N THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :01.11.2019

CORAM

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

C.S.No.305 of 2000
and A.Nos.4916 of 2017 & 5638 of 2019

UNITECH Limited
"Unitech House",
No.6, Community Centre,
Saket, New Delhi-110 017. .. Plaintiff

Vs.

1. Sports Development Authority of
Tamil Nadu rep. by its
Member-Secretary,
116-A, Periyar EVR High Road,
Chennai-600 084.

2. Government of Tamil Nadu
rep. by its
Secretary to Government,
Youth Welfare and Sports
Development Department,
Fort St. George, Chennai-600 009. .. Defendants

* * *

Prayer : Civil Suit filed under Order IV Rule 1 of the Original Side Rules read with Order VII Rule 1 of the Code of Civil Procedure praying to pass a judgment and decree directing the first defendant to pay the plaintiff a sum of Rs.7,77,34,281/- together with interest at 18% per annum on Rs.4,69,99,649/- from the date of plaint till realization.

* * *

For Plaintiff : Mr.Karthik Seshadri
for M/s.Iyer and Thomas

For Defendants : Mr.S.Gomathinayagam,
Senior Counsel for
Mr.N.Ramiah for D1

Mr.N.Manikandan,
Govt. Advocate (CS) for D2

JUDGMENT

The suit is for recovery of money to the tune of Rs.7,77,34,281/- together with interest at 18% per annum on Rs.4,69,99,649/- from the date of plaint till realization filed by the plaintiff, who is a Contractor.

2. The plaintiff is a public limited company and the first defendant is a Society registered under the Tamil Nadu Societies Registration Act, 1975, and constituted in terms of G.O.Ms.No.641, Education, Science and Technology Department, for the purpose of development of sports. The second defendant is the Government of Tamil Nadu. The suit is filed for the recovery of money by the plaintiff, who is a Contractor. The amount, being the additional expenses incurred for executing the work of construction of the Stadium for the Seventh South Asian Federation Games (SAF Games), which was held in December 1995.

3. Since it was a prestigious project and the same had to be completed within the rigid time-frame, a tender was called for from the pre-qualified contractors. The plaintiff company, one of the leading contractors, was a pre-qualified tenderer. A pre-bid meeting was held between the representatives of various pre-qualified contractors, including the plaintiff, and the officers of various Departments of the second defendant. The plaintiff submitted its tender on 07.01.1995 for the work and subsequently, there were further negotiations in respect of which, the plaintiff was requested to offer a rebate on the rates quoted. After the plaintiff's offer, its overall rebates of quoted rates by communication dated 11.01.1995, the first defendant by its letter dated 18.01.1995 accepted the plaintiff's tender for the work to the value of Rs.20,25,77,152/-. The communication of acceptance of the tender containing several conditions was sent to the plaintiff and the plaintiff had duly signed the same for accepting the award of the work. As per the terms of the tender, the time for completion of the work was 10 months from the 15th day of the work order, which comes to 02.02.1995 and the date of completion was fixed on 01.12.1995.

4. Accordingly, an agreement dated 31.01.1995 was executed by the plaintiff in favour of the first defendant. The first defendant was duty bound to handover the possession of the site prior to 02.02.1995

to enable the plaintiff to commence the work. However, the site was not handed over till 29.04.1995, as there were certain encroachments on the site and the encroachers had obtained an order of stay from this Court, which was vacated later and possession of the site was handed over on 29.04.1995 only resulting in a delay of three months in handing over the site to the plaintiff and the said delay had caused financial loss to the plaintiff, as the best working season for construction was lost and the equipment, men and machinery, including the construction material mobilised by the plaintiff could not be utilized.

5. It is claimed that after the commencement of the work, it was noticed that there was a sewerage line of the metro water running under the proposed site for the Indoor Stadium. Therefore, the first defendant shifted the stadium site by 15 meters towards north into the existing lagoon. As the work had to be shifted into a pond, it resulted in further delay in starting the piling work and also the entire survey work had to be redone. The affected portion of the lagoon had to be raised upto 3-4 meters resulting in enormous amount of filling up in the lagoon. The shifting of the site to the lagoon area also had resulted in redoing the entire design. This additional work also resulted in further delay of 45 days in the job. Thus, out of 10 months

time frame fixed for completion of the work, 4 ½ months lost due to the above said reasons for the plaintiff and the plaintiff had to compress the entire work within the remaining 5 ½ months for completing the project within the time schedule given.

6. As per the agreement, an Architect, who is the first defendant's representative, was engaged for supervising the quality, accuracy, etc. and also to check the measurement and certify the Contractor's bills. Even during the review meetings for the progress of the construction of Multi-purpose Indoor Stadium, the plaintiff had explained and clarified to the defendants about the delay caused in the commencement of the work, on account of the delay in handing over the possession of the site and also on account of the shifting of the site into a lagoon. As the project was a time bound one, the plaintiff gave them a plan of action and stated that to keep up the target within the time, additional sources had to be mobilized. Therefore, the plaintiff requested the defendant (i) the secured advance for all materials purchased and collected at site be paid ; and (ii) due to additional mobilization required in a short time their overheads and cost gone up and therefore, enhanced rate by 15% should be given. The plaintiff also had communicated the same by their letter dated 26.08.1995 setting out the details of additional expenditure on account of

overhead and costs that would be required to be paid to complete the work within the compressed time schedule. Even without waiting for the confirmation of the request made by the plaintiff, the work was proceeded with in order to strictly adhere to the time schedule. Despite the climatic conditions with the intervening and unseasonal rains, the plaintiff bestowed enormous efforts to mobilize the men, material and machinery to make the stadium ready for the SAF Games and the stadium was also inaugurated on 23.12.1995 by the then Chief Minister of Tamil Nadu and the SAF Games were also conducted successfully.

7. By communication dated 08.03.1996, the plaintiff sent a bill for additional expenses incurred under the compressed time schedule and requested Architect to arrange for processing of the bill and forward the same for payment. The Architect also scrutinized the same and made necessary corrections and according to the Architect, the correct amount payable towards the additional expenses incurred by the plaintiff for executing the work under the compressed time schedule is Rs.3,03,86,573/-. The Architect also had given his remarks and stated that his recommendation for payment towards the additional expenditure incurred for executing the work within the compressed time schedule was in order.

8. Despite the recommendations, the first defendant neither made the payment nor denied the same. The virtual date of completion of the work was taken as 31.10.1996 and in terms of the contract, the first defendant returned 50% of the Retention money. The defects liability period of two years was taken from the virtual date of completion of work and the remaining 50% of the retention amount was refunded to the plaintiff on 24.02.1997 after the defects were rectified by the plaintiff.

9. In so far as the final bill is concerned, the same was submitted on 12.05.1997 to the Architect as in terms of the contract, the bills have to be certified by the Architect. The Architect, after scrutiny, had forwarded the final bill to the first defendant on 16.06.1997. As per the Architect's certificate, a sum of Rs.1,66,13,076.35 was due to the plaintiff under the final bill. He also stated that this amount may be paid to the plaintiff directly under intimation to him. Even the said amount was also not paid to the plaintiff for more than three years from the date of certification by the Architect.

10. The plaintiff has stated that due to the shifting of the site of the work and also removal of encroachment over the site, the handing over of the site got delayed by 5 ½ months out of the original schedule

of 10 months. As the first defendant also had insisted on completion of the work within the original schedule time, the plaintiff had to compress the work by incurring additional expenses. As the above claim made by the plaintiff under the head of additional expenses and final bill was only due to the action of the first defendant, the suit has been laid for recovery of the same with interest at the rate of 18% for the additional expenses for the period from 08.03.1996, which is the date of submission of the Bill to the Architect, till the date of plaint and at the same rate for the amount due under the final bill from 16.07.1997 till the date of plaint.

11. The first defendant filed a written statement denying all the allegations and the claim of the plaintiff. The first defendant claimed that it is a non-profit organization and is a society registered under the Societies Registration Act with the motto of promoting sports throughout the State of Tamil Nadu. It floated tenders for construction of stadium in various places at Chennai as per International Standards for the conduct of VII SAF Games in December, 1995. The plaintiff was the successful bidder for the construction of the Multi Purpose Indoor Stadium and thus, the first defendant issued Work Order dated 18.01.1995 favouring the plaintiff and also entered into an agreement on 31.01.1995, and the said document contained clauses stipulating

time for completion of the work, from which date the commencement of work has to be reckoned, alteration of drawings, etc. The first defendant also stated that para 6 of the Work Order specifically stipulated that "the rates quoted shall be firm till completion and they shall hold good to any quantity with no limit on variation either on plus or minus side. No extra claim therefor shall be made for any reason whatsoever." Further, para 29 barred the contractor from seeking compensation for any loss suffered by it on account of delay in commencing or executing the work. Para 34 of the Work Order mandated the contractor to seek prior authorisation for doing any extra work. The first defendant also stated that the claims for payment of interest on outstanding amounts were not tenable and the scope for escalation was also ruled out.

11.1. It is the case of the first defendant that the plaintiff had occupied the site as early as on 17.03.1995 and had commenced the work, which is evident from their own letter dated 07.04.1995 and reasons for the delay in handing over of the entire site are known to the plaintiff. Thus, the claim of the plaintiff that the site was handed over only on 29.04.1995 leading to the delay in completion of the work was denied by the first defendant. In fact, the first defendant in order to complete the construction in time and to conduct the prestigious events decided to reduce the height of the Stadium by 4.50 metres,

which will reduce the seating capacity, at the request of the plaintiff to their advantageous, which was adverse to the first defendant. The first defendant also stated that the contributory negligence of the plaintiff is the reason for the delay. Therefore, it is stated that the claim of the plaintiff that it had completed all the works on time and had delivered possession of the Indoor Stadium on time is false and such claim was made only to enhance the additional rates and interest.

11.2. The first defendant also claimed that clause 6 of the Agreement indicated about the alteration in drawings and para 13 of the conditions of contract provided for the inspection of the site before submission of the tender. Hence, the allegation of the plaintiff that the structural redesigning of the stadium and providing additional pile caps and columns due to the shifting of the stadium in the lagoon area by 15 meters caused further delay of 4½ months and thus, they had left with only 5 ½ months is without basis and the same cannot be accepted.

11.3. The first defendant also stated that the Architect in his letters and Minutes dated 23.03.1996, 08.04.1996, 19.04.1996, 16.05.1996, 29.07.1996, 01.08.1996, 05.08.1996, 06.09.1996, etc. indicated about the pending works and gave directions to the plaintiff to expedite the work. The plaintiff completed the work 17 months after the scheduled date of completion and the stadium was handed

over only on 31.10.1996 in part and on 02.05.1997 in full, but not on 30.11.1995, and the said fact is evident from the plaintiff's own letter dated 08.01.1997, wherein, they informed the completion of the construction and asked the first defendant to take over the stadium. Hence, the claim of the plaintiff for 15% additional amount was baseless and unreasonable.

11.4. The first defendant relied on Clause 8 of the Agreement and para 43 of Condition of Contract to substantiate that they are entitled to levy 5% on the balance of the incomplete work as liquidated damages for non-completion of the work within the stipulated time schedule. The Architect assessed the value of the incomplete work as on 22.12.1995 at Rs.2,39,73,218/- and accordingly, the liquidated damages was begged at Rs.56,93,640/- for a period of 57 months reckoned from 01.12.1995 to 31.08.2000. After deducting the said amount, the first defendant was liable to pay only a sum of Rs.1,02,67,661/- to the plaintiff. The first defendant also claimed that the plaintiff while submitting the final bills did not furnish the details on non-tendered items and hence, after assessment, the liability of the first defendant was arrived at Rs.24,23,457/-, of which, a sum of Rs.9,03,324/- alone was to be paid on the non-tendered items leading to the total liability of Rs.1,59,61,301/-.

11.5. In the written statement summing up its contentions the first defendant had stated that since it is essentially a contractual dispute and the rights and liabilities of both parties are derived from the provisions of the contract and have to be determined within the boundaries of the contract and the plaintiff, having entered into the contract willingly knowing fully the provisions of the contract and the time schedule, non-escalation clause, non-provisioning of payment of interest for delayed payment, cannot maintain the instant suit.

11.6. The first defendant sought for dismissal of the suit with cost, while allowing its counter-claim of Rs.56,93,640/-, being the liquidated damages as per Clause 8 of the Agreement.

11.7. The second defendant adopted the written statement of the first defendant.

12. On the above pleadings, the following issues were framed by this Court :

1. Whether there was delay in handing over the site as alleged by the plaintiff?

2. Whether by reason of shifting the stadium site, the plaintiff had lost 45 days in the job, which compressed in time schedule?

3. Whether the plaintiff is entitled to claim of Rs.3,03,86,573/- together with interest as claimed in para 6 of the plaint and for the reasons stated therein?

4. Whether the plaintiff is entitled to claim a sum of Rs.1,63,13,076/- being the amount due under final bill together with interest at 18% p.a?

5. Whether the counter claim made by the defendant in sum of Rs.56,93,640/- towards alleged damages is sustainable?

6. To what relief are the parties entitled to?

13. The Vice President (Projects) of the plaintiff's company examined himself as P.W.1 and in lieu of chief examination, filed his proof affidavit and marked Exs.P1 to P45. Mr.P.Samuel Raja Daniel, Manager-1 of Sports Development Authority of Tamil Nadu was examined as D.W.1, who has filed the proof affidavit, 6 documents were marked as Exs.D1 to D6 on the side of the defendants.

Issue Nos.1 and 2:

14. The suit is filed for recovery of money basically on two heads of claims, viz., additional expenditure incurred for executing the work under a compressed time schedule and the amount due under the final bill dated 16.06.1997. The project in question was for constructing a new Indoor stadium and the plaintiff qualified to be the builder, who was offered the work.

15. The letter issued by the first defendant to the plaintiff accepting the tender quoted by the plaintiff was marked as Ex.P1(b) and the contract agreement entered into between them was marked as Ex.P2 dated 31.01.1995.

16. Clause 4 of Ex.P1 (b) provided that the date of commencement of work will be taken as 02.02.1995 and the date of completion/handing over the work shall be on 01.12.1995. The plaintiff had to mobilise the adequate resources, manpower, equipment and materials for ensuring timely completion of work. As SAF games were to be conducted in the proposed stadium, which is an international fixture involving the prestige of the country and in particular of the State, there was absolutely no provision for extension for any reason.

17. Clause 6 of Ex.P1 (b) mentioned that the rates quoted shall be firm till completion and they shall hold good to any quantity with no limit to variation either on plus or minus side. No extra claim therefore shall be made for any reason whatsoever.

18. After the contract was signed, there was a delay in handing over the site to the plaintiff to commence the work on time. According to the plaintiff, the site was handed over only on 29.04.1995 with a delay of almost three months.

19. There were two reasons for the said delay. Firstly, there were encroachments by hut dwellers, who could not be removed due to the stay granted by this Court. The stay order could be vacated by the defendants only on 17.03.1995. Even though the stay order was vacated on 17.03.1995, the eviction of encroachers on the site could not be done immediately. The above facts are also clear from Exs.P3 and P5. Ex.P3 is the letter dated 07.04.1995 sent by the plaintiff to the first defendant acknowledging the order of vacating the stay, after which, a strip of lands were levelled. However, the hut dwellers were not evicted and there was a risk in starting the piling work, as there was no control over the children playing there. This is also evidenced by Ex.P5 dated 22.04.1995, which is the letter sent by the plaintiff to

the first defendant requesting the best co-operation in taking steps to vacate the hutment dwellers from the said place. Finally, the site was handed over to the plaintiff only on 29.04.1995. As such, the delay in handing over the site was admitted and borne out of the records.

20. The other reason for the delay was due to shifting of the location of the building. As per Clause 3 of the Contract Agreement-Ex.P-2 dated 31.01.1995, the Architect was to be nominated by the defendants. The plaintiff was bound to execute the work as per the directions of one M/s.C.R.Narayana Rao, the Architect, nominated by the defendants. Accordingly, the Architect directed the plaintiff to shift the location of the building by 3 meters North and 15 meters East into the lagoon to avoid MMWSSB sewer line. This is also evidenced by Ex-P4, which is the letter dated 22.04.1995 sent by the Architect to the plaintiff requesting them to shift the building to avoid the sewerage line. In view of such shifting of the building, the plaintiff was forced to re-do the entire survey. As the portion of the building had to move to the lagoon, it had to be reclaimed and filled upto 3 to 4 metres. Further, the design of foundation and the structural RCC frame had to be redone completely. The number of piles and pile caps had to be increased. Consequently, the pedestals over pile caps had to be increased. The plaintiff had to re-design the lagoon area as RCC load

bearing floor.

21. The above said major two reasons had substantially delayed the project, as the site itself was handed over to the plaintiff only on 29.04.1995. As the Architect is the key person, whose instructions, the plaintiff has to rigidly follow and as per his instructions, the shifting was done. It was not the independent decision of the plaintiff. As these facts are admitted by the first defendant, there was a time loss of 4 1/2 months out of the total project schedule of 10 months for the plaintiff for no fault of it.

22. In fact, the plaintiff had put the first defendant on notice about the loss caused due to delay and also the extra cost has to be incurred by it for completion of the work within the compressed time. Though it is expected that when such kind of major alterations were done, the cost of the construction and the time period is directly proportional and the first defendant cannot refuse the claim of the plaintiff.

23. In fact as per Exs.P8, P9, P10 and P11, the plaintiff had expressed the difficulties faced by them due to change in circumstances and also had intimated the first defendant that they will

submit the claims in respect of these unanticipated circumstances. The plaintiff had also sent a letter dated 26.08.1995 requesting the first defendant to consider 15% enhancement in the contract value to cover a portion of the loss suffered by the plaintiff on account of shifting of the location and also the compressed time schedule. After the discussions, the plaintiff had also submitted detailed workings for the loss incurred under Ex.P3 on 07.09.1995.

24. Ex.P14 is the letter dated 11.09.1995 addressed by the first defendant to the plaintiff expressing urgency to ensure the timely completion and the constant monitoring of work. The said letter had also stipulated for completion of the entire work in all respects by 30.11.1995 and also recommended engaging sub contractors to complete the work without regard to rates. In furtherance to the same, on 11.09.1995 under Ex.P15, the plaintiff had also sought for approval of their proposals for securing the advance on materials and enhancement of the rates which will help them in expediting the progress of the work.

25. It is also pointed out that the virtual completion has been done and the Stadium was inaugurated by the then Chief Minister of Tamil Nadu on 02.12.1995 and the Stadium was also used for

conducting VII SAF Games. The Architect appointed by the defendants also had certified on 10.01.1996 under Ex.P20 that the Indoor Stadium was virtually complete with all essential features like play field, wooden flooring, lighting, player and umpire rooms, public toilets etc. The Architect also recommended that the claim of the plaintiff be favorably considered and finalised. The said Architect addressed the Principal Secretary of the second defendant on 05.05.1996 under Ex.P26 offering his remarks and explaining that due to the compressed time schedule, the additional labour force had to be deployed, more materials had to be stockpiled and also additional equipment and additional cranes, excavators, tractors, dozers had to be deployed. The said Ex-P26 is the document, which is in compliance with the Ex.P2-Contract Agreement and it specifically had provided for certification of the Architect in all respects. Thus, admittedly, there has been delay in handing over the site, as alleged by the plaintiff and due to shifting of the Stadium, the plaintiff had lost about 45 days in the time schedule as agreed upon and had to complete the work within the compressed time schedule. As the claim of the plaintiff that the site was handed over belatedly resulting in loss of 45 days in the specified time period, the issues 1 and 2 are answered in favour of the plaintiff.

Issue No.3:

26. The plaintiff has claimed a sum of Rs.3,03,86,573/- as additional expenses for shifting of the Stadium and also for the huge loss resulting in moblising of more materials and manpower. In view of the delay in handing over the site for construction and also time taken for completion of the project within the time agreed upon, there was an additional cost incurred by the plaintiff. Hence, 15% escalation in the tender value was claimed.

27. The learned Senior Counsel appearing for the first defendant vehemently contended that the contract is silent about any escalation of price in the project. Hence, the plaintiff is not entitled for the said claim. He also drew the attention of this Court to the work order and the General Instructions 29 and 34. As per Clause 34, "when any instruction or decision given at site involves extra work or where the Contractor may plan to claim an extra, it shall be the responsibility of the Contractor to inform the Employer / Architect of the extra amount and get written authorisation from the Architect and or the Employer before proceeding with the work involved."

28. In this regard, it is pointed out by the learned counsel for the plaintiff that the delay was caused due to the first defendant's failure to hand over the site without hindrances and also the re-location of the site into the lagoon.

29. Exs.P9 to P14 were relied upon by the plaintiff to state that the first defendant was put on notice of their intention to claim extra amount for the compressed schedule. Hence, both the additional work and the compression of the time frame cannot be disputed by the first defendant.

30. It is further contended that the defendants are estopped from relying on exclusion clauses to avoid liability to pay compensation. In this regard, it is relevant to advert to Section 55 of the Contract Act, which reads thus:

> "*55. **Effect of failure to perform at a fixed time, in contract in which time is essential.**—When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the*

intention of the parties was that time should be of the essence of the contract.

***Effect of such failure when time is not essential**.—If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.*

***Effect of acceptance of performance at time other than that agreed upon.**—If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance he gives notice to the promisor of his intention to do so.*

31. It was argued by the learned counsel for the plaintiff that the application of Section 55 of the Contract Act, 1872 does not stand ousted. When there are reciprocal promises between the parties, the Contractor would be entitled to compensation where the employer commits breach and thereafter instead of repudiating the contract the

contractor performs his obligations under the contract after giving notice of his intention to claim damages and compensation.

32. The learned counsel for the plaintiff placed reliance on the decision of the Hon'ble Supreme Court reported in **2002 (4) SCC Page 45 [GENERAL MANAGER, NORTHERN RAILWAY AND ANOTHER -VS- SARVESH CHOPRA]**, wherein, it has been held in paragraph 15 as follows:

> **"15.** In our country question of delay in performance of the contract is governed by Sections 55 and 56 of the Indian Contract Act, 1872. If there is an abnormal rise in prices of material and labour, it may frustrate the contract and then the innocent party need not perform the contract. So also, if time is of the essence of the contract, failure of the employer to perform a mutual obligation would enable the contractor to avoid the contract as the contract becomes voidable at his option. Where time is "of the essence" of an obligation, *Chitty on Contracts* (28th Edn., 1999, at p. 1106, para 22-015) states
>
> "a failure to perform by the stipulated time will entitle the innocent party to (*a*) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed; and (*b*) claim damages from the contract-breaker on the basis that he has committed a

fundamental breach of the contract ('a breach going to the root of the contract') depriving the innocent party of the benefit of the contract ('damages for loss of the whole transaction')".

If, instead of avoiding the contract, the contractor accepts the belated performance of reciprocal obligation on the part of the employer, the innocent party i.e. the contractor, cannot claim compensation for any loss occasioned by the non-performance of the reciprocal promise by the employer at the time agreed, "unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so". Thus, it appears that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations: (*i*) if the contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act, (*ii*) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (*iii*) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms.

33. Reliance was also placed on the decision reported in **2017 (8) SCC 146** ***(ASSAM STATE ELECTRICITY BOARD AND OTHERS -VS- BUILDWORTH PRIVATE LIMITED),*** wherein, in paragraphs 14 and 18, the Hon'ble Apex Court held as follows :

> **"14.** In *Hudson's Building and Engineering Contracts* (11th Edn., pp. 1098-99) there is reference to "no-damage" clauses, an American expression, used for describing a type of clause which classically grants extensions of time for completion, for variously defined "delays" including some for which, as breaches of contract on his part, the owner would prima facie be contractually responsible, but then proceeds to provide that the extension of time so granted is to be the only right or remedy of the contractor and, whether expressly or by implication, these damages or compensation are not to be recoverable therefor. These "no-damage" clauses appear to have been primarily designed to protect the owner from late start or coordination claims due to other contractor delays, which would otherwise arise. Such clauses originated in the federal government contracts but are now adopted by private owners and expanded to cover wider categories of breaches of contract by the owners in situations which it would be difficult to regard as other than oppressive and unreasonable. American jurisprudence developed so as to avoid the

effect of such clauses and permitted the contractor to claim in four situations, namely, (*i*) where the delay is of a different kind from that contemplated by the clause, including extreme delay, (*ii*) where the delay amounts to abandonment, (*iii*) where the delay is a result of positive acts of interference by the owner, and (*iv*) bad faith. The first of the said four exceptions has received considerable support from judicial pronouncements in England and the Commonwealth. Not dissimilar principles have enabled some Commonwealth courts to avoid the effect of "no-damage" clauses. (See *Hudson*, *ibid.*).

18. In the case before us, the claims in question as preferred are clearly covered by "excepted matters". The statement of claims, as set out in the petition under Section 20 of the Arbitration Act, does not even prima facie suggest why such claims are to be taken out of the category of "excepted matters" and referred to arbitration. It would be an exercise in futility to refer for adjudication by the arbitrator a claim though not arbitrable, and thereafter, set aside the award if the arbitrator chooses to allow such claim. The High Court was, in our opinion, not right in directing the said four claims to be referred to arbitration."

34. It is also alleged by the learned counsel for the first defendant that the plaintiff did not carry out the work as required and

it is the plaintiff, who has to be blamed for non completion of the work. The said argument is unnecessary, as it was already admitted by the defendants that the plaintiff was given possession of the site only belatedly and the time given was not extended in view of the importance of the event, for which, the same was constructed. After the Stadium was put to use for the purpose specified, certain minor defects and additional work were also carried out by the plaintiff. The retention money of 50% was returned on 25.03.1997 and the balance of 50% of the retention money was released on 26.02.1999.

35. As stated in the written statement, after the virtual completion, the certificate was issued. When all the works were designed by the Architect and carried out as per his instructions, the plaintiff cannot be found fault with it. The bills raised by the plaintiff were also duly certified by the Architect, as he had been closely monitoring the progress of work. Therefore, the claim that the plaintiff was not carrying out the work as required, has to be rejected.

36. Yet another objection raised by the defendant is that the height of the Stadium was reduced by 4.5.mtrs resulting in loss of capacity. Once again, it has to be reiterated that the plaintiff had no role to play in this decision, as Ex.D2 letter clearly indicates that the

Government had approved the reduction of the height of Indoor Stadium by 4.5 meters, based on which, the plaintiff was given the suitable instructions and completed the work as required.

37. The next contention of the defendant that ever after the alleged virtual completion, the plaintiff had to carry out the work for more than 17 months after the scheduled time for delivery. It is also not in dispute that the Stadium was used for volley ball event as planned. Hence, it should be deemed that the construction was completed in all respects. The Architect also had certified that the construction of the Indoor Stadium was fulfilled and recommended the claim of the plaintiff to be favourably considered and finalised.

38. However, it was argued by the learned senior counsel for the first defendant that even the recommendation of the Architect dated 08.03.1996 for extra payment of 15% was unacceptable and rejected by the first defendant as early as on 04.02.1999 and communicated on 23.02.1999. The receipt of the said communication was denied by the plaintiff and the same is evident from the fact that the first defendant had not produced either the order or the letter as claimed. In any case, such unilateral rejection by the first defendant is not binding on the plaintiff, as the plaintiff has only made the

legitimate claim based on the work done.

39. As the performance has been accepted, this Court is disposed to think that there would not be any impediment for entertaining the claim of the plaintiff. The above analysis of the facts and documents would only entitle the plaintiff of its claim of Rs.3,03,86,573/-, which is the additional expenditure incurred by it. Issue No.3 is answered in favour of the plaintiff and against the defendants.

Issue Nos.4 and 5:

40. These issues relate to the claim of the plaintiff with respect to the final bill of Rs.1,66,13,076/-. In this regard, the first defendant has also made a counter claim of Rs.56,93,640/- towards the alleged damages. In the written statement, they have made the counter claim in Paragraph 35. In this regard, when it was questioned in the cross examination to D.W.1, he has admitted as follows:

> "I do not know whether the first defendant had disclosed in the affidavit of documents about the architect's letter dated 30.07.1997 wherein he had valued the incomplete works as on 22.12.1995 at Rs.2,39,73,217/-. Further he has stated that as per Clause 8 of the Agreement, a sum of Rs.56,93,640/-

was arrived at as the liquidated damages for a period of 57 months reckoned from 01.12.1995 to 31.08.2000."

41. Further, when countenanced with the question with respect to liquidated damages, the following were the answers given by D.W.1.

"There is no percentage specified in Clause 8 of the contract agreement. The tabular column in Clause 43 of the conditions of the contract provides levy of penalty at 0.5% per week.

I do not know why the liquidated damages was arrived at for a period of 57 months beyond 01.12.1995, i.e. upto 31.08.2000. Clause 44 of the terms and conditions of the contract namely the architect shall issue a certificate to the effect that the works were practically completed and the virtual completion of the work shall be deemed for all the purpose of this contract to have taken place on the day named in such certificate."

Thus, the defendants are unable to explain as to how the liquidated damages is being claimed even without producing the Architect's letter dated 30.07.1997. In fact, the Architect's Certificate-Ex.P-36 certifies that the Final Bill- Ex.P35 did not levy any liquidated damages. It is

also pointed out that the Architect, in his letter dated 15.10.1997-ExP-38, had specifically opined that no liquidated damages shall be charged to the Contractor, as the reasons for the delay are not attributable to the Contractor and the delay in completion of the Stadium is no way affected the successful conducting of the functions in Indoor Stadium for which it was built. The defendants also have not examined the Architect in this regard. As held supra, when every technical and financial aspect of the contract has to be approved by the Architect appointed by the defendants and when the defendants are disputing the claim of the plaintiff, the Architect ought to have been examined. The non examination of the Architect is fatal to the case of the defendants.

42. In view of the above, the liquidated damages is not chargeable and the counter claim of the defendants has to be rejected. It is also relevant to point out that after the suit was filed, the first defendant had paid a sum of Rs.1,02,67,661/-. The said amount is against the claim of the final bill of Rs.1,66,13,076/- after deducting the counter claim made by the defendants. As already the counter claim of the defendants is rejected, the defendants have to pay the balance of the amount retained by them in the final bill claiming it towards liquidated damages. Thus, the plaintiff is entitled to the Final

Bill claimed as such after deducting the amount retained by the defendant as liquidated damages. Thus, issue Nos.4 and 5 are also answered in favour of the plaintiff and against the defendants.

43. Accordingly, the suit is decreed as prayed for with costs.

01.11.2019

Index : Yes / No
Internet : Yes
gg/srn

C.S.No.305 of 2000

PUSHPA SATHYANARAYANA, J.

gg/srn

C.S.No.305 of 2000

01.11.2019