Numaligarh Refinery Ltd vs Daelim Industrial Company Ltd on 6 September, 2007

Author: A.K. Mathur

Bench: A.K.Mathur, Markandey Katju

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           CASE NO.:
Appeal (civil)  4079 of 2007

PETITIONER:
Numaligarh Refinery Ltd

RESPONDENT:
Daelim Industrial Company Ltd

DATE OF JUDGMENT: 06/09/2007

BENCH:
A.K.MATHUR & MARKANDEY KATJU

JUDGMENT:
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J U D G M E N T CIVIL APPEAL NO. 4079 OF 2007 [Arising out of S.L.P.(c) No.20989 of 2006] With :

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Civil Appeal No.  4080                          of 2007
[ Arising out of S.L.P.(c) No. 4409 of 2007]



A.K. MATHUR, J.


1.              Leave granted.
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2. Both these appeals arise out of the order dated 24.8.2006 passed by the Division Bench of the High Court of Gauhati at Guwahati in Arbitration Appeal No.1 of 2002. Therefore they are taken up together and disposed of by this common order.

3. Brief facts which are necessary for disposal of these appeals are that the respondent, Daelim Industrial Company (hereinafter to be referred to as 'DIC') is a company incorporated in Seoul, Korea having its registered office there. During the pendency of the arbitration proceedings, Daelim Engineering Company Limited (DEC) got merged with Daelim Industrial Company Limited (DIC), and therefore DEC ceased to exist. For our convenience we will take up DIC for all practical purpose. The appellant, Numaligarh Refinery Limited (hereinafter to be referred to as 'NRL') is a

Government of India undertaking incorporated under the Companies Act, 1956, having its registered office at Guwahati, in the State of Assam. NRL through its consultant Engineers India Limited (hereinafter to be referred to as 'EIL'), also a Government of India undertaking, on 22.11.1993 invited global quotations for building of a Cogeneration Captive Power Plant for its Petroleum Refinery at Numaligarh in Assam. DIC with its consortium partner, Turbotecnica SPA of Italy, contested the global bid and after negotiation with NRL, the contract was awarded to DIC by its fax of intent dated 31.1.1995. Three contract agreements were signed between NRL and DIC and Turbotecnica. The total contract price embodied in the above contract agreements dated 11.4.1995 was on a Turnkey basis and the time schedule for completion of the works as per the consolidated contract was as follows :

> " (i) First train of Gas Turbine Generator (GTG), Heat Recovery Steam Generator (HRSG) and Utility Boiler (UB) within 21 months of the issue of Fax Intent i.e. by 31.10.1996 and (ii) balance plant within 24 months of issue of the Fax Intent i.e. by 30.01.1997."

In course of the execution of the project disputes arose between the parties and therefore, in terms of Clause 9(b) of the Consolidated Agreement, DIC referred the matter on 7.8.1997 before the International Chamber of Commerce; International Court of Arbitration, Paris for resolution thereof and claimed Rs.37.9 crore under different heads. NRL disputed the claim and submitted its written reply on 20.9.1997 and a rejoinder was filed by the DIC on 4.11.1997. In terms of the International Chamber of Commerce's Arbitration Rules, 1988, (hereinafter to be referred to as the 'Rules') the DIC and NRL nominated their Arbitrator. The International Court of Arbitration confirmed the appointment of Arbitrators and nominated a third Arbitrator-cum-Chairman to constitute the Arbitral Tribunal. Meanwhile, DIC updated its claim to be at Rs.55.8 crore to which NRL submitted its written reply. DIC in response thereto, submitted its rejoinder. However, no counter claim was made by NRL. The Tribunal framed necessary issues. The majority award of the Arbitrators by the order dated 23.9.2000 held that the respondent was entitled to Rs.29.76 crore and further an amount of US $ 170,000 being 50% of the cost of arbitration paid by it, in addition to its share of the total cost of US$ 340,000. The appellant having refused to pay its portion thereof interest at the rate of 12% per annum pendente lite on Rs.29.76 crore from 7.8.1997 till the date of the award was also sanctioned. In addition, the appellant, NRL was saddled with the liability of post award interest at the rate of 18% per annum on the above awarded amounts in case of its failure to make the payments within 60 days of the receipt the award. However, Justice M.M.Dutt, Member of the Arbitral Tribunal gave a dissenting award. He awarded DIC an amount of Rs.13,74,55,272/- with interest at the rate of 10% till realization, in case of failure on the part of NRL to disburse the sum. DIC was also further awarded an amount of Rs.1.65 crore to be recovered from the Customs authorities exacted on goods not chargeable to duty. Being aggrieved with the majority award dated 23.9.2000, NRL filed application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter to be referred to as the' Act') in the Court of the District Judge at Golaghat which was registered as Misc. Arbitration Case No.1 of 2001. Notice was issued and in pursuance of such notice the respondent appeared. The learned District Judge after hearing the parties and on consideration of the materials on record, set aside the award. Aggreived against that order of the District Judge an appeal was preferred by the DIC before the High Court. DIC itemized their claims as under :

> " A. Transfer of US$ 6 million : Rs.9.6 crores B. Turbotecnica's Contract price : Included in Item C C. Countervailing Duty : Rs.13.0 crores D. Excess Custsoms Duty due to Fluctuation of exchange rate : Included in Item C E. Liquidated damages for delay In approval of Design and Engineering : Rs.8.9 crores F. Excess expenses due to lack of infrastructure : Rs.4.6 crores G. Additional expenses cost by Schedule delay : Rs.12.0 crores H. Interest for borrowed funds, Delayed opening of LC for Design : Rs.0.5 crore I. Escalation : Rs.4.1 crores J. Change Order : No dispute K. Extra tax burden as per AGSI With effect from 1st May 1997 : Rs.3.1 crores L. Indian statutory taxes included in Item No.C. (Total Claim of DEC) [Rs.55.8 crores]"

No counter claim was filed by NRL. With regard to transfer of US $6 million equivalent to Rs.9.6 crore, the issue framed was to the following effect.

> " Is the claimant entitled to a sum of Rs.9.6 crores as claimed under heading Transfer of US $ 6 million "

Under this heading it was pleaded by the DIC that the overseas contract required supply by it of various imported items priced at US $8,750,000. However, after ascertaining the indigenous sourcing of a good number of such items to be satisfactory, DIC vide its letter dated 13.9.1995, requiring the bidder to bid on the basis of indigenization scope to the maximum extent possible. The request was based on clause 14.3 of the ITB, which prescribed that items quoted in the bid to be imported could be subsequently transferred to indigenous supply for which NRL was to pay at actuals maximum whereof to be limited to the computed value on site delivery basis on the pricings quoted originally for that of the imported origin. Clause 14.3 of the Instructions to Bidders reads as under:

> " In case any item, quoted as imported in the bid, but is subsequently transferred to the Indian category, the total cost on project-site-delivery basis for such item will be payable by Owner at actuals but maximum limited to the computed value on site delivery basis based on the pricings quoted originally for that of imported origin."

Though this was agreed by NRL but it delayed the formal decision and DIC arranged procurement of the substituted indigenous materials by undertaking market survey, selecting Indian manufactures, supplying of design and drawing to the manufacture, ensuring product with quality control and supplies of finished project within a stipulated time frame for which it incurred cost and expenses to the tune of Rs. 25.3 crore which included the cost borne by DIC towards procurement , service charges, inspection and expediting charges, overhead expenses and profit. NRL duly approved the indigenous manufacturers from whom the substituted items were procured and permitted them to be incorporated in due execution of the contract. NRL extended its formal approval for the substitution eventually by its letter dated 13.3.1997. Though the DIC had claimed Rs.25.3 crore incurred as the total cost, but it limited its claim to Rs.21.7 crores being the procurement cost of indigenous materials by applying the conversion rate of Rs. 36.28 per US $ as on 26.2.1996. Rs.12 crores was paid by NRL and therefore DIC registered its claim under the above head to the extent of Rs.9.6 crores. For computing the actual cost of Rs. 25.3 crores, the DIC took into consideration

various factors; like bare cost, Excise duty, Central Sales tax, freight and insurance, procurement service charges, inspection and expediting charges, overhead expenses, profit and tax deduction at source. The majority of the arbitrators after considering all the materials placed before them came to the conclusion that since EIL was the prime consultant of NRL for the execution of the project, assessed the value of Rs.17.68 crores by applying its mind to the submission of DIC, the majority of the Arbitrators accepted the value expressed by EIL by its communication dated 4.11.1996 and the majority of the Arbitrators as per clause 14.3 accepted, the advice of EIL. Though NRL tried to withhold this letter, however same was brought on record and the majority of the Arbitrators accepted it and they added 15% profit margin and that worked out to Rs.2.65 crores on the basis of the decision of this Court in M/s.Brij Paul & Ors. Vs. State of Gujarat [AIR 1984 SC 1703]. The majority of the Arbitrators accepted the claim of the DIC to the extent of Rs.20.33 crores (Rs.17.65 crores + Rs.2.65 crores). An amount of Rs.12.19 crores under this head was already received by the DIC therefore, rest of the claim amount was accepted and awarded in favour of DIC i.e. Rs.8.14 crores with US $ exchange rate at $1 = Rs.36.28 as equivalent on 26.2.1996. As against this, the minority Arbitrator, Justice M.M.Dutt held that the original documents and vouchers were not produced by DIC as it was their duty to have produced the whole vouchers to justify the purchases made in India for the substituted materials. The minority arbitrator took the view that since the claim of the DIC was to the tune of Rs.21.77 crores, Rs.12.19 crores having been paid, there remains only Rs.9.58 crores. But according to the minority award, as per the cost given by NRL their liability comes to Rs.14.19 crores and therefore, DIC is not entitled to beyond this amount. NRL also contested the expenses on account of procurement service, inspection and expediting for Rs.97 lakhs and overhead for Rs.3.47 crores as well as the claim of profit for Rs.3.14 crores and tax deduction at source for Rs.1.32 crores was not payable. After discussion, Justice M.M.Dutt took the view that the claimant was entitled to Rs.141,920,735.00 plus Rs.1,32,13,395.00 as tax deduction at source aggregating to Rs.15,51,34,130.00 only out of which the claimant has received Rs.10,69,83,850.00. Therefore, the claimant was entitled to receive the balance amount of Rs.4,81,50,272.00 only and not Rs.9.6 crores as claimed. The District Court disapproved the approach of the arbitrators and emphasized that the word 'actual' occurring in Clause 14.3 means that the party should have produced the necessary evidence to substantiate it. The High Court however did not approve the same and took into consideration the letter dated 4.11.1996 of the EIL as the basis and observed that the Tribunal has rightly accepted the letter and set aside the order of the District Court. The High Court further held that while construing the 'actuals' under Clause 14.3. the DIC in addition to the charges is also entitled to reasonable margin of profit amounting to 15 per cent of the cost amount of Rs.17.68 crores which does not appear to be illogical or arbitrary and confirmed the finding of the majority award of the Arbitrators.

4. After considering the findings given by the majority and minority Arbitrators and the view taken by the High Court on the interpretation of Clause 14.3, in normal course the parties should have led evidence to substantiate their claims with reference to vouchers and other documents in evidence in order to justify their claim, but in the present case we find that when NRL through the communication dated 4.11.1996 have accepted the total value to the extent of Rs.14.19 crores, then there is no reason why this should not have been accepted as they have examined all the items in their letter. Be that as it may, the fact remains that the DIC has purchased the indigenous materials and substituted that as permissible under Clause 14.3, then there is no reason to deny them the cost

for the same especially when intrinsic evidence is available i.e. an independent body NRL which is a Government of India undertaking and conceded the amount to the extent of Rs.14.19 crores as the actual cost. Therefore, taking that Rs.14.19 crores as the actual and Rs.12.19 crores having been paid, we think under this head, the DIC is legitimately entitled to a sum of Rs.2 crores against their claim of Rs.9.6 crores. However, the view taken by the minority Arbitrator with regard to procurement service, inspection and expediting, overhead and claim of profit appears to be correct and that has been rightly disallowed by the minority Arbitrator and we uphold that view. M/s. Brij Paul's case (supra) related to breach of contract under section 73 of the Contract Act and while allowing the petition, 15% was assessed as loss of fright. This case was decided on peculiar facts, it cannot provide any assistance to the contractor. Hence, so far as the claim under Item No.1 for the substituted material the respondent DIC is entitled to a sum of Rs.2 crores.

[Rs.2 crores allowed under item No.1]

5. Now, coming to another head Turbo technical price, under this head Turbocechnica SPA of Italy, a consortium partner of DIC in the contract agreement with NRL, had to supply various imported items for a consideration of US $4150000 and DM 22990000 as specified in the Price Schedule of the Overseas Contract. The said consideration under Item No.2.1.1 was a consolidated figure including payment on account of service like third party inspection charges, ocean fright and marine insurance. Note 1 of the above Price Schedule permitted DIC / Turbotechnica to furnish list of goods with CIF (cost insurance and freight) value of NRL for availing concession in payment of customs duty payable in respect of import from overseas. Note 2 reiterated that third party inspection charges were included in the above price. DIC vide letter dated 13.9.1995 requested NRL to bifurcate the total consideration of the import items into CIF cost and service cost and to amend the contract agreement for that purpose but no amendment was made. It was pointed out that if no amendment was made for the relevant portion, Turnotechnica shall have to declare the entire contract value as CIF cost to the customs authority and since payment of customs duty was DIC's responsibility, DIC will have to pay customs duty on service portion also. DIC vide letter dated 25.11.1995 pointed out to NRL that contract price consisted of CIF value, cost of design and engineering and supervision and other incidental costs and requested for break-up of costs, so that DIC may not pay customs duty on the total contract price when such duty was payable on CIF value by the owner. Therefore, the amendment not being carried out by the NRL, DIC could not avail necessary concession in customs duty. Therefore, they claimed under this head a sum of Rs.1.65 crores and the same was accepted by the majority of the Arbitrators. The majority took the view that DIC had to unnecessarily pay the customs duty on service portion of the price consideration and as such allowed the claim. As against this, Justice M.M.Dutt in minority took a contrary view and held that NRL was not responsible for framing of such agreement and it was held that it was the fault of DIC and as such the claim was turned down. However, it was observed that DIC could justify and claim the said amount from the Customs department but NRL could not be held responsible for the extra duty paid by the DIC. The District Judge agreed with the minority award. However, the Division Bench of the High Court reversed the finding and approved the view taken by the majority of the Arbitrators. We have heard learned counsel for the parties and find that it depends upon the framing of the terms of the agreement, if the DIC would have been vigilant then they could have excluded the service charges; like design engineering etc. It was their duty to have excluded the

services charges but they have not properly framed the contract and they cannot insist on amendment of the contract. If all the services were subjected to duty which they could have segregated the same but since they did not do this, therefore they could claim the benefit. No direction could be given to the contracting party to amend their agreement. It is a mutual affair of the contracting party. The view taken by the High Court does not appear to be correct. Secondly, it was not possible for the NRL to amend the agreement as the same has already been registered with the Customs authorities and the Reserve Bank of India/ Hence, the DIC is not entitled to the aforesaid amount of Rs.1.65 crores under this head.

{ Claim of Rs.1.65 crores under this head not allowed]

6. Next issue is with regard to countervailing duty. DIC claimed a sum of Rs.8.78 crores which was paid on account of excise duty. The claim of the DIC was that in fact at the time when the agreement was executed between the parties, countervailing duty was not there and it was introduced with effect from 1.1.1995 by Customs Tariff (Amendment) Ordinance, 1994. New Sections 9, 9A and 9B were introduced. This Ordinance was subsequently replaced by Customs Tariff (Amendment) Act, 1995 which was deemed to have come into force with effect from 1.1.1995. DIC submitted its initial bid on 16.3.1994 and final bid on 23.11.1994 by taking into consideration customs duty on imported materials at 25% as operative then. DIC could not have imagined the levy of countervailing duty at 12.5 % brought into force with effect from 1.1.1995. Bid settlement was made on 24.1.1995 and NRL finally awarded the contract to DIC by fax of intent dated 31.1.1995. Therefore, the submission of DIC was that at the relevant time there was no countervailing duty and it came into force subsequent to the contract, therefore as per Section 64-A of the Sale of Goods Act, 1930, the DIC is entitled to get this claim reimbursed. NRL contended that as per Clause 14.1 in the statement of claim pertaining to the contract clear instructions were given to the bidders under clauses 15, 15.1, 15.2, 15.3 that entire customs duties or levies including the stamp duty and import licence fee levied on the equipments by Government of India or any State Government will have to be borne by DIC. The payment of countervailing duty was allowed by both the Arbitrators i.e. the Majority and Minority. But the Division Bench of the High Court reversed the finding. Aggrieved against this part of the order, appeal has been filed by DIC which has been registered as Civil Appeal arising out of S.L.P.(c) No.4409 of 2007.

7. In order to appreciate the submission of rival parties it will be appropriate to refer to necessary clauses of the agreement; Clause 6 of the Consolidated Agreement read with Clauses 1.8, 13.2, 15.3. The crucial clause is Clause 6 which reads as under :

> " It is specifically understood and agreed between the parties hereto that if there is any liability towards taxes/ duties (including custom duty on foreign component of supply portion) as may be assessed/ claimed/ demanded by the concerned Indian or Foreign authorities, it shall be the sole responsibility/ liability of the contractor to pay all such taxes/ duties and that the owner shall not be responsible at all the payment of such taxes/ duties. "

Mr.Ganguli, learned senior counsel for the appellant in this case submitted that the view taken by the High Court is not correct and as per Section 64-A of the Sale of Goods Act, 1930, if there is no contract to the contrary, then the parties are entitled to include the amount of duties to the contract the equivalent amount paid. It was submitted that both the majority and minority view of the Arbitrators has upheld the claim and in that connection learned counsel has placed reliance on a decision of this Court in Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission [(2003) 8 SCC 593]. As against this, learned counsel for the respondent herein has supported the view taken by the High Court. The Division Bench of the High Court after considering all the relevant provisions came to the conclusion that as per various clauses of the contract since it was the duty of the DIC to pay all taxes and customs duty and levies, they cannot escape their liability to bear the countervailing duty imposed by the Government. Mr. Ganguli, learned senior counsel for the appellant in this appeal argued that in fact this was a new levy and at the time when the negotiation was entered into it was not in contemplation and in that connection learned senior counsel invited our attention to a decision of this Court in The State of Madras v. Gannon Dunkerley & Co., (Madras) Ltd. ([1959] SCR 379). Mr.Ganguli, learned senior counsel for the appellant submitted that so far as interpretation of contract is concerned, the arbitrator is the best judge because he has the jurisdiction to interpret the contract having regard to the terms and conditions of the contract, the circumstances of the case, the pleadings of the parties, the High Court should not substitute its interpretation. In this connection, learned senior counsel has invited our attention to the following decisions of this Court.

(i) (1992) 4 SCC 440 Thermax Private Limited. V. Collector of Customs (Bombay) New Customs House.

(ii) (1968) 3 SCR 387 Kollipara Sriramulu v. T.Aswathanarayana & Ors.

(iii) (1989) 2 SCC 38 M/s. Sudarsan Trading Co. v. Government of Kerala & Anr.

(iv) (1999) 4 SCC 214 H.P.State Electricity Board v. R.J.Shah & Company Learned senior counsel for the appellant also invited our attention to Section 64-A of the Sale of Goods Act, 1930 and Section 69 of the Contract Act, 1872 and submitted that the contract party is entitled to reimbursement of tax liability. As against this, learned counsel for the respondent submitted that Clause 2 (b) & Clause 6 of the Consolidated Agreement read with Clause 2.1 (g) of the Instructions to Bidders and Clause 13(f) of the Bid Document, leave no manner of doubt that it is the duty of the contracting party to pay all taxes, duties and levies. Relevant provisions are reproduced below :

> " "Clause 2(b) all taxes and duties in respect of job mentioned in the aforesaid contracts shall be the entire responsibility of the contractor "
>
> " Clause 6. It is specifically understood and agreed between the parties hereto that if there is any liability towards taxes/ duties (including custom duty on foreign component of supply portion) as may be assessed/ claimed/ demanded by the concerned Indian or foreign authorities, it shall be the sole responsibility/ liability of the contractor to pay all such taxes/ duties and that the owner shall not be

responsible at all for the payment of such taxes/ duties "

" Clause 2.1 (g). The scope of this proposal will include the following (g) payment of customs duty, port clearance charges etc. and customs clearance at Indian port of entry "

" Clause 13(f) , Bid Documents:

.. Prices for the entire scope of work on divisible contract basis and indicate the following break-up: (f) lump sum charges on accounts of customs duty, port charges etc. for imported equipment and materials ""

Reading of these documents leave s no manner of doubt that all the taxes and levies shall be borne by the contracting party i.e. DIC.

8. We have considered the rival submissions of the parties. So far as the legal proposition as enunciated by this Court in various decisions mentioned above, it is correct that Courts shall not ordinarily substitute its interpretation for that of the arbitrator. It is also true that if the parties with their eyes wide open have consented to refer the matter to the arbitration, then normally the finding of the arbitrator should be accepted without demur. There is no quarrel with this legal proposition. But in a case where it is found that the Arbitrator has acted without jurisdiction and has put an interpretation of the clause of the agreement which is wholly contrary to law then in that case, there is no prohibition for the Courts to set things right. In the present case, the aforesaid clauses reproduced above, clearly lays down that all taxes, duties and levies have to be borne by the contracting party. Countervailing duty which came into force with effect from 1.1.1995 by way of ordinance (subsequently converted into an Act) is a duty enforced by the Statute and hence in face of Clause 2(b) and Clause 6 of the Consolidated Agreement read with Clause 2.1 (g) of the Instructions to Bidders and Clause 13 (f) of the Bid Document. There is leaves no manner of doubt that DIC has to pay the same. Therefore, this levy has to be borne by the DIC and they cannot escape from this situation. In this connection, learned counsel has invited our attention to Section 64-A of the Sale of Goods Act, 1930 which reads as under:

" 64-A. In contracts of sale, amount of increased or decreased taxes to be added or deducted.- (1) Unless a different intention appears from the terms of the contract, in the event of any tax of the nature described in sub-section (2) being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulation as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such goods tax-paid where tax was chargeable at that time,-

(a) if such imposition or increase so takes effect that the tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increase of tax, and he shall be entitled to be paid and to sue for and

recover such addition; and

(b) if such decrease or remission so takes effect that the decreased tax only, or no tax, as the case may be, is paid or is payable, the buyer may deduct so much from the contract price as will be equivalent to the decrease of tax or remitted tax, and he shall not be liable to pay, or be sued for, or in respect of, such deduction.

(2) The provisions of sub-section (1) apply to the following taxes, namely;-

(a) any duty of customs or excise on goods;

(b) any tax on the sale or purchase of goods."

This section also clearly says that unless a different intention appears from the terms of the contract, in case of the imposition or increase in the tax after the making of a contract, the party shall be entitled to be paid such tax or such increase. In this connection, the intention of the parties is to be ascertained, as per the clauses mentioned above. A perusal of the contract makes it clear that DIC is under obligation to pay the taxes, duties and levies. Therefore, the intention is very clear that taxes and duties will be the obligation of the DIC. Section 69 of the Indian Contract Act, 1872 deals with reimbursement of a person paying money due by another, in payment of which he is interested. Section 69 has no role to pay in the present case in view of the clear terms of the agreement that the taxes, levies have to be paid by the DIC. Therefore, nothing turns on Section 69 of the Contract Act. In view of the above discussion, we are of opinion that so far as the payment of countervailing duty is concerned, it was the obligation of the DIC and the view taken by the Division Bench of the Act appears to be correct and there is no ground to interfere with this part of the order. Consequently, we uphold the judgment of the High Court and dismiss the appeal arising out of S.L.P.(c) No.4409 of 2007 filed by the DIC.

9. The next question is with regard to payment of extra customs duty due to fluctuation of the exchange rate. In this connection, the majority of the Arbitrators took the view that the DIC was entitled to Rs.2.09 crores on account of excess payment of customs duty on account of fluctuation of the exchange rate. As against this, the minority view taken by Justice MM Duty was to the contrary. He has observed that the NRL had entered into a turnkey firm-price contract with the sole object of avoiding any future additional burden till the completion of the contract. He has also observed that the price quoted in the bid documents is fixed and cannot be varied according the variation of the fluctuation of the exchange rate of US dollar. He has also observed that this also holds good both for upward and downward variations. Therefore, he found that the claim of DIC cannot be acceded to and accordingly rejected the claim of DIC. The Division Bench of the High Court has affirmed the majority view.

10. We have heard learned counsel for the parties and perused both the views expressed by majority as well as minority. In this connection, it is relevant to mention Clause 12.2 of the Instructions to the Bidders which clearly stipulates that it must be understood and agreed that such factors have properly been investigated and considered while submitting the bids. It also clearly stipulates that

no financial adjustments arising thereof shall be permitted by the owner. Clause 12.2. of the Instructions to Bidders is reproduced as under :

> " 12.2. It must be understood and agreed that such factors have properly been investigated and considered while submitting the bids. No claim for financial adjustment to the contract awarded under these specifications and documents will be entertained by the owner. Neither any change in the time schedule of the contract nor any financial adjustments arising thereof shall be permitted by the owner, which are based on the lack of such clear information of its effect on the cost of the works to the bids."

Similarly, clause 13 which deals with price scope and basis clearly stipulates that price for the entire scope of work on divisible contract basis, break up has been given in the schedule. In this connection, clause 13 which is most relevant reads as under :

> " 13.0. Price Scope & Basis:
>
> The Bidders shall quote in their proposals, Prices for the entire scope of work on divisible contract basis and indicate the following break-up schedule:
>
> a) Dosing and Engineering charges for the complete works.
>
> b) Lump sum Price on F.O.B.port of Shipment basis for all Imported equipment and materials.
>
> c) Lump sum ocean fright and Insurance for the above imported goods.
>
> d) Lump sum Price on FOR/FOT dispatch point basis for5 all indigenous equipment/ material, cement and steel, inclusive of taxes, duties, levies, licence feee etc.
>
> e) Lump sum service charges towards documentations, handling, forwarding, payment of customs duty, inland transportations, transit insurance of all the imported goods.
>
> f) Lump sum charges on account of customs duty, port charges etc. for Imported equipment and materials.
>
> g) Lump sum charges, forwards, transportations through waterways for over Dimensional consignment inclusive or en route Indian/ Bangladesh Custom clearance to Project site.
>
> h) Lump sum charges toward clearance, handling, transportation (other than ODCS) storage, preservation and conservation of all equipment at project site.

i) Lump sum cost of all civil works.

j) Lump sum charges toward pre-assembly, if any, erection, testing and commissioning of the complete system.

k) LIST OF RECOMMENDED SPARES for two years normal operation indicating Parts name, cagalogues No., quantity and Unit Prices.

l) List o components with itemized unit rate for all individual equipment and materials, to enable Price Adjustment, if required during detailed engineering and execution of the work.

m) Fees/ Charges payable, if Owner/ Consultant opts for inspection by Lloyds Register or third party inspection for IMPORTED equipment.

n) Agency commission if any, included for Indian Agents."

Clause 14 deals with pricing and currency changes. Clause 14.1. reads as under :

" The prices quoted for the entire scope of work shall remain firm and fixed till complete execution of the work."

In these parameters of the terms and conditions, that the price quoted for the entire work shall remain firm and fixed till the complete execution of the work, the heading pricing and currency changes leaves no manner of doubt that there is no scope for giving any benefit of fluctuation on the exchange rates. Once the price is fixed there is no provision for giving any benefit for fluctuation in terms of the contract then in that case, the claimant DIC cannot raise this claim of excess payment made towards customs duty on account of fluctuation on exchange rate. The minority view expressed by Justice M.M.Dutt appears to be correct. Had there been downward trend in the exchange rate, then the DIC would not have slashed the exchange rate. If the downward trend cannot benefit either party then equally the up-ward trend cannot benefit the DIC for claiming the payment of the higher customs duty on account of fluctuation in exchange rate. Therefore, the expression, 'firm and fixed' is clear answer to the question if during the course of contract certain fluctuation has taken place in the market then on that count the claimant cannot raise extra demand on account of upward trend in the exchange rate. In this connection, reliance was placed on a decision of this Court in Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission [(2003) 8 SCC 593]. In this case this Court granted the contractor's claim for being compensated for foreign exchange fluctuation and not for any escalation in the price. This Court held that the claimant does not violate any terms of contract. In the present case, in view of the fact that the price is firmly fixed and DIC has clearly understood and agreed the terms of the contract, and it was clearly stipulated in Clause 12.2. that no financial adjustment arising there from shall be permitted by the owner. In these circumstances, the minority view taken by the Arbitrator, Justice M.M.Dutt appears to be well founded. Pure Helium India (P) Ltd. (supra) was decided on peculiar facts. As such, it cannot provide us any assistance.

11. Similarly, our attention was invited to a decision of this Court in Tarapore and Company v. Cochin Shipyard Ltd., Cochin & Anr. [(1984) 2 SCC 680]. In this case, their Lordships held that if a question of law is specifically referred by the parties to the arbitrator for decision, award of the arbitrator would be binding on the parties and court will have no jurisdiction to interfere with the award even on ground of error of law apparent on the face of award. We have no quarrel with this proposition. So far as other decisions of this Court mentioned above, that the Court should accept the interpretation of the terms of the agreement made by the arbitrator, and should not interfere, there is no two opinion on that question but in the present case, we are faced with a peculiar situation that the three Arbitrators out of whom two has taken one view of the matter and the third has taken another view of the matter. The District Judge has also set aside the award on some issues and the High Court has also accepted some items of the majority award of the Arbitrators and some items of the minority award of the Arbitrator. Therefore, in the peculiar state of affairs in the present case when there is variation of views ; the majority award takes one view and the minority award takes another view, the District Judge takes the third view and the High Court takes the fourth view, in the state of these conflicting views on the subject, we have to enter into the merit to put an end to the controversy by adjudicating the conflicting views of various Forum. However, general consensus of the view emerging from various judgments of this Court is there is no two opinion that the Court should not sit in appeal and normally should not interfere with the views of the Arbitrator in interpretation of the terms of agreements interpreted by the Arbitrator when the Arbitrator is appointed with consent of parties. However, in peculiar facts and circumstances of the case, the view taken by the High Court in accepting the majority view of the arbitrators cannot be accepted. We overrule the view taken by the High Court in accepting the majority view and accept the minority view taken by Justice M.M.Dutt and decline the claim of DIC in the sum of Rs.2.9 crores on account of fluctuation in the exchange rate.

[Claim of Rs.2.9 crores on account of fluctuation on exchange rate declined]

12. The next item is with regard to liquidity damages for delay of 929 days. So far as this liquidity damages is concerned, it was decided purely on the question of fact. The majority of the Arbitrators after review of the factual aspect held that whole contract was time bound delay occurred at various level, like delay in approval of drawing and designs submitted by DIC, delay in opening of letter of credit. After review of all these factual aspects, the Tribunal concluded that on account of delay for about 929 days, the contractor had suffered loss on account of fluctuation in the prices as well as fluctuation in the exchange rates and therefore, the claimant claimed liquidity damages to the extent of Rs.8.9 crores under this head. The question is whether the case of DIC for such liquidity damages was covered under Clause 18 or Clause 22 of the General terms and conditions of the contract. Clause 18 stipulates the price reduction schedule for delay in co-operation. In case the contractor fails to complete successfully the system within the time fixed under the contract, the contract price shall be reduced at the rate of 1% of the contract value per week of delay or part thereof subject to the maximum of 15% of the contract value. Clause 18 of the General conditions of the contract reads as under :

> " 18.0 Price Reduction Schedule for delay in Co-operation: If the Contractor fails to successfully commission the complete system within the time fixed under the

> Contract, the Contract Price shall be reduced at the rate of 1% of the Contract value per week of delay or part thereof subject to the maximum of 15% of the Contract value. "

But this clause was amended subsequently and one percent was reduced to = percent and 15 percent was reduced to 5 per cent as per the consolidated agreement. The said amendment reads as under:

> " II) PRICE REDUCTION SCHEDULE IN THE ENVENT OF DELAYS:
>
> If the contractor fails to comply any of the time schedule mentioned hereinabove, the Contract price shall be reduced @ =% of the total contract value per week of delay or part thereof subject to a maximum of 5% of the total contract value i.e. total aggregate contract value of Contract Nos.3244-00- LZ-PO-7012/10091 and 3244-00-LZ-PO-7013/10092 mentioned hereinabove. Price reduction as set forth in this clause shall be the sole remedy available to owner and the sole liability of the contractor for delay. In the event of delay of over 10 weeks, owner may exercise their rights to invoke any or all provisions under this agreement."

This was for the contractor's failure to complete the contract.

13. However in this connection, our attention was invited to clause 22. This relates to delay on the part of the owner or its various agents. Clause 22 reads as under :

> " 22.0 Delay by Owner or his Authorised Agents :
>
> 22.1. In case the Contractor's performance is delayed due to any act of omission on the part of the Owner or his authorized agents, then the Contractor shall be given due extension of time for the completion of the works, to the extent such omission on the part of the owner has caused delay in the Contractor's performance of his work. 22.2. In addition, the Contractor shall be entitled to claim demonstrable and reasonable compensation if such delays have resulted in any increase in the cost. The owner shall examine the justification for such a request for claim, and if satisfied, the extent of compensation shall be mutually agreed depending upon the circumstances at the time of such an occurrence."

In terms of this clause if delay has been caused to the contractor on account of the omission or commission on the part of the owner or its authorized agent then the contractor is entitled to claim demonstrable and reasonable compensation if such delay has resulted in any increase in the cost. In that case, the owner shall examine the justification for such claim and if satisfied then compensation shall be mutually agreed depending upon the circumstances at the time of such an occurrence. Since DIC's claim for compensation was on account of delay on the part of the owner, therefore, it was the obligation on the part of DIC to demonstrate as to how delay has escalated the loss to it. Then and then alone the claimant will be entitled to the compensation for this delay. The minority Arbitrator has taken the view that since the claimant has nothing to demonstrate therefore, it is not entitled to

any compensation whatsoever. However, the majority has taken the factum of delay by reviewing all evidence on record and has come to the conclusion that there was a delay of 929 days and on the basis of factual assessment has granted damages to the extent of 5 % of the total contract value. An argument was raised that in fact 5 % damages could be granted under clause 18 to the owner for the delays on account of the contractor and the contractor has to demonstrate reasonably how loss has occurred to him. However, the majority of the Arbitrators has taken into consideration the parameter that in case the delay was occasioned on the part of the contractor, then the owner would have been entitled to the damages to the extent of 5%. This has been taken as the yardstick and the compensation has been worked out at 5% of the contract value and damages to the tune of Rs.8.9 crores has been awarded to the claimant. We are of opinion that this issue is purely dependent on the factual controversy of the matter and the majority of the arbitrators has assessed the loss on account of the delays on the part of the owner and awarded 5% of the contract value as a measure to award compensation to the owner on account of the delay on the part of the owner in completing the work and no exception can be taken to this approach. The amount cannot be said to be a wrong assessment of the situation. We cannot sit over the finding of fact arrived at by the majority of Arbitrators and affirmed by the High Court. Therefore, we accept the view taken by the Division Bench of the High Court in accepting the view the majority of the Arbitrators in granting damages to the tune of Rs.8.9 crores in favour of the claimant- DIC.

[Rs.8.9 crores granted as damages for delay of 929 days]

13. Next item relates to interest on borrowing of the funds. Under this head, the DIC has claimed Rs.6.5 crores. The majority of the Arbitrators has granted Rs.0.2 crores. However, the minority award has denied the claim. The High Court has affirmed the majority view of the Tribunal. Since in view of our finding on the issue of delay in liquidity damages we are of opinion that the view taken by the majority of the arbitrators is correct as there was delay on the part of the owner NRL and therefore, DIC had to pay interested on the delayed sum. Therefore, the view taken by the majority of the arbitrators cannot be said to be wrong as it is a pure question of fact and therefore, we are of opinion that the grant of Rs.0.2 crore towards interest on delayed amount has been rightly held by the majority of the arbitrators and affirmed by the High Court. [Rs.0.2 crores granted as interest paid on delayed funds]

14. The next claim is with regard to interest. The majority of the arbitrators have granted interest on the amount at the rate of 12 per cent pendente lite and post pendente lite at rate of 18 per cent but the minority arbitrator, Justice M.M.Dutt has granted 10 per cent interest uniformally. The grant of interest is discretionary and the majority of the arbitrators has rightly granted interest at the rate of 12 per cent pendente lite and at the rate of 18 per cent post pendent lite. Therefore, no exception can be taken to grant of such interest. Consequently, we affirm this finding of the majority of the Arbitrators and of the High Court.

[Interest at the rate of 12% P.I. & at the rate of 12% post P.I.]

15. Hence, as a result of our above discussion, we are of opinion that the claimant DIC is entitled to Rs.2 crores for substituted material, Rs.8.9 crores for liquidity damages, Rs.0.2 crore as interest

paid on the delayed funds i.e. Rs.11.1 crore (Rs.2 crore + Rs.8.9 crore + Rs.02 crore) and finally interest at the rate of 12 per cent pendente lite from the date of the claim petition till realization. The payment should be made within a period of six months from today failing which it will carry interest at the rate of 15 per cent per annum. The appeal arising out of S.L.P.(c) No.20989 of 2006 is partly allowed. The order passed by the High Court is modified as indicated above. The claim of the DIC is decreed to the extent indicated above. However, the appeal arising out of S.L.P.(c) No.4409 of 2007 filed by the DIC is dismissed. No order as to costs.