

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

%

Judgment delivered on: 19.12.2013

+

**FAO (OS) 34/2013 & CM No. 13089/2013**

**CENTRAL WAREHOUSING CORPORATION** .....Appellant

versus

**BOMBAY CONTAINER TERMINALS PVT. LTD.** .....Respondent

**Advocates who appeared in this case:**

For the Appellant : Mr K. K. Tyagi and Mr Anoop Kumar.

For the Respondent : Mr Atul Y. Chitale, Sr. Advocate with Mrs  
Suchitra A Chitale and Mrs Sanyukta  
Mukherjee.

**CORAM:-**

**HON'BLE MR JUSTICE BADAR DURREZ AHMED**

**HON'BLE MR JUSTICE VIBHU BAKHRU**

**JUDGMENT**

**VIBHU BAKHRU, J**

1. The appellant has preferred the present appeal impugning the judgment dated 26.09.2012 passed by a learned Single Judge disposing of the objections filed by the respondent under Sections 30 & 33 of the Arbitration Act, 1940 (hereinafter referred to as 'the Act'). The said judgment dated 26.09.2012 is hereinafter referred to as the 'impugned judgment'. The said objections were preferred by the respondent against the final award dated 27.05.2004 (hereinafter referred to as the 'impugned award') passed by a sole arbitrator in respect of the disputes between the appellant and the respondent which related to a contract dated 21.04.1989

(hereinafter referred to as 'the subject contract'). The appellant and the respondent are hereinafter referred to as "CWC" and "BCT" respectively.

2. The subject contract was entered into between CWC and BCT in terms of which the work of handling and transportation of containers from Jawaharlal Nehru Port Container Yard (hereinafter referred to as the 'Container Yard') at Nhava Sheva to the Jawaharlal Nehru Port Container Freight Station (hereinafter referred to as the 'Freight Station') at Nhava Sheva, was outsourced by CWC to BCT. The Arbitrator awarded a sum of ₹19,28,946/- together with simple interest at the rate of 9% per annum in favour of BCT. In addition, the Arbitrator also awarded interest on the amount awarded under the interim award which was delivered earlier.

3. Certain operations of the Freight Station at Jawaharlal Nehru Port were handed over by the Jawaharlal Nehru Nhava Sheva Port Trust to CWC with the approval of the Government of India. On 21.04.1989, CWC entered into the subject contract for *inter alia* outsourcing the work relating to handling and transportation of containers at the Freight Station to BCT. The work to be carried out by BCT pertained to handling and transporting containers from the Container Yard to the Freight Station and vice versa. The work to be done by BCT under in terms of the subject contract included de-stuffing of cargo, stacking the same in the designated godown, receipt of exported cargo at the Freight Station godown, stuffing of export containers, transportation of export containers to the Container Yard, handling of empty containers and other incidental services.

4. After execution of the subject contract, CWC shifted its export aggregation warehouse to Kalamboli which was 24 kms away from the Freight Station at Nhava Sheva Port. The same was done due to lack of infrastructure facilities at the Freight Station. As a result, the containers were required to be transported for an additional distance of 48 kms (24 kms each way). By a letter dated 05.12.1989, which formed a part of the subject contract, CWC awarded to BCT the work of handling and transportation of the containers from the Freight Station to Kalamboli and vice versa. The subject contract was for a period of about four years commencing 31.05.1989 till 20.04.1993. The subject contract was, subsequently, extended till 11.07.1993.

5. Disputes arose in respect of the subject contract and BCT submitted a list of claims by a letter dated 28.12.1993 i.e. within the period of one year from the expiry of the subject contract, as provided in the tender conditions. This was followed by several reminders. Since, BCT did not receive any satisfactory response from CWC in respect of its claims/letters, BCT filed a suit (being suit no.943/1995) in the Bombay High Court. In the meanwhile, CWC appointed the sole arbitrator, by its letter dated 31.07.1995, to adjudicate the disputes between the parties. CWC, thereafter, filed a statement of claim before the sole arbitrator on 29.09.1995. BCT contested the same by filing a written statement and also filed its counter claims on 23.12.1995. After the pleadings were completed, the Arbitrator framed the following issues:-

- “1. Are the deductions made by the Claimants from the Respondents bills on account of delay in movement of

containers, delay in de-stuffing of containers, damage to property, containers and the cargo, electricity charges, Forklift charges and miscellaneous deductions legally valid. Is the actual amount Rs. 38,79,284 as contended by the Claimants or Rs. 39,38,188 as contended by the Respondents?

2. Are the Claimants competent to with-hold payment of Rs. 25,30,991 due to the Respondents?
3. Do deductions amounting to Rs. 26,78,060 fall under the excepted matters and are not arbitrable?
4. Are the Respondents entitled to a sum of Rs. 7,27,23,960 as compensation on account of loss in business?
5. Should the Respondents be paid an additional amount of Rs. 88,12,320 on account of hike in the EISD cost?
6. Are the Respondents entitled to interest also @ 24% p.a. on the aforesaid amount?
7. Whether the Claimants-Corporation are entitled to levy any penalty whatsoever on the Respondents-Contractors in view of the fact that no penalty was levied by the JNPT?"

6. The disputes giving rise to issue no. 2, as struck by the Arbitrator, were taken up at the initial stage of the arbitration proceedings and the Arbitrator passed an interim award, in respect thereof, on 09.12.1996 whereby CWC was directed to release a sum of ₹23,24,883/- to BCT. The said sum as awarded under the interim award was paid by CWC to BCT. The Arbitrator passed the impugned award on 27.05.2004 whereby he awarded interest at the rate of 9% per annum for the period 31.07.1995 to 09.12.1996 on the amount of ₹23,24,883/- i.e. on the interim award made

on 09.12.1996. In addition, the Arbitrator also awarded a sum of ₹19,28,946/- in respect of other claims along with interest at the rate of 9% per annum w.e.f. 31.07.1995 till the date of payment. These amounts as awarded by the impugned award have since been paid, however, the same were paid under protest and without prejudice to the rights of CWC to challenge the impugned award.

7. The disputes relating to issue no. 2 as struck by the Arbitrator no longer survive. The interest awarded on the sum as directed to be paid under the interim award is also not a subject matter of dispute before us. Essentially, the disputes in respect of which submissions have been advanced before us relate to issues nos. 1,4,5,6 and 7 (as struck by the arbitrator and as extracted above).

8. The impugned award indicates that the Arbitrator considered several claims under the heading “issue nos. 1, 3 and 7”. Issue no.1 was not struck with respect to a singular claim but with respect to disputes relating to claims on several counts which, *inter alia*, included the following claims of CWC:-

- |                                                                   |                |
|-------------------------------------------------------------------|----------------|
| “1. Delay in movement of containers (as per Clause XXII-2(v).     | Rs.15,07,440/- |
| 2. Delay in de-stuffing of containers (as per Clause XXII-3(viii) | Rs.7,18,117/-  |
| 3. Deductions towards damage to property (as per Clause VII (E)   | Rs.7,46,516/-  |
| 4. Damage to containers (as per Clause XII (b))                   | Rs.1,16,467/-  |

|                                            |                 |
|--------------------------------------------|-----------------|
| 5. Damage to cargo (as per Clause XII (d)) | Rs.1,47,841/-   |
| Total:                                     | Rs.32,81,381/-  |
| To be referred for arbitration             |                 |
| 6. Water & electricity charges             | Rs.5,64,998/-   |
| 7. Forklift hiring charges                 | Rs.1,08,819/-   |
| 8. Misc. Deductions                        | Rs.1,08,819/-   |
| Total:                                     | Rs.12,13,817/-” |

9. The Arbitrator considered each of the claims relating to issue no. 1 separately. With regard to Claim no.1 regarding delay in movement of containers (₹15,07,440/-) and Claim no. 2 relating to the delay in de-stuffing of containers (₹7,18,117/-), the Arbitrator held that although there was a heavy volume of correspondence, charts and statements which had been placed on record, nothing therein indicated the quantum of delay in individual cases. The learned Arbitrator held that in absence of this information, he had no option but to make a “reasonable guess” in respect of the penalty imposed. Accordingly, he awarded 50% of the amounts that were claimed and thus, awarded a sum of ₹7,53,720/- & ₹3,59,059/- on account of delay in movement of containers and delay in stuffing of containers respectively.

10. Claim no.3 was made by CWC on account of alleged damage to property (₹7,46,517/-). It appears that CWC reduced the amount claimed under this head to ₹2,35,391/-. This claim was supported by additional documents that were, apparently, placed on record by CWC at a belated stage and just prior to the conclusion of the arbitral proceedings. The learned Arbitrator took note of the said record and allowed this claim. The

learned Arbitrator held that although on the basis of documents filed by CWC, the claim relating to the damage to property was enhanced to ₹2,54,891/-, the same could be allowed only to the extent of ₹2,35,391/- i.e. the claim already made of which BCT had notice of.

11. In respect of the claim made on account of damage to the containers (i.e., claim no. 4 for a sum of ₹1,16,467/-) and the claim made in respect of damage to the cargo (i.e., claim no.5 for a sum of ₹1,47,841/-), the Arbitrator permitted CWC to place additional documents on record. The Arbitrator considered the said additional documents and on basis of the same allowed the said claims in their entirety.

12. With respect to the claim on account of electricity charges for a sum of ₹5,64,998/- (claim no. 6), CWC contended that the same were charges which were being deducted from the amounts payable to BCT on account of actual consumption of electricity by BCT. The amounts charged for consumption of electricity had been invoiced to BCT by CWC regularly from time to time during the course of the subject contract and there was no protest by BCT in this regard. Subsequently, BCT had claimed that these charges could not be recovered as the subject contract did not make any provision for recovery of these charges. The learned Arbitrator rejected the contention of BCT and held that the electricity charges as claimed by CWC were payable by BCT.

13. With respect to the forklift hiring charges (claim no. 7), it was admitted by BCT that certain forklifts were provided by CWC to BCT. Before the Arbitrator, it was contended that hire charges for the forklifts

provided by CWC should be at the rate of ₹8,000/- per month. It was further contended by BCT that the forklifts provided by CWC had broken down 2-3 days after its delivery. The learned Arbitrator did not accept the contention of the respondent and accordingly held that forklift hiring charges were payable as per the rates specified in the subject contract. It is not disputed, before us, that the forklifts provided by CWC were, infact, used by BCT and the rates at which the hire charges have been computed are also not in dispute. It has been contended on behalf of BCT that the additional forklifts were not required and the same were thrust upon BCT by CWC and, therefore, they are not liable to pay for the same.

14. The miscellaneous deductions by CWC amounting to ₹1,08,819/- (claim no. 8) were not found to be justified and accordingly were rejected. To sum up, the disputes in relation to which issue no. 1 was struck comprised of claims on various counts aggregating ₹44,95,198/- and these claims were considered by the Arbitrator separately as indicated above.

15. Issue nos. 4 and 5 related to the claims of BCT on account of compensation for loss of business and for escalation on account of hike in diesel prices respectively. These claims were rejected by the Arbitrator.

16. The impugned award was challenged by BCT before the learned Single Judge. BCT was aggrieved by the impugned final award to the extent that issue nos.4 and 5 had been decided against it, while issue nos. 1, 3 & 7 had been partly allowed in favour of CWC and the Arbitrator had held that CWC could validly deduct certain sums from the amounts payable to BCT. At this stage it is relevant to note that issue no. 3 related to the

contentions of CWC that certain deductions made by CWC in respect of which claims were made were excepted matters and thus, outside the purview of the Arbitrator to adjudicate the same. This issue was decided against CWC by the learned Arbitrator and was not a subject matter of challenge before the learned Single Judge. Thus we are not concerned with issue no. 3 at this stage.

17. The impugned judgment indicates that the learned Single Judge examined the impugned award with respect to issue nos. 1, 3 & 7 together. With respect to issue Nos. 1 & 7, the learned Single Judge came to the conclusion that in the present case there was no genuine pre-estimate of loss that was agreed between parties and, consequently, Section 74 of the Contract Act, 1882 had no application. The learned Single Judge held that the claims under issue nos. 1 & 7 had to be decided with reference to Section 73 of the Contract Act and it was incumbent upon CWC to prove the same. The relevant extract of the impugned judgment is as under:-

“34. In the instant case, there was no “genuine pre-estimate of loss” in any of the clauses of the contract. Consequently, Section 74 CA had no application. Issues 1, 3 and 7 had to be decided with reference to Section 73 CA. CWC led no evidence to prove the exact losses and damages suffered by it as a result of the alleged breach of the contract by BCT. In the impugned final Award, there is no discussion by the learned Arbitrator either of the evidence or the law as explained in the decisions of the Courts. The distinction between the legal requirements under Sections 73 and 74 CA was not appreciated by the learned Arbitrator. The impugned final Award in respect of Issues 1, 3 and 7 is therefore unsustainable in law.”

18. We are in agreement with the view expressed by the learned Single Judge that in absence of any genuine pre-estimate of loss, it would be incumbent upon CWC to prove the loss and damages suffered by it. In absence of sufficient material indicating the damage suffered by CWC, it would not be entitled to levy any penalty on account of any alleged breach of contract. However, in our view, the learned Single Judge erred in considering issue nos. 1, 3 and 7 together without making any distinction in respect of the individual heads under which varied amounts were claimed by CWC. Issue no. 1 did not relate to disputes under a singular head, but consisted of eight separate claims as indicated above. In addition to considering the eight claims, the learned Arbitrator had also considered a claim of BCT with respect to certain sums alleged to have been withheld by CWC without any justification. And, the Arbitrator found that CWC was not entitled to withhold a sum of ₹5,98,926/-. Accordingly, the Arbitrator had awarded the said sum in favour of BCT and this amount was also reduced from the quantum of claims decided in favour of CWC under issue no.1.

19. As stated above, even though several claims have been discussed by the Arbitrator under the heading “Issue No.1, 3 and 7”, it is apparent on examination of the impugned award that the Arbitrator has dealt with the same separately. It is further apparent that the Arbitrator found that CWC had produced material on the basis of which the Arbitrator found that certain claims of CWC were sustainable. In respect of the other claims, the Arbitrator found that crucial information was absent. It is contended on behalf of CWC that even if the view of the learned Single Judge that

Section 74 of the Contract Act had no application in respect of the claims made by the CWC and that CWC had to provide sufficient material to sustain a claim of loss and damage is accepted, CWC would still be entitled to an award in its favour in respect of certain claims. It is contended that there was sufficient material on record on the basis of which CWC could make good its claims. It is contended that the claim for forklift hiring charges could be made on the basis of the terms of the subject contract as the subject contract itself provided for the rate at which the hiring charges for forklifts were to be computed. With regard to the claim relating to electricity charges, the same was not in the nature of penalty and, it is contended that the claim in this regard could be sustained on the material already produced before the Arbitrator.

20. In our view, the learned Single Judge erred in considering all claims made under issue nos. 1 & 7 as claims in the nature of penalty or damages for which no material was available on record. Issue nos. 1 & 7 included not only claims in the nature of penalty and damages but also other claims that could be sustained on the basis of the terms of the subject contract. In addition, the record of the Arbitrator also indicates that CWC had provided additional documents on the basis of which CWC may be able to sustain some of their claims. In this view of the matter, we think it is appropriate that issue nos. 1 & 7 be remitted to the Arbitrator for a decision, afresh, in accordance with law.

21. In respect of issue nos. 4, 5 & 6, the learned Single Judge has concluded that the decision of the Arbitrator to disallow the same could not be sustained as the Arbitrator had not discussed the evidence which had

been led by BCT. In this regard, the learned Single Judge has held as under:-

"47. The learned Arbitrator chose not to discuss the evidence led by BCT to substantiate its claim for losses. BCT had relied on a large volume of documents to show that the RTGCs were not available for the entire period of the contract; trailers of BCT were detained for long periods at the JNPT-CY; there was an absence of checkers, supervisors, gantry operators and further there were various other port related problems that resulted in heavy pendency and back-log of container delivery. None of the above evidence was discussed by the learned Arbitrator. He also appears to have ignored the written submissions of BCT in this regard."

22. We concur with the decision of the learned Single Judge, insofar as issue nos. 4, 5 and 6 are concerned, and no grounds for interference with the impugned judgement in this respect have been made out.

23. Accordingly, we dispose of this appeal by directing that the Arbitrator will also consider the claims of CWC in respect of which issue nos.1 & 7 had been struck by the Arbitrator along with issue nos. 4, 5 and 6. The present appeal and the application are disposed of. The parties are left to bear their own costs.

**VIBHU BAKHRU, J**

**BADAR DURREZ AHMED, J**

**DECEMBER 19, 2013**  
**RK**