

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

% *Judgment reserved on: 26<sup>th</sup> July, 2016*  
*Judgment pronounced on: 29<sup>th</sup> July, 2016*

+ **O.M.P. 218/2015 & I.A. No.13089/2015**

UNION OF INDIA ..... Petitioner  
Through Mr.Anirudh Mehrotra, Adv. for  
Mr.Jagdeep Sharma, Adv.

versus

NAGARJUNA CONSTRUCTION CO. LTD. .... Respondent  
Through Ms.Priya Kumar, Adv. with  
Mr.Adhish Srivastava and  
Ms.Tanya Tiwari, Adv.

**CORAM:**  
**HON'BLE MR.JUSTICE MANMOHAN SINGH**

**MANMOHAN SINGH, J.**

1. The petitioner, Union of India has filed the petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") for setting aside award dated 8<sup>th</sup> September, 2014 passed by sole Arbitrator.
2. The brief facts of the case as per the petition are as under:
  - i) On 26<sup>th</sup> March, 2003, an Agreement bearing No: 41/EE/PWD-27/2002-2003 (hereinafter referred to as the 'agreement') with respect to the construction of District Court Complex at Sector 16, Dwarka, New Delhi (hereinafter referred to as the 'work') was entered between the petitioner and the respondent. As per the agreement, the date of commencement of work was decided

by the parties to be 5<sup>th</sup> April, 2003 and the stipulated date of completion of work was 4<sup>th</sup> October, 2005.

- ii) On 26<sup>th</sup> March, 2003 an award letter No.54(834)/PWD-27/A-II/831 was issued by the petitioner wherein the respondent was awarded the work. In the said letter, the petitioner had made it clear that the time for completion of the work is 30 months.
- iii) On 26<sup>th</sup> July, 2003 a letter was issued by the petitioner stating that it is evident from the progress of work that the respondent are not able to achieve the required progress as per the agreement and hence, they were requested to accelerate the progress of work.
- iv) On 23<sup>rd</sup> August, 2004, another letter was issued by the petitioner stating that the progress of work was very slow due to the insufficient resources, specifically shortage of shuttering material and labour. The petitioner again requested the respondent to take effective steps to increase the resources so that the work could be completed as per the agreement. It was further informed by the petitioner to the respondent that any delay in completing the work will be dealt as per the relevant clause of the agreement at the appropriate time.
- v) On 28<sup>th</sup> July, 2004, the petitioner issued another letter stating that the progress of work was slow and that the structural work could not be completed by the stipulated 18 months period for completion of structural work i.e. 4<sup>th</sup> October, 2005. For this reason, vide letter dated 28<sup>th</sup> July, 2004 the petitioner issued a show cause notice to the respondent under Clause 2 of the agreement which empowered the Superintending Engineer to levy penalty on the respondent.

- vi) On 6<sup>th</sup> February, 2006, the petitioner issued another letter inviting the attention of the respondent to the slow progress of the work and constant slippage of the targets given by the petitioner from time to time.
- vii) On 22<sup>nd</sup> March, 2006 the above-mentioned show cause notice was issued by the petitioner to the respondent with respect to levy of compensation vide Clause 2 of the agreement. The petitioner issued this show cause notice because it appeared that the respondent would not complete the work by 31<sup>st</sup> March, 2006 [which is the provisional extension time granted to the respondent] due to non-deployment of adequate resources at the site of work.
- viii) On 13<sup>th</sup> June, 2006, the respondent submitted analysis of rates with regard to 'coffer shuttering' to the petitioner.
- ix) On 9<sup>th</sup> March, 2007 the petitioner informed the respondent by issuing a letter that work was delayed due to non-deployment of resources and manpower by the respondent from time to time. The petitioner had mentioned it to the respondent that work awarded to other agencies was also delayed because of non-completion of related work by the respondent.
- x) On 11<sup>th</sup> September, 2007 the petitioner issued another letter informing the respondent that the work with respect to the strengthening of staircase railing and treatment of coffer surface was abysmally slow and that progress of other works was not satisfactory.
- xi) On 21<sup>st</sup> April, 2008 the petitioner issued another letter informing the respondent that the petitioner had inspected the site on 21<sup>st</sup> April, 2008 and no improvement was found in the deployment

of adequate resources to complete the work as per the targets. In the said letter, the petitioner had also stated that they contacted the respondent on telephone from site and informed that the matter of deployment of sufficient manpower and resources to complete the work as per target was not given the desired seriousness and only assurances were given to the various senior officers of the petitioner but were not implemented at the site.

- xii) In September 2008, the respondent had claimed that the work awarded i.e. Construction of District Court Complex at Sector 16, Dwarka, New Delhi has been completed. However, the work awarded was not complete and the respondent had in fact abandoned the work.
  - xiii) On 13<sup>th</sup> April, 2009 the respondent invoked the provisions of clause 25 of the agreement for appointment of Arbitrator in order to settle the disputes arising out of the work.
  - xiv) On 17<sup>th</sup> March, 2010 the petitioner had issued a show cause notice to the respondent under Clause 2 of the agreement levying the compensation for delay in execution of the work because the respondent had not completed and abandoned the work although the petitioner had extended the time for completion of the work. The same was replied by the respondent on 30<sup>th</sup> March, 2010.
  - xv) On 19<sup>th</sup> May, 2010 the Arbitrator entered upon reference in the dispute between the petitioner and the respondent in order to adjudicate the disputes between the parties.
3. On 21<sup>st</sup> April, 2011, the respondent had filed the statement of claims before the Arbitral Tribunal with respect to claim Nos.1 to 10.

4. On 8<sup>th</sup> September, 2014, the arbitral award was published by the Arbitral Tribunal. The claims and counter claims that were decided and the amount that was awarded by the said award is as follows :

Claim No.	Whether held as entitled	Amount Awarded by the Tribunal
1	Yes	1,04,98,936/-
2	Yes	7,39,282/-
3	Yes	1,25,59,198/-
4	Yes	3,10,177/-
5	No	-
6	No	-
7	Yes	5,00,000/-
8	No	-
9	Yes	-
10	No	-
11	Yes	2,93,57,480/-
12	No	-

Counter Claim No.	Whether held as entitled	Amount Awarded by the Tribunal
1	No	-
2	No	-
Additional Counter Claim	No	-

5. The petitioner has challenged the award dated 8<sup>th</sup> September, 2014 passed by the sole Arbitrator under two heads namely, that the decision of the Arbitrator in allowing the claim No.2 as well as in deciding the claim No. 11, counter claim No. 1 and additional claim against the petitioner on the ground that the levy of compensation as per clause 2 of the agreement by the petitioner was not justified.

However, the counsel has restricted his argument on claim No.11 only.

6. The arguments were addressed by the counsel for the petitioner on claim No.11 by stating that clause 2 of the agreement specifies that in case the respondent fails to maintain the required progress or to complete the progress or there is a delay, the petitioner would be entitled, to recover the amount as per the rates stipulated under clause 2, which specifies that the amount of compensation is to be adjusted or set off against any sum payable to the contractor under this or any other contract with the government. It is submitted that firstly, the term "adjusted or set off" against any sum payable permits the petitioner to adjust the amount of compensation by invoking the "performance guarantee" and "guarantee bond". Therefore, the Arbitrator has erred in deciding the claim No.11 against the petitioner.

7. Secondly, it is submitted that clause 2 provides that the decision of Superintending Engineer would be final and binding as per the arbitration clause i.e.clause 25 which states that the matters where the decision of the Superintending Engineer would be final and binding would be outside the purview of the arbitration clause. Therefore, the decision of the Superintending Engineer under clause 2 was a considered decision and an excepted matter which could not have been arbitrated upon.

8. It is also argued on behalf of the petitioner that the Arbitrator also erred and did not appreciate that the respondent in the present case had abandoned the work and was put to the notice by way of letters and show cause notices to explain the reasons for not completing the work in time and without deficiencies. The letter

dated 26<sup>th</sup> July, 2003, letter dated 28<sup>th</sup> July, 2004, show cause notice dated 22<sup>nd</sup> March, 2006, letter dated 9<sup>th</sup> March, 2007, letter dated 11<sup>th</sup> September 2007 and show cause notice dated 17<sup>th</sup> March, 2010 would show that the decision of the Superintending Engineer was taken on the basis of material placed on record and also that the respondent had been negligent in executing the work. Therefore, the Arbitrator had erred in deciding the issue against the petitioner on the ground that the petitioner did not raise the issue of invoking clause 2 for 2½ years. The letters on record would show that the petitioner did not waive off the right under clause 2 at any point of time.

9. It is also submitted that the petitioner had specifically pleaded along with the documents that the respondent had abandoned the work and the competent authority as per the agreement had taken a considered view to levy the compensation as per clause 2, but the said documents were not considered by the Arbitrator. Therefore, non-consideration of the documents on record amounted to violation of the principles of natural justice against the public policy and therefore, the award ought to be set aside under Section 34 of the Act.

10. Notice in the objection petition was not issued, as both parties agreed that the objections be decided at the admission stage itself.

11. Admittedly at the time of hearing, the petitioner on 19<sup>th</sup> July, 2016 has restricted its challenge to the Award dated 8<sup>th</sup> September, 2014 only in respect to Claim No.11.

12. The sole Arbitrator in the award in respect of Claim No. 11, awarded the amount appropriated by the petitioner by encashment

of the Performance Bank Guarantee of the respondent holding the encashment by the petitioner to be untenable as per law.

13. The Bank Guarantees had been encashed by the petitioner in order to recover the compensation levied by the Superintending Engineer under Clause 2 of the Agreement.

14. The contention of the petitioner is that the Clause 2 of the Agreement which deals with the compensation for delay if the contractor fails to maintain the required progress read along with Clause 25 makes the determination of the Superintending Engineer final and binding and therefore, the Arbitral Tribunal could not have examined this issue.

15. The learned Counsel for the petitioner has pressed the challenge only on the ground that Claim No.11 was not arbitrable on account of Clause 2 read with Clause 25 of the Agreement.

16. In view of the submissions made by the parties, it is to be examined as whether the award in question is sustainable or not. The Arbitral Tribunal after recording the facts and having gone through the statement of claim has arrived at the finding in favour of the respondent, the reasons for which are given in para 11 of the award, the same are read as under:

"11.0 Claim No.11:	On account of bank guarantee encashment	Rs.2,78,57,480 & Rs.15,00,000.
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11.1 The claimant in the statement of claim dated 11.08.2011 has contended that the encashment of bank guarantees has not been done as per the terms of the guarantees and that it was a mechanical exercise with the sole aim of unjust enrichment. By citing a number of reasons, the claimant has considered the action of the respondent to invoke bank guarantees as unwarranted, illegal and arbitrary.

11.2 In the statement of defence filed vide letter dated 11.08.2011, the respondent has argued that the work was abandoned by the claimant on 15.07.2009 and that the respondent was left with no alternative but to take action under clause 2 of the agreement and the bank guarantees were encashed to recover the amount of compensation of Rs.5,57,14,960 levied as per clause 2 of the agreement.

11.3 In accordance with the provisions of Special Condition No. 2 at page 119 of the agreement, the claimant submitted 'Performance Guarantee' of Rs.2,78,57,480 of Andhra Bank . The claimant also furnished a 'Guarantee Bond' of Rs.15,00,000 of Allahabad bank which was required as per the provisions of SI. No. 1.9 at page 150 of the agreement relating to the 'Specifications for Anodized Aluminum Works'.

11.4 It is as undisputed fact that the 'Performance Guarantee' and 'Guarantee Bond' referred in para above were encashed by the respondent and the amounts received from the banks have been shown as adjusted in 57<sup>th</sup> R/A Bill and 58<sup>th</sup> & Final bill prepared by the respondent.

11.5 It is on record as per the documents filed by the parties vide letters dated 11.08.2014 and 13.08.2014 that the banks were requested by the respondent vide letters dated 30.04.2010 to encash the bank guarantees since an amount of Rs.5,57,14,961 had allegedly become recoverable from the claimant on account of compensation levied by the competent authority under clause 2 of the agreement. Thus it is not the case of the respondent that 'Performance Guarantee' of Rs.2,78,57,480 was encashed due to 'non-performance' of the claimant and 'Guarantee Bond' of Rs.15,00,000 was encashed by the respondent on account of any deficiency observed in the 'Aluminum Work'.

11.6 The action of the respondent to levy compensation amounting to Rs.5,57,14,961 under clause 2 of the agreement has not been upheld as per para 13.10 infra.

Therefore, the respondent is not entitled to retain the encashed amounts of the 'Performance Guarantee' and 'Guarantee Bond' on account of the reasons stated in para above. Thus an amount of Rs.2,93,57,480 [=27857480 +1500000] is payable to the claimant. Accordingly, a sum of Rs.2,93,57,480 is awarded”.

17. The scope of Section 34 of the Act provides for limited jurisdiction restricted to the grounds mentioned therein. It is not an appeal proceeding against the award. Neither is it an examination of the correctness of the award but rather it checks whether there exist circumstances which would justify annulment of proceedings.

18. The Supreme Court has further expounded the said scope in the case of **Markfed Vanaspati and Allied Industries v. Union of India**, (2007) 7 SCC 679, wherein it was observed as under:

“17. Arbitration is a mechanism or a method of resolution of disputes that unlike court takes place in private, pursuant to agreement between the parties. The parties agree to be bound by the decision rendered by a chosen arbitrator after giving hearing. The endeavor of the court should be to honour and support the award as far as possible”.

The limited scope of interference under Section 34 of the Act has also been succinctly elucidated by a Single Judge of this Court in the case of **Bhagwati Contractors v. Union of India (UOI) and Anr.** 2009 Indlaw Del 3647 wherein it was held as under:

“7. Arbitration is intended to be a faster and less expensive alternative to the courts. If this is one's motivation and expectation, then the finality of the arbitral award is very important. The remedy provided in Section 34 against an award is in no sense an appeal. The legislative intent in Section 34 was to make the result of the annulment procedure prescribed therein potentially different from that in an appeal. In appeal, the decision under review not only may be confirmed, but may also be modified. In annulment, on the other

hand the decision under review only may be invalidated in whole or in part or be left to stand if the plea for annulment is rejected. Annulment operates to negate a decision, in whole or in part, thereby depriving the portion negated of legal force and returning the parties, as to that portion, to their original litigating positions. Annulment can void, while appeal can modify. Section 34 is found to provide for annulment only on the grounds affecting legitimacy of the process of decision as distinct from substantive correctness of the contents of the decision. A remedy of appeal focuses upon both legitimacy of the process of decision and the substantive correctness of the decision. Annulment, in the case of arbitration focuses not on the correctness of decision but rather more narrowly considers whether, regardless of errors in application of law or determination of facts, the decision resulted from a legitimate process.”

19. It is settled law that re-appreciation of evidence considered and accepted by the Arbitrator is not a course open to the High Court while examining objection to the award. The Arbitrator is the sole judge of the quality and quantity of the evidence and even where the courts feel that it could have arrived at a different conclusion on the basis of the evidence on the record, that would not by itself be a ground for setting aside the award. Based on the experience and qualification of a Technical Arbitrator, some estimation was also bound to be there in the grant of the award.

20. Issues involving in the present matter are the mixed question of law and facts and cannot be pleaded for the first time in Section 34 proceedings. Thus, facts not pleaded before the Arbitrator cannot be raised for the first time at the stage of Section 34 proceedings as there are allegations and counter allegations of the parties.

21. The sole Arbitrator has held that the dispute raised by the respondent is arbitrable, as a party cannot be a judge in its own cause, therefore, the Superintendent Engineer cannot determine the

party responsible for the delay, therefore, there is no force in the submission of the petitioner that the dispute would not fall for consideration and adjudication before the Arbitrator. If there is a concluded and undisputed fact regarding the contractor being responsible for the delay, no doubt under those circumstances the compensation determined by the Authority may not be arbitrable. However, the plea raised by the petitioner was not raised when the performance bank guarantees were invoked. The stand at that time was that the small part of the work was not completed by the contractor. Even then, what is made final and binding under the said clause is only the calculation of damages found payable by the contractor at a rate lower than those prescribed in the contract. No doubt, it is true that the clause 2 of the contract deals with the compensation for delay if the contractor fails to maintain the required progress. This compensation can be maintainable only if there is no dispute regarding the responsibility of the contractor for the failure to maintain the progress.

22. The said provision of Clause 2 of the GCC does not prohibit the claims raised. What is made final and binding under the said Clause is only the calculation of damages if found payable by the Contractor at a rate lower than those prescribed in the contract. This decision can be made by the Superintending Engineer only if there was no dispute in respect of the Contractor being in breach of the contract or responsible for the delays/prolongation. Such disputes cannot be adjudicated by the authority mentioned in the Contract, and this would necessarily fall in the jurisdiction of the Arbitrator or the Court, as the case may be. It is based on the principle that no party can be a judge in its own cause.

23. Clause-2 has been discussed by the Supreme Court in the case of **J.G. Engineers Pvt. Ltd. v. Union of India and Anr.**, (2011) 5 SCC 758, the Court held as under :

"13. Claim 3 was for refund of security deposit of Rs.1,00,000. 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 that 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.

14. Claim 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.

15. 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.

16. We may refer to the relevant provisions of the said contract document, that is, Clauses (2), (3)(Part) and (25)(Part) to decide whether 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 per cent 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 per cent 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 Engineer-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) (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 the 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 the Government.

(b) (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 the 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 of 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, CPWD in charge of the work at the time of dispute or if there be no Chief Engineer the administrative head of the said CPWD 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."

17. 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 every day'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. What is made final is only the decision of the Superintending Engineer in regard to the percentage of compensation payable by the contractor for every day'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 every day the due quantity of the work remains incomplete, subject to a ceiling of ten per cent. 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. What 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 the 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 the 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.

18. 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 accepted from arbitration under any provision of the contract.

19. 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."

24. The Supreme Court in ***BSNL v. Motorola India (P) Ltd.***, (2009) 2 SCC 337 in para 23, 24 and 26 has 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 [Ed.: Matter between two asterixes emphasised in original as well.] . 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[Ed.: Matter between two asterixes emphasised in original as well.] .

24. 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 appellants BSNL or by anybody who has been authorised on the terms of the agreement. Reading Clauses 15 and 16 together, it is apparent that Clause 16.2 will come into operation only after a finding is entered in terms of Clause 15 that the supplier is liable for payment of liquidated damages on account of delay on his part in the matter of making delivery. Therefore, Clause 16.2 is attracted only after the supplier's liability is fixed under Clause 15.2. It has been correctly pointed out by the High Court that the question of holding a person liable for liquidated damages and the question of quantifying the amount to be paid by way of liquidated damages are entirely different. Fixing of liability is primary, while the quantification, which is provided for under Clause 16.2, is secondary to it.

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”

25. If the present interpretation is accepted, then the rationale behind making the decision of the Superintending Engineer being final and binding would be understandable and as per law it would be a decision by the department in favour of the contractor.

26. In view of the aforesaid reasons, I am of the view that there is no infirmity in the award published by the Arbitral Tribunal. No interference is called for in view of the scope of interference while deciding the objections, as it is evident from the award that the Arbitral Tribunal has not acted arbitrarily, irrationally or independently of the contract nor had travelled outside the bounds of the contract or the award passed is without jurisdiction. Therefore, the objections are dismissed. Pending applications also stands disposed of.

27. No costs.

**(MANMOHAN SINGH)  
JUDGE**

**JULY 29, 2016**