MAHANADI COALFIELDS LTD. & ORS. A

v.

M/S. DHANSAR ENGINEERING CO. PVT. LTD. & ANR.

(Civil Appeal No. 9732 of 2016)

SEPTEMBER 27, 2016

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[T. S. THAKUR, CJI AND A. M. KHANWILKAR, J.]

Contract – Work contract – For extraction and transfer of Coal/Coal Measure Strata by deploying surface miners – As per the terms and conditions of the tender document as well as the agreement, the tender quantity could be reduced or increased by 30% on the same terms and conditions – Time for completion of C *contract work was extended at the request of the contractor – During the subsistence of the contract period appellant-company passed order for increase of 30% extra quantity – The contractor requested the company for closure of contract and informed its intention to withdraw from operation after full contract period due to financial* D *hardship – The company therefore gave the remaining work to a third party at higher rate – Company imposed penalty on the contractor for non-execution of the remaining work – The penalty was inclusive of the financial loss incurred by the company due to allocation of that work at higher rate – Contractor filed writ petition – Petition allowed by High Court – On appeal, held: Clause 5 of the* E *agreement empowered the company to increase or reduce the quantity of work by 30%, whilst the contract was subsisting – Therefore, obligation of contractor to complete the extra work in terms of the contract within the contract period or extended period was imperative – Contractor committed breach of contractual obligation* F *in not completing the balance work – The contractor is liable to compensate for the financial loss suffered by the company in assigning the remaining work at higher rate – However, liberty is granted to the contractor to make representation to the company requesting to waive the penalty in terms of the contract.*

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Partly allowing the appeal, the Court

HELD: 1. Clause 5 of the Contract cannot be read in isolation. The other terms and conditions of the contract must be read as a whole. Clause 5 of the agreement dated 26th May 2003 posits authority in the appellants to reduce or increase the tendered quantity by +/– 30%, whilst the contract is subsisting. H

A Indisputably, the original contract period was upto 15th April, 2004. At the instance of the respondents, the same stood extended till 15th July 2004. The extra 30% work was allotted to the respondents on 11th June 2004, before expiry of the extended contract period i.e. 15th July 2004. As the contract period was B extended and that decision was allowed to attain finality, it inevitably obliged the respondents to fulfill all the contractual stipulations under the original agreement including to complete the assigned quantity of work - be it original quantity or extra quantity - before 15th July 2004. The fact that they had to suffer financial loss due to low contract rate could not be cited as an C excuse to extricate from that contractual obligation. [Para 18] [148-F-H; 149-A]

2. Failure to comply with the contractual obligation of executing the original quantity of work or the extra work, as the case may be, must visit the respondents with liability to D compensate the appellants in terms of other express clauses of the contract to the extent of unfinished work and in particular the financial loss suffered by the appellants for getting the same work executed through a third agency at a higher rate. The fact that the respondents executed 108.47% of work before 15th July 2004, could be no justification to relieve them of their obligation E to compensate the appellants with suitable amount for the unfinished contract work (out of 130%). [Para 19] [149-B-C]

3. It is not correct to say that the extra quantity of work could not have been allotted to them, absent 45 clear days notice that too at the fag end of the contract period. It is one thing to say F that the contractor should be given sufficient time to complete the extra work commensurate with the extra quantity required to be executed by him. However, in law, it is not open to contend that even though the contract period is still subsisting, the principal (appellants) could not have exercised its option to G increase the quantity of work to the extent permissible under that clause, to be executed by the contractor within the contract period. The principal (appellants) could be asked to exercise their option to extend the contract period beyond 15th July, 2004, to enable the respondents to complete the unfinished extra work. If such request were to be made by the respondents, there would H have been corresponding obligation on the appellants to extend

the contact period commensurate with the increased quantity of work in terms of clause 5 of the agreement. The respondents, instead, opted to walk out of the contract for the sole reason that the contract rate agreed by them was very low and was causing financial loss to them. That can be no just reason to not fulfill their contractual obligation. [Para 20] [149-D-G]

4. The stipulation in clause 5 providing for 45 clear days notice was not an impediment for the appellants to allot extra quantity of work upto 30%, whilst the contract period was subsisting.The said stipulation would come into play only if the respondents were also called upon to increase the machine capacity by upto 30% extra "daily" quantity. In the present case, the appellants merely allotted extra 30% quantity without requiring the respondents to increase the daily quantity. There is marked difference between increasing the extra quantity during the contract period and that of increasing the extra "daily" quantity. [Para 21] [149-H; 150-A-B]

5. The respondents are not right in contending that the appellants-Company had no authority to grant extension of time to complete the enhanced quantity. This is evidenct from the other contractual terms such as Clause 11.0 - providing for variation in the scheduled quantity, extent and rate; Clause 13 - time for completion of contract and more particularly Clause 14.0 - for extension of date of completion. Clause 14.0 (e) was available and ought to have been invoked by the respondents in this situation. [Para 22] [150-F-G]

6. The respondents committed breach of their contractual obligation, in not completing the balance work out of 130% of work (i.e. 130 - 108.47%). To that extent the respondents became liable to compensate the appellants including by way of penalty and in particular towards the financial loss caused to the appellants due to assigning the unfinished work to a third agency (contractor) at a higher rate. [Para 23] [151-B-C]

7. It is indisputable that financial loss was suffered by the appellants on account of assigning the unfinished work to a third agency (contractor) at a higher rate. The fact that no loss of production was suffered by the appellants, cannot relieve the respondents of that liability. It is a different matter that the

A respondents were not put to notice before the final decision was taken by the appellants to recover the financial loss along with penalty. The respondents could have approached the appellants for reconsideration of their demand towards penalty, in terms of Clause 30.3 of the contract; and persuade the appellants to waive B the penalty amount to be recovered from them. Even if this appeal succeeds, the respondents can be granted an opportunity to make a representation to the Appellants - company, who in turn can deal with the same in accordance with law. [Para 24] [151-F-H; 152-A-C]

C *Maula Bux v. Union of India* (1969) 2 SCC 554 : 1970 (1) SCR 928; *Gorkha Security Services v. Government (NCT of Delhi) & Ors.* (2014) 9 SCC 105; *Kumari Shrilekha Vidyarthi & Ors v. State of U.P.* (1991) 1 SCC 212 : 1990 (1) Suppl. SCR 625 – referred to.

8. However, that would not absolve the respondents from D the financial liability arising due to difference of rate of contract and the actual cost incurred by the appellants to complete the unfinished work out of 130% of the contract quantity, through a third agency at a higher rate. That can be recovered by the appellants from the respondents along with interest accrued thereon at such rate, as may be permissible in law, even if the E representation made by the respondents for recall or modification of the penalty amount is pending consideration. [Para 24] [152-D-E]

F *Popcorn Enterainment vs. City Development Corporation,* (2007) 9 SCC 593; *Harbanslal Sahnia & Anr. vs. Indian Oil Corporation Ltd. & Ors.* (2003) 2 SCC 107; *Union of India & Ors. vs. Tantia Construction Pvt. Ltd.* (2011) 5 SCC 697; *M. P. State Agro Industries Development Corpn. & Anr. vs. Jahan Khan* (2007) 10 SCC 88; *Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai* (1998) 8 SCC 1 – referred to.

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Case Law Reference

1970 (1) SCR 928	referred to	Para 24
(2014) 9 SCC 105	referred to	Para 24
1990 (1) Suppl. SCR 625	referred to	Para 24
2007 (3) SCR 17	referred to	Para 25
(2003) 2 SCC 107	referred to	Para 25

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2011 (5) SCR 397	**referred to**	**Para 25**	A
2007 (9) SCR 715	**referred to**	**Para 25**	
1998 (2) Suppl. SCR 359	**referred to**	**Para 25**	

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9732 of 2016.

From the Judgment and Order dated 07.11.2012 of the High Court of Orissa, Cuttack in W. P. (C) No. 1093 of 2006. B

Gourab Banerji, Sr. Adv., K. N. Madhusoodhanan KN., T. G. Narayanan Nair, S. A. Haseeb, Sahil Tagotra, Advs. for the Appellants.

Rakesh Dwivedi, Sr. Adv., Arunabh Chowdhury, Anupam Lal Das, Vaibhav Tomar, Ms. Shruti Choudhry, Karma Dorjee, Anirudh Singh, Ms. Barnali Chowdhury, Advs. for the Respondent. C

The Judgment of the Court was delivered by

A. M. KHANWILKAR, J. 1. Leave granted.

2. This appeal challenges the judgment of the Division Bench of the High Court of Orissa at Cuttack dated 7th November 2012 in Writ Petition (Civil) No. 1093/2006. D

3. Briefly stated, on 2nd December 2002 the appellants issued notice inviting tenders for the work of extraction and transfer of Coal/Coal Measure Strata (CMS) by deploying "Surface Miners" on hiring basis at various Open Cast Projects, inter-alia, at Lakhanpur. E

The respondents were declared the lowest bidder having quoted Rs.17/- per cubic meter for the stated contract. A letter of intent was issued in favour of the respondents on 4th April, 2003 which was accepted by the respondents on 14th April, 2003. Work order was issued in favour of the respondents on 23rd April, 2003 and a formal agreement was executed between the parties on 26th May 2003. The relevant clauses of the agreement are clauses 2 to 5 which read as under: F

> *"2) Time shall be considered as one of the essence of the contract and the time for the completion of the contract shall be counted from 16.04.2003 of from the date of issue of L.O.I. to which terms the contractor agreed at the time when his tender was accepted and the contract shall be completed by 15.04.2004 provided, sufficient face is provided by the management.* G

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3) The work order has already been issued for a period of one year for a quantity of 49,50,000 Cum. At the rate of Rs. 17.00/Cum. for an amount of Rs. 8,41,50,000.00.

4) The contractor shall re-deploy the Surface Miner in other OCPs as per direction of the Company.

B

5) The tendered quantity may be reduced or increased by +/- 30%. No claim shall lie on the company for such variation in quantity whether increase or decrease. The tenderer must be in a position to increase the machine capacity upon 30% extra daily quantity within 45 days notice."

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(emphasis supplied)

4. As the agreement refers to the terms and conditions of the tender document, we may usefully refer to the relevant clauses therein.

"11.0 VARIATION IN SCHEDULED QUANTITY EXTENT AND RATE

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The quantity given in the "Schedule of Quantity's provisional and is meant to indicate the extent of the work and to provide a uniform basis for tendering and any variation either by addition or omission shall not vitiate the contract.

E

The tendered quantity may be reduced or increased by 30%. No claim shall be on the company for such variation in quantity whether increase or decrease. Tenderer must be in a position to increase the machine capacity within 45 days notice to achieve the extra increased quantity.

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If the additional altered or substituted work includes any item of work for which no "rate is specified in the contract, "rate" for such item shall be determined by the Company Headquarters in the following manner:-

The rate shall be derived from the rate for similar or near similar item of work awarded in the Company, or

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The rate shall be derived from contractor's rate claimed for such item of work supported by analysis of the rate claimed by the contractor. The rate to be determined by the Company Headquarters as may be considered reasonable taking into account percentage of profit and overhead not exceeding ten

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percent or on the basis of market rate, if any prevailing at the time when work was done. A

However, the Engineer-in-charge shall be at liberty to cancel the instruction by giving notice in writing and to arrange to carry out the work in such manner as he considers advisable under the circumstances. The contractor shall under no circumstances suspend the work in the plea of non-settlement of rates. B

The time of completion of the originally contracted work shall be extended/reduced by the Company in the proportion that the additional/reduced work (in value) bears to the original contracted work (in value), as may be assessed and certified by the Engineer-in-charge. C

The company through its Engineer-in-charge or his representative, on behalf of the company, shall have power to omit any part of the work for any other reason and the contractor shall be bound to carry out the work in accordance with the instruction given to Engineer-in-change. No claim for extra charges/damages shall be made by the contractor on these grounds. D

In the event of any deviation being ordered which in the opinion of the contractor changes radically the original scope and nature of the contract, the contractor shall under no circumstances suspend the work, either original or altered or substituted and the dispute/disagreement as to the nature of deviation or the rate to be paid therefore shall be resolved separately with the company. E F

13. TIME FOR COMPLETION OF CONTRACT

Time is the essence of the contract.

The contractual period of work shall be as specified in NIT/LOI Agreement. The work shall be deemed to have commenced within 60 days of the issue of Letter of Intent at all the places and should be able to execute 100% of the daily awarded quantity from 61th day from the date of issue of LOI. G

Agreement should be executed before the release of 1st, on A/c. bill. H

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For failure to reach the desired quantity from 61th day of issue of LOI, contractor shall be liable for penalty @ 20% of amount for shortfall quantity i.e. (shortfall quantity x awarded rate x 20%).

B

The contractor must be prepared to work continuously for three shifts a day and all the working days in a year.

If the contractor, without valid reason, commits default in commencing the execution of the work within 60 days from the date of issue of LOI or fails to attain within specified date of issue of Letter of Intent, the required quantity to give the ultimate output as per the schedule of quantity, the company shall without prejudice to any other right or remedy, be at liberty, by giving 15 days notice in writing to the contractor, to forfeit the Earnest Money deposited by him and to terminate the contract.

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14.0 EXTENSION OF DATE OF COMPLETION

On happening of any event causing delay as stated hereunder, the contractor shall apply for time extension to the CGM/GM of the Area.

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a) Abnormally bad weather

b) Serous loss or damage by fire

c) Civil Commotion, strike or lockout affecting execution of work

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d) Non-availability of working force or site which is the responsibility of the company to supply.

e) Any other cause which, at the sole discretion of the company, is beyond the control of the contractor.

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The contractor may request the company in writing for extension of time within 14 days of happening of such event ceasing delay stating the period for which extension is desired. The company may, considering the eligibility of the request, give a fair and reasonable extension of time of completion of the work. Such extension shall be communicated

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to the contractor, in writing, by the company through the Engineer-in-charge within 1 month of the date of receipt of such request. A

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30.0 DEFAULT AND PENALTY

30.1 LOSS OR DAMAGE B

Any loss or any expenditure for damages incurred by company will be recoverable from the contractor whether fully or partly if such expenditure for damages have been caused either directly or indirectly due to any negligence or failure on the part of the contractor.

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30.2. SHORTFALL PENALTY IN MECHANICAL EXCAVATION AND LOADING

The average daily quontity of the quarter shall be worked out by dividing the mutually agreed quarterly allotted quantity by the working days of the quarter, ending on 30th June, 30th September, 31st December & 31st March Average daily quantity of a quarter must conform to average daily quantity of the year contractual period. D

In the event of the Contractors failure to comply with the rate of rate of progress as per the agreed progress chart the contractor shall be liable to pay a penalty on the quantity by which the contractor has fallen short from the allotted quarterly quantity at the rate of 20% of the awarded rate. E

For failure of produce size coal as per NIT (-100 mm size), the contactor shall also be liable for penalty at the rate of 20% of the awarded rate for such over size quantity. F

The shortfall penalty will be recovered concurrently from the running bill which will be adjusted annually subject to that the total penalty is limited to 20% of (Annual Shortfall Quantity x Rate).

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30.3 WAIVAL OF PENALTY

The company may at its sole discretion waive the payment of penalty in full or in part in request received from the contractor depending the merit of the case if the entire work is completed within the date as specified in the contract or within extended H

A *period approved without imposing penalty.*

31.0. SETTLEMENT OF DISPUTE

Except where otherwise provided for in the contract, all questions and disputes relating to meaning of the scope, specification and instructions herein before mentioned and as to any other question, claim right matter or thing whatsoever in any way arising out of or relating to the contract, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof, shall be referred to the Chairman-Cum-Managing Director of the Company or any other person authorized by him.

It is also a terms of the Contract if the contractor (s) do/does not make any demand for any claim(s) in writing 90 days of receiving the intimation from the company that the bill is ready for payment or of the date of receiving payment whichever is earlier, the claim of the Contractor(s) will be deemed to have been waived and absolutely barred and the Company shall be released and discharged of all liabilities under the contract in respect of these claims."

(emphasis supplied)

5. The respondents commenced the work of surface miners at Lakhanpur and completed around 70% of the awarded quantity by the end of February 2004. Due to financial problems faced by the respondents vide letter dated 13th February 2004, they requested the appellants to allow them to close the contract by invoking power to reduce the quantity by 30% of awarded quantity, under clause 11 of the general terms and conditions of the NIT; and to issue fresh tender for the remaining work. The appellants did not accede to the said request and informed the respondents vide letter dated 16th February 2004, stating that the agreement is for performing the contract upto 100% of awarded value and provision of executing extra 30% quantity on the same terms and conditions. The respondents requested the appellants vide letter dated 9th May 2004 to extend the time frame for completion of the remaining contract upto 15th July 2004 as the contract period was only till 15th April, 2004. The said letter reads thus:

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ANNEXURE-P8

DHANSAR ENGINEERING CO. PVT. LTD.,

SITE

P.O. Dhansar	*P.O. Jorabaga*
Dhanbad – 828106 (Jharkhand)	*Via Belpahar*
Ph: 0326 – 307161/7074.	*Dist.:Jharsuguda(Orissa)*
Fax: 0326 303294	*Ph.: 06645 -233222*
	E-mail– decopl@dte.vsnl.net.in

B

Ref: No. DECO/NIT 276/2004 *Date: 09.05.2004*

C

To
The chief General Manager
Lakhanpur Area
Mahanadi Coalfields Ltd.,
(Through proper channel)

D

Sub: WORK OF EXTRACTION AND TRANSFER OF COAL/ COAL MEASURE STRATA BY DEPLOYING SURFACE MINER ON HIRING AT LAKHANPUR OCP OF LAKHANPUR AREA (NIT – 276) VIDE WORK ORDER NO. MCL/CGM/LKPA/ SO(M)/SUR. MINER/2003-04/001 DATED 23.04.2003.

E

Dear Sir,

Management is fully aware that tender rate of Rs. 17/- per Cum for the work is all time low and wholly unworkable. We are working at this rate at a colossal loss.

F

We started the work almost at the approach of monsoon on 16.04.2003 and we could not also speed up progress because of transportation restriction between 11.00 A.M. & 4.00 P.M. against heat wave alert and thereafter on-set of heavy rains consequenting upon bad, water-logged & slippery road followed by short supply of rakes. With all these operational hazards beyond our control, we could accomplish 34.74 Lakhs Cum upto 31.03.2004.

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As our financial loss was soaring day by day, we had requested for foreclosure of the work after we have completed 70% of the work but this was not agreed to by GM(TC) vide his letter No. 1251 dated 26.03.2004.

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Therefore, being under contractual obligation we had, no other alternative but to apply for extension of time upto 15.07.2004 and would request you to kindly treat the contract as closed with the completion of the above awarded quantity as we are ill-afford to bear further loss.

C

Thanking You,

Yours faithfully,
Sd/-
For Dhansar Engineering Co. Pvt. Ltd."

D

6. This request of the respondents was considered by the appellants in its 68th Meeting of the Board. Extension of three months time was granted while reserving the right to impose penalty. The respondents were informed accordingly vide letter dated 5th June 2004. As a result of this decision, the contract period was extended until 15th July 2004 on the same terms and conditions agreed upon. As the contract period was subsisting till 15th July 2004, the appellants issued an approval order dated 11th June 2004 to increase of 30% extra quantity i.e. 14.8 Lakh cubic meter at the existing rate of next tender rate or whichever is lower, amounting to Rs. 252.42 Lakh. The respondents by letter dated 11th June 2004, however, reiterated that the contract be treated as closed - as they were on the verge of completing the quantity specified in the contract by 15th June 2004. The said letter reads thus:

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"ANNEXURE – P9

DHANSAR ENGINEERING CO. PVT. LTD.,

SITE

G

P.O. Dhansar
Dhanbad – 828106 (Jharkhand)
Ph: 0326 – 307161/7074.
Fax: 0326 303294

P.O. Jorabaga
Via Belpahar
Dist.: Jharsuguda (Orissa)
Ph.: 06645 -233222
E-mail – decopl@dte.vsnl.net.in

Ref: No. DECO/NIT 276/2004 *Date: 11.06.2004*

H

To .
The chief General Manager
Lakhanpur Area
Mahanadi Coalfields Ltd.,

A

Sub: NIT NO. 276 – EXTRACTION AND TRANSFER OF COAL/COAL MEASURE STRATA BY DEPLOYING SURFACE MINER ON HRING BASIS AT LAKHANPUR OCP OF MCL

B

Dear Sir,

We would like to inform you that the order quantity of 49.50 lakh Cum is in the verge of completion, and is expected that this quantity will be fully completed by 15.06.2004.

C

In this connection kindly refer to our letter No. DECO/NIT – 276/ 2004 dated 09.05.2004 under which we had requested your good-self to treat the contract as closed with the completion of the quantity of 49.50 lakh Cum. In reiterating our request we would inform you that we may be forced to stop the machine as it is giving trouble and we are not able to repair the machine for dire scarcity of fund.

D

Thanking You,

Yours faithfully,
Sd/-
For Dhansar Engineering Co. Pvt. Ltd.

E

Copy to: 1) The Director (Technical) MCL, Burla,
2) The General Manager, Lakhanpur Area."

7. The respondents by another letter dated 6th July 2004 seeking closure of contract due to financial hardship, stated that they were withdrawing their operations. The appellants, however, by letter dated 7th July 2004 called upon the respondents to continue with the remaining work assigned under the contract which was still subsisting; and also noted that the respondents had by then completed only 105% of the contract work out of 130%. The said communication reads thus:

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"ANNEXURE -P12
"UNDER JURISDICTION OF SAMBALPUR COURT ONLY"
MAHANADI COALFIELDS LIMITED
(A SUBSDIARY OF COAL INDIA LIMITED)

H

A

Corporate Office | *Office of the Chief General Manager*

M.C.L. Complex | *LAKHANPUR AREA*
Jagriti Vihar | *P.O. bandhabahal – Via: Belpahar*
Burla – 768018 | *Dist.: Jharsuguda, Pin 768217*
Dist: Sambalpur (Orissa) phone: 33202, STD CODE: 06645

B

Ref: No. MCL/CGM/LKPA/SO(M)/932 Date: 07.07.2004

To

M/s Dhansar Engineering Co. pvt. Ltd.
C *Site Office: P.O. Jorabaga, Via – Belpahar,*
Dist: Jharsuguda (Orissa)
Pin: 768217.

Ref: (1) Work order No. MCL/CGML/LKPA/SOM(M)/Sur Miner/2003-04/001 dated 23.04.2003 for Extraction and Transfer of Coal/Coal measure strata by deploying 'Surface Miners" on hiring basis at Lakhanpur OCP (NIT-276).

D

Sub: Contract of Surface Miner work at Lakhnapur OCP (under NIT No. 276)

E *Dear Sir,*

Kindly refer to your letter No. DECO/NIT-276/2004 dated 6.07.2004 on the above subject.

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This is to bring to your notice that as per clause No.2 of the work order forming part of the agreement the tendered quantity can be increased by 30% and no claim shall lie on the company for such variation till date only 105% (approx.) of the awarded quantity has been executed by you. There is no communication from MCL-HQ for finalization of new contract for the above work till date.

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In such condition you are requested to continue your operation of surface miner at Lakhanpur OCP till completion of 30% extra quantity. Withdrawal of operations of Surface Miner at this stage will seriously affect dispatch of coal to our Pit head customer (OPGC) and other linkage customers earning a bad name to the company.

Thanking You,

H

Yours faithfully,
SD/-
GENERAL MANAGER
LAKHANPUR AREA

Copy to:
The Chairman-cum-Managing Director, MCL Burla
The Director (T), MCL, Burla
The General Manager (TC), MCL HQ, Burla
The Staff Officer (Mining) LKPA"

8. The respondents, however, renewed their request to the appellants to allow them to close the contract vide letters dated 8th July 2004 and 12th July 2004. The respondents finally wrote to the appellants on 15th July 2004 which reads thus:

"ANNEXURE – P15

DHANSAR ENGINEERING CO. PVT. LTD.,

SITE

P.O. Dhansar
Dhanbad – 828106 (Jharkhand)
Ph: 0326 – 307161/7074.
Fax: 0326 303294

P.O. Jorabaga
Via Belpahar
Dist.: Jharsuguda (Orissa)
Ph.: 06645 -233222
E-mail – decopl@dte.vsnl.net.in

Ref: No. DECO/NIT 276/2004
Date: 15.07.2004

To

The General Manager,
Lakhanpur Area, MCL,

Sub: Closing Down of work of Surface Miner at lakhanpur OCP under NIT No. 276

Dear Sir,

A copy of our letter No. DECO/NIT/2004 dated 12.07.2004 addressed to CMD MCL Burla with copies to D(T) and GM(TC), MCL HQ is enclosed herewith for your information.

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As notified this is to inform you that we are stopping the work and withdrawing from operations at Lakhanpur OCP with effect from 16.07.2004 (FN). It is not out of place to mention that we had been expressing out intention to abandon execution after completing 100% of the work on account of our un-economical plight out has been continuing wit the execution to cooperate with the management to arrange next recourse, so as to ensure that the production schedule of Lakhanpur OCP does not suffer any set back.

B

We could not however elicit any communication to our letters or any sympathetic decision from the management. In the meanwhile the contract period also expired by 15.07.2004.

C

In view of the above situation we have no other alternative but to withdraw from operation after working the full period of the contract.

You are therefore requested to kindly take up final measurement as on 15.07.2004 and finalise the contract.

Thanking you and assuring you of our best cooperation to all time come.

D

Yours faithfully,

Sd/-

For Dhansar Engineering Co. Pvt. Ltd.

E

Copy to:

1. The CMD, MCL, Burla Fax No. 0663 -2432066/2542366
2. The D(T), MCL, Burla, Fax No. 0663 – 2542509
3. The GM (TC), MCL, Burla, Fax No. 0663 – 2542629."

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9. As the respondents had already informed the appellants of their intention to withdraw from operation after the full contract period, a fresh tender process was commenced by the appellants which culminated with a letter of intent in favour of third party (Sainik Mining and Allied Services) but at a higher rate of Rs.31.50 per cubic meter.

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10. The bills submitted by the respondents for the work executed under the contract dated 26th May 2003 were considered by the Board of the appellants in its 72nd meeting. The decision taken in the said meeting was communicated to the respondents by letter dated 8th December 2014 which reads thus:

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"ANNEXURE R/9

MAHANADI COALFIELDS LIMITED
(A subsidiary of Coal India Limited)
P.O. – Jagruti Vihar, Burla, Distt. Sambalpur-768020 (Orissa)
Gram : SAMBCOAL,: Fax : (0663) 2542770
Phone : PBX :- (0663) 2542461 to 2542469

B

Ref. No. MCL/SBP/GM(TC)/2004/1047 Dt. 08.12.2004

To,

General Manager,
Lakhanpur Area

C

Dear Sir,

Enclosed herewith please find a copy of Extract from the Draft Minutes of the 72nd meeting of the Board of Directors of MCL held on 27th November, 2004 at Kolkata in respect of imposing penalty by way of forfeiture of Earnest Money Deposit of Rs. 20.00 lakhs to M/s. Dhansar Engineering (P) Ltd., for non-performance of 130% of the total contracted quantity under NIT – 276. The relevant extract is appended below:-

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"The Board deliberated on the subject in detail and in consideration of the facts and circumstances highlighted in the agenda note and in recognition of the clarification offered during deliberation, decided that penalty as proposed in the agenda note in terms of the provisions of the contract be imposed on M/s Dhansar Engineering pvt. Ltd. For non-performance of 130% of the total contracted quantity under NIT-276.

E

Proposed in the Agenda Note

Clause No. 16 – (Forfeiture of Earnest Money)

The contractor is liable for forfeiture Money Deposit under Clause No. 16(a) and 16(d) which reads as under:-

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16(2) withdraws his offer during the validity period of offer.
16(a) fails to execute the order as per terms and conditions thereof.
In the present case the EMD is Rs. 20.00 lakhs.
Clause No. 30.2 (Shortfall penalty in Mechanical excavation and loading)

- 130% of Contract Quantity – 63,70,000.00 Cu.m.
- Final quantity executed – 53,49,437.55 Cu.m.
- Balance quantity to be executed – 10,20,562.45 Cu.m.
- Working rate - Rs. 17.00 per Cu.m.
- 20% of working rate Rs. 3.40 per Cu.m.
- Payable penalty for not executing Upto 130% quantity Rs. 34,69,911.00

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A These penalties may be imposed individually or collectively depending on the decision taken by the Management. The imposition of penalty may be decided on the background that the contractor working at a very low rate has executed 108.47% in spite of incurring heavy losses and withdrew only when the new contract was finished ensuring that there is no loss of production.

B

Yours faithfully
Sd/- Illegible
General Manager (TC)

Encl : As above"

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11. The Board of the appellants in its 78th Meeting decided to impose penalty for non-execution of the balance contract work by the respondents and including the financial loss incurred by the appellants due to allocation of that work to third party at higher rate. In terms of that decision, an approval order for recovery of penalty was issued by

D the appellants on 3rd November 2005 which reads thus:

"ANNEXURE -19

MAHANADI COALFIELDS LIMITED
(A subsidiary of Coal India Limited)
P.O. – Jagriti Vihar

E *Burla – 768018*
Distt: Sambalpur-768020 (Orissa)
Gram : SAMBCOAL,: Fax : (0663) 2542770
Phone : PBX :- 2542461 to 2542470

F *Ref: No. MCL/SBP/GM(TC)/2005/1100 Date: 03.11.2005*

APPROVAL ORDER

Sub: Imposition of penalty to M/s Dhansar Engineering Company Pvt. Ltd., under NIT-276 (Dt; 01.12.2002) for the work of "Extraction and Transfer of Coal/Coal Measure Strata by deploying "Surface Miners"

G *on hiring basis at lakhanpur OCP, Lakhanpur Area.*

On recommendation of the committee to examine the issue on imposition of penalty under NIT – 276 dated 02.12.2002 to M/s Dhansar Engineering Company Pvt. Ltd., for the work of "Extraction and Transfer of Coal/Coal Measure Strata by deploying "Surface Miners"

H *on hiring basis at Lakhanpur OCP, Lakhanpur Area, the same has*

been agreed by D(T) /D(F)/D(P)/CMD/MCL. The MCL Board in its 78th meeting held on 27.10.2005 under item No. 78.C/20 has been pleased to approve the proposal of imposition of penalty in terms of provision of the contract to M/s. Dhansar Engineering Company Pvt. Ltd.' By non performance of 130% of total contacted under NIT -276 (dt: 02.12.2002) for an amount of Rs. 1,57,40,655.22 (Rupees One Crore Fifty-seven Lakh Forty Thousand Six Hundred Fifty-five and paisa Twenty-two only) under the Clause – 30.1 (loss or damage) of the agreement.

Sd/- General Manager (TC)

Distribution:

1. *GM Lakhanpur Area*
2. *CGM(F) MCL, HQ*
3. *TS to CMD, MCL*
4. *TS to D(T), MCL*
5. *Secy. To D(F), MCL*
6. *Sanction Order file"*

12. Aggrieved, the respondents filed Writ Petition under Article 226 of the Constitution of India and prayed as follows:

"PRAYER

In the circumstances, it is therefore prayed that Your Lordships be graciously pleased to issue a Rule NISI in the nature of certiorari calling upon the Opposite Parties, to show cause as why the impugned letter dated 08.12.2004 vide Annexure-22 issued by the General Manager (TC), Mahanadi Coal Fields Limited, Opposite party No.2 imposing penalty shall not be quashed and if the Opposite Parties fail to show cause or show insufficient cause make the said Rule absolute.

AND

Issue a Writ in the nature of mandamus directing the Opposite parties to pay a sum of Rs. 79,01,434.60 to the Petitioner No.1 Company, which has been illegally withholding by the Opposite parties.

AND

Issue a Writ in the nature of Mandamus directing the Opposite Parties to pay interest @ 18% per annum as the Opposite Parties have illegally withhold the outstanding dues of Rs. 79,01,434.60 of Petitioner No.1 Company since 15.07.2004.

AND

Issue such other Writ/Writs, Order/Orders, Direction/Directions as this Hon'ble Court may deem it fit and proper.

And for this act of Kindness the Petitioner shall as in duty bound ever pray."

A 13. The Writ Petition was opposed by the appellants by filing reply affidavit. The appellants raised preliminary objection about the maintainability of the Writ Petition. On merits, the appellants asserted that the demand raised against the respondents was in accord with the terms and conditions of the contract and if the respondents were aggrieved by the same they were free to resort to the procedure for settlement under clause 31 of the agreement. The Division Bench of the High Court, however, allowed the Writ Petition preferred by the respondents on the finding that it was not permissible for the appellants to allot extra work to the respondents at the fag end of the contract period in terms of clause 5 of the contract which envisaged giving 45 clear days notice for variation of the quantity under the contract. That notice was given to the respondents only on 11th June 2004 even though the extended contract period was to expire on 15th July 2004. The Court held that, surprisingly after extending the contract period on 5th June 2004, within six days on 11th June 2004 the appellants decided to enhance the contract quantity by 30%. That was not a bonafide act and was unacceptable. The Court also held that the appellants had not offered any explanation as to in what circumstances decision to impose penalty was taken by the Board of Directors. The Court further noted that the respondents had executed the contract upto 108.47% at a very low rate, and incurred heavy losses in that regard. Further, a new contract for Lakhanpur OCP was already awarded and there was no loss of production caused to the appellants. On these basis, the Division Bench allowed the Writ Petition in the following terms:

> *"16. Accordingly, the letter dated 8.12.2004 of the General Manager (T.C) Mahanadi Coalfields Limited under Annexure-22 proposing to levy shortfall penalty as well as, its Approval Order dated 03.11.2005 under Annexure-A to the counter affidavit are hereby quashed. . The outstanding dues payable to the petitioner be released in its favour within the period of thirty days along with simple interest @ 8% per annum to be computed from the date of conclusion of contract, i.e. from 16.7.2004. The bank guarantee furnished by the petitioners, pursuant to the direction of this Court dated 28.7.2009 are hereby directed to be cancelled and consequently, directed that the same be returned to the petitioners forthwith.*
>
> *The writ petition is allowed with the aforesaid terms. No Costs."*

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14. Aggrieved, the appellants have filed the present appeal. This Court passed an interim order on 12th April, 2013, directing to maintain status quo as it existed on that date until further orders.

15. According to the appellants the High Court has committed manifest error in entertaining the Writ Petition. Firstly, in respect of a purely contractual matter and moreso when efficacious remedy under clause 31 of the contract was available to the respondents for redressal of their grievance. Secondly, on merits the High Court has misconstrued and misapplied the contractual terms and in particular clause 5 of the contract. However, if the terms and conditions of the contract are read as a whole, it leaves no manner of doubt that the appellants had the discretion to extend the original contract period; and having done so at the request of the respondents, the respondents were bound by the terms of the contract till 15th July 2004. Further, before that date at any point of time, it was open to the appellants to reduce or increase the contract quantity upto 30%. The sole plea of the respondents for their inability to perform the contract was founded on financial difficulty and sufferance of further loss due to low contract rate. That can be no consideration for walking out of the contract. Moreso, after the extra quantity was allocated the respondents could have asked for further time for completing the extra work, if they were not in a position to complete the same within the contract period. That request could have been considered by the appellants appropriately. The respondents did not do so. Instead, they insisted to withdraw from operation merely because the rate of contract was not affordable to them. Resultantly, the appellants had to allot the extra quantity of unfinished work by the respondents, to third party at a higher rate. The fact that the appellants did not suffer any loss of production, it does not follow that no financial loss was suffered by the appellants due to higher rate paid for the unfinished extra work. The appellants were, therefore, justified in recovering the difference of rate in respect of unfinished extra work and penalty therefor. That was a legitimate demand under the terms and conditions of the contract between the parties.

16. The respondents, on the other hand, contend that it was unfair on the part of the appellants not to allow the respondents to close the contract as per the original contract and within the extended contract period i.e. upto 15th July 2004. Further, the respondents cannot be made liable for the unfinished extra quantity of work as that was allotted only

B C D E F G H

A on 11th June 2004, leaving very little time for the respondents to complete the same for which the appellants should blame themselves. According to the respondents, the High Court was right in concluding that clause 5 of the agreement did not permit the appellants to allot an extra quantity of work to the extent of 30% at the fag end of the extended contract period, absent 45 clear days notice mandated therein. Further, the High B Court has passed an equitable order also keeping in mind that the respondents had already executed 108.47% of the contract work by suffering heavy losses, which fact is substantiated from the execution of new contract at the rate of Rs.31.50 per cubic meter as against the rate of Rs.17/- per cubic meter payable to the respondents. It is also C contended that the demand for penalty amount is unilateral and without any just cause. The same is illegal. Hence, contends the learned counsel, the appeal be dismissed.

17. Having heard the learned counsel for the parties at some length, we find force in the plea of the appellants. The challenge in the Writ D Petition filed by the respondents was limited to the letter dated 8th December 2004, issued by the General Manager of the appellants. The respondents had not challenged the extension of contract period till 15th July 2004 vide letter dated 5th June 2004, the decision of the appellants to allot an extra quantity of 30% work and much less the decision of the Board to impose penalty taken on 27th October, 2005 and communicated E to the respondents vide Approval Order dated 3rd November 2005. The High Court, however, has not only set aside the letter dated 8th December 2004 but also the Approval Order dated 3rd November 2005.

18. For doing so, the High Court has taken support from clause 5 of the Contract. That clause cannot be read in isolation. The other terms F and conditions of the contract must be read as a whole. Clause 5 of the agreement dated 26th May 2003 posits authority in the appellants to reduce or increase the tendered quantity by +/– 30%, whilst the contract is subsisting. Indisputably, the original contract period was upto 15th April, 2004. At the instance of these respondents, the same stood extended till G 15th July 2004. The extra 30% work was allotted to the respondents on 11th June 2004, before expiry of the extended contract period i.e. 15th July 2004. As the contract period was extended and that decision was allowed to attain finality, it inevitably obliged the respondents to fulfill all the contractual stipulations under the original agreement including to complete the assigned quantity of work – be it original quantity or extra

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quantity – before 15th July 2004. The fact that they had to suffer financial loss due to low contract rate could not be cited as an excuse to extricate from that contractual obligation. A

19. Failure to comply with the contractual obligation of executing the original quantity of work or the extra work, as the case may be, must visit the respondents with liability to compensate the appellants in terms of other express clauses of the contract to the extent of unfinished work and in particular the financial loss suffered by the appellants for getting the same work executed through a third agency at a higher rate. The fact that the respondents executed 108.47% of work before 15th July 2004, could be no justification to relieve them of their obligation to compensate the appellants with suitable amount for the unfinished contract work (out of 130%). B C

20. Presumably to get over this position, the respondents relying on clause 5 of the agreement would contend that the extra quantity of work could not be allotted to them, absent 45 clear days notice that too at the fag end of the contract period. This argument, in our opinion, is a complete misreading of the said clause. It is one thing to say that the contractor should be given sufficient time to complete the extra work commensurate with the extra quantity required to be executed by him. However, in law, it is not open to contend that even though the contract period is still subsisting, the principal (appellants) could not have exercised its option to increase the quantity of work to the extent permissible under that clause, to be executed by the contractor within the contract period. The principal (appellants) could be asked to exercise their option to extend the contract period beyond 15th July, 2004, to enable the respondents to complete the unfinished extra work. If such request were to be made by the respondents, there would have been corresponding obligation on the appellants to extend the contact period commensurate with the increased quantity of work in terms of clause 5 of the agreement. The respondents, instead, opted to walk out of the contract for the sole reason that the contract rate agreed by them was very low and was causing financial loss to them. That can be no just reason to not fulfill their contractual obligation. D E F G

21. Relying on the third sentence (last sentence) in clause 5, it was contended that the employer could not have increased the tendered quantity in absence of 45 clear days notice. We agree with the appellants that the said stipulation would come into play only if the respondents H

A were also called upon to increase the machine capacity by upto 30% extra "daily" quantity. In the present case, the appellants merely allotted extra 30% quantity without requiring the respondents to increase the daily quantity. There is marked difference between increasing the extra quantity during the contract period and that of increasing the extra "daily" quantity. In the case of latter, the contractor would be required to step B up the machine capacity for which giving of 45 clear days notice to him is necessary. Suffice it to observe that the stipulation in the third sentence of clause 5 providing for 45 clear days notice was not an impediment for the appellants to allot extra quantity of work upto 30%, whilst the contract period was subsisting.

C 22. The respondents had then relied on the notings of the Project Officer dated 26th January 2005 to contend that assigning of extra work to the respondents at the fag end of the contract period was doubted even by the said officer. The observations of the Project Officer cannot be the basis to construe the scope of Clause 5 of the contract. Besides, D it was only an inter-departmental communication which was duly considered at different level in the office of the appellants, but finally it is the decision of the Board of Directors of the appellants that must prevail. As a matter of fact, Clause 5 of the agreement empowers the appellants to increase or reduce the quantity of work upto permissible limit whilst the contract was subsisting. That power having been E exercised, the obligation of the contractor to complete the extra work in terms of the subject contract within the contract period or extended contract period was imperative. The respondents are not right in contending that the appellants-Company had no authority to grant extension of time to complete the enhanced quantity. This contention F deserves to be stated to be rejected, keeping in mind the other contractual terms such as Clause 11.0 - providing for variation in the scheduled quantity, extent and rate; Clause 13 – time for completion of contract and more particularly Clause 14.0 - for extension of date of completion. Clause 14.0 (e) was available and ought to have been invoked by the respondents in this situation. It postulates that for any other cause not G specifically provided in sub-clauses (a) to (d) of the same Clause, at the sole discretion of the appellants, the date of completion could be extended, if it was found to be necessary because of situation beyond the control of the contractor. That clause could be invoked for the situation in which the respondents were placed due to extra work allocated to them at the H fag end of the contract (extended) period.

A 23. In our opinion, clause 5 did not prohibit the principal (appellants) to allot upto extra 30% quantity of work, for want of 45 clear days of subsisting contract period. Whereas, that option could be exercised by the appellants at any time until the contract period was subsisting, which in this case was until 15th July 2004. In the present case, such notice regarding increase of work upto 30% permissible under clause 5 of the B agreement, was given on 11th June 2004. On this finding, it must follow that the respondents committed breach of their contractual obligation, in not completing the balance work out of 130% of work (i.e. 130 - 108.47%). To that extent the respondents became liable to compensate the appellants including by way of penalty and in particular towards the C financial loss caused to the appellants due to assigning the unfinished work to a third agency (contractor) at a higher rate. The amount demanded by the appellants includes the difference of contractual rate and the actual loss suffered by the appellants for completing the unfinished work through a third agency (contractor) at a higher rate, as is noticed from the communication dated 8th December 2004 sent to the D respondents.

24. The respondents, would then contend that, the appellants without giving any opportunity to the respondents unilaterally imposed penalty and despite the noting of the General Manager that there was no loss of production to the appellants. Similarly, a doubt was expressed by E the Project Officer regarding giving extra work to the respondents at the fag end of the contract period. The respondents have relied on the decision of this Court in ***Maula Bux vs. Union of India***[1], in which it has been held that "where a sum is named in the contract in the nature of a penalty, where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by it." It is, however, F indisputable that financial loss was suffered by the appellants on account of assigning the unfinished work to a third agency (contractor) at a higher rate. In that, the contract rate for the same work to be done by the respondents would have been at Rs. 17/- per cubic meter, which the appellants were required to get it executed at the rate of Rs. 31.50 per G cubic meter through a third agency. The fact that no loss of production was suffered by the appellants cannot relieve the respondents of that liability. It is a different matter that the respondents were not put to notice before the final decision was taken by the appellants to recover the financial loss along with penalty. The respondents could have

[1] (1969) 2 SCC 554 H

A approached the appellants for reconsideration of their demand towards penalty, in terms of Clause 30.3 of the contract; and persuade the appellants to waive the penalty amount to be recovered from them. The respondents, however, chose to straightway approach the High Court by way of Writ Petition. Notably, the High Court has not set aside the B penalty amount as such, but the entire demand being impermissible. Since we have reversed the findings and conclusion of the High Court and even if this appeal succeeds, the respondents can be granted an opportunity to make a representation to the Appellants - company, who in turn can deal with the same in accordance with law. If the appellants accept the claim of the respondents about the unjustness of penalty or C quantum thereof, they would be free to withdraw or modify their claim for recovery of penalty amount, if so advised. In the event, the appellants reject the representation, they will be free to recover the amount as demanded towards penalty along with interest accrued thereon, as may be permissible in law. However, that would not absolve the respondents D from the financial liability arising due to difference of rate of contract and the actual cost incurred by the appellants to complete the unfinished work out of 130% of the contract quantity, through a third agency at a higher rate. That can be recovered by the appellants from the respondents along with interest accrued thereon at such rate, as may be permissible in law, even if the representation made by the respondents for recall or E modification of the penalty amount is pending consideration. Considering the above, it is not necessary for us to burden this judgment with the contention of the respondents that the penalty imposed without any notice or hearing to the respondents is vitiated; as also the decisions relied in support of that contention in the case of ***Gorkha Security Services vs. Government (NCT of Delhi) & Ors.***[2] ***and Kumari Shrilekha Vidyarthi*** F ***& Ors vs. State of U.P.***[3]

25. Similarly, it is not necessary for us to burden this judgment with the decisions relied on by the respondents, to contend that existence of alternative remedy is no bar to entertain a Writ Petition under Article 226 of the Constitution of India, as held in the cases of ***Popcorn*** G ***Enterainment vs. City Development Corporation***[4], ***Harbanslal Sahnia & Anr. vs. Indian Oil Corporation Ltd. & Ors.***[5], ***Union of***

[2] (2014) 9 SCC 105
[3] (1991) 1 SCC 212
[4] (2007) 9 SCC 593
H [5] (2003) 2 SCC 107

***India & Ors. vs. Tantia Construction Pvt. Ltd.*[6], *M.P. State Agro Industries Development Corpn. & Anr. Vs. Jahan Khan*[7] *and Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai*[8].** For, we have already examined the merits of the controversy and more so granted liberty to the respondents to make representation to the appellants on the question of justness of the demand towards penalty or the quantum thereof. It will be open to the respondents to pursue remedy in that behalf, as may be permissible in law. We are not expressing any opinion one way or the other on the issue of penalty amount. All questions in that behalf are left open.

26. Accordingly, we partly allow this appeal. The judgment of the Division Bench dated 7th November 2012 is set aside. The reliefs claimed by the respondents in the Writ Petition are disposed of in the above terms.

27. The appeal is partly allowed in the above terms with no order as to costs.

Kalpana K. Tripathy Appeal partly allowed.

[6] (2011)5 SCC 697
[7] (2007) 10 SCC 88
[8] (1998) 8 SCC 1