

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **FAO (OS) No.457/2006**

Reserved on : May 13th, 2009

Date of decision : May 19th, 2009

BHARAT SANCHAR NIGAM LTD. Appellant
Through : Mr. H.S.Phoolka, Sr. Advocate with
Mr. Sarat Kapoor, Mr. Kanwar Faisal and
Ms. Vijaishree Dubey, Advocates

VERSUS

BWL LTD. Respondent
Through : Mr. D.K.Malhotra, Ms. S.Kohli,
Advocates

CORAM:
HON'BLE MR. JUSTICE MUKUL MUDGAL
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

% **JUDGMENT**

VALMIKI J.MEHTA, J.

1. The present appeal arises out of the impugned judgment dated 8.5.2006 of a learned Single Judge of this Court passed in OMP 88/2005 filed under Section 34

of the Arbitration and Conciliation Act, 1996 (hereinafter referred as the Act) by the appellant objecting to the Award dated 21.10.04 of the Arbitrator. By the Award the Arbitrator in a claim petition filed by the respondent was pleased to award the following amounts to the respondent/claimant :

“The Claimant is therefore entitled to the following claims:-

A.	Banking Guarantee wrongly invoked.	Rs.23,14,000.00
B.	Bank Charges on the above	Rs. 44,460.00
C.	Infrastructure Assessment fee paid to TEC	Rs. 5,000.00
D.	Type Test Fees Paid to TEC	Rs. 65,000.00
E.	Loss of Profit	<u>Rs. 1,11,32,312.43</u>
		<u>Rs. 1,35,60,772.43”</u>

2. The disputes between the parties arose out of a contract for the supply of optical fibre cables entered into between the appellant as the buyer and the respondent as the seller. The value of the contract was Rs.5,66,61,562/-. The respondent gave a performance security in the form of a bank guarantee of Rs.23,14,000/-. The contract was terminated by the appellant on account of the failure and breach of the respondent in failing to supply the contracted material by the due date. The original purchase order is dated 16.9.1999 and the supply was to be completed within seven months from this purchase order viz. by 15.4.2000. An extension was granted to the respondent at its request whereby the last date of

supply was extended to 28.6.2000. The extension was however subject to liquidated damages (hereafter “LD”) and that the respondent would be only entitled to 75% of the price on delivery instead of 95% as was originally contracted. The extension which was granted on 27.4.2000 for delivery by 28.6.2000 specifically stated that the extension granted is the last extension. One of the terms of the contract was that the respondent was responsible for obtaining a Type Approval from Tele-communications Engineering Centre (hereafter “TEC”) with respect to the cables. This Type Approval under the contract was to be obtained by the respondent from TEC, the designated body under the contract, within three months of the original purchase order dated 16.9.1999 i.e. by 16.12.1999. The respondent in fact did not get the Type Approval by 16.12.1999 and in fact applied only on 15.12.1999, the last day by which Type Approval was to be obtained. The cables under the contract were to be supplied with certain accessories and which were to be procured by the respondent from the Department of Tele-communications (hereafter “DOT”) approved small scale industries manufacturers. The first extension was applied for by the respondent on 28.3.2000 and which was granted for supply by 28.6.2000, as already stated above. On 7/8.7.2000 the respondent further requested the appellant to extend the delivery period upto October, 2000. This letter seeking extension is after expiry of the extended period, and, which had expired on 28.6.2000. Extension was sought on

the ground that Type Approval had not come from the TEC. On 21.7.2000 TEC asked the respondents to deposit a sum of Rs.65,000/- as the testing fees and for issuing of the Type Approval and which fees were deposited by the respondent. The appellant on 24.7.2000 terminated the contract on account of the failure of the respondent to supply the cables by the extended date of 28.6.2000. The appellant also encashed the bank guarantee given as performance security for the sum of Rs.23,14,000/-. It is relevant to note that the accessories portion to be supplied with the cables was deleted by the appellant vide its letter dated 27.4.2000 i.e. at the time of grant of the extension itself.

3. Disputes having arisen between the parties, the same were referred to an Arbitrator who was appointed by an order passed in a petition moved in this Court for appointment of an Arbitrator under the Act. After completion of the pleadings the following issues were framed by the Arbitrator :

- “a) whether the time was of the essence of the contract?
- b) whether the action of Respondents in short closing the contract of the claimant and subsequent encashment of the bank guarantee was illegal and arbitrary?
- c) whether the Claimant is entitled to the relief as prayed for in the Statement of Claim?”

4. The Arbitrator arrived at the following basic conclusions :-

- (i) There was no fault on the part of the respondent inasmuch as it was the TEC which failed to give the Type Approval.

(ii) The appellant was guilty of arbitrary action under public law in refusing to extend the date for the performance of the contract because the appellant ought to have realized that TEC was partly owned by the Government and under the contractual clause 15.3 it was the duty of the appellant “to evaluate the situation” and extend the time for performance.

(iii) The time of performance was not the essence of the contract.

(iv) The appellant failed to note that the delay in supply by the respondent was on account of pressure upon it of performance of another contract which the respondent had entered into with the appellant.

(v) It was the appellant who was guilty of breach and therefore the respondent was entitled to loss of profit, recovery of the amount of bank guarantee which was wrongly encashed etc.

5. The learned Single Judge by the impugned judgment dated 8.5.2006 has dismissed the objections filed by the appellant under Section 34 of the Act on principally three grounds:-

(i) The date of 16.12.1999 as fixed by the contract was the date for making an application to the TEC (and not therefore for getting approval) and that TEC delayed the Type Approval. The learned Single Judge in this behalf has held as under :

“Learned senior counsel did not dispute that the application was made within time, but it was contended that the same was made on the last date. In my considered view, this would make no difference as the respondent was given a time-period to make the application and within the time-period, the respondent did take steps. There is also an important inter-connected fact found in this behalf inasmuch as the TEC took almost 7 months from the date of the application itself for the respondent to be called upon to deposit the requisite fee. I am unable to accept the plea that the petitioner can wash its hands off the role played by TEC. TEC is the body, which is part of the Government and the requirement of Type Approval from TEC is stipulated by the petitioner itself. The extension was also granted apparently on account of the failure to process the application of the respondent expeditiously.”

(ii) The appellant has wrongly urged the plea of fraud which was so done because all the relevant communications of the respondent with the TEC was not placed with the Arbitrator. In this behalf the learned Single Judge has held as under :

“Interestingly, some of the communications sought to be placed on record are between the petitioner and TEC itself. The petitioner can hardly state that they were unaware of such communications. Insofar as the communications between TEC and the respondent are concerned, in some of the cases, copies have been marked to the petitioner. In any case, TEC is part of the Government and is the designated authority of the petitioner for obtaining necessary approvals. The petitioner can hardly be permitted to contend that it was unaware of the communications or the relevance thereof. It is not that the petitioner moved an application seeking any directions for production of any documents. In such a situation, to label the non-availability of these documents with the Arbitrator as a fraud perpetuated by the respondent would be wholly unsustainable.”

(iii) The Arbitrator was not justified in awarding profit margin of 20% but ought to have awarded a profit margin of 15% as per the decision in **Mohd. Salamatullah v. Govt. of Andhra Pradesh, AIR 1977 SC 1481.**

(iv) The learned Single Judge reduced the rate of interest, on the plea of the appellant from 18% to 12% till the date of the decree and thereafter at 9% per annum.

6. Before us the learned counsel for the appellant has principally urged the following contentions:-

(a) The learned Single Judge has fallen into an error in treating the last date viz. 16.12.1999 as the date for filing the application for Type Approval whereas the said date was the last date not for filing of the application for Type Approval but was the last date for obtaining of the Type Approval under the contract. The counsel for the appellant also drew our attention to internal page 19 of the Award where the learned Arbitrator has given an inconsistent finding as under :-

“The Claimant filed his application for infrastructural instructions and Type Approval within time. The Contract expected that the Type Approval is secured by the Claimant within three months and supplies of the cable to be completed within four months thereafter.”

The counsel further contended that the respondent having entered into a commercial contract with open eyes and having agreed to obtain the Type

Approval from TEC within the fixed period, the onus was upon the respondent to in fact get the approval by 16.12.1999 and it did not lie into the mouth of the respondent to contend that TEC was partly owned by the Government. The counsel further contended that the fact that the TEC was a designated body cannot take away the binding effect of the Type Approval having necessarily to be obtained within 3 months of the purchase order dated 16.9.1999. The counsel also contended that no efforts have been pleaded and much less proved by the respondent as to how in the first period of 90 days from 16.9.1999 the respondent regularly and consistently made efforts for securing Type Approval but could not obtain it on account of alleged fault of TEC and similarly also assuming that a second period of 90 days again began from 16.12.1999 the same arguments hold valid. The respondent could not simply just apply to TEC and say that its obligation had come to an end. The obligation was also to ensure getting of the Type Approval within the prescribed period. The counsel contended that the Arbitrator could not have held the last date was the date for filing the application and also that it was the last date for obtaining the approval and which observations are mutually inconsistent.

(b) The learned Arbitrator ignored the admitted fact that though time was not originally the essence of the contract inasmuch as there was a provision for liquidated damages, but, the appellant surely could have made the time of

performance as the essence of the contract subsequently and which was so done when the extension was granted on 27.4.2000 for supply and it was categorically stated that, that would be the last extension. The counsel also referred to a similar plea which was raised before the Arbitrator as found at internal page 13 of the Award as under :-

“Counsels for both the parties have relied on the said decisions of the Supreme Court. Counsel for the Respondent has further relied on another observations of the Supreme Court in M/s Hind Construction. The observation, is if time was not the essence of the contract or if we get stipulation as to the time fixed for completion, but by the reason of waiver, ceased to be applicable, then the only course open to the Respondent Defendant is to fix sometime making it the essence and if within the time so fixed the other party had failed to complete the work, the Respondent Defendant could rescind the contract.

The submission of the Counsel for the Respondents is that the extended date, namely, 28th June, 2000 was the new date making same the essence of the contract. The claimant had failed to make the delivery by that date, and was therefore, liable for the action taken against it.”

- (c) The very fact that the respondent accepted the first extension along with the condition of liquidated damages and also accepted a lesser price of 75% instead of 95% at the time of the delivery clearly indicates that the respondent had admitted its breach of contract at the time of securing of an extension of the delivery period which was all the more so as there was no opposition or challenge to the action of the appellant in imposing of the liquidated damages and amend the payment terms.
- (d) The learned Arbitrator has fallen into an error in mixing up public law issues with purely contractual issues.

We may note that the pleas (c) & (d) were not advanced before the arbitrator and the learned Single Judge but being purely legal pleas arising out of the admitted facts on record as found from the record of the Arbitrator, we have permitted the appellant to urge the same.

(e) The learned Arbitrator has committed a grave error of law while awarding damages on two basic counts. Firstly, since admittedly the respondent has not manufactured the material under the contract and which was thus not available for supply, the only basis of calculation for damages/loss would be the difference in the market rate (viz. lower prizes of cables on the date of breach) whereas the Arbitrator has proceeded to award damages under Section 73 of the Contract Act, 1872 on the basis of the cost of work done/cost of cables as elaborated as internal page 27 of the Award and which is wholly impermissible in law under Section 73. Secondly, it is further argued that loss could be awarded only if it was first pleaded that the market prices had fallen down however, there is no pleading before the Arbitrator by the respondent that prices of the contracted goods viz. optical fibre cables had fallen from the prices prevailing as on the date of the contract to those prevailing on the date of the breach (assuming if any) by the appellant in terminating the contract on 24.7.2000.

7. Per contra the counsel for the respondent has urged as under :-

(a) The respondent had only to apply for Type Approval within three months and it was not as if approval had to be obtained from the TEC within three months. The decision of the Arbitrator is final when he interprets a clause in the contract and therefore the learned Single Judge was right in not interfering with the decision of the Arbitrator.

(b) The counsel further argued with reference to various clauses in the contract that all of them have to be read together so that the respondent should not be held guilty of breach of contract on account of failure of TEC to give the Type Approval and on account of the accessories portion which had to be procured from the designated small scale industries manufacturers as stated in the contract.

(c) It was also urged that the appellant had failed to plead before the Arbitrator in its pleadings that it had been caused loss, on account of loss of revenue, by the very nature of the contract, and which was a must for claiming LD and encashment of the bank guarantee, however, the appellant having failed to plead so, it was bound to have pleaded as to how losses were in fact caused to the appellant and consequently the appellant was wholly disentitled to encash the bank guarantee and which amount of the bank guarantee viz. Rs. 23,14,000/- is bound to be refunded to the respondent along with the bank guarantee charges. This plea was not argued on this basis before the learned Single Judge and Arbitrator but being a legal plea

similar to point (c) as urged by the appellant this court will have to consider this plea as now urged.

(d) That the decision of the arbitrator is final on facts and law and the court should not interfere with the Award merely because two views were possible on the findings of fact and law as arrived at by the arbitrator.

The counsel in support of his arguments has relied upon the decision of **ONGC vs. Saw Pipes Ltd. 2003 (5) SCC 705, Arosan Enterprises Ltd. vs. Union of India 1999 (9) SCC 449** and **Pure Helium India (P) Ltd. Vs. ONGC 2003 (8) SCC 593** and other judgments as given in the written arguments and which also lay down the same proposition of law.

8. We are of the opinion that the learned Single Judge has fallen into an error in dismissing the objections which were filed by the appellant to the Award. The learned Single Judge failed to appreciate that the Arbitrator had ignored the direct and categorically clear provision in the contract pertaining to obtaining of the Type Approval as distinguished from applying for the Type Approval. Further, the learned Single Judge ought to have noted that the Arbitrator had not followed the substantive provisions of law being the settled interpretation of measure and process of arriving at the loss under Section 73 of the Contract Act, 1872; as was mandated on the Arbitrator by the substantive provision of law being Section 73 of

the Contract Act and under the same the only basis of the claim of damages could be losses which “naturally arises from the breach of the contract” and which in a case like this can only be the difference in the market prices being the lower market prices and definitely not the cost of material as has been found by the Arbitrator. Further, the learned Single Judge has ignored the fundamental fact that before any damages can be awarded under Section 73 of the Contract Act it is necessary that loss/damages have to be averred as required by law viz. loss on account of fall in the market prices which was not the case of the respondent. Also, awarding of 15% value of contract as loss of profits without any evidence being available that loss has actually been caused by falling prices is wholly against the basic intendment of Section 73 of the Contract Act. The learned Single Judge also ought to have noted that it is settled law that in contractual matters public law element cannot be brought in viz. of arbitrariness merely because one of the contacting party is the Government or State. Therefore, a conspectus of the above shows that the Arbitrator has wholly ignored the definitive position which emerges in law and has proceeded on a basis in law which was contrary to the substantive law of the land and hence the Award is hit by Section 28 of the Act. The Arbitrator has also proceeded to interpret a clause in the contract pertaining to Type Approval in an inconsistent manner and therefore the learned Single Judge

was bound to interfere with such an impermissible interpretation of a plain language of document of the parties.

9. (i) Reference may be usefully made to the recent judgments of the Supreme Court reported in **DDA Vs. R.S.Sharma & Co., 2008 (9) JT 362, ONGC Vs. Garware Shipping Corporation Ltd., 2007 (13) SCC 434, Security Printing & Minting Corporation of India Ltd. and Anr. Vs. Gandhi Industrial Corporation, 2007 (13) SCC 236 and Numaligarh Refinery Vs. Daelim Industrial Co. Ltd, 2007 (8) SCC.**

(ii) In the **R.S.Sharma & Co.’s** case the Supreme Court in paragraph 12 of the judgment has laid down an Award which is against the terms of the respective contract or patently illegal or against the fundamental policy of Indian law or if the Award is so unfair and unreasonable that it shocks the conscience of the Court the Award can be set aside under Section 34 of the A&C Act. In the **Garware Shipping’s** case the Supreme Court has laid down in paragraph 30 of the judgment that there is no such provision that Courts have to be slow in interfering with the Arbitrator’s Award even if the conclusions are perverse and the very basis of the Award is wrong. In the **Security Printing** case in paragraph 16 it has been held by the Supreme Court that even though the courts are slow in interfering with the Award it does not mean that if the Award is perverse the Courts are powerless to interfere in the matter. In the case of **Numaligarh Refinery case** in paragraph 17

of the judgment the Supreme Court has said that where it has been found that the Arbitrator has acted without jurisdiction and has put an interpretation on a clause of the agreement which is wholly contrary to law then in that case it cannot be said that there is no provision for the courts to set the things right, even though the Courts do not ordinarily substitute the interpretation for that of the Arbitrator and that the finding of the Arbitrator is normally accepted.

10. First taking up the issue with respect to the date of 16.12.1999, whether the same is the last date for making of an application for Type Approval or is the last date for getting the Type Approval. We would therefore refer to the admitted clause between the parties which reads as under:-

“Delivery Schedule: The Supplier have to take the Type Approval from TEC within three months of Placement of Purchase Order and supplies shall be completed within seven months of placement of Purchase Order. Delivery schedule indicated above shall be firm and not subjected to any change.”

This clause appears in the advance purchase order dated 11.8.1999 between the parties and it is also identically reproduced as clause 6 in the purchase order dated 16.9.1999.

A reading of the aforesaid clause leaves no manner of doubt that the period of three months beginning from 16.9.1999 is definitely not for making of an

application for Type Approval but it was in fact for obtaining of the approval from TEC. There was only one possible interpretation but the learned Arbitrator has chosen an interpretation which would amount to doing violence to the language of the Contractual Clause. A reading of the clause shows that it is not at all justified to hold that the period of three months is only for applying for Type Approval and not for getting the Type Approval. Even assuming that the date of 16.12.1999 (on alternatively 16.3.2000 assuming the extension granted for supply has postponed the date by another three months) should be taken as the last date for making the application, even so, it was an incumbent upon the respondent to specifically plead with detailed facts and circumstances as to how in spite of all efforts consistently and regularly done qua TEC, in spite of the same it was TEC which did not give the Type Approval. On a query from the Court the counsel for the respondent was not able to show any such pleading of consistent and persistent follow up on a regular basis by the respondent with TEC for getting the Type Approval, much less any proof in the form of correspondence between the respondent and the TEC. It was not enough for the respondent to simply make an application and leaving it at that and simply saying that nothing was required to be done by it any further. The respondent entered into a commercial bargain/contract with open eyes, a commercial contract of crores of rupees and had specifically contracted to get the Type Approval within 3 months which it miserably failed to do. No explanation

was forthcoming from the counsel for the respondent and the Arbitration Record as to why it was only on the very last date that an application was filed for Type Approval, a surprising and puzzling fact indeed. The categorical effect thereof surely is that it was the respondent who was guilty of breach in not obtaining the Type Approval either in the first period of 90 days or even in the second/extended period of 90 days from 16.12.1999. No further latitude was rightly granted to the respondent by the appellant. Another glaring fact of the admission of the guilt and breach of the respondent is clear from the fact that when on 27.4.2000 the first extension was granted extending the supply period to 27th June, 2000, at that stage, liquidated damages were imposed upon the respondent and additionally the respondent's entitlement to receive the price was brought down from 95% to 75% on delivery and there was no protest whatsoever from the respondent at any stage immediately after 27.4.2000 or even later till the contract was terminated by the appellant. We have no doubt that it is the respondent who was guilty of breach of contract in not obtaining the Type Approval within time and not making the supplies prescribed under the contract. In fact, the respondent has admittedly not even pleaded the case of having duly manufactured the contracted quantity of material for supply to the appellant whether within time or even later.

11. The contention of the counsel for the respondent is that it was not guilty of delay inasmuch as there was default on the part of the small scale industries

manufacturers for supply of the accessories and the contract was a complete package for supply of the cables and the accessories together. In our view this is a misconceived plea because at the time of granting extension on 24.7.2000, the appellant has specifically deleted the supply of accessories from the supply of cables and this has been specifically so noted by the Arbitrator at internal page 11 (first top para) of the Award as under:-.

“In reply, the Respondents have contended that the delay in securing the infrastructure and Type Approval was caused by the Claimant. It was also submitted by them that the accessories were de-linked from the required cables through its letter dated 27th April, 2000 and yet the cables were not supplied by the Claimant.”

We may note this argument of non-supply of accessories by the designated industries is only an argument of desperation as the contract was cancelled by the appellant not because of the failure of the respondent in not supplying the accessories but the contract was terminated on account of the failure of the respondent to supply the optical fibre cables under the contract. The issue raked up by the respondent with respect to supply of accessories is therefore clearly misconceived.

12. The counsel for the appellant is also right in contending that the Award (from internal page 16 to 18) holds that the appellant wrongly guilty on public law principles of alleged lack of reasonableness on fair play in action and which

principles do not apply to contractual matters. We agree that it is not impermissible in law in contractual matters to bring in public law issues. We may refer to a recent Division Bench Judgment of this court reported as **C.J. International vs. NDMC, 2003 (105) DLT 545**, and which clearly holds that once the parties are in the realm of the contract it makes no difference if one of the party to the contract is Government/State. Paras 40 & 54 of the judgments reads as under:-

“Business requires total freedom to decide and take action in the best interest of business. Profit, is the aim of every business and, therefore, when a State conducts business it must have all the freedom to do so. If shackled by the strict principles of judicial control over administrative action, it may become impossible for a State to conduct business, as business needs to be conducted.”

“The aforesaid decisions of the Supreme Court when analysed, clearly brings out the distinction that where action is taken pure and simple under a contract, the principles of justness, fairness, arbitrariness, reasonableness etc. Flowing out of Article 14 of the Constitution of India cannot be attracted. Where, however, the foundation of the action lies in an administrative or an executive policy decision taken and then applied to the contract, the merits of the administrative or executive decision taken are subject to judicial review. In each of the cases, aforesaid, before the Supreme Court it was noted that either the police decision taken suffers from the vice of arbitrariness or the administrative decision taken was found to be so suffering. In each and every decision the Supreme Court was at pains to clarify that their observations would not apply purely to a field of contract pure and simple.”

In the aforesaid Division Bench judgment reference has been made to the judgments of the Hon’ble Supreme Court as stated hereinafter. In **Bareilly**

Development Authority vs. Ajay Pal Singh, 1989 (2) SCC 116 it was held that after entering into the field of contracts, the “relations are no longer governed by the constitutional provisions but by the legally valid contract which determines the rights and obligations of the parties inter se. In this sphere, they can only claim rights conferred upon them by contract.”

The Hon’ble Supreme Court in the case of **Assistant Excise Commissioner vs. Issac Peter & Ors., 1994 Vol. 4 SCC 404** has held as under :

“Learned counsel for respondents then submitted that doctrine of fairness and reasonableness must be read into contracts to which State is a party. It is submitted that the State cannot act unreasonably or unfairly even while acting under a contract involving State power. Now, let us see, what is the purpose for which this argument is addressed and what is the implication?.....Doctrine of fairness or they duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the rule of law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties..... We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contract (which may be statutory in some cases) and the laws relating to contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. It bears repetition to say that the State does not guarantee profit to the licenses in such contract. It bears repetition to say that the State does not guarantee profit to the licenses in such contract. There is no warranty against incurring losses. It is a business for the licensees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to

its money under the contract. It is not as if the licensees are going to pay more to the State in case they make substantial profits. We reiterate that what we have said hereinabove is in the context of contracts entered into between the State and its citizens pursuant to public auction, floating of tenders or by negotiation. It is not necessary to say more than this for the purpose of these cases.”

13. We may also state that it was impermissible for the Arbitrator to grant benefit of the entitlement to claim extension of time to the respondent merely because it was performing other contracts for the appellant. This legal position is unknown to law as to how there can be mixing up of two contracts so that extension can be claimed as a matter of right in one contract though not so provided for in that contract, merely because another contract is being performed by the same party with the other party to the contract. A contract is governed only by its terms and not by any other terms of any other contract and much less with the performance of the other contract which has nothing to do with the performance of the other contract in question.

14. In a contract of the type of the contract in question which pertains to supply of goods/material, if a breach is alleged by a seller then the only entitlement of the seller is to claim the difference in the market prices as between the higher contracted price and a lower price on the date of performance/breach/wrongful termination. Of course, it is not necessary to perform a contract which has been broken by actually going to the market and selling at a loss, but, the lower market

prices on the date of breach have to be proved. See **Saraya Distillery vs. Union of India & Anr., AIR 1984 Delhi 360.**

In the present case it is quite clear that the difference in the market prices is not the basis of the claim made before the Arbitrator and the Arbitrator too has, has gone on the cost of the manufacture (i.e. selling price minus cost price and not selling price minus market price) basis and although admittedly the materials under the contract were not manufactured by the respondent for supply to the appellant. The relevant portion of the Award showing the calculation on the loss on the basis of the cost of material is as under :

"STATEMENT OF LOSS OF PROFIT

TENDER NO.CT/PO/051/99-2000 DT.16/09/99

A) TENDER QUANTITY

TYPE OF CABLE	ORDERED QTY. CKM (CABLE KM)	ORDER RATE (ALL INCLUSIVE) PER KM.Rs.
6 F ARMoured CABLE	871	55994

B) LOSS OF PROFIT

6 F ARMoured CABLE

**ASSOCIATED
ACCESSORIES**

1) ORDERED QUANTITY	871	871
2) SELLING PRICE (Rs)per k.m	55994	7911.12(AS PER ANNEX.5)
3) <u>COST OF PRODUCTION(Variable)</u>		
RAW MATERIAL COST	26202.09 (AS PER ANNEXURE-1)	5996.83(AS PER ANNEX.5)
EXCISE DUTY	7404 (AS PER ANNEXURE-2)	0

POWER & FUEL	825 (AS PER ANNEXURE-3)	
STORES & SPARES	93 (AS PER ANNEXURE-3)	0
<u>SELLING EXPENSES</u>		
A) FREIGHT & FORWARD	2347* (AS PER ANNEXURE-4)	0
B) OTHER SELLING		
EXPENSES	540 (AS PER ANNEXURE-3)	0
OTHER MANUFACTURING		
EXPENSES	113**	
INTEREST ON WORKING CAPITAL (For three months on sale value (i.e. Rs.55994 and Rs. 7911 @ 17.5% p.a		
	2450***	346
Total cost per k.m	<u>39974.09</u>	<u>6342.83</u>
4) LOSS OF PROFIT PER K.M Rs.(2-3 i.e.SELLING PRICE- COST PRICE Rs. 55994-40261.09)	16019.91	1568.29
5) TOTAL LOSS OF PROFIT ON THE CONTRACTED QTY. RS.(1x 4) IN LAC	139.53	13.66
6) TOTAL LOSS OF PROFIT		<u>153.19</u>

NOTE *Freight and forwarding charges has been calculated on the basis of contractual freight.

**Other manufacturing expenses has been calculated on the basis of expenses incurred on account of Repair and Maintenance (Plant & Machinery) during financial year 1999-2000)

***The interest on working capital has been considered to extent of sale value for entire quantity instead of inventories for manufacturing of 6F Armoured Cable on staggered basis for a period of three months.”

Clearly therefore the Arbitrator has proceeded on an incorrect proposition of law and also of taking the cost of manufacture basis and not the market price on date of breach basis because admittedly, the materials under the contract were not manufactured at all by the respondent.

15. As regards the plea of the appellant that in view of the above, there was no basis for the Arbitrator to award loss of profit at Rs.1,11,32,312.43 is wholly justified because there is no basis for awarding profits at either 20% as done by the Arbitrator or 15% which has been allowed in the impugned judgment.

16. We however agree with the contention of the respondent that the appellant was not entitled to encash and forfeit the bank guarantee amount of Rs.23,14,000/-. Admittedly the appellant had sought to forfeit this amount towards liquidated damages. It is not the contention of the appellant that the contract in question is of such a nature that damages/loss cannot be estimated and therefore the amount of liquidated damages represents the loss to the appellant. The counsel for the appellant in reply to this court’s query has conceded that there are no pleadings before the Arbitrator whereby the appellant had claimed forfeiture of the bank guarantee amount on the ground that on account of the failure of the respondent, by

the very nature of the contract it had suffered loss of revenue which would have been earned by it from its customers after laying of the cables. In such circumstances it was a sine qua non for the appellant to plead and prove actual loss and damages by showing that the prices of cables had in fact gone up as compared to the contracted prices and consequently it has suffered a loss. Admittedly the appellant has neither pleaded nor proved so and as conceded by counsel for the appellant. It would at this stage be used to refer to certain observations in the case of **Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705** it has been held in paragraphs 46, 66 and 67 as under:-

"From the aforesaid sections, it can be held that when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss which naturally arises in the usual course of things from such breach. These sections further contemplate that if parties knew when they made the contract that a particular loss is likely to result from such breach, they can agree for payment of such compensation. In such a case, there may not be any necessity of leading evidence for proving damages, unless the court arrives at the conclusion that no loss is likely to occur because of such breach. Further, in case where the court arrives at the conclusion that the term contemplating damages is by way of penalty, the court may grant reasonable compensation not exceeding the amount so named in the contract on proof of damages.

In *Maula Bux case*¹⁹ the Court has specifically held that 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 a case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. The Court has also specifically held that in case of breach of some contracts it may be impossible for the court to assess compensation arising from breach.

Take for illustration construction of a road or a bridge. If there is delay in completing the construction of road or bridge within the stipulated ⁷⁴²

time, then it would be difficult to prove how much loss is suffered by the society/State. Similarly, in the present case, delay took place in deployment of rigs and on that basis actual production of gas from platform B-121 had to be changed. It is undoubtedly true that the witness has stated that redeployment plan was made keeping in mind several constraints including shortage of casing pipes. The Arbitral Tribunal, therefore, took into consideration the aforesaid statement volunteered by the witness that shortage of casing pipes was only one of the several reasons and not the only reason which led to change in deployment of plan or redeployment of rigs Trident II platform B-121. In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In such a situation, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that the party who has committed breach of the contract is not liable to pay compensation. It would be against the specific provisions of Sections 73 and 74 of the Indian Contract Act. There was nothing on record that compensation contemplated by the parties was in any way unreasonable. It has been specifically mentioned that it was an agreed genuine pre-estimate of damages duly agreed by the parties. It was also mentioned that the liquidated damages are not by way of penalty. It was also provided in the contract that such damages are to be recovered by the purchaser from the bills for payment of the cost of material submitted by the contractor. No evidence is led by the claimant to establish that the stipulated condition was by way of penalty or the compensation contemplated was, in any way, unreasonable. There was no reason for the Tribunal not to rely upon the clear and unambiguous terms of agreement stipulating pre-estimate damages because of delay in supply of goods. Further, while extending the time for delivery of the goods, the respondent was informed that it would be required to pay stipulated damages.”

(Emphasis Supplied)

Therefore, to the extent of the award of the Arbitrator directing the refund of the bank guarantee amount as also the charges with respect to the bank guarantee is completely justified because the contract in question was not pleaded to be of the type where the loss or damage is the natural consequence of the breach.

17. Therefore, in view of the judgments of the Supreme Court with respect to entitlement of the Court in interfering with an Award as stated in para 9 above we

are of the view that the learned Single Judge has fallen into an error in not interfering with the Award and disallowing the objections there against. We therefore allow the appeal and allow the objections of the appellant to the Award except the objections with respect to the bank guarantee amount of Rs.23,14,000/- and the charges with respect thereto of Rs.44,460/-. The respondent will be entitled to interest at the rate of 12% till the date of decree and thereafter at 9% till payment as awarded by the learned Single Judge in respect of the amounts of Rs.23,14,000/- and Rs.44,460/-.

18. The appeal is disposed of accordingly leaving the parties to bear their own costs.

VALMIKI J.MEHTA, J

MUKUL MUDGAL, J

MAY 19, 2009

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