IN THE HIGH COURT OF DELHI

OMP No. 66/2004 & OMP No. 80/2004

Reserved on : 23rd December, 2009
Date of decision: 30th April, 2010

GAIL (India)Ltd. ....Petitioner
through: Mr. Jagjit Singh, Adv.

VERSUS

Paramount Ltd. ....Respondent
through: Ms. Meenakshi Arora, Adv.

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL

1. Whether reporters of local papers may be allowed to see the Judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

GITA MITTAL, J

1. GAIL (India) Ltd. (referred to as the petitioner/GAIL hereafter) entered into two contracts with the Paramount Limited ('Contractor'/respondent hereafter), one in respect of a Waste Water Treatment Plant at UPCC, Pata, and the second with regard to the Condensate Polishing Unit (Part-B) for a Gas Cracker Unit for U.P. Petrochemical Complex of M/s GAIL at Pata, Uttar Pradesh.

2. Identical disputes arose in respect of completion of the two contracts resulting in initiation of the arbitration in both matters. The disputes in both contracts were referred to the arbitration of Shri T.S. Vijayaraghavan as sole arbitrator. Separate proceedings were held by the learned arbitrator which

culminated in the making and pronouncement of two awards both dated 20th November, 2003 in favour of the contractor. GAIL has assailed the said awards by way of the separate objections under Section 34 of the Arbitration & Conciliation Act, 1996 which have been registered as OMP No. 66/2004 and OMP 80/2004. The awards are similar and identical questions of law and fact have been raised for consideration in both these matters. For this reason, these two petitions are hereby taken up together for consideration.

OMP No. 66/2004

3. For the purposes of convenience, OMP No. 66/2004 is taken up first.

4. *Factual Matrix*

4.1 GAIL invited bids on 27th June, 1994 for setting up of a Waste Water Treatment Plant ('WWTP' hereafter for brevity) on turn key basis for its U.P. Petro Chemical Complex at Pata ('UPPC' hereafter for brevity). As per the bid document, the brief description of work was as follows :-

> "Turnkey execution of Waste Water Treatment Plant (WWTP) including process design, basic, engg., detail engg., procurement, supply, fabrication, erection with all civil, electrical, instrumentation works, testing, commissioning & guaranteeing the performance of the WWTP meeting the guidelines as specified in bid document. The process design & basic engg. should preferably be based on latest proven technology systems and practices."

4.2 On 10th September, 1994, Paramount Limited (hereafter referred to as the 'contractor') submitted its tender for the same.

GAIL accepted the contractor's tender on 14th July, 1995, vide a fax of intent. Clause 1.1 reiterated testing and commissioning of the plant as part of the scope of work. As per the said communication, the scope of work was further specified in clause 4 as comprising :-

> "The contractor's scope of work shall comprise process design basic Engg. And detail Engg. Based on the Indicative flow diagram (Drg. No. 3346-00-17-41-3-001 Rev. (B), where the essential requirements and proposed requirements for the effluent treatment Plant have been marked, manufactured, supply, erection, painting, testing commissioning & guaranteeing the entire effluent treatment plant complete on turnkey basis to meet the treated effluent quality as specified in the design basis, as mentioned in Indicative flow diagram, technical specifications, data sheets, drawings etc. else where given in the bid document."
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> (Emphasis supplied)

4.3 In clause 6.0, GAIL had given details of the sources of waste water generation in the complex which included the effluents from several other units including inter alia :-

"a) L.L.D.P.E.
b) H.D.P.E.
c) Gas Cracker Unit
d) Gas Sweetening unit
e) Flare Area
f) Hydro carbon storage tanks area"

Subsequent to the fax of intent dated 14th July, 1995, a formal letter of acceptance dated 27th September, 1995 was also issued by GAIL, again referring to all the above components of the contract including design, erection, testing and commissioning of the waste water treatment plant for UPPC at Pata. The lump sum contract value for the works under the contract was stated as Rs.12,39,39,690/-.

4.4 So far as the time schedule was concerned, in clause 3.0 of this communication, it was mentioned as follows :-

> "The Time Schedule for completion of works covered under this contract shall be 18 (eighteen) months reckoned from the date of issue of the Fax of Intent i.e. 14.7.1995 and is inclusive of mobilisation period."

Thus, work was to be completed within 18 months from the date of fax of intent (FOI) i.e. from 14th July, 1995 to 13th January, 1997.

4.5 The relevant extract of the General Conditions of the Contract ('GCC' hereafter for brevity) which also governed the contract relied on by the parties and necessary for the present adjudication are briefly summarised as follows :-

> "
> Section-1
> GENERAL CONDITIONS OF CONTRACT
> 1. DEFINITION OF TERMS :
> 1) The OWNER/COMPANY/GAIL means GAS AUTHORITY OF INDIA LIMITED. A Government of India Undertaking having its Registered office at Hotel Samrat, Chanakyapuri, New Delhi and includes its successors and assigns.
> 2) The CONTRACTOR means the person or the

persons, firm or Company or Corporation whose tender has been accepted by the OWNER and includes the CONTRACTOR's legal Representatives his successors and permitted assigns.

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4) The WORK shall mean and include all items and things to be supplied/done and services and activities to be performed by the CONTRACTOR in pursuance to and in accordance with the CONTRACT or part thereof as the case may be and shall include all extra additional, altered or substituted works as required for purpose of the CONTRACT.

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8) EIL means Engineers India Limited, who are the Consulting Engineers to the OWNER for this project and having registered office at El House, 1-Bhikaji Cama Place, R.K. Puram, New Delhi.

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25.0 TIME OF PERFORMANCE
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25.2 TIME SCHEDULE OF CONSTRUCTION :
25.2.1 The General Time Schedule of construction is given in the TENDER DOCUMENT CONTRACTOR should prepare a detailed monthly or weekly construction programme jointly with the ENGINEER IN-CHARGE within one month of receipt of LETTER OF INTENT or ACCEPTANCE OF TENDER. The WORK shall be executed strictly as per the Time Schedule given in the CONTRACT DOCUMENT. The period of construction given includes the time required for mobilisation testing rectifications, if any, retesting and completion in all respects in accordance with CONTRACT DOCUMENT to the entire satisfaction of the ENGINEER-IN-CHARGE.

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26.0 FORCE MAJEURE
26.1 CONDITIONS FOR FORCE MAJEURES

In the event of either party being rendered unable by Force Majeure to perform any obligations required to be performed by them under the CONTRACT the relative obligation of the party affected by such Force Majeure shall upon notification to the other party be suspended for the period during which Force Majeure event lasts. The cost and loss sustained by the either party shall be borne by respective parties.

The term “Force Majeure” as employed herein shall mean acts of God, earthquake, war (declared or undeclared), revolts, riots, fires, floods, rebellions, explosions, hurricane, sabotage civil commotions and acts and regulations of respective Government of the two parties, namely the OWNER and the CONTRACTOR.

Upon the occurrence of such cause(s) and upon its termination, the party alleging that it has been rendered unable as aforesaid thereby, shall notify the other party in writing immediately but not later than 72 (Seventy-two) hours of the alleged beginning and ending thereof, giving full particulars and satisfactory evidence in support of its claim.

Time for performance of the negative obligations suspended by the Force Majeure shall be extended by the period cause lasts.

If deliveries of bought out and of works to be executed by the CONCTRACTOR are suspended by Force Majeure conditions lasting for more than 2 (two) months the OWNER shall have the option to terminate the CONTRCT.

27.0 COMPENSATION FOR DELAY (LIQUIDATED DAMAGES):

27.1 Time is the essence of the CONTRACT. In case the CONTRACTOR fails to complete the WORK within the stipulated period, then, unless such failure is due to Force Majeure as defined in Clause 26 here above or due to OWNER's defaults, the CONTRACTOR shall pay to the OWNER, by way of compensation for delay and not as penalty, a sum @ ½% (Half Percent) of the VALUE OF CONTRACT for delay per week on pro-rata for part thereof subject to a maximum of 10% (Ten percent) of the VALUE OF CONTRACT. The

parties agree that this is a genuine pre-estimate of the loss/damage which will be suffered on account of delay/breach on the part of the CONTRACTOR and the said amount will be payable on demand without there being any proof of the actual loss or damages caused by such delay/breach.

The decision of the ENGINEER-IN-CHARGE in regard to applicability of Compensation for Delay shall be final and binding on the CONTRACTOR.

27.2 All sums payable by way of compensation under any of the conditions shall be considered as reasonable compensation without reference to the actual loss or damage which shall have been sustained.

28.0 RIGHTS OF THE OWNER TO FORFEIT SECURITY DEPOSIT :

Whenever any claim against the CONTRACTOR for the payment of a sum of money arises out of under the CONTRACT, the OWNER shall be entitled to recover such sum by appropriation in part or whole the Security Deposit of the CONTRACTOR. In the event of the security being defficient or if no security has been taken from the CONTRACTOR, then the balance or the total sum recoverable, as the case may be shall be deducted from any sum then due or which at any time thereafter may become due to the CONTRACTOR. The CONTRACTOR shall pay to the OWNER on demand any balance remaining due.

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44.0 LIENS:

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44.3 The final payment shall not become due until the CONTRACTOR delivers to the ENGINEER-IN-CHARGE complete release or waiver of all liens arising or which may arise out of his agreement or receipt in full or certification by the CONTRACTOR in a form approved by ENGINEER-IN-CHARGE that all invoices for labour, materials, services have been paid in lien thereof and if required by the ENGINEER-IN-CHARGE in any case an affidavit that so far as the CONTRACTOR has knowledge or information the releases and receipts include all the labour and material for which a lien could be filled.

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53.0 COMPLETION OF CONTRACT :

Unless otherwise terminated under the provisions of any other relevant clause, this CONTRACT shall be deemed to have been completed at the expiration of the PERIOD OF LIABILITY as provided for under the CONTRACT.

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76.0 ACTION AND COMPENSATION IN CASE OF BAD WORK

If it shall appear to the ENGINEER-IN-CHARGE that any work has been executed with unsound, imperfect or unskilled workmanship, or with materials of any inferior description, or that any materials or articles provided by the CONTRACTOR for the execution of the WORK are unsound, or of a quality inferior to that contracted for, or otherwise not in accordance with the CONTRACT, the CONTRACTOR shall on demand in writing from the ENGINEER-IN-CHARGE or his authorised representative specifying the WORK, materials or articles complained of notwithstanding that the same may have been inadvertently passed, certified and paid for, forthwith rectify or remove and reconstruct the WORK so specified and provide other proper and suitable materials or articles at his own cost and in the event of failure to do so within the period specified by the ENGINEER-IN-CHARGE in his demand aforesaid, the CONTRACTOR shall be liable to pay compensation at the rate of 1% (one percent) of the estimated cost of the whole WORK, while his failure to do so shall continue and in the case of any such failure the ENGINEER-IN-CHARGE may on expiry of notice period rectify or remove and re-execute the WORK or remove and replace with others, the materials or articles complained of to as the case may be at the risk and expense in all respects of the CONTRACTOR. The decision of the ENGINEER-IN-CHARGE as to any question arising under this clause shall be final and conclusive.

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107.0 ARBITRATION"

107.1 All disputes of difference whatsoever which shall at any time arise between the parties hereto touching or concerning the WORKS or the execution effect thereof or to the rights or liabilities or the construction meaning operation or effect thereof or to the rights or liabilities of the parties or arising out or in relation thereto whether during or after completion of the CONTRACT or whether before or after determination, foreclosure or breach of the CONTRACT (other than those in respect of which the decision of any person is by the CONTRACT expressed to be final and binding) shall after written notice by either party to the CONTRACT to the other of them and to the Appointing Authority hereinafter mentioned be referred for adjudication to a sole arbitrator to be appointed as herein after provided.

107.2 For the purposes of appointing the sole Arbitrator referred to above, the Appointing Authority will send within thirty days of receipt of the notice, to the CONTRACTOR a panel of three name persons who shall all the presently unconnected with the organisation for which the WORK is executed.

The CONTRACTOR shall on receipt of the names as aforesaid, select any one of the persons named to be appointed as a sole Arbitrator and communicate his name to the Appointing Authority within thirty days of receipt of names. The Appointing Authority shall thereupon without any delay appoint the said person as the sole Arbitrator. If the CONTRACTOR fails to communicate such selection as provided above within the period specified, the Appointing Authority shall make the selection and appoint the selected person as the Sole Arbitrator.

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The venue of arbitration shall be New Delhi.

The fees, if any, of the Arbitrator shall, if required to be paid before the award is made and published, be paid half AND half by each of the parties. The costs of the reference and of the award including the fees, if any, of the Arbitrator shall be in the

discretion of the Arbitrator who may direct to and by whom and in what manner, such costs or any part thereof shall be paid and may fix or settle the amount of costs to be so paid.
The award of the Arbitrator shall be final and binding on both the parties.
Subject to aforesaid the provisions of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder, and for the time being in force, shall apply to the arbitration proceeding under this clause."

4.6 My attention has also been drawn to the agreed variation between the parties relating to the release of the last 10% of payment to the contractor as enclosed with the letter dated 27th September, 1995 which reads as follows :-

"RELEASE OF LAST 10% PAYMENT

In case GAIL/EIL are not in a position to release commissioning front after completion of precommissioning activities/Mech. Completion, final 10% of the contract value shall be released in the following manner :

a) 5% of the contract value shall be released to contractor upon:

i) Issue of Mech. Completion certificate and :

ii) Extension/submission of performance BG of 10% of contract value to be kept valid till 21 months from the date of Mech. Completion certificate.

b) Balance 5% of contract value shall be released after 18 months of issue of Mech. Completion certificate or after the commissioning and acceptance of the system, whichever is earlier.

The owner shall give 15 days notice to the contractor during the period of 18 months where upon the contractor shall be obliged to depute his commissioning."

4.7 So far as delay in completion of the work resulting on account of reasons attributable to GAIL are concerned, the

contract between the parties provided the following compensation:-

> "A.28.0 COMPENSATION FOR EXTENDED STAY
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> The clause no. 87(vi) of GCC is modified to the following extent :-
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> In case the time of completion of work is delayed beyond the time schedule indicated in the tender document plus a grace period equivalent to 1/5th of the time schedule of 2 months whichever is more, due to reasons solely attributable to owner, the contractor shall be paid extended stay compensation in order to maintain necessary organisational set up and construction tools, tackles, eqpts. etc. at site of work. The bidder shall mention the rate for such extended stay compensation per month in the 'UPRICE PART' which will be considered for evaluation for 1/5th of the time schedule or 3(three) months whichever is less. In case bidder does not indicate the rate for extended stay compensation in UPRICE PART, it will be presumed that no extended stay compensation is required to be paid to the contractor.
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> In case the completion of work is delayed beyond a period of 3 months after the grace period, then both the owner and the Contractor shall mutually decide the future course of action including payment of further extended stay compensation."

4.8 According to the contractor, it mobilised its resources for commencement of the work but was prevented in the completion till 15th September, 1997. The reasons for the delay which occurred have also been detailed on record by the arbitrator as follows :-

(a) The entire plant site was flooded with water because the plant site was located at the lowest place of the entire project (UPPC). The roads were inundated and site was rendered unaccessible. GAIL had failed to provide any form of flood protection or drainage measure. As per GCC 1.31 mobilisation

was defined as simultaneous action at all locations. Piece meal handing over of the site was therefore not to be acceptable. GAIL was required to provide a site in workable condition. Even though fax of intent was issued on 14th July, 1995, but the site being located at the lowest level and completely flooded, workable site was not made available till 15th September, 1995. Again in July, 1996 there was heavy monsoon hampering transportation of man power and material.

(b) Between November to December, 1995 there was an unforeseen law and order problem which occurred at the site. The resident construction manager of the company was beaten up by miscreants and there was resultant demoralisation of the work force, it took five weeks to disentangle and resume work.

(c) Drawings of the DG sizing (set) were submitted on 21st December, 1995 and were finally approved by GAIL only in February, 1997. This set was inspected, dispatched and received at the site only on 19th August, 1997.

(d) Between April to June, 1996, on account of elections to the U.P. State Assembly, all vehicles of the respondent company were requisitioned and impounded by the state authorities for electioneering. The site was located at a distance of 15 kms from the residential area rendering commutation without the (vehicles) impossible.

(e) Details of the slop oil tanks were provided to GAIL on 16th April, 1996 for obtaining the approval from the Chief Controller of Explosives at Nagpur. These were approved only by 21st April, 1997.

(f) In February, 1997, work at site suffered on account of non-availability of the cement which was to be supplied by GAIL as per the contract.

4.9 The contractor relies on a mechanical completion certificate dated 20th August, 1997 issued by the Engineers India Limited (referred to as 'EIL' hereafter) certifying that “all work have been mechanically completed in the above plant as per specification, drawings and instruction of engineer in charge.” The certificate was issued without prejudice to the contractor's

liability and GAIL's rights as per the provisions of the contract.

4.10 After the mechanical completion, pre-commissioning activities were commenced. Final commissioning of the plant could take place only after the oily water effluent and the sanitary waste was made available by GAIL which was to be treated in the plant.

4.11 Extension of time

In the above circumstances, the contractor made the following requests for extension of time which were considered and granted :-

Request by the Contractor	Approval
(i) On 9th January 2007 On 14th January, 2007 the contractor sought extension of time. (ii) On 31st March, 1997 a request for extension of time from 9th March to 31st March, 1997	By a communication dated 14th January, 1997 EIL had recommended extension of time for completion of the contract up to 28th February, 1997.
(iii) 23rd April to 31st May, 1997	GAIL wrote a letter dated 8th May, 1997 granting provisional extension of time up to 31st May, 1997 without prejudice to contractual provisions and right to impose liquidated damages.
(iv) On 23rd June, 1997 the contractor revised the date to 30th June and shifted it to 30th July, 1997.	
(v) 6th September, 1997 till 31st October, 1997	GAIL agreed to provisionally extend the time without prejudice to its rights.

4.12 The contractor wrote a detailed communication to GAIL dated 30th September, 1997 informing it about the reasons for the delays which had occurred and seeking regularisation of the delays and extension of time till the extended period. Apart from the aforenoticed details, it was pointed out, that the contractor was waiting for the necessary sanitary waste which was to be provided by GAIL so that the biomass could be developed in the aeration tank to achieve the required results for treatment to complete the testing and commissioning. It was urged that the delay at the worst was for a period of 32 weeks in the circumstances noted hereinabove. Again on 7th October, 1997, the contractor wrote to GAIL requesting for the supply of service water to complete the commissioning.

4.13 The contract envisaged the Guarantee Test Run ('GTR' hereafter) within eighteen months from the date of the award of the work. Admittedly mechanical completion of the plant stood completed on 20th August, 1997. Commissioning of the plant by way of individual systems commenced on 7th July, 1997 and stood completed by 24th of October, 1997. Despite repeated requests including the one made on 30th September, 1997 since the mechanical completion, GAIL was unable to provide the sanitary waste that is the service water for testing and commissioning of the plant. As late as on 21st of January, 1998 the contractor was therefore compelled to seek extension of time for testing and

commissioning of the plant till such time as the sanitary waste was made available. A reminder in this behalf on 6th February, 1998 and telegram dated 7th of March, 1998 were of no avail.

4.14 In this background, by a communication of 7th March, 1998, the contractor confirmed completion of the individual commissioning of the plant; and further requested GAIL to take over the plant; relieve its staff and issue a mechanical completion certificate with effect from 20th August, 1997.

4.15 In a meeting held on 31st March, 1998, GAIL confirmed the date of completion of the various systems and pump operations and informed the contractor that the necessary oily water effluents and sanitary waste were not available for the GTR/commissioning. GAIL required the contractor to provide the GTR/commissioning on fifteen days notice.

4.16 On 10th August, 1998, GAIL again certified that the plant was mechanically completed on 20th August, 1997; that pre-commissioning activities were started subsequently and milestones for the systems stipulated between 27th August, 1997 and 24th October, 1997 stood completed. It was further noted that the commissioning activities of the plant by way of individual systems and water run of various sections also stood completed on the 24th of October, 1997; that the performance GTR was awaiting inputs of all the effluents and sanitary waste to the plant, supply of which was to be made available by GAIL and that the plant was

being operated by GAIL since the 29th of June, 1998.

In this meeting, it is noteworthy, that the contractor agreed for the performance run of the plant on a 15 day notice without any additional financial implications.

4.17 So far as availability of the sanitary waste and effluent for testing is concerned, the contractor has complained that it was unnecessarily compelled to maintain staff at the site.

4.18 GAIL's inability to provide the effluent so far for the GTR was confirmed by it on 21st November, 1998 when it wrote that ethylene production was expected only in the first half of December and the contractor should keep its commissioning team ready for mobilizing at the site by mid-December, 1998.

4.19 The contractor had responded by a letter dated 1st December, 1998 reminding GAIL that the plant stood taken over and duly commissioned, except the biological section where the biomass was to be developed subject to the sanitary waste and effluent being made available by GAIL. Amongst other grievances, the contractor reminded GAIL that availability of the pollutant was dependent on commissioning of their other plants including the LLDPE, HDPE, gas crackers and gas sweetening plants sets.

4.20 Contradictorily, on 3rd December, 1998, GAIL addressed a letter to the contractor stating that the “waste water treatment

plant is not commissioned and it had merely taken the custody of the plant till it is commissioned by the contractor as the required effluents were not available at that time". It was stated that the contractor was yet to establish the performance parameters of each unit of the WWTP before the plant can be called "duly commissioned". At the same time GAIL wrote that the sanitary waste, though "desirable", is not "essential" for commissioning of WWTP/development of biomass. GAIL was insisting that the team of the contractor should have been present even when the effluents started coming from any single unit, irrespective of whether sufficient effluent for testing the plant was generated or not.

4.21 My attention is drawn to further communications dated 7th December, 1998, 7th April, 1999 and 10th April, 1999 wherein the contractor had categorically informed that sanitary waste was required to carry out the performance test runs; that a sample of composite effluents from various plants was required to be analysed prior to the guarantee test run; and that, despite the mechanical completion of the plant on 20th August, 1997, sanitary waste and biomass for the testing of the plant was not available till date. As a result, release of the 5% payment in terms of the agreement between the parties as well as release of the bank guarantees which had been submitted by the contractor was sought.

4.22 In view of the aforenoticed statement of agreed variation in the payment terms with regard to the release of the last 10% payment, even the very last 5% payment was required to be released on expiry of 18 months of issue of the mechanical completion certificate or after commissioning and acceptance of the system by GAIL, whichever being earlier. There was not even a whisper of a suggestion by GAIL that any loss or damage had enured to it by any act of omission or commission by the contractor.

4.23 The contractor consequently submitted its final bill to EIL. The same was verified and processed by the communication dated 7th April, 1999. EIL had confirmed the inability to undertake the GTR and performance of the plant due to non-availability of sufficient input even though the contractor had reported at the site for commissioning/performance guarantee test as per GAIL's intimation. EIL further informed GAIL that it had processed the final bill in order to close the contract as required by GAIL and directed release of payment after taking the performance guarantee run. It did not recommend imposition of liquidated damages. This letter also mentioned that "time extension for mechanical completion had been granted by the competent authority."

The letter of the Engineers India Limited dated 7th April, 1999 also categorically recorded that the contractor was being

asked to provide a no claim certificate.

4.24 GAIL has stated that the contract was treated as having concluded on 25th of February, 1999. However, GAIL did not act upon the recommendation of the EIL and did not make any payment to the contractor. In this background, a no claim certificate dated 13th October, 1999 was also submitted by the contractor. GAIL still did not process the final bill and failed to release the payment.

4.25 After waiting for the payment for a considerable period of almost three and a half years since the mechanical completion, the contractor issued its detailed statement of claims to GAIL on 30th June, 2001. No response was sent by GAIL to the contractor disputing the liability to pay or raising any kind of claim against it.

5. *Commencement of the arbitration*

5.1 Finally, the contractor invoked clause 107 of the contract by a communication dated 28th September, 2001 pointing out that despite its communication dated 30th June, 2001 requesting for settlement and payment, no payment had been made manifesting that disputes and differences had arisen between the parties. As such, the respondent called upon the chairman and managing director of GAIL, who was the appointing authority under clause 107, to refer the matter for adjudication to the sole arbitrator and requesting for a panel of three persons

from whom the arbitrator would be chosen. GAIL suggested a panel of three names by the letter dated 20th November, 2001 from whom the contractor proposed the name of Sh. T.S. Vijayaraghavan, former Secretary in the Ministry of Petroleum & Natural Gas to be appointed as the sole arbitrator. As a result, by a letter dated 16th January, 2002, Sh. T.S. Vijayaraghavan was appointed as the sole arbitrator in the present (WWTP) project as well as the arbitration of the disputes in the CPU project.

5.2 The arbitrator entered upon the reference and commenced proceedings in the matter on 31st January, 2002. GAIL contested the claims of the contractor. The arbitration proceedings culminated in the passing of the award on 20th November, 2003.

5.3 In the arbitration proceedings, the contractor filed claims dated 25th February, 2002. In para 8 of the claims, it was stated as follows :-

> "8) The claimant says that, under the terms and conditions of the contract, the claimant were to complete the work and GTR within the period of 18 months from the date of award of work, but on account of the respondent's reasons, though the work in question was mechanically completed on 20/8/1997, the claimant were unable to give GTR on account of inputs not made available. The claimant says that, after Mechanical completion, the time required for GTR is maximum 1 month including precommissioning and commissioning, but due to the respondent's reasons, the GTR could not be conducted till date. Also, after Mechanical Completion the claimant were required to give GTR within the period of 18 months on providing the entire inputs for the said test, but, as the said entire

inputs have not been made available, till date no any GTR could be conducted upto 19/7/1999, and this term of 18 months as provided in the contract was only on account of the reasons that, the inputs could not be made available immediately after Mechanical Completion. Hence, under the terms and conditions of the contract, now, after 19/2/1999, the claimant are in no way liable for any consequences arising out of the contract, and the contract in question in any circumstances is to be considered as concluded on 19/2/1999."

5.4 GAIL filed a reply dated 21st June, 2002 wherein it replied as follows :-

> "8. Contents of para 8 are wrong and denied. In fact, even after the mechanical completion certificate was given to the claimant on 20.8.1997, it had not rectified the various lapses in design and constructions as mentioned in the various check lists given by the EIL/GAIL and it would be relevant to mention that even after the contract was considered as concluded on 19.2.1999 the claimant had not completely rectified all the lapses, some of which had been pointed out in the fax message of EIL dated 25.2.1999 as well as earlier. Therefore, the claimant cannot validly blame the respondent for its own lapses and non-rectification of the same despite the lapses being specifically pointed out to the claimant by both EIL and GAIL from time to time."

5.5 In addition thereto, placing reliance on the no claim certificate dated 13th October, 1999 submitted by the contractor, GAIL raised preliminary submissions stating as follows :-

> "1. That the claimant having itself submitted a "no-claim certificate" dated 13.10.1999 to the respondent categorically stating therein that it did not have any other claim in respect of the contract other than its payment due in final bill, it is estopped by its own acts and conduct from filing the present claim for seeking payments beyond its

final bill of Rs.63,63,123/- The claim in excess of the amounts mentioned in the final bill is, therefore, not legally maintainable and is liable to be rejected."

5.6 In the reply filed by GAIL, it for the first time, set up a plea of entitlement to and raised a claim for liquidated damages in the following terms :-

> "5. Contents of Para 5 are wrong and denied besides being absolutely vague, hence undeserving of any consideration. The claimant, before signing the contract, was required to have thoroughly inspected the site from all angles and the reasons mentioned by the claimant for delay in the execution of the work are not condonable as per the terms and conditions of the agreement between the parties and no claim for any compensation for the such delay can be made by the claimant against the respondent and in fact, since the delay was not on account of force majeure, the claimant was liable to compensate the respondent for the delay at the rate of ½% of the value of contract for delay per week subject to a maximum of 10% of the value of contract. Therefore, in view of the great delay on the part of the claimant in executing the work, 10% of the value of contract amounting to Rs.3,00,00,000/- was liable to be paid by the claimant to the respondent or to be adjusted from the payments due from the respondent to the claimant. This amount of compensation for delay is liable to be taken into consideration, while deciding the present claim of the claimant."
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> (Underlining supplied)

5.7 Long after the petitioner raised its claims and sought appointment of the arbitrator in 2001; appointment of the arbitrator on 16th January, 2002 and commencement of the arbitration proceedings on 31st January, 2002, GAIL also for the

first time addressed a letter to the Engineers India Limited dated 16th March, 2002 recording that it had erred in recommending final time extension of the contract up to 20th February, 1999 without levy of liquidated damages presumably because of delay in providing necessary inputs for commissioning of the plant and sought imposition of liquidated damages on the delay of 233 days in the mechanical completion. The letter recorded that the matter had been reviewed in detail by its author (being the Director (Planning) & CVO of GAIL) and a considered view was given. This letter from GAIL was addressed to GM&OIC, UPCC, Pata and its copy was endorsed to the CVO, GAIL, New Delhi.

A further letter dated 30th March, 2002 was written by GAIL again informing EIL that it ought not to have forwarded recommendation of final time extension without levy of liquidated damages.

5.8 After a detailed consideration, the sole arbitrator pronounced the award dated 20th of November, 2003.

5.9 Perusal of the award would show that the arbitrator has considered the contentions of the parties under the following heads:-

(i) whether the time was the essence of the contract;
(ii) whether the claimant was solely responsible for the delay;
(iii) whether the liquidated damages could be justly levied;
(iv) whether the issuance of the no claim certificate by the contractor amounts to an estoppel against its claim.

The arbitrator has concluded that time was not of the

essence of the contract, that the contract was a composite contract and commissioning of the plant was an integral part thereof; found delay in completion of the contract attributable to GAIL and held that GAIL was disentitled to adjustment of any amount as liquidated damages.

5.10 Coming to the specific claims which were considered and decided. The main headings under which the contractor was claiming against GAIL and the amount awarded can be summed up as follows :-

Sr.No.	***Claim No.***	***Claim detail***	***Claimed amount***	***Principal***	***Int.upto 30.06.01***	***Int. After 30.06.01 up to award***	***Total***
1	1(a)	Work done but not paid (final bill)	63,63,123	58,49,586			
2	1(b)	Interest up to 30.06.2001	37,82,310		26,07,528	16,78,911	101,36,025
3	2(a)	Release of Security Deposit in form of B.G.	61,96,985	Order to release Bank Guarantee			
4	2(b)	Bank commission/security	72,42,701	10,08,709			10,08,709
5	3	Due to delay in supply of inputs Interest up to 30.06.2001	11,13,000 4,00,680	3,00,000	81,852	86,104	4,67,956
6	4	Extra items Interest up to 30.06.2001	5,45,524 5,05,768	3,09,524	2,15,225	88,838	6,13,587

Sr.No.	*Claim No.*	*Claim detail*	*Claimed amount*	*Principal*	*Int.upto 30.06.01*	*Int. After 30.06.01 up to award*	*Total*
7	5(a)	Overheads and profit	99,83,975	20,65,659			
8	5(b)	overstay	73,00,750	Nil			
9	5(c)	Rise in Price/labour/& material Interest up to 30.6.2001	33,31,370 2,20,82,379	Nil	14,36,340	5,92,872/-	40,94,871
10	6	Non providing of inputs for commissioning	21,00,206	Nil			
11	7(a)	Recovery against cement	49,37,360	27,07,280			
12	7(b)	Interest @ 18% up to 30.06.2001 interest @ 12% beyond upto award	42,78,081		17,24,910	7,77,026	52,09,216
13	8	Interest @ 24% on all above claims till payment	------				
14	9	Arbitration cost	5,00,000/-	Nil			
					Total claim awarded		2,15,30,364

5.11 Aggrieved by the rejection of its pleas and the award in favour of the contractor, GAIL has filed the present objections under section 34 of the Arbitration & Conciliation Act, 1996.

5.12 In the present proceedings, GAIL has not assailed the quantification of the contractor's entitlement by the arbitrator. The objection on behalf of GAIL is that time was of the essence of the contract, that on account of the delay in execution of the work by the contractor, under clause 27 of the contract, GAIL is entitled to 10% of the value of the contract, being an amount of Rs.3,00,00,000/- as liquidated damages which was to be paid by the contractor to it or to be adjusted from the payments due from GAIL to the contractor. The challenge to the award is premised on the contention, that the amount of the compensation has not been taken into consideration while deciding the claims of the claimant. It has further been contended that the award of interest at the rate of 12% is exorbitant, unwarranted and without any basis at all. Mr. Jagjit Singh, learned counsel appearing for GAIL has vehemently urged that the conclusions of the arbitrator on these aspects are contrary to the contract, without jurisdiction and hence opposed to public policy of the country. The submission is that for this reason the award is liable to be set aside under section 34 of the Arbitration & Conciliation Act, 1996.

The objections are opposed by the contractor on merits as well as on grounds of maintainability.

5.13 The objections taken by GAIL can usefully be considered issue-wise for facilitating clarity.

6. *Whether Time was the essence of the contract*

6.1 The arbitrator has concluded that the question as to whether time was the essence of the contract, is essentially a question of the intention of the parties which is to be gathered from the terms of the contract. After analysing the material on record and judicial precedents, the arbitrator concluded that time was not of the essence of the contract in the instant case.

6.2 Before an examination of the factual matrix in the present case, the applicable legal principles on which the facts are to be tested require to be considered.

6.3 The issue as to when time is of the essence of the contract arose for consideration before the Supreme Court in ***(1979) 2 SCC 70 Hind Construction Contractors vs. State of Maharashtra***. The court relied on the enunciation of the law in the Halsbury's Laws of England. The principles relied on by the court and laid down in this judgment deserve to be considered in extenso and read as follows :-

> "7..... In the latest 4th Edn. Of Halsbury's Laws of England in regard to building and engineering contracts the statement of law is to be found in Vol.4, para 1179, which runs thus :
>
> *"1179. Where time is of the essence of the contract.- The expression time is of the essence means that a breach of the condition as to the time for performance will entitle the innocent party to consider the breach as a repudiation of the contract. Exceptionally, the completion of the work by a specified date may be a condition precedent to the contractor's right to claim payment. The parties may expressly provide that time is of the essence of the contract and where there is power to determine the*

contract on a failure to complete by the specified date, the stipulation as to time will be fundamental. Other provisions of the contract may, on the construction of the contract, exclude an inference that the completion of the works by a particular date is fundamental; time is not of the essence where a sum is payable for each week that the work remains incomplete after the date fixed, nor where the parties contemplate a postponement of completion.

Where time has not been made of the essence of the contract or, by reason of waiver, the time fixed has ceased to be applicable, the employer may by notice fix a reasonable time for the completion of the work and dismiss the contractor on a failure to complete by the date so fixed."

8. It will be clear from the aforesaid statement of law that even where the parties have expressly provided that time is the essence of the contract such a stipulation will have to be read alongwith other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental; for instance, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract. The emphasised portion of the aforesiad statement of law is based on Lamprell v. Billericay Union (1849) 3 Exch 283, 308, Webb v. Hughes (1870) LR 10 Eq 281 and Charles Rickards Ltd. v. Oppenheim (1950) 1 KB 616 : (1950) 1 All ER 420 (CA)"

Therefore, a mere stipulation in the contract that time is of the essence of the contract by itself does not make it so. The other contractual terms require to be construed before such conclusion could be reached.

6.4 Pollock & Mulla in their celebrated text "Indian Contract and Specific Relief Acts" have culled out the following three instances as to when time would be the essence of the contract from a reading of the judicial pronouncements on the subject :-

> "(1) Where the parties have expressly stipulated in their contract that the time fixed for performance must be exactly complied with;
> (2) Where the circumstances of the contract or the nature of the subject-matter indicate that the fixed date must be exactly complied with; and
> (3) Where time was not originally of the essence of the contract, but one party has been guilty of undue delay, the other party may give notice requiring contract to be performed within reasonable time and what is reasonable time is dependent on the nature of the transaction and on proper reading of the contract in its entirety."

6.5 In ***M/s Arosan Enterprises Ltd. vs. Union of India & Anr.*** reported at ***(1999) 9 SCC 449,*** the Supreme Court had held that merely because a schedule is contractually prescribed or a provision for liquidated damages is contained in a contract, it does not mean that ipso facto time is necessarily of the essence of the contract. The court held that :-

> "27. Mere fixation of a period of delivery or a time in regard thereto does not by itself make the time as the essence of the contract, but the agreement shall have to be considered in its entirety and on proper appreciation of the intent and purport of the clauses incorporated therein. The state of facts and the relevant terms of the Agreement ought to be noticed in its proper perspective so as to assess the intent of the parties. The Agreement must be read as a whole with corresponding obligations of the parties so as to ascertain the true intent of the parties. In the instant case, the Port of Discharge

> has not been named neither the Surveyor is appointed - without whose certificate, question of any payment would not arise - can it still be said that time was the essence of the contract, in our view the answer cannot but be a positive 'No'.”

Thus, it is well settled that whether time is the essence would be essentially a question of the intention of the parties to be gathered from the terms of the contract. This intention can be inferred also from the responses, actions and state of readiness of the parties in the fulfilment of the contract.

6.6 In a judgment reported at ***AIR 1940 NULL 1 Shambhulal Panalal Vaish vs. Secretary of State***, the court placed reliance on an earlier pronouncement of the Privy Council in ***Burn & Co. vs. Lukhdhirji Morvai State MANU/PR/0025/1925***. The Privy Council had held that inclusion of clauses in a contract providing for extension of time in certain contingencies and providing for payment of fine or penalty for every day or week for the work undertaken on the contract remains unfinished on the expiry of the time provided in the contract is inconsistent with time being of the essence of a contract and would be calculated to render ineffective an express provision in a contract to that effect. In this behalf, in para 13 and 17 of ***Shambhulal Panalal Vaish*** (supra), the court held as follows :-

> “13 ..... In Halsbury's Laws of England, Vol. 3, paras. 378, 379, the law on this question is thus stated:

> “378. In building contracts time is not of the essence of the contract in the absence of express words making it so, as the subject of the contract is not such as to, make the completion of time essential. And the mere insertion of words making time of the essence of the contract will be ineffective if they are inconsistent with other terms of the contract.”
>
> xxx
>
> 17. xxxxx And this certainly accords with commonsense. To say in one breath that time is of the essence of a contract but that the period provided in the contract may be extended is a contradiction in terms; to say that time is of the essence of a contract and at the same time to provide the levy of a daily or weekly fine or penalty for non-completion on due date is no less a contradiction in terms. Confronted with this difficulty the learned Advocate-General has referred us to a passage in Vol. 3 of Halsbury's Laws of England which appears at p. 280 in paragraph 511 which reads thus:
> “511. * * * * In many cases the time fixed by the contract ceases to be applicable on account of some act or default of the employer or his architect. A provision therefore is generally inserted, in order to avoid such acts or defaults destroying the right to liquidated damages, by which the architect is empowered to grant an extension of time in certain specified events, and the contractor is bound, in case such an extension has been properly granted, to complete within the extended time. This has the effect of substituting for the time fixed by the contract a new time from which the liquidated damages are to run. * * * *”
> But such a new time can only be substituted for the original time, under such a power, where the extension is given under the circumstances and in the events expressly stipulated by the contract. Thus, a power to extend the time in: the event only of strikes or other causes beyond the contractor's control would not authorize an extension of time for delay in giving to the contractor possession of the site.....”

6.7 It is settled law that in construction contracts, generally time is not of the essence of the contract unless special features

exist therefore. It was so held in ***(2006) 11 SCC 181 McDermott International Inc. vs. Burn Standard Co. Ltd. & Ors.*** Mere incorporation of the term that time is of essence of the contract would not ipso facto render it so if the same is the matter of construction keeping in view the facts and circumstances which are brought out on record.

6.8 In ***(1977) 2 SCR 877 : MANU/SC/0010/1997 Govind Prasad Chaturvede vs. Hari Dutt Shastri & Anr.***, the Supreme Court held that it is settled law that merely fixation of the period within which the contract has to be performed does not make the stipulation as to time being the essence of the contract. It was further held that the intention to treat time as the essence of the contract may be evidenced by circumstances which are sufficiently strong to displace the normal presumption that in a contract of sale, stipulation as to time is not the essence of the contract.

6.9 The arbitrator has referred to the following terms in the contract in the present case which militate against time being the essence of the contract :-

(i) SCC A 28 stipulating compensation for extended stay;

(ii) General Conditions of Contract ('GCC') – 27 which permitted a levy of liquidated damages for delay;

(iii) GCC 45 allowing extension of time for the owner's default ;

(iv) GCC 60.2 providing for extension by the EIC where just and reasonable;

(v) SCC.B.9.1.3 (a) for payment of the final 10% in case the owner is not able 'to supply water and power immediately after

issue of the partial completion certificate (for completing the whole work in all respects except trial run and commissioning) for testing, trial run and commissioning';

(vi) agreed variation to SCC.B.13.33 that specifies the course of events 'in case GAIL/EIL are not able to release the commissioning front after the completion of pre-commissioning activities/mechanical completion; then contractor would be entitled to payment of the final 5% after eighteen months of mechanical completion.'

6.10 The arbitrator has noted, that GAIL did not deny the fact that the contractor could do nothing on account of the flooding and the unworkable site handed over in July, 1995 which so remained till 15th September, 1995. In the light of the explanations given with regard to the attack on the manager and the demoralisation of the work force; requisitioning of the vehicles of the contractor on account of elections and the non-availability of the site, the arbitrator has arrived at a conclusion, that on the whole, the contractor should not be held to be at fault.

6.11 GAIL has accepted inaccessibility of the site for two months and also a grace period of one month was granted on account of cement shortage and monsoons. The arbitrator was conscious of the legal requirements to arrive at a conclusion and has carefully extracted the relevant passage from Pollock & Mulla's legal text and on a construction of the available record, the arbitrator concluded that time was not the essence of the contract.

6.12 I find that there is no dispute to the factual narration noted by the arbitrator. Even the provisions of the contract stand

accepted. It has been held by the Apex Court in ***Hind Construction*** (supra) that whether time is the essence of the contract would be essentially an issue of the intention of the parties to be gathered from the terms of the contract and that such intention can be inferred, besides from the responses, actions and state of readiness of the parties in the fulfilment of the contract. The facts of the present case show that the actions of the parties seem to militate against time being of the essence of the contract. There were various terms in the contract that envisaged a situation of delay and time extension. "Site" was defined in GCC 1.21 of the bid document as a place on, under, in, or through which permanent works are to be carried out. To begin with a flooded and unworkable site was handed over in July, 1995 that remained so till September, 1995. Therefore, the contractor could have done nothing for two months till 15th September, 1995. There was the inaccessibility of the site for two months and a grace of one month granted on account of cement shortage and monsoon. GAIL has not denied these facts but urges the excuse as invalid. Other factors like the site being located at the lowest grade, the disruption on account of the attack on the manager, the law and order situation causing demoralisation of the work force; the government requisitioning private vehicles during elections have been considered by the arbitrator concluding that the delay could not be solely attributable to the contractor. GAIL

concededly extended the time for performance on more than one occasion. On the last occasion, it merely reserved its right to claim liquidated damages.

6.13 Admittedly the GTR commissioning of the plant which was part of the work order has not been possible even till date on account of GAIL's inability to supply the waste water. The contractor has completed all components of the contracted work which did not require any intervention by GAIL. The only component which could not be completed is the commissioning of the plant and the GTR which is solely for the fault of GAIL.

6.14 Even EIL had proposed final time extension of the contract without levy of liquidated damages. The arbitrator has enlisted that the contract provided for compensation for extended stay; extension of time for the owners (GAIL's) default; extension by the Engineers India Limited where the same was just and reasonable and liquidated damages for delay. The contract provisions noted above show that the 'work' included extra additional works required for the purposes of the contract.

6.15 The parties had agreed to variation in the release of the last 10% of the payment which terms were enclosed with the letter dated 27th September, 1995. This agreed variation envisaged and provided for the situation where GAIL/EIL was not in a position to release commissioning front after completion of pre-commissioning activities/mechanical completion.

In fact the factual narration aforenoticed would show that this is what actually transpired after the plant had been erected by the contractor and manifests that GAIL did not treat time as of essence of the contract.

6.16 Testing and commissioning of the plant was an integral and composite part of the contract. The parties envisaged a delay in this component of the contract and had provided for an agreed variation in the payment terms. The grant of extension on several occasions coupled with the above terms of the contract and the very fact that GAIL was not in a position to provide the requisite effluents for testing and commissioning of the plant, would itself lead to the inevitable conclusion that time was not the essence of the contract.

Keeping all these factors in mind, the inference of law and fact arrived at by the arbitrator to the effect that time was not the essence of the contract is founded on the contract, established factual matrix and the applicable law.

6.17 The conclusion arrived at by the learned arbitrator is a pure question of fact premised on a detailed consideration after marshalling the established facts and consideration of the applicable law. Issues on merits relating to whether time is of the essence of the contract or not falls squarely within the domain and jurisdiction of the arbitrators to decide as is deemed fit. In view of the clearly delineated parameters of the scope of consideration by

this court would, in exercise of jurisdiction under section 34 of the Arbitration Act, have no right or authority to interdict an award on such a factual issue.

6.18 In any case, in the light of the above discussion, there is nothing on record which would enable this court to conclude that the conclusion arrived at by the arbitrator is contrary to the terms of the contract or the law on the subject or opposed to public policy for any reason.

7. *Liquidated Damages*

The arbitrator has examined this issue from the aspect of delay of whether the contractor was solely responsible for the delay and whether GAIL was entitled to liquidated damages as a result. The consequential issue examined was whether GAIL entitled to adjustment of amounts found due and payable by it to the contractor.

7.1 Mr Jagjit Singh, learned counsel for GAIL, has contended that delay per se in the mechanical completion of the plant irrespective of whether any loss or damage has been suffered would entitle GAIL to liquidated damages.

7.2 This submission has been found by the learned arbitrator as being contrary to law. The fundamental principle relied upon by the arbitrator was the fact that loss or damage has to be real. In other words, the persons who are claiming liquidated damages should have actually been put to a loss. A

clause for liquidated damages merely dispenses with the proof of "actual loss or damage". However it does not justify an award of compensation when in consequence of a breach, no legal injury has resulted at all.

7.3 So far as the levy of liquidated damages is concerned, the arbitrator observed as follows :-

(a) the contract was a composite contract which commenced from design, engineering, supply, fabrication to commissioning of performance testing of the waste water treatment plant;

(b) the mechanical completion of the plant was achieved on 20th August, 1997;

(c) the water run of the various sections of the plant was completed on 24th October, 1997 as admitted by GAIL in the certificate dated 10th August, 1998;

(d) as per the terms of the contract, the time required for the GTR was a maximum of one month after the mechanical completion. The guarantee test run is even on date awaiting supply of waste water and effluent the availability of which was the responsibility of GAIL.

Vide letter dated 10th August, 1998, GAIL stated that the plant was mechanically completed to its satisfaction on 20th August, 1997.

By the 24th of October, 1997, water run of various sections was over. GTR was awaiting the supply of inputs.

(e) the plant was being operated since 29th June, 1998 as was admitted by GAIL in the certificate dated 10th August, 1998.

(f) the final bill was submitted by the contractor on 9th January, 1999 and recommended by the EIL on 7th April, 1999. The same was forwarded by EIL to GAIL for payment.

(g) Clause 76 of the GCC provided for the action and compensation in case of bad work. At no point of time, GAIL invoked this clause against the contractor. On the contrary in the letter dated 20th August, 1997 and 7th April, 1999, GAIL confirmed that the work was in order. No complaint in running of the plant since 29th June, 1998 has been pointed out. GAIL has given no notice of any claim or demand to the contractor with regard to any sub-standard work.

(h) By a letter dated 27th January, 1999, GAIL demanded that "your final bill shall be processed from GAIL's side only after the balance jobs and problems are attended to satisfactorily" (award para 17).

7.4 The arbitrator has held that so far as the issue of quantum of compensation is concerned, as per the contract it could be decided only by the designated authority/engineer. It is an admitted position that the Engineer India Limited recommended the payment of the final bill without levy of any liquidated damages.

7.5 The arbitrator has concluded that mere invocation of the GCC 27 would not entitle GAIL to claim liquidated damages and that GAIL had not adduced any proof of loss. The additional reason for concluding that GAIL had not suffered loss was the fact that GAIL had contributed to the delay in the conclusion of the contract. Detailed reference has been made to the fact that despite accepting mechanical completion of the contract on 20th August, 1997, which stood confirmed by the minutes dated 31st March, 1998 and the certificate of 10th August, 1998, GAIL had failed to provide the sufficient sanitary waste and effluents necessary for generation of the biomass and even undertaking of the guarantee test runs. GAIL raised no objection at all with the Engineers India Limited recommending the payment of the final bill to it, till such time as its vigilance office reacted in the matter. This arbitrator concluded that GAIL was not entitled to claim liquidated damages.

7.6 The question which is required to be answered is as to whether a mere stipulation in the contract would ipso facto entitle a party to the stated amount as damages upon breach of contract.

7.7 In this behalf the arbitrator has placed reliance on the Constitution Bench pronouncement of the Supreme Court reported at ***1964 (1) SCR 515 : AIR 1963 SC 1405 Fateh Chand vs. Balkrishan Das*** wherein the court had held as follows :-

"15. xxxx

> Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damages"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good 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."
>
> (Emphasis supplied)

7.8 These principles were reiterated in the three Bench pronouncement of the Apex Court reported at ***AIR 1970 SC 1953 : (1969) 2 SCC 554 Maula Bux vs UOI*** which have also been relied upon by the arbitrator. In para 88 of the SCC report, the court has held that the expression 'whether or not actual damage or loss is proved to have been caused thereby' is intended to cover the class of contracts in which it may be impossible for the Courts to assess compensation arising from breach and the sum named by the parties may be taken as a measure of reasonable compensation. However, whether a loss in terms of money can be determined or not, a party claiming compensation must prove the loss suffered by it.'

7.9 In ***Maula Bux*** (supra), the Supreme Court further held that where loss in terms of money can be determined, the party

claiming the compensation must prove the loss suffered by him.

7.10 In ***(1973) 2 SCC 515 M.L. Devendra Singh vs. Syed Khaja,*** which was affirmed in ***(2004) 6 SCC 649 P.D'Souza vs. Shondrilo Naidu***, the court accepted the same approach and further emphasised that mere stipulation of some amount would only be a piece of evidence, but inconclusive by its very nature.

7.11 The arbitrator has additionally placed reliance on ***AIR 1971 Raj. 229 State of Rajasthan vs. Chander Mohan Chopra*** and ***AIR 1959 Bom. 454 S.R. Bhut vs. V.N. Jamdar*** wherein the above principles have been relied upon.

7.12 Section 73 and 74 of the Contract Act deal with claims of damages. Section 73 provides for unliquidated damages, Section 74 of the Contract Act provides that a party complaining of the breach is entitled, whether or not actual damage or losses are proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation. The statute therefore permits a person effected by the breach of contract not to be required to prove the actual loss or damage suffered by him before he claims a breach, and the court would be competent to award reasonable compensation in case of breach, even if no actual damage is proved to have been suffered in consequence of the breach. In a case where a court is unable to assess the compensation, a sum named by the parties, if it be regarded as a

genuine pre-estimate, may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty.

7.13 It is well settled, that whether the claim is for any damages under section 73 or liquidated damages under section 74 there is no difference in this position. The difference lies with regard to ascertainment of the loss or the quantum of damages awardable. However the basic requirement for both is a finding by a competent court or authority or any named/agreed forum, including an arbitrator, that the person against whom the claim is made has committed breach and has incurred a pecuniary liability.

7.14 The entire submission on behalf of GAIL before this court rests on a basic contention that delay in completion of the contract automatically entitled it to liquidated damages without anything more. The question as to when a claim of such damages crystallises into an entitlement or becomes an actionable or enforceable claim is well settled by a host of judicial precedents.

An argument similar to the submission by GAIL before this court was raised by the Coffee Board who filed a petition seeking winding up of the Greenhills Exports (Pvt.) Ltd. before the company court in the Karnataka High Court on a claim for losses based on a plea of breach of contract by the other side. The matter was carried in appeal to the Division Bench. An issue was

raised in the appeal before the Division Bench as to whether such claim for damages by a party would be covered within the meaning of the expression 'debt' under the Companies Act, 1956 so as to entitle a person to base a petition for winding up thereon. In its judgment reported at ***2001 (106) CompCas 391 Greenhills Exports (Pvt.) Ltd. vs. Coffee Board,*** the court considered the entire law on the subject including the aforenoticed pronouncements of the Supreme Court. On a consideration of several judicial precedents, the court culled out the following propositions of law :-

> "14. We will now cull out the principles for ready reference:
>
> (i) A 'debt' is a sum of money which is now payable or will become payable in future by reason of a present obligation. The existing obligation to pay a sum of money is the sine qua nan of a debt.
>
> "Damages" is money claimed by, or ordered to be paid to, a person as compensation for loss or injury. It merely remains as a claim till adjudication by a Court and becomes a 'debt' when a Court awards it.
>
> (ii) In regard to a claim for damages (whether liquidated or unliquidated), there is no 'existing obligation' to pay any amount. No pecuniary liability in regard to a claim for damages, arises till a Court adjudicates upon the claim for damages and holds that the defendant has committed breach and has incurred a liability to compensate the plaintiff for the loss and then assesses the quantum of such liability. An alleged default or breach gives rise only to a right to sue for damages and not to claim any 'debt'. A claim for damages becomes a 'debt due', not when the loss is quantified by the party complaining of breach, but when a competent Court holds on enquiry, that the person against whom the claim for damages is made, has committed breach and incurred a pecuniary liability towards the party complaining of breach and assesses the quantum of loss and awards damages. Damages are

payable on account of a fiat of the Court and not on account of quantification by the person alleging breach.

(iii) When the contract does not stipulate the quantum of damages, the Court will assess and award compensation in accordance with the principles laid down in Section 73. Where the contract stipulates the quantum of damages or amounts to be recovered as damages, then the party complaining of breach can recover reasonable compensation, the stipulated amount being merely the outside limit.

(iv) When a contract provides that on default by a buyer to pay for and take delivery of goods, the seller is entitled to recover the loss incurred on resale, interest on delayed recovery of the price, godown charges, insurance charges and other expenses incurred by the seller till resale, it cannot be said the buyer incurs the liability to pay those amounts automatically, when he fails to take delivery. Failure to take delivery may be due to several valid or lawful reasons which may show that the failure to take delivery is not a 'default' or 'breach' in which event, no pecuniary liability may fasten on him.

(v) Even if the loss is ascertainable and the amount claimed as damages has been calculated and ascertained in the manner stipulated in the contract, by the party claiming damages, that will not convert a claim for damages into a claim for an ascertained sum due. Liability to pay damages arises only when a party is found to have committed breach. Ascertainment of the amount awardable as damages is only consequential."

(Emphasis supplied)

7.15 On an application of these principles, the Division Bench of the Karnataka High Court had found that there was no adjudication of either a civil court or by any arbitrator that the appellant company had committed breach and incurred a pecuniary liability.

7.16 This very issue also fell for consideration before the Bombay High Court. In a decision rendered on **20th November, 2009** in **C.P. No. 367/2009** entitled **E-City Media Pvt. Ltd. vs. Sadhrta Retail Ltd.**, on the issue as to whether a mere stipulation of the payment of a sum by way of liquidated damages in a clause in the contract would constitute a firm debt, the court laid down the principles thus :-

> "11. If the clause in the present case is regarded as being a clause which stipulates the payment of a named sum by way of liquidated damages a debt will become crystallized only upon an adjudication of damages in a suit. Prior to an adjudication, it still constitutes a claim for damages. The decree of the Court is what transforms the claim into a stated sum due and payable by way of damages. Whether the amount is reasonable or by way of a penalty are evidential matters which cannot be decided in a petition for winding up. For, as the judgment in Saw Pipes holds, even if the sum stipulated by way of liquidated damages is clear, the jurisdiction of the Civil Court extends to determining whether it is unreasonable or by way of penalty. All these issues have to be decided in a suit. Whether or not evidential proof will be required to sustain such a claim is again a matter for the trial Court or, as the case may be, an arbitral forum to decide. The Petition for winding up would manifestly not be maintainable. Until an adjudication results in duly constituted proceedings, it cannot be held that there is a debt due and payable."

7.17 A claim for damages and compensation requires adjudication by an authority which the parties may name or by a court. Adjudication upon such a claim for compensation or

damages rests on a finding that the other side has committed a breach and has incurred a liability to compensate for the loss. It also requires an assessment of the quantum of such a liability. Till such determination or adjudication, an alleged default or breach only gives rise to a right to sue or claim damages. Quantification of the loss by a party complaining of the breach of a contract is merely in the realm of a claim. Such claim would become payable only on account of a fiat of the court or a named authority (as EIL in the present case) holding an enquiry that the person against whom the claim for damages is made, has committed breach and incurred a pecuniary liability towards the party complaining of a breach; assessing the quantum of loss and awarding damages.

7.18 The legal position is that a claim for damages becomes an ascertained sum due as damages only when calculated by the aggrieved party, in the manner provided in the contract.

The clear enunciation of law on this aspect is to be found in the statement of the applicable principles by ***Chagla, C.J. in Iron & Hardware India Co. vs. Firm Shamlal & Bros AIR 1954 Bom 423*** wherein a distinction between the expression 'debt' and 'damages' was explained thus :-

> "6. xxx
>
> Now, in order that there should be a debt there must be an existing obligation. The payment may be due immediately or it may be

due in future, but the obligation must arise in order that the debt should be due. It may even be that the actual payment due in respect of the debt may require ascertainment by some mechanical process or by the taking of accounts. But even when the actual amount is to be ascertained the obligation must exist. It is well-settled that when there is a breach of contract the only right that accrues to the person who complains of the breach is the right to file a suit for recovering damages. The breach of contract does not give rise to any debt and therefore it has been held that a right to recover damages is not assignable because it is not a chose in action. An actionable claim can be assigned, but in order that there should be an actionable claim there must be a debt in the sense of an existing obligation. But inasmuch as a breach of contract does not result in any existing obligation on the part of the person who commits the breach, the right to recover damages is not an actionable claim and cannot be assigned.

7. Now, this principle has been accepted by the learned Judge below, but the reason why he has taken a different view is that the definition of "debt" given in this Act is an artificial definition and is not the definition which has been accepted for the purpose of the Transfer of Property Act, and what is emphasised is that debt is not merely a liability which is ascertained, but it is also a liability which is to be ascertained, and therefore the view is taken that unliquidated damages would constitute a debt within the meaning of this Act. In my opinion, with respect to the learned Judge, greater emphasis should be placed on the expression "any pecuniary liability" rather than on the expression "whether ascertained or to be ascertained". Before it could be said of a claim that it is a debt, the Court must be satisfied that there is a pecuniary liability upon the person against whom the claim is made, and the question is whether in law a person

who commits a breach of contract becomes pecuniary liable to the other party to the contract. In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party.

As already stated, the only right which he has is the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But, till that determination there is no liability at all upon the defendant.

The expression "to be ascertained" may well apply to a case which I have indicated earlier where the pecuniary liability cannot be ascertained without accounts being taken or some other process being gone through. But the whole basis of suit for damages is that at the date of the suit there is no pecuniary liability upon the defendant and the plaintiff has come to Court in order to establish a pecuniary liability".

(Underlining supplied)

7.19 In this regard, reference can also be made to the pronouncement of the Apex Court reported at ***AIR 1962 SC 1314 Sir Chunilal V. Mehta and Sons Ltd. vs. The Century Spinning and Manufacturing Co. Ltd.*** wherein the court laid down the principles thus :-

> "16. xxx
> When parties name a sum of money to be paid as liquidated damages they must be deemed to exclude the right to claim an unascertained sum of money as damages. ..... Again, the right to claim liquidated damages is enforceable under Section 74 of the Contract Act and where such a right is found to exist no question of ascertaining damages really arises. Where the parties have deliberately specified the amount of liquidated damages there can be no presumption that they, at the same time, intended to allow the party who has suffered by the breach to give a go by to the sum specified and claim instead a sum of money which was not ascertained or ascertainable at the date of the breach".

7.20 In ***AIR 1974 SC 1265 Union of India vs. Raman Iron Foundry***, the Apex Court reiterated the above principles thus :-

> "9. xxxx
> It therefore makes no difference in the present case that the claim of the appellant is for liquidated damages. It stands on the same footing as a claim for unliquidated damages. Now the law is well-settled that a claim for unliquidated damages does not 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. When there is a breach of contract, the party who commits the breach does not eo instant incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved

by the breach of the contract has is the right to sue for damages".

(Emphasis supplied)

7.21 Reliance has been placed by Mr. Jagjit Singh, Advocate for GAIL on the pronouncement of the Apex Court in ***ONGC vs. Saw Pipes JT (2003) 4 SC 171***. This pronouncement of the Supreme Court reiterates the well settled position that where the terms of a contract make an unambiguous implication for payment of liquidated damages, in the event of a breach, a party guilty of the same is required to pay compensation named in the contract unless it is held that the estimate of damages is unreasonable or by way of penalty. The legal position was laid down by the court in para 68 in the following terms :-

"68. From the aforesaid discussions, it can be held that:

(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages / compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable

> compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.
>
> (4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the Court can award the same if it is genuine preestimate by the parties as the measure of reasonable compensation.

7.22 It is noteworthy that this case related to a contract for supply of pipes by M/s Saw Pipes unlike the present case which relates to an engineering and construction project. The matter went to arbitration. The arbitrator had concluded that time was the essence of the contract and that delay was attributable to M/s Saw Pipes. However for the reason that no reasonable loss was proved, the arbitrator had rejected the claim of liquidated damages. In para 67, the Supreme Court returned a finding that ONGC had suffered a loss on account of shortage of casing pipes due to breach of contract but it was difficult to prove the exact loss and hence the parties had pre-estimated the loss.

7.23 In ***ONGC vs. Sawpipes*** (supra), the Supreme Court held that if parties when they make a contract, know that a particular loss is likely to result from a breach, it is open to them to agree upon the payment of a named sum as compensation in the event of breach. In such a case, it may not be necessary to lead

evidence to prove damages unless the court arrives at a conclusion that no loss is likely to occur by the breach. Where the court comes to the conclusion that a term contemplating damages is by way of a penalty, it would be open to the court to grant reasonable compensation not exceeding the amount named in the contract on proof of damages.

In the Saw Pipes case, the proceedings before the Supreme Court arose from an arbitral award which had been challenged before the High Court under section 34 of the Arbitration & Conciliation Act. Unlike the present case, the issue before the Supreme Court thus was a challenge to the adjudication on the question of damages.

7.24 It is apparent that a claim on account of damages for the breach of contract by its very nature first requires adjudication on the issue as to whether there is a breach or not.

7.25 An examination of clause 27 of the contract shows the award of liquidated damages thereunder requires : (i) that time is to be the essence of the contract; (ii) that the contractor has failed to complete the work within the stipulated period and such delay is not on account of force majeure or due to owner's defaults; (iii) the contractor was required to compensate the owner for the delay and not as a penalty (iv) the compensation for the same would be equivalent to half per cent of the value of the

contract for delay per week on pro rata or part thereof subject to a maximum of 10% (v) such amount was considered a genuine pre-estimate of the loss/damage which would be suffered on account of the delay/breach (vi) the amount would be payable on demand without any proof of the actual loss or damages caused by such delay/breach (vii) the decision of the Engineers India Limited/engineer in charge in this regard is final and binding on the parties.

7.26 There is no doubt that EIL was the agreed forum under clause 27 to determine whether there was a breach by the contractor entitling GAIL to liquidated damages. This final authority for imposition of liquidated damages has failed to attribute any unwarranted delay to the contractor or to find GAIL entitled to any amount as liquidated damages.

GAIL could assert a right so far as its claim of liquidated damages is concerned only if the same stood assessed and quantified by EIL. As per clause 27 of the GCC, the decision of EIL on this was final and binding. Even under the contract between the parties, GAIL had no unilateral right to determine, assess and quantify the liquidated damages and appropriate any amount which it deemed fit against the sums payable to the contractor.

GAIL thus had no right to any amount towards liquidated damages till there was a decision by EIL on the issue

affirming the same and therefore no right to appropriate or adjust any amount from those found due and payable by it to the contractor.

7.27 I find that there was no decision by EIL holding that the contractor had delayed the project; of the period by which the project was delayed. More importantly EIL was not of the opinion that GAIL had suffered any loss or damage on account of any of the delays. The plea of delay or breach of contract on the part of the contractor has been rejected by the arbitrator. In addition thereto, it has been found that no loss had been occasioned by the owner.

7.28 From the aforenoticed narration, the contract provided various stages of the setting up of the plant. It is also evident that the contract was required to be completed as one whole. Under clause 1 of the GCC, "work" is defined to mean and includes all items and things to be supplied/done and activities to be performed by the contractor. As per clause 25.2 which sets out the time schedule of construction, the period of construction includes the time required for "mobilisation testing rectifications, if any, retesting and completion in all respects".

7.29 It is undisputed that availability of the liquid waste for treatment in the plant was essential for its testing and running and that GAIL was not in a position to provide the same even when the present objections are being heard.

7.30 The contention on behalf of GAIL that the contractor had delayed the mechanical completion of the project by 233 days has to be examined against the above facts. The contractor disputes responsibility for the delay. Even if GAIL's contention was to be accepted, the same has to be tested against the inability of GAIL to provide the requisite inputs for the GTR for a period of more than eighteen months after the certification of the mechanical completion of the plant, in fact for almost ten years thereafter when hearing in the present objections commenced.

7.31 The contract envisages the GTR to be completed within one month of the mechanical completion. GAIL was contractually enabled to withhold payment of the last 10% of the contract value. In case GAIL/EIL were not in a position to release commissioning front after completion of pre-commissioning activities/mechanical completion as noticed above, in terms of the variation effected by the letter dated 27th September, 1995, 5% of the contract value was agreed to be released upon issuance of the mechanical completion certification and the extension of the performance bank guarantee of 10% of the contract value was required to be kept valid till twenty one months from the date of the mechanical completion certificate. The balance 5% was also agreed to be released after eighteen months of issue of the mechanical completion certificate or after the commissioning and the acceptance of the system, whichever is earlier.

7.32 Thus, the payment terms noticed above clearly envisaged commissioning of the plant as an essential part of the contract. They also recognise the possible inability of the owner to facilitate the commissioning when it stipulates that the last 5% of the contract value which GAIL was retaining would in any case be released after eighteen months of issue of the mechanical completion.

7.33 It needs no elaboration that completion of a contract has to be as a whole. Mere erection of a plant without its commissioning or testing as per the terms agreed between the parties would not result in the completion of the work as noticed above. GAIL recognised this fact when it wrote the letters dated 21st November, 1998 as well as 3rd December, 1998.

7.34 Clause 27 does not stipulate levy of liquidated damages for delay in completing any particular stage of the contract.

Therefore, the delay which is to be considered is to be construed in completion of the contract as a whole. The result of the acceptance of the delay is the claim of damages. Such damages would be occasioned and assessed only if the contract as a whole stood completed. In the instant case, it is an admitted position that the GTR has not been possible on account of the inability of GAIL.

7.35 The arbitrator has arrived at a factual finding in para 16

of the award that the facts brought on record showed that even the main plants, wherefrom GAIL was to provide the liquid effluent for treatment, were not ready when the waste water treatment plant was mechanically completed.

The arbitrator has also concluded that there is no justification at all for the engineer in charge to levy compensation. The factual finding of the arbitrator is based on a correct reading of the contractual terms and careful evaluation of the material placed before him.

7.36 From the above narration of facts, it is also evident that for the first time, a plea of entitlement to liquidated damages was set up by GAIL when it filed its reply dated 21st June, 2002 filed before the arbitrator. It is noteworthy that in this reply, as noted above, GAIL had also admitted that the mechanical completion certificate stood given on 20th August, 1997. An effort was made now to attribute lapses in design and construction; use of sub-standard material and bad work to the contractor. Other than a bald claim based on a plea that there was “great delay” on the part of the contractor in execution of the work, a blanket claim of 10% of the value of the contract towards liquidated damages was made. On these contentions, GAIL claimed an amount of Rs.1,23,23,939.69 as liquidated damages. Pertinently these kind of issues appear to have been raised on account of intervention of some proceedings of the vigilance authorities into the matters.

It is noteworthy that a complaint made, after the issuance of the satisfactory mechanical completion certificate; its reiteration on 10th August, 1998 and commissioning of individual components, would be of little consequence and would support the contractors contention that the same were baseless after thoughts.

7.37 There was no dispute before the arbitrator that GAIL was not in a position to provide the necessary sanitary waste and effluent for conducting the Guarantee Test Run ('GTR') and commissioning of the plant despite expiry of more than 18 months of the mechanical completion of the plant effected on 20th August, 1997. So far as the factual position is concerned, it is an admitted position, that the requisite sanitary waste for the testing has not been provided even till date.

7.38 Even if it were to be held that there was a default by the contractor, no evidence at all was placed before the arbitrator or pointed out before this court that any loss was suffered by GAIL. Nothing has been pointed out which could even remotely suggest that any loss at all has been occasioned by GAIL.

7.39 Clause 27 provides a range of liquidated damages commencing from half per cent of the contract value to a maximum of 10% of the contract value. The damages are to be calculated based on a computation of the period for which the

contract has been delayed.

7.40 The entitlement to liquidated damages is premised solely on the requests made from time to time by the contractor for extension of time and the contractual provisions by way of clause 27 which the parties had agreed to. The parties had agreed that within the prescripted range, EIL would decide the period of delay, period for which the liquidated damages would be payable. The outer limit of the extent of pecuniary liability to compensate GAIL for losses, if any, from the contractor's delay was stipulated. EIL did not recommend so. GAIL cannot therefore rely upon the presumptive condition and claim the maximum compensation leviable under clause 27. No material at all has been placed as to why and how GAIL is entitled to the maximum limit of the compensation.

7.41 Even if it were to be held that such extensions could be construed as a breach of the contract by the contractor, I am unable to find any legal principle at all on which compensation equivalent to the maximum of the stipulation in clause 27 could be awarded to GAIL on the sole ground that this clause permitted levy of liquidated damages.

7.42 This objection requires to be tested from yet another angle.

7.43 There is yet another aspect to this matter. Even assuming that the contractors pecuniary liability towards

liquidated damages under clause 27 stood quantified, GAIL has not initiated any legal proceedings to press any claim against the contractor.

Arbitration was not the option available to GAIL to recover the amount towards liquidated damages.

The agreed agency i.e. the EIL had failed to award liquidated damages to the objector. The only option available to the objector was to raise a claim and seek adjudication thereof by way of a suit.

Such suit would be required to be filed within the stipulated period of limitation. As per the Limitation Act, a suit for recovery of damages has to be brought about within three years of the breach of contract. GAIL premises its claim on delay in mechanical completion which it certified as having been completed in 1997.

7.44 My attention has been drawn to the letter dated 30th of March, 2002 written by GAIL to the EIL. It refers to EIL's letter four years prior, dated 9th of May, 1998 recommending final time extension of the contract upto 20th of February, 1999 without levy of liquidated damages and without financial implication on either side. GAIL wrote that the matter had been reviewed and it has been noticed that EIL has erred in so recommending for the following reason :

> "As per the contract schedule bar chart, the Waste Water Treatment Plant was to be mechanically

completed or ready for commissioning by 30.11.1995. However, the actual mechanical completion date as per the mechanical completion certificate issued by EIL is 20/08/1997. Thus, there was a delay of 253 days in mechanical completion of the plant. Out of 263 days of delay, 30 days delay is attributed to GAIL and a delay of 233 days is attributed to the contractor as per above referred letter of EIL.

Since the contractor had failed in meeting the mechanical completion schedule as per contract, EIL should not have forwarded recommendation for the final time extension without levy of LD.

The issue of delay of inputs from GAIL's side for commissioning of the plant should not have been linked up by EIL as contract does have provisions in case owner's inputs are delayed with regard to testing, trial run, commissioning and final acceptance of the plant. EIL should have considered this aspect while forwarding their recommendation.

The above has been viewed seriously and you are advised to avoid such lapses in your recommendations in future.

You are also advised to levy Liquidated Damages for the delay of 233 days in mechanical completion by M/s Paramount Pollution Control Ltd."

7.45 The letter dated 9th of May, 1998 written by EIL referred to in the above communication has not been produced by GAIL on record either before the arbitrator or before this court. Vehement objection in this behalf was raised by Ms. Arora, learned counsel for the contractor.

7.46 The above communication also shows that GAIL was even on 30th March, 2002, only seeking levy of liquidated damage by EIL and that there was no quantified or determined levy by any agreed authority.

7.47 Assuming that GAIL was entitled to its propounded claim of liquidated damages, GAIL did not raise the issue of

liquidated damages till 30th March, 2002 when arbitration was in progress which was more than 5 years after the mechanical completion; more than three years after the submission of the final bill; and four years after Engineers India Limited's recommendation on the 9th of May, 1998 for payment of the said bill to the contractor. The claim has been made long after the arbitrator entered upon the reference apparently on account of some vigilance issues. It is important to note, that GAIL was aware that the approved final bill was in its hands and the contractor was raising a claim before it. It has not addressed a single communication till the plea set up in 2002 before the arbitrator, that it was entitled to adjustment of the amounts claimed by the contractor against GAIL's entitlement to liquidated damages.

7.48 There can be no manner of doubt that the period of three years was also over long before the letter dated 30th March, 2002 was written or the reply dated 21st June, 2002 filed before the arbitrator. The instant case shows that other than reserving a right to claim liquidated damages, the objector has till date failed to seek adjudication or recovery in this behalf.

Therefore, so far as the claim of liquidated damages is concerned, even if GAIL was to be held entitled thereto, its remedy for adjudication and recovery thereof stands extinguished.

7.49 No ground at all for setting aside the findings returned by the learned arbitrator, so far as the plea of adjustment of amounts found due from GAIL to the contractor, are made out.

7.50 Though, it has not been argued before me but a question does arise as to whether such an enforcement of clause 27 would amount to effectuating a penalty clause.

7.51 The finding by the arbitrator that no loss was suffered by GAIL is based on a correct appreciation of the law, admitted facts and careful conclusions derived therefrom. The challenge thereto is clearly not premised on any legally tenable grounds and is hereby rejected.

8. *Issue of liquidated damages was an excepted matter and therefore beyond the arbitrator's jurisdiction*

8.1 An objection has been raised by Mr. Jagjit Singh, learned counsel on behalf of GAIL that in view of clause 27, the issue of liquidated damages was an excepted matter and could not have been gone into by the arbitrator.

8.2 Learned counsel for GAIL has placed reliance on the pronouncements of the Apex Court reported at ***2008 (12) SCALE 720 Bharat Sanchar Nigam Ltd. & Anr. vs. Motorola India Pvt. Ltd.*** and of this court reported at ***158 (2009) DLT 265 ONGC vs. Mittra Guha Builder (India) Co.; 1999 (2) SCC 166 Bharat Bhushan Bansal vs. U.P. Small Industries Corporation Ltd. Kanpur; 158(2009) DLT 409 Centre for***

Development of Telematics (C-DOT) vs. Ansal Properties and Infrastructure Ltd.(APIL) in support of the contention that the arbitrator had no jurisdiction over an excepted matter.

8.3 Ms. Meenakshi Arora, learned counsel for the contractor on the other hand has submitted that so far as Clause 27 of the contract in hand is concerned, it is only the question of quantification of damages resulting therefrom which is excepted from the purview of arbitration. It is urged that the primary questions which arise and have to be decided prior thereto as to whether there was delay or breach of contract by the contractor or whether loss was occasioned by GAIL were not excepted matters and were within the jurisdiction of the arbitrator. Learned counsel has placed reliance on the pronouncements in ***(1989) 1 SCC 657 Vishwanath Sood vs Union of India*** (followed in ***(1999) 4 SCC 491 Food Corporation of India vs. Sreekanth Transport ; 2004 (2) Raj 63 (Del) Wee Aar Construction Builder vs. Delhi Jal Board ; 2002 (3) Raj 292 (Del.) Airport Authority of India vs. S.N. Malhotra*** and ***2001 (supl.) Arb.L.R. (Delhi) 375 (DB) Bhagat Construction Co. vs. DDA)*** in support of this contention.

8.4 In this regard, reference can also usefully be made to the observations of the Supreme Court in ***(1989) 1 SCC 657 Vishwanath Sood vs Union of India*** relied upon by the learned counsel for the contractor, wherein the court had occasion to

consider a similar clause in a contract whereby the parties had left the decision of determination of the amount of compensation for the delay in the execution of work to the superintending engineer, whose decision was to be final. A similar issue with regard to non-arbitrability of the compensation was raised in this case. In para 10 of the pronouncement, the Apex Court held as follows :-

> "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% 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."

8.5 So far as the agreement between the parties providing for a clause setting out the manner and authority by whom compensation for delay in execution of the contract by the contractor is to be assessed is concerned, in the pronouncement of the Supreme Court in ***Food Corporation of India vs. Sreekanth Transport (1999) 4 SCC 491*** and this court in ***2004 (2) Raj 63***

(Del) Wee Aar Construction Builder vs. Delhi Jal Board (supra), it was held that such an agreement would bind the parties and compensation under the contract cannot be the subject matter of arbitration. This is for the reason that the parties have agreed that no further adjudication on the compensation is required as the agreement has provided the named adjudicator whose decision is required to be final. The pronouncement of the court in ***2001 (Supp.)Arb.L.R. 375 (Delhi (DB) Bhagat Construction Co. vs. DDA*** is also to the same effect. It has been held that an issue expressly excluded from the purview of the arbitration clause is beyond the jurisdiction of the arbitrator.

There can be no dispute on these well settled principles.

8.6 Mr. Jagjit Singh, learned counsel has placed reliance on the pronouncement of the Apex Court reported at ***1999 (2) SCC 166 Bharat Bhushan Bansal vs. U.P. Small Industries Corporation Ltd. Kanpur.*** In this case also the Supreme Court has only held that the clause in the agreement laid down that the decision of the executive engineer was to be final, conclusive and binding on the parties and questions relating to specification, design and on questions of quality of workmanship etc. and the decision of the managing director would be final in relation to any claim. The issue which arose before the court was as to whether such a clause amounted to an arbitration agreement. No such

issue arises before this court.

8.7 So far as the Division Bench decision reported at ***158 (2009) DLT 265 ONGC vs. Mittra Guha Builder (India) Co.*** is concerned, it was held by the court that the validity of levy of liquidated damages and the decision of the Superintending Engineer in accordance with clause 2 of the agreement in question, was not arbitrable in arbitration as parties has agreed to treat the same as final. However in para 13 of the decision of the Division Bench, placing reliance on the aforenoticed decision of the Apex Court in ***Bharat Bhushan Bansal*** (supra), the Division Bench of this court held that even if such decision was not arbitrable, the determination by the Superintending Engineer was not a judicial or quasi judicial adjudication and that the same would be open to challenge in a civil suit. Thus, if liquidated damages are levied by the SE, his decision could be challenged in an appropriate civil proceedings but not in arbitration proceedings.

8.8 A further question had arisen in this case as to whether the arbitrator could determine whether there was delay in levy of the liquidated damages or not by the Superintending Engineer. It was held that this question was also an excepted matter and that the arbitrator had no jurisdiction to rule on aspects of legality or justification for the levy of liquidated damages.

8.9 The issue before the Apex Court in ***1999 (2) SCC 166 Bharat Bhushan Bansal vs. U.P. Small Industries Corporation Ltd. Kanpur*** and ***158(2009) DLT 409 Centre for Development of Tally Matics (C-DOT) vs. Ansal Properties and Infrastructure Ltd.*** was the same.

8.10 It is noteworthy that in each of these pronouncements, a substantive claim had been made by one party claiming entitlement to certain amounts which were found to be covered under matters which had been excepted out of the purview of arbitration. In none of the cases a counter claim for adjustment of an amount of liquidated damages to which a defendant claimed entitlement was set up against the claimants. For this reason, the principles laid down in these pronouncements are neither attracted nor applicable to the instant case.

8.11 Even if the submission of Mr. Singh, on behalf of GAIL that the issue of liquidated damages was an excepted matter and the arbitrator could not have gone into the issue of delay and losses is accepted, it would follow that the arbitrator would be required to stop after examination of the claims of the contractor. Having ascertained the amounts due to it, the arbitrator would be required to pass an award in terms of such determination.

Only the findings of the arbitrator to the effect that GAIL was not entitled to adjustment of the amount due against

GAIL's claim of liquidated damages would be required to be quashed. For this reason as well, the objection is misconceived.

8.12 In the present case, it deserves to be borne in mind that there is no levy of liquidated damages by the authority which was authorised under clause 27 of the contract to do so. The consideration by the arbitrator therefore does not relate to examination of legality or justification of a levy of liquidated damages. The cases cited by learned counsel for the petitioner therefore have no application to the instant case.

8.13 In ***57 (1995) DLT 474 DDA vs. M/s Sudhir Bros.*** also relied upon by learned counsel for GAIL, an entitlement to recovery of Rs.5,69,473/- was laid by the DDA before the arbitrator. Even the contractor called upon the arbitrator to give a finding on the merits of the claim. However for the reason that the same was an excepted matter, the award of the arbitrator to the extent that it examined the validity of the levy of compensation by the Superintending Engineer was taken out from the award.

It is noteworthy that in ***Sudhir Bros.***(supra) as well, the court had clearly held that DDA could recover the amount of Rs.5,69,473/- in "whatever manner it is open to it and in case any such proceedings are taken, it will be open to the contractor to raise all differences that may be open to him in law to contend that the levy is bad. In case the DDA seeks to recover the said amount of compensation from the contractor, it will be open to the

contractor to file a suit and raise all such contentions as he may deem fit." In view of the conduct of the parties in calling upon the arbitrator to go into this issue, the court directed that the question of limitation would not be raised by either of the parties.

From the above pronouncement as well, it is apparent that it is the levy of compensation by the final authority agreed by both parties in the contract which is not justiciable by the arbitrator and excepted out of the purview of the arbitration agreement alone.

8.14 Perusal of the pronouncement in ***2008 (12) SCALE 270 Bharat Sanchar Nigam Ltd. & Anr. vs. Motorola India Pvt. Ltd.*** would show that an issue was raised therein as to whether the levy of damages under clause 16.2 of the tender document is an excepted matter in terms of clause 20.1 containing the arbitration clause. The Supreme Court held that the decision with regard to only the quantification of the liquidated damages was excepted from arbitration which was contemplated under clause 16.2. The relevant portion of the decision of the court may usefully be adverted to in extenso and reads as follows :-

> "10. .....Quantification of liquidated damages may be an excepted matter as argued by the appellant, under Clause 16.2, but for the levy of liquidated damages, there has to be a delay in the first place. In the present case, there is a clear dispute as to the fact that whether there was any delay on the part of the respondent. For this reason,

it cannot be accepted that the appointment of the arbitrator by the High Court was unwarranted in this case. **Even if the quantification was excepted as argued by the appellant under Clause 16.2, this will only have effect when the dispute as to the delay is ascertained**.

Clause 16.2 cannot be treated as an excepted matter because of the fact that it does not provide for any adjudicatory process for decision on a question, dispute or difference, which is the condition precedent to lead to the stage of quantification of damages.

The above stated position can be ascertained through the judgment of this Court in the case of ***State of Karnataka v. Shree Rameshwara Rice Mills*** (1987) 2 SCC 160. This Court in the said case, made a clear distinction between adjudicating upon an issue relating to a breach of condition of contract and the right to assess damages arising from a breach of condition. It was held that the right conferred to assess damages arising from a breach of condition does not include a right to adjudicate upon a dispute relating to the very breach of conditions and that the **power to assess damages is a subsidiary and consequential power and not the primary power**.

11. Clause 20.1 regarding excepted matters reads "In the event of any question, dispute or difference arising under this agreement or in connection there-with *(except as to the matters, the decision to which is specifically provided under this agreement)*...". Therefore it is clear from this provision, matters which will not fall within the arbitration clause are questions, disputes or differences, the decision to which is specifically provided under the agreement. Clause 16.2 is not a clause where in any decision making power is specifically provided for with regard to any question, dispute or difference between the parties relating to the existence of breach or the very lack of liability for damages, i.e. the levy of Liquidated Damages.

12. The learned senior counsel for the appellant relied on the decisions of this Court in ***Vishwanath Sood v. UOI*** MANU/SC/0646/1989 :

> [1989]1SCR288, and ***General Manager, Northern Railway v. Sarvesh Chopra*** MANU/SC/0145/2002 : [2002]2SCR156 . These cases, we are afraid, will not be of any help to the appellants being distinguishable on facts and having different contractual clauses. We may note that Clause 16.2 cannot be treated as an excepted matter. This is because admittedly, 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 nor is it a no claim or no liability clause.
>
> In ***Vishwanath Sood's*** case (supra), it was held by this Court that a particular claim of the government was excluded because the Superintendent Engineer acted as the revisional authority to decide disputes between the two parties by an adjudicatory process, there being a complete machinery for settlement of the disputes in the relevant clause and most importantly, the Superintendent Engineer had the discretion on consideration of the facts and circumstances including mitigating facts, held no damages was payable. Again in the case of ***Sarvesh Chopra,*** this Court had held that the claims covered by the no claims clause, i.e., where the contractor had given up the right to make a claim for breach on the part of the government was not arbitrable in terms of the arbitration clause contained therein and Clause 63 of the general conditions of the contract which provided for exclusion because no claim clause was excepted as such claims were simply not entertainable. In view of the discussions made hereinabove, we hold that the disputes raised by the respondents are arbitrable and not excepted from scope of arbitration."

The Court agreed with the finding of the lower court on the question as to whether the respondent had at all acted in breach of any terms and conditions of the tender document, it was held that the decision regarding the fixing of the liability of the supplier was not outside the ambit and purview of the arbitrator.

8.15 The instant case raises similar questions. A dispute has been raised as to whether time is of essence of the contract and as to whether the contractor was liable for breach at all.

8.16 The above facts also show that in order to adjudicate on the plea raised by the contractor, the learned arbitrator had to arrive at a finding as to whether the contractor had completed its part of the contract entitling it to the payment of the final 5% (as per the agreed variation). Adjudication upon the issue as to whether time was of essence of the contract and whether the contractor was in breach of the terms was inherent in adjudication of the claims raised by the contractor.

So far as the counter claim by way of adjustment is concerned, the same postulates a pre-determined amount owed by the claimant which was to be adjusted. No such amount was claimed by GAIL nor was it determined in GAIL's favour by EIL, the stipulated authority.

8.17 Section 74 of the Contract Act declares the law as to the liability upon breach of contract where compensation is pre-determined by an agreement of the parties. A party to a contract who is in default of the terms thereof may itself lay a claim of some kind against the other party. In such circumstance, the other party claiming compensation by virtue of section 74 of the

Contract Act, may very well be a defendant. Law envisages counter claims by the defendant/respondent which may include a plea of payment or adjustment against amounts which may be found due and payable by the defendant to the plaintiff.

8.18 So far as adjustment is concerned, though the same has not been explained in any statutory provision, however it been a subject matter of several judicial precedents. In ***1978 RLR 289 Shakuntala Devi vs. N.D. Khullar***, it was held that the essence of a claim for adjustment by a defendant, like a plea of payment, tantamounts to a finding that the plaintiff's claim has already been discharged by the defendant or satisfied by it to the extent of the claim and so no longer subsists.

8.19 Further light is thrown on the effect of such a plea in ***MANU/MP/0052/1964 : AIR 1964 MP 231 State of Madhya Pradesh v. Raja Balbadhra Singh***. It was pointed out in this case that when two persons have certain accounts and monies are payable by each to the other, they are both entitled to mutual adjustments of the monies provided they are really due and recoverable.

8.20 The judicial pronouncements have made it clear that a claim of adjustment cannot be treated as a counter claim or as a claim for set off. A plea of adjustment is really akin to a plea of payment. The pronouncement in ***State of M.P. vs. Raja***

Balbadhra (supra) points out that 'payment' is made to the creditor while the 'adjustment' is made by the debtor himself.

Thus, if a claim for recovery of money is set up by a party which is in breach or default of a contract, the other side is not precluded from making a prayer to adjust an amount which it claims as compensation against amounts to which the defaulting party is found entitled to. However the same presupposes the determination of the amount.

8.21 As noted above, there was no quantification of the amount in the instant case. There would therefore be no question of adjustment of any such against the amount awarded to the contractor.

8.22 The plea of GAIL for adjustment of the amounts found due against compensation that it was entitled to, could follow only if the arbitrator adjudicated and concluded that time was of the essence of the contract and also held that the contractor was in breach thereof. In view of the agreement between the parties contained in clause 27, it is only after arriving at such a conclusion that EIL would quantify the damages. It is evident that it is only the issue of quantification of the damages which was the excepted matter.

8.23 The above legal position would show that the parties had agreed to the decision of the engineer in-charge

only on the question of fixation of compensation as liquidated damages in terms of clause 27 being final. Adjudication on the issue as to whether time is of the essence of the contract and the fault of the contractor in completing the work as well as on the reasonableness of the claim for compensation of the owner are not matters excepted out of the purview of arbitration. In terms of clause 27, the decision of the engineer in-charge with regard to the amount of compensation is final and binding. However it cannot be contended or held that it was not open to the arbitrator to examine the issue with regard to delay in completion of the contract or the reasonableness of the claim by the contractor.

8.24 It was not open to the arbitrator only to arrive at any quantification of liquidated damages which was an excepted matter.

8.25 In para 46 of ***(2006) 11 SCC 245 Santograde Mineral & Metal Inc. vs. Hindustan Copper Limited*** it was held that such an objection was required to be raised during the arbitration proceedings or soon after initiation thereof as a preliminary issue. No such plea was raised by making an application under section 16 of the Arbitration & Conciliation Act, 1996. The arbitrator has held that the plea taken by GAIL was an after thought and not supported by any evidence at all.

8.26 It was the objector who had raised a plea of entitlement to adjustment of the amount awarded to the contractor against the liquidated damages which it was claiming to be entitled. In these circumstances, the objector cannot be permitted to now turn around and say that the arbitration findings were without jurisdiction.

8.27 The objection to the jurisdiction of the arbitrator taken during the oral submissions before this court is required to be rejected for yet another reason. I have been carefully taken through the entire objections which are under consideration. There is not even a whisper of a challenge to the jurisdiction of the learned arbitrator on any of the questions which have been answered by him.

For all these reasons, the challenge to the award raised for the first time in the oral submissions before this court on the ground that it deals with excepted material is misplaced and hereby rejected.

9. *Whether issuance of the no claim certificate constitutes estoppel*

9.1 The third issue raised before the arbitrator was that the issuance of the no claim certificate operates as an estoppel against claiming anything beyond the amount of the final bill.

9.2 The arbitrator has found that the final bill represents the work done and not paid. It does not require the claims of the contractor to be mentioned therein.

9.3 The arbitrator has also found substance in the plea of the contractor that the contractor had no option and was compelled to issue the no claim certificate in view of the huge amounts which were lying blocked with the respondent and the amount it was incurring towards maintenance of the bank guarantees.

9.4 Placing reliance on the pronouncement of the Calcutta High Court in ***AIR 1981 Cal. 101 Jeevni Engineering Works vs. UOI*** it was observed by the arbitrator, that it was a well known and notorious fact that unless a no claim certificate is furnished by a contractor, payment of the final bill is not made. Therefore, issuance of such certificate would not prevent a contractor from raising his claims before the arbitrator. In this regard reference has also been made to ***AIR 1984 NOC 132 (Delhi) Mehta & Co. vs. UOI***. As a result the arbitrator has held that the issuance of the no claim certificate would be inconsequential in the given facts.

9.5 As noticed hereinabove, the mechanical completion was completed on 20th August, 1997. The contractor sent a final bill on 9th January, 1999. GAIL demanded the no claim certificate by its

letter dated 27th January, 1999. EIL recommended the payment of the final bill on 7th April, 1999, more than 19 months after the mechanical completion mentioning that the contractor was being asked to provide the no claim certificate.

9.6 The contractor has rendered an explanation for the issuance of the no claim certificate contending that it was informed that unless the certificate was given, the final bill in question could not be processed, leaving no option to it but to issue the same. The contractor contended that the certificate was without free consent and thus had been issued under compulsion. It was pointed out that GAIL had not acted on the same and had not made the payments to it. Hence issuance of the certificate was without any legally binding consequences and would not bar it from raising the claims before the arbitrator.

9.7 Clause 44.3 of the GCC noted above mandated that to procure payment of the amounts, such certification by the contractor was essential. EIL demanded the same as per its letter dated 7th April, 1999.

9.8 Clause 53 states that the contract shall be deemed to have been completed at the expiration of the period of liability. This clearly includes the period for testing and commissioning of the plant. The parties had agreed that 5% of the contract value out of the last 10% payment was agreed to be released to the

contractor upon issuance of the mechanical completion certificate. However, in terms of the letter dated 27th September, 1995, the contractor was required to keep the bank guarantee of 10% of the contract value valid till 21 months from the date of issuance of the mechanical completion certificate. The last 5% of the contract value was required to be released after eighteen months of issuance of mechanical completion certificate or after the commissioning and acceptance of the system whichever being earlier.

9.9 The amount towards the execution of the work which was withheld by GAIL to the tune of 5% of the contract value was certainly not a small amount. The final bill was raised more than nineteen months after the mechanical completion. Its payment stood recommended by EIL on 7th April, 1999 when it demanded the no claim certificate towards the payments. It is an admitted position, that GAIL took no steps to process the payment. The contractor has also admittedly been required to keep a huge bank guarantee equivalent in value to the extent of 10% of the contract value alive for which it was incurring recurring expenses. The contractor has explained that in this background, in order to secure its blocked payments, it was compelled to submit a no claim certificate on 13th October, 1999 after a considerable wait for its payment. The above facts would show that clearly the

contractor had no option but to give the no claim certificate.

9.10 An important fact is that GAIL did not take any action based on the no claim certificate. The bill of the contractor was not processed and no payment was released despite the certificate and the recommendation of the Engineers India Limited.

The contractor has admittedly not accepted any payment based thereon. It raised its claims upon GAIL and upon non-payment/settlement thereof, sought arbitration.

9.11 Learned counsel for the respondent has relied on ***1994 Supp.(3) SCC 126 P.K. Ramaiya & Co. vs. CMD, NTPC*** in support of the contention that in the wake of the no claim certificate, the claims of the contractor are barred by estoppel. Perusal of the judgment shows that the contractor in this case not only issued the certificate but received the amount unconditionally in full and final settlement. It is not so in the instant case.

In view of the above, the claim of the contractor cannot be confined to the final bill amount.

9.12 In the judgment reported at ***(2004) 2 SCC 663 75 MD NTPC Ltd. vs. Reshmi Constructions, Builders & Contractors*** the court held as follows :-

> "Necessities nonhabet legem is an old age maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of other party to the bargain who is on a stronger position.Although it may not be strictly in place but we cannot shut our eyes to the ground

> reality that in the cases where a contractor has made huge investment, he cannot afford not to take from the employer the amount under the bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a 'No Demand Certificate' is signed. Each case, therefore, is required to be considered on its own facts."

The observations of the Supreme Court apply squarely to the instant case.

9.13 The findings of the arbitrator are based on the evidence which was placed before the arbitral tribunal and cannot be examined by this court. The issuance of the no claim certificate in such circumstances would not constitute a bar on the claims of the contractor on grounds of estoppel.

10. *Claims and award thereon*

10.1 It now becomes necessary to examine the actual claims awarded by the arbitrator. The sums which have been awarded have been carefully calculated upon a meticulous consideration of the material. I find that the arbitrator has computed the same as follows :-

Claim No. 1

10.2 This claim was based on entitlement to the payment of the final bill of Rs.63,63,123/- presented on 8th January, 1999. GAIL denied liability on the basis that it was entitled to adjustment of liquidated damages to the tune of Rs.1,23,23,939.69 and alleged

that the work and material used were sub-standard. It was stated that its vigilance department had directed stoppage of payment pending certification that “other work done by the claimant was also not sub-standard”.

10.3 The arbitrator discussed the contentions and observed that no notice in this regard had been served on the claimant and further held that the recommendations of the vigilance department were the claimant's internal matter. Placing reliance on the satisfactory mechanical completion of the work effected on 20th August, 1997 certified by GAIL on 10th August, 1998, the arbitrator carefully calculated the amounts towards work not done to the tune of Rs.1,49,646/-; towards sales tax of Rs.2,48,539/- and an amount of Rs.1,15,352/- against electrical charges. The amount of Rs.58,49,586/- only was therefore allowed by the arbitrator against the final bill.

Claim no.2

10.4 The second claim had two components. The first was release of the bank guarantee. Under the condition no. 24 of the GCC, the contractor was required to deposit a security equivalent to 10% of the contract value which was to the tune of Rs.1,23,93,969/- An amount of Rs.30,98,493/- being 2.5% of the contract value had to be estimated within 10 days of acceptance to the tender as “Initial Security Deposit” (ISD) and retained till

completion. These deposits could be made by way of a demand draft or a bank guarantee. Half of the security deposit could be refunded midway in the defect liability period while the balance after the full period was over. The contractor made the initial security deposit by way of bank guarantee no. 105/59/95-96 of 16th October, 1995 so as to avail the mobilisation advance which was required to constitute not only the ISD but also to provide a Composite Bank Guarantee (CBG) equivalent to the security deposit, duly validated till three months beyond the defect liability period. The contractor consequently arranged the CBG no. 105/58/95-96 of 16th October, 1995. The contractor has sought release of the bank guarantees and claimed loss inflicted by GAIL in not releasing the bank guarantees after completion date of 13th January, 1997.

10.5 The arbitrator has noticed the terms of the bank guarantee which were obtained by the contractor from the Indian Overseas Bank. The terms required a deposit of margin money equivalent to 10%; personal guarantee of all directors and a collateral security of plant and machinery, US 64 in the form of a reinvestment deposit plan. The bank guarantee was akin to an overdraft which was counterpoised by the reinvestment deposit.

It was found that the contractor was entitled to compensation equivalent to the commission paid in extending the

bank guarantees beyond the due dates and the interest differential between the overdraft and reinvestment deposit for the period. The arbitrator held that the ISD of Rs.30,98,493/- was to be released on 20th August, 1997 but was kept valid till 31st December, 1997. For this reason, commission from 20th August, 1997 till 31st December, 1997 being Rs.56,000/- and interest differential for the period being Rs.16,140/- was quantified by the arbitrator. The total loss on this bank guarantee payable to the contractor was therefore quantified at Rs.72,140/-

10.6 So far as CBG no. 105/58/95-96 for Rs.1,23,93,969/- is concerned, it was found that this bank guarantee ought to have been released on 19th May, 1999 being 21 months after the mechanical completion as per clause B 9.1.3 (i and iii) of the SCC. The commission paid after 19th May, 1999 on this bank guarantee was found to be to the tune of Rs.3,38,350/- and the differential interest was to the tune of Rs.51,860/-. The total loss which enured to the contractor on this bank guarantee was assessed at Rs.3,90,210/-.

10.7 For the same reasons, so far as the third composite bank guarantee being BG No. 0105/04/2000 of Rs.61,96,985/- provided on 1st February, 2000 is concerned, the arbitrator has found the contractor entitled to release of the bank guarantee. The commission paid on this was to the tune of Rs.3,81,110/- and

interest differential thereon was of Rs.1,65,249.01, being the total to Rs.5,46,359/-

10.8 GAIL does not explain when the bank guarantees were eligible for release but it has been contended that heavy recoveries for default and defective work have to be made from them. The arbitrator has concluded that the composite bank guarantees should be released forthwith. The arbitrator also found the contractor was entitled to compensation on account of extending the bank guarantees being equivalent to the amount of commission paid thereon and the interest differential.

10.9 The arbitrator held that the claimant was eligible for compensation on the three bank guarantees being a total of the aforesaid losses of them of Rs.72,140/-, Rs.3,90,210/- and Rs.5,46,359/- bringing the total to Rs.10,08,709/- on account of extending the bank guarantees. The arbitrator also concluded that interest was not reckoned as the bank guarantees could have been invoked. It was also observed that so far as the issue as to what the commission and differential interest might have yielded was in the realm of hypothesis.

Claim no.3

10.10 Claim 3 for the sum of Rs.15,13,680/- relates to the cost for keeping the resources at the site from 20th August, 1997 to December, 1999 and the prolongation in the testing which

had to be conducted item wise due to the lack of inputs to carry out the GTR at one stroke. The arbitrator has considered the conduct of GAIL which included requiring the contractor to depute its team to PATA, UP on two occasions on false alarms. The arbitrator considered the material placed by the contractor on record and observed that while GAIL had not explained why such resources had to be kept on the site for 18 months after the mechanical completion, however the contractor had also not given a basis for the costs which were claimed. In this background, the arbitrator has allowed only an ad-hoc amount toward the cost of security which had to be provided at the plant after it stood taken over by GAIL which was to the extent of Rs.3 lakhs.

Claim no. 4

10.11 The contractor had claimed an amount of Rs.5,45,524/- towards extra works done on the directions of GAIL/EIL which included provision of a sluice gate, extra piping at battery limits, repair of the surge pond.

The arbitrator placed reliance on the confirmation fax by the Engineers India Limited to the contractor in this regard while allowing the cost of some of the extra items to the tune of Rs.3,09,524/- only.

Claim no. 5

10.12 Claim no. 5 was divided into three heads

numbered serially as claim nos. 5A, 5B & 5C. The contractor had contended that GAIL was responsible for the delay from 13th January, 1997 to 20th August, 1997 and claimed that it wrongfully deprived the contractor of Rs.4,26,98,474/- up to 30th June, 2001.

In claim 5A, placing reliance on assessment of monthly loss on account of overheads based on the law relating to engineering and building contracts in India, the arbitrator has concluded that a monthly loss of Rs.6,88,533/- may be derived on account of overheads. The arbitrator has also placed reliance on the judicial pronouncements reported at ***AIR 1985 Kerala 49 State of Kerala vs. K. Bhaskaran; AIR 1977 SC 1481 Mohamed Salamanatullah vs. Govt. of India*** and the directive of the Ministry of Irrigation and Power laid down in 1956, that 10% is a fair provision towards profits and overheads by a contractor. The factual matrix as also the applicable law has been carefully considered. An amount of only Rs.20,65,659/- as on 20th August, 1997 towards overheads for three months has been awarded.

It is noteworthy that on a careful consideration of the material placed before him, the arbitrator has rejected claim nos. 5B and 5C.

<u>Claim no. 6</u>

10.13 The arbitrator has also rejected claim 6 towards

non-provision of inputs to the contractor up to August, 1997 by GAIL recording detailed reasons for his award. The contractor has laid no challenge to the award in respect of such of its claims as were rejected.

Claim no.7

10.14 By way of claim 7, the contractor sought refund of Rs.49,37,360/- expended on excess cement used above the free issue limit with interest of Rs.42,78,081/-. Again after careful calculation and consideration of the correspondence on record, the arbitrator concluded that so far as excess cement was concerned, GAIL could recover only the normal cost of the excess cement and nothing more. It was concluded that an amount of Rs.27,07,280/- was to be refunded to the contractor who was also held entitled to interest of Rs.17,24,910/- up to 30th June, 01 ; and Rs.7,77,026/- after 30th June, 01 up to the date of the award. Thus under claim no. 7, the arbitrator awarded a total amount of Rs.52,09,216/-.

Claim no.8

As claim no. 8, the contractor claimed interest compounded yearly at the rate of 24% per annum on its claims and entitlements from the due dates till the date of the award.

The arbitrator was of the view that the contractor would be entitled to interest on the amounts awarded. Reliance was placed by the arbitrator on the principles laid down in ***AIR 1992***

SC 732 entitled ***Secretary, Irrigation Department, Government of Orissa & Ors. vs. G.C. Roy*** "that a person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be interest, compensation or damages. This basic consideration is valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference" and "where the agreement between the parties does not prohibit grant of interest and where the party claim interest and that dispute is referred to the arbitrator, he shall have the power to award interest pendente lite", the arbitrator held that interest be awarded on all the claims which were allowed, having regard to the commercial lending rates and practice which was relevant and prevalent at the time. It is, however, noteworthy that the arbitrator has not granted the claimed interest. Keeping in view the market variations, interest was granted at the rate of 18% up to 30th June, 2001 which is the date on which the claims were made by contractor upon GAIL and that 12% beyond till the date of the award.

Claim no. 9

In claim 9, the contractor pointed out that it had incurred a cost to the tune of Rs.5 lakhs as against cost of arbitration and the same was being claimed. The arbitrator held

that each party will bear its own arbitration cost. It was also directed that the cost incurred towards the stamp duty in passing the award would be shared equally by the two parties.

11 *Scope of challenge to an arbitral award*

11.1 The objector is challenging the conclusions returned by the arbitrator on the basis of evidence led before him. Not only has evidence been led before the arbitrator, but the award shows a considered and detailed analysis thereof. The arbitrator has stated the applicable legal principles and then analysed the factual matrix applying these principles.

11.2 The objections which have been pressed before this court do not relate to the determination affected by the arbitrator on the respective claims but are premised on the objection that the objector was entitled to adjust the entire amount which was claimed by the contractor, the respondent herein, against liquidated damages.

11.3 So far as amount of the bills are concerned, the objector does not dispute that the bills have been verified and amounts ascertained by the EIL after due verification of the work, which was the competent authority.

11.4 It is noteworthy that in the present proceedings also, GAIL does not dispute the quantification of the amounts which the arbitrator has found the contractor entitled to. The only plea

which is set up is that it is entitled to adjust the same against liquidated damages.

11.5 The statement of objects and reasons for the enactment of the Arbitration & Conciliation Act, 1996 shows that it has been enacted to ensure that the arbitral tribunal remains within the limits of its jurisdiction. Sub-section 3 of Section 28 of this Act requires that the Arbitral Tribunal has to decide in accordance with the terms of the contract and has to take into account the usages of the trade applicable to the transaction. The mandate of an arbitrator is thus to be reasonable and not perverse.

11.6 While considering objections to an arbitral award under section 34, the court has to be conscious of the nature of the challenge and has to bring out the same with clarity. It is the duty of the court to see whether the arbitrator has acted within the limits of his mandate. The limits of the courts power to interfere with the arbitral award, while seized of objections thereto, are not only statutorily prescribed but also guided by judicial precedents.

The principles in this behalf are well settled.

11.7 A challenge to the reasonableness of reasons given by the arbitrator is not permissible. In this regard, in ***(1989) 2 SCC 38 Sudarshan Trading Co. vs. Govt. of Kerala & Anr.***, in para 25, 29, 32 and 35 it was held as follows :-

"25. While dealing with that part of the award which

exonerated the contractor from the risk after holding that the termination of the contract by the respondent was valid, it was held that the same was opposed to the provisions of the agreement. The direction to release the amount and release of security deposit without taking into account the liability to account for the loss on rearrangement of work amounted to errors apparent on its face. In the aforesaid light, the High Court held that the award under claims Nos. l(b), 2, 5, 6 & 7 and also the award of an additional sum of Rs. 50,000/-under claim No. 14 over and above the claim allowed was against the terms of the contract and, therefore, liable to be set aside.

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29. .....Furthermore, in any event, reasonableness of the reasons given by the arbitrator cannot be challenged. Appraisement of evidence by the arbitrator is never a matter which the court questions and considers. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisement of the evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the Court to take upon itself the task of being a judge on the evidence before the arbitrator.

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32. The High Court in the judgment under appeal referred to the decision of the Division Bench of the Kerala High Court in State of Kerala v. Poulose 1987 1 Ker LT 781 (supra). Our attention was also drawn to the said decision by the counsel for the respondents that if an arbitrator or the umpire travels beyond his jurisdiction and arrogates jurisdiction that does not vest in him, that would be a ground to impeach the award. If an arbitrator, even in a non-speaking award decides contrary to the basic features of the contract, that would vitiate the award, it was held. It may be mentioned that in so far as the decision given that it was possible for the court to construe the terms of the contract to come to a conclusion whether an award made by the arbitrator was possible to be made or not, in our opinion, this is not a correct proposition in law and the several decisions relied by the learned Judge in support of that proposition do not support this proposition. Once there is no dispute as to the

contract, what is the interpretation of that contract is a matter for the arbitrator and on which court cannot substitute its own decision.

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35. .....It may be stated that if on a view taken of a contract, the decision of the arbitrator on certain amounts awarded is a possible view though perhaps not the only correct view, the award cannot be examined by the court in the manner done by the High Court in the instant case."

(Emphasis supplied)

11.8 In ***(1999) 4 SCC 214 Himachal State Electricity Board vs. R.J. Shah & Co***., the court again held as follows :-

"25. . From the aforesaid decision of this Court and the last one in particular it is clear that when the arbitrator is required to construe a contract then merely because another view may be possible the court would not be justified in construing the contract in a different manner and then to set aside the award by observing that the arbitrator has exceeded the jurisdiction in making the award. "

11.9 On the same issue, in ***(2006) 11 SCC 181 Mcdormott International Inc. vs. Burn Standard Co. Limited & Ors.***, the court held as follows :-

"112. It is also trite that correspondence exchanges by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to the determination of a question of law.

120. Once, thus it is held that the arbitrator had the jurisdiction, no further question shall be raised and the Court will not exercise its jurisdiction unless it is found that there exist any bar on the face of the award.

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> 169. As regards certain other contentions, in view of the fact that the same relates to pure question of fact and appreciation of evidence, we do not think it necessary to advert to the said contention in the present case."

11.10 Each of the questions raised by GAIL is squarely an issue of fact and the conclusion arrived at by the learned arbitrator on the facts is based on an interpretation of the contractual terms and construction of the documents placed and the evidence led before the arbitrator. It is not open to this court to interdict the award on these issues.

11.11 Reference in this behalf also requires to be made to the pronouncement of the Apex Court reported at ***(1999) 9 SCC 449 Arosan Enterprises vs UOI*** wherein in para 39, the Supreme Court held as follows :-

> "39. In any event, the issues raised in the matter on merits relate to default, time being the essence, quantum of damages--These are all issues of fact, and the Arbitrators are within their jurisdiction to decide the issue as they deem it fit--The Courts have no right or authority to interdict an award on a factual issue and it is on this score the Appellate Court has gone totally wrong and thus exercised jurisdiction which it did not have. The exercise of jurisdiction is thus wholly unwarranted and the High Court has thus exceeded its jurisdiction warranting interference by this Court. As regards issues of fact as noticed above and the observations made herein above obtains support from a judgment of this Court in the case of Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan and Ors.AIR 1999 SC 2102"

11.12 The parties have taken this court through the evidence and the documents which were placed before the arbitrator and have been considered by him. It needs no elaboration that while considering objections under section 34 of the Arbitration & Conciliation Act, 1996, the court cannot look into the evidence which was laid before the arbitrator and re-appreciate the same. The arbitrator was the chosen forum of the parties who has conclusively decided rival issues of fact between the parties. There is nothing at all suggested that the arbitrator did not decide on the basis of relevant facts which were placed before him or that he has ignored any material evidence.

11.13 The objections to the award are premised on the plea that a clause for liquidated damages having been incorporated into the contract, as a consequence, it ipso facto follows that liquidated damages are the inevitable result of any delay at any stage of the contract by the contractor.

I have held hereinabove that the same is legally impermissible. Even if it were not so, no case for entitlement to liquidated damages by GAIL has been made out. In any case recovery of the same is hopelessly barred by limitation.

11.14 Ms. Arora has painstakingly taken me through the reply dated 27th of September, 2002 filed by GAIL pointing out the admissions by GAIL towards non-payment for work done and inability to conduct the GTR. It is pointed out, that other than

setting up a plea of entitlement to 10% of the contract value as damages, the reply to the claims filed before the arbitrator contained no counter claim for liquidated damages nor any prayer for the same.

11.15 Reliance is placed on behalf of GAIL on the pronouncement reported at ***(2007) 13 SCC 236 Security Printing & Minting Corporation of India Ltd. & Anr. vs. Gandhi Industrial Corpn.*** is also misconceived. In this case, the arbitrator had given an overriding effect to the terms and conditions of a tender rather than the terms contained in the subsequent supply order placed by the appellant corporation accepted by the respondent corporation. In this background, it was held that it is the completed contract which is binding and not the terms of the offer of the advertisement. It was observed that even though courts are still not interfering with the findings and interpretation of the terms of the contract given by the arbitrator, however, if any perverse order is passed, then the courts are not powerless to interfere with the matter. Therefore, the view taken by the arbitrator as affirmed by the High Court to the effect that the terms in the offer of the advertisement would bind the parties even though a concluded contract had come into existence could not be sustained and was held to be exfacie illegal. No such issue has been raised before me in the instant case.

11.16 Mr. Jagjit Singh, learned counsel for the respondent has placed reliance on para 15 of the judgment reported at ***(2002) 4 SCC 45 General Manager, Northern Railway & Anr. vs. Sarvesh Chopra***. This pronouncement however also does not support the submissions on behalf of GAIL inasmuch as it refers to a claim for compensation of a contractor for non-performance of reciprocal promises by the employer.

11.17 In ***JT 2003 (4) SC 171 : 2003 2 RAJ 1 ONGC vs. Saw Pipes Limited***, the Supreme Court held that only if an award is contrary to a fundamental policy of Indian law or is against justice or morality or is patently illegal, the same has to be set aside.

11.18 In the decision of the Supreme Court reported at ***AIR 2008 SC : 2008 1 RAJ 164 ONGC Ltd. vs. Garvare Shipping Corporation***, the court held that there is no proposition that the courts would be slow to interfere with an award even if the conclusions are perverse.

11.19 An issue would arise as to whether compensation not levied within a reasonable time from the date of completion of the work would tantamount to waiver of the right to levy such compensation (Ref : ***(1997) 2 Arb.L.R. 369 Bhartiya Construction Co. vs. DDA***).

11.20 In the present case, the arbitrator has carefully

examined the rival versions laid before him. The above discussion would show that his conclusions are based not merely on an analysis of the material and documents placed before him, meticulous calculations, as well as on a consideration of the pronouncements of the Supreme Court on the issues.

11.21 The findings returned by the arbitrator are therefore unexceptional and certainly not opposed to the fundamental policy of Indian law. Nothing arbitrary, unreasonable or illegal has been also pointed out. No fundamental infirmity in holding that the contractor was entitled to the refund of the security deposit or the amounts which had been determined by the EIL has been pointed out.

11.22 Before me, the challenge by GAIL, even if legally permissible, is not supported either by the terms of the contract or the evidence led before the learned arbitrator. In these circumstances, I am not able to discern any infirmity or illegality in the award.

12. *Challenge to award of interest*

12.1 Mr. Jagjit Singh, learned counsel has lastly urged that in any case, the award of interest at the rate of 18% for the pre-arbitration stage and pendente lite at 12% was not warranted in the current economic scenario. Reliance has been placed on the pronouncement of the Supreme Court reported at ***(2007) 2 SCC***

720 Krishna Bhagya Jala Nigam Ltd. vs. G. Harischandra Reddy & Anr. to contend that on account of change of regime, rates have substantially been reduced.

12.2 Perusal of the objections raised by the respondent before this court shows that in the petition under Section 34, the only plea taken, is that awarding of interest is beyond the contract and therefore the award of interest by the arbitrator is not sustainable. The plea for setting aside the award of interest is premised on this objection alone.

12.3 It is noteworthy, that the Supreme Court has on more than one occasion held the finding by the court that a direction to pay interest on the awarded amount is not mandatory, is erroneous. It has been held that if a person is deprived of use of money, he is legitimately entitled, as of right, to be compensated for such deprivation by granting monies by whatever name it may be called whether interest or compensation or damages. (Ref : ***(2001) 2 SCC 721 Executive Engineer vs. N.C. Budhiraja; (2009) 10 SCC 187 Indian Humepipe Company Ltd. vs. State of Rajasthan***).

In the judgment reported at ***2009 (14) SCALE 399 Madnani Construction Corporation Pvt. Ltd. vs. UOI ,*** the Supreme Court has reiterated the power of the arbitrators to grant pendente lite and future interest till realization.

The principles laid down by the Apex Court find a

statutory recognition by the legislature while enacting section 31 of the Arbitration & Conciliation Act. The statute has clearly empowered the arbitrator under Section 31(1)(a) to award pre-refernece and pendente lite interest.

12.4 So far as award of interest is concerned, it becomes necessary to make a reference to Section 31(7) of the Arbitration & Conciliation Act which provides as follows :-

> **31. Form and contents of arbitral award**
> (7)(a)Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.
> (b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per cent per annum from the date of the award to the date of payment.

12.5 In view of the clear statutory provision as well as the settled principles laid down by the Apex Court in the several judgments noticed heretofore, the entire submissions with regard to the jurisdiction of the arbitrator to award interest on which the objections have been premised are devoid of any legal merit.

12.6 Before me, other than a reference to the above directions of the court, the objector has placed no reasons to justify reduction of the rate of interest.

12.7 In ***(2007) 2 SCC 720 Krishna Bhagya Jala Nigam Ltd. vs. G. Harischandra Reddy & Anr.,*** the court was of the

view that the award was fair and equitable. However, keeping in mind the long standing dispute between the parties, the court observed that after economic reforms, the interest regime had changed and rates substantially reduced.

For this reason, the court suggested reduction in the awarded figure which was accepted by the parties.

12.8 In ***(2006) 11 SCC 181 McDermott International Inc. vs. Burn Standard Co. Ltd. & Ors.,*** the court observed that in some cases, to do complete justice between the parties given the long lapse of time, the Supreme Court resorted to exercise of jurisdiction under Article 142, therefore, the court held it to be in the interest of justice to reduce the rate of interest. No such submission contending a long lapse of time or changed economic scenario or liberalised interest regime has been placed before this court other than the bald reference to these judgments.

12.9 In a case reported at ***AIR 2005 SC 3701 : (2005) 6 SCC 678 Rajendra Construction Company vs. Maharashtra Housing and Area Development Authority & Ors.***, the court referred to an earlier pronouncement (***AIR 2005 SC 2071 Bhagwati Oxygen Ltd. vs. Hindustan Copper Ltd.***) observing that having regard to the period since 1987 when the contract was entered into, work completed and 1995 when the award passed, it would be proper equitable and in the interest of justice if the court reduced the rate of interest to 10%.

From the above discussion, it is evident that on account of the liberalised interest regime and the changed economic scenario, there has been a fall in the rates of interest. Further, the long passage of time since the contract was entered into and completed as well as the duration of the arbitration proceedings has also been a consideration while bringing down interest awarded by arbitrators.

12.10 The arbitrator has awarded interest for the period upto 30th of June, 2001 at 18%. For the period thereafter till the making of the award, interest at the rate of 12% has been awarded.

12.11 Having regard to observations of the Supreme Court to the falling interest rates and the current economic scenario, as noticed above, I direct that interest for the period upto 30th June, 2001 awarded at 18% shall stand reduced to 12%. The interest for the period beyond till making the award which has been awarded at 12% is reduced to 9%. The objector shall be liable to make payment of interest on these rates. The award shall stand modified to this limited extent.

13. *Post-award interest*

13.1 It has further been contended by Mr. Singh, learned counsel, that the arbitrator has not granted post-award interest and that the contractor has not filed objections assailing the same. The submission is that the failure to specifically award post-award

interest tantamounts to its rejection.

13.2 Clause (b) of sub-section (7) of Section 31 contains an express provision that unless an award has otherwise directed, a sum directed to be paid by an arbitral award shall carry interest at the rate of 18% per annum from the date of award to the date of payment. Thus, unless there is a direction to the contrary in the arbitral award, the clear statutory stipulation requires mandatory payment of interest from the date of the award to the date of payment. In the absence of any specific stipulation in the arbitral award with regard to future interest, the statutory prescription in clause (b) of sub-section 7 of section 31 has to apply. (Ref: ***2009 (6) BomCR 176 Eskay Engineers vs. Bharat Sanchar Nigam Limited, Raigad Telecom Division***).

13.3 On this issue, it would be useful to advert to the observations of the Bombay High Court in another pronouncement on the same issue which is reported at ***2001 (3) BomCR 652 Vijaya Bank vs. Maker Development Services Pvt. Ltd.*** wherein the court held as follows :-

> "In any event, we see that sub-section (7) of Section 31 provides that any sum directed to paid by the Arbitrator shall, unless there is a contrary direction in the award, carry interest at the rate of eighteen per cent per annum from the date of the award to the date of payment. We think that this is a salutary provision in the statute which is intended to deter parties from raising frivolous disputes by putting them on notice that interest calculated at the rate of 18 per cent per annum on the amount directed to be paid is payable. Beyond making this observation, we do not feel called upon to make out any

> clarificatory exercise for we think that the salutary provision operates per proprio vigore (by its own force or vigor)."

13.4 In view of the prevalent statutory regime, bare examination of the statutory provision would show that it is not necessary for a party to claim post award interest. It is also not necessary for an arbitration award to contain a specific direction for payment of the same. In view of Section 31(7), if the award is silent about interest from the date of award of payment, then the person in whose favour the award is made will be entitled to interest at the rate of 18% per annum on the principal amount awarded from the date of award till the payment.

13.5 The Supreme Court had occasion to examine the further issue as to whether a person would be entitled to payment of interest on interest i.e. to say as to what would be the amount on which future interest would be payable. In the judgment reported at ***MANU/SC/0131/2010 State of Haryana & Ors. Vs. S.L. Arora***, the court also examined the question as to whether there was any discretion available with the arbitral tribunal in this regard. In this judgment, the court in detail examined Section 31(7) and what is authorised under it, thus setting out the legal position regarding the award of interest by the arbitral tribunal. The observations of the Supreme Court in paras 17 and 18 have a bearing on the issue raised in the present case. The relevant extract thereof may be usefully adverted to in extenso and reads

as follows :-

> “17. The difference between Clauses (a) and (b) of Section 31(7) of the Act may conveniently be noted at this stage. They are:
>
> (i) Clause (a) relates to pre-award period and Clause (b) relates to post-award period. The contract binds and prevails in regard to interest during the pre-award period. The contract has no application in regard to interest during the post-award period.
>
> (ii) Clause (a) gives discretion to the Arbitral Tribunal in regard to the rate, the period, the quantum (principal which is to be subjected to interest) when awarding interest. But such discretion is always subject to the contract between the parties. Clause (b) also gives discretion to the Arbitral Tribunal to award interest for the post-award period but that discretion is not subject to any contract; and if that discretion is not exercised by the arbitral Tribunal, then the statute steps in and mandates payment of interest, at the specified rate of 18% per annum for the post-award period.
>
> (iii) While Clause (a) gives the parties an option to contract out of interest, no such option is available in regard to the post-award period.
>
> In a nutshell, in regard to pre-award period, interest has to be awarded as specified in the contract and in the absence of contract as per discretion of the Arbitral Tribunal. On the other hand, in regard to the post-award period, interest is payable as per the discretion of the Arbitral Tribunal and in the absence of exercise of such discretion, at a mandatory statutory rate of 18% per annum.
>
> 18. As there is some confusion as to what Section 31(7) authorizes and what it does not authorize, we will attempt to set out the legal position regarding award of interest by the arbitral tribunals, as emerging from Section 31(7) of the Act.

18.1) The provision for interest in the Act is contained in Section 31 dealing with the form and contents of arbitral award. It employs two significant expressions "where the arbitral award is for payment of money" and "the arbitral tribunal may include in the sum *for which the award is made*, interest.... on the whole or any part of the money". The legislature has thus made it clear that award of interest under Sub-section (7) of Section 31 (and award of costs under Sub-section (8) of Section 31 of the Act) are ancillary matters to be provided for by the award, when the arbitral tribunal decides the substantive disputes between the parties. The words *'sum for which the award is made'* and *'a sum directed to be paid by an arbitral award'* contextually refer to award on the substantive claims and not ancillary or consequential directions relating to interest and costs.

18.2) The authority of the arbitral tribunals to award interest under Section 31(7)(a) is subject to the contract between the parties and the contract will prevail over the provisions of Section 31(7)(a) of the Act. Where the contract between the parties contains a provision relating to, or regulating or prohibiting interest, the entitlement of a party to the contract to interest for the period between the date on which the cause of action arose and the date on which the award is made, will be governed by the provisions of the contract, and the arbitral tribunal will have to grant or refuse interest, strictly in accordance with the contract. The arbitral tribunals cannot ignore the contract between the parties, while dealing with or awarding pre-award interest. Where the contract does not prohibit award of interest, and where the arbitral award is for payment of money, the arbitral tribunal can award interest in accordance with Section 31(7)(a) of the Act, subject to any term regarding interest in the contract.

18.3) If the contract provides for compounding of interest, or provides for payment of interest upon interest, or provides for interest payable on the principal upto any specified stage/s being treated as part of principal for the purpose of charging of

interest during any subsequent period, the arbitral tribunal will have to give effect to it. But when the award is challenged under Section 34 of the Act, if the court finds that the interest awarded is in conflict with, or violating the public policy of India, it may set aside that part of the award.

18.4) Where an arbitral tribunal awards interest under Section 31(7)(a) of the Act, it is given discretion in three areas to do justice between the parties. First is in regard to rate of interest. The Tribunal can award interest at such rate as it deems reasonable. The second is with reference to the amount on which the interest is to be awarded. Interest may be awarded on the whole or any part of the amount awarded. The third is with reference to the period for which the interest is to be awarded. Interest may be awarded for the whole or any part of the period between the date on which cause of action arose and the date on which the award is made.

18.5) The Act does away with the distinction and differentiation among the four interest bearing periods, that is, pre-reference period, pendente lite period, post-award period and post-decree period. Though a dividing line has been maintained between pre-award and post-award periods, the interest bearing period can now be a single continuous period the outer limits being the date on which the cause of action arose and the date of payment, subject however to the discretion of the arbitral tribunal to restrict the interest to such period as it deems fit.

18.6) Clause (b) of Section 31(7) is intended to ensure prompt payment by the award-debtor once the award is made. The said clause provides that the "sum directed to be paid by an arbitral award" shall carry interest at the rate of 18% per annum from the date of award to the date of payment if the award does not provide otherwise in regard to. the interest from the date of the award. This makes it clear that if the award grants interest at a specified rate up to the date of payment, or specifies the rate of interest payable from the date of award till date of payment,

> or if the award specifically refused interest, Clause (b) of Section 31 will not come into play. But if the award is silent in regard to the interest from the date of award, or does not specify the rate of interest from the date of award, then the party in whose favour an award for money has been made, will be entitled to interest at 18% per annum from the date of award. He may claim the said amount in execution even though there is no reference to any post award interest in the award. Even if the pre-award interest is at much lower rate, if the award is silent in regard to post-award interest, the claimant will be entitled to post- award interest at the higher rate of 18% per annum. The higher rate of interest is provided in Clause (b) with the deliberate intent of discouraging award-debtors from adopting dilatory tactics and to persuade them to comply with the award."

13.6 In view of sub-section (7)(b) of Section 31 of the Arbitration and Conciliation Act and the clear enunciation of the applicable principles by the Supreme Court in ***State of Haryana & Ors. vs. S.L. Arora*** (supra), the contention of the learned counsel for GAIL is wholly devoid of any merit. Silence in the award about future interest is inconsequential upon the entitlement of a party to post award interest on the principal sum awarded. Such silence does not tantamount to rejection of the same. The same would flow from legislative mandate of Section 31(7)(b) of the Arbitration & Conciliation Act of 1996. No order to this effect is also necessary and no objections were required to be filed.

13.7 It is noteworthy that the Supreme Court has clearly held that even if pre-award interest is at a much lower rate, if the award is silent with regard to the post award interest, the claimant

will be entitled to post-award interest at the higher rate of 18% per annum. It has been observed that the higher rate of interest is provided in clause (b) of Section 31 with the deliberate intent of discouraging award debtors from adopting dilatory tactics and to persuade them to comply with the award.

The scheme of the Arbitration & Conciliation Act, 1996 as noticed by the Supreme Court in ***State of Haryana & Ors. vs. S.L. Arora & Co.*** (supra) also clearly shows that the spirit, object and purpose of the statute is to bring about expeditious disposal of arbitral proceedings and attach a finality to the arbitral award. The legislature has incorporated the provisions of Section 31(7)(b), stipulating interest at the rate of 18% per annum at the post-award stage to discourage non-compliance of the arbitral awards. The grounds on which the arbitral awards can be assailed have been restricted and statutorily prescripted in Section 34 of the Arbitration & Conciliation Act. In view of the well settled legal position noticed above, a considered decision could have been taken at least to comply with such portion of the award which was completely unassailable.

13.8 In view of the above discussion, it is held that the respondent would be entitled to interest on the principal sum awarded in the arbitration award at the rate of 18% per annum from the date of the award till date of payment.

14. *Costs of the present proceedings*

14.1 The arbitrator did not award costs of the proceedings in favour of the claimant. However, the claimant has seriously pressed its claim for costs of the present objections.

14.2 Nothing has been pointed out which could disentitle the respondent to costs of the present proceedings.

14.3 The above discussion would show, that the legal principles on which the present objections have been premised, stand authoritatively decided against the objector long ago. The narration of facts by the arbitrator noticed hereinabove also shows how baseless and misconceived are the contentions on which these objections have been based. The objector was conscious of its liability towards the respondent and consequently had raised no issue at all of liquidated damages.

14.4 The present litigation is wholly unwarranted. The facts of the present case speak volumes of the functioning of GAIL and its inability to maintain any technical or financial discipline. It is astonishing that GAIL was unable to synchronise timely completion of the various components of its project to completion and ensure generation of the liquid wastes. As a result, crores of public money have been spent in building a waste water treatment plant which could not even be tested for a period of over ten years till hearing in these objections. Commercial investments of a contractor running into lakhs of rupees are lying blocked. There is certainly no accountability for the public money expended and the

contractor having blocked crores of rupees, has no voice to even object, let alone ask any questions. GAIL's conduct in the matter is inexplicable and unpardonable, to say the least. Instead of efficient discharge of its contractual obligations, even though GAIL was aware of its inability to ensure the GTR or commissioning dispute completion of the plant, it refused to get its act together to even permit discharge of the contractor's staff at the plant or release the large payments due from it. In March, 2002 when the matter reached GAIL's vigilance authorities, it would appear that it adopted the policy of attack as the best defence. The facts brought out establish that the letter to EIL seeking the recommendation for imposition of liquidated damages were all issued thereafter as a shield for culpability for probable vigilance action.

14.5 Protracted arguments have been laid before this court on totally misplaced objections as noticed above. A stand has been taken which was not even the stand before the arbitrator. As such valuable time of the court has been expended in the hearing and adjudication of these objections. I have been compelled to go through the voluminous record of the case as well.

14.6 So far as frivolous litigation is concerned, in the judgment reported at ***(2006) 4 SCC 683 State of Karnataka vs. All India Manufacturers Organisation*** (supra), the Supreme Court had stated that in addition to paying costs to the adversary

party, the appellant should be directed to pay costs to the Supreme Court Legal Services Authority. It was observed that such frivolous litigation has to be deprecated.

14.7 I had occasion to consider a similar issue earlier and in the judgment dated **19th October, 2006** in **CCP No. 130/2005 in OMP No. 361/2004** entitled **Goyal MG Gases Pvt. Ltd. vs. Air Liquide Deutschland GMBH & Ors.**, had observed as follows :-

> "67. Imposition of costs normally follows the indemnity principle which is simply described as "If you lose, you will be responsible not merely for your own legal costs but you must pay he other side's too".
> 68. In this background, there is yet another more imperative reason which necessitates imposition of costs. The resources of the court which includes precious judicial time are scarce and already badly stretched. Valuable court time which is required to be engaged in adjudication of serious judicial action, is extended on frivolous and vexatious litigation which is misconceived and is an abuse of the process of law. A judicial system has barely sufficient resources to afford justice without unreasonable delay to those having genuine grievances. Thereforee, increasingly, the courts have held that such totally unjustified use of judicial time has to be curbed and the party so wasting precious judicial resources, must be required to compensate not only the adversary but also the judicial system....."

14.8 The following observations of Lord Phillips MR in a judgment rendered in the court of appeal in ***(2004) 1 WLR 88 (CA) entitled Bhamjee v. Forsdick and Ors***. were relied upon by the court :-

> "(8) In recent years the courts have become more conscious of the extent to which vexatious litigation

represents a drain on the resources of the court itself, which of necessity are not infinite. There is a trace of this in the judgment of Stoughton LJ in Attorney-General v. Jones (1990) 1 WLR 859, when he explained why there must come a time when it is right for a court to exercise its power to make a civil proceedings order against a vexatious litigant. He said that there were at least two reasons:

> First, the opponents who are harassed by the worry and expense of vexatious litigation are entitled to protection; secondly the resources of the judicial system are barely sufficient to afford justice without unreasonable delay in those who do have genuine grievances and should not be squandered on those who do not.

14.9 Placing reliance on other judicial precedents, in ***Goyal MG Gases Pvt. Ltd.*** (supra), it was further observed as follows :-

> "69. The same concerns were articulated in Attorney-General v. Ebert (2004) EWHC 1838 (Admn.) thus:
>
> > Mr. Ebert's vexatious proceedings have...been very damaging to the public interest; quite aside from the oppression they have inflicted on his adversaries.... The real vice here, apart from the vexing of Mr. Ebert's opponents, is that scarce and valuable judicial resources have been extravagantly wasted on barren and misconceived litigation, to the detriment of other litigants with real cases to try." Silber J, concurring, referred (at para 61) to "a totally unjustified use of judicial time.
>
> 70. The Division Bench of this Court has further considered yet another impact of frivolous and vexatious litigation. In MANU/DE/0865/1995 : 59(1995)DLT604 Jagmal Singh v. Delhi Transport Corporation, the court was called upon to consider a challenge to the disciplinary proceedings at the hands of an employee of the Delhi Transport Corporation. While noticing the various reasons as to the self-imposed limitations on

the courts in interfering with interlocutory stages of departmental proceedings, the court arrived at a finding that the writ petition by the petitioner was not only misconceived but an abuse of the process of the court. After so holding, the court observed thus:

> "We are firmly of the view that petitioner has resorted to the dilatory tactics hereby crippling the progress of the departmental enquiry pending against him for the last about eight long years. It is not only unfortunate but matter of concern to all of us being the members of the society, that the petitioner by indulging in this type of frivolous litigation has not only wasted his time and money but has also wasted the time of the court and other public functionaries thereby causing unnecessary drain on the resources of public exchequer whose coffers are filled in by poor people's money. In such a case with a view to discourage frivolous litigation, it becomes our duty not only to see that the petitioner is saddled with exemplary costs but also to ensure that he gets no benefit on account of the delay caused by him in the departmental enquiry pending against him."

The above observations squarely apply to the instant case.

14.10 The contractor is consequently held entitled to the costs of defending the present proceedings from GAIL which, obviously has to include not only the litigation costs but also counsel's fee and are quantified at rupees one lakh fifty thousand only.

15. *Amount spent on maintenance of bank guarantee*

15.1 The matter does not end with payment of the costs. In the instant case, GAIL has not only filed objections under Section

34 of the statute but alongwith filed IA No. 1351/2004 making a prayer to the arbitrator to keep the bank guarantee no. 105/04/00 alive. On a consideration of this application, an order dated 3rd March, 2004 was passed directing the contractor to keep this bank guarantee alive.

The contractor has submitted that it has been compelled to deposit margin money with the bank for the bank guarantee and also has been required to pay commission for keeping the same alive. The contractual liability of the contractor to maintain the bank guarantee was long over.

15.2 The contractor has placed before this court the statements of the amount of commission which has been paid to the bank upto 31st of December, 2009 on keeping this bank guarantee alive. It is contended that equity demands that GAIL be directed to compensate the contractor for keeping the bank guarantee alive forms part of costs of the present proceedings.

The contractor also presses that it must be awarded interest on the margin money which has remained deposited with the bank for issuing the bank guarantee.

15.3 The levy of interest on the awarded amount ensures that the objector gets no benefit on account of the delay caused by him in effecting the payment to the contractor/respondent. However, equities require to be balanced and interests of justice demand that the contractor be compensated for the amounts paid

towards commission for keeping the bank guarantee alive under the orders passed by this court at the instance of the objector. These are part of the expense which has enured to the contractor as a result of the present litigation.

In view of the above factual position as well as the well settled legal position, nothing precluded GAIL from restricting its challenge to the award to only seek reduction in the interest rates. As noticed above, no objection in these terms has been laid before this court. GAIL also did not take recourse to any alternate dispute redressal mechanism in the nature of conciliation or mediation, all of which are statutorily recognised, to seek amicable resolution of any issue. Financial and commercial imperatives ought to have diverted GAIL to take recourse to the shortest possible method of dispute resolution. There is no rationale or reasonableness nor any sense of commercial fair dealing in the manner in which GAIL has proceeded in the instant case. GAIL cannot, therefore, take the shelter of it being a public sector undertaking as a justification for either filing the objections or the inefficiency and commercial indiscipline which has been displayed.

15.4 It may be noted that the contractor would have incurred the expense on the commission which it has paid to the banker between 31st December, 2009 till date as well. The contractor shall inform GAIL of the amount of the up to date commission enclosing a banker's certificate in this behalf. GAIL shall be liable

to pay the amount of the commission paid by the contractor to its banker for keeping the bank guarantee alive till the date of the present pronouncement.

15.5 The contractor has also placed the statement of the amounts which it was required to maintain as margin money for keeping the bank guarantee alive. This amount could have been very well utilised by the contractor for commercial purposes. In order to balance equities the contractor should be held entitled to simple interest from GAIL on the amount which it was required to maintain/deposit as margin money with the bank for issuance of the bank guarantee. However, for the reason that the contractor has been granted interest at the rate as specified in Section 31(7) for the post-award period, an order for payment of interest on the margin money is not being made.

15.6 Before parting, I may point out that the figures relied upon have been extracted from the award. In case of any discrepancy or error, it is made clear that the dates, amounts and figures stated in the award dated 20th November, 2003 shall prevail over any contradictory date or figure which may appear herein on account of a bonafide typing error.

The petition is, accordingly, disposed of in the above terms.

OMP No. 80/2004

16. *Factual matrix in OMP No. 80/2004*

16.1 It is necessary to briefly examine the facts giving rise to OMP 80/2004 which are breifly set out hereafter. Both parties submitted that the factual narration are similar and the issues are identical to the objections registered as OMP No. 80/2004. So much so both parties opted to file only written submissions in the present matter.

16.2 The scope of the work as defined in the bid document included the general requirements for design, engineering, supply, fabrication, erection, testing, commissioning and performance testing of the DM water plant and the Condensate Polishing Unit. The time schedule for completion of works was fixed for twelve months.

16.3 The contractor's tender was accepted by GAIL after various discussions and negotiations vide a fax of intent issued in favour of Paramount on 15th February, 1995 whereby it was intimated that the tender has been accepted and consequently the contract was to be executed and performed within stipulated time being twelve months from date of fax of intent. The contract was required to be executed and completed on or before 14th February, 1996. Just as in the other contract, the fax of intent recorded that M/s Engineers India Ltd. ('EIL' hereafter) were to be the consultants for the said project. It was also stipulated that EIL's Resident Construction Manager at the project site would be the engineer in charge for the work. On 4th of June, 1995, the

petitioner issued a letter of acceptance stipulating that the work as per the bid document was to be completed within twelve months from 15th of February, 1995 when the fax of intent was issued. On 21st June 1995, the respondent confirmed to the petitioner its acceptance of the agreement.

Therafter, there was a chain of events which led to a delay in the completion of the contract.

16.4 The contractor has pointed out the following circumstances evidencing and attributing delays to GAIL in execution of the work :-

(i) The contractor was scheduled to commence site construction activities in April, 1995. However, the site in question was not provided by the petitioner because of other contractor's material lying on the site and other contractors refactory work was going on. The contractor claims that it had effected mobilisation and also conveyed its intent to start work in April, 1995 anticipating approvals as well as possession of the site.

Upon receipt of approved lay out plans and drawings, the contractor had requested EIL by a communication of 27th September, 1995 to instruct the agency occupying the area earmarked for contractor's construction to vacate and shift the same. The contractor claims that it had mobilised the site on 29th September, 1995 and dismantled 85% of the pavement by 15th October, 1995. However, they were unable to proceed as GAIL as

well as EIL failed to get the site cleared by the other contractor or removal of the structural items including heating coil and other heavy materials of other agencies lying at site. However the site was not made available till 30th October, 1995. As a result, the work could actually commence only on 1st November, 1995. This was also conveyed to GAIL by a communication of 9th November, 1995. GAIL was also informed that due to the heavy structures and other materials lying in the area, line out marking was not possible and further civil work could not be started.

The contractor relies on a General Condition of the Contract 1.31 which infers mobilisation as simultaneous action at all locations. It has been contended that having regard to the nature of the work, piecemeal handing over of the site was not permitted. The civil work envisaged erecting the foundation plinth, roof, etc. and for this reason GAIL's contention that the portions of the site were unoccupied is inconsequential. GAIL admits that the entire site was not unoccupied; that the layout was revised thrice and that the BEP was cleared only in September, 1995.

(ii) As per the contract, the contractor submitted the basic engineering package (BEP), lay out and P&I diagram to EIL on 1st May, 1995 immediately after work awarded, these were to be finalised and approved by GAIL at the earliest, within twenty days. GAIL however failed to do so. The first reaction of EIL to these

drawings was given only on 9th June, 1995. Communications dated 20th and 30th June; 3rd and 30th August and 2nd, 9th and 18th September, 1995 from the contractor were of no avail. As a result, the contractor also held discussions on 22nd/23rd June and 10th July, 1995 with GAIL pressing for early approvals. It is stated that comments were only received piecemeal; the lay out revised thrice; despite consent having been given on 3rd August, 1995, lay out was revised even thereafter on 12th September, 1995. On 12th September, 1995 by a detailed letter, the respondent brought to the notice of EIL that after repeated discussions, comments of EIL had been fully addressed in the basic engineering and plant layout drawings and revised drawings of 3rd August, 1995 were treated as final. However, EIL had made further changes which would cause re-drafting of almost all drawings and the same would delay the engineering schedule as well as construction schedule as unless the layout plan was frozen, no site activity could be comenced. It has been pointed out that under the contract, the clearance which was envisaged within three weeks as per clause 62.3, came in the end of September, 1995 thus inducing a chain reaction in delays.

(iii) As per SCC 6.10, contractor was required to purchase equipment only from the EIL approved vendors. Supply of the heat exchangers (HE) and the condensate pump (CP) were critical to the execution of the work. The contractor placed orders for the condensate feed pumps on the approved vendor on 18th

September, 1995 scheduling the delivery for January, 1996. On 10th and 16th October, 1995, since the approved vendors had sent regret letters, the contractor informed EIL that its approved vendors could not supply the product of the requisite specifications. Two alternatives which could be procured from them were suggested. The contractor had pointed out that in meetings held on 14th and 15th September, 1995 with such vendors, EIL had itself asked them to quote for the alternatives specifications. In October, 1995 since the approved vendors sent regret letters for supply of heat exchangers, they unable to supply the material of construction, the contractor requested EIL to accept alternative material. On 2nd November, 1995, the contractor reminded EIL to send approval for various items submitted and pending. Again on 14th November, 1995, drawings and documents for condensate feeder pumps were submitted for approval to EIL. Again on 21st November, 1995, the contractor sent an urgent request and reminder on the letter of 2nd November, 1995 to EIL for comments and approval of drawings and documents. On 17th January, 1996, in reply to EIL's fax of 12th January, 1996 as to status of pumps and motors, respondent informed that condensate feed pumps had been ordered on Akay Industries on 18th September, 1995, motors on Bharat Bijli on 5th October, 1995.

The specified material of construction (MOC) for HE

was Cu-Ni cladding for shell and cover, and Cu-Ni for the tube sheet, channel, channel cover and baffle. The contractor wrote to EIL on 10th and 16th October, 1995 that none of its approved vendors could supply the products specified. It suggested to alternatives instead – (i) a HE of SS 304L for the main coller and Cu-Ni for the trim coolder or (ii) a Plate Type HE of SS 316L construction. The letter of 16th October, states that at meetings held on 14th and 15th September, 1995 with vendors, EIL itself asked them to quote for plate type HE. On 27th November, 1995, the contractor proposed a BEM Tupe HE. EIL accepted the same on 25th January, 1996 at a meeting held in Baroda two months later, but expressed concern at one the pace of procurement. On 25th January, 1996 in a meeting between EIL and the contractor, the final decision for ordering heat exchangers and material of construction was taken. It was decided New Field Baroda would fabricate the HE using Cu-Ni tubes procured for Alcobex, Jodhpur and IDL, Hyderabad would supply the tube sheet and do the Cu-Ni clading on the bonnet, flange, nozzle neck, nozzle flange and other wsetted parts. It was decided that orders would be placed before 31st January, 1995. The contractor's letter to EIL dated 3rd April, 1996, suggests that the HE design was modified on 25th and 26th March, 1996 in regard to baffle spacing, flow and temperature parameters. The EIL appears to have modified the heat exchanger design as late as on 25th and 26th March, 1996 due to

EIL's additional requirements resulting in placement of orders for the condensate equipment at Ankhaleshwar on 7th February, 1996 and with IDL, Hyderabad on 27th April, 1996.

This order had to be revised again in April, 1996 due to EIL's additional requirements. Also, as per EIL requirement cladding of two metals, namely copper and nickel of heat exchangers were now required to be done at IDL, Hyderabad. This order could be finalised only on 27th April, 1996. The contractor has contended that the design was modified again in April, 1996, close follow up was maintained with IDL and EIL was informed on 6th August, 1996 that alcobex had supplied the tubes and IDL has dispatched cladded plate and sheet material. After fabrication the HE had to be moved to IDL for cladding on whom the order was placed on 27th April, 1996. Because of delay in finalisation of order, the subject heat exchanger was ready and inspected only on 18th October, 1996 and dispatched to site immediately.

(iv) The approval of drawings for various items was also delayed and amongst others, the contractor issued reminders dated 2nd November, 1995 and 14th November, 1995 to GAIL.

(v). The drawings and documents for the condensate feeder pumps were submitted for approval to EIL. A letter dated 1st of December, 1995 emphasing the urgency for the drawings as vendors could commence manufacture of pumps and heat exchangers only thereafter. The data sheet approval for pumps

was received by the contractor only on 6th December, 1996. The data sheet and specifications were finally confirmed by EIL only on 28th June, 1996 by which time Akay Pumps, the approved vendor had labour problems and could not adhere to the revised delivery date of 5th July, 1996. In this background, the order on this vendor was cancelled on 30th July, 1996 and fresh offers were invited from other vendors whose delivery schedule was more than six months. Only Process Pumps give delivery of eight weeks and orders were placed after discussions with GAIL. EIL expressed reservations on 14th September, 1996 against the substitute vendor as well whose order was cancelled. The matter was re-negotiated with Akay Pumps, the original vendor. As a result, there was delay in the readiness of the machines till 7th February, 1997; inspection could be carried out only on 26th March, 1997 and the items were discharged only on 22nd April, 1997. The pumps were received on 27th May, 1997. All these decisions were taken with the intervention and final decision by EIL.

(vi). On 10th February, 1996, EIL rephased the completion of the contract till 30th June, 1996.

(vii). By a letter dated 8th of April, 1996, the contractor requested for time extension up to end August, 1996. In the letter for time extension, Paramount recorded that they had dispatched all open tanks, MS pipes and fittings, cable trays, earthing materials, valves, etc. And civil works were almost complete at site

and detailed inter alia the following reasons for seeking time extension :-

(a) after LOI dated 15th February, 1995, kick off meeting ws held on 22nd February, 1995, submission of basic design package on 7th April, 1995; layout underwent changes three times and finally approved by end September, 1995; all GA Drgs, Civil Drgs. Etc. Already prepared had to be revised and reworked.

(b) Site clearance : Opened site on 29th September, 1995 and dismantled RCC structure. The civil work could not be comenced due to heavy material lying on site from other agencies. The material of other agencies was removed finally on 30th October, 1995 and only thereafter and therefore considerable time was lost in the process.

(c) The approved vendors regretted and claimed inability to supply because of which 4-5 months were lost.

(d) So far as execution of its works were concerned, the contractor confirmed that civil works and various other works were almost complete at the site. However, pointing out the above reasons, extension of time was requsted up to the end of August, 1996.

(viii) EIL however extended the time only till June, 1996.

(ix). A communication dated 19th June, 1996 was addressed by EIL requiring additional testing to be carried out with heat exchangers. The contractor informed EIL that if this was insisted

upon, additional time would be required by the vendor delaying the work by twelve to fourteen weeks.

(x). In the above background, by a letter of 26th June, 1996, the contractor reported that all major engineerng work and civil construction had been completed. Most of the tankages stood received on site and installed on their foundation. The contractor was constrained to request time extension up to 15th October, 1996 as supply/erection of three pumps; filter heat exchangers; rubber lined piping work and instrumentation was under completion. The contractor had not received the heat exchangers from the vendors which supply was expected by end of August, 1996 and commissioning could be done in about 1½ months thereafter.

(xi). In the meantime, despite the order for the condensate pumps having been placed as back as on 18th September, 1995, the same had also not been received. On 10th June, 1996, Akay Industries on whom order for supply of pumps had been placed informed delay in supply due to labour problems. The supplier Akay Pumps was facing labour problems and delivery was uncertain. An alternative was suggested by the respondent, M/s Process Pumps Ltd., Bangalore who offered delivery of six weeks. After much deliberations and EIL's instructions, an order was placed on it. On 17th September, 1996, after much deliberations and EIL's instructions, the order was cancelled and reordered with

Akay Pumps.

In this background, by a letter of 7th October, 1996, the contractor requested for time extension up to 31st January, 1997.

(xii). The condensate pumps were finally received only on 27th May, 1997 and their erection was completed by 15th June, 1997. Mechanical completion of the pumps was attained on 20th June, 1997. As on 30th August, 1997, erection of all pumps was completed. Inspection and hydrotesting was also completed.

The contractor-respondent was ready for commissioning of the plant on availability of the DM water, processed condensate, turbine condensate and cooling water from GAIL which was however not available till August, 1999.

(xiii). GAIL accepted mechanical completion only on 15th September, 1997. This was also confirmed in a meeting held on 31st March, 1998 between GAIL, EIL and the contractor. EIL also issued a mechanical completion certificate in this regard.

(xiv). By the letters dated 7th October, 1997 and 31st October, 1997, it was confirmed that the essential condensate and the DM water had not been made available for the final performance test run. In this background, by a letter dated 12th November, 1997, the respondent requested time extension.

(xv). It is noteworthy that even in the minutes dated 31st March, 1998, it was recorded that pre-commissioning activities stood concluded but the final performance test run was not

possible for the reason that the condensate was not available.

(xvi). The contractor places strong reliance on a letter dated 19th September, 1998 from Shri V.N. Prasad the engineer in chief of EIL addressed to GAIL recommending grant of final extension of time to the contractor till completion without levy of liquidated damages and financial implication to either party (award para 17). The arbitrator has noted that the engineer in chief had inferred that the delay attributable to the owner (GAIL) outways the contractor's lapse of twelve months and recommended grant of final extension of time to the contractor till completion without levy of liquidated damages and financial implications to either party.

(xvii). On 7th December, 1998, the contractor informed EIL that according to GAIL, the plant was still not ready for the Guarantee Test Run (GTR). The contractor offered to remain in contract with GAIL periodically to find out when the plant was ready for the guarantee test run. It was noted that as per the contract, inputs were required to be made available within eighteen months from the date of the mechanical completion.

Just as in OMP No. 66/2004, in terms of the contract in the instant case, the contractor submitted its final bill for balance 5% payment of the contract on 9th January, 1999 pointing out that the guarantee test run could not be conducted for the reason that GAIL was not in a position to make available the inputs.

(xviii). EIL informed GAIL by a letter dated 19th July, 1999 that for the reason that inputs were not available for the performance guarantee test run despite mechanical completion on 15th September, 1997, the bank guarantee in terms of the contract stood extended up to 14th June, 1999. As per the contract inputs were required to be made available within 18 months from the date of mechanical completion. Inasmuch as more than 21 months had expired since without availability of the inputs, it was decided to carry out the performance test run at available parameters.

(xix) On 20th May, 1999 and 28th June, 1999 the contractor requested for return of the bank guarantee since more than 18 months had expired from 15th September, 1997, the date of mechanical completion, and inputs were not available for GTR.

(xx). Since more than 18 months had expired from 15th September, 1997 (date of the mechanical completion) without availability of the inputs for the guarantee test run, the contractor addressed a letter dated 21st July, 1999 seeking approval of the final time extension for settlement of the final bill and release of bank guarantee.

(xxi). No dispute to these dates was raised by GAIL. By its communication of 21st July, 1999, GAIL advised the contractor to carry out the guarantee test run in the first week of August, 1999.

(xxii). The contractor places strong reliance on the letter of 29th July, 1999 from the EIL at which advised GAIL to close the

contract and to release the final payment as 21 months had elapsed since the mechanical completion.

(xxiii). A seperate recommendation of the same date (29th July, 1999) was also issued whereby the engineer in charge of EIL recommended final time extension of contract to the contractor without imposition of liquidated damages.

(xxiv). It is pointed out that on 27th August, 1999, this recommendation of the EIL for grant of final time extension till completion of performance guarantee test run was put up to GAIL's committee for approval which granted final time extension up to 18th October, 1999 with imposition of liquidated damages for twelve months.

(xxv). The final certificate of completion was issued on 13th September, 1999 EIL noting that the mechanical completion stood attained on 15th September, 1997 and performance guarantee test run could be completed with available parameters only on 13th September, 1999 due to non-availability of inputs from the petitioner's side.

(xxvi). The guarantee test run was started on 13th September, 1999 and the service cycle was completed on 25th September, 1999. On supply of required inputs by the petitioner, the GTR was again carried out on 22nd October, 1999. The minutes of the meeting held on 22nd October, 1999 recorded successful completion of the GTR which was confirmed in the minutes

regarding the same. It is noteworthy that the GTR could thus be conducted only twenty four months after mechanical completion.

(xxvii). In the above circumstances, vide its letter dated 23rd October, 1999 the contractor sought relase of the bank guarantee of Rs.30,30,865/- and final completion certificate. The contractor enclosed copy of minutes of meeting dated 22nd October, 1999 recording successful completion of the GTR. It also reminded EIL by its letter dated 5th January, 2000 to return the bank guarantee and sought payment of the final bill for the completed work of condensate polishing unit.

(xxviii). The Engineer in charge EIL addressed a letter dated 12th January, 2000 to GAIL calling upon it to condone the delay and grant extension of time without liquidated damages pointing out the aforenoticed reasons.

EIL pointed out that it had already forwarded the final time extention recommendation for the works by its letter dated 20th September, 1998. The engineer in charge noted that the major delays on account attributable to the contractor were due to delay in delivery of the heat exchangers and the condensate pump which were received on the site only in the month of May, 1997. The delay in supply of the material was basically due to the delay by the sub-vendors.

It was also pointed out that even though the unit was mechanically completed on 15th September, 1997 due to non-

availability of the condendate from GAIL, the Guarantee Test Run could be conducted only in September, 1999 after a wait of twenty four months.

In this background, EIL recommended that final time extension be granted to the contractor without any financial implication on either side and without levy of any liquidated damages which already stood recommended in the final time extension recommendation letter dated 20th September, 1998.

(xxix). It is noteworthy that the committee of GAIL which examined the recommendation made by the Engineers India Limited found that there was delay of eight months in handing over of the site to the contractor which was not attributable to the contractor. There was also no objection to EIL's finding of the delay from 15th September, 1997 attributable to GAIL on account of constraints of availability of DM water for testing. It was, however, observed that the delay between 15th September, 1997 to 18th October, 1999 due to non-availability of the condensate for the performance guarantee test did not effect the contractor for which reason he was demobilised and directed to report with a notice of fifteen days for the GTR and that the delay analysis should stop on the date of the mechanical completion. Based on this, a view was taken that LD was requuired to be imposed for a period of twelve months and final time extension being granted subject to the same by 18th October, 1999. The Committee also reviewed the

matter in the light of EIL's letter of 12th January, 2000. It, however, reiterated its earlier decision.

(xxx). In this background, the contractor raised claims by its communication of 30th June, 2001 on account of non-payment of the amounts to it; release of bank guarantee; loss and damages etc and invoked the arbitration clause contained in the contract. As there was no dispute resolution, the matter was referred to the sole arbitration of Sh. T.S. Vijayaraghavan, the sole arbitrator. The contractor filed its claims which were dated 25th February, 2002 to which GAIL responded on 21st June, 2002. The issues raised before the arbitrator were identical to those raised before the arbitrator to the award is the subject matter of challenge in OMP No. 66/2004.

17. *GAIL's contentions*

17.1 The arbitrator has considered GAIL's counter that the heat exchanger could have easily been sourced from other approved vendors of EIL of ISI and discounts that contractor approached all of them. GAIL allege that contractor submitted diffective plans which delayed to amend, which is no ground to alter the completion schedule and the plans were duly approved on rectifications. GAIL termed all the reasons for delay given by the contractor as irrelevant and immaterial. The arbitrator has noted that GAIL did not deny that the layout was revised thrice or that BEP was cleared only in September, 1995.

17.2 GAIL has placed its stand in the reply which was filed before the arbitrator to the claims raised by the contractor. In reply to the claim no. 1, GAIL has raised the following plea :-

> "The respondent is entitled to recover compensation to the tune of 10% of total value of the contract amounting to Rs.3,03,08,65.00 on account of delay on the part of the claimant along with sales tax of Rs.62,562/- income tax of Rs.31,329/- recovery of non-supply of spare amounting to Rs.1,50,800/- and recovery for issue of material on chargeable basis amounting to Rs.37,457/- Thus in all a sum of Rs.33,30,103/- was recoverable by the respondent from the claimant and as such even assuming that an amount of Rs.15,86,310/- as per the final bill of claimant was payable to claimant, after adjusting the same, an amount of Rs.17,46,793/- was to be received by the respondent from the claimant which it failed to pay on account of which it is also liable to pay interest thereon at such rate as may be considered appropriate by the learned arbitrator. The claimant is therefore not entitled to recover any amount from the respondent."

18. *Award*

18.1 The arbitrator carefully considered the pleadings of the parties and the several documents placed before him. The award dated 20th November, 2003 was thereafter passed accepting some of the claims in favour of the contractor. The claims included the following :-

(i) Claim No. 1- for work done and not paid the claimed amount to the extent of Rs. 15,63,310/-

(ii) Claim No. 2 - On account of release of security deposit.

(iii) Claim No. 3 - On account of delay in supply of inputs.

(iv) Claim No. 4 - On account of any lossess and damages for

the reason that work could not be completed on stipulated date and was mechanically completed on 15th September, 1997

(v) Claim No. 5 - On account of non-providing of inputs.

(vi) Claim No. 6 - On account of excess consumption of cement

(vii) Claim No. 7 - On account of interest

(viii) Claim No. 8 - On account of arbitration costs.

It is noteworthy that Sh. T.S. Vijayaraghavan the sole arbitrator considered the rival claims arising out of this contract as well. After detailed consideration, the arbitrator passed an award dated 30th November, 2003 after a careful consideration of the factual matrix and the contentions on the rival claims. The claimant had set up seven claims before the arbitrator. However, the arbitrator did not allow claim no. 4B, 4C and 5 at all. So far as the other claims were concerned, partial amounts were awarded by the arbitrator who has considered the contentions of GAIL and the plea set up of its entitlement to liquidated damages. The arbitrator found an amount of Rs.80,13,716/- payable to the claimant inclusive of interest @ 18% up to 30th June, 2001 and at 12% pendente lite interest thereafter up to the date of the award.

18.2 Aggrieved thereby, the present objections have been filed by GAIL on the very issues urged in support of OMP No. 66/2004. It is primarily urged that GAIL was entitled to liquidated damages.

18.3 The parties have urged identical contentions before this

court challenging the award on behalf of GAIL and supporting the same on behalf of the contractor. Detailed reasoning on these issues has been given while consideration of the identical objections filed as OMP 66/2004 which apply on all fours to the challenge riased by GAIL to the award dated 20th November, 2003 passed in this case as well.

18.4 It is an admitted position that this contract also contained GCC A25 relating to compensation for extended stay; GCC 45 allowing extension for time for owners default; GCC 60.2 providing for extension by the engineer in charge when found just and reasonable.

18.5 From the above, it is evident that the parties had agreed that the decision of the Engineer in charge with regard to the applicability of compensation of delay was to be final and binding on the contractor.

18.6 In the instant case, by the letter dated 29th July, 1999, EIL had recommended closure of the contract and release of final payment to the contractor. This was re-affirmed in the letter dated 12th January, 2000. It was apparent that the person named under the contract had rejected the GAIL's claim for entitlement to liquidated damages in this case as well.

18.7 It is also apparent from the above that the GAIL has asserted entitlement to adjustment of the amounts claimed by the contractor from its claim of compensation equivalent to 10% of the

total contract value amounting to Rs. 3,03,08,65.00 and other amounts being a total of Rs.30,33,103/-

The engineer in chief of the Engineers India Ltd. who was a competent authority under GCC 27 did not recommend or levy liquidated damages upon the contractor. The reasoning contained in paras 7.1 to 7.51 above squarely applies to the objections of GAIL premised on its claim of entitlement to liquidated damages.

18.8 The only difference between the facts which were before this court while considering OMP 66/2004 and the present case is the fact that the recommendations of EIL in the instant case were placed before a committee of GAIL which recommended imposition of liquidated damages. However it is to be borne in mind that neither under the contract nor under any provision of law was GAIL or any in house committee appointed by it the competent authority to adjudicate upon the entitlement or quantification of the liquidated damages. In the light of the observations of the commitee which held its proceedings on 27th August, 1999, GAIL was required to take legal steps for asserting its claim and seeking adjudication thereof. Certainly, there was no adjudication on the claim of liquidated damages by any court or competent authority. There was no quantification of the amounts claimed by GAIL. In this background, there can certainly not have been any adjustment of the amount claimed by GAIL as liquidated

damages.

18.9 The submission of non-arbitrability of the claim of liquidated damages is also misconceived in view of the discussion contained in paras 8.1 to 8.27 above.

18.10 In the instant case also, the contract was a composite one and completion of the contract was to be achieved only after the performance guarantee test of the plant was conducted. So far as entitlement to damages for delay is concerned, it is apparent that the same could not be consider stage wise and the matter has to be considered as a composite whole. The testing, commissioning and guarantee test run was an integral and essential part of the contract. GAIL was certainly not ready with its main project and could not supply the necessary inputs and effluents for the performance of the test runs even after the mechanical completion was over. This position stands admitted in a host of communications placed on record.

Deteailed reasoning has been recorded in OMP No. 66/2004 holding that delay at any intermediate stage would not entitle a party to a claim of liquidated damages. The same reasoning squarely applies to GAIL's claim for liquidated damages in the present case as well.

18.11 As noticed above, several terms of the contract and the manner in which GAIL has proceeded in the matter show that the parties never considered time as of the essence of the contract.

The committee in its proceedings held on 27th August, 1999 also notices that there was delay of eight months in handing over to the site to the contractor which was not attributable to the contractor. It is clearly evident that the time was not the essence of the contract and never so treated by the parties. GAIL does not even attempt to suggest any explanation for the delays in approval of the designs etc as noticed above.

In any case, even if it were to be held that delay in completion of the contract was attributable to the contractor, for the detailed reasons recorded hereinabove, GAIL was bound to show that some loss or damage had enured to it. As noticed above, no such plea even has been set up let alone any material to establish loss or damage having been suffered by GAIL has been placed either before the arbitrator or in the present proceedings.

18.12 For the detailed reasons recorded while disposing of OMP 66/2004 and in the facts and circumstances noticed hereinabove, objections to the award dated 20th November, 2003 passed by the arbitrator to claim nos. 1 to 8 are wholly misconceived and devoid of any merit.

19. *Interest*

19.1 So far as the award of interest is concerned, it is noteworthy that the learned arbitrator has awarded interest at 18% up to 30th June, 2001 and 12% for the pendente lite period. The issue of appropriate rate of interest has been considered by

the Apex Court in a catena of judgments noticed above. The court has held that having regard to the melt down and the prevalent marked rates of the interest as well as a fact that a long period is involved, it would not be fair to award interest at such rates. Detailed reasons have been recorded in paras 12.1 to 12.11 above on this issue.

Accordingly, I direct that the amounts found due and payable by the arbitrator shall carry interest @ 12% up to 30th June, 2001 and thereafter till the date of the award at the rate of 9%.

19.2 In view of the reasons recorded in paras 13.1 to 13.8, it is held that post award, the contractor is entitled to interest at the rate of 18% in terms of Section 31(7) from the date of the award till payment.

19.3 In this case as well as the contractor has been compelled to keep the bank guarantee alive at the instance of GAIL. The contractor has placed the statement of the commission paid to the bank upto 31st December, 2009 as well as the margin money deposited. For the detailed reasons recorded in OMP No. 66/2004, it is held that the contractor shall be entitled to amount expended on it as commission on the bank guarantee from the date of filing of the present objection till the date of the present judgment. The contractor shall inform GAIL of the amount of the up to date commission enclosing a banker's certificate in this

behalf. GAIL shall be liable to pay the amount of the commission paid by the contractor to its banker for keeping the bank guarantee alive.

19.4 So far as the margin money deposited with the bank for issuance of the bank guarantee is concerned, this amount could have been very well utilised by the contractor for commercial purposes.

19.5 The contractor should be held entitled to simple interest from GAIL on the amount which it was required to maintain/deposit as margin money with the bank for issuance of the bank guarantee. However, for the reason that the contractor has been gratned interest at the rate as specified in Section 31(7) for the post-award period, an order for payment of interest on the margin money is not being made.

19.6 The contractor has pressed for the same costs as in OMP No. 80/2004.

The contractor shall be entitled to litigation costs which are quantified at Rs.75,000/-.

19.7 Before parting, I may point out that the figures relied upon have been extracted from the award. In case of any discrepancy or error, it is made clear that the dates, amounts and figures stated in the award dated 20th November, 2003 shall prevail over any contradictory date or figure which may appear herein on account of a bonafide typing error.

These petitions are disposed of in the above terms.

GITA MITTAL
(JUDGE)

April 30, 2010
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