

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

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Judgment Reserved on: 01st September, 2015
Judgment Delivered on : 07th January, 2016

+ FAO(OS) 487/2015

ENGINEERS INDIA LIMITED

.... Appellant

versus

TEMA INDIA LIMITED

.... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Arvind Nigam, Sr Advocate with Mr Dhruv Dewan and
Ms Reena Choudhary.

For the Respondent : Mr Akhil Sibal with Ms Khooshnum Davierwala, Mr Hasan
Murtaza and Mr Nikhil Chawla for R-1.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J

1. The appellant has filed the present appeal impugning the order dated 07.07.2015, whereby the petition under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act') against the award dated 22.10.2012 passed by the sole Arbitrator, has been allowed and the award has been set aside.

2. The appellant – Engineers India Limited (EIL) had placed on the respondent – TEMA India Limited (TEMA) a purchase order dated 27.02.2008 for supply of nine heat exchangers – high pressure (screw

plug/breach lock). The EIL was procuring the said equipment for Chennai Petroleum Corporation Limited (“CPCL”). The delivery period stipulated was 17 months from the date of purchase order and delivery was expected to be completed on or before 26.07.2009.

3. A clause for Price Reduction Schedule (PRS) for delay in delivery was stipulated in the purchase order. As per the PRS, as a consequence of delay in delivery, price was to be reduced by 1% of the total order value per week, subject to maximum of 10% of the total order value. The purchase order stipulated that the General Purchase Conditions (GPC) and other commercial terms and conditions, as sent with the RFQ and amendment thereon, would apply.

4. Clause 12 of the GPC dealing with delayed delivery reads as under:-

“12. Delayed Delivery:

The time and date of delivery of materials/equipment as stipulated in the Order shall be deemed to be the essence of the contract. In case of delay in execution of the order beyond the date of delivery stipulated in the order or any extensions sanctioned, the Purchaser may at his option either

(i) Accept delayed delivery for Criminal items i.e. Refrigeration Package, Reciprocating Compressor, Centrifugal Compressor, Pump Multistage Centrifugal (feed Pump), HP Heat Exchangers (Screw Plug/Breach Lock), at prices reduced by a sum equivalent to one (1%) of the total order value for every week of delay or part

thereof, limited to a maximum of ten percent (10%) of the total order value.

(ii) For all items other than critical items, accept delayed delivery at prices reduced by a sum equivalent to one (1%) of the total value of delayed equipment/item for every week of delay or part thereof, limited to a maximum ten percent (10%) of the total order value.

(iii) Cancel the order in part of full and purchase such cancelled quantities from elsewhere on account and at risk and cost of the Seller, without prejudice to its right under (i) & (ii) above in respect to goods delivered.”

5. Clause 13 of the GPC dealing with delay due to *force majeure* reads as under:-

“13. Delays Due to *Force Majeure*

In the event of causes of *Force Majeure* occurring within the agreed delivery terms, the delivery dates can be extended by the Purchaser on receipt of application from the Seller without imposition of penalty. Only those causes which depend on natural calamities wars and national strikes which have duration of more than seven consecutive calendar days and Government Acts and other direct legislative enforcement are considered the causes of *Force Majeure*.

The Seller must advise the Purchaser by a registered letter duly certified by the local Chamber of Commerce or statutory authorities, the beginning and the end of such cases of delay immediately, but in no case later than 10 days from the beginning and end of

each cause of such *Force Majeure* condition defined above.”

The extension of time for completion of work or any part of the work or any operation (s) involved therein shall be the sole remedy of the Seller for any cause or event of delay and the Seller shall not be entitled in addition to or in lieu of such extension to claim any damages or compensation for extended stay or otherwise whether under the law governing contracts or quasi Seller or any other relationship, and the Seller hereby waives and disclaims any and all contrary rights.”

6. There was admittedly a delay in delivery. As per the respondent, the delay occurred on account of disruption in supply on account of *force majeure* conditions being Lok Sabha elections followed by Assembly Elections between April and September, 2009 and further disruption of labour loss, workers were lured by the local political parties, thereby affecting the works of TEMA as well as other businesses in the area where manufacturing activities were being carried on.

7. TEMA invoked clause 13 of the GPC claiming *force majeure* by its letter dated 22.12.2009 and reiterated by its letter dated 11.01.2010. The delivery, which was expected on or before 26.07.2009, in fact, happened on 16.04.2010. On 14.05.2010, payment was released by EIL. On 12.08.2010, refund was claimed by EIL on the ground that Price Reduction Clause 12 had been activated on account of delay on the part of TEMA.

8. On the failure of TEMA to refund any amount, arbitration was invoked by EIL. EIL filed its statement of claim seeking to recover the amount paid to TEMA on the ground of Price Reduction Clause (PRS). TEMA raised the defence of *force majeure* in clause 13 and contended that EIL was not justified in applying the PRS. The learned Arbitrator held that grounds did not exist for invocation of the force majeure provision even in terms of clause 13 of GPC and as such, held that no case for extension of time was made out by TEMA.

9. The next issue considered by the learned Arbitrator in the award was whether the deduction made by EIL was on account of liquidated damages or by way of penalty or by way of PRC in terms of GPC. The Arbitrator held that the deduction made by EIL was by way of PRS and not by way of liquidated damages or penalty.

10. The learned Single Judge, in the impugned order, has noticed that the central point in issue between the parties is with regard to the interpretation of clause 12 of the GPC. He found merit in the contention of the counsel for the TEMA that both the parties did understand clause 12 of the GPC to be a clause providing for liquidated damages.

11. The learned Single Judge has noticed that in the statement of claim filed before the learned Arbitrator, the appellant – EIL had stated that TEMA had sought extension of Contract Delivery Date (CDD) under clause 13 of the GPC, incorporated by reference in the PO, without levy of liquidated damages in terms of the PRS. Further, EIL had stated that it had refunded

the monies retained as liquidated damages in terms of PRS, subject to final finding on the issue of *force majeure*. Further, it had stated that TEMA was absolutely refusing to release the balance heat exchangers without refund of moneys retained as liquidated damages. In its rejoinder, EIL once again stated that TEMA had invoked Clause 13 of the GPC "to avoid imposition of liquidated damages in terms of the contractual provisions.....".

12. The learned Single Judge has noticed that there was no issue framed by the Arbitrator on whether the PRS under Clause 12 of the GPC was neither liquidated damages nor a penalty, however, in the final award, the Arbitrator himself formulated a separate issue as to whether the deduction was by way of liquidated damages, whether the deduction was by way of penalty and whether the deduction was by way of reduction in price contemplated by clause 12 of GPC read with Price Reduction Schedule (PRS) for delay in delivery, as provided by the PO and hence, it was neither LD nor a penalty.

13. The learned Single Judge has concluded that the Arbitrator, in formulating, during the course of the final award, an additional issue whether the deduction was neither LD nor a penalty, has travelled beyond the scope of the reference and pleadings and written submissions of the parties. The learned Single Judge noticing the submissions of the counsel before the learned Arbitrator has noted that clause 12 of the GPC was neither in respect of LD nor a penalty.

14. In view of the order above, the learned Single Judge has returned the

finding that apart from travelling beyond the scope of the pleadings and holding contrary to the understanding of clause 13 by the parties themselves, the learned Arbitrator appeared to have gone beyond the scope of reference of the arbitration. Under Section 28(3) of the Act, the Arbitrator had to decide in accordance with the terms of the Contract and thus, the Arbitrator had to go by the parties' understanding of the contract clauses unless there was a dispute in that regard.

15. From the pleadings of the parties and the submissions made by the counsel before the Arbitrator, it was noticed that there was no dispute at all as to whether clause 12 provided for liquidated damages and the only question was whether EIL was entitled to such price reduction in terms of the PRS or not?

16. The learned Single Judge has noticed the settled legal position as regards the necessity of appropriate pleadings for a claimant to recover liquidated damages.

17. Reliance is placed on the judgment in the case of **Kailash Nath v. DDA : 2015 (4) SCC 136**, paragraph 43 of which summarized the legal position as under:-

"43. On a conspectus of the` above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:

43.1 Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as

reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

- 43.2 Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.
- 43.3 Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage for loss caused is *sine qua non* for the applicability of the Section.
- 43.4 The Section applies whether a person is a plaintiff or a defendant in a suit.
- 43.5 The sum spoken of may already be paid or be payable in future.
- 43.6 The expression “whether or not actual damage or loss is proved to have been caused thereby” means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the

liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

43.7 Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.”

18. Further, reference is made to a decision of the Division Bench in the case of **Vishal Engineers & Builders v. Indian Oil Corporation : 2012 (1) Arbitration Law Report 253 (Delhi)**, to hold that the plaintiff must first prove the damages that they have suffered to recover simpliciter a sum by way of liquidated damages.

19. The learned Single Judge has noticed that in the present case, there was no averment by EIL that it had, in fact, suffered any loss on account of the delayed delivery of the equipment. He has returned a finding that clause 12 of GPC is not in the nature of a no fault liability clause. It is a clause, which reflects an agreement between the parties as to the consequence of a delayed delivery in monetary terms. It gives an outer limit of 10% of the total value of the contract, which can be sought to be recovered. It does not dispense with the need for the party complaining of the breach i.e. EIL to at least aver that it has suffered some loss on account of such breach. The legal position, as explained in **Indian Oil Corporation v. Lloyds Steel Industries Limited : 2007 (4) Arbitration Law Report 84 (Delhi)**, has also been referred to, wherein it is held *that 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 there from 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 in spite 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.* . 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.(underlining supplied)

20. The learned Single Judge held that the burden of proof would shift to TEMA to prove that no loss would have been suffered by EIL only if EIL had, in the first place, pleaded that it had suffered some loss or damage as a result of delayed delivery. It has thus been held that the conclusion of the learned Arbitrator that clause 12 of the GPC was neither a clause for liquidated damages nor penalty but a simpliciter clause providing for PRS, which, therefore, placed it outside the ambit of Sections 73 and 74 of the Indian Contract Act, 1872, was contrary to public policy of Indian Law and could not be sustained in terms of Section 34 (2)(b)(ii) of the Act.

21. We are in complete agreement with the above view taken by the learned single judge. The Arbitrator exceeded his jurisdiction inasmuch as he had framed an issue while passing the impugned award, which was not originally framed. The parties had clearly understood that the amount claimed by EIL was on account of liquidated damages, as stipulated in clause 12 of the GPC. The parties having clearly understood that the amount claimed by EIL was on account of liquidated damages, it was incumbent on EIL to aver and prove that it had suffered a loss. As noticed by the learned

Single Judge, the pleadings of EIL clearly established that it understood the same to be liquidated damages.

22. The pleadings are silent with regard to the loss/damages suffered by EIL and the extent thereof. In terms of the law laid down by the Supreme Court, a party cannot be compensated for loss not suffered, more so, in the case, where there is no pleading or proof of loss, having been suffered. EIL has not placed any material before the Arbitrator to show that it suffered any loss on account of the delayed delivery made by TEMA. EIL had a back to back contract with CPCL and there is nothing on record to show that on account of the delayed delivery, any penalty was imposed or any price reduction was made by CPCL in the amount paid to EIL by it. That being the position, EIL has clearly failed to aver that it had suffered loss/damages or even place any material before the Arbitrator that it had actually suffered any loss or damages on account of the delayed delivery. The purpose of the PRC was only to compensate EIL for any loss/damage that it may suffer on account of the delayed delivery by TEMA. Since EIL failed to prove any loss or damage, it was clearly not entitled to any amount on that account.

23. The additional issue framed by the Arbitrator was clearly contrary to the pleadings and the understanding of the clause by the parties. The Arbitrator has to decide the claims based on the understanding of the parties of the Contract. Since the Arbitrator framed a new issue while publishing the final award and applied his interpretation of the clause when there was no dispute on the interpretation of the clause by the parties, the Arbitrator

clearly exceeded his jurisdiction.

24. In view of the above, we find no ground to interfere with the order passed by the learned Single Judge in setting aside the award on the said ground.

25. The appeal is accordingly dismissed leaving the parties to bear their own costs.

SANJEEV SACHDEVA, J.

BADAR DURREZ AHMED, J.

January 07, 2016
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