

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **OMP No.306/2000**

1st February, 2010

M/S. FORBES GOKAK LTD.

...Petitioner

Through: Mr. I.S. Alag, Mr. J.S.Lamba and
Mr. Rishabh Bhutani, Advocates

VERSUS

CENTRAL WAREHOUSING CORPORATION.

....Respondents

Through: Mr. A.B.Dial, Sr. Advocate with Mr.
K.K.Tyagi, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

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JUDGMENT (ORAL)

VALMIKI J.MEHTA, J

1. By this petition under Section 34 of the Arbitration and Conciliation Act, 1996, the petitioner challenges the Award dated 23.6.2000 passed by the Sole Arbitrator. By the impugned Award, the Arbitrator has awarded the respondent herein liquidated damages against the petitioner on account of the delays caused in transportation of the containers by the petitioner from Varanasi (where the Inland Container Depot (ICD) of the respondent was) to Mumbai.

2. There were three basic issues which arose in the arbitration proceedings and which issues have been argued very strenuously by Mr. Alag before this court. The first issue was that once the Arbitrator holds that the contractual clause fixing the transportation period is the result of a mistake, then, the Arbitrator could not have fixed the period of transportation on his own because a court/arbitrator cannot rewrite a contract. The second contention of Mr. Alag was that the liquidated damages awarded of Rs. 500 TEU per day is not justified and that action of the Arbitrator is illegal being beyond the provisions of the Contract. The third point which was argued was with respect to the fact that the Arbitrator has granted interest from a subsequent date i.e the date of reference and not from an earlier date of the bill raised for payment.

3. The parties hereto entered into a contract dated 25.9.1996 under which the petitioner undertook transportation of the containers for the respondent, inter alia, from Varanasi to Mumbai port. The contract in question contained a time period of transportation of 72 hours and liquidated damages of Rs.2000 per container per day if there is delay in transportation beyond the stipulated period. On account of gross delays which were committed by the petitioner while performing the work of transportation, the respondent herein recovered liquidated damages and therefore, refused to release the bills of the petitioner. This led to disputes and ultimately arbitration proceedings, in which, the present impugned Award came to be passed. The Arbitrator after awarding a particular

amount to the respondent towards liquidated damages, has directed payment of the balance amount to the petitioner with interest.

4. At the outset, Mr. Alag, relied upon a judgment of a Single Judge (S. Mukherjee, J) of this court dated 8.11.2002 in OMP 265/2000, passed between the parties in a similar type of contract and Award deciding disputes thereunder and in which the Single Judge has set aside the Award of the Arbitrator by holding that the Arbitrator is not entitled to re-fix the time because an Arbitrator/a Court cannot re-write the contract between the parties. By the said judgment dated 8.11.2002, the objections to the Award were accepted and the Award was set aside. The said judgment I am informed, has been appealed from and consequently, the matter is sub-judice.

5. In my opinion, the said judgment dated 8.11.2002 will not apply to the facts of the present case inasmuch as three important sections of the Contract Act, 1872 namely, Sections 8, 9 and 46, have not been dealt with in the said judgment and the present judgment therefore proceeds on a wholly different basis than the judgment dated 8.11.2002 in OMP 265/2000. I will deal with the aspects relied upon in the judgment of S.Mukherjee, J. at appropriate places in the present judgment.

6. The first contention which was strongly pressed by the counsel for the petitioner was that once it is held by the arbitrator that the clause in question, was admittedly the result of a mistake as the same was impossible of

performance, the Arbitrator could not have proceeded to fix on his own, a transit time for the transportation of the containers.

7. Before I discuss the merits of the contention of the counsel for the petitioner, it is necessary to refer to Sections 8,9 and 46 of the Contract Act, 1872 which read as under:-

“8. Acceptance by performing conditions, or receiving consideration.— Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

9. Promises, express and implied.—In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

46. Time for performance of promise, where no application is to be made and no time is specified.—Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation.—The question “what is a reasonable time” is, in each particular case, a question of fact.”

8. A reading of Sections 8 and 9 of the Contract Act, shows that it is not necessary that a contract can be entered into only either by means of a formal contract or by a specific acceptance. Acting upon the terms as offered by one party, would also amount to entering into the contract by virtue of Section 8. Further, in terms of Section 9, the contract can be implied i.e implied by way of parties acting under the same. There is an important difference between the issue of consensus ad idem for entering into a contract and the issue of acting upon the terms offered by one party as per Section 8 although any one term is not agreed upon. This aspect has to be borne in mind while discussing this

issue. Before a contract is entered into there are offers and counter-offers, and unless there is a consensus ad idem, there is no contract. This of course, is the law and there is no doubt to this proposition. However, where besides the issue of lack of consensus ad idem as to one of the terms, if ,on the basis of offer made by one party, the other party acts upon the same, a contract definitely stands entered into as regards the terms acted upon by virtue of Section 8. After all, the person to whom the offer was made of performance, could have very well, in his complete freedom of action, rejected the offer and need not have acted upon the terms. However, it is not open to a person to say that he has acted upon the offer, yet, there is no concluded binding contract simply because he has written a letter stating that he does not agree to one of the terms and that thereby there was no consensus ad idem with regard to contract as a whole. In my opinion, writing a letter after acting upon an offer is not good enough to affect the finality of the contract entered into. In fact, if the contract was not to be entered into then, in terms of Section 8, the person to whom the offer was made should not have acted upon the same. Once there is acting upon the terms of the offer, simply writing a counter letter, but, also simultaneously performing the contract will not absolve the person from his legal obligations under the contract by virtue of the language of Section 8 of the Contract Act. In such cases when the contract is otherwise concluded, the effect of one of the terms being not agreed upon, will not affect the sanctity of the contract as a whole and the effect of one term being not agreed upon or being illegal as incapable of

being performed will have to be tested on the principles of severability of the clause, an aspect which will be dwelt upon hereinafter.

9. Further, if there is no term in the contract with respect to the transit time, on account of lack of consensus ad idem on the same or the said clause being illegal, then, in such a case, Section 46 of the Contract Act, comes into play which requires that if no time is specified for performance of an obligation then such an obligation has to be performed within a reasonable time and that what is a reasonable time, where the time of performance is or is not essence of the contract, will have to be seen from the facts and circumstances of each case. This aspect, that time of performance, in contracts of this nature, is of the essence has also been adverted to by the Arbitrator.

10. I may at this stage, refer to Sections 57 and 58 of the Contract Act which would be relevant and which read as under:-

“57. Reciprocal promise to do things legal and also other things illegal.— Where persons reciprocally promise, firstly to do certain things which are legal, and, secondly, under specified circumstances to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.

58. Alternative promise, one branch being illegal.—In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced”.

11. I have referred to Sections 57 & 58 because Mr. Adarsh Dial, Sr. Advocate on behalf of the respondent relies upon the “blue pencil” rule, whereby, when certain terms of the contract are struck off by ‘blue penciling’ the same. On so doing, the contract has to be read as if the terms which are

struck off, did not exist at all, however, the validity and finality of contract is not affected by striking off of one severable clause. In my opinion, Sections 57 & 58 lay down the same principle statutorily. A conjoint reading of Sections 57 & 58 show where there are two sets of promises one of which is legal and other is illegal, the illegal portion can be severed from the legal part of the contract, and so far as those reciprocal promises which are a legal set of promises, the same create a binding contract between the parties and can be enforced between the parties.

12. Applying the ‘blue pencil’ rule does not amount to re-writing the contract by the Court. This “blue pencil” principle has recently been enunciated by the Supreme court in *Shin Satellite Public Co. Ltd. v. Jain Studios Ltd., (2006) 2 SCC 628* and the relevant paras of the said judgment read as under:

“Partial invalidity in contract will not *ipso facto* make the whole contract void or unenforceable. Wherever a contract contains legal as well as illegal parts and objectionable parts can be severed, effect has been given to legal and valid parts striking out the offending pars. (Para 17)

A court of law will read the agreement as it is and cannot rewrite nor create a new one. The contract must be read as a whole and it is not open to dissect it by taking out a part treating it to be contrary to law and by ordering enforcement of the rest if otherwise it is not permissible. But if the contract is in several parts, some of which are legal and enforceable and some are enforceable, lawful parts can be enforced provided they are severable. But it could be done only in those cases where the part so enforceable is clearly severable and not where it could not be severed. By such process, main purport and substance of the clause cannot be ignored or overlooked. Thus, a covenant “not to carry on business in Birmingham or within 100 miles” may be severed so as to reduce the area to Birmingham, but a covenant “not to carry on business within 100 miles of Birmingham” will not be

severed so as to read “will not carry on business in Birmingham”. The distinction may appear to be artificial, but is well settled. (Paras 15 and 19).

The proper test for deciding validity or otherwise of an agreement or order is “substantial severability” and not “textual divisibility”. It is the duty of the court to sever and separate trivial or technical parts by retaining the main or substantial part and by giving effect to the latter if it is legal, lawful and otherwise enforceable. In such cases, the court must consider the question whether the parties could have agreed on the valid terms of the agreement had they known that the other terms were invalid or unlawful. If the answer to the said question is in the affirmative, the doctrine of severability would apply and the valid terms of the agreement could be enforced, ignoring invalid terms. To hold otherwise would be to expose the covenantor to the almost inevitable risk of litigation which in nine cases out of ten he is very ill-able to afford, should he venture to act upon his own opinion as to how far the restraint upon him would be held by the court to be reasonable, while it may give the covenantee the full benefit of unreasonable provisions if the covenantor is unable to face litigation. (Para 27)

In the present case, clause 23 relates to arbitration. It is in various parts. The first part mandates that, if there is a dispute between the parties, it shall be referred to and finally resolved by arbitration. It clarifies that the Rules of UNCITRAL would apply to such arbitration. It then directs that the arbitration shall be held in Delhi and will be in English language. It stipulates that the costs of arbitration shall be shared by the parties equally. The offending and objectionable part, no doubt, expressly makes the arbitrator’s determination “final and binding between the parties” and declares that the parties have waived the rights of appeal or objection “in any jurisdiction”. The said objectionable part is clearly severable as it is independent of the dispute being referred to and resolved by an arbitrator. Hence, even in the absence of any other clause, the part as to referring the dispute to an arbitrator can be given effect to and enforced. By implementing that part, it cannot be said that the Court is doing something which is not contemplated by the parties or by “interpretative process”, the Court is rewriting the contract which is in the nature of “novatio”. The intention of the parties is explicitly clear and they have agreed that the dispute, if any, would be referred to an arbitrator. To that extent, therefore, the agreement is legal, lawful and the offending part as to the finality and restraint in approaching a court of law can be separated and severed by using a “blue pencil”. (Para 26) (Underlining added)

13. In view of the aforesaid Sections and the judgment in *Shin Satellite Company*, let us examine the facts of the present case. After the Arbitrator held that the time of transportation as specified in the contract, of 72 hours, was a mistake, then, the Arbitrator thereafter has giving the finding that time of performance is of the essence in cases like these, has thereafter arrived at a reasonable time for transportation. No doubt, the Arbitrator may not have referred to Section 46 of the Contract Act, but he has gone by the spirit of that provision. Once the Arbitrator has after 'blue pencilling' the term of the contract with regard to time for transportation, arrived at finding of fact with regard to what is a reasonable time of transportation, there is no illegality in such an action of the Arbitrator because such an action of the Arbitrator gets statutory backing from Section 46 of the Contract Act, and more so in the facts of the present case, where the petitioner himself has in its letter dated 25.9.1996 requested that the transportation time should be taken as 10 days and which period of 10 days has been arrived at by the Arbitrator as the reasonable time of transportation. Whereas the respondent had contended that the time of transportation should be taken as 8 days but the Arbitrator has accepted the time of transportation of 10 days as put forward by none other than the petitioner. It is only after the expiry of the period of 10 days that the Arbitrator has held that liquidated damages would be payable. The conclusion in the Award in effect is that the illegal part/Clause of 72 hours stands severed, and which was capable of being severed, as it cannot be said that parties did not agree to the contract of

transportation inasmuch as they would have entered into the contract of transportation by even ignoring the clause of 72 hours. The fact that the contract for many months was in fact acted upon even in the absence of alleged consensus ad idem as regards the time of transportation establishes beyond doubt that parties did intend to enter into the contract even in the absence of a clause pertaining to time of transportation. By severing the time clause an illegal part has been severed and effect has been given to the legal parts of the contract.

In my opinion, therefore, there is no illegality whatsoever in the Award. It is only if the Award is illegal then, this court has jurisdiction under Section 34 to set aside such an Award. In fact, in my opinion, the Award is in fact in accordance with law because the same proceeds in terms of the provisions of Sections 8, 9, 46, 57 and 58 of the Contract Act. Accordingly, I do not find any illegality in the Arbitrator holding that the period of transportation should be taken as a reasonable period of 10 days. By doing so there is no re-writing of the Contract as urged by the counsel for the petitioner and as held in judgment of S. Mukherjee J. dated 8.11.2002 in OMP 265/2000.

14. The relevant portions of the Award in this regard is as under:-

“17. It is an admitted fact that both the parties have committed a mistake in signing the contract with 72 hours transit time. The respondent had also revised the penalty in his letter dated 27/29.3.1997 making it Rs.2000/- per TEU instead of ‘per container’. I find that there was no application of mind by both the parties while considering the tender documents and signing of the contract. But both the parties have continued to perform the contract for the full term. I am unable to accept the argument of the claimant that the contract could be performed without determining the

transit time and the penalty amount. This is essentially a transportation contract and time is the essence of the contract. A contract of this kind dealing with transport of export and import containers without reference to transit time may not be feasible. Therefore this dispute could be resolved only the arriving at a reasonable transit time and the penalty amount which is to be imposed in case of default of transit time as the contract has been performed.

18. The respondent had stated that the Custom operations commenced at ICD on 7.2.97 whereafter the respondent vide letter dated 27.3.97 (exhibit R-1) wrote to the claimant that they were to carry out the operations within 8 days and a penalty of Rs.2,000/- per TEU per day would be levied for all delayed transportation. This stand was reconfirmed by the respondent vide several other letters namely, Sr. No.66 dt. 21.10.97, Sr. No.69 dt. 28.10.97, and also letter dt. 28.8.97 at Sr. No.19 of exhibit R-5. That the claimant was thus well aware that the transit time was 8 days. In any event a public Notice issued by custom authorities has statutory force and is binding between the parties. The claimant had worked at the ICD for a period of 13 months and during this period handled 160 containers. This worked out to a dismal figure of 12.3 containers per month. In contrast the present contractor has handled 488 containers during the year April, 1999 to March, 2000. There was a delay only in transportation of 16 containers and the penalty amount recovered comes to a paltry sum of Rs.14,500/-. Due to the excellent working of the present contractor, the export and import operations at ICD registered an increase of 34%. It vindicates the stand of the Respondent that had the performance of the Claimant been better the business losses of Respondent would not have been so steep.

19. According to the respondent the monthly expenditure of the respondent towards the establishment cost come to approximate Rs.2,94,000/- compared to which the total earnings of the respondent @ Rs.1000/- per TEU is Rs.1,60,000/- only for the entire 13 months during which the claimant performed the contract. The ICD, thus, was not even able to generate enough earnings to run a single months expenditure. This was primarily due to the poor performance and dissatisfaction of exporters, importers and the shipping line in general, as has been demonstrated, the business picked up with better performance of present contractor.

23. I therefore decide the transit time accordingly. I reject the contention of the claimant that the Arbitrator has no jurisdiction to decide the transit time. The dispute pertains to mistake committed by both the parties regarding the transit time and the penalty amount. In a transport contract time is the essence of the contract. In this case both the parties have performed the contract for the full term and effectively transported the export and import containers for a period of 13 months. The period of the contract has been extended. The question of transit time has to be resolved talking into the offer and counter offer of the parties regarding the transit time and the other circumstances. I, therefore, conclude that I have the jurisdiction under section 16 of the Arbitration and Conciliation Act, 1996 to decide the issue no.1. I decide issue No.1 in the affirmative.” (Emphasis supplied)

The first objection of Mr. Alag is therefore rejected.

15. The second contention of Mr. Alag was that the respondent had failed to prove the loss as was caused to them and consequently, the damages could not have been granted by the Arbitrator. Another facet to this argument was that whereas the contract provided for damages at Rs.2000 per container per day, the Arbitrator by giving damages at Rs.500 per TEU i.e. Rs. 500 for 20 ft. Container and Rs. 1000 for a 40 ft. container has committed an illegality.

16. Taking the second part of the argument with regard to the rate of liquidated damages awarded, I note that the contract specified the penalty at Rs.2000 per container per day, however, the Arbitrator has not awarded such amount of liquidated damages of Rs.2000 per container per day, but a lesser figure. In fact if the Arbitrator would have awarded the figure of Rs. 2000 per container per day it would have been correct because after all the parties did in fact agree to this term and it is not that as if there is a mistake with regard to this term that the damages could not have been at Rs.2000 per container per day. Before proceeding ahead I may note that liquidated damages @ Rs.500 per TEU amounts to liquidated damages @ Rs. 500/- for a 20 ft container and for a 40 ft. container the liquidated damages would amount to Rs. 1000 per container. Therefore, the awarded figure of Rs.500 for a 20 ft. container for liquidated damages per day and Rs.1000 per container for a 40 ft. container in fact is lesser than the contractual figure of Rs.2000 per day per container. I do not agree with the contention of the counsel for the petitioner that Award is liable to be interfered with as regard to this rate awarded by the Arbitrator @ Rs. 500 per

TEU because in my opinion if there was to be any grievance, the grievance in fact only ought to have been of the respondent, because, the respondent was entitled to award of liquidated damages at Rs.2000 per container per day, whereas, instead the Arbitrator has awarded Rs. 500 per TEU or Rs.500 per 20 ft. container and Rs.1000 for a 40 ft. container and which figures are admittedly only 50% or less than that figure of liquidated damages which has been prescribed under the contract. To conclude I may, while on this issue, lastly add, that what the arbitrator has done in awarding a lesser figure than the stipulated figure of liquidated damages, is in fact in accord with the law laid down with respect Section 74 that the contracted figure of liquidated damages is only an upper limit and a court/arbitrator is entitled to award reasonable sum as damages which amount is lesser than the contractual figure of liquidated damages. This aspect that a reasonable amount should be awarded although there is a different figure of the agreed liquidated damages is clear from para 64 of the Supreme Court judgment in the case of *ONGC Vs. Saw Pipes Ltd.* **2003(5)SCC 705** and which para reads as under:

“64. It is apparent from the aforesaid reasoning recorded by the Arbitral Tribunal that it failed to consider Sections 73 and 74 of the Indian Contract Act and the ratio laid down in *Fateh Chand case*¹⁸ wherein it is specifically held that jurisdiction of the court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; and compensation has to be reasonable. Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This section is to be read with Section 74, which deals with penalty stipulated in the contract, *inter alia* (relevant for the present case) provides that 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, the party complaining of breach is entitled, whether or not actual 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. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable 741 compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach. Take for illustration: if the parties have agreed to purchase cotton bales and the same were only to be kept as a stock-in-trade. Such bales are not delivered on the due date and thereafter the bales are delivered beyond the stipulated time, hence there is breach of the contract. The question which would arise for consideration is — whether by such breach the party has suffered any loss. If the price of cotton bales fluctuated during that time, loss or gain could easily be proved. But if cotton bales are to be purchased for manufacturing yarn, consideration would be different.” (underlining mine)

Accordingly, I do not see any merit in the argument that the Arbitrator erred in awarding a lesser figure of liquidated damages and thereby he can be said to be guilty of committing an illegality or perversity.

17. Mr. Alag then argued that, in this case, liquidated damages could not have been awarded, as actual loss has not been suffered by the respondent and according to Mr. Alag this has been so stated by the respondent in its letter dated 26.5.2000. The relevant portion of this letter reads as under:-

“3. Though no claim received from any Shipping Line/Exporter on account of delayed movement but we as well as Shipping Lines/Shippers suffer a irreparable business loss due to non-providing of satisfactory service by FGL and business could not be boost up resulting this ICD was running in loss.”

18. In my opinion, this above para of the letter dated 26.5.2000 in fact supports the contention of the respondent and not the petitioner because it in fact shows that loss has been caused to the respondent and not that no loss has been caused as argued by Mr. Alag. This paragraph clearly provides that no doubt no claim was received from the shipping line, however this para notes the

irreparable business loss because of non providing of satisfactory services by the respondent to its customers. In fact, this is what is the subject matter of Section 74 of the Contract Act and the concept of a genuine pre estimate of damages in the form of liquidated damages when the loss cannot be easily proved.

19. Mr. Alag thereafter referred to para 26 of the Award and contended that the respondent corporation had not proved any loss and he accordingly argued that thus liquidated damages could not have been awarded. Mr. Alag also in support of the proposition that loss should actually have been proved has relied upon the judgments of the Supreme Court in the cases of *Fateh Chand Vs. Balkishan Das AIR 1963 SC 1405* and *Maula Bux Vs. Union of India AIR 1969 2 SSC 554*.

20. In my opinion, the contention of Mr. Alag that since the admitted fact is that loss has not been proved, therefore, no amounts could have been awarded towards liquidated damages is not a correct argument. The Supreme Court in the judgment of *ONGC Vs. Saw Pipes (2003) 5 SCC 705* has considered all earlier judgments as regards Section 74 of the Contract Act, including the judgment in Maula Bux case. The Supreme Court in Saw Pipe's case has said that there are two types of contracts when we talk of imposition of liquidated damages under Section 74 of the Contract Act . In the first type of contracts, where loss is caused, the same can be proved, then, in such cases, the person who suffers loss must necessarily prove the loss in spite of the fact that there is

a provision for liquidated damages and the figure of liquidated damages is only the upper limit of damages to be awarded. The second type of contracts are those contracts where losses cannot be easily proved. These contracts are such as for building of a toll road or construction of an oil rig. These examples have been specifically given along with the law with respect to Sections 73 and 74 of the Contract Act in paras 46, 64, 66 and 67 of the *Saw Pipes* case and which paras read as under:

“46. 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. However, when the terms of the contract are clear and unambiguous then its meaning is to be gathered only from the words used therein. In a case where agreement is executed by experts in the field, it would be difficult to hold that the intention of the parties was different from the language used therein. In such a case, it is for the party who contends that stipulated amount is not reasonable compensation, to prove the same.

64. It is apparent from the aforesaid reasoning recorded by the Arbitral Tribunal that it failed to consider Sections 73 and 74 of the Indian Contract Act and the ratio laid down in *Fateh Chand case*¹⁸ wherein it is specifically held that jurisdiction of the court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; and compensation has to be reasonable. Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This section is to be read with Section 74, which deals with penalty stipulated in the contract, *inter alia* (relevant for the present case) provides that 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, the party complaining of breach is entitled, whether or not actual 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. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable 741 compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when

they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach. Take for illustration: if the parties have agreed to purchase cotton bales and the same were only to be kept as a stock-in-trade. Such bales are not delivered on the due date and thereafter the bales are delivered beyond the stipulated time, hence there is breach of the contract. The question which would arise for consideration is — whether by such breach the party has suffered any loss. If the price of cotton bales fluctuated during that time, loss or gain could easily be proved. But if cotton bales are to be purchased for manufacturing yarn, consideration would be different.

66. 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.

67. 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 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.” (underlining supplied)

21. I have recently had the occasion to consider the judgment in *Saw Pipe's* case in the OMPs 498/2007 reported as *Belco Enterprises Vs. DTC* decided on

21st January, 2010 wherein by referring to the aforesaid paras in *Saw Pipes* case, I have held that where there is delay in supply of the buses after fabrication of the bus bodies by the contractor to the Delhi Transport Corporation, then, once there is a clause of liquidated damages, actual damages need not to be proved. In that judgment I have given the rationale that ridership in a bus is not something which can be easily proved and therefore parties were fully entitled to agree on a genuine pre-estimate of damages because either the buses could have run full or could have run empty or could have run partly full or partly empty. It is to overcome these types of situations where losses cannot be easily proved that the concept of liquidated damages has been brought in by the legislature in the form of Section 74 of the Contract Act and accordingly explained by the Supreme Court in the *Saw Pipes* case.

In the present case, on account of the delays and defaults in completion of the transportation in the prescribed time by the petitioner it cannot be disputed that there would have been loss of business, reputation, good will etc. to the respondent and which losses are such which cannot be easily proved. Once the quality of services of the respondent had fallen on account of the tardy action of the petitioner it was bound to cause loss of business to the respondent and which loss cannot easily be proved inasmuch as how many customers the respondent lost on account of delays caused by petitioner and how many more customers respondent would have had if work had been done on time and the business profits consequently in each of the circumstance it would have generated or lost,

cannot be easily proved. Consequently, it was fully open to the parties, in cases such as the present, to fix a clause with respect to liquidated damages as a genuine pre-estimate of damages and which they have so done.

In my opinion, therefore, the contention of Mr. Alag that losses have to be actually proved, is not a sound contention and in fact it has been rejected by the Supreme Court in the *Saw Pipes* case. I therefore, reject this contention as urged on behalf of the counsel for the petitioner.

22. The final argument of Mr. Alag was that the Arbitrator has not awarded any interest with respect to the amount which has been held to be net payable to the petitioner and as stated in sub-para 2 of para 28 of the Award. While noting this, I also note that in sub para 4 of the same para 28 while awarding the amount of liquidated damages to the respondent herein of Rs.6,80,000/-, the Arbitrator has not awarded any interest whatsoever. Therefore, the Arbitrator has balanced out the two claims and equities and has denied the interest to the respondent on the one hand and on the other hand granted interest to the petitioner, but for a lesser period than as prayed for, meaning thereby instead of giving interest from the date of submission of the bill of charges, interest has been awarded only from the date of reference (and which period in issue is of approximately of a year and a half as regards denial of interest). In the facts and circumstances of the case and considering that no interest has been awarded to the respondent, with respect to its claim of liquidated damages of Rs.6,80,000/-, I do not find this to be a fit case to interfere with respect to the contention of the

petitioner that interest should have been awarded from the date of the bill which is earlier in point of time then date of reference.

23. The aforesaid discussion shows that the Award is neither illegal nor perverse nor violative of the contractual provisions so as to entitle the petitioner to claim that the same can be interfered with under Section 34 of the Arbitration and Conciliation Act, 1996.

24. In this view of the matter, I do not find any merit in the objections, which are dismissed, however in the facts and circumstances of the case leaving the parties to bear their own costs.

VALMIKI J.MEHTA, J

February 01, 2010

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