

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

+ **FAO No. 222/2012**

% **21<sup>st</sup> January, 2014**

ASHWANI BAHL & ORS. .....Appellants  
Through: Mr. Sandeep Sharma, Advocate.

**VERSUS**

AIR INDIA LTD. .... Respondent  
Through: Mr. Mudit Sharma, Mr. Tanmaya  
Nirmal, Advocates

**CORAM:**  
**HON'BLE MR. JUSTICE VALMIKI J.MEHTA**

To be referred to the Reporter or not?

**VALMIKI J. MEHTA, J (ORAL)**

1. This appeal has been filed by the appellants under Section 39 of the Arbitration Act, 1940 (hereinafter referred to as “the Act”) impugning the judgment of the court below dated 31.3.2012 by which the objections filed by the appellants herein under Sections 30 and 33 of the Act have been dismissed.

2. The facts of the case are that the appellant no. 1 was appointed as a trainee pilot with the respondent herein (claimant in the arbitration proceedings) on terms and conditions as mentioned in the letter dated

26.07.1989. The appellant no. 1 also executed an indemnity bond dated 1.8.1989 to render 7 years of service with the respondent. Appellant no. 1, however, left earlier than the fixed period. The respondent therefore called upon the appellant no. 1 to pay an amount of Rs. 6,42,857/- along with interest. It may be noted that the indemnity bond executed by the appellant no.1 provided for liquidated damages of Rs. 7.5 lacs if the appellant no. 1 left the services before the contracted period of 7 years. Since the appellant no. 1 failed to pay the amount as demanded, the respondent invoked arbitration proceedings, and which resulted in an Award dated 25.7.1998 being passed as per which the respondent awarded a sum of Rs. 6,42,857/- along with interest at 12% per annum.

3. Learned counsel for the appellants urged before this Court that by passing of the Award Arbitrator misconducted himself and the proceedings because the Arbitrator has gone against the law of the land that damages actually ought to have been proved to have been caused to the respondent and unless such damages are proved by the respondent, grant of damages specified in the indemnity bond would amount to imposing of a penalty which is legally impermissible as per Section 74 of the Indian Contract Act, 1872. Reliance in support of this argument is placed upon a judgment of a

Division Bench of this Court in the case of ***Vishal Engineers & Builders Vs. Indian Oil Corporation Ltd.***, FAO(OS) No. 204/2010 decided on 30.11.2011.

4. The law with respect to liquidated damages is crystallized in two Constitution Bench judgments of the Supreme Court. First judgment is the judgment in the case of ***Sir Chunilal V. Mehta and Sons Ltd. Vs. Century Spinning and Manufacturing Co. Ltd.***, (1962) Supp. 3 SCR 549 : AIR 1962 SC 1314 and the second judgment is in the case of ***Fateh Chand Vs. Balkishan Das***, (1964) 1 SCR 515 : AIR 1963SC 1405. In the case of ***Sir Chunilal V. Mehta and Sons (supra)*** a managing agency agreement was illegally terminated and therefore Supreme Court allowed a claim of fixed damages/liquidated damages as provided under the agreement because as held by the Supreme Court if the managing agency agreement was terminated before the fixed period of time then what could have been the losses to the beneficiary on account of illegal termination cannot be calculated accurately for the remaining period of the contract, hence the liquidated damages were not in the nature of the penalty under Section 74 of the Indian Contract Act, 1872 and could be and were accordingly granted. In the case of ***Fateh Chand (supra)*** the Constitution Bench of the Supreme

Court dealt with the breach of contract under an agreement to sell of an immovable property. In that context the Hon'ble Supreme Court made observations that as per the nature of the contract in such a case of breach of selling of an immovable property liquidated damages cannot be awarded because in such cases damages can be proved (which would be difference of market price) and so have to be proved, and unless and until such damages are proved in the legal proceedings, fixed liquidated damages cannot be awarded. I may at the cost of repetition note that in a case of breach of contract to sell an immovable property, losses or damages caused will be the difference in the market price of the property, which can be surely calculated and proved, and therefore, fixing of liquidated damages by the contract is in the nature of penalty hit by Section 74 of the Indian Contract Act, 1872 and thus liquidated damages cannot be awarded and actual damages which can be calculated and proved can only be awarded.

5. The Supreme Court in the judgment of *ONGC vs. Saw Pipes Ltd. (2003) 5 SCC 705* has while dealing with grant of liquidated damages under Section 74 of the Contract Act, 1872 has given an example of contractual delay in construction of road within the stipulated contractual time, and in which case it would be difficult to prove how much loss is suffered, because

how many persons would have used the toll road in the delayed period could not be calculated and consequently in such cases liquidated damages can be awarded by virtue of the clause of liquidated damages in the contract and such a clause would not be in the nature of penalty.

6. In the present case, the Arbitrator while awarding the damages as claimed by the respondents/claimants has made the following observations:

“18. In my view therefore the respondent No. 1 has committed a breach of the contract and the only question is as to what damages is the claimant entitled to. It is argued on behalf of the respondent No. 1 that the cost of training is only to the extent of about Rs. 50,000/- to Rs. 60,000/- and therefore the amount mentioned in the contract and by way of damages is in the nature of a penalty. It is no doubt true that the amount of Rs. 7,50,000/- does not appear to have any being or relation to the cost of training and therefore I have to consider what should be the amount of damages to be awarded. However, it is to be noted that the cost of the training is only one aspect of the matter. The real question for purpose of determining the damages is how long the claimant would take to train another person to be trained and become a pilot with the efficiency as the respondent No. 1. The time taken to train a new person to become a pilot and for him to take charge of a plane and the loss which would be caused in that period to the claimant is running its business and obtaining the goodwill of its customers is also matters to be taken into consideration. It is not possible to measure the amount of losses which the claimant would suffer and if the party had chosen to measure the said damages on the basis of losses per year then it is not either for the court or the arbitrator to determine the same in absence of evidence which undoubtedly cannot be given with sufficient accuracy. In conclusion therefore I hold that the agreement between the claimant and respondent No. 1 is valid and enforceable in law.

I also hold that the respondent No. 1 had committed a breach of the contract. I further hold that there are no extenuating circumstances not to hold respondent No. 1 for being liable in damages.” (underlining added)

7. In my opinion, the reasoning and discussion given by the Arbitrator is flawless. The language used is completely apposite and I am sure this Court could have done no better. Surely, losses which are caused to an Airline on account of a Pilot leaving before the contractual period has various ramifications of which the cost of the training is only but one aspect. Therefore, in such cases, once the actual damages which are caused to the Airline, cannot be exactly calculated and proved, then, there is no illegality in awarding fixed/liquidated damages as specified in the contract and which in the facts of the present case thus would not be in the nature of penalty as specified in Section 74 of the Indian Contract Act, 1872. The reliance placed by the appellant upon the judgment of the *Vishal Engineers & Builders (supra)* has no application in this case as the Division Bench of this Court was dealing with the contract pertaining to Award on work of internal roads earth filling, drains and pipe culverts and liquidated damages were sought to be fixed/awarded on account of delay in completion of the work. What was the loss caused by delay on account of breach of contract can surely be calculated, and which is done in lacs and lacs of such cases, and

therefore, the Division Bench in *Vishal Engineers & Builders (supra)* has rightly relied upon the observation of the Supreme Court in the case of *Fateh Chand(supra)* that considering the nature of the contract in that case damages could have been calculated and thus in such a case liquidated damages could be awarded.

8. I note that the issue with respect to application of the law under Section 74 has necessarily to be dependent on facts of each case and whereas in one set of facts liquidated damages would be legal in other set of facts it may not be legal. Therefore, I do not find any illegality in the impugned Award or in the impugned judgment dismissing the objections of the appellant because in the facts of this case the Arbitrator has rightly observed that fixed damages can be awarded as per Section 74 of the Contract Act, 1872.

9. Learned counsel for the appellant sought to argue that how could the Arbitrator Award an amount of Rs. 6,42,857/- when the contract provided for an amount of Rs. 7.5 lakhs, however, to such an argument I put it to the counsel for the appellant that does the appellant instead want an Award of Rs. 7.5 lakhs against him, and to which hurriedly the counsel for the appellant states that appellant did not want the amount of damages awarded

to be so. Therefore, awarding of lesser damages than the fixed damages it should be a grievance of the respondent and certainly not of the appellant herein.

10. Learned counsel for the appellant sought to argue that in certain number of cases respondent had accepted a lesser amount, however, I failed to understand how accepting particular amount in certain other cases can amount to laying down the law for this Court to bound that the respondent should also accept lesser amount in this case also, although, the law and facts of this case state otherwise.

11. The scope of hearing of objections under Sections 30 and 33 of the Act are limited. If the scope of hearing by the Court below is limited, then, the scope of hearing in an appeal against a judgment dismissing the objections is further limited.

12. Therefore, there is no merit in the appeal, and the same is therefore dismissed with costs of Rs. 30,000/- payable to the respondent. Costs be paid within two weeks from today.

**JANUARY 21, 2014**  
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**VALMIKI J. MEHTA, J**