

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO(OS) No.457/2010 & CM No.12044/2010

Bharat Sanchar Nigam Ltd.

.....Appellant through
Mr. H.S. Phoolka, Sr. Adv.
with Mr. Sharat Kapoor &
Mr. Kanwar Faisal, Advs.

versus

BWL Ltd.

.....Respondent through
Mr. Ramesh Singh with
Ms. Tanya Khare, Advs.

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Date of Hearing : April 06, 2011

Date of Decision : April 19, 2011

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

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

VIKRAMAJIT SEN, J.

1. This Appeal assails the concurrent findings of the Arbitral Tribunal as well as the learned Single Judge. The Respondent had challenged the deduction from its Running Bills of a sum of ₹ 1,32,04,290/- inclusive of interest. The Appellant made these deductions on the ground of liquidated damages. An Advance Purchase Order was placed by the Appellant on the Respondent on 23.10.1996 for the supply of (a) 21 nos. 60 M Tubular Tower and (b) 108 nos. 80 M Tubular Towers.

Eventually, on 19.11.1996, the Appellant placed a Purchase Order on the Respondent for the aforementioned numbers of Towers for a total value of ₹ 9,10,49,192. The terms, *inter alia*, were that the supplies would be effected only after issuance of Quality Approval by the DOT and secondly that these supplies would be completed within six months, that is, on or before 28.5.1997. The necessary Drawings were supplied by the Appellant to the Respondent on 9.12.1996.

2. Clauses 16.1 and 16.2 of the Contract, which deals with the imposition and recovery of liquidated damages, read thus:-

16.1 The date of delivery of the stores stipulated in the acceptance of tender should be deemed to be 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 his right to recover liquidated damages under clause 16.2 below. However, when supply is made within 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 or 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 the supply materially hampers installation and commissioning of the other systems, L/D charges shall be levied as above on the total value of the purchase order. Quantum of liquidated damages assessed and levied by the purchase shall be final and not challengeable by the supplier.

3. The assailed deductions were carried out to the extent of ₹ 47,09,583/-, and after adding interest at the rate of 24 per cent per annum, the amount claimed before the Arbitrator aggregated ₹ 1,32,04,290/-, already mentioned above.

4. Mr. H.S. Phoolka, learned Senior Counsel for the Appellant, justifies the filing of the present Appeal on the premise that the Arbitrator as well as the learned Single Judge have proceeded on an erroneous understanding of the law pertaining to the claim for liquidated damages. The contention is that since the Appellant had granted an extension of time for supply of the Towers subject to its claim for liquidated damages, and since the Respondent had not demurred or objected to the deductions being carried out, the Respondent's Claim was totally untenable.

5. We are of the opinion that failure to record an objection cannot, *ipso facto*, and without more, inexorably lead to the conclusion that any demur thereafter is unjustifiable. This proposition, having been stated so widely and broadly, must be rejected. There is an abundance of decisions of the Hon'ble Supreme Court to the effect that if a party is left with no option but to go along with the whims or demands of the other party which enjoys a superior and dominating position, it is, at best, an acquiescence which can subsequently be withdrawn. Their Lordships have clarified that even though a Receipt had been given stating that monies had been accepted in full and final settlement, since the parties were not *in pari delicto*, the disadvantaged party could subsequently assert the absence of a complete accord and satisfaction. Private parties are very often forced and compelled to acquiesce the dictates of the Government or other authorities in order to minimize their losses or protect their profits. At the highest, a failure to object can be seen as evidence substantiating a particular position. Such evidence cannot be conclusive or total self-sustainable, impervious to or intolerant of proof to the contrary. It shall be open for the Arbitral Tribunal to go into the question and give a determinative finding as to whether the accord and satisfaction given by the party was free of any extraneous circumstances or

was obtained under force or coercion by the party in a domination position. It has been held in *Nathani Steels Ltd. -vs- Associated Constructions*, 1995 Supp(3) SCC 324 and *Union of India -vs- Popular Builders, Calcutta*, (2000) 8 SCC 1 that where a party has accepted the Final Bill without any protest and the Court is satisfied that the accord and satisfaction had been arrived at by the execution of a full and final receipt and/or a final bill, in the absence of any fraud, duress, coercion or the like, the Arbitration Clause would have come to its logical end and no proceedings under the Arbitration & Conciliation Act, 1996 (A&C Act for short) would be called for. A reading of *NTPC -vs- Rashmi Constructions, Builders & Contractors*, (2004) 2 SCC 663 is further illustrative on this issue and it holds that the existence of any fraud, coercion or undue influence can be gone into by the Arbitral Tribunal which is competent to determine all questions of law and facts including construction of the contract agreement. If on a consideration of the evidence collected by it, there are reasons to conclude that the accord and satisfaction granted by a party before it had been arrived at by free will, it should record it and refrain from proceeding further. If, however, the evidence before it reveals that such an accord and satisfaction was not born out of the free will of the party, it shall be its duty to enter reference and decide

conclusively on the claims despite the purported accord and satisfaction.

6. It is in this context that we are reminded of the sterling observations of the Constitution Bench in *DTC -vs- DTC Mazdoor Congress*, AIR 1991 SC 101 in these words:

281. The trinity of the Constitution assure to every citizen social and economic justice, equality of status and of opportunity with dignity of the person. The State is to strive to minimise the inequality in income and eliminate inequality in status between individuals or groups of people. The State has intervened with the freedom of contract and interposed by making statutory law like Rent Acts, Debt Relief Acts, Tenancy Acts, Social Welfare and Industrial Laws and Statutory Rules prescribing conditions of service and a host of other laws. All these Acts and Rules are made to further the social solidarity and as a step towards establishing an egalitarian socialist order. This Court, as a court of constitutional conscience enjoined and is jealously to project and uphold new values in establishing the egalitarian social order. As a court of constitutional functionary exercising equity jurisdiction, this Court would relieve the weaker parties from unconstitutional contractual obligations, unjust, unfair, oppressive and unconscionable rules or conditions when the citizen is really unable to meet on equal terms with the State. It is to find whether the citizen, when entering into contracts of service, was in distress need or compelling circumstances to enter into

contract on dotted lines or whether the citizen was in a position of either to “take it or leave it” and if it finds to be so, this Court would not shirk to avoid the contract by appropriate declaration. Therefore, though certainty is an important value in normal commercial contract law, it is not an absolute and immutable one but is subject to change in the changing social conditions. (Emphasis Supplied)

7. *LIC of India -vs- Consumer Education & Research Centre, (1995) 5 SCC 482* reiterates and resonates the tenor and timbre of these very observations in these compelling words:-

47. It is, therefore, the settled law that if a contract or a clause in a contract is found unreasonable or unfair or irrational, one must look to the relative bargaining power of the contracting parties. In dotted line contracts there would be no occasion for a weaker party to bargain or to assume to have equal bargaining power. He has either to accept or leave the services or goods in terms of the dotted line contract. His option would be either to accept the unreasonable or unfair terms or forego the service for ever. With a view to have the services of the goods, the party enters into a contract with unreasonable or unfair terms contained therein and he would be left with no option but to sign the contract.

8. A similar exposition of the law is available in *Suisse Atlantique Societe d' Armement Maritime S.A. -vs- N.V. Rotterdamsche Kolen Centrale*, [1967] 1 A.C. 361; *A Schroeder*

Music Publishing Company Ltd. -vs- Macaulay, [1974] 1 WLR 1308; *Clifford Davis Management Ltd. -vs- W.E.A. Records Ltd.*, [1975] 1 WLR 61 and *Photo Production Ltd. -vs- Securicor Transport Ltd.*, [1980] AC 827.

9. We are, therefore, unable to affirm, in toto, the decision in *Union of India -vs- Daulat Ram*, 2009(2) Arb. L.R. 327 (Delhi) wherein the learned Single Judge may have been right in coming to a particular conclusion which cannot ubiquitously apply to all situations. This very question came up for consideration in *ONGC -vs- Saw Pipes*, 2003(5) SCC 705 and their Lordships formulated the controversy to be -“Whether the claim of refund of the amount deducted by the appellant from the bills is disputed or undisputed claim?” The discussion is perspicuous and is available in paragraphs 70-72. The conclusion was that the “arbitrators were required to decide by considering the facts and the law applicable whether the deduction was justified or not”. These decisions are an enunciation of the legal position that (a) liquidated damages cannot be punitive in nature and (b) that the actual loss need not be proved in order to sustain the claim for liquidated damages. This, however, does not mean that merely because a contract contains a liquidated damages clause, these damages could be claimed even where no loss has been sustained; even

where delay has not actually occurred; and where delay is a consequence of the action of the claimant.

10. A neat question of law has, once again, arisen on the manner in which Clauses in an Agreement providing or pertaining to liquidated damages are to be interpreted and applied. The earliest exposition of the law is to be found in the decision of the Constitution Bench in ***Fateh Chand -vs- Balkishan***, AIR 1963 SC 1405, which was, as it had to be, applied in the subsequent Judgment in ***Maula Bux -vs- Union of India***, (1969) 2 SCC 554. Both these decisions have been explained in the ***Saw Pipes*** and we can do no better than reproduce the relevant paragraphs:-

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* 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.

65. In *Maula Bux case* plaintiff Maula Bux entered into a contract with the Government of India to supply potatoes at the Military Headquarters, U.P. Area and deposited an amount of Rs 10,000 as security for due performance of the contract. He entered into another contract with the Government of India to supply at the same place poultry eggs and fish for one year and deposited an amount of Rs 8500 for due performance of the contract. The plaintiff having made persistent default in making regular and full supplies of the commodities agreed to be supplied, the Government rescinded the contracts and forfeited the amounts deposited by the plaintiff, because under the terms of the agreement, the amounts deposited by the plaintiff as security for the due performance of the contracts were to stand forfeited in case the plaintiff neglected to perform his part of the contract. In context of these facts, the Court held that it was possible for the Government of India to lead evidence to prove the rates at which potatoes, poultry, eggs and fish were purchased by them when the plaintiff failed to deliver “regularly and fully” the quantities stipulated under the terms of the contracts and after the contracts were terminated. They could have proved the rates at which they had to be purchased and also the other incidental charges incurred by them in procuring the goods contracted for. But no such attempt was made. Hence, claim for damages was not granted.

66. In *Maula Bux case* 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. (Emphasis supplied)

11. Mr. Ramesh Singh, learned counsel for the Respondent, has contended that the findings of the Arbitrator are to the effect that the performance of the contract was not delayed because of any action or inaction of the Respondent. It is also contended that it was a legal imperative for the Appellant to lead evidence to prove that it had sustained damages owing to

the alleged delay in the performance of the contract by the Respondent.

12. We are fully mindful of the caution in *ONGC Limited -vs- Garware Shipping Corporation Ltd.*, (2007) 13 SCC 434 where their Lordships observed that – “There is no proposition that the courts could be slow to interfere with the arbitrator’s award, even if the conclusions are perverse, and even when the very basis of the arbitrator’s award is wrong”.

13. We are unable to appreciate the reliance placed by Mr. H.S. Phoolka, learned Senior Counsel for the Appellant on *Bharat Sanchar Nigam Limited -vs- Reliance Communication Ltd.*, (2011) 1 SCC 394, wherein their Lordships had “noted that the liquidated damages serve useful purpose of avoiding litigation and promoting commercial certainty and therefore, the Court should not be astute to categorise as penalties the clauses described as liquidated damages”. The Respondent itself does not contend that the liquidated damages partake of the stigma of a penalty. Its argument is that the Appellant did not bother to place any evidence of its having suffered losses.

14. Learned Counsel for the Respondent has contended that the Arbitrator, as well as the learned Single Judge, were fully satisfied that no damage had resulted as a consequence of the delay effect the change of the name of the Respondent. It is not

controverted that since the contract was to be performed by the company in its new/changed name, in the absence it being certified to be a Small Scale Industry, it would be required to deposit a sum of ₹ 20,00,000/- as the Bid Security. This Certificate was eventually given in favour of the Respondent by National Small Scale Industries Corporation (NSIC). Mr. Singh has submitted that the supplies could not have been commenced till the TAC had been given on behalf of the Appellant, and this event occurred as late as on 25.8.1987. Mr. Singh has further argued that the delay was occasioned because the consignee had been changed by the Appellant from time to time. Mr. Phoolka's response is that Clause 13.1.C. empowered the Appellant to make changes with regard to the place of delivery, and that this is all that was done; the Consignee had not been changed.

15. We must not lose sight of the fact that the learned Single Judge was concerned with Objections that had been filed by the Appellant under Section 34 of the A&C Act. If the Arbitrator had incorrectly appreciated the law, or pursued a path which was repugnant to the public policy of India, interference would be justified. The role of the Division Bench is even more restricted than that of the learned Single Judge adjudicating Objections. Neither Court exercises appellate powers; they are not

empowered or expected to sift through the evidence nor to satisfy itself that the conclusions drawn by the Arbitrator are in consonance with the thinking of the Court. Both Courts must desist interference where perversity of legal application or marshalling of evidence is not manifest. We are satisfied that the learned Arbitrator has, on an appreciation of the documentary evidence, found the claim of damages of the Appellant to be unsustainable as neither was there any delay ascribable to the Respondent nor had any damages resulted from the delayed completion of the supplies. These are findings of fact which are not perverse in nature and hence cannot be interfered with by the Court.

16. It seems to us that in that in these premise the decision of the Division Bench in *Union of India -vs- Hakam Chand*, 2009 (1) Arb. L.R. 421 Delhi is of no avail to the Appellant. Our learned Brothers were satisfied that the failure to perform the contract for supply of milk inherently, inexorably and undeniably resulted in a loss. Furthermore, the Court was satisfied that the liquidated damages of ₹ 2 per kg/litre was not in the nature of a penalty. This is not the factual matrix obtaining before us.

17. Mr. Phoolka relies on paragraph 8 of the decision of the learned Single Judge in *Mahanagar Telephone Nigam Ltd. -vs-*

Haryana Telecom Ltd., 2010(2) Arb. L.R. 60(Delhi). Our learned Brother had in contemplation contracts the breach of which would invariably lead to damages. It was in those circumstances that the burden of proof was held to shift from the claimant to the party in breach. The latter would then have to prove that the breach did not result in any loss. Secondly, our learned Brother had only reiterated the consistent views of the Supreme Court starting from ***Fateh Chand***, continued in ***Maula Bux*** and reiterated in ***Saw Pipes*** that in the presence of a clause for liquidated damages it may be irrelevant to prove actual loss, but the contract did not absolve the claimant to prove that it had sustained some loss attributable to a breach or non-performance by the alleged defaulter. It would also be required to prove that the liquidated damages were not punitive in nature, and in so doing it was irrelevant what the actual loss was because of the presence of the liquidated Damage Clause.

18. We must also consider the submission of Mr. Phoolka that a previous decision rendered by the author of the impugned Judgment contains a contrary conclusion. In *National Agriculture Co-operative Marketing Federation of India Limited -vs- Union of India*, 2010 (1) Arb. LR 575, no doubt the learned Single Judge had expressed the opinion that “the petitioner/objector was estopped from raising this counter claim

as during the contemporaneous period when liquidated damages were deducted, Petitioner-Objector had never raised any objection. Consequently, in my view, petitioner-objector has waived its right to claim refund of liquidated damages. In any event, I find that the petitioner-objector did not lead any evidence to show that petitioner-objector did not lead any evidence to show that petitioner-objector had not breached its original contract dated 19th March, 1996". So far as the facts of the present case are concerned, it is unassailable that the extension of time granted on 11.9.1997 and 30.3.1998 was subject to levy of liquidated damages. The learned Single Judge has taken note of the fact that by letter dated 26.9.1997 (Ex. CW1/6), the Respondent had recorded that the delay in effecting supplies cannot be attributed to it. Furthermore, the learned Single Judge had also taken cognizance of the fact, as per Ex. CW2/134 to 137, that supplies have been made within the extended period. These are findings of fact which we ought not and do not wish to dislodge. However, we think it relevant to mention that if the Appellant thinks it is entitled to claim liquidated damages because it had so cautioned and declared in its letter, equal efficacy must be given to the Respondent's letter where it had recorded that no delay had occurred for which the Respondent was liable. Having received such a letter,

the Appellant, who enjoys a dominant position, could have refused to accept deliveries. In the event, it has not been done so and must therefore, have acquiesced or agreed or consented to the asseverations made by the Respondent in its Letters to the effect that no delay had transpired.

19. It is in these circumstances it is our view that the Appeal is devoid of merits. No question justiciable under Section 34 or Section 37 of the A&C Act has arisen. It is accordingly dismissed. CM No.12044/2010 is also dismissed. There shall be no order as to costs.

(VIKRAMAJIT SEN)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

April 19, 2011
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