

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

+ **OMP Nos, 498/07, 502/07, 508/07 & 511/07**

21st January, 2010

1. OMP No. 498/2007

M/s Belco Enterprises ... Petitioner.

Though: Mr. Sandeep Sharma,
Advocate.

VERSUS

M/s Delhi Transport Corporation ... Respondent.

Though: Mr. Ajay Verma and
Mr. Amit Mehra, Advocates.

2. OMP No. 502/2007

M/s Belco Enterprises ... Petitioner.

Though: Mr. Sandeep Sharma,
Advocate.

VERSUS

M/s Delhi Transport Corporation ... Respondent.

Though: Mr. Ajay Verma and
Mr. Amit Mehra, Advocates.

3. OMP No. 508/2007

M/s Delhi Transport Corporation ... Respondent.

Though: Mr. Ajay Verma and
Mr. Amit Mehra, Advocates.

VERSUS

M/s Belco Enterprises ... Petitioner.

Though: Mr. Sandeep Sharma,
Advocate.

4. OMP No. 511/2007

M/s Delhi Transport Corporation

... Respondent.

Though: Mr. Ajay Verma and
Mr. Amit Mehra, Advocates.

VERSUS

M/s Belco Enterprises

... Petitioner.

Though: Mr. Sandeep Sharma,
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 order I will dispose of the aforesaid objections filed by both the parties to the two Awards passed by the sole Arbitrator dated 28.5.2007.
2. Since there are objections of both the parties to both the Awards, I would not refer to the parties as objector and non-objector but would refer to them by their names i.e., M/s Delhi Transport Corporation Ltd. and M/s Belco Enterprises (Belco)/contractor.

3. This common order is being passed inasmuch as facts of both the cases are more or less identical and only the figures vary. No separate order is also necessary in view of the fact that I am accepting the objections of DTC to the Award and dismissing the objections of the contractor, and consequently, nothing would be payable by DTC to Belco in terms of the two Awards.

4. DTC awarded the contractor a contract for building of bus bodies vide its work order dated 31.3.2003. The work orders were for 46 bus bodies on Tata Chassis and 54 number of bus bodies on Ashok Leyland Chassis. Delivery schedules were provided under both the work orders and the contracts contained a Clause for liquidated damages for default in not complying with the delivery schedule. The Clause of liquidated damages is as under:-

“LIQUIDATED DAMAGES: The time will be an essence of the contract and liquidated damages @ **Rs.400/-** per day per bus and not by way of penalty for the late deliveries of the body/bodies delivered beyond the agreed delivery schedule, will be recovered as per the conditions enumerated in the terms & conditions of the documents from the bills of the Contractor by the Corporation.”

5. In fact, the liquidated damages in terms of the aforesaid clause of Rs.400/- per day per bus as was originally agreed, was increased to Rs.800/- per day in one of the cases i.e. in the Award pertaining to the 46 number TATA chassis.

6. By the impugned Awards two issues have been decided. The first issue and the first claim of M/s Belco before the Arbitrator was of seeking of

refunds of the recoveries which were made by DTC on account of liquidated damages. The second issue and the second claim was the claim of Belco for payment of certain charges, which it states that it had incurred on account of repair charges and fixing of certain components, such as, screws etc in the buses and which charges were beyond the scope of the warranty clauses.

7. By the impugned Awards, the Arbitrator after holding the contractor guilty of non-compliance with the delivery schedule held that DTC was entitled to invoke the clause for liquidated damages and make recoveries. But, the Arbitrator thereafter has come to a surprising finding of an alleged “implicit understanding” between the parties viz. of DTC agreeing to accept the fabricated buses bodies even after delay. The Arbitrator has therefore granted liquidated damages but has reduced the liquidated damages, and has directed DTC to pay Rs.6,41,200/- to the contractor out of the amount of Rs.37,46,000/-. Meaning thereby, the entitlement of DTC for liquidated damages of Rs.37,46,000/- was reduced by Rs.6,41,200/-, and which is the position with respect to the contract pertaining to fabrication of bus bodies on TATA chassis being 46 number. With respect to the contract of Ashok Leyland chassis for supply of 54 bus bodies, the Arbitrator awarded Belco Rs.2 lacs, meaning thereby, the entitlement of liquidated damages of DTC was reduced from 18,65,600/- to Rs.16,65,600/-.

8. So far as the finding in the Award that there is in fact delay in delivery of the buses, that finding of fact could not be effectively challenged

by the counsel for M/s Belco before me because this is a fact which has been clearly established on record that there was in fact delay in the delivery of buses after fabrication of the bus bodies. In fact, with respect to the TATA chassis, the delivery was so delayed that the liquidated damages were agreed afresh between the parties to be payable at Rs.800 per bus per day instead of the earlier agreed figure of Rs.400 per bus per day. The Arbitrator is a fact finding authority and the aforesaid finding of fact of delayed performance, is such with which this court cannot interfere unless this finding is shown to me to be in any manner perverse. No perversity at all has been shown in this finding of the Arbitrator that there was delay in the delivery of the buses. Accordingly, the Clause of liquidated damages rightly comes in to play entitling DTC to recover liquidated damages for delayed delivery by Belco.

9. Mr. Sandeep Sharma, counsel for the Belco, urged that DTC was not justified in invoking the Clause of liquidated damages and DTC ought to have, in fact, at best cancelled the contract. For this purpose, Mr. Sharma has placed reliance on the last para of the Award of the Arbitrator pressed with respect to Claim No.1, and by which, the Arbitrator has reduced the entitlement of liquidated damages of DTC from Rs.37,46,000/-, by deducting therefrom, a sum of Rs.6,41,200/- which was held payable to Belco. The relevant portion of the Award reads as under:

“DTC had accepted delivery of all bus bodies duly fabricated on the chassis from the M/s Balco(sic Belco) Enterprises. Though the delivery were much after the delivery schedule

given in the contract. DTC could have cancelled the contract and taken away the chassis given to the M/s Balco Enterprises for fabrication but it appears in the record DTC did not take any of these steps like cancelling the contract and taken away the bus bodies from the firm premises.

This is very clear from the record that there was a implicit understanding to accept bus bodies duly complete in all respect though their delivery were delayed and as such M/s Balco Enterprises can not be ask to pay the liquidated damages of RS.800/- per day and earlier Rs.400/- per day as late delivery charges. There has been total delay of 1603 days on the part of M/s Balco to deliver the bus bodies complete in all respect to the DTC. However after application of mind judicial consideration I direct the DTC to pay a sum of Rs.6,41,200/-(Rs. Six Lacs Forty one thousand two hundred only) to the M/s Balco Enterprises. The contractor with a direction if the DTC fails to pay this amount of Rs.6,41,200/- to the contracting firm M/s Balco Enterprises within 30 days of the date of award M/s Balco Enterprises will be entitled to get a interest of 10% on Rs.6,41,200/- to be paid by DTC.”

To further buttress his argument, Mr. Sharma placed reliance upon

Clause 12 of the Contract which reads as under:

12. DEFECTIVE WORK OR DELAY IN EXECUTION

In the event of the work not being carried out with such despatch as deemed necessary in the opinion of the CMD or his authorized representative, the body fabricator will ensure their completion within the stipulated time and for this purpose if the work is not being executed as efficiently, and workmanlike manner, the CMD or his authorized representative shall give written notice to the body fabricator and if he will refuse to rectify or neglect to rectify such defective work or comply with any other instruction in relation thereto, or if within **three days** after receipt of such notice he does not adopt ample means for the satisfactory execution of work, the CMD shall have full powers to terminate the contract and also losses, damages, extra cost, charges & expenses incurred by the Corporation in doing so, shall be borne and forthwith paid by the body fabricator or such amount may be deducted from the Security Deposit etc. or from any other account but nothing in this clause contained shall be deemed to debar the Corporation from recovering, from the body fabricator by a suit or by other legal means in case such cost, damages & expense as aforesaid shall exceed the amount due to the body fabricator for the time being or such Security Deposit.”

Finally Mr. Sharma also argued that since there were stage wise inspections, envisaged under the contract, therefore, if there is any delay in

performance, DTC ought to have cancelled the contract and there was no question of imposition of liquidated damages.

10. The law with regard to the imposition of and a claim towards liquidated damages is now well settled. Liquidated damages are a genuine pre-estimate of the damages under Section 74 of the Contract Act, 1872. Once the parties agree that a particular amount towards liquidated damages is payable, then, unless and until it is alleged and proved that the liquidated damages are in fact not a genuine pre-estimate of damages, but are in fact in the nature of penalty, such liquidated damages can be claimed. When in certain contracts, losses caused can be proved, then, in such cases, in spite of a clause of liquidated damages, a person who is aggrieved, has also to prove the loss/ damages and the figure of liquidated damages would only be the upper limit of damages which can be awarded for breach of the contract. In these latter cases, what are damages to be awarded is to be calculated on the basis that loss suffered has to be proved. However, there are other cases of certain contracts where loss/damages cannot be proved. One example is where damages cannot be calculated on account of breach of contract is when a contractor is given a contract for the construction of a road, which is delayed and on which road toll had to be collected, and consequently it cannot be known how many vehicles would have actually passed on the road and therefore what would be the loss of the toll also cannot be known. Similarly, another example is with respect to construction of an oil rig. If

there is delay in the construction of the oil rig, what would be the amount of the oil rig would have produced if it was made on time cannot be known. Therefore, in both these cases of construction of road as well as oil rig, there is no requirement of an aggrieved party to prove damages as are contemplated in the clause for liquidated damages and such damages are automatically awarded to the aggrieved party. Both the aforesaid examples were considered by the Supreme Court in the judgment of *ONGC Vs. Saw Pipes 2003 (5)SCC 705*, and the relevant paragraphs of this judgment dealing with this issue are paragraphs 46, 66 and 67 of the judgment which 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.

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~~⁷⁴²time, 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”.

The aforesaid paragraphs of the Supreme Court were also considered and applied by a Division Bench of this court recently in the judgment reported as *Bharat Sanchar Nigam Vs. BWL Limited 2009 (160) DLT 489*.

11. In the facts of the present case, I feel that the paragraphs 46, 66 and 67 of the judgment in the Saw Pipe's case are apposite. On account of delay, in the delivery of buses, what would be the loss to the DTC which it

would have otherwise earned from passenger revenue cannot be exactly calculated. It can be possible that DTC may not have any ridership or it may be the buses would have been completely filled by passengers, and thus in such circumstances, what is the cost and the loss to the DTC on account of delayed delivery of buses is not such as can be calculated with precision . In such circumstances, therefore, as held by the Supreme Court in the case of Saw Pipes, the provision of Section 74 comes into play entitling the imposition of and claim to liquidated damages being a genuine pre-estimate of damages.

12. The Arbitrator therefore, has in my opinion ,rightly, held that DTC was entitled to impose liquidated damages however, what the Arbitrator has then proceeded to do, is that, it has held that there is an implicit understanding to take delayed delivery. I am totally puzzled at such a finding of the Arbitrator. No doubt a conclusion is given that there is an implicit understanding, but what are the reasons, and germane factual basis on which it can be said that there is an implicit understanding is not stated by the Arbitrator. Simply agreeing to take delayed delivery, in my opinion, cannot be reflective of an implicit understanding. In fact, taking of delayed delivery only means that DTC will take delayed delivery and in fact will be entitled to impose and claim liquidated damages in terms of the contract. Any other interpretation would be perverse and against the law of land. In my opinion, therefore, there is clear perversity and illegality in the Award

when it in spite of holding the contractor guilty of delayed delivery still the Arbitrator awarded Rs.6,41,200/- so far as the contract for 46 number of TATA chassis buses are concerned and Rs.2 lacs for 54 number of Ashok Leyland chassis buses are concerned. This part of the Award therefore is totally illegal and perverse and is set aside. In fact, in my opinion, Mr. Sharma is not right in concluding that there is a direct conflict of the contractual clause of liquidated damages, and as per which DTC is entitled to complete liquidated damages, with the other clauses viz clause 12 reproduced above or the clause of stagewise inspections.

I also do not agree with the contention of Mr. Sandeep Sharma that the DTC was bound to cancel the contract and should not have imposed liquidated damages. In my opinion, this argument of Mr. Sharma intends to turn the logic and the settled legal proposition in this regard on its head and in reverse. This is because once there is a Clause of liquidated damages, then, it has been held by the Supreme Court in the case of ***Hind Construction Contractors Vs. State of Maharashtra AIR 1979 SC 720*** that the time of performance ceases to be of essence of the contract and such clause will not entitle an owner to terminate a contract and only a lesser right of a claim of liquidated damages can be asserted. Mr. Sharma's assertion therefore, that the Supreme Court's judgment in ***Hind Construction case*** (supra) holds that there should be a cancellation of the contract, in my opinion, is totally against the ratio in Hind Construction

Contractors case because in that case, in spite of the contract providing that time was the essence of contract, but since simultaneously the contract also contained an express provision for liquidated damages, the Supreme Court held that time was not the essence of the contract in spite of being provided so. It is because time is not of the essence, then, accordingly there is no requirement to cancel the contract and only liquidated damages are payable. Therefore, in a case where there is a provision for liquidated damages there is no need to cancel the contract but the right recourse is to claim liquidated damages. I have therefore totally failed to understand the argument raised by Mr. Sharma relying upon the case of *Hind Construction* and his arguments based on last para of the Award while dealing with Claim No.1, that contract should have been cancelled and liquidated damages could not have been awarded.

The argument of Mr. Sharma that there was stage wise inspections and therefore the contract should have been cancelled is also in my opinion neither here nor there. If there are clause of inspection, I do not understand how can that in any manner necessarily require DTC to cancel the contract although it has a right not to cancel the contract and claim liquidated damages in terms of the clause of liquidated damages.

13. Objections therefore, of DTC to the Awards are accepted and the objections of Belco to the Award are therefore dismissed. In sum and substance, therefore DTC is entitled to retain with it the total amount of

recoveries made by it for liquidated damages i.e. Rs.37,46,000/- with respect to the 46 numbers of TATA chassis buses and Rs.18,65,600/- for the 54 number of Ashok Leyland chassis buses. This part of the Award is therefore set aside and no amount shall be payable by DTC to the contractor/Belco.

14. The next issue which has been decided by the Arbitrator is with respect to awarding of claims of the contractor for charges for repairing certain defects. In this regard, the Arbitrator so far as TATA chassis buses are concerned, has awarded a sum of Rs.2,50,000/- and so far as the Ashok Leyland buses are concerned has awarded Rs. 2,00,000/-.

Mr. Verma on behalf of the DTC has very strenuously argued that these figures are purely a guess work and there was absolutely no documentary or any other evidence filed by the contractor to justify this cost. On a query by this court to counsel for Belco to show to me from the Arbitral record any document, by which the Arbitrator could have arrived at the estimate of the amounts awarded under these claims, Mr. Sharma failed to show me any documents which could show that such cost has in fact been incurred by Belco and which could therefore be allowed by the Arbitrator. No doubt an Arbitrator is entitled to make a reasonable guesstimate, an honest guess work, once there is some material before him, however, if there is absolutely no material before the Arbitrator there does not arise any question of Arbitrator making only total guess work. In the judgments of the Supreme Court in the cases of *Mohd. Salamatulla Vs. State of A.P.*,

AIR 1977 SC 1481 and *M/s. A.T. Brij Pal Singh & Bros. Vs. State of Gujarat, AIR 1984 SC 1703* the Supreme has said that it is only once there is some material available before the Arbitrator, then, the Arbitrator can make a reasonable guess work. Therefore, in the facts of the present case, once there exists no material showing incurring of cost for which claim is preferred, and there is only total guess work by the Arbitrator, the Award is therefore illegal and perverse in awarding the cost which is simply the *ipsi dixit* of the contractor. In my opinion, therefore, the objections of DTC with respect to awarding of this claim must also succeed and the objections of the contractor in this behalf must fail.

15. In view of the above, I accept the objections being OMP No. 508/2007 and OMP No. 511/2007 as filed by the DTC and dismiss the objections being OMP No. 498/2007 and OMP No. 502/2007 filed by Belco. The petitions of Belco are dismissed with costs of Rs.25,000/- for each of the petition. .

VALMIKI J.MEHTA, J

January 21, 2010

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