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

Reserved on: January 2, 2017

Date of Decision: February 20, 2017

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O.M.P. 610/2008

TRIVENI ENGINEERING & INDUSTRIES LIMITED Petitioner

Through: Mr. Sanjeev Anand & Mr. Akshay Kapoor,
Advocates.

versus

NAHAR INDUSTRIAL ENTERPRISES LIMITED Respondent

Through: Mr. Pramod B. Agarwala & Mr. Aayush
Agarwala, Advocates.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

20.02.2017

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1. The challenge in this petition under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act') by Triveni Engineering & Industries Limited ('Triveni') having its office in Deoband, District Saharanpur, Uttar Pradesh is to an Award dated 28th August, 2008 passed by the sole Arbitrator in the disputes between Triveni and the Respondent, Nahar Industrial Enterprises Limited ('Nahar') (earlier known as Nahar Sugar & Allied Industries Limited), arising out of an Agreement dated 5th August, 1993 whereunder Triveni was to design, procure, manufacture, supply, transport to the site and supervise the erection and commissioning of a sugar plant for Nahar at Fatehgarh Sahib, Punjab for a price of Rs. 20.90 crores subsequently

increased to Rs. 21.24 crores.

2. In terms of the Agreement, the plant was to be commissioned by 30th September, 1994. According to Triveni, the plant could not be commissioned by the above date due to force majeure for reasons attributable to Nahar. A meeting was held between the parties on 26th October, 1994 wherein it was agreed that the commissioning of the plant with one boiler would be carried out by 15th November, 1994 and the full plant would be complete in all respects by 15th December, 1994. It was further agreed that any failure on the part of Triveni to adhere to the schedule would make it liable for Liquidated Damages ('LD') in terms of Clause 16.1 of the Agreement to be calculated from 1st October, 1994.

3. Triveni states that on 24th/27th November, 1994 it completed and commissioned the plant with one boiler and the plant, completed in all respects, was commissioned on 10th January, 1995. Nahar sent a legal notice dated 18th December, 1996 making certain claims under the Agreement, which were disputed by Triveni. Thereafter, Nahar invoked the arbitration Agreement and filed a petition under Section 11 of the Act in this Court. By an order dated 11th February, 2000, a sole Arbitrator was appointed in the said petition.

4. Nahar filed a statement of claim of which one pertained to LD in the sum of Rs. 105 lakh along with interest at 18% per annum with effect from 1st October, 1994 up to the date of payment. Triveni filed its statement of defence and also filed its counter-claims. The learned Arbitrator on 19th July, 2000 framed the following issues:

- “1. Whether the respondent failed to adhere to the terms of the contract and could not erect and commission the plant by or before the stipulated date as alleged by the claimant? If so, its effect.
2. If the answer to the Issue No. 1 is in the affirmative, whether failure to adhere to the terms of the contract and erection and commissioning of the plant by or before the stipulated date was for the reasons attributable to the claimant and force majeure conditions as contended by the respondent? If so, its effect.
3. Whether the respondent failed to commission the plant as agreed at a meeting held on 26th October, 1994 as alleged by the claimant? If so, its effect.
4. If the answer to the Issue No. 3 is in the affirmative, whether the respondent failed to commission the plant as agreed at a meeting held on 26th October, 1994 for the reasons attributable to the claimant and force majeure conditions as contended by respondent?
5. Whether any work had/has remained unattended or incomplete under the contract or that the entire plant complete in all respect has not been handed over by the respondent to the claimant? If so, its effect.
6. Whether the respondent is liable to pay liquidated damages of Rs.105 lacs or any other amount with interest to the claimant?
7. Whether the claimant is entitled to claim Rs. 10,32,500/- with interest from the respondent for alleged short supply of parts of machinery and material to it by the respondent?
8. Whether the claimant is entitled to claim for Rs. 7,12,387/- with interest from the respondent as claimed in the claim petition?
9. Whether the claimant is entitled to claim Rs. 15,48,836.10 with interest being the alleged loss due to alleged excess consumption of fuel?

10. Whether the claimant is entitled to claim Rs. 26,98,155.93 with interest being the alleged excess payment made by it to the respondent?

11. Whether the claimant suffered any loss due to the alleged delay in the commission of the plant?

12. Whether the claimant's claim of Rs. 15,48,836.10 is arbitrable and can be entertained in the present Arbitration?

13. Whether the respondent is entitled to claim of Rs.6,89,570.54 with interest by way of counter claim from the claimant?

14. Relief and against whom.”

5. On behalf of Nahar, Mr. N.D. Jain, a director in the Company, was examined. On behalf of Triveni Mr. P.K. Gupta, Manager (Contract) was examined.

6. In the impugned Award, the learned Arbitrator clubbed issue Nos. 1 to 4, 6 & 11 as they formed part of the same claim for LD. It was held that in terms of Clause 16.1 of the Agreement dated 5th August, 1993, Nahar was entitled to LD @ ½% per week for every completed week's delay subject to 5% of the contractual value. It was held that Nahar had been able to prove that Triveni committed default in handing over the complete plants with two boilers within the stipulated time. The contract price was Rs. 21.24 crores and 5% thereof worked out to Rs. 105 lakh and this was held to be the amount due from Triveni to Nahar. It was held that parties were *ad idem* on Clause 16.1 of the Agreement as is clear from the minutes of the meeting dated 26th October, 1994 and, therefore, Triveni could not have avoided itself liability by characterising the Clause as penal Clause. The learned

Arbitrator took into account the fact that the plant with one boiler was commissioned on 27th November, 1994 and that Triveni was therefore entitled to remission @ 0.25% per week for six weeks from 27th November, 1994 up to 10th January, 1995 when the plant with both the boilers was handed over. This amount worked out to Rs. 31.50 lakhs and after deducting it, the balance worked out to Rs. 73.50 lakhs towards LD.

7. As regards the plea of Triveni that there were *force majeure* conditions, the learned Arbitrator held that no sufficient, convincing and cogent evidence has been placed on record to substantiate it. All other claims of Nahar were rejected. The claim for Nahar for excess payment in the sum of Rs. 26,98,155.93 and the counter-claim of Triveni in the sum of Rs.6,89,570.54 were also rejected. In sum, the learned Arbitrator awarded Nahar Rs.73.50 lakh towards LD together with simple interest at 10% per annum with effect from 24th April, 2000 i.e., the date of filing of the claim till the date of realisation.

8. Mr. Sanjeev Anand, learned counsel appearing for Triveni submitted that the delay in commissioning the plant was only 9 days, and the delay in commissioning the complete plant was only three completed weeks. Relying on the decisions in ***Fateh Chand v. Balkishan Dass AIR 1963 SC 1405***; ***Maula Bux v. Union of India (1969) 2 SCC 554*** and ***Vishal Engineers & Builders v. Indian Oil Corporation Limited 2012 (2) R.A.J. 390 (Del)***, it was submitted by Mr. Anand that compensation cannot be awarded if no legal injury has occurred and no loss has been suffered on account of breach. He submitted that actual loss had to be proved by Nahar. He submitted that

no evidence was led to prove the claim of actual loss made in para 7 of the affidavit of evidence filed on behalf of Nahar. Only hypothetical workings were submitted to show the alleged reasonableness of the claim. Further, the loss suffered during the period from 1st October, to 15th November, 1994 could not be counted as parties had extended the time for commissioning of the plant with one boiler up to 15th November, 1994 and for the full plant up to 15th December, 1994. On the other hand, the affidavit of evidence of Nahar although claims a loss on account of purchase of sugarcane at Rs. 90 per quintal instead of Rs. 72 per quintal, it, however, remained unsubstantiated.

9. Mr. Anand also submitted that the delay had to be computed only for the period after the extended period had come to an end. However, the learned Arbitrator wrongly held that there was a delay of over ten completed weeks and this was based on no evidence/material and contrary to the factual position between the parties. Further, the learned Arbitrator ignored the evidence placed on record which showed that for the crushing season for the year 1994-95, crushing had started on 24th November, 1994. There was a serious cane shortage in that year and whatever sugarcane was available was crushed by Nahar as was evident from RT-8(C) form. It further revealed that the entire crushing capacity of the plant i.e., 2,500 TCD was never available with Nahar.

10. Lastly, it was submitted that the Clause and the minutes of the meeting dated 26th October, 1994 that LD would be payable from 1st October, 1994 was penal in nature. This aspect has not even been discussed in the

impugned Award. It is submitted that the clause was penal because it provided for a liability to pay damages from an earlier date i.e., for a non-default period from 1st October, 1994 to 15th November, 1994 only to act as a deterrent to compel timely performance of the obligation. Reliance is placed on the decisions in ***Union of India v. Vasudev Aggarwal AIR 1960 Patna 87; Sasanka Sekhar Pal v. Dinanath Gorain AIR 1952 Patna 271*** and ***K.P. Subbarama Sastri v. K.S. Raghavan AIR 1987 SC 1257***.

11. On behalf of Nahar, Mr. Pramod B. Agarwala, learned counsel submitted that the learned Arbitrator after analysing the evidence returned a factual finding that there was delay in completion of the plant and, therefore, the claim for LDs stood justified. Clause 16.1 provided for a reasonable pre-estimate of loss suffered. The actual loss, therefore, did not have to be established. The scope of interference by the Court being limited, it should refrain from re-appreciating the evidence and interfering with the Award only because another view was possible. Reliance was placed on the decisions in ***T.P. George v. State of Kerala (2001) 2 SCC 758; Indu Engineering & Textiles Limited v. Delhi Development Authority (2001) 5 SCC 691; Steel Authority of India Limited v. Gupta Brothers Steel Tubes Limited (2009) 10 SCC 63; Rashtriya Ispat Nigam Limited v. Dewan Chand Ram Saran (2012) 5 SCC 306*** and the recent decision in ***Kailash Nath Associates v. Delhi Development Authority (2015) 4 SCC 136***.

12. The above submissions have been considered. Clause 16.1, which is the relevant clause, reads as under:

“16.1. Liquidated damages for delay in delivery and commissioning.
If the Seller fails to deliver and ensure timely commissioning of the

plant within the scheduled time fixed or extension if any allowed by the Purchaser, the Seller shall pay liquidated damages of an amount equal to ½ % (Half per cent) of the contract for every completed week of delay but not exceeding 5% (five per cent) of the price payable under Clause 3 (including necessary facilities and price escalations paid).”

13. The above clause is one providing for pre-estimate of damages, which has been found by the learned Arbitrator to be genuine. The minutes of the meeting held on 26th October, 1994 reiterated the above clause as is evident from para 1 thereof, which reads as under:

“1. At the request of TEW, NSA agrees for the commissioning of the plant with one boiler by 15th Of November, 94 and the full plant complete in all respects by 15th December, 94. Any failure on the part of TEW to adhere to the above Schedule shall make TEW liable for Liquidated Damages In terms of Clause 16.1 of the Agreement dated 5th August, 93 to be calculated from 1st Day Of October, 94.”

14. That there was delay in adhering to the extended time limits is not in dispute. The question is not how much delay occurred but the consequences of the delay. It was agreed between the parties, as recorded in the above minutes, that if there was a delay beyond the extended period, Triveni would be liable for LD in terms of Clause 16.1 of the Agreement “to be calculated from 1st day of October, 94.” This was a conscious decision taken voluntarily by Triveni. It is too late in the day for Triveni to question the applicability of the clause from 1st October, 1994. The plea that the period of delay should be computed only after the extended period and therefore the LD should be made applicable only for that limited period is plainly untenable. As observed by the Supreme Court recently in *M/s. Sharma & Associates Contract (P) Ltd. v. Progressive Constructions Ltd. 2017 (2)*

SCALE 326, "...in a matter of contract where the parties have to stick to govern by the provisions of the contract entered into between them, equity has no role to play."

15. In ***Kailash Nath Associates v. Delhi Development Authority*** (*supra*), the Supreme Court analysed the law governing Section 74 of the Indian Contract Act, 1872 and the decisions relied on by learned counsel appearing for Triveni i.e., ***Fateh Chand v. Balkishan Dass*** (*supra*); ***Maula Bux v. Union of India*** (*supra*) and ***Shree Hanuman Cotton Mills v. Tata Air Craft Limited*** (1969) 3 SCC 522 and summarised the legal position as under:

“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 or loss caused is a 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.”

16. Before the learned Arbitrator, Triveni submitted calculations to justify the claims for losses in order to demonstrate that it was reasonable. The figures quoted by the learned Arbitrator in the impugned Award were taken from the annual report containing audited accounts. The learned Arbitrator examined the figures for the raw material consumed, the quantity of sugarcane crushed, the average price of sugarcane for the said crushing season etc. Therefore, it cannot be doubted that the learned Arbitrator had sufficient material on record to examine if the claim for Rs. 105 lakh towards LD was justified. Further, the learned Arbitrator did not stop at that but actually granted remission to Triveni for commissioning one boiler on 27th November, 1994. It, thus, got the benefit of Rs. 31.50 lakh. What the Arbitrator has, in fact, done is to enforce Clause 16.1 read with para 1 of the minutes of the meeting of 26th October, 1994.

17. The Court is, therefore, satisfied that the impugned Award in respect of the claim for LD by Nahar is fully consistent with the legal position explained by the Supreme Court in *Kailash Nath Associates v. Delhi*

Development Authority (supra).

18. As rightly pointed out by Mr. Agarwala, the Court in exercise of its jurisdiction under Section 34 of the Act is not sitting in appeal over the impugned Award. Unless there is something so perverse or shocking to the judicial conscience or a finding which could be opposed to the fundamental policy of Indian law, the Court would not interfere with the impugned Award. That high threshold cannot be said to have been met in the present case. The impugned Award discusses in detail the evidence on record in light of the legal position and has concluded that Nahar would be entitled to a sum of Rs. 73.5 lakh towards LD along with interest at 10% per annum from the date of filing of the claim. There is nothing in the impugned Award which can remotely be said to attract any of the grounds under Section 34 of the Act.

19. The petition is, accordingly, dismissed with costs of Rs. 20,000 to be paid by the Petitioner to the Respondent within four weeks.

FEBRUARY 20, 2017

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S. MURALIDHAR, J