

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 868 OF 2014

**M/s.B.E.Billimoria & Co. Ltd.,)
A Company Incorporated under the)
provisions of Indian Companies Act, 1956))
having its Registered Office Shiv Sagar)
Estate, 'A' Block, 2nd Floor, Dr.A.B.Road,)
Worli, Mumbai – 400 018)
represented by its Mr.N.C.Parameswaran)
Authorised Signatory)**

**..... Petitioner
(Respondent in the
Arbitration Reference)**

Versus

**M/s.Raheja Universal Private Ltd.)
A Company Incorporated under the)
Provisions of the Indian Companies Act,)
1956, having its Registered Office at)
'Raheja Centre Point, 294, CST Road,)
Kalina, Santacruz (E), Mumbai – 400 098)
represented by Captain T.Venu Gopal)
(Retd.) Authorised Signatory)**

**..... Respondent
(Claimant in the
Arbitration Reference)**

Mr.K.L.Varghese, Senior Advocate, a/w. Ms.Santha Varghese, Mr.Rahul Varghese,
Mr.Ranjith Varghese, i/b. M.S.Delhvi for the Petitioner.

Mr.Zubin Behramkamdin a/w. Mr.P.P.Paul, i/b. Mr.Nilesh Das for the Respondent.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 30th SEPTEMBER, 2015

PRONOUNCED ON : 27th OCTOBER, 2015

JUDGMENT :

By this petition filed under section 34 of the Arbitration and Conciliation Act, 1996 (for short the Arbitration Act), the petitioner has impugned part of the arbitral award dated 27th March, 2014 insofar as claim for deduction of liquidated damages allowed by the learned arbitrator in favour of the respondent is concerned. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. The petitioner was the original claimant whereas the respondent herein was the original respondent in the arbitral proceedings.

3. On or about 27th August, 2011 the respondent had invited tenders in respect of the subject work for developing a piece of land at Mangalore and constructing two towers of 24 storeys of flats for residential purpose to be offered to the public sale. The petitioner submitted their tender in response to the said notice. The respondent issued a work order on 13th March, 2012 in favour of the petitioner for the said work. The contract value was Rs.86,66,62,094.03. The time for completion of the said work was 21 calendar months from 10th day after letter of acceptance was issued i.e. during the period between 13th March, 2012 to 12th December, 2013. The work was to be commenced within 10 days from the date of the work order.

4. It was the case of the petitioner that though under clause 6 of the work order, it was provided that the site for Atlantic and Pacific buildings would be handed over to the petitioner immediately, the site for Atlantic building was handed over only on 8th April, 2012 whereas the site for Pacific building was handed over on 16th May, 2012. On 13th April, 2012, the petitioner informed that Form 5 was not issued by the respondent.

5. On 2nd May, 2012, the respondent agreed that the petitioner had commenced mobilization immediately on issue of the letter of acceptance with adequate site staff, equipments and machinery. It is the case of the petitioner that there was loss of 21 days on account of non-supply of ready mixer concrete by the vendors approved by the respondent and also on account of delay in handing over the site of Pacific and Atlantic Towers. Several correspondence was exchanged between the parties alleging delay on the part of each other.

6. It was the case of the petitioner that there was delay on the part of the respondent in issuance of drawing and in making legitimate payments to the petitioner. On 27th December, 2012, the respondent issued a termination order stating that the work would stand terminated on 11th January, 2013 and that the petitioner should vacate the project removing all men/workers deployed/deputed, failing which the respondent would resort to its right to remove them at risk and cost and consequences of the petitioner. On 31st December, 2012 the respondent encashed the bank guarantee of Rs.7,95,51,153/-.

7. By letter dated 28th December, 2012, addressed by the petitioner, the petitioner informed the respondent that it was ready to continue and complete the work within another 12 months plus extension of time which the petitioner was legitimately entitled to as per contract considering the delays caused by the respondent and those beyond control of the petitioner.

8. On 16th January, 2013, the respondent took steps for confiscating petitioner's machinery, tools and plants of the petitioner. The petitioner informed the respondent by their letter dated 16th January, 2013 that it had taken measurement of the work done and that part A of 8th and final bill was being submitted as contract

was being terminated by the respondent and reserved its right to furnish other claims as part B consequent to the illegal termination of the contract by the respondent. Parties thereafter appointed the learned arbitrator who issued directions to both parties to file their pleadings and documents. Pursuant to the liberty granted by the learned arbitrator, the petitioner submitted its statement of claim on 25th January, 2013 and made eight claims before the learned arbitrator.

9. The respondent herein filed their statement of defence. The respondent also filed counter claim on 4th February, 2013 inter alia praying for an order and directions against the petitioner to pay a sum of Rs.31,20,00,000/- with interest at the rate of 18% per annum till payment or realization and for arbitration cost. The petitioner filed their defence statement to the said counter claim made by the respondent on 20th February, 2013. Further pleadings were filed by both the parties before the learned arbitrator.

10. Learned arbitrator rendered an award on 27th March, 2014 directing the petitioner to pay a sum of Rs.5,21,85,160/- to the respondent towards claims made by the respondent against the petitioner and directed the respondent herein to pay to the petitioner a sum of Rs.3,93,12,070/- to the petitioner. It was directed that the excess amount of Rs.62,23,095/- recovered against the mobilization advance by the respondent when invoking the bank guarantees was to be refunded to the petitioner. The learned arbitrator directed that as a net effect of the rival claims awarded in favour of both the parties, the petitioner shall pay a sum of Rs.66,49,995/- to the respondent in full and final settlement of all the claims of both the parties and awarded interest at the rate of 18% per annum thereon w.e.f. 15th April, 2014. It is further directed that upon the payment of the said sum, the machinery, equipment and material of the petitioner held under lien as per contract by the respondent

shall be released to the petitioner by the respondent. The respondent herein has not challenged any part of the award rendered by the learned arbitrator.

11. The petitioner however has impugned part of the award and more particularly the finding of the learned arbitrator as to whether time was essence of the contract and holding that the termination of the contract by the respondent was valid. The petitioner has also impugned the award allowing the claim of the liquidated damages made by the respondent in the sum of Rs.4.33 crores. The learned arbitrator rejected the other claim of damages made by the respondent against the petitioner on the ground that since there was a provision for liquidated damages, those claims for damages thus could not be awarded in favour of the respondent.

12. Mr.K.L.Varghese, learned senior counsel for the petitioner invited my attention to some of the correspondence exchanged between the parties, relevant provisions of contract and also some portion of the arbitral award. He submits that there was gross delay on the part of the respondent in issuing drawing, in making payment of running the account bill nos. 1 to 8 and in releasing the mobilization advance. He submits that no delay was attributable on the part of the petitioner. The vendors appointed by the respondent had also caused delay in supplying ready mixer concrete. Learned senior counsel placed reliance on clause 6 of the contract which provided that the time was an essence of the contract and the entire work covered under the scope of contract shall be completed within 21 calendar months from the date of commencement of the work. He also placed reliance on clause 4.7 of the General Conditions of Contract which provided for extension of time in certain eventualities. Clause 4.8 provided for liquidated damages. Reliance is placed on clause 13.10.4 of the Special Conditions of Contract which provided for

compensation only by way of extension of time.

13. Learned senior counsel invited my attention to clause 27 of the work order which provided for termination. The said clause is extracted as under :-

In case of non performance by you as determined by us, this contract can be terminated by us after giving 15 days notice to you and on non performance thereafter, the contract/tender awarded to you shall stand terminated. In such event, no compensation of whatsoever nature will be payable by us to you. All the completed work or in-completed work/material/design & all documents which form part of the contract and tender document upon termination will be our property.

Clause 7 of the work order is extracted as under :-

For all delays which do not merit an extension of time, you shall pay to us as Liquidated Damages at the rate of 0.5% of the contract value per week for delay in the completion of work subject to a maximum of 5% of the contract value.

14. Learned senior counsel for the petitioner submits that though under clause 27 of the work order, the respondent had right to terminate the contract, the contract could be terminated only after giving 15 days notice to the petitioner for rectification of the breaches if any and only for non performance thereafter the contract awarded to the petitioner could be terminated. He submits that the respondent however vide notice dated 27th December, 2012 terminated the contract w.e.f. 11th January, 2013 without giving any notice for rectifying any alleged breaches and/or for performance of the contract. He submits that the termination of the contract thus was totally illegal and in violation of clause 27 of the work order. He submits that the respondent thus could not levy any liquidated damage against the petitioner. It is submitted by the learned senior counsel that the finding of the learned arbitrator that the contract was validly terminated by the respondent is totally perverse and contrary to clause 27 of the work order.

15. It is submitted by the learned senior counsel that admittedly the respondent had terminated the contract much before the stipulated date of completion on the ground of alleged delay on the part of the petitioner. There was sufficient time available to the petitioner to complete the work. There was no extension granted by the respondent though demanded by the petitioner. The liquidated damages if any could be levied by the respondent only if the respondent would have granted any extension of contract and that also for a period after stipulated date of completion was over. He submits that the liquidated damages could be claimed only for all delay which did not merit an extension of time which could not have been claimed for the alleged delay when the contract was in existence. He submits that the entire claim by the respondent for liquidated damages against the petitioner was totally contrary to the provisions for liquidated damages. The impugned award in respect of the liquidated damages rendered by the learned arbitrator is thus totally contrary to the provisions of the contract and patently illegal.

16. Learned senior counsel submits that in any event since the respondent had not proved any damages alleged to have been suffered by the respondent due to any alleged delay on the part of the petitioner, the respondent could not have made any demand for recovery of liquidated damages. It was not the case of the respondent that the compensation mentioned therein was the reasonable pre-estimate loss and/or compensation agreed upon by and between the parties. He submits that since such alleged loss in any event was being capable of calculation, the respondent not having proved such alleged loss, the learned arbitrator could not have awarded any liquidated damages. In support of this submission, learned senior counsel placed reliance on the judgment of this court in case of ***Hindustan Petroleum Corporation Limited vs. Offshore Infrastructure Limited*** delivered on 28th July, 2015 in Arbitration Petition No.869 of 2012 and in particular paragraphs

27 and 28.

17. Learned senior counsel for the petitioner also placed reliance on the following judgments :-

- (i) Judgment of Supreme Court in case of **ONGC vs. Saw Pipes Ltd., (2003) 5 SCC 705** (paragraphs 15, 55, 74)
- (ii) judgment of Supreme Court in case of **ONGC Ltd. vs. Western Geco International Ltd., (2014) 9 SCC 263** (paragraphs 35 to 39)
- (iii) judgment of Supreme Court in case of **Associate Builders vs. Delhi Development Authority, (2015) 3 SCC 49**, (paragraphs 27 to 40)

in support of his submission that the award being contrary to the terms of the agreement and without any evidence and being in contravention of substantive law and is perverse deserves to be set aside.

18. Reliance is also placed on the judgment of Supreme Court in case of **State of Maharashtra vs. Hind Construction Contractors. AIR 1979 SC 720**, (paragraphs 7 and 8) and judgment of Supreme Court in case of **McDermott International Inc. vs. Burn Standard Co. Ltd. (2006) 11 SCC 181** (paragraphs 86 and 88)

19. Mr.Behramkamdin, learned counsel appearing for the respondent on the other hand submits that time was an essence of the contract under clause 6 of the work order. He submits that since delay on the part of the petitioner was so gross that even if the respondent would have granted any extension to the petitioner, the petitioner could not have completed the said work. He submits that the notice of termination issued by the respondent under clause 27 was 15 days notice as contemplated under the said provisions and was effective after expiry of 15 days. It is submitted that the learned arbitrator has interpreted the said clause of the

contract and has rightly rendered a finding that the contract was validly terminated by the respondent. He submits that the said provision also provided for bonus in case of early completion of the contract by the petitioner. The petitioner has not seriously challenged the termination. He submits that the finding of fact rendered by the learned arbitrator on the issue of gross delay on the part of the petitioner and that the contract was validly terminated cannot be interfered with by this court under section 34 of the Arbitration Act.

20. It is submitted by the learned counsel that prior to the date of termination of contract by the respondent, the respondent had already issued several notices to the petitioner for complying with their part of the obligations, for showing the progress and for proceeding with the work with due diligence and without any delay. He submits that there was thus no separate notice required for rectification of the breaches of 15 days as canvassed by the petitioner. He submits that on the date of termination of contract, the petitioner was required to complete the construction of eight floors whereas the work carried out by the petitioner till that date was comparatively much less and within the period of 15 days, the petitioner could not have completed the construction of eight floors.

21. It is submitted by the learned counsel for the respondent that clause 4.7 of the General Conditions of Contract which has been relied upon by the petitioner has been superseded by the terms and conditions provided in the work order. My attention is invited to various paragraphs of the written statement of the petitioner to the claims/counter claims made by the respondent and would submit that the petitioner had opposed the other claims for compensation made by the respondent on the ground that in view of there being a provision for liquidated damages, the respondent could not have made any claim for compensation under section 73 of

the Contract Act. He submits that the learned arbitrator has rejected all other claims for compensation made by the respondent by accepting the plea of the petitioner that in view of there being provision for liquidated damages, other claims for compensation/damages under section 73 of the Contract Act could not have been granted by the learned arbitrator. He submits that the petitioner cannot be allowed to raise such contradictory and self destructive pleas.

22. It is submitted by the learned counsel for the respondent that the purpose of liquidated damages was for restoring the loss suffered by the respondent due to the gross delay on the part of the petitioner. He submits that the cause of action for claim for liquidated damages and termination is common. Since the learned arbitrator has rendered a finding of fact that the termination was valid, the learned arbitrator was justified in allowing the claims for liquidated damages made by the respondent. Learned counsel submits that the contract provided for completion of different dates for performance. The parties had made a month-wise schedule. The liquidated damages thus could be calculated on the date of termination and could be claimed for the period of delay phasewise caused before the date of termination. In support of this submission, learned counsel for the respondent placed reliance on judgment of this court in case of ***Indian Drugs and Pharmaceuticals Ltd. Hyderabad vs. Industrial Oxygen Co. Ltd. Poona and another, AIR 1985 Bombay 186*** and in particular paragraphs 5 and 6.

23. Learned senior counsel for the petitioner in rejoinder submits that the respondent cannot be allowed to justify the impugned award by supplementing the reasons during the course of arguments which reasons were not rendered by the learned arbitrator. He submits that the respondent cannot be allowed to produce any evidence for consideration of this court to support the findings rendered by the

learned arbitrator which documents were not considered by the learned arbitrator in the impugned award while allowing the claims made by the respondent.

REASONS AND CONCLUSIONS :-

24. There is no dispute that clause 4.7 of the General Conditions of Contract provided for extension of time in certain eventualities. Since there is provision in the contract for extension of time, in my view the time cannot be construed as an essence of the contract.

25. Insofar as issue of validity of termination raised by the petitioner is concerned, a perusal of the record indicates that the respondent had issued notice for termination of contract on 27th December, 2012 stating that the work would stand terminated on 10th January, 2013 and called upon the petitioner to vacate the project by removing all men/workers deployed/deputed, failing which the respondent would resort to its right to remove them at the risk, cost and consequences of the petitioner. A perusal of the said letter indicates that the respondent had made the said termination effective immediately after expiry of 15 days. Clause 27 of the contract clearly provided that the contract could be terminated by the respondent after giving 15 days notice to the contractor and on non-performance thereafter, the contract shall stand terminated. The respondent was thus required to give clear 15 days notice for carrying out performance and only if there was non-performance on the part of the petitioner within the said period of 15 days, the respondent could have terminated the contract. In my view, the notice of termination was ex-facie contrary of clause 27 of the contract. Merely because some correspondence was exchanged between the parties alleging delay by each other earlier, that would not exempt the respondent from issuing 15 days clear notice for performance under clause 27 of the contract.

26. A perusal of the award on the issue of termination indicates that the learned arbitrator has held that when the termination letter was issued by the respondent on 27th December, 2012, the work of the buildings should have been at 6th floor minimum whereas the petitioner had only constructed the first floor slab level and thus it was clear case of the non-performance and thus the termination was in accordance with the terms of the contract. In the impugned award, the learned arbitrator has not dealt with the validity of the notice period as canvased by the petitioner and simplicitor held the action on the part of the respondent termination valid on the ground that there was gross delay on the part of the petitioner. In my view, the finding of the learned arbitrator is contrary to clause 27 and is perverse.

27. Since the learned arbitrator has not dealt with the validity of termination on the ground that 15 days notice for performance of the contract was not issued by the respondent, in my view, the respondent cannot be allowed to supplement the reasons rendered by the learned arbitrator and to justify the said reasons by placing any evidence on record at this stage and the same cannot be considered by this court to come to a conclusion that the learned arbitrator must have considered those material on record while rendering the finding of termination of the contract in favour of the respondent. This court cannot probe into the mind of the learned arbitrator as to what he must have considered while taking a particular view, if it is not reflected in the reasons rendered by him. I am not inclined to accept the submission of the learned counsel for the respondent that since the petitioner was already issued several notices in past for showing progress of work, separate 15 days notice again for performance of the contract was not warranted or in the alternative that the said notice dated 27th December, 2012 was a 15 days notice as contemplated under section 27. This court cannot permit a party to supplement the

reasons rendered by the learned arbitrator by relying upon the pleadings and documents which are not considered by the arbitrator and cannot probe into the mind of an arbitrator and assume that the learned arbitrator must have considered such pleadings, documents and submissions of parties which are not reflected in the award.

28. The next question that arises for consideration of this court is whether the claim for liquidated damages made by the respondent could have been awarded by the learned arbitrator. In my view since the termination of the contract was contrary to clause 27 of the contract, the respondent could not have made any claim for liquidated damages against the petitioner. Be that as it may, it is not in dispute that the contract was already terminated by the respondent much prior to the stipulated date of completion. The petitioner had applied for extension of time which was not granted by the respondent.

29. A perusal of the award on the claim of liquidated damages made by the respondent indicates that the learned arbitrator has allowed the entire claim of liquidated damages made by the respondent on the ground that according to him the terms 'all delays' in clause 7 of the work order indicates that the delay at any stage of the work and the said clause did not provide that 'work' which would have signified the complete work. The learned arbitrator held that the liquidated damages thus could be claimed even at interim stages of the work. It is not in dispute that the respondent did not lead any evidence to prove the actual loss suffered if any, by the respondent due to alleged delay on the part of the petitioner.

30. A perusal of clause 7 of the work order in my view clearly indicates that the liquidated damages could be claimed for delay which did not merit an extension of

time. Clause 4.7 of the General Conditions of Contract provides for extension of time in the event of certain eventualities mentioned therein which if would have occurred, the contractor could have applied for extension. Clause 13.10.4 of the Special Conditions of Contract provides for extension of time due to various eventualities mentioned therein. There is no inconsistency in clause 4.7 of the General Conditions of Contract and clause 7 of the work order.

31. A conjoint reading of the provisions for extension in the General Conditions of Contract, the Special Conditions of Contract and clause 7 of the work order clearly indicates that the liquidated damages could be claimed only if extension was granted for the reasons causing delay which did not merit an extension of time and that also at the rate of 0.5% of the contract value per week for delay in completion of work subject to a maximum of 5% of the contract value.

32. Similarly the said clause further provides for payment of bonus of 0.25% of the contract value per week of early completion, subject to a maximum of 2.5% of the contract value. In my view the computation and claim for liquidated damages thus could be only for the period of delay beyond the original stipulated date of completion and not for any alleged delay caused to the project by the contractor within the contractual period. The said clause does not provide for levy of liquidated damages for any alleged delay phasewise during the ongoing work or in case of premature termination. Similarly bonus payable to the contractor can be computed only if the contractor is able to complete the work before the stipulated date of completion. The contractor also would not be eligible to claim any bonus under the said provisions for early completion of the work in every phase. In my view, the interpretation of the learned arbitrator that the liquidated damages could be claimed phasewise even during the execution of the work and before

termination of contract is ex-facie contrary to clause 7 of the work order and is an impossible interpretation. In my view, the award in respect of liquidated damages is thus in conflict with the public policy.

33. In my view, if according to the respondent there was any delay on the part of the contractor which caused any loss and/or damages to the respondent, the respondent could make claim for the losses suffered due to such delay. The petitioner had though raised the plea before the learned arbitrator that the respondent could not make any claim for compensation under other heads in view of the provisions of the liquidated damages, in my view since the learned arbitrator could not have awarded claim for liquidated damages under clause 7 for the alleged delay during the contractual period, the learned arbitrator could have considered and awarded the claim for compensation which if would have been proved by the respondent. It is not in dispute that the respondent has not challenged any part of the impugned award including the rejection of the claim for compensation made by the respondent under various other heads arising out of the alleged delay on the part of the petitioner. This court thus can not decide the validity of that part of the award in this petition in view of the respondent not impugning that part of the award.

34. In my view merely because the learned arbitrator had rejected those claims for damages under other heads, the learned arbitrator could not have awarded the claim for liquidated damages for the alleged delay caused during the contractual period automatically.

35. Insofar as judgment of this court in case of ***Indian Drugs and Pharmaceuticals Ltd. Hyderabad (supra)*** relied upon by the learned counsel for the respondent is concerned, the clause considered by this court for levy of

liquidated damages in that matter was totally different. This court had considered the situation where the contractor had agreed to supply particular number of cylinders every week and the contract provided for rental charges at a particular rate per week which could be computed for the delay committed every week. In my view, the said judgment is clearly distinguishable in the facts of this case and does not assist the case of the respondent.

36. It is not in dispute that the respondent did not lead any evidence before the learned arbitrator in support of the said claim for liquidated damages. It was also not the plea of the respondent that the amount demanded by the respondent as and by way of liquidated damages was a genuine and reasonable pre-estimate of the damages agreed by the parties. This court in case of ***Hindustan Petroleum Corporation Limited (supra)*** after adverting to the judgment of Supreme Court in case of ***Kailash Nath Associates vs. Delhi Development Authority*** decided on 9th January, 2015 in ***Civil Appeal No.193 of 2015*** has held that unless the employer would have pleaded and prove that the amount mentioned in the contract was of genuine pre-estimate amount of damage or loss and the employer would have prevented the actual loss suffered, no amount could be recovered as and by way of liquidated damages. Supreme Court in case of ***Kailash Nath & Associates (supra)*** has held that there cannot be any windfall in favour of the respondent to recover liquidated damages even if no loss is suffered or proved. I am respectfully bound by the judgment of Supreme Court in case of ***Kailash Nath & Associates (supra)*** and judgment of this court in case of ***Hindustan Petroleum Corporation Limited vs. Offshore Infrastructure Limited (supra)***.

37. In my view the award shows patent illegality insofar as finding of the termination rendered by the learned arbitrator is concerned, the same being

contrary to clause 27 of the work order. Similarly the award in respect of the liquidated damages is also contrary to clause 7 of the work order and contrary to the principles laid down by the Supreme Court and this court. The judgment of Supreme Court in case of **ONGC vs. Saw Pipes Ltd.(supra)**, **Associate Builders vs. Delhi Development Authority (supra)** relied upon by the learned senior counsel for the petitioner supports the case of the petitioner and the impugned award insofar as claim for liquidated damages awarded in favour of the respondent thus deserves to be set aside.

38. I, therefore, pass the following order :-

- (a) Arbitration Petition No.868 of 2014 is made absolute in terms of prayer clause (a). Impugned award dated 27th March, 2014 in respect of claim for deduction of the liquidated damages is set aside.
- (b) Arbitration petition is made absolute in the aforesaid terms.
- (c) No order as to costs.

[R.D. DHANUKA, J.]

On request of the learned counsel appearing for the respondent, operation of this order is stayed for a period of four weeks from today.

[R.D. DHANUKA, J.]