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IN THE HIGH COURT OF DELHI AT NEW DELHI

**RESERVED ON: 28.10.2009
PRONOUNCED ON: 20.11.2009**

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CS(OS) No.1311/2002

DELHI DEVELOPMENT AUTHORITY

..... Plaintiff

Through : Mr. Anil Garg, Advocate.

versus

M/S CONSTRUCTION & DESIGN SERVICES U.P. JAL NIGAM Defendant

Through : Nemo.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

MR. JUSTICE S.RAVINDRA BHAT

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1. This suit for recovery was filed by the plaintiff (hereafter “DDA”) against the defendant seeking recovery of a sum of Rs. 20,86,446/- along with interest at the rate of 24% per annum from the date of filing of the suit till the date of realization.

2. According to the suit averments the plaintiff, being desirous of constructing a sewerage pumping station at CGHS area at Kondli Gharoli, invited tenders. The defendant applied and was awarded the said contract by letter, dated 28.09.1995 (Ex. PW-1/2) and a written agreement, dated 04.10.1995 (Ex. PW-1/3) was entered into between the parties. The plaintiff alleges that the defendant was never prepared to honour its obligation under the agreement as from the very beginning the work proceeded at a very slow pace and even after several reminders to speed up

the pace, the defendant was unable to complete the job in time. It is the case of the plaintiff that the defendant was not able to complete the work assigned even after several reminders and show-cause notices and finally the contract was rescinded (by the plaintiff) on 17.09.1999.

3. The defendant was proceeded *ex-parte* by order dated 16.04.2009, as there was no appearance on its behalf since March 21, 2007 nor any written statement was filed. Further, by the same order of the Court, the plaintiff was directed to file its evidence on affidavit alongwith original documents or certified copies of the same.

4. In its evidence by way of affidavit the plaintiff points out to letters dated 08.02.1996 and 20.03.1996 (Ex. PW-1/4) issued to the defendant requesting to speed up the work. It is stated that on 17.07.1996 its Chief Engineer inspected the work site and found only excavation work was done at the site, the same was brought to the notice of the defendant by letter, dated 23.07.1996 (Ex. PW-1/5) and again a letter was issued to the defendant to expedite the work on 06.02.1997 (Ex. PW-1/6). The defendant was also given permission to work round-the-clock, as the Supreme Court was monitoring the whole project. Again a letter citing similar grievances was written to the defendant on 18.02.1997 (Ex. PW-1/7). Then on 03.03.1997, it is stated, that the defendant stopped the work suddenly and the plaintiff wrote a letter, dated 05.03.1997 (Ex. PW-1/8) (to the defendant) requesting to start the work but the defendant paid no heed. Therefore, a show-cause notice, dated 14.05.1997 was issued to the defendant (Ex. PW-1/9) in response to which, the latter by its letter, dated 01.07.1997 cited some strike by the DDA Engineers, as the reason for stopping the work, which the plaintiff claims to be falsehood, as the actual reason was that the defendant was unable to mobilize the labour for execution of the work. By a letter, dated 10.07.1997 (Ex. PW-1/10) the defendant was called upon to take up the work immediately and get it completed at the earliest. It is stated that on 09.03.1997 the defendant had submitted a revised programme and target dates, but the same was not adhered to. A letter, dated 11.09.1997, was again issued by the plaintiff requesting the defendant to expedite the work (Ex. PW-1/11). On the same day the plaintiff's Superintending Engineer inspected the project site in presence of the defendant's Project Manager where the progress of the work was found to be unsatisfactory. On 30.09.1997 the Project Manager of the defendant informed the plaintiff, by a letter (Ex. PW-1/12), that they were not able to execute the work on account of some internal problems and

financial constraints. Taking note of the negligible progress and highly unsatisfactory quality of work, the plaintiff held two meetings at the site and issued two letters, dated 29.09.1997 (Ex. PW-1/14) and 13.10.1997 (Ex. PW-1/13) drawing the defendant's attention to the issue and with a direction to expedite the work. On 21.11.1997 the plaintiff cautioned the defendant that if the project is not completed within the target time then necessary action under Clause 3(a), (b) and (c) of the tender document shall be taken against the defendant, for which a show-cause notice had already been issued to the defendant (Ex. PW-1/15). By letter, dated 24.11.1997 the defendant was informed that the work at the project site was found to be at a stand-still (Ex. PW-1/16).

5. On 26.11.1997 another show-cause notice under Clause 2 of the agreement was issued to the defendant (Ex. PW-1/17); its reply is not placed on record. In a meeting held in the office of the Chief Engineer on 13.01.1998 the representatives of the defendant gave a positive assurance to the plaintiff to finish the work by 15.02.1998. Minutes of the meeting dated 13.01.1998 are exhibited (Ex. PW-1/18). The plaintiff states that despite all these efforts the desired progress was not achieved, therefore on 04.03.1998 two more reminders were issued to the defendant asking it to adhere to the targets (Ex. PW-1/19 and PW-1/20). On an inspection of the project site, the work was discovered to be at a stand-still, the defendant was reminded that as per the revised programme the main roof cast was to be laid before 12.03.1998 yet till date only 10% of the silt had been removed; a fresh reminder dated 05.03.1998 (Ex. PW-1/21) was issued to the defendant to expedite the work. By letters, dated 02.04.1998 the defendant was once again called upon to start the work of shuttering of the roof (Ex. PW-1/22 and PW-1/23). Further, a reminder was issued to the defendant to get the designs approved from Tata Consulting Engineers on 07.04.1998 (Ex. PW-1/24); reminders to expedite the work were also issued on 02.05.1998 (Ex. PW-1/25), 05.05.1998 (Ex. PW-1/26), 15.07.1998 (Ex. PW-1/27) and 26.09.1998 (Ex. PW-1/28). Again by letter, dated 24.12.1998 the defendant was called upon to accelerate the work (Ex. PW-1/29), but to no avail resulting in issuance of another show-cause notice, dated 01.02.1999 (Ex. PW-1/30) to the defendant to show cause why an action under Clause 3 (a), (b) and (c) should not be taken against it. Another reminder was issued to the defendant on 09.04.1999 to complete the work in target time (Ex. PW-1/31). As the defendant did not pay any heed to the plaintiff's repeated requests and reminders, the agreement was rescinded on

17.09.1999 (Ex. PW-1/33), pursuant to a final show-cause notice, dated 31.07.1999 (Ex. PW-1/32).

6. In terms of Clause 2 of the tender document, which is a part of the agreement, dated 04.10.1995 the Superintending Engineer levied compensation of Rs. 20,86,446/- for delay in execution of the project and the defendant was called upon to deposit the same by letter, dated 21.07.1999 (Ex. PW-1/34). Another reminder for this purpose was sent to the defendant by letter, dated 29.07.1999 (Ex. PW-1/35); however, the defendant failed to comply. The plaintiff then informed the defendant by letter, dated 29.03.2000 (Ex. PW-1/36) that under the agreement the defendant was under an obligation to perform the Water Tightness Test, which it did not, therefore another agency had to be requested to perform the same, at the cost and risk of the defendant.

7. The plaintiff asserts that time was of essence as per the agreement and in case of any delay in execution of the tendered work, the defendant was liable to compensate the plaintiff in terms of the agreement. To say this, the plaintiff places reliance on Clause 2 of the said agreement, which reads as under:

“The time allowed for carrying out the work as entered in the tender shall be strictly observed by the contractor and shall be deemed to be the essence of the contract on the part of contractor and shall be reckoned from the Tenth Day after the day on which the order to commence the work is issued to contractor. The work shall throughout the stipulated period of the contract be proceeded with all due diligence and the contractor shall pay as Compensation an amount equal to one percent, or such smaller amount as the Superintending Engineer Delhi Development Authority (whose decision in writing shall be final) may decide on the amount of estimated cost of the whole work as shown in the tender, for every day that the work remains uncommenced or unfinished, after the proper dates. And further, to ensure good progress during the execution of the work, the contractor shall be bound in all cases in which time allowed for any work exceeds, one month (save the special jobs) to complete one-eight of the whole of the work before one-fourth of the whole time allowed under the contract has elapsed, three-eight of the work, before one-half of such time has elapsed and three-fourth of the work, before three-fourth of such time has elapsed. However, for special job if a time-schedule has been submitted by the Contractor and the same has been accepted by the Engineer-in-Charge, the contractor shall comply with the said time-schedule. In the event of the contractor failing to comply with

this condition, he shall be liable to pay as compensation an amount equal to one percent or such smaller amount as the Superintending Engineer Delhi Development Authority (whose decision shall be final) may decide on the said estimated cost of the whole work for everyday that the due quantity of work remains incomplete; provided always that the entire amount of compensation to be paid under the provision of this clause shall not exceed ten percent, of the estimated cost of work as shown in the tender.

The contractor shall be required to submit a detailed programme for completing of work with the stipulated period in the form of a Bar-Chart, covering all major activities, to the Engineer-in-Charge, within 10 days from the date of award of work, modification suggested by the Engineer-in-Charge shall be ensured by the contract or that the time schedule as laid down in the aforesaid Bar-Chart is adhered. To in case of any slip, the time lost will have to be made good by the contractor by speeding up the activities in such cases, he shall be bound to follow the Engineer-in-Charge."

8. The Court has considered the suit averments and the documents placed on record by the plaintiff. The time allowed, under terms of the tender document, for completion of the work was 15 months from the tenth day after the date of the letter, dated 28.09.1995. Thus, the defendant was required to complete the project by 07.01.1997. The Contract was finally rescinded by the plaintiff on 17.09.1999, i.e. more than two and a half years after the date initially fixed for completion of the project; during which period, this deadline was revised/extended twice at least, at the behest of the defendant. The Court cannot be unmindful of the fact that the plaintiff had issued infinite reminders to the defendant to expedite the work and meet the quality promised. The defendant moved an application (I.A. No. 9589/2003) under section 151 of the Code of Civil Procedure, 1908 for dropping the proceedings of this suit on the ground that by order dated 19.12.2001 of this Court, Mr. Justice (Retd.) P.K. Bahri was appointed as the Sole Arbitrator in consideration of an earlier application moved by the defendant herein claiming further that the disputes referred for arbitration arise out of the same contract, which was not disclosed by the plaintiff before this Court, at the time on filing of the present suit. By order dated 21.03.2007 the said application of the defendant was dismissed in light of the decision in *Delhi Development Authority v. M/s. Sudhir Brothers* 1995 (2) Arb.L.R. 306. In that decision, the court held that matters excluded from the purview of arbitration, could be the subject of claims before the civil court.

9. The claim in the suit is premised upon the condition in Clause 2, the material portion of which empowers the Engineer-in-chief to “decide” the question of damages, payable by the contractor, up to an extent of 10% of the contract value, in the following terms:

“...However, for special job if a time-schedule has been submitted by the Contractor and the same has been accepted by the Engineer-in-Charge, the contractor shall comply with the said time-schedule. In the event of the contractor failing to comply with this condition, he shall be liable to pay as compensation an amount equal to one percent or such smaller amount as the Superintending Engineer Delhi Development Authority (whose decision shall be final) may decide on the said estimated cost of the whole work for everyday that the due quantity of work remains incomplete; provided always that the entire amount of compensation to be paid under the provision of this clause shall not exceed ten percent, of the estimated cost of work as shown in the tender...”

(emphasis supplied)

10. The materials and pleadings show that the contractor had to complete the job conferred, by 7.01.1997. The plaintiff says that several extensions were granted, and relies on letters written to the defendant by the Superintending Engineer, levying compensation of Rs. 20,86,446/- for delay in execution of the project. The defendant was called upon to deposit the same by letter, dated 21.07.1999 (Ex. PW-1/34). Another reminder to this effect was sent to the defendant by letter, dated 29.07.1999 (Ex. PW-1/35). Other than these materials, the plaintiff has not relied on anything to say what is the basis of the claim.

11. It would be necessary to extract Section 73 and 74 of the Indian Contract Act. They are as follows: -

“73. Compensation for loss or damage caused by breach of contract

When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract - When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation - In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

74. Compensation for breach of contract where penalty stipulated for -

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.- A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception.- When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the 1[Central Government] or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.*

Explanation. - A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested”.

12. The above provisions enact principles upon which damages are to be awarded by the Courts in India for breach of contracts. There are obvious differences between the two provisions. Section 73 outlines the general principles for the award of damages, which is the difference between the price or cost of the goods or services contracted for as on the date of breach, which the injured party would be entitled to. In such an instance, the injured party would have to prove the breach (of contract); the value, cost or price of the goods or services contracted for on the date of breach and the measures taken by it towards mitigation of damages. Section 74, on the other hand, dispenses with the requirement of proving actual damage once breach of contract is established, the Court is enabled to award the “reasonable compensation” not exceeding the amount specified in the contract or the amounts which can be arrived at on application of the *formulae* or method prescribed in the contract.

13. The Supreme Court, in *Fateh Chand v. Bal Kishan Das* AIR 1963 SC 1405 called Section 74 as the provision cutting through the maze of rules evolved by English Courts over a

period of time to distinguish between what is considered a genuine pre-determination of damages and what is penalty and, therefore, not enforceable. The Court held as follows: -

“10. Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of “actual loss or damage”; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.

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15. Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the court is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit. Use of the expression “to receive from the party who has broken the contract” does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach.

16. There is no evidence that any loss was suffered by the plaintiff in consequence of the default by the defendant, save as to the loss suffered by him by being kept out of possession of the property. There is no evidence that the property had depreciated in value since the date of the contract provided; nor was there evidence that any other special damage had resulted. The contract provided for forfeiture of Rs 25,000 consisting of Rs. 1039 paid as earnest money

and Rs 24,000 paid as part of the purchase price. The defendant has conceded that the plaintiff was entitled to forfeit the amount of Rs 1000 which was paid as earnest money. We cannot however agree with the High Court that 13 percent of the price may be regarded as reasonable compensation in relation to the value of the contract as a whole, as that in our opinion is assessed on an arbitrary assumption. The plaintiff failed to prove the loss suffered by him in consequence of the breach of the contract committed by the defendant and we are unable to find any principle on which compensation equal to ten percent of the agreed price could be awarded to the plaintiff. The plaintiff has been allowed Rs 1000 which was the earnest money as part of the damages. Besides he had use of the remaining sum of Rs 24,000, and we can rightly presume that he must have been deriving advantage from that amount throughout this period. In the absence therefore of any proof of damage arising from the breach of the contract, we are of opinion that the amount of Rs 1000 (earnest money) which has been forfeited, and the advantage that the plaintiff must have derived from the possession of the remaining sum of Rs 24,000 during all this period would be sufficient compensation to him. It may be added that the plaintiff has separately claimed mesne profits for being kept out possession for which he has got a decree and therefore the fact that the plaintiff was out of possession cannot be taken, into account in determining damages for this purpose. The decree passed by the High Court awarding Rs 11,250 as damages to the plaintiff must therefore be set aside.”

14. In *Maula Bux v. Union of India* AIR 1970 SC 1955, the Supreme Court repelled the contention that quantified amounts spelt out in a contract for supply of potatoes to the Central Government, were, in the circumstances of the case, genuine pre-determination of what the damages were likely to be and held that such conditions were unenforceable penalties. The Court also noticed that that the Central Government did not make any effort to establish the quantum of damage suffered by it. It approved the previous ruling in *Fateh Chand* and applied the ratio, holding that:

“Counsel for the Union, however, urged that in the present case Rs 10,000 in respect of the potato contract and Rs 8500 in respect of the poultry contract were genuine pre-estimates of damages which the Union was likely to suffer as a result of breach of contract, and the plaintiff was not entitled to any relief against forfeiture. Reliance in support of this contention was placed upon the expression (used in Section 74 of the Contract Act), “the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation”. It is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree, and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression “whether or not actual damage or loss is proved to have been caused thereby” is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess

compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is 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 him...”

Similarly, in *M.L. Devendra Singh v. Syed Khaja* 1973 (2) SCC 515 (affirmed in *P. D'Souza v. Shondrilo Naidu*, (2004) 6 SCC 649) the Court accepted the same approach and further emphasized that mere stipulation of some amount would only be a piece of evidence, but inconclusive by its very nature:

“20. The fact that the parties themselves have provided a sum to be paid by the party breaking the contract does not, by itself, remove the strong presumption contemplated by the use of the words ‘unless and until the contrary is proved’. The sufficiency or insufficiency of any evidence to remove such a presumption is a matter of evidence. The fact that the parties themselves specified a sum of money to be paid in the event of its breach is, no doubt, a piece of evidence to be considered in deciding whether the presumption has been repelled or not. But, in our opinion, it is nothing more than a piece of evidence. It is not conclusive or decisive.”

In *Oil and Natural Gas Corporation Ltd v. V. Saw Pipes Ltd.* AIR 2003 SC 2629, the Court summarized the legal position as follows:-

“68. From the aforesaid discussions, it can be held that:

(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by

way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.”

15. A penal clause in an agreement has been characterized as a stipulation “in terrorem” which the courts would refuse to recognize, or give effect to. This necessarily implies that the amount, or *formulae* (or formula) of damages far exceeds what can be “reasonable compensation” in the given facts of the case. Of course, the Court would not, unless it is convinced that such condition far exceeds the genuine estimate of reasonable damages, interdict with the condition, which the parties have agreed to include in the contract.

16. No doubt, the plaintiff has established that it was in constant correspondence with the defendant for the completion of work. Many reminders were issued, till eventually the contract was rescinded. It sought recourse to clause 2, and concededly claimed compensation at 10% of the total contract value. The two notices (Ex. PW-1/34 and Ex. PW-1/35), however, do not disclose what was the basis of decision of the authority, i.e. the Superintending Engineer. While the discretion to levy compensation can be part of an overall agreement regarding pre-estimate for damages, the Court is of opinion that there ought to have been some material disclosing why the maximum limit of compensation has been claimed. This assumes importance, because the plaintiff concededly extended time for performance on several occasions, which blunts its argument that time was of the essence of the contract.

17. There is some evidence on the record – for instance Ex. PW-1/16 (Collectively) – showing that the defendant had completed roughly 30% of the work agreed, (8 completed and two partly completed works, out of 34), and completed 40% of the work by 15.11.1998 (PW-1/18). In these circumstances, the plaintiff should have at least shown the basis why the maximum compensation leviable, was in fact claimed.

18. On an overall consideration of the facts found, this Court is of the opinion that the plaintiff treated the condition, i.e. Clause 2 as a penal clause. The amount which can be recovered under the condition is based on exercise of discretion. Yet, the order levying the compensation provides no clue what persuaded the decision maker to claim the maximum amount. This is the clearest indication that it was seen by the plaintiff as a penal clause, and operated as such.

19. As observed earlier, the plaintiff did not treat the contract as of the essence- as clarified by its conduct in extending the time on many occasions. Though it warned of its rights to claim damages, in the later letters, yet the fact remains that till beginning 1999, the plaintiff was content to accept delayed performance. It has been settled that when the contract itself provides for extension of time, the same cannot be termed to be the essence of the contract and default however, in such a case, does not make the contract voidable either. In *M/s. Arosan Enterprises Ltd. v. Union of India and another*, AIR 1999 SC 3804, where it was observed that:

"13. Incidentally the law is well-settled on this score on which no further dilation is required in this judgment to the effect that when the contract itself provides for extension of time, the same cannot be termed to be the essence of the contract and default however, in such a case does not make the contract voidable either. It becomes voidable provided the matter in issue can be brought within the ambit of the first paragraph of Section 55 and it is only in that event that the Government would be entitled to claim damages and not otherwise.

14. In Pollock & Mulla's Indian Contract and Specific Relief Acts, three several cases have been very lucidly discussed, where time can be termed to be the essence of contract :

(1) Where the parties have expressly stipulated in their contract that the time fixed for performance must be exactly complied with;

(2) Where the circumstances of the contract or the nature of the subject-matter indicate that the fixed date must be exactly complied with; and

(3) Where time was not originally of the essence of the contract, but one party has been guilty of undue delay, the other party may give notice requiring contract to be performed within reasonable time and what is reasonable time is dependent on the nature of the transaction and on proper reading of the contract in its entirety."

20. The Court is of opinion that the plaintiff having not treated the contract as of the essence, and having extended the time for performance on several occasions, cannot now fall back on a presumptive condition to impose the maximum compensation leviable; enforcement of such action would be giving effect to a penalty clause. As far as granting reasonable compensation is concerned, the plaintiff has not shown even the basis for levying the compensation that it did in this case. As said earlier, this aspect assumes significance, because the plaintiff was aware what extent of the contract was performed, as well as what was the exact extent of loss, in monetary

terms, either by way of payment to another contractor, or the amount spent for completing the work. In the circumstances, the Court is of opinion that the relief sought cannot be granted.

21. In view of the above discussion, the suit cannot succeed; it is accordingly dismissed, without any order as to costs.

November 20, 2009

(S.RAVINDRA BHAT)
JUDGE