

(2011) 11 DEL CK 0053
In the Delhi High Court
Case No : FAO (OS) No. 204 of 2010

Vishal Engineers and Builders

APPELLANT

Vs

Indian Oil Corporation Limited

RESPONDENT

Date of Decision : 30-11-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Constitution of India, 1950 — Article 14
Contract Act, 1872 — Section 73, 74

Citation : (2012) 1 ARBLR 253

Hon'ble Judges : Sanjay Kishan Kaul, J;Rajiv Shakdher, J

Bench : Division Bench

Advocate : J.P. Gupta, for the Appellant; Rajat Navet and Ms. Prachi V. Sharma, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Kishan Kaul, J.—The appellant was awarded the work of internal roads earth filling, drains and pipe culverts at L.P.G. Bottling Plant, Farrukhabad, U.P. vide order No.LPG/ENG/1564 on 2.9.1994. The stipulated date of completion of the work was 1.4.1995 but the work was completed by the appellant only on 15.5.1996. It is the say of the appellant that the non-availability of WBM and soling stones, because of agitation in Uttarakhand as also non-availability of regular transport and non-availability of bitumen on account of closure of refinery in the months of March-April, 1996, led to the delay.

2. The appellant requested for extension of time till 15.5.1996 during the course of the execution of the work but was granted extension only till 31.8.1995 without levy of any penalty. On completion of the work the respondent paid the final bill raised by the appellant but withheld an amount of Rs. 25,000.00 on account of a labour case filed against the appellant to which the respondent was also made a party. The respondent also recovered liquidated damages to the extent of 10 per cent of the contract value amounting to Rs. 4,59,992.00 on

account of delay in completion of the work by the appellant. This and other controversies resulted in inter se disputes between the parties and in view of existence of an arbitration clause the competent authority of the respondent appointed Shri G.P. Gupta, Deputy General Manager of the respondent as an arbitrator vide letter dated 25.8.1998. The arbitrator made and published his award dated 29.6.2002 partly allowing some claims.

3. The appellant aggrieved by the award filed objections to the same by filing an application, OMP No. 314/2002, u/s 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the said Act). The learned single Judge has dismissed this application with costs of Rs.25,000/- vide impugned order dated 21.01.2010.

4. A perusal of the impugned order shows that the objections were pressed by the appellant only qua non-award of claims 1 & 5 by the arbitrator. Claim No.1 was in respect of retention of the amount of Rs. 25,000.00 pending conclusion of litigation initiated by an employee of the appellant. The stand of the respondent was that this amount would be returned on that issue being settled or the legal proceedings coming to an end. It has also been agreed that the amount of Rs. 25,000.00 retained by the respondent would be placed in a fixed deposit and in case it is ultimately returned to the appellant, the interest earned on it would enure for the benefit of the appellant.

5. Learned counsel for the appellant does not seriously dispute nor has he raised any ground in appeal regarding Claim No. 1 and, thus, confined his submissions to claim No.5 pertaining to the amount of liquidated damages recovered by the respondent of Rs. 4,59,873.00.

6. It is not in dispute that there was a delay of 37 weeks in the execution of the work. It is also not in dispute that the respondent granted extension of time to the appellant to complete work without levy of any penalty only till 31.8.1995 but the work was completed only on 15.5.1996. In terms of the contract, liquidated damages are liable to be imposed by the respondent @ 1 per cent per week of delay subject to a maximum of 10 per cent of the contract value.

7. The arbitrator found that even if the plea of the appellant that there was delay in procurement of bitumen for which the respondent was responsible and should have granted extension of time is to be accepted, it would not make any difference to the quantum of damages recovered on account of inordinate delay of 37 weeks in completion of the contract. The plea of learned counsel for the appellant that the appellant has not been guilty of delay, i.e., the delay was not attributable to factors for which the appellant was responsible, has been disbelieved both by the arbitrator and the learned single Judge, which can hardly call for any interference. The only plea really pressed by learned counsel for the appellant arose out of the legal issue sought to be formulated by the learned counsel - even if liquidated damages are provided they cannot be automatically levied, if no damages/losses are actually suffered by the respondent.

8. The factual basis for the aforesaid plea was laid on the basis of a note dated

8.3.1996 followed by a note dated 8.10.1996 of the respondent which are in the nature of internal notes. We may note that these internal notes were in the form of recommendations which ultimately did not find favour with the competent authority on 25.3.1997.

9. The learned single Judge has taken a view that such internal documents of the respondent cannot be looked into as they were made in the process of taking a decision. The learned single Judge was of the view that in view of the pronouncement of the Supreme Court in *Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.*, , in certain contracts loss actually need not to be proved because loss is not capable of being proved and, thus, liquidated damages become automatically payable.

10. We may note that in this context another plea advanced by learned counsel for the appellant before the learned single Judge arose out of the absence of any notice to the appellant prior to the imposition of the liquidated damages, the same being alleged to be in violation of principles of natural justice and violating Article 14 of the Constitution of India. This plea has been rejected on the ground that the parties are bound by the terms of the contract, the relationship being governed by the Indian Contract Act, 1872 (hereinafter referred to as _the Contract Act") and, thus, no element of public law was involved. This finding has also not been really assailed by learned counsel for the appellant especially taking into account the fact that the learned single found that apparently no objection was taken in this behalf in the application u/s 34 of the said Act.

11. In order to appreciate the plea of the learned counsel for the appellant, we consider it appropriate to discuss the legal position arising from the imposition of such liquidated damages. Before we proceed to discuss the case law on this issue it would be appropriate to extract the relevant provisions of the Contract Act as under:

73. Compensation of loss or damage caused by breach of contract

When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss of damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract : When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation : In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by non-performance of the contract must be taken into account.

74. Compensation of breach of contract where penalty stipulated for

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.- A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception.- When any person enters into any bail-bond, recognizance or other instrument of the same nature or, under the provisions of any law, or under the orders of the [Central Government] or of any [State Government], gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.- A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

12. Section 73 of the Contract Act, thus, contemplates award of damages for losses suffered by breach of contract by the opposite party. Section 74 of the Contract Act stipulates that in case of such a broken contract if a sum is named in the contract as the amount to be paid in case of such breach, whether or not actual damage or loss is proved to have been caused thereby, the aggrieved party is entitled to receive from the opposite party who has broken the contract, a reasonable compensation not exceeding the amount so named.

13. The question which, thus, arises is whether in view of such a stipulated amount damages are liable to be paid ipso facto without any further proof qua the issue of sufferance of damages or quantification thereof or something more is required to be done.

14. We would begin with a seminal judgement in Fateh Chand Vs. Balkishan Das, , where it was held that the jurisdiction of the Court to award compensation in case of breach is unqualified except as to the maximum amount stipulated so long as the compensation is reasonable. This imposes a duty upon the court to award compensation according to the settled principles. The phraseology of Section 74 was held to dispense with the proof of actual loss or damages but it did not justify the award of compensation when in consequence of the breach no legal injury at all has resulted. It was, thus, clearly held that a plaintiff has to

prove a loss suffered by him in consequence of the breach of contract committed by the defendant. This legal position laid down by the Constitution Bench of the Supreme Court is good law till date and, thus, any judgement of the Supreme Court of a Bench constituted of lesser number of Judges would, thus, have to be read in the context of the seminal pronouncement.

15. The duty of the court not to enforce the penalty clause but only to award reasonable compensation has been held to be statutorily imposed upon courts by Section 74 of the Contract Act. The court just has to adjudge in every case, reasonable compensation for breach of contract having regard to the conditions which existed on the date of the breach [ref: Fateh Chand case (supra)].

16. In *Maula Bux Vs. Union of India (UOI)*, , the forfeiture of security was upheld by the High Court, the amount forfeited being held as not unreasonable u/s 74 of the Contract Act. The Supreme Court set aside the order of the High Court accepting the plea that the loss suffered by the respondent therein was capable of being measured and they could not seek protection under the garb of Section 74 of the Contract Act. Since the respondent had led no evidence that it had suffered loss, it was held that the amount could not be forfeited.

17. The claim for liquidated damages for all practical purposes were held to stand on the same footing as the unliquidated damages in *Union of India (UOI) Vs. Raman Iron Foundry*, . The claim of unliquidated damages was, thus, held not to give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a court or other adjudicatory authority. The appellant was held not to have any right or authority to appropriate amounts of other pending bills of the respondent towards satisfaction of claim for damages against the respondent. The breach of contract does not eo instanti incur any pecuniary obligations, nor does the party complaining of the breach become entitled to a debt due from the other party. The only right which accrues at that moment is that the party aggrieved by the breach of contract has a right to sue for damages. Thus, when damages are assessed, the court in the first place must decide that the defendant is liable and then it proceeds to assess as to what is the damage.

18. It is in the aforesaid context that there are observations in *State of Karnataka Vs. Shree Rameshwara Rice Mills, Thirthahalli*, , that there has to be an admission of the breach of condition and thereafter only the issue of quantification of damages would arise.

19. Having set out the aforesaid judgements, we consider it appropriate at this stage to refer to the Privy Council pronouncement in *Bhai Panna Sing & Ors. Vs. Firm Bhai Arjan Singh - Bhajan Singh - Surjan Singh & Anr.* 117 Indian Cases 485 PC, where while dealing with the issue of damages, Atkin, J. observed that the effect of Section 74 of the Contract Act is to disentitle the plaintiffs to recover simpliciter a sum by way of liquidated damages and that the plaintiff must first prove the damages they have suffered.

20. In *Indian Oil Corporation Vs. Lloyds Steel Industries Ltd.* 2007 (4) Arb. LR 84 (Del), the Indian Oil Corporation (for short "_IOC") invoked a clause in the GCC for liquidated damages and recovered the maximum damages possible even though the work was completed to the satisfaction of the IOC but there was delay in the execution of the work. This recovery was resisted by the contractor on the ground that there was no damage payable. The dispute was resolved in the arbitration by an award which held that there was absence of justification in invoking the clause of damages. It is at the stage of consideration of objections that the learned single Judge, A.K. Sikri, J. (as he then was) of this Court held that it would be preposterous on the part of the petitioner to submit that it should get the liquidated damages stipulated in the contract even when no loss is suffered. Time was essence of the contract providing for 16 months for completion of the work. This period was fixed keeping in view that the terminal at Jodhpur would be ready by that time and the pipeline would reach the said terminal. Thus, while granting extensions, IOC realized that the terminal was not complete and, thus, it could not be put to any use. The period of six (6) months was, thus, held to have lost its significance inasmuch as setting up of Jodhpur Terminal was part of an integrated project and the Terminal could not be put to commercial use before August, 1996, while the contractor had successfully completed the work well before that date. It would be useful to reproduce the observations made in paragraphs 41 & 42, which read as under:

41. It is clear from the above that Section 74 does not confer a special benefit upon any party, like the petitioner in this case. In a particular case where there is a clause of liquidated damages the Court will award to the party aggrieved only reasonable compensation which would not exceed an amount of liquidated damages stipulated in the contract. It would not, however, follow therefrom that even when no loss is suffered, the amount stipulated as liquidated damages is to be awarded. Such a clause would operate when loss is suffered but it may normally be difficult to estimate the damages and, therefore, the genesis of providing such a clause is that the damages are pre-estimated. Thus, discretion of the Court in the matter of reducing the amount of damages agreed upon is left unqualified by any specific limitation. The guiding principle is "reasonable compensation". In order to see what would be the reasonable compensation in a given case, the Court can adjudge the said compensation in that case. For this purpose, as held in *Fateh Chand* (supra) it is the duty of the Court to award compensation according to settled principles. Settled principles warrant not to award a compensation where no loss is suffered, as one cannot compensate a person who has not suffered any loss or damage. There may be cases where the actual loss or damage is incapable of proof; facts may be so complicated that it may be difficult for the party to prove actual extent of the loss or damage. Section 74 exempts him from such responsibility and enables him to claim compensation in spite of his failure to prove the actual extent of the loss or damage, provided the basic requirement for award of "compensation", viz. the fact that he has suffered some loss or damage is established. The proof of this

basic requirement is not dispensed with by Section 74. That the party complaining of breach of contract and claiming compensation is entitled to succeed only on proof of "legal injury" having been suffered by him in the sense of some loss or damage having been sustained on account of such breach, is clear from Sections 73 and 74. Section 74 is only supplementary to Section 73, and it does not make any departure from the principle behind Section 73 in regard to this matter. Every case of compensation for breach of contract has to be dealt with on the basis of Section 73. The words in Section 74 "Whether or not actual damage or loss is proved to have been caused thereby" have been employed to underscore the departure deliberately made by Indian legislature from the complicated principles of English Common Law, and also to emphasize that reasonable compensation can be granted even in a case where extent of actual loss or damage is incapable of proof or not proved. That is why Section 74 deliberately states that what is to be awarded is reasonable compensation. In a case when the party complaining of breach of the contract has not suffered legal injury in the sense of sustaining loss or damage, there is nothing to compensate him for; there is nothing to recompense, satisfy, or make amends. Therefore, he will not be entitled to compensation See *State of Kerala and Others Vs. United Shippers and Dredgers Ltd.*, . Even in *Fateh Chand* (supra) the Apex Court observed in no uncertain terms that when the section says that an aggrieved party is entitled to compensation whether actual damage is proved to have been caused by the breach or not, it merely dispenses with the proof of "actual loss or damage". It does not justify the award of compensation whether a legal injury has resulted in consequence of the breach, because compensation is awarded to make good the loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach. If liquidated damages are awarded to the petitioner even when the petitioner has not suffered any loss, it would amount to "unjust enrichment", which cannot be countenanced and has to be eschewed. 42. It is too preposterous on the part of the petitioner to submit that it should get the liquidated damages stipulated in the contract even when no loss is suffered.

(Emphasis supplied)

21. The aforesaid judgement, thus, if read in letter and spirit follows the principles laid down in *Fateh Chand* case (supra).

22. Now turning to some of the latter judgements of the Supreme Court including the judgement in *ONGC Vs. Saw Pipes Ltd.* case (supra) relied upon by the learned single Judge. All that was said was that the court was competent to award a reasonable compensation in case of breach even if no actual damage is proved to have suffered in consequence of the breach of contract as in some contracts it would be impossible for the court to assess compensation arising from the breach. If the compensation contemplated is not by way of penalty or unreasonable the court can award the sum if it is a genuine pre-estimate of the loss to be suffered by a party as a measurement of reasonable compensation.

23. In our view these observations have to be read in the context of the pronouncement of the Constitution Bench pronouncement in Fateh Chand case (supra). If it is so, all that it implies is that where it is impossible to assess the compensation arising from breach and that factor is coupled with the parties having agreed to a pre-determined compensation amount not by way of penalty or unreasonable compensation then that amount can be awarded as a genuine pre-estimate of the loss suffered by a party. It cannot be read to mean that even if no loss whatsoever is caused to party it can still recover amounts merely by reason of the opposite party being in breach.

24. The importance of the aforesaid principles has also been emphasized in Bharat Sanchar Nigam Ltd. and Another Vs. Motorola India Pvt. Ltd., , while dealing with the two clauses in the contract - clause 15 which held that the supplier was liable to pay liquidated damages and clause 16 dealing with quantification of damages. The quantification of limited damages came in the category of excepted matters but it was held that for levy of liquidated damages under Clause 16 there has to be a delay in the first place. Once there was a dispute about this fact, the appointment of the arbitrator was held not unwarranted.

25. In the end we may refer to the judgement of the Supreme Court in B.S.N.L. Vs. Reliance Communication Ltd., . It was held that whether a provision is to be treated as a penalty in matter of construction is to be resolved by asking whether at the time the contract was entered into the predominant contractual function was to deter a party from breaking a contract or to compensate the innocent party for the breach. Thus, the question to be asked is whether the alleged penalty clause can pass muster as a genuine pre-estimate of loss. Liquidated damages were observed to serve the usual purpose of avoiding litigation and permitting commercial certainty. Thus, liquidated damages should not be categorized as penalties.

26. We have, thus, no hesitation in concluding that if there was absence of any loss whatsoever, an aggrieved party cannot claim that it is still entitled to liquidated damages without, at least, proving a semblance of loss.

27. Now coming to the factual matrix in so far as the present case is concerned. The appellant in the statement of claim para (viii) observed that "it was also the admitted case that the respondent did not suffer any loss due to delay in execution of the work".

This fact was again emphasized in para (x) while referring to the note dealing with the issue of completion of the project.

28. The respondent, however, in reply denied that they had not suffered any loss and while referring to their relevant minutes relied upon by the appellant stated that all the attending and relevant circumstances were considered by the competent authority which has to weigh the merits and demerits of the case and it is only thereafter that a decision was taken qua waiver or applicability of

liquidated damages.

29. It has also been emphasized that as per clause 5 of the GCC an extension of time, if granted shall be without any prejudice to the right of the respondent to claim any loss and/or damages suffered on account of the delay in execution of the work.

30. We have perused the relevant note which was in the decision making process of the respondent. There can be no doubt that the note cannot be read by itself nor can it create any right in favour of the appellant merely because during the consultative process of decision making someone has opined in favour of non-levy of liquidated damages. The matter, however, is not as simplistic as that. A note dated 8.3.1996 refers to a letter of the appellant dated 8.8.1995. The Deputy Manager (LPG Engineering) recommended extension till 31.4.1996, the justification for which is as under:

JUSTIFICATIONS:

Enclosed find the Letter from the Party Ref - NIL Dt. 08.08.95.

As per the scope of work the Party has to Construct Internal Roads, Drains & Earth Filling Works.

The Party has completed 100% of the Earth Filling Work. Similar is the case for Drains the Party have completed 90% of the work. Rest shall be completed after completion of ADMIN & AMINETY Block which is nearing completion.

Though the work on internal roads in past was slow due to non availability of WBM & SOLING stones from Haldwani because of UTTARAKHAND AGITATION, frequent BHANDS and Road Blockage, HSD CRISIS and non availability of the regular Transport but the Party have completed the same by putting lot of efforts. Moreover Work of Road SUFFERED in unlicensed area as the front was not available due to Construction of ADMIN & Aminety Block in the past months.

The work of Seal Coat is completed for the internal Roads and only 40% is left for the Buffer Zone Roads which could not be taken up due to non availability of Bitumen from Mathura Refinery due to it's Shutdown. The Bitumen is expected to reach by 22.03.96 and the Party shall complete the same within a Fortnight Time.

With the efforts made by the Party and the Site Condition Constraints, it is recommended that the Party may be given time to Complete the work by APRIL" 96 END.

As the delay is not attributed to the Contractor due to Site Location Constraints and there is no loss to the Corporation in this Account as the commissioning shall be in JUN"96, Extension of Time up to 31.04.96 is recommended.

(Emphasis supplied)

31. The aforesaid, thus, justifies extension on the ground that the delay is not

attributable to the appellant due to site location constraints and more importantly there is no loss to the respondent as the commissioning was to be in June, 1996, and the extension of time was recommended up to 31.4.1996.

32. There is a second note dated 8.10.1996, wherein a recommendation was made for extension of time up to 15.5.1996 by the same officer (who was at the site), which reads as under:

JUSTIFICATIONS:

Enclosed find the Letter from the Party Ref - NIL Dt. 08.10.96.

As per the scope of work the Party has to Construct Internal Roads, Drains & Earth Filling Works.

The Party has completed 100% of the Earth Filling Work, Drains & Culverts within the stipulated Time Period.

The progress on the Work of Internal roads suffered due to following reasons and could not be completed in the Stipulated Time Period.

i. Due to non availability of WBM & SOLING stones from Haldwani because of UTTARAKHAND AGITATION, frequent BHANDS and Road Blockage, HSD CRISIS and non availability of the regular Transport, despite putting lots of efforts by the Party.

ii. Work of Road SUFFERED in unlicenced area as the front was not available due to Construction of ADMIN & Aminety Block. This area could be available only in the month of Feb'96.

iii. Work of Balance above portion of Seal Coat could not be taken up due to non availability of Bitumen from Mathura Refinery due to it's Shutdown in the month of MAR/APRIL'96. The Bitumen was received only on 22.4.96 with our efforts.

As a result the Party could complete the Work by 15.05.96.

RECOMMENDATIONS:

With the efforts made by the Party and the Site Condition Constraints, the Party is not at Fault and there is no loss to the Corporation on this account as the Mechanical Completion of the Plant is expected by Dec'96 end. Hence it is recommended that the Party may be given Extension of Time till 15.05.96.

As the delay is not attributed to the Contractor due to Site Location Constraints and there is no loss to the Corporation in this Account as the commissioning shall be in JUN'96, Extension of Time up to 15.05.96 is recommended.

33. The aforesaid recommendation once again shows that the mechanical completion of the plant had been delayed up to December, 1996 end and that is why extension of time till 15.5.1996 was recommended.

34. The note dated 25.3.1997 is by Mr. V.K. Ailawadi, CLM (E) which

recommends the approval up to 30.4.1996. The background note and the recommendation read as under:

2.0 BACKGROUND

2.1 Work order for the subject job was placed on M/s Vishal Engineers & Builders against Public Tender approved by GM (LPG) as per details given below:-

> W.O. No. & Date

-

LPG/ENG/1564 dtd.2.9.94

> W.O. Value

-

Rs.45.99 lacs

> Date of start

-

19.09.94

> Date of completion

-

09.06.95

As per W.O.

2.2 The extension of completion time was approved by CLM (E) upto 31.8.95 vide note no.LPG/FKBD/60 dtd. 12.4.95.

2.3 As per the scope of work, the contractor has to construct Internal WBM roads, Drains and Earth filling works. The work has been completed on 15.5.96 and we have received the final bill from site. The deduction of Liquidated Damages @ 10% of the bill amount was approved by GM (LPG) vide note dtd 29.3.96 and the total L/D deducted till date is Rs.1,01,829/-

2.4 M/s. Vishal Builders & Engineers vide their letter dtd. 8.10.96 have stated constraints in completion of work and requested for extension of time upto 15.5.96. Dy. Mgr (L-E) Farrukhabad vide his note dtd. 8.10.96 has given the following reasons due to which work could be completed within stipulated time period:

> Due to non availability of WBM & Soling stones from Haldwani because of Uttarakhand agitation, frequents Bhands and Road blockages, HSD crisis and non availability of the regular transport, despite putting lots of efforts by the party.

> Work of road suffered in unlicensed area as the front was not available due to

construction of Admn. And Amenities bloc. This area could be available only in the month of Feb"96.

> The Bituminous seal coat on this portion could not be taken up due to non availability of bitumen from Mathura Refinery due to shutdown in the month of Mar/April"96. The Bitumen was received only on 22.4.96.

Party has completed 100% of Earth filling, construction of drains and culverts within stipulated completion time.

3.0 RECOMMENDATIONS

3.1 The contention of the party that the stone grit could not be transported from quarry at Haldwani due to Uttarakhand agitation is partly true. The trucks were held up en route and the regular transport was not available. Sufficient front was available to carry out the work all the time.

3.2 Party has limited resources and it was not fully mobilized at site. We understand that the contractor was also mobilized at the same time at our Najibabad Depot and has diverted his resources.

3.3 The delay in completion of WBM roads has not affected the progress of other works and the mechanical completion of the plant has not been affected. However, in view of inordinate delay in completion of works, it is recommended to grant extension of time upto 30.4.96 and hence recovery of Liquidated damages for 2 weeks delay i.e. 2% of the total value.

GM (LPG) Sd/- 31/3

DGM (F)

31/3/97

KD, NR

(Emphasis supplied)

35. The notes thereafter made by the various authorities, which examined the case are also material and read as under:

The reason for delay in completion of work has been explained as above. The main delay is on account of non-availability of stone grit and soling material which could not be done from Haldwani and due to Uttarakhand agitation. The proposal may be considered.

Sd/-

7/4

In view of justification and reasons stated given above, the proposal may be concurred.

DGM (F)

Sd/-

7/4/97

DGM (F)

(illegible)

KD, N/R

SM (LPG)

Note no.LPG/Eng./1564 dt. 29/3/96 is very clear on L/D. Intention of the note is to recover full L/D in line with the terms and conditions of W.O. Incidentally some CLM(E) reconsidered for L/D recovery on 29/3/96. It is suggested that we may maintain status quo as per approval on the note dt/ 29/3/96.

(Emphasis supplied)

36. If these notes are examined even in the process of internal decision making of the respondent, it will be seen that the persons at site have categorically observed that the full delay cannot be said to be attributable to the appellant. However, the most important aspect is that the delay in the completion of work by the appellant has been observed as not affecting the progress of other works and the mechanical completion of the plant. There was, thus, no loss caused to the respondent. The superior authority also concurred with this view but when the matter was ultimately put up to the competent authority all that is observed is that the intention should be to recover full liquidated damages in line with the terms and conditions of the work order. It is not the opinion of the competent authority that the views expressed by the persons including the persons at site is incorrect and that the delay is attributable to the appellant and that actually the respondent had suffered loss or damage. The view was that since the contract contained a clause for recovery of liquidated damages, irrespective of whether loss is caused or not, liquidated damages should be recovered.

37. In our considered view, this is a fallacious approach. No doubt the final say rested with the competent authority. It cannot, however, be said that the issue of sufferance of any damage whatsoever to the respondent cannot be looked into by the arbitrator or by subsequent forums including by us even if the finding is that no loss at all has been suffered. Merely because there is a clause of liquidated damages does not mean that the amount of liquidated damages has to be recovered even when no loss has been caused. The respondent had to establish that loss was caused.

38. The approach of the respondent is, in fact, the same as adopted in Indian Oil Corporation case (supra) - the entity IOC being common to that case as the respondent herein. The learned single Judge (as he then was) has already held that even where no loss is suffered, the recovery of liquidated damages would not be permissible and it would be preposterous for the IOC to submit that they should get liquidated damages stipulated in the contract even when no loss is

suffered. We have extracted the relevant portion of that judgement aforesaid which applies on all fours to the facts of the present case.

39. We are, thus, of the considered view that the recovery of liquidated damages by the respondent in the absence of any loss whatsoever cannot be held to be permissible. As noted above, the competent authority never held that the loss was caused by the appellant but on the opinion rendered by subordinates and the factual matrix set out by the persons at site only opined that since liquidated damages were provided in the contract, the amount be recovered.

40. The result of the aforesaid is that the rejection of Claim No.5 vide the award dated 29.6.2002 sustained by the impugned order dated 21.1.2010 cannot be upheld and is set aside. The amount of Rs. 4,59,873.00 recovered by the respondent as liquidated damages is, thus, liable to be refunded to the appellant. The denial of this amount clearly borders on perversity as it is contrary to the settled legal position enunciated in various pronouncements discussed aforesaid and, thus, calls for interference.

41. The aforesaid would naturally give rise to the issue of interest on this amount which has been improperly recovered by the respondent. We are conscious of the fact that the interest regimes since 1996 has varied over different periods of time with periods of lower interest regime and higher interest regime. We also cannot lose sight of the fact that this is a commercial transaction where the amount has been utilized by the respondent. We, thus, consider it appropriate to grant interest @ 15 per cent per annum (simple interest) from the date the amount was appropriated by the respondent till date of payment.

42. The appeal is accordingly allowed in the aforesaid terms leaving the parties to bear their own costs.