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IN THE HIGH COURT OF DELHI AT NEW DELHI

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**Reserved on: 09th May, 2017
Pronounced on: 31st May, 2017**

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FAO(OS) (COMM) No.102/2017 and CM No.17671/2017

M/S PAWAN HANS HELICOPTERS LTD

..... Appellant

Through : Mr.Puneet Taneja and Ms.Shaheen,
Advs.

versus

M/S MARITIME ENERGY HELI AIR SERVICES PVT LTD

..... Respondent

Through : Mr. M.C.Dhingra with Ms. Priya
Puri, Mr. Muhammed Riyazudeen,
Mr.Ranjay Kr. Dubey with Ms.
Swatantra Rai, Advs.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This appeal challenges the judgment dated 01.03.2017 passed by the learned Single Judge in OMP(COMM) No.281/2016 whereby the learned Single Judge had rejected the claim of the appellant qua the liquidated damages, primarily, on the ground that time was never an the essence of the agreement.

2. The brief facts are on 09.04.2010, the appellant had entered into a Memorandum of Understanding (MOU) with the Andaman and

Nicobar Administration for introduction of seaplane operations in Andaman & Nicobar Islands with a validity period of five years. The use of a seaplane was contemplated to connect popular tourist destinations in the Andaman & Nicobar Islands. Subsequently, PHHL floated a global tender inviting bids for Wet lease of an amphibian seaplane; (with passenger capacity of 5-10) for an initial period of six months with an option to extend for a further period of six months. The bidders-were required to mobilize the seaplane at Port Blair within a period of 75 days from the issue of Letter of Intent (LOI).

3. Maritime submitted its bid pursuant to the aforesaid invitation, which was accepted and the LOI was issued by PHHL to Maritime on 13.09.2010. In terms of the instructions issued by PHHL, the bids were to be split into fixed monthly charges (FMC) and flying hourly charges (FHC). In terms of the Agreement between the parties, Maritime was entitled to FMC of ₹49,07,270/- and FHC of ₹49,250/- per hour inclusive of service tax and other taxes. Admittedly, Maritime was obliged to mobilize the seaplane by 25.11.2010; that is, within a period of 75 days from the issuance of the LOI.

4. It is not disputed that Maritime had failed to mobilize the aircraft within the period of 75 days as agreed. The aircraft arrived in Mumbai on 30.11.2010 and was cleared by the Customs on 03.12.2010. Maritime applied for the necessary permissions from Directorate General of Civil Aviation (DGCA), however, that, took some time; the aircraft was finally delivered to PHHL on 24.12.2010. The Non Scheduled Operators Permit (NSOP) was received, from

DGCA on 07.01.2011 and the No Objection Certificate (NOC) for operation of the seaplane to and fro from Port Blair to Havelock water aerodrome was received on 19.01.2011. The flight could only be operated from 20.01.2011.

5. In view of the delays, PHHL issued a letter dated 10.12.2010 permitting Maritime to mobilize the seaplane at Port, Blair, albeit, with levy of liquidated damages. The parties then entered into a formal contract on 14.02.2011 (hereafter 'the Agreement'). However, on 27.04.2011, PHHL issued a notice for discontinuation of services under clause 14 (14.2) of the Agreement, effective 15 days from 28.04.2011. On 28.07.2011, after the Agreement was terminated, PHHL informed Maritime about the levy of ₹88,49,043/- as liquidated damages. At the material time, a sum of ₹76,62,429/- was admittedly payable by PHHL to Maritime. PHHL sought to adjust the aforesaid sum and demanded the balance payment of ₹11,86,614/- which was paid by Maritime under protest.

6. Maritime also raised an invoice of ₹1,29,83,285/- for 263.62 flying hours. It claimed that PHHL had assured at least 100 hours of flying per month, and the actual flying hours during the term of the Agreement were only 117.38 hours which were short by 263.62 hours (computed on the basis of 100 flying hours per month). Maritime also raised another bill for a sum of ₹1,07,64,334/- towards FMC from 13.05.2011 to 18.07.2011, being the unexpired period of the Agreement. In addition Maritime also raised a bill of, ₹1,09,62,097/-

for FHC for the period 13.05.2011 to 18.07.2011, the unexpired period of the Agreement.

7. Since the disputes had arisen the respondent invoked the arbitration clause by its letter dated 08.08.2011. Justice Manju Goel (Retd.) was appointed as a sole arbitrator. She accepted Maritime's claim for refund of liquidated damages for several reasons a) the seaplane operation could not be mobilized without sufficient infrastructure approved by DGCA and the necessary infrastructure was not ready, b) the Jetty at Havelock Island was ready only on 23.12.2010 and the Jetty at Diglipur Island was not ready for a long period thereafter; c) although DGCA had issued the NSOP on 07.01.2011, the same was not sufficient to commence operations as the permission from Directorate of Aerodrome Standard was required to put the seaplane in service and this required clearance of the area from where seaplane would be operating; d) there was delay in clearance regarding waterways, etc. The arbitrator held that Maritime could not alone be held responsible for the time taken by DGCA. The last sanction regarding waterways was granted on 19.01.2011 and the operations could only be started thereafter. The arbitrator also held that the requisite notice for imposing liquidated damages had, not been issued by PHHL. Accordingly, the arbitrator held that PHHL was not entitled to levy liquidated damages as per clause 5 and Section 3 of the Tender documents. The arbitrator further held that the termination of the Agreement was wrongful and accordingly also allowed Maritime's claim for FMC for the unexpired period of the Agreement. However, Maritime's claim for shortfall in FHC during

the period of the Agreement and for the unexpired period of Agreement was rejected. The arbitrator also allowed interest at the rate of 9% per annum with effect from 21.12.2011 till the filing of the claim which was quantified at Rs.13,97,453/-. The arbitrator also awarded pendente lite interest and future interest at the rate of 9% per annum. In addition, Maritime was also awarded proportionate costs on the amount awarded.

8. The appellant being aggrieved came under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the award dated 24.02.2016. The learned Single Judge agreed with the reasoning of the arbitrator and disallowed the appellant's position qua liquidated damages on the ground the infrastructure being not ready, as jetties need to be renovated/ modified and further the appellant could not prove if it suffered any damage on account of the aircraft being not mobilized in time. Moreover, the learned Single Judge agreed with the arbitrator that the appellant failed to issue any notice for levy of such liquidated damages. However, the plea of the appellant's right to terminate the agreement per clause 14 found favour with the learned Single Judge and the award to the extent of FMC charges was set aside.

9. The appellant before us urges that the learned Single Judge went wrong in rejecting its plea that it was entitled to recover the liquidated damages per Clause 5 of the Standard Terms and Conditions of the Agreement between the parties, which is as under :

“DELIVERY OF AMPHIBIAN SEA PLANE

The Bidder undertakes to deliver the Amphibian Sea Plane at Port Blair as required by PHHL on or before the Delivery date. The date of delivery and starting of operations shall be the essence of the Agreement. The Bidder shall ensure that their Amphibian Sea Plane shall be ready for operations at the location as required within 75 days from the date of Letter of Intent (LOI)/signing of the contract, whichever is earlier. Should the Amphibian Sea Plane not be inducted at the designated base by the Delivery Date, PHHL shall have the right to act as under:-

Accept the Amphibian Sea Plane on any subsequent date after issuing notice of levy of liquidated damages (and not by way of penalty) equivalent to 0.5 % of six months of contract value for each day of delay or part thereof upto 30 days, after which PHHL has the right to terminate the contract without being liable to pay any charges whatsoever to the Bidder and forfeit the bid bond."

10. The case of the appellant is that the operations delayed considerably due to conduct of the respondents which caused tremendous losses to the appellant. Further that the respondent admitted the delay caused by it and rather requested the appellant not to charge the liquidated damages. The appellant agreed that it did give the notice for recovery of such liquidated damages and hence the Arbitrator acted contrary to the terms of contract and to the documents on record and thus the award being against the public policy, needs to be set aside. It is argued on behalf of the appellant, PHHL that the condition with respect to payment of liquidated damages is of the kind where parties visualized the amount to be a genuine pre-estimate of the likely damages. Elaborating on this

aspect, Mr. Taneja submitted that there can be no doubt that the seaplane was to be in the designated place within a particular time, i.e., 75 days. The condition clearly envisioned their failure to adhere to this timeline was to result in payment of liquidated damage without proof, to the injured party. It was submitted that by introducing the notion of satisfaction of reciprocal obligations, the award - and the impugned judgment are patently erroneous in law.

11. It was argued on behalf of Maritime that PHHL could not have claimed compensation. Learned counsel submitted that the requisite clearances of the authorities were not forthcoming and importantly there was no proper infrastructure existed and that the jetties were renovated for proper use after the 75 days period. In the circumstances, it could not have been ever argued that PHHL incurred or suffered any significant loss much less of the magnitude claimed by it as liquidated damages. Learned counsel further argued that even Section 74 of the Contract Act and various decisions of the Supreme Court including *Maula Bux v. UOI*, AIR 1970 SC 1955 and *Fateh Chand v. Balkishan Das*, AIR 1963 SC 1405 state that reasonable compensation not exceed the amount agreed upon by the parties can be granted upon proof of damage. The necessary pre-condition for one alleging injury and claiming compensation is proof of such injury. Since the appellant did not at any stage lead evidence, it could not claim damages. In the circumstances, the view of the Tribunal as endorsed by the impugned judgment is correct in law.

12. Clause 16 of the tender document gives the responsibilities of the bidder as follows :

a) All mandatory clearances including custom clearance etc. for import of the Sea Plane in India after award of LOI and sending back after completion of the contract period would be sole responsibility of the Bidder.

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d) The Bidder shall at its own expenses and under its responsibility:

i) The bidders are required to provide experienced IFR rated licensed and Night flying qualified Pilots; qualified Engineers, technicians etc. required for operation and maintenance, tools, spares and components, ATF, oils etc. The Bidder's personnel including pilots & engineers are to be utilized, subject to security clearance by the concerned Indian authorities.

ii) Bidders are to provide transportation of its Amphibian Sea Plane, equipments, spare parts and personnel' including pilots, engineer, technicians etc, from place of present location to & from PHHL's customer operating helibase to undertake the task assigned by PHHL/its customer.

e) The Bidder shall comply with all Indian Aviation Regulations and all other applicable laws, rules & regulations of India, The Bidder shall indemnify Pawan Hans against the Bidder's ignorance and/or failure to comply with said laws, rules & regulations. The Bidder should confirm- that he agrees to abide by Civil Airworthiness Requirements Series C Part I Sec 3 dt. 17.5.93 and as amended from time to time and provide all assistance/information to PHHL and DGCA to ensure compliance. The Bidder also confirm that he agrees to abide by any other new requirement introduced by DGCA India from time to time for foreign operators.

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*17. CHARTERER'S / PAWAN HANS
RESPONSIBILITIES*

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*b) PHHL can .-provide on mutually acceptable rates
Amphibian Sea Plane parking and maintenance space
and available ground support equipment to the Bidder at
Mumbai, Juhu Aerodrome.*

13. The mandatory clearances, per clause 16 were to be obtained by the respondent. The bidder was to abide by the civil airworthiness requirements and to provide timely information to the appellant and DGCA to ensure compliance and to abide by any other new requirement introduced by DGCA, India from time to time. The appellant was only to provide parking/maintenance space and available ground support equipment to the Bidder at Mumbai, Juhu Aerodrome.

14. In the above scenario we see that it was the condition of the tender document that the respondent was to mobilize the sea plane at Port Blair within a period of 75 days from the date of issue of LOI and it included not only the physical delivery of the plane but also all the necessary approvals/permissions for the operation of sea plane. The sea plane was to start operations from 76th day. Admittedly the LOI dated 11.10.2010 was issued on 13.09.2010, hence the plane services were to be made operational on 26.11.2010 i.e. the 76th day of the LOI.

15. The appellant had filed and proved various letters before the learned arbitrator, some of which are relevant. Such letters reveal the delay in delivery of plane was attributable to the respondent as initially it informed that the Australian party with whom it had an agreement despite it should have the possession of amphibian sea plane per bid requirement. In its letter dated 26.10.2010 the respondent rather admitted its guilt and informed that there shall be a delay of 10 days in mobilizing the sea plane and that respondent should not levy liquidated damages. The Andaman & Nicobar Administration rather by its letter dated 10.11.2010 informed the appellant that the infrastructure for operation of sea plane services in Andaman would be completed by 25.11.2010 and in the meanwhile all necessary approvals be obtained from the concerned agencies. Again by its letter dated 06.12.2010 the respondent admitted delay in mobilizing the sea plane and undertook to initiate steps for requisite permissions like security clearance of the pilot and clearance of the manual from DGCA. It even thanked the appellant for rendering help for seeking clearances. On 14.12.2010 by an e-mail the respondent informed that its pilot was missing and sought permission to arrange an alternate pilot and even requested the appellant to help it to seek permission from DGCA, as a special case, to allow an alternate pilot to fly without FATA (Foreign Aircrew Temporary Authorization) under Rule 133A of Aircraft Rules. The appellant filed its letter dated 15.12.2010 though allowed the respondent to mobilize an alternate pilot and informed that they shall levy liquidated damages for delay in mobilization and may in case of further delay terminate the

agreement. The respondent only vide its e-mail dated 23.12.2010 for the first time called upon the appellant to obtain confirmation from A&N Administration as regards the readiness of infrastructure at the desired locations. The Andaman and Nicobar Administration on the same day vide their e-mail informed them that jetties meant for docking sea plane at Diglipur and Havelock were ready. On 24.12.2010 once again the respondent requested the appellant to reconsider its decision to charge the liquidated damages as delay was beyond their control. However, on 02.01.2011 the respondent yet again vide its e-mail informed that due to some tragedy the pilot is not available and requested to reschedule the date for commencement of commercial operations. In its letter dated 06.01.2011 the respondent requested the appellant not to terminate the contract but may levy liquidated damages. The respondent also undertook to seek NSOP Number and DGCA approval of water ways by 20.01.2011. It was only on 19.01.2011 after obtaining DGCA permission for water landing the respondent offered to carry out commercial operations of sea plane from 20.01.2011. Even on 28.01.2011 the respondent wrote the delay was beyond its control and requested the appellant not to levy liquidated damages. Such request was further made on 21.02.2011. Moreover, the respondent had arranged only one pilot instead of two thereby restricting the number of sorties which could be taken within a day or week and the Andaman and Nicobar Administration rather expressed its dissatisfaction and asked for deployment of additional pilots. Instead of mobilizing the second pilot, the respondent on 07.03.2011 informed the appellant that the

water rudder cable in the aircraft was damaged and needs to be imported from abroad and would take 7 to 10 days and as the pilot was not feeling well so the aircraft would remain grounded. The services could only be restored on 23.01.2011. On 23.03.2011 the respondent by its e-mail requested the appellant to pay its pending bills and to recover liquidated damages from the performance bank guarantee. On 24.03.2011 the joint meeting took place between the respondent, the appellant and the Andaman and Nicobar Administration wherein the decision to levy liquidated damages was reaffirmed for delay in mobilizing and non-availability from 07.03.2011 to 21.03.2011. On 27.04.2011 the services were terminated and the appellant vide a letter dated 28.07.2011 informed the respondent that they have adjusted liquidated damages of the amount of ₹88,49,042/- towards a delay in mobilization of the sea plane restricted to 30 days, the appellant had to restrict the liquidated damages to 30 days only. Out of sum of ₹88,49,043, a sum of ₹76,62,429/- was adjusted towards a bill amount payable to the respondent and the remaining amount of ₹11,86,614/- was to be adjusted by encashing the performance bank guarantee. The respondent rather by its letter dated 17.10.2011 had agreed to pay the balance amount of ₹11,86,614/- towards the liquidated damages on or before 28.10.2011 and requested the appellant not to invoke the bank guarantee. However, later it raised a dispute.

16. The communication on record do show that delivery and mobilizing of the sea plane at Port Blair, after obtaining all necessary permissions from different authorities, was the sole responsibility of

the respondent. The respondent delayed the delivery of plane and consequently the permissions from appropriate authorities. It is true the time such authorities could have taken to grant permission was not within the domain of the respondent but the timely delivery of plane and *to apply* for such permissions was certainly within its domain. In fact the period of 75 days was fixed only after taking into account the time to be taken by authorities to grant such permission(s).

17. Admittedly, the plane arrived at Mumbai Airport on 30.11.2010; the necessary permissions were obtained by 19.01.2010 i.e. within 50 days of the delivery of the plane at Mumbai. Now, Clause 5 says the date of delivery was an essence of the contract as also the start of its operations. The start of operations were logically connected to the date of delivery as such operations were to start within 75 days of LOI which period was sufficient for obtaining permissions. The correspondences on record do prove the delay in delivery and operations. The notice to levy liquidated damages also was given by the appellant vide letter dated 15.12.2010, further reiterated in its letter dated 23.03.2011, which the arbitrator ignored. The appellant was justified in demand of liquidated damages. The learned Arbitrator failed to interpret the conditions of contract in proper prospective and failed to properly consider the material documents produced by the appellant while making the impugned award. The Arbitrator acted beyond the parameters of the arbitral agreement/ contract and hence the award needs to be set aside qua the issue of liquidated damages.

18. The next issue urged before us is as to what extent such liquidated damages be charged. The respondent's plea is the appellant had failed to quantify its damages by any comparative data viz, of the number of tourists lost; profit earned in subsequent years etc, hence liquidated damages can not be granted.

19. In *ONGC v. Saw Pipes* 2003 (5) SCC 705, after noticing *Maula Bax v. Union of India* AIR 1970 SC 1955 the Supreme Court held that in certain eventualities parties may contemplate payment of damages or compensation to cater to specific situations because the quantification of such damages by evidence is impossible or impracticable. The Court observed as follows:-

“Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia (relevant for the present case) provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only

entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him.

67.....In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In such a situation, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that the party who has committed breach of the contract is not liable to pay compensation. It would be against the specific provisions of Section 73 and 74 of the Indian Contract Act. There was nothing on record that compensation contemplated by the parties was in any way unreasonable. It has been specifically mentioned that it was an agreed genuine pre- estimate of damages duly agreed by the parties. It was also mentioned that the liquidated damages are not by way of penalty. It was also provided in the contract that such damages are to be recovered by the purchaser from the bills for payment of the cost of material submitted by the contractor. No evidence is led by the claimant to establish that the stipulated condition was by way of penalty or the compensation contemplated was, in any way, unreasonable. There was no reason for the Tribunal not to rely upon the clear and unambiguous terms of agreement stipulating pre-estimate damages because of delay in supply of goods. Further, while extending the time for delivery of the goods, the respondent was informed that it would be required to pay stipulated damages.”

20. Again, in *Bharat Sanchar Nigam Ltd v Reliance Communication Ltd* 2011 (1) SCC 394, it was observed by the court, that:

“17. According to Chitty on Contracts "whether a provision is to be treated as a penalty is a matter of construction to be resolved by asking whether at the time the contract was entered into the predominant contractual function of the provision was to deter a party from breaking the contract or to compensate the innocent party for breach. The question to be always asked is whether the alleged penalty clause can pass muster as a genuine pre-estimate of loss". (See para 26-126 of Chitty on Contracts, 30th edition) The fact that damage is difficult to assess with precision strengthens the presumption that a sum agreed between the parties represents a genuine attempt to estimate it and to overcome the difficulties of proof at the trial. According to the Law of Contract by G.H. Treitel (10th edition), a clause is penal if it provides for "a payment stipulated as in terrorem of the offending party to force him to perform the contract. If, on the other hand, the clause is an attempt to estimate in advance the loss which will result from the breach, it is a liquidated damages clause. The question whether a clause is penal or pre-estimate of damages depends on its construction and on the surrounding circumstances at the time of entering into the contract". Lastly, the fact that a sum of money is payable on breach of contract is described by the contract as "penalty" or "liquidated damages" is relevant but not decisive as to categorization.”

21. Admittedly, the operations were to start on 25.11.2010 i.e., prior to the winter holidays season. It cannot be said that the appellant did not have an eye on profits. The levy as determined in Clause 5 of the tender document was thus a genuine pre-estimate of damages.

Admittedly, the contract was later terminated due to the conduct of respondent including delay in delivery of plane, delay in arrival of pilots, not providing a substitute pilot; technical snag in plane of its grounding etc, hence to deny the appellant the liquidated damages, which per Clause 5 was a genuine pre-estimate of damage, would be acting contrary to the contract.

22. Appeal is thus allowed and the impugned judgment and award to the extent of refusal to grant liquidated damages and interest to the appellant is set aside. Parties to bear their own cost.

YOGESH KHANNA, J

S. RAVINDRA BHAT, J

MAY 31, 2017
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