

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

235.

+ O.M.P. 499/2007

**BHARAT SANCHAR NIGAM
LIMITED**

Through

..... Petitioner

Mr. Sanjeev Narula, Advocate

versus

HARYANA TELECOM LIMITED

Through

..... Respondent

Mr. Narender Sharma with Ms.
Mithu Jain, Advocates with
Mr. S.L. Uppal, AR of HTL

WITH

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CORAM:**HON'BLE MR. JUSTICE MANMOHAN**

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

J U D G M E N T**MANMOHAN, J (ORAL)**

1. Present batch of three petitions has been filed under Section 34 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as “Act, 1996”) challenging the three arbitral Awards dated 19th June, 2007 passed by the same sole Arbitrator.

2. Briefly stated the facts of these cases are that petitioner-objector is a provider of telephone services in this country. Polythene Insulated Jelly Filled (in short ‘PIJF’) telephone cables are laid underground and are used by petitioner-objector to provide telephone connections.

3. Petitioner-objector floated tenders for supply of PIJF cables for various circles. After opening of tenders, respondent-claimant’s offers were accepted. In pursuance thereto, petitioner-objector issued separate Letter of Intents allocating different quantities of cables for various circles. Subsequently, petitioner-objector issued separate Purchase Orders to respondent-claimant.

4. Admittedly, respondent-claimant did not supply PIJF cables within the contracted period. At respondent-claimant's request, the time for supply of PIJF cables was extended subject to levy of liquidated damages.

5. Thereafter petitioner-objector levied liquidated damages and deducted the same from payments due to the respondent-claimant. Aggrieved by the deductions, respondent-claimant invoked the arbitration clauses.

6. Learned Arbitrator vide impugned Awards allowed respondent-claimant's claims for refund of deductions along with interest at the rate of 12% per annum from the date of Awards till the date of payments. The reasoning given by the Arbitrator in one of the three Awards being A.A. No. 65/2001 is reproduced hereinbelow :

"Issue No.1.

Clause 16 of the General Conditions of the Contract is reproduced as below:-

Cl.-16 LIQUIDATED DAMAGES

16.1 The Date of delivery of stores stipulated in the acceptances of tender should be deemed to the essence of the contract and delivery must be completed not later than the dates specified therein. Extension will not be given except in exceptional circumstances. Should however, deliveries be made after expiry of the contract delivery period without prior concurrence of the purchaser, and be accepted by the consignee, such deliveries will not deprive the purchaser of its right to recover liquidated damages under clause 16.2 below. However when supply is made with 21 days of the contracted original delivery period, the consignee may accept

the stores and in such cases the provision of clause 16.2 will not apply.

16.2 Should the tenderer fail to deliver the stores and any consignment thereof within the period prescribed for delivery the Purchaser shall be entitled to recover ½% of the value of the delayed supply for each week of delay or part thereof, subject to maximum of 5% of the value of the delayed supply, provided that delayed portion of the supply does not in any way hamper the commissioning of the other systems. Where the delayed portion of supply materially hampers installation and commissioning of the other systems, LD Charges shall be levied as above on the total value of the Purchase Order. Quantum of Liquidated Damages assessed and levied by the purchaser shall be final and not challengeable by the supplier.”

It is admitted on the part of the claimant that there had been delay in delivery of the products to the opposite parties. It is also admitted that there had been delay of more than 21 days in making supplies. As such clause 16.2 becomes relevant for deciding the issue. As per clause 16.2, the purchaser is entitled to recover ½% of the value of the delayed supply for each week of delay or part thereof subject to maximum of 5% of the value of the delayed supply, if the delayed part of the supply does not in any way hamper commissioning of the other system. It is further provides that where the delayed portion of supply materially hampers installation and commissioning of the other systems, LD Charges shall be levied as above on the total value of the Purchase Order.

In the case before me, since it is an admitted case that the delayed supply did not in any way hamper the commissioning of the other systems, the liquidated damages, if at all could be levied, had to be @ ½% of the value of the delayed supply for each week of delay or part thereof subject to maximum of 5% of the value of the delayed supply. The case of the opposite parties is that they levied liquidated damages at the aforesaid rates. From the side of the claimant there is no dispute on that count but it contends that the opposite parties were not entitled to levy liquidated damages and thus they are liable to refund the same with interest. Thus, the only question which remains is whether the opposite parties could legally make deductions of the liquidated damages of Rs. 5,33,295/- from the running bills of the claimant.

The contentions of the learned counsel for the claimant is that clause 16 of the General Conditions of the Contract contained in Section – III of the tender documents is null and void, penal in nature and in terroram. She vehemently urged before me that it is an admitted case of the opposite parties

that due to delay in supplies of the material to the opposite parties the opposite parties did not suffer any damages. He has invited my attention to that portion of cross examination of Mr. M. Ahmad, Jt. DDG(MMS), BSNL who filed affidavit on behalf of the opposite parties where he admits that losses suffered by the department due to delayed supply of cables by the claimant did not reflect in the books of accounts of the Department.

The case of the opposite parties is that the Department is entitled to deduct the liquidated damages at the rate specified in clause 16.2 and as per that entitlement, liquidated damages were deducted. The learned counsel for the opposite parties argued before me that the rate of liquidated damages as stipulated in clause 16.2 is a pre-estimated damage due to delay in supplies. According to him, this clause is neither penal nor in terroram. He also contended that the clause is neither arbitrary nor illegal. He fairly conceded that prior to levy of liquidated damages there had not been any calculation of damages suffered by the Department and that the same were deducted on the basis of provisions in clause 16.2 relating to levy of liquidated damages. No doubt, the Department has given a chart showing the damages suffered, but that is only an estimate of the damages which have been prepared after the levy of the liquidated damages and after the claimant raised disputes with the opposite parties regarding deduction of liquidated damages. This factual position is established on records, and, therefore, application of clause 16.2 has to be seen in the context of the aforesaid established facts and circumstances.

The case of the claimant is that due to facts and circumstances beyond its control there had been delays in making supplies and, therefore, the delays ought to have been ignored for making deductions of liquidated damages from its running bills. It was also contended by the learned counsel for the claimant that due to power-cuts made by the Haryana Electricity Board, the principal producer and supplier of power, under the contract, the opposite parties should not be allowed deduction of the liquidated damages from the running bills of the claimant as there was no default on the part of the claimant in timely making production and supply to the opposite parties. Counsel for the claimant thus contended that clause 17 of the General Conditions of the Contract in Section – III of the tender documents was applicable on the facts of this case.

The controversies between the parties in this issue are, firstly, whether the first part of the aforesaid clause 16.2 is a genuine pre-estimate of damages or is a clause in the nature

of a penalty or in terroram and, secondly, whether the claimant is entitled to the benefit of the provisions of clause 17.

If the first controversy, is decided in favour of the claimant, the second controversy becomes redundant. Therefore, firstly, I take up the first controversy.

Though in the contract in question, Clause 16.2 has been described as “Liquidated Damages” but the position of law is very clear that the expression used by the parties is not conclusive. Whether it is liquidated damages or a penalty will depend on the intention of the parties to be gathered from the consideration of the contract as a whole. In construing the terms “penalty” and “liquidated damages” the court is not bound by the philosophy of the parties. The contention of the learned counsel for the claimant is that since the opposite parties did not suffer any loss the levy under clause 16.2 ceases to be a liquidated damage and in effect it takes the shape of a penalty. She further contended that the claimant’s agreement to pay liquidated damages while being granted extension was only to the damages actually suffered and not to any pre-estimated damages or penalty. She relied on the provisions of Section 74 of the Contract Act and the two leading decisions of the Supreme Court in Fateh Chand Vs. Bal Kishan Das [1964 (1) S.C.R. 515] and Maula Bua Vs. UOI [1970(1) S.C.R. 928]. She also referred to Bhai Panna Singh Vs. Bhai Arjun Singh (1929 P.C. 179) in which while considering the effect of Section 74 of the Contract Act it was observed that:-

“The effect of section 74 of the Contract Act, 1872 is to disentitle the plaintiffs to recover simplicitor the sum of Rs. 10000/- whether penalty or liquidated damages. The plaintiffs must prove the damages they have suffered.

The object of Section 74 of the Contract Act is to confer jurisdiction on the Court to award reasonable compensation. The object of award of damages is to make good the loss or damages as a result of the breach of contract. No doubt, in the case before me the claimant failed to supply goods within time and the extensions granted by the opposite parties were subject to their right to claim liquidated damages and that the claimant had agreed to pay liquidated damages while being granted extensions but in my view that alone will not settle the issue. What I find is that the opposite parties do not appear to have suffered actual damages. They have not proved any losses before me. On the contrary their witness Mr. M. Ahmad, Jt. DDG (MMS) admitted in his cross-examination that losses were not reflected in the books of

accounts of the Department. Had there been any losses, they would have surely been reflected in the books of the accounts of the Department.

Therefore, while deciding the controversy it has to be kept in mind that the Department has not actually suffered any losses and it has levied damages just because of its power to levy the same under clause 16.2 of the Contract.

In the given facts, in my opinion, the first part of clause 16.2 on the basis of which the opposite parties have deducted liquidated damages from the running bills in effect becomes a penalty clause and not a pre-estimated damage clause. It is true that the claimant had agreed to pay liquidated damages which might have been suffered by the opposite parties as a consequence of delay in the delivery of goods but the claimant cannot be deemed to have agreed that it be punished with a penalty. Had the opposite parties suffered losses, I would have definitely awarded reasonable compensation. Proof of actual damage is a sine qua non to claim damages. The Supreme Court in Maula Bux Vs. UOI [1970(1) S.C.R. 928] has said that if a stipulation in a contract is a penalty, the Court can refuse to enforce it.

In view of the above discussions, clause 16.2 being a penalty clause, I hold that the deduction of liquidated damages by the opposite parties from the running bills of the claimant and retention thereof is illegal and unjustified. Thus, the issue is decided against the opposite parties.”

(emphasis supplied)

7. Mr. Narula states that Clause 16 of Section III of General Conditions of Contract (in short “GCC”) provides a genuine pre-estimate of loss, which the parties knew when they made the contract, likely to result from the breach of it. Therefore, according to him, there is no question of proving such loss and petitioner-objector is not required to lead evidence to prove any actual loss. Mr. Narula contends that if petitioner-objector is required to first assess and quantify the actual loss and make deductions thereafter, then the entire purpose of the pre-estimate compensation stipulated in Clause 16.2 stands defeated

and negated.

8. Mr. Narula points out that respondent-claimant is not new to the tender process as both the parties are experts in their respective fields. He states that as the terms of the contracts are clear and unambiguous, they have to be given a meaning that can be gathered from the words used therein. He states that the argument that intention of the parties is different from the language used therein is untenable in law.

9. He states that there is nothing on record to show that the compensation contemplated by the parties is in any way unreasonable. In fact, Mr. Narula submits that in view of Clause 16 of Section III of GCC, the burden was on respondent-claimant to lead evidence to prove that no loss had occurred due to its breach. He states that respondent-claimant miserably failed in discharging the burden of proof and, therefore, the finding of the Arbitrator is based on surmises and conjectures.

10. Mr. Narula states that in the present contracts, it is difficult to prove exact loss, which the petitioner suffered because of breach. He states to deal with such a situation, the parties pre-estimated such loss by way of agreeing to Clause 16 of Section III of GCC.

11. In any event, Mr. Narula points out that the petitioner-objector

has led independent evidence to show the loss that it has suffered. According to Mr. Narula, it is totally unjustified for the Arbitrator to arrive at a conclusion that the party, who has committed breach of the contract, is not liable to pay compensation. He submits that this observation is contrary to Sections 73 and 74 of the Indian Contract Act, 1872.

12. Mr. Narula lastly submits that the impugned Awards are contrary to the Supreme Court judgment in ***Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*** reported in (2003) 5 SCC 705. In this connection, Mr. Narula relies upon the following conclusion in ***Oil & Natural Gas Corporation Ltd.***'s case (supra):-

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

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

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

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

(4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.”

13. He points out that the Arbitrator did not refer to leave alone discuss the aforesaid judgment though it had been cited before him. He submits that Supreme Court in said judgment has interpreted its earlier judgments which the Arbitrator has relied upon to pass the impugned Awards.

14. On the other hand, Mr. Narendera Sharma, learned counsel for respondent-claimant submits that the Arbitrator has held that Clause 16.2 is in two parts. According to him, the first part of the said clause provides that if the supplier fails to supply the consignment within the stipulated period, purchaser shall be entitled to recover ½% of the value of the delayed supply subject to maximum of 5% of the value of the delayed supply provided the delayed portion of the supply does not in any way hamper the commissioning of the other systems. The second part of Clause 16.2 provides that if delayed portion of the supply materially hampers installation and commissioning of other systems, liquidated damages shall be levied at the same rate but on the total value of the purchase order. Mr. Sharma points out that Arbitrator has rightly held that first part of Clause 16.2 is “in terrorem” and “penal” in nature as it has been inserted only to secure compliance of contractual provisions. He states that first part of Clause 16.2 is not a genuine pre-estimate of damages as there are no specific words to this effect in the said Clause unlike in the case of *Oil & Natural Gas Corporation Ltd.*’s case (supra).

15. Mr. Sharma submits that in the present cases petitioner-objector has neither suffered any damage nor has it proved any actual loss suffered by it. He points out that the contracts in question are not the type where loss or damage is a natural consequence of breach. Mr. Sharma laid emphasis on the fact that as the commissioning of the system is not hampered in any way, it cannot be said that petitioner-objector has suffered any legal injury in the sense of sustaining any loss or damages and, therefore, there is nothing to compensate it. He submits that if liquidated damages in the present cases are awarded, it would amount to unjust enrichment.

16. Mr. Sharma lastly submits that the arbitrator is a sole judge of the quality and quantity of evidence and this Court in Section 34 proceedings cannot interfere with it. In this connection, he refers to and relies upon the judgments in *Union of India Vs. Peekay Industries* reported in *160 (2009) DLT 735*, and *Himachal Joint Venture Vs. Panalpina World Transport (India) Pvt. Ltd.* reported in *AIR 2009 Delhi 88*

17. Having heard the parties at length and having perused the impugned Award, I am of the view that it would be appropriate to first outline the circumstances in which a Court can interfere with an arbitral award passed under the Act, 1996. The Supreme Court in *Delhi*

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reported in (2008) 13 SCC 80 after referring to a catena of judgments including ***Oil & Natural Gas Corporation Ltd.*** (supra) has held that an arbitral award is open to interference by a court under Section 34(2) of the Act, 1996 if it is:-

- (i) contrary to substantive provisions of law; or
- (ii) contrary to the provisions of the Arbitration and Conciliation Act, 1996; or
- (iii) against the terms of the respective contract; or
- (iv) patently illegal; or
- (v) prejudicial to the rights of the parties.

18. The Supreme Court has further held in the aforesaid judgment that an award can be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality.

19. Undoubtedly, in the realm of interpretation of contracts and finding of facts, the view of the arbitrator is to be respected, but in the present case I am of the opinion that the impugned awards are violative of Section 28(3) of Act, 1996 as they are contrary to contractual terms and ignore the evidence on record.

20. Though there is merit in Mr. Narula's submissions that the Arbitrator should have referred to and discussed the judgment of ***Oil & Natural Gas Corporation Ltd.*** (supra) specially when it had been referred to during the hearings, but in my opinion, the impugned

Awards cannot be set aside on this ground as three learned Single Judges of this Court in *Indian Oil Corporation Vs. M/s. Lloyds Steel Industries Ltd.* reported in 144 (2007) DLT 659, *M/s. Haryana Telecom Ltd. Vs. Union of India & Anr.* reported in AIR 2006 Delhi 339 and *Union of India & Anr. Vs. M/s. Samrat Press* passed in O.M.P. 361/2002 decided on 3rd October, 2008 have held that the judgment of *Oil & Natural Gas Corporation Ltd.* (supra) is based upon the peculiar language of the contract therein as it specifically stipulated that liquidated damage is a “genuine pre-estimate of damages duly agreed by the parties”. In fact, this Court in *Indian Oil Corporation Vs. M/s. Lloyds Steel Industries Ltd.* (supra) held as under:-

“39. No doubt, the parties to a contract may agree at the time of contracting that, in the event of breach, the party in default shall pay a stipulated sum of money to the other. However, the stipulated sum has to be a genuine pre-estimate of damages likely to flow from the breach and is termed as ‘liquidated damages’. If it is not a genuine pre-estimate of the loss, but a amount intended to secure performance of the contract, it may be a penalty.....

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41. It is clear from the above that Section 74 does not confer a special benefit upon any party, like the petitioner in this case. In a particular case where there is a clause of liquidated damages the Court will award to the party aggrieved only reasonable compensation which would not exceed an amount of liquidated damages stipulated in the contract. It would not, however, follow therefrom that even when no loss is suffered, the amount stipulated as liquidated damages is to be awarded. Such a clause would operate when loss is suffered but it may normally be difficult to estimate the damages and, therefore, the genesis of providing such a clause is that the damages are pre-estimated. Thus, discretion of the Court in the matter of reducing the amount of damages agreed upon is left unqualified by any specific limitation. The guiding principle is

'reasonable compensation'. In order to see what would be the reasonable compensation in a given case, the Court can adjudge the said compensation in that case. For this purpose, as held in Fateh Chand (supra) it is the duty of the Court to award compensation according to settled principles. Settled principles warrant not to award a compensation where no loss is suffered, as one cannot compensate a person who has not suffered any loss or damage. There may be cases where the actual loss or damage is incapable of proof; facts may be so complicated that it may be difficult for the party to prove actual extent of the loss or damage. Section 74 exempts him from such responsibility and enables him to claim compensation inspite of his failure to prove the actual extent of the loss or damage, provided the basic requirement for award of 'compensation', viz. the fact that he has suffered some loss or damage is established. The proof of this basic requirement is not dispensed with by Section 74. That the party complaining of breach of contract and claiming compensation is entitled to succeed only on proof of 'legal injury' having been suffered by him in the sense of some loss or damage having been sustained on account of such breach, is clear from Sections 73 and 74. Section 74 is only supplementary to Section 73, and it does not make any departure from the principle behind Section 73 in regard to this matter. Every case of compensation for breach of contract has to be dealt with on the basis of Section 73. The words in Section 74 'Whether or not actual damage or loss is proved to have been caused thereby' have been employed to underscore the departure deliberately made by Indian Legislature from the complicated principles of English Common Law, and also to emphasize that reasonable compensation can be granted even in a case where extent of actual loss or damage is incapable of proof or not proved. That is why Section 74 deliberately states that what is to be awarded is reasonable compensation. In a case when the party complaining of breach of the contract has not suffered legal injury in the sense of sustaining loss or damage, there is nothing to compensate him for; there is nothing to recompense, satisfy, or make amends. Therefore, he will not be entitled to compensation [see State of Kerala v. United Shippers and Dredgers Ltd., AIR 1982 Ker. 281]. Even in Fateh Chand (supra) the Apex Court observed in no uncertain terms that when the section says that an aggrieved party is entitled to compensation whether actual damage is proved to have been caused by the breach or not, it merely dispenses with the proof of 'actual loss or damage'. It does not justify the award of

compensation whether a legal injury has resulted in consequence of the breach, because compensation is awarded to make good the loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach. If liquidated damages are awarded to the petitioner even when the petitioner has not suffered any loss, it would amount to 'unjust enrichment', which cannot be countenanced and has to be eschewed.

42. It is too preposterous on the part of the petitioner to submit that it should get the liquidated damages stipulated in the contract even when no loss is suffered."

(emphasis supplied)

21. But in my view, the present three contracts are sui generis as their contractual terms are neither identical to the ***Oil & Natural Gas Corporation Ltd.*** case (supra) nor to the three cases decided by this Court. Though in the present three contracts, the liquidated damages clause does not stipulate that it is a genuine pre-estimate of damages duly agreed by the parties, but the petitioner-objector has led independent evidence of the loss that it seeks to recover as liquidated damages. The relevant averment in the affidavit filed by way of evidence in the three arbitral proceedings reads as under :-

*"21. That I say that due to the delayed supply of PUJF cables by the Claimant, the 6 circles of the Respondent could not provide the number of estimated new connections within the stipulated time and the charts showing the loss suffered by the various circles involved is annexed as **EXHIBIT RW1/1 COLLY.**"*

22. Along with the said affidavit, petitioner-objector has filed various charts indicating the loss incurred by it on account of loss of revenue. The cross-examination of petitioner-objector's witness on this aspect is as under :-

"The department has produced documents indicating the loss the department has suffered.
It is incorrect to suggest that due to delay in supplies the department did not suffer any loss.

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It is incorrect to suggest that the department did not suffer losses and only after filing of the claim, the department has come out with expected losses.

The losses suffered by the department due to delayed supply of cables by the claimant did not reflect in the books of accounts of the department. Maybe, in some cases, audit reports are there to reflect the losses."

(emphasis supplied)

23. In view of aforesaid sketchy cross-examination, the petitioner-objector's evidence has to be accepted. Consequently, it cannot be said that this is a case where no loss has been suffered by petitioner-objector.

24. The Arbitrator has rejected the evidence filed by petitioner-objector on two counts, namely, that losses were not reflected in the books of accounts of the Department and the chart showing damages suffered had been prepared after levy of liquidated damages. In my opinion, the reasoning given by the Arbitrator on both counts is not a plausible one. In my view, for reasons based on the breach of claim, no

invoice is required to be proved. Moreover, liquidated damages have been contemporaneously deducted from the payments due to respondent-claimant and consequently, there is no occasion to reflect loss in the alleged books of accounts of petitioner-objector. In fact, had the petitioner-objector once again shown the loss in its books of accounts after deductions of the same from the running bills of respondent-claimant, it would have amounted to double deduction of liquidated damages. Moreover, filing of a chart of damages subsequently cannot take away from the fact that petitioner-objector has, in fact, suffered loss – if it has actually done so. Consequently, in the present batch of cases, as petitioner-objector has led evidence to show that it has suffered some loss and there is no effective cross-examination on this aspect, I am of the view that petitioner-objector's evidence has to be accepted.

25. A perusal of the impugned Awards also shows that the Arbitrator has held the first part of Clause 16.2 as penalty clause as according to the Arbitrator, petitioner-objector did not prove actual damages. But in my opinion, it is not for the petitioner-objector to prove actual loss by first purchasing unsupplied material. In fact, a Division Bench of this Court in the case of *Saraya Distillery Vs. Union of India & Anr.* reported in *AIR 1984 Delhi 360* has held as under:-

(7) Learned counsel for the contractor contended that before a party could claim damages he must go to the market, purchase the goods not supplied or short supplied and suffer

actual loss. Only then, argued the learned counsel, he would be entitled to damages. We do not agree.

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(10) The Supreme Court in the case of M/S Murlidhar Chiranjilal v. M/s qHarishchandra Dwarkadas and another AIR 1962 SC 366 observed at page 369:

"The two principles on which damages in such cases are calculated are well settled. The first is that as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed; but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps : (British Westing house Electric and Manufacturing Company Limited v. Underground Electric Rly. Co. of London (1912 AC 673 at p.689). These two principles also follow from the law as laid down in S. 73 read with the Explanation thereof. If, therefore, the contract was to be performed at Kanpur it was the respondent's duty to buy the goods in Kanpur and rail them to Calcutta on the date of the breach and if it suffered any damage thereby because of the rise in price on the date of the breach as compared to the contract price, it would be entitled to be reimbursed for the loss. Even if the respondent did not actually buy them in the market at Kanpur on the date of breach it would be entitled to damages on proof of the rate for similar canvas prevalent in Kanpur on the date of breach, if that rate was above the contracted rate resulting in loss to it. But the respondent did not make any attempt to prove the rate for similar canvas prevalent in Kanpur on the date of breach. therefore, it would obviously be not entitled to any damages at all, for on this state of the evidence it could not be said that any damage naturally arose in the usual course of things."

Learned counsel for the Contractor relied on a judgment of a learned single Judge of this court in Union of India v. Tribhuwan Dass Lalji Patel AIR 1971 Delhi 120 . In this case it was observed that the Government can recover the loss only sustained by it and could not claim damages, if no loss was sustained. With respect we do not agree with this view.

This is contrary to the observations made by the Supreme Court in M/s Murlidhar Chiranjilal (supra). A division bench of this court in All India Institute of Medical Sciences vs. American Refrigeration Co. Ltd. AIR. 1982 Del 275 came to the conclusion that the case Union of India v. Tribhuwan Dass. (supra) was wrongly decided. We hereby overrule the decision in Union of India v. Tribhuwan Dass.”

(emphasis supplied)

26. I am also of the opinion, the present batch of cases belong to a genre of cases where actual loss or damages is impossible to prove. Section 74 of Indian Contract Act, 1872 enables the aggrieved party to claim compensation in respect of its failure to prove actual loss or damage provided the basic requirement of award of compensation, viz., the fact that he has suffered some loss or damage is established. In fact, the observation of Supreme Court *Oil & Natural Gas Corporation Ltd.*'s case (supra) in para 67 are very apposite. The said paragraph is reproduced hereinbelow:-

“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.

(emphasis supplied)

27. Moreover, Arbitrator's interpretation that first part of Clause 16.2 is not a genuine pre-estimate of damages as it does not result in hampering or commission of other systems, is to say the least perverse. Take for example a case where a contract comprises supply of cables and an exchange by two different suppliers. In the event, both the said contractors supply their goods beyond the stipulated period, can it be said that the owner has not suffered any loss? In my opinion, to deny compensation to the owner, in such a scenario, would be unreasonable and would suffer from perversity. In fact, the owner in anticipation of supply of cables within the contracted period, could have entered into 'consequent/downstream' contracts or hired labour in advance to lay the cables underground. Consequently, in the present illustration, installation of other systems or the contracted system would not be delayed, but the owner would have suffered loss.

28. Another illustration could be where a contract comprises supply of cables by two different contractors and both the contractors default in supplying the cables within the contracted period. In this instance also, the commissioning of other systems may not be hampered, but in my opinion, this would not disentitle the owner from claiming liquidated damages from both the contractors provided, it is able to show that it has suffered some loss.

29. In fact, in my view, petitioner-objector by splitting Clause 16.2 into two parts and by providing for levy of liquidated damages in the first instance only on non-supplied portion has acted justly and fairly. If petitioner-objector had levied liquidated damages on the entire contracted value even though it might have suffered some loss without the commissioning of entire system being hampered, then the respondent-claimant could well have argued that such a clause is 'penal' and in 'terroram'.

30. In view of the aforesaid, as the impugned Awards are contrary to the terms of the contracts and the evidence on record, they are set aside. Accordingly, present petitions are allowed but with no order as to costs.

MANMOHAN,J

MARCH 12, 2010.
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