioner with interest @ 24%	Rs.30,18,975/- [amount that was withheld by ONGC towards liquidated damages]	Amount of Rs.30,18,975/- withheld by ONGC as liquidated damages was to be refunded and adjusted towards payment of Claim No.1 and 2
7.	Interest payable on final bill	-	-
8.	Interest payable on withheld amount	-	-
9.	Interest payable on escalation amount	-	-
10.	Interest payable on looses and damages	-	-
11.	Interest pre-suit pendente lite and future interest @ 24%	-	10% interest
12.	Cost of Arbitration	Rs.1,00,000/-	Rs.2,00,000/-
Total amount awarded by Ld. Arbitrator (Claim 1 + 2 + 3)			Rs.58,11,164/-

Arbitral Award in Arbitration Case No.297A/2002 dated 01.07.2005

Claim No.	Particulars of claim of the Petitioner before the Ld. Arbitral Tribunal	Amount claimed by the Petitioner	Amount awarded by Ld. Arbitrator
1.	Balance payment claimed by the Petitioner towards Final Bill	Rs.25,91,225/-	Rs.24,80,142/-
2.	Amount allegedly withheld by ONGC	Rs.12,00,000/-	Rs.12,00,000/-
3.	Escalation claimed by the Petitioner as per provisions of the contract	Rs.29,56,110/-	Rs.29,56,110/-
4.	Losses and damages incurred by the Petitioner in the shape of overheads due to prolongation of contract	Rs.18,23,613/-	Claim rejected by the Ld. Arbitrator
5.	Loss of turnover suffered by the Petitioner due to prolongation of contract	Rs.46,91,973/-	Claim rejected by the Ld. Arbitrator
6.	Declaration sought by the Petitioner that the penalty under Clause 2 imposed by ONGC was illegal and unwarranted and the amount withheld by ONGC was payable to the Petitioner with interest @ 24%	Rs.36,80,142/- [amount that was withheld by ONGC towards liquidated damages]	Amount of Rs.36,80,142/- withheld by ONGC as liquidated damages was to be refunded and adjusted towards payment of Claim No.1 and 2
7.	Interest payable on final bill	Rs.9,84,680/-	-
8.	Interest payable on withheld amount	Rs.6,36,000/-	-
9.	Interest payable on escalation amount	Rs.18,91,910/-	-
10.	Interest payable on looses and damages	Rs.40,39,666/-	-
11.	Interest pre-suit pendente lite and future interest @ 24%	-	10% interest
12.	Cost of Arbitration	Rs.1,00,000/-	Rs.2,00,000/-
Total amount awarded by Ld. Arbitrator (Claim 1 + 2 + 3)			Rs.66,36,252/-

The learned Arbitrator allowed the claim of the claimant and disallowed the liquidated damages/compensation of Rs.32,79,828/- in Arbitration Case No.297A of 2002 and Rs.42,08,940/- in Arbitration Case No.297 of 2002 presuming the same to be a penalty.

4. Challenging the award, the respondent filed petitions bearing OMP Nos.358 and 359 of 2005 under Section 34 of the Arbitration and Conciliation Act, 1996 before the High Court of Delhi and the same were dismissed by the Single Judge vide order dated 02.11.2007. The learned Single Judge held that the Arbitrator has found that under the garb of liquidated damages, what was sought to be imposed was penalty. The learned Single Judge found that almost 60% of the delay was attributable to the respondent-ONGC while 273 days - 40% delay was attributable to the appellant. The learned Single Judge held that when the respondent-ONGC themselves are responsible for substantive part of the delay, it can hardly be said that respondent is entitled to recovery of liquidated damages or penalty. While upholding the award passed by the Arbitrator, the learned Single Judge in Arbitration Case No.297A of 2002 corrected the award amount as Rs.66,36,252/- from Rs.69,36,252/- which was on account of clerical mistake.

5. The respondent-ONGC filed appeals under Section 37 of the Arbitration Act, 1996 before the High Court of Delhi. The respondent contended that the pre-estimated liquidated damages of Rs.32,79,828/- in Arbitration Case No.297A of 2002 and Rs.42,08,940/- in Arbitration Case No.297 of 2002 claimed by the respondent-ONGC in terms of Clause 2 of the contract between the parties was wrongly disallowed by the Arbitrator presuming the same to be a penalty.

6. The issue involved before the Division Bench of the High Court was interpretation of Clause 2 of the contract regarding liquidated damages/compensation levied by the Superintending Engineer and the finality attached to it. Before the Division Bench, it was contended by the respondent-ONGC that the decision of the Superintending Engineer to levy liquidated damages under Clause 2 being final, the same was an “excepted matter” and not arbitrable.

7. The Division Bench set aside the findings of the award passed by the learned Arbitrator and the order of the learned Single Judge by holding that Clause 2 of the agreement provided that the decision of the Superintending Engineer on the question of levy of liquidated damages is final and that the same could not have been agitated in the arbitration proceeding. The Division Bench held that

when the parties have consciously provided that the decision of the Superintending Engineer shall be final only to exclude the issue of "excepted matter" from the scope of the arbitration, the Arbitrator ought not to have dealt with the same and passed the award. The Division Bench has also pointed out that when the respondent-ONGC first gave notices to the appellant-contractor to rectify the defects and thereafter, gave a notice to levy liquidated damages on 15.05.2001 followed by the letter dated 25.05.2001 to the appellant-contractor that the final bill was ready and that the appellant was required to reconcile the final bill to ensure the settlement of the account, it cannot in such circumstances be said that the liquidated damages were imposed as a counter blast to the appellant's claim. With those findings, the Division Bench reversed the findings of the learned Single Judge and set aside the award.

8. Assailing the above judgment of the Division Bench, Mr. Bipin Prabhat, learned counsel for the appellant contended that the High Court failed to appreciate that Clause 25 of the contract which authorises the quantum of reduction as well as the reduction of rates for substantive works cannot be construed to empower the Superintending Engineer to determine the issue of levy of liquidated damages. It was submitted that the High Court failed to appreciate

that the dispute relating to levy of compensation for delay provided under Clause 2 read with Clause 25 of the contract is not an “excepted matter” and the same has been rightly adjudicated upon by the learned Arbitrator. The learned counsel further contended that the Division Bench, in exercising its power under appellate jurisdiction under Section 37 of the Act, erred in reappreciating the evidence and in upsetting the findings of the learned Arbitrator and the learned Single Judge.

9. Per contra, Mr. K.M. Natraj, learned Additional Solicitor General (ASG) assisted by Mr. Akshay Amritanshu, learned counsel submitted that the learned Arbitrator wrongly disallowed the estimated liquidated damages and reasonable compensation of Rs.32,79,828/- in Arbitration Case No.297A of 2002 and Rs.42,08,940/- in Arbitration Case No.297 of 2002 presuming the same to be a penalty. The learned ASG further contended that the learned Arbitrator travelled beyond the terms of the contract and disallowed the liquidated damages to the respondent even though it was an “excepted matter”, not falling within his jurisdiction. It was submitted that the Division Bench of the High Court has rightly held that the imposition of liquidated damages by the respondent was

not a counter-blast or an afterthought and prayed for dismissal of the appeals.

10. We have carefully considered the contentions of both sides and perused the impugned judgment and materials on record. The following points arise for consideration in these appeals:-

(i) Whether the levy of pre-estimated liquidated damages and reasonable compensation by the Superintending Engineer in terms of Clause 2 of the contract between the parties is “arbitrable”?

(ii) Whether the respondent-ONGC is right in contending that the levy of liquidated damages in terms of Clause 2 of the contract is final and an “excepted matter” not falling within the jurisdiction of the Arbitrator and whether the learned Arbitrator has travelled beyond the terms of the contract?

11. **ONGC’s claim of liquidated damages in terms of Clause 2 of the agreement:-** The salient features of the contract in Arbitration Case No.297A/2002 are that the work was to commence on 22.02.1996 and was stipulated to be completed by 21.08.1997. But the work was completed only on 24.05.1999. Insofar as Arbitration Case No.297/2002, the work was to commence on 21.02.1996 and was stipulated to be completed by 21.08.1997. But the work was completed only on 24.05.1999. In its statement of

defence, the respondent-ONGC asserted that there has not been any significant delay caused by the respondent-ONGC which could delay the work of the claimant. In its statement of defence, the respondent-ONGC mentioned that total delay which has occurred was 640 days out of which claimant is responsible for the delay of 39 weeks (39 × 7 = 273 days) and on this account, the claimant is liable to pay compensation in terms of Clause 2 of the contract which stipulate compensation payable @ ½% per week subject to maximum 10% of the cost of the executed work and the decision of the Superintending Engineer in this regard is final. The respondent-ONGC has thus claimed Rs.32,79,828/- in Arbitration Case No.297A of 2002 and Rs.42,08,940/- in Arbitration Case No.297 of 2002 recoverable from the claimant as compensation for the delay caused by the claimant in completing the work.

12. After reference to various correspondences between the respondent-ONGC and the appellant and after a detailed discussion, the learned Arbitrator recorded a finding of fact that the respondent-ONGC was responsible to an extent for the prolongation of the contract and the claimant was also to some extent responsible which resulted in slow progress of the work. Considering the delay alleged by the respondent-ONGC, the

learned Arbitrator has observed that there was delay of 640 days and both the respondent-ONGC and the appellant were responsible for the delay and observed as under:-

> "….The date of commencement of the work stipulated in the contract was the 22nd February 1996 and the work was to be completed on the 22nd August 1997. According to the respondent, the actual date of commencement of the work was the 13th March 1996 and the work was completed on the 24th May 1999. Thus, there took place delay of 640 days. The respondent was responsible for only 160 days of delay whereas the claimant was responsible for delay of 371 days. It is not understood how the respondent has quantified the delay imputed to either of the parties."

13. By upholding the award of the learned Arbitrator, the learned Single Judge held that the delay in completion of the work was on account of both parties and by applying the equitable principles, the learned Single Judge held that the damages were payable by either of the parties.

14. The learned Single Judge, in our view, failed to note the implication of Clause 2 of the contract and also various correspondences between the parties, while affirming the award passed by the learned Arbitrator. In terms of Clause 2 of the agreement dated 05.02.1996 between the parties, the contractor is to proceed with the work with due diligence throughout the contract period. In case of delay or failure to ensure good progress during

execution of the work, Clause 2 of the agreement provides for determination/quantification of compensation for delay or certain inactions, on the part of the contractor. In terms of Clause 2 of the agreement, the Superintending Engineer shall assess and quantify the compensation. By the terms of the agreement, the parties have consciously agreed that in case the contractor fails to comply with the conditions and complete the work with due diligence, the Superintending Engineer may decide the compensation in terms of Clause 2 of the agreement.

15. In order to appreciate the claim of ONGC in levying the damages in terms of Clause 2, it is necessary to refer to Clause 2 of the agreement which reads as under:-

> **"Clause 2: Compensation for Delay**
>
> 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 the essence of the contract on the part of the contractor and shall be reckoned from the 15th 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 compensation on amount equal to ½ % per week as the Superintending Engineer (whose decision in writing shall be final) may decide on the amount of the contract, value of the whole work as shown in the agreement, for every week that the work remains uncommenced, or unfinished, after the proper dates. After 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 the special jobs) to complete one-eighth of the work, before one-fourth of the whole time allowed under the contract has elapsed and three-eights of the work, before one-half of such time has elapsed, and three-fourth 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 ½ % per week as the Superintending Engineer (whose decision in writing shall be final) may decide on the said contract value if the whole work for every week that the due quantity of works remains incomplete provided always that the entire amount of compensation to be paid under the provisions of the clause shall not exceed ten per cent (10%) of the tendered cost of the work as shown in the tender**." [**Emphasis added**]

A reading of Clause 2 makes it clear that the Superintending Engineer has been conferred with not only a right to levy compensation; but it also provides a mechanism for determination of the liability/quantum of compensation. The very Clause 2 itself would show that such a decision taken by the Superintending Engineer shall be final. The finality clause in the contract in terms of Clause 2 makes the intention of the parties very clear that there cannot be any further dispute on the said issue between the parties; much less before the arbitrator.

16. Clause 25 of the agreement – Settlement of disputes by Arbitration, reads as under:-

"**Clause 25 – Settlement of disputes by Arbitration**

If any dispute, difference, question or disagreement shall, at any time, hereafter arises between the parties hereto or the respective representatives or assigns in connection with or arising out of the contract, or in respect of meaning of specifications, design, drawings, estimates, scheduled, annexures, orders, instructions, the construction, interpretation of this agreement, application of provisions thereof or anything hereunder containing or arising hereunder or as to rights, liabilities or duties of the said parties hereunder or arising hereunder any matter whatsoever incidental to this contract or otherwise concerning the works of execution or failure to execute the same whether during the progress of work or stipulated/extended period or before or after the completion or abandonment thereof shall be referred to the sole arbitration of the person appointed by a Director of ONGC Ltd. at the time of dispute. There will be no objection to any such appointment that the arbitrator so appointed is an employee of ONGC Ltd. or that he had to deal with the matters to which the contract relates and that in the course of this duties as ONGC Ltd. employees, lie had expressed views on all or any of the matters in dispute or difference.

If the arbitrator to whom the matter is originally referred dies or refuses to act or resigns for any reason from the position of arbitrator, it shall be lawful for the Director of ONGC Ltd. to appoint another person to act as arbitrator 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 if both the parties consent to this effect, failing which the arbitrator will be entitled to proceed de-novo.

……..

It is also a term of the contract that if the contractor(s) do/does not make any demand for arbitration in respect of any claim(s) in writing within 90 days of receiving the intimation from the corporation that the bill is ready for payment, the claim of the contractor(s) will be deemed to have been waived and absolutely barred and the Corporation shall be discharged and released of all liabilities under the contract in respect of these claims.

The decision of the Superintending Engineer regarding the quantum of reduction as well as his justification in respect of reduced rates for sub-standard work, which may be decided to be accepted, will be final and would not be open to arbitration.

……..". [**Emphasis added**]

The intention of the parties to exclude some of the decisions of the Superintending Engineer from the purview of arbitration is clearly seen from the abovesaid clause. Claim No.6 made by the appellant is to declare that the penalty imposed by ONGC under Clause 2 was illegal and unwarranted and the amount withheld by ONGC was payable to the appellant. The very prayer to declare the amount levied by the Superintending Engineer as illegal is against the tenor of the terms of the contract (Clause 2) between the parties. By virtue of the finality clause in the contract, any decision taken by the Superintending Engineer in levying compensation cannot be referred to an arbitrator. The parties have consciously agreed to have finality to the decision of the Superintending Engineer and the same cannot be frustrated by challenging the same as illegal. Any other meaning to the finality clause in the contract and allowing further adjudication by another authority would make the agreed Clause 2 and Clause 25 of the agreement meaningless and redundant.

17. As held by the Division Bench of the High Court, whether there was delay in completion of work and the levy of liquated damages, could not have been determined by the arbitrator. Vide letters dated 08.12.1999, 09.12.1999, 17.12.1999, 11.02.2000 and 17.04.2000, ONGC called upon the respondent/contractor to remove the defects failing which it would get the defects remedied at his cost. According to ONGC, the completion time was extended without prejudice to the right of ONGC to recover compensation in accordance with Clause 2 of the agreement. The contention of ONGC is that by the letter dated 15.05.2001, the contractor was put on notice that in exercise of the power conferred on the Superintending Engineer under Clause 2, the contractor is liable to pay 10% of the contract value by way of compensation. The contractor was informed by the said letter dated 15.05.2001 that the compensation is levied on him for the period of 39 weeks at half per cent per week subject to maximum of 10% of the contract value and that the actual amount of compensation shall be worked out on checking the final bill and the same shall be recovered by ONGC from the final bill. By the subsequent letter dated 25.05.2001, the claimant was informed that the final bill is ready and the claimant was required to reconcile the final bill after adjusting the compensation.

18. A reading of the other terms of the contract would further indicate that under Clauses 13 and 14 of the agreement, the parties have agreed for payment of compensation and non-payment of compensation in certain situations. Significantly, Clauses 13 and 14 of the agreement do not have any finality clause which indicates that any dispute arising out of such clauses may be a dispute referable to arbitration. However, in respect of levy of compensation for the delay, Clause 2 of the agreement specifically makes the decision of the Superintending Engineer, final. The entire contract between the parties and the terms thereon have to be read as a whole to decide the rights and liabilities of the parties arising out of the contract. In claim No.6, the contractor has sought for declaration "that the penalty under Clause 2 imposed by ONGC was illegal and unwarranted and the amount withheld by ONGC was payable to the contractor with interest @ 24%". Claim No.6 sought for by the contractor is clearly in violation of Clause 2 of the agreement between the parties, in and by which, the parties have agreed that the decision taken by the Superintending Engineer levying compensation shall be final. The finality clause in the contract cannot therefore be frustrated by calling upon the arbitrator to decide on the correctness of levy of compensation by the Superintending Engineer.

19. While considering similar contractual provisions viz. Clause 2 of the agreement as in the present case, in *Vishwanath Sood v. Union of India and Another* **(1989) 1 SCC 657,** the Supreme Court held as under:-

> "**8.** ……. As we see it, clause 2 contains a complete machinery for determination of the compensation which can be claimed by the Government on the ground of delay on the part of the contractor in completing the contract as per the time schedule agreed to between the parties. The decision of the Superintending Engineer, it seems to us, is in the nature of a considered decision which he has to arrive at after considering the various mitigating circumstances that may be pleaded by the contractor or his plea that he is not liable to pay compensation at all under this clause. In our opinion the question regarding the amount of compensation leviable under clause 2 has to be decided only by the Superintending Engineer and no one else.
>
> **9.** ……..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. ……. 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". [**Underlining added**]

The ratio of the above decision squarely applies to the present case. Once the parties have decided that certain matters are to be

decided by the Superintending Engineer and his decision would be final, the same cannot be the subject matter of arbitration.

20. In this regard, reliance was also placed upon *Food Corporation of India v. Sreekanth Transport* **(1999) 4 SCC 491** wherein, the Supreme Court interpreted Clause 12 of the agreement thereon. Clause 12 of the agreement in *Food Corporation of India* reads as under:-

> "The decisions of the Senior Regional Manager regarding such failure of the contractors and their liability for the losses etc. suffered by the Corporation shall be final and binding on the contractors….".

21. While interpreting the clause on **'excepted matters'**, in *Food Corporation of India*, the Supreme Court held as under:-

> **"3.** "Excepted matters" obviously, as the parties agreed, do not require any further adjudication since the agreement itself provides a named adjudicator — concurrence to the same obviously is presumed by reason of the unequivocal acceptance of the terms of the contract by the parties and this is where the courts have been found out lacking in their jurisdiction to entertain an application for reference to arbitration as regards the disputes arising therefrom and it has been the consistent view that in the event of the claims arising within the ambit of excepted matters, the question of assumption of jurisdiction of any arbitrator either with or without the intervention of the court would not arise. <u>The parties themselves have decided to have the same adjudicated by a particular officer in regard to these matters; what these exceptions are however are questions of fact and usually mentioned in the contract documents and form part of the agreement and as such there is no ambiguity in the</u>

matter of adjudication of these specialised matters and being termed in the agreement as the excepted matters.

……..

9. ……... The Food Corporation, therefore, as a matter of fact desired an adjudication of their claim to the extent of Rs 1,89,775 together with interest at the rate of 18 per cent per annum from the civil court rather than relying on the adjudicatory process available in the contract itself through their own Senior Regional Manager. The agreement as noticed above expressly provides that the adjudication shall be effected by the Senior Regional Manager and by no other authority and the decision, it has been recorded in the agreement, of the Senior Regional Manager would be final and binding on the parties…..".

In the present case, the parties themselves have agreed that the decision of the Superintending Engineer in levying compensation is final and the same is an "excepted matter" and the determination shall be only by the Superintending Engineer and the correctness of his decision cannot be called in question in the arbitration proceedings and the remedy if any, will arise in the ordinary course of law.

22. The learned counsel for the appellant has relied upon *Bharat Sanchar Nigam Limited and another v. Motorola India (P) Ltd.* **(2009) 2 SCC 337** and by referring to Clause 16(2) in the concerned agreement submitted that for quantification of liquidated damages, first of all, there has to be a delay and for ascertaining as to who was responsible for the delay, such an issue will be within the

jurisdiction of the arbitrator. The learned ASG however, submitted that in the present case, Clause 2 of the agreement is not only a mechanism for quantification of liquidated damages, but Clause 2 also makes the contractor liable for payment of the same and in terms of Clause 2 of the agreement, the decision of the Superintending Engineer is final and the present case is therefore, distinguishable from *BSNL's case*.

23. As rightly contended by the learned ASG, in *BSNL's case*, Clause 16(2) of the agreement does not create any kind of liability to pay liquidated damages; but only provides for entitlement of BSNL to collect the damages in case of any delay in supply on the part of the supplier under Clause 16(2). While interpreting Clause 16(2) and Clause 21 of the contract which was under consideration in *BSNL's case*, in paras (23) and (26), the Supreme Court held as under:-

> **"23.** The question to be decided in this case is whether the liability of the respondent to pay liquidated damages and the entitlement of the appellants, 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*.

……..

26. Quantification of liquidated damages may be an excepted matter as argued by the appellants, 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 appellants 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."

24. In *BSNL's case*, Clause 16 provided for entitlement of the party to recover liquidated damages. In Clause 16(2), the phrases used "value of delayed quantity" and "for each week of delay" clearly show that it is necessary to find out whether there has been delay on the part of the supplier in discharging his obligation. Thus, in *BSNL's case*, in determining whether there is delay or not, a process of adjudication is envisaged. Per contra, in the present case, Clause 2 of the agreement is a complete mechanism for determination of liability. The right to levy damages for delay is exclusively conferred upon the Superintending Engineer and Clause

2 of the present agreement is a complete mechanism for determination of liability and when such compensation is levied by the Superintending Engineer, the same is final and binding. The parties have also consciously agreed that for the delay caused, the Superintending Engineer shall levy the compensation of the amount equal to half per cent and the said amount shall not exceed from 10% of the cost of the work and the determination by the Superintending Engineer is final and cannot be the subject matter of arbitration. In claim No.6, the prayer sought for by the contractor to declare the compensation levied by the Superintending Engineer as illegal is contradictory to the agreed terms between the parties. So far as the liquidated damages determined and levied, by virtue of Clause 2, is out of the purview of the arbitration especially in view of the fact that under the very same clause, the parties have agreed that the decision of the Superintending Engineer shall be final.

25. Learned Single Judge erred in proceeding under the presumptive footing that the compensation levied by the Superintending Engineer was in the nature of penalty. It was actually levy of liquidated damages/compensation in terms of Clause 2 of the agreement. Levy of compensation of Rs.32,79,828/- in Arbitration Case No.297A of 2002 and

Rs.42,08,940/- in Arbitration Case No.297 of 2002 in terms of Clause 2 of the agreement is final and the same could not have been the subject matter of arbitration. Applying the ratio of *Vishwanath Sood*, the Division Bench of the High Court rightly set aside the order of the learned Arbitrator with regard to claim No.6 by holding that levy of liquidated damages/compensation is adjustable against the final bill payable to the appellant. The impugned judgment does not therefore, suffer from any infirmity warranting interference.

26. As per the chart filed by the respondent-ONGC, total amount awarded by learned Arbitrator in favour of the appellant is Rs.1,24,47,416/- (Rs.66,36,252/- + Rs.58,11,164/-). Total amount of compensation/liquidated damages withheld by ONGC is Rs.66,99,117/- (Rs.36,80,142/- + Rs.30,18,975/-). Towards satisfaction of the arbitral award, ONGC has deposited an amount of Rs.2,10,41,965/-. As per the order of the Division Bench of the Delhi High Court, the appellant was directed to refund an amount of Rs.74,88,768/- (amount withheld by ONGC + accrued interest). In compliance of the order of the Supreme Court dated 09.04.2009, the appellant has deposited Rs.75,00,000/- before the Supreme Court and the same has been invested in a nationalised bank. The

amount of Rs.74,88,768/- along with accrued interest is ordered to be paid to the respondent-ONGC. The balance of Rs.11,232/- (Rs.75,00,000 – Rs.74,88,768/-) along with accrued interest be refunded to the appellant.

27. In the result, the appeals are dismissed. No order as to cost.

……..J.
[R. BANUMATHI]

……..J.
[A.S. BOPANNA]

……..J.
[HRISHIKESH ROY]

New Delhi;
November 08, 2019