

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

+ **OMP No.330/2002**

5th February, 2010

MMTC LIMITED & ANR.

...Petitioners

Through: Mr. Rohit Puri and Ms. Zurrat Zamal
Kaur, Advocates.

VERSUS

OIL & NATURAL GAS CORPORATION LTD.

....Respondent.

Through: Mr. Subhash Oberoi, 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 these objections under Section 34 of the Arbitration and Conciliation Act, 1996, the petitioners challenge the Award dated 28.5.2002 of the sole Arbitrator. The Award decides the dispute of the entitlement of damages of the respondent on account of the petitioners having failed to supply the contracted goods viz Sodium Carboxy Methyl Cellulose CMC(LVG) within the agreed delivery schedule. The facts of the case are that two supply orders were placed by the respondent on the petitioner No.2 M/s Kalpana Chemicals Limited.

Petitioner No.2 M/s Kalpana Chemicals thereafter assigned the contract to petitioner no.1. Reference to the petitioners in this judgment therefore includes reference as per the context to either or both the petitioner no.1 MMTC and petitioner no.2 M/s Kalpana Chemicals Ltd.

2. The first supply order was for 200 metric tones(MT) dated 15.01.1993 as per which the supply was to be made by 15.11.1993 and the second supply order for 50 metric tones was dated 3.2.1993 for supply by 1.4.1994. The admitted facts are that the petitioner failed to supply the contracted goods to the respondent within the delivery period under the contract and consequently, the respondent cancelled the contract on 27.10.1994. As a result of cancellation of the contract, the respondent, on 23.5.1995, purchased at the risk and cost of the petitioner, contracted goods, and thereafter instituted arbitration proceedings for recovery of the higher cost paid for purchase of the contracted goods. The respondent after encashing the bank guarantee of Rs.2,68,662/-, claimed the balance amount with respect to the first contract at Rs.11,92,728.35 and with respect to the second contract at Rs.3,77,817.50. As regards the aspect of cancellation of the contract and subsequent risk purchase, certain dates and additional facts are relevant and have to be noted. When the respondent wrote its letters/telexes dated 27.10.1993 and 27.11.1993 to supply the balance 220 MTs, out of the total contracted quantity of 250 MTs, MMTC asked for extension of the delivery period upto December 1994, but respondent wanted the supply to be completed in three months and therefore refused to extend the

delivery period and cancelled the contract vide its letter dated 27.10.1994. The actual risk purchase was however only made on 23.5.1995 i.e. well after December 1994, the month/period to which the petitioners had asked for extension of time.

3. Before the Arbitrator, the petitioner raised various disputes with regard to the fact that it was not guilty of breach of contract because of force majeure conditions and other issues. The Arbitrator has arrived at a finding of fact that the petitioner was in fact guilty of breach of contract and the respondent was entitled to terminate the contract. This part of the Award, assuming that there could not have been extension upto December 1994, could not in any manner be challenged by the counsel for the petitioner because such finding has not been shown to me to be in any manner illegal or beyond the provisions of the Contract or perverse.

4. The issue however which came up during the course of hearing of this petition was whether there could be an Award for actual damages when the contract in question contains a Clause of liquidated damages namely Clause-11, and as per this clause of liquidated damages, the parties agreed that the maximum amount of liquidated damages which the respondent was entitled to on account of failure of the petitioners to supply within the delivery period was a maximum of 5% of the contract price. The Arbitrator, in this case has awarded the actual risk purchase cost /damages to the respondent totalling to

Rs.15,70,545.85 plus Rs.2,68,662/-, the latter amount being the amount received from the encashing of the bank guarantee.

5. The law with regard to the entitlement of damages on account of breach of contract is contained in Sections 73 and 74 of the Contract Act, 1872. These provisions have been exhaustively examined by the Supreme Court in the case of *ONGC Vs. Saw Pipes, (2003) 5 SCC 705*. Para 64 of this judgment is relevant and the same 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  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.”

6. A reading of the aforesaid para shows that where a contract provides a figure of liquidated damages to be awarded against the guilty party in case of

breach of contract, then, such figure of liquidated damages is the upper limit of damages which can be awarded as a consequence of breach. In fact, a lesser reasonable compensation can also be awarded although liquidated damages are stipulated at a higher figure. Of course, actual loss need not be proved and all that has to be proved is that in fact losses were caused.

7. In the facts of the present case, it cannot be disputed that loss was in fact caused to the respondent. There is also an additional controversy with regard to when should the respondent have taken action for risk purchase tender, and, I will dilate on this aspect a little later because in view of what I am presently holding, the actual damages as awarded by the Arbitrator are legally impermissible and only liquidated damages amount as stipulated under the contract could have been awarded by the Arbitrator. The issue of the date of risk purchase is relevant on the aspect of actual damages awarded to the respondent and which eventuality in the facts of the present case is being subsequently considered and the present part proceeds on the basis that the parties are governed by the Clause of liquidated damages under the contract.

8. The issue that the maximum damages which could have been awarded were not actual damages but only the figure of liquidated damages, was not argued before the Arbitrator and nor were objections in that behalf taken in this Court, however since the findings, conclusions and the Award of the Arbitrator is clearly illegal and more so, this issue is a pure legal issue which arises from

the admitted facts of the case, I have permitted the counsel for the petitioner to argue the same.

9. The admitted facts are that the petitioners were not seeking to repudiate the contract, but had only asked for extension of time upto December 1994. The question was therefore whether the refusal to grant extension was justified in the facts and circumstances of the present case. In my opinion, the very fact that risk purchase was done in May 1995, the refusal to grant extension upto December 1994, was clearly unjustified. I do not agree with reasoning of the Arbitrator, though given in the context of date of risk purchase being not delayed and valid, that the respondent being a PSU it takes time for certain actions. Law is the same for everyone and that includes a PSU. In view of the above, the later part of the clause 11 of liquidated damages due to repudiation does not apply and what applies is only the earlier portion of Clause 11 for imposition of liquidated damages on account of delayed delivery which would have taken place by December 1994, but which could not take place on account of the unjustified refusal by respondent to grant extension.

10. Therefore, the question is what follows. In my opinion, at best by virtue of Clause 11 of the Contract between the parties, the respondent could be entitled only to a 5% of the contract price as liquidated damages by virtue of the aforesaid admitted facts which exist in the present case and read with the ratio of the decision of the Supreme Court in the *Saw Pipe's* case. Five percent of the two orders in this case comes to a sum of Rs.3,32,882/-. The Award

however, is for an amount of Rs.15,70,545/- against the petitioner and also in addition thereto the amount of Rs.2,68,662/- which was already with the respondent inasmuch as it had invoked and encashed the bank guarantee as issued by the petitioner. Accordingly, I modify the Award and hold that the respondent in total will only be entitled to a sum of Rs.3,32,882/-. Since the respondent has already received a sum of Rs.2,68,662/- by encashing the bank guarantee, the respondent therefore is now only entitled to the difference of the amount of Rs.3,32,882/- and Rs.2,68,662/- which comes to Rs.64,220/-. Accordingly, the Award is modified and the Award will now be only for a sum of Rs.64,220/- in favour of the respondent and against the petitioner. I am not changing either the rate of interest or the period for which interest has been granted because interest has been granted at a very reasonable rate of 6% per annum simple.

11. Before closing the case, I must note that even this amount of Rs.3,32,882/- which I am awarding to the respondent by modifying the Award is also an extra benefit/gain only, because, if I would have looked at the issue strictly then the whole Award was bound to be set aside. The reason is that as per the law under Section 73 of the Contract Act, and which provision the Arbitrator has acted under, in order that the respondent would have been entitled to damages in accordance with the action of risk purchase, it was necessary for the risk purchase action to have been on or around the date of breach in failure to supply the goods (i.e. the end date of the contractual period)

or at best in around October 1994, when the respondent terminated the contract and not of May 1995. I have had an occasion to consider this aspect of the law in the case of *Delhi Consumer Co-operative Wholesale Stores Ltd. Vs. Union of India* being O.M.P. No.63/99 decided on 15.12.1999. Para 6 of the said judgment is relevant in this regard and the same reads:

“6. The only other issue which has been urged is that the Arbitrator has taken the rates of the subject goods from leading newspapers, namely, “Financial Express”, The Economic Times” and “Business Standards” as on the dates of the breaches and then has arrived at the aforesaid rates, whereas the risk purchase was done much later in 1995. The contention seems to be that the cost of the risk purchase ought to have been taken for calculating and awarding the loss to the respondent.

I do not find any fault whatsoever in this approach of the Arbitrator. Under Section 73 of the Contract Act, 1872 a person who is aggrieved, has to be compensated by a rate in and around the date of the breach. This is exactly what the Arbitrator has done. Merely, because the actual risk purchase tender was ultimately finalized only in late 1994/early 1995 for supplies in February, March and April 1995 cannot mean that the rates of that period have to be awarded. In fact, if such rates would not have been claimed by the Union of India, of late 1994/early 1995, then, I am sure that it would be the petitioner who would then have said that the rates so awarded have no co-relation to the actual loss suffered which necessarily has to relate to the difference of price on the date of the commission of the breach in August, 1993.”

I have already adverted to the fact that merely because the respondent is a PSU cannot mean that the law applicable will not be the damages on account of difference in market value of the contracted product on the date of the breach/termination. The only evidence of market rate is of May 1995, and there is no evidence of market rate of October, 1994 which rate in October, 1994 only could have been adopted as a basis for awarding of damages. Once there is no proper and legal evidence of the rate of October, 1994 then the claim of the respondent for risk purchase cost is bound to fail because respondent has failed

to lead the necessary/relevant evidence of the market rate prevalent in October, 1994. As stated above, I am however proceeding on the basis of the clause of liquidated damages and not on basis of Section 73, which the Arbitrator has done.

12. With the aforesaid observations, the petition stands disposed of leaving the parties to bear their own costs. The Award is modified in terms of para 10 above.

VALMIKI J.MEHTA, J

February 05, 2010
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