

COMPENSATION FOR DELAY IN WORKS CONTRACTS

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In this fast developing era, thousands of works contracts are being awarded and executed in India at any given time. It is, however, noticeable that it is very rare that any of these projects is completed within the allotted time, more particularly when one of the parties is the Government or a PSU or a semi-Government undertaking or the like. This is despite the fact that it is well understood that it is neither in the interest of the Employer or the Contractor or the Nation that the works should be delayed. The reasons for delay are many and all of them are well-known and documented. Sometimes delay occurs on account of breaches committed by the Employer and at other times due to the Contractor. On occasions, delays occur for which neither party is responsible. Where the delay is due to the Contractor, the Employer normally provides an in-built mechanism in the contract for realization of damages in the form of liquidated damages. Where delay is due to the Employer, a Contractor has to seek his remedy by seeking compensation or damages either in a court of law or before the Arbitral Tribunal, if the contract provides an arbitration clause.

Broadly speaking, factors leading to delay on account of breaches of contract committed by the Employer include: (a) Delay in handing over unhindered possession of site; (b) Delay in appointment of Engineer/Architect; (c) Delay in supplying instructions/drawings for carrying out works; (d) Delay in supplying stipulated materials; (e) Unnecessary interference in the working of the contractor; (f) insufficiency of funds etc. These factors are illustrative and not exhaustive.

Where prevention by the Employer is a default to do something which is a condition precedent to the Contractor's obligation to do the work, the Contractor may treat the prevention as repudiation of the contract, but in other cases where prevention is only partial, the contractor can complete the work and seek his remedy in damages.¹ In *G.M. Northern Rly. Vs. Sarvesh Chopra*,² it has been held as follows:

“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

1. *Holme v. Guppy*, (1838)3 M&W 387; *Mackintosh v. Midland Counties Rly. Co.*, (1845)14 M&W 548; *Lawson v. Wallasey Local Board*, (1883)48 LT 507; *Emden's Building Contracts & Practice*, 8th Ed., p. 243.
2. (2002)4 SCC 45: AIR 2002 SC 1272

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.”

Consequences of delays caused due to non handing over of site: While inviting tenders, the Employer invariably requires the Contractor to visit the site so as to acquaint himself about the state of the site and so as to acquire knowledge about availability of resources, materials etc. available at or near the site. This invitation to visit the site pre-supposes that the Employer is in possession of land for execution of the works. In actual practice, however, it is often observed, especially in Government contracts, that site is not made available to the Contractor at the start of the work or even within a reasonable time. In some cases, even the formalities for acquisition of land are not completed when contracts are awarded. Where land is available, it is often encumbered, either due to existence of utilities, temporary structures, religious structures, crops etc. In such circumstances, the Employer requires the Contractor to execute the works in bits and pieces and in an unplanned manner.

There is an implied undertaking on the part of the building owner that he will hand over the land for the purpose of allowing the Contractor to do that which he has bound himself to do.³ If the Employer does not hand over the site at the time fixed by the

3. *Freeman v. Hensler*, (1900)64 JP 260.

contract, or immediately if no time is so fixed or if he excludes the Contractor from the site, the Contractor is entitled to throw up the work and bring an action for damages,⁴ or he may after he obtains the site continue with the work and bring an action for damages for breach of contract later.⁵ In the case of partial prevention, i.e. where the breach by the Employer is not fundamental and does not entitle the builder to cease work, or, being fundamental, is not treated as a repudiation by the builder, the measure of the damage is the loss of profit arising from the reduced profitability or added expense of the work carried out and completed by the builder. It is, of course, quite possible for a continuing fundamental breach by the employer first to affect the profitability of work carried out, since the builder may not immediately elect to treat the contract as at an end, and then to give rise to a claim for loss of profit on the uncompleted work when he does so.⁶

If the contract is delayed due to breaches on the part of the Employer, the Contractor would be entitled to recover compensation for loss of opportunity to earn profit elsewhere – the reason being that, but for the delay, the Contractor would have received back his key men, plant, equipment and working capital which collectively form the contract organization, ready for employment elsewhere. It is convenient for this purpose to envisage the contract organization as a profit-earning machine. The claim will be governed by time corresponding to the delay caused by the breach and by the potential daily, weekly or monthly profit-earning capacity of the particular contract organization.⁷

A Contractor is entitled to claim extra expenditure incurred on establishment, overhead charges, machinery, T&P, shuttering and scaffolding if the period of contract is prolonged due to breaches of contract on the part of the Employer.⁸ A Contractor can also be compensated in the form of revision of rates for works executed after the stipulated date of completion of the work.⁹ An arbitrator is entitled to award damages on account of increase in the cost of construction material or extra expenditure on overheads and establishment charges because these are damages which a Contractor suffers due to lengthening of the period of performance beyond the time originally fixed in the contract.¹⁰ A contractor can also make a claim for under-utilization of his machinery, equipment etc. during the stipulated period of contract in the event of breach committed by the Employer.¹¹

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4. *Roberts v. Bury Commissioners*, (1870) LR 5 CP 310.
 5. *Ibid*; *Miller v. London County Council*, [1934] All E.R. Rep 657; *Cowell v. Rosehill Racecourse Co. Ltd.*, (1937)56 CLR 605 at p. 621; *Uttar Pradesh State Electricity Board v. Om Metals & Minerals Ltd.*, 2000(3) RAJ 32 (SC).
 6. *Hudson's Building and Engineering Contracts*, 10th Ed., p. 596.
 7. CONSTRUCTION CONTRACTS : PRINCIPLES AND POLICIES IN TORT AND CONTRACT, BY I.N. DUNCAN WALLACE, p. 116; *P.C. Sharma v. D.D.A.*, 2006(1) RAJ 521 (Del).
 8. *Kishan Chand v. Union of India*, 1999(1) RAJ 510 (Del).
 9. *Municipal Corp. of Greater Mumbai v. Jyoti Const. Co.*, 2003(3) Arb LR 489 : 2004(1) RAJ 165 (Bom); *Alkaram v. Delhi Development Authority*, AIR 1980 NOC 47 (Delhi); *State of Karnataka v. R.N. Shetty & co.*, AIR 1991 Kant 96: 1991(1) Arb LR 334 (DB); *P.M. Paul v. Union of India*, AIR 1989 SC 1034: 1989(2) Arb LR 215; *R.P. Builders v. Union of India*, 1992(1) Arb LR 391 (Del).
 10. *Rawla Construction Co. v. Union of India*, ILR (1982)I Delhi 44; *Puranchand Nangia v. Delhi Development Authority*, 2006(2) Arb LR 456 (Del).
 11. *Krishna Bhagya Jala Nigam Ltd. v. G. Harishchandra Reddy and another*, (2007)2 SCC 720: AIR 2007 SC 817

A Contractor is entitled to escalation during the extended period of contract, especially if he is not responsible for delay in execution of works.¹² If there is an escalation clause in the contract, it would equally apply for the period during the extended period of contract as it did during the stipulated period.¹³ An arbitrator would, however, not be entitled to adopt an escalation formula different from that set out in the agreement for purposes of compensating the Contractor for delay in execution of contract.¹⁴

The Employer cannot be allowed to take advantage of such wrongs which result into prolongation of contract. The party committing breach of contract cannot demand performance thereof by the other party and consequently cannot retain or forfeit the security money deposited for performance of the contract if there is delay in execution of works.¹⁵

Delay due to issue of drawings: It is the duty of the Employer to furnish to the Contractor the necessary drawings within a reasonable time.¹⁶ When a Contractor engages labour for levelling and dressing of the site of construction and the Employer commits breach of the contract by not making available drawings on time, it cannot safely be said that the Contractor was prevented from performing his part of the contract within the stipulated time. Under such circumstances, the Contractor would be entitled to award of charges incurred on idle labour.¹⁷ If the machinery, tools, plants and establishment of the Contractor remains idle on account of non-supply of drawings and designs, an award on this account was held to be fair and equitable.¹⁸ Where in the course of execution of a contract, drawings and designs are changed as a result of which there is an abnormal increase in the quantity of work, the contractor would be entitled to claim higher rate for extra works required to be executed.¹⁹

Law and order: In a contract awarded by the State Government, if a Contractor is prevented from completing the work due to failure of the Government to maintain law and order, he would be entitled to compensation for increased cost of execution.²⁰

Delay in supply of stipulated materials: In case of delay in supply of materials contracted for, the damages are to be assessed with reference to the date fixed for delivery and the Court must estimate the rate as best as it can. If it is proved that after rescission of the contract the claimant acting reasonably and as prudent man, he might have made a contract at better rates that could be considered a ground for abatement of damages and if after the breach of the contract, fresh contract is entered which is at the risk of the party other than the party claiming damages for he cannot make use of such a purchase

12. *NPCC vs Rajdhani Builders*, 2006(3) RAJ 214; 2006(2) Arb LR 219 (Del); *State of Goa v. Jyoti Ltd.*, 1996(1) Arb LR 476 (DB—Bom); *Delhi Development Authority v. Wee Aar Constructive Builders*, AIR 2005 Del 140 (DB).

13. *State of Goa v. Jyoti Ltd.*, 1996(1) Arb LR 476 (Bom)(DB).

14. *Delhi Development Authority v. U.Kashyap*, 1999(1) Arb LR 88; 1999(2) RAJ 91 (Del)(DB).

15. *Vakil Chand Bindal v. Delhi Development Authority*, 1999(2) Arb LR 553; 1999(3) RAJ 566 (Del).

16. *Kingdom v. Cox*, (1848) 5 C.B. 522.

17. *Ibid*; *C.Srinivasa Rao v. P. Ramakutty*, AIR 1999 Mad 317; 2000(1) RAJ 473.

18. *Krishna Bhagya Jala Nigam Ltd. vs G. Harishchandra Reddy*, (2007)2 SCC 720; AIR 2007 SC 817.

19. *State of U.P. v. Ram Nath International Const. Pvt. Ltd.*, AIR 1996 SC 782; (1996)1 SCC 18.

20. *K.N. Sathyapalan vs State of Kerala*, (2007)13 SCC 43; 2006(4) Arb LR 275; 2007(1) RAJ 211

for the purpose of enhancing his damages. The mere fact that it is somewhat difficult to accept the damages with certainty and precision does not relieve the defendant of his liability to pay the damages to the plaintiff to compensate for the loss. The plaintiff would be entitled to the benefit of every reasonable presumptions as to the loss suffered.²¹

Delay in making payments: If the Employer fails in the discharge of his primary duty to ensure regular and timely payments for work done, the Contractor deserves to be compensated in the form of damages for overstay at the site. In *Hyderabad Municipal Corporation Vs M. Krishnaswami Mudaliar*, AIR 1985 SC 607: (1985)2 SCC 9, it has been held as under:

“Where under the terms of the contract the work was to be completed by the contractor within a period of one year but due to financial difficulties – less budget having been provided for in the said year the contractor was requested by the authorities to spread over the work for two years more, i.e. to complete the same in three years but the contractor was agreeable to spread over the work for two years more as suggested on condition that extra payment will have to be made to him in view of increased rates of either material or wages and the Government did not intimate to the contractor that no extra payment on account of increased rates would be paid to him or that he will have to complete the work on the basis of original rates, and only when after completion of work the contractor submitted his final bill claiming 20 per cent extra over and above the rates originally agreed upon between the parties the Government stated that he was not entitled to increased rates, it was held that both in equity and in law the contractor was entitled to receive extra payment.”

Extension of time: Where the cause of delay is due to breach of contract by the Employer, and there is also an applicable power to extend the time, the exercise of that power will not, in the absence of the clearest possible language, deprive the Contractor of his right to claim damages for the breach.²² There can be no substance in the argument that the act of granting extension of time eliminates any right claim of damages due to prolongation of work, as the organization granting extension cannot be a judge of its own cause.²³

Computation of damages: In a very recent decision in *McDermott International Inc v. Burn Standard Co. Ltd.*,²⁴ the Supreme Court has held as under:

“Sections 55 and 73 of the Indian Contract Act do not lay down the mode and manner as to how and in what manner the computation of damages or compensation has to be made. There is nothing in Indian law to show that any of the formulae adopted in other countries is prohibited in law or the same would be inconsistent with the law prevailing in India.

21. *Union of India v. Indian Proofing & General Industries*, 1998 (Supp) Arb LR 181: 1998(3) RAJ 281 (Del).

22. HUDSON’S BUILDING AND ENGINEERING CONTRACTS, 10th Ed, p. 647; *Metro Electric Co. v. Delhi Development Authority*, AIR 1980 Del 266 (DB); *Rawla Construction Co. v. Union of India*, ILR (1982)I Delhi 44; EMDEN AND WATSON’S BUILDING CONTRACTS, 7th Ed., p. 272; *State of Karnataka v. R.N. Shetty & Co.*, AIR 1991 Kant 96 : 1991(1) Arb LR 334 (DB).

23. *N.D.R. Israni v. Delhi Development Authority*, 1989(2) Arb LR 349 (Del).

24. (2006)11 SCC 181: 2006 (2) Arb LR 498

“As computation depends on circumstances and methods to compute damages, how the quantum thereof should be determined is a matter which would fall for the decision of the arbitrator. We, however, see no reason to interfere with that part of the award in view of the fact that the aforementioned formula evolved over the years, is accepted internationally and, therefore, cannot be said to be wholly contrary to the provisions of the Indian law.

“A court of law or an arbitrator may insist on some proof of actual damages, and may not allow the parties to take recourse to one formula or the other. In a given case, the court of law or an arbitrator may even prefer one formula as against another. But, only because the learned arbitrator in the facts and circumstances of the case has allowed MII to prove its claim relying on or on the basis of Emden Formula, the same by itself, in our opinion, would not lead to the conclusion that it was in breach of Section 55 or Section 73 of the Indian Contract Act.”

The Madras High Court, has however, held that evidence must be led to prove losses instead of exclusively relying on any formula. The High Court did not agree with the arbitrators that *Hudson’s* formula could be relied upon in the absence of evidence of loss of profit, depreciation and maintenance. It further held that the Supreme Court in the above-said case had required the arbitrator to consider strict legal obligations and not expectations of a Contractor, however, reasonable.²⁵

In awarding compensation for prolongation of contract period, some amount of guess work is inevitable and it cannot be contended that reasoning given is not proper.²⁶ The fact that damages are difficult to estimate, or could not be assessed with certainty or precision, cannot relieve the wrong-doer of the necessity of paying the damages for breach. Lack of evidence in such matters would not be a sufficient ground for awarding only nominal damages.²⁷

Hudson in his treatise has summed up the law on the subject in the following manner:

“At this point it may assist if an indication is given of the types of consequential damage which contractors are likely to or may suffer when a contract is monetarily affected by an employer's breach, the heads of damage (apart from the direct damage immediately suffered on some individual work process, which will obviously vary from case to case) are likely to be as follows:

- (a) When delay in completion of the whole project results, a contractor will usually suffer:
 - (i) a loss owing to the fact that his off-site overheads, which will partly be independent of the actual site expenditure or even the period the

^{25.} *Ennore Port Ltd. vs Skanska Cementation India Ltd.*, 2008(2) Arb LR 598 (Mad).

^{26.} *A.S. Sachdeva & Sons v. Delhi Development Authority*, 1996(1) Arb LR 148 (Del).

^{27.} *Pani Bai v. Sire Kanwar*, AIR 1981 Raj 184.

contract takes to complete (such as head-office rents) and partly may be dependent (such as additional administrative expenditure in relation to a dislocated and longer contract) will have either increased in the latter case, or need to be recovered from a smaller annual turnover than that budgeted for in the former case;

- (ii) a loss of the profit earning capacity of the particular contract organisation affected, due to its being retained longer on the contract in question without any corresponding increase in the monetary benefit earned and without being free to move elsewhere to earn the profit which it otherwise might do;
 - (iii) an increase of cost in his running on-site overheads, that is to say those elements of cost directly attributable to the contract which are governed by time and which are independent of the amount of work carried out, for instance supervisory costs, costs of permanent plant such as site huts, and certain special plant needed throughout the work;
 - (iv) in a contract without an applicable fluctuations clause, the inflationary or other increases in the cost of labour or materials (less any decreases) which he would not have incurred but for the delay.
- (b) Whether or not delay in completion results, the disturbance of a contractor's progress or planning may also result in lower productivity from the contractor's plant or labour.

All these heads of damage can be conveniently discussed under the following four paragraphs (a) to (d):

(a) "Head Office Overheads" and profit

Off-site overheads are usually known in the industry as "Head Office Overheads". It is convenient to deal with these together with profit, because it is the practice of most contractors of any substance in major contracts, after making their best estimate of the prime cost of the whole project, to add a single percentage thereto for both the above items. In bill contracts, the total sum calculated from prime cost may be distributed across the bill rates, or the contractors may have built up the tender sum by estimating bill rates for particular processes, adding the same percentage to cost when calculating each rate, and in really important contracts two teams of estimators may each estimate separately by the two methods as a cross-check before finally producing the tender sum. Other things being equal, the contractor's loss from an extended

contract period must bear proportionate extension of this percentage of his contract sum, and the loss calculated in this way is a real loss (provided the true percentage used can be determined) and is quite independent of the extent to which his contract prices may have been profitable or unprofitable, which depends on the accuracy of his estimates of cost on that particular contract and not on the profit percentage (this is not, of course, the case where an extended contract period is not involved, and the contractor sues for loss of profit on work which he has not done, as where the contract has been wrongly terminated by the employer. there he must prove that he would have made a profit in fact - i.e. that his contract prices were an accurate estimate, or an over-estimate, of cost.) The percentage used in the United Kingdom in pricing for head-office overheads and profit obviously varies from contractor to contractor, and is usually a closely guarded secret, but evidence given in litigation on many occasions suggests that it is usually, in a major contract subject to competitive tender on a national basis, between 3 per cent and 7 per cent, of the total prime cost, including P.C. and provisional sum figures for nominated sub-contractors. It should be remembered that these percentages which may seem small in relation to turnover, in fact represent a return on capital employed of several times that percentage per annum (it is, in effect, this very high "gearing" element in the pricing of building and engineering contracts, due to the very high ratio between turnover and capital employed, that means that a very small difference in pricing or estimating may produce very heavy losses or very large profits). Some contractors do consciously apply a breakdown of the percentage as between head office and profit, but for the purpose of assessing the loss due to delay in completion, the division is not theoretically important. The formula usually used is as follows:-

$$\frac{\text{H.O./Profit Percentage}}{100} \times \frac{\text{Contract Sum}}{\text{Contract Period}} \times \text{Period of delay (in weeks)}$$

(e.g. in weeks)

A caveat should, however, be entered in regard to the profit element in the above formula. The formula assumes that the profit budgeted for by the contractor in his prices was in fact capable of being earned by him elsewhere had the contractor been free to leave the delayed contract at the proper time. This itself involves two further assumptions, namely that on average the contractor did not habitually underestimate his costs when pricing, so that the profit percentage was a realistic one at that time, and secondly that there was thereafter no change in the market, so that work of at least the same general level of profitability would have been

available to him at the end of the contract period. There is no doubt that satisfactory evidence on these matters is necessary, and the case of *Sunley Vs Cunard White Star (1940)*, and a number of cases involving the wrongful detention of ships, and consequential loss of charter-party profits, indicate that in the absence of such evidence a contractor who has been delayed will only be entitled to interest on capital employed, and not to loss of profit."

The following interesting case, it is respectfully submitted, approaches the question of overheads correctly from the point of view of principle, though the method of calculation is not entirely clear and it does not follow the same formula.

ILLUSTRATION

A master, in a case where work had been delayed for 4¾ months and where the contractor's average percentage of overheads to total turnover over the last two years had been 4.99 percent, allowed the contractor (a) \$3,600, being 4.99 per cent of the additional direct cost of a particular breach causing delay and (b) \$2,802 for overheads during the period of delay. The Court of Appeal of Ontario disallowed (b). *Held*, by the Supreme Court of Canada, during the 4¾ month period overheads were continuing to run, but the contractor was obtaining no revenue from which to defray the overheads and the contractor was entitled to (b); *Shore V. Horwits (1964) S.C.R. 589 (Canada)*

(b) Site Overheads

These will include items like supervision (including, perhaps, part of the time of a contracts manager as well as a full-time site agent or general foreman), hutting, permanent gantries or hoists, certain types of pumping or dewatering in engineering contracts, and standing time of plant required to be retained on the site. Some of these will not necessarily be present for the whole period of delay. The "standing time" of unproductive plant, is frequently claimed by contractors on the basis of hire-rates, which may result in the capital value of a new piece of plant being claimed over a relatively short period of time. Hire-rates may sometimes be adopted by Courts, where satisfied that a loss of profit has occurred, and where evidence of that particular loss exists, but in the absence of evidence of profit opportunity, only depreciation and maintenance may be allowed.

ILLUSTRATION

An excavating machine costing Pounds 4,500 when new, and with a life of three years, was delayed by one week under a contract for

its transport from Doncaster to Guernsey. While still at Doncaster during the delay, it worked for one day and earned Pound 16. There was very little other evidence before the court. The plaintiffs had originally claimed Pound 577. *Held*, by the Court of Appeal, in the absence of evidence as to actual loss of profit, the damage was depreciation during the period, interest on the money invested, some maintenance and some wages thrown away. Average depreciation when working would be Pound 29 per week. As the machine was idle, Pound 20 per week would be allowed and Pound 10 for interest, maintenance and wages, making Pound 30, less the Pound 16 receipts, for which credit must be given. *Sunley Vs Cunard White Star [1940]*¹ K.B. 740

(c) Rises in cost of materials and labour

These call for little comment, except that it may be very difficult exercise, for which careful examination of the contractor's likely programme will be required, to decide when materials would have been ordered, or labour engaged, but for the delay.

(d) Loss of Productivity

As stated, this may not necessarily be associated with any overall delay. This damage is usually very hard to assess. In many cases where there has been delay, a delaying factor may cause little or no loss under this head, because if the extent and duration of the delay can be forecast with reasonable notice, the contractor can postpone engaging, or reduce, his plant and labour force during the period when the delaying factor is operating, so that they bear a similar ratio to output to that during periods when progress is more rapid. In other cases, he may not be able to do this, and in inflationary times, a contractor will have good reason not to disperse his labour force once he has organised it, for fear that he will not be able to get it back later. Bonus schemes can also be seriously upset, whether or not there is overall delay. In assessing claims for loss of productivity of plant, such plant, if hired, will be paid for by the contractor at "standing" rates. Plant not in this category should be valued on a depreciation basis and loss of profit should not be allowed upon it in the absence of evidence of an available profitable use elsewhere - See the *Sunley* case. It is not unusual, in the absence of any more precise method, to claim this type of loss as an arbitrary percentage on total labour or plant expenditure during the period of dislocation.

(e) General Considerations

In cases where the work is partly carried out and the contract is repudiated, a contractor should consider his position carefully before deciding to sue for damages for breach of contract, since it has been held that in such a case, he may elect not to sue for damages but instead bring an action in *quantum meruit* for the work done by him. In a case where the contractor's rates are highly profitable, it is obviously likely to be the best course to sue for loss of profit. If, on the other hand, the contract rates or price are low or uneconomic, it may well be that a reasonable price for the work done will be more advantageous to him, particularly if a substantial amount of work has been done prior to the employer's repudiation.

Wrongful termination of contract: Where the Employer has wrongfully terminated the contract, or has committed a fundamental breach justifying the Contractor to treat the contract as at an end, the measure of damages will be the loss of profit which he would otherwise have earned. If the work is partly carried out at the time when the contract is repudiated, the Contractor will normally be entitled to the value of the work done assessed at the contract rates, plus his profit on the remaining work. The measure of profit was assessed at 15% of the value of the remaining part of the work.²⁸ In a similar case, where the Government wrongfully cancelled a contract, the Kerala High Court held that the measure of damages is the amount of profit lost to the contractor by the breach.²⁹ For estimating the amount of damages, the Court should make a broad evaluation instead of going into minute details.³⁰ The view taken by Delhi High Court in *R.K. Aneja v. Delhi Development Authority*³¹ goes a step further when it says that the Contractor would be entitled to 10% loss of profit on the balance amount of work left undone even without proof of loss of profit which he expected to earn by executing the balance work.

Prohibition on award of damages: If the arbitrator awards compensation, when there is a specific prohibition in the contract then the arbitrator would be said to have travelled beyond the terms of the contract.³² In MES contracts, clause 11 of the agreement prescribes a prohibition for award of damages. In *Ramnath International Construction (P) Ltd. vs Union of India*,³³ the Supreme Court held as under:

“..... clause 11(C) of the General Conditions of Contract is a clear bar to any claim for compensation for delays, in respect of which extensions have been sought and obtained. Clause 11(C) amounts to a specific consent by the contractor to accept extension of time alone in satisfaction of his claims for delay and not claim any compensation. In view of the clear bar against award of damages on account of

28. *A.T. Brij Paul Singh & Bros v. State of Gujrat*, AIR 1984 SC 1703:(1984)4 SCC 59; *Mohd. Salamatullah v. Govt. of A.P.*, AIR 1977 SC 1481; *B.S.N.L. v. Narasinghal Aggrawal*, AIR 2006 Ori 148: 2006 (4) Arb LR 93; *Devendra Kumar Sharma v. Airport Authority of India*, 2008(3) Arb LR 87 (Del); *BSNL vs BWL Ltd.*, 2006(3) RAJ 239: 2006(2) Arb LR 212 (Del).

29. *State of Kerala v. K. Bhaskaran*, AIR 1985 Ker 49 (DB); *Subhash & Company vs DDA*, 2006(3) RAJ 618: 2006(4) Arb LR 506 (Del).

30. *Dwaraka Das v. State of MP*, (1999)3 SCC 500: AIR 1999 SC 1031.

31. 1998(2) Arb LR 341: 1999(1) RAJ 344 (Del).

32. *State of Kerala v. N.E. Abraham*, AIR 1998 Ker 314: 1998(2) Arb LR 369: 1998(2) RAJ 523 (DB).

33. (2007)2 SCC 453: AIR 2007 SC 509: 2006(4) Arb LR 385.

delay, the arbitrator clearly exceeded his jurisdiction, in awarding damages, ignoring clause 11(C).”

However, in *Asian Techs Ltd. vs Union of India*,³⁴ the Supreme Court held as under:

“Apart from the above, it has been held by this Court in *Port of Calcutta v. Engineers-De-Space-Age*, (1996)1 SCC 516, that a clause like Clause 11 only prohibits the *Department* from entertaining the claim, but it did not prohibit the *arbitrator* from entertaining it. This view has been followed by another Bench of this Court in *Bharat Drilling & Treatment (P) Ltd. v. State of Jharkhand*, (2009)16 SCC 705.”

However, it must be added here that *Ramnath’s* case was not considered in *Asian Techs* case. Be that as it may, what we are now faced with are two judgments of the Apex Court, which run contrary to each other. How to resolve the dilemma? In a recent unreported judgment of the Delhi High Court titled *Simplex Concrete Piles (I) Ltd. vs Union of India*, Suit No. 614A/2002 decided on 23.2.2010, both the aforesaid judgments were cited. By relying upon settled precedents, the Delhi High Court held that when there are conflicting judgments of Supreme Court of co-equal Benches, then, the High Court ought to follow the judgment which lays down the law more correctly. The Delhi High Court also relied upon a judgment of the Supreme Court reported as *M.G. Brothers Lorry Service Vs. M/s. Prasad Textiles*, (1983)3 SCC 61: AIR 1984 SC 15 wherein it was held that a contractual clause which is in the teeth of a provision which furthers the intendment of a statute, has to give way and such a clause becomes void and inoperative by virtue of Section 23 of the Contract Act. The High Court summed up the position as follows:

“Provisions of the contract which will set at naught the legislative intendment of the Contract Act, I would hold the same to be void being against public interest and public policy. Such clauses are also void because it would defeat the provisions of law which is surely not in public interest to ensure smooth operation of commercial relations. I therefore hold that the contractual clauses such as Clauses 11A to 11C, on their interpretation to disentitle the aggrieved party to the benefits of Sections 55 and 73, would be void being violative of Section 23 of the Contract Act.”

Clause 59 of the A.P.Standing Specifications provides that no claim for compensation on account of any delay or hindrance to the work from any cause whatsoever shall lie, has been subjected to close judicial scrutiny. A single Judge of the A.P. High Court³⁵ held that the clause was totally inequitable and unreasonable. This judgment was confirmed by a Division Bench of the High Court³⁶, but was reversed by the Supreme Court³⁷ and the matter was sent back to the high Court for final consideration. The A.P. High Court has thereafter consistently held that clause 59 is a complete bar on claim for

34. (2009)10 SCC 354.

35. *V.Raghunadha Rao v. State of AP*, (1988)1 Andh LT 461.

36. *State of A.P. v. Raghunadha Rao*, (1988)1 Andh LT 242 (DB).

37. CA. No. 530/1994.

escalation and compensation.³⁸ The Supreme Court, while upholding the validity of clause 59 of the A.P. Standing Specification, has held that any award of escalation beyond the contractual period was barred.³⁹ However, if the State itself waives off the benefit of clause 59 and enters into an agreement to pay extra rates for one year when the work was extended, it cannot deny the same benefit to the Contractor for the next year when the work was delayed due to its own fault.⁴⁰

Where the terms of the contract specifically prohibited revision of rates due to change in scope of work or specifications, an award rendered by an arbitrator awarding the said sum is liable to be set aside.⁴¹ A clause in a contract debarring the contractor from claiming escalation in rates was construed to be limited to the stipulated period of contract and not beyond.⁴²

Damages not payable where no loss suffered: Every case of compensation for breach of contract has to be dealt with on the basis of Section 73 of the Contract Act. In a case where the party complaining of breach of contract had not suffered legal injury in the sense of sustaining loss or damage, there is nothing to compensate him, for; there is nothing to recompense, satisfy or make amends and, therefore, he would not be entitled to compensation.⁴³

Recommendation: The law of compensation for delay in completion of works contracts is fairly well developed in India and judgments such as those rendered in the cases of *G.M. Northern Rly. v. Sarvesh Chopra* and *McDermott International Inc v. Burn Standard Co. Ltd.* have furthered elucidated and clarified the law on the subject. Employers should be wary of delays caused in execution of works and ought to plan the works in such a manner that such delays are avoided. Prevention is better than cure.

38. *State of Andhra Pradesh v. Associated Engg. Enterprises Ltd.*, AIR 1990 AP 294: 1990(2) Arb LR 375: (1989)2 ALT 372 (DB).

39. *Ramalinga Reddy v. Superintending Engineer*, 1994(5) SCALE 67

40. *Government of Andhra Pradesh v. Satyam Rao*, AIR 1996 AP 288: 1996(2) Arb LR 453 (DB).

41. *Hindustan Construction Company Limited v. Tamil Nadu Electricity Board*, 2005(1) Arb LR 41 (Mad) (DB); *R.B. Jodhamal v. State*, 2005(1) Arb LR 534 (J&K).

42. *Anurodh Constructions v. DDA*, 2005(3) RAJ 252 (Del).

43. *Indian Oil Corporation vs Llyod Steel Industries Ltd.*, 2007(4) Arb LR 84: 2008(1) Arb LR 170 (Del).