
OIL AND NATURAL GAS CORPORATION VS. WELSPUN SPECIALTY SOLUTIONS¹

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CIVIL APPEAL NO. 6834 OF 2021

ARISING OUT OF SLP (C) NO. 19203 OF 2012)

The case highlights the importance of contractual obligations and the conversational clarity that should be communicated between parties. A civil appeal was filed before the Hon'ble Supreme Court. The Appeal No: 2826-2827 in the year 2016 was filed. The respondent is Welspun Solutions Ltd. (formerly known as Remi Metals Gujarat Ltd.). The appellant in this case is Oil and Natural Gas Cooperation, who went to the Supreme Court. The ONGC was aggrieved by the decision of the Arbitral Tribunal. There were many issues raised during the hearing of the arbitral tribunal. Can Time be Considered as an Essence of the Contract, to make supplies under the Four Orders can the delivery date can be estimated as per the extension of the delivery of the supply orders. This case summary discusses the course of the judgement pronounced by the Hon'ble Apex Court. This case questions the very nature of the challenged judgement whether the Arbitral Tribunal was right in setting aside the Arbitration Award in favor of ONGC. The date and time of delivery specified by the ONGC as per the POs is considered as the essence of the supply order given. It must be completed within the timeline provided. The ONGC asked Remi Metals to pay for the liquidated damages. The dispute arises whether the competent authority should grant the right or remedy to recover damages for breach of contract. The provisions of the Contract as follows that if incase the contractor fails to deliver for any of such transaction that has to be incurred during the due course of time as per the contractual obligations is likely to be entitled to recover liquidated damages for the breach of contract. The recovery of liquidated damages as agreed by the contractor to pay a sum equivalent to 1/2% (half percent) of the contract price of the complete unit per week for the postponement in the delivery for the genuine and pre estimated amount mutually promised

¹ LL 2021 SC 646

by the parties. The amount for the recovery of the liquidated damages of the 5% contract price of the whole contract price of the units ordered and the delivery period fixed was not adhered. The recovery will be initiated by the concerned paying authorities by the purchaser explained in the supply order in the bill for the payment of the cost of materials supplied by the contractor or his foreign suppliers in consonance with the Purchase Order.

Keywords- Purchase Orders, Time as the essence of the Contract, Arbitration Award, Contractual Obligations, Arbitration, Welspun Solutions Ltd, Oil and Natural Gas Corporation

The facts of the case are that, ONGC was floated by a global tender for the purchase of an aggregate quantity of seamless steel casing pipes of 3,93,297metres. Here, Welspun Specialty Solution formerly known as the Remi Metals Gujarat Ltd. The Welspun Specialty claims that it bid to supply as a supplier on behalf of a Russian company Volski Mills, Russia.

The case throws light on the failure and termination clause/ liquidated damages. The purchaser primarily emphasis on the performance of the contract through the essence of time for purchase of the Purchase Orders. The arbitral tribunal held that a mere clause in the contract for making time as the essence for the performance of the contract does not make any substantial difference. It was noted that the contract containing the provision for extension on the payment of the penalty on default would dilute the obligation of the performance making the contract ineffective. A wholesome view of the contract would be more definitive delegation of the obligations of the contractor. On the similar lines it was also held by the Arbitral tribunal that there is no breach of contract as far as the essence of time is concerned. The ONGC presented four categories of losses that were incurred. The types of tangible losses as follows, namely: (i) revenue loss; (ii) loss due to the use of higher PPF/grade casing; (iii) loss due to intra/inter-regional transportation; and (iv) loss due to foreign exchange fluctuation. The liquidated damages were waived off expressly by ONGC because of which it cannot claim damages incurred during the extended period. The ONGC was held entitled to the amount of rupees 2,09,28,995 as the retention. The ONGC was not satisfied with the awarding of the arbitral award to Remi Metals, so filed a suit in the District Court under section 34 of the Arbitration and Conciliation Act, 1996 who also mentioned that time is not the essence of the contract and only the incurred losses could be granted. The arbitration cost was reduced from 25 lakhs rupees to 9,40,000 rupees. Aggrieved by the District Judge's order, both the parties filed a suit before the Nainital High Court under section 37 of the Arbitration and Conciliation Act, 1996.

The Nainital High Court held that both District Judge as well as the Arbitral Tribunal has committed a gross error in the ONGC to prove its losses before recovering any damages. The petition filed by ONGC was allowed, whereas the petition filed by Welspun Specialty was dismissed. The counsel for Welspun Specialty submitted before the Hon'ble Nainital High Court and its reasoning from the Apex Court's Judgement **Associate Builders V. Delhi Development Authority** (2015) 3 SCC 49 that the arbitral award was reasonable and just. Time is not the essence as there was extension of time as well as the liquidated damages was provided as per the contractual provisions. It also stated that Hon'ble Nainital High Court should not interfere with the awards or in setting aside, as it should present a clear and unarbitrary understanding of that award given was patently illegal. The learned counsel for ONGC stated that a similar circumstance of imposition of damages occurred **ONGC V. Saw Pipes** (2003) 5 SCC 705.

The award cannot be given for this particular contract for specifying liquidated and unliquidated damages. Time is the essence of this contract as the extensions that were given are a clear indication. The award given is an interpretation of the contractual clauses that unreasonable and plausible in nature. Before the amendment of 2015 for Arbitration and Conciliation Act, 1996 under Section 34(2)(b) of the Act clearly states that the arbitral award was in conflict with the Public Policy of India. The aim is to strike a balance between Appellate Powers and the Arbitral Procedure. The arbitral award was adversely affecting the principles of natural justice, eventually leading to patent illegality of the award given. **Renusagar Power Company Ltd. V. Electric Power Company** (1994) suppl (1) 644. The three-judge bench case **ONGC V. Western Geco International Case** (2014) 9 SCC 263 upheld that in the case **Saw Pipes** that illegality is the root of the matter in issue. **Dyna Technologies V. Crompton Greaves** (2019) states that a mere setting aside of the award should not be considered, unless the matter in issue is deeply affected with root cause. As per the section 74 of the Indian Contract Act, 1872 the penalty stipulated for breach of contract arises in the form of compensation. The Apex Court held that, in order to thoroughly examine whether the time can be considered as the sole basis for the delay and extension. But, later on it was held by the Tribunal that the time cannot be held as the sole basis as it was part of the contractual provisions. The measure damage/ liquidated damages cannot be claimed by ONGC as time cannot be considered as an essence. The clause 9(i) of the Purchase Order (PO) clearly states that the deadlines are subject to extension without actually the rights of ONGC being damaged. The conclusion is based on the Arbitral Tribunal reference from section 55 of the Indian

Contract Act, 1872. It explains that the Promisee is entitled to a compensation from the promisor, in the cases where the contracts are not affected by the essence of time. It also stated that losses shall be granted by evidentiary value and not the pre-estimated loss. The ONGC clearly gave an extension before the pre-estimation of the liquidated damages. Setting aside of the Arbitral Award would be arbitrary and unreasonable because the clear terms and conditions specified and accepted by both the parties. The Nainital High Court states that the aforementioned reason, i.e. time not being the essence of the contract, stands true. The second point it highlighted is that terms and conditions of the contract are clearly specified and not accepted by parties and clearly explains the ambit of liquidated damages, as explained under section 55 of Contract Act. The arbitral Tribunal stands true to the award given as the proclamation announced for imposition of liquidated damages as per the **Saw Pipes** case. The Apex Court further dismissed the judgement of High Court and District Judge was set aside and the Arbitral Tribunal decision stands correct.