

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

+ **FAO No. 453/2016**

% **9th May, 2017**

DELHI TRANSPORT CORPORATION Appellant
Through: Mr. Sarfaraz Khan and
Md.Khairul Hussain, Advocates.

versus

M/S DEEKSHA SECURITY SERVICES Respondent
Through: Mr. Vikas Tiwari, Advocate.

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

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This first appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') is filed by the appellant against the judgment of the court below dated 2.4.2016 by which objections filed by the appellant under Section 34 of the Act were dismissed. By the Award of the arbitrator dated 16.11.2013 the claim filed by the appellant/objector for a sum of Rs.6,00,000/- was rejected.

2. The facts of the case are that admittedly there was an agreement dated 14.5.2009 entered into between the parties whereby the respondent was to supply to the appellant one hundred security

guards for security for various premises of the appellant. Since the respondent failed to supply the security guards, appellant sought to forfeit the security amount of Rs.6,00,000/- and which was in the form of bank guarantee given by the respondent to the appellant under the subject agreement. The bank guarantee, however, in the meanwhile had expired and therefore the appellant could not encash the bank guarantee. Appellant, therefore, filed the subject arbitration proceedings for recovery of the amount of Rs.6,00,000/-.

3. The court below has dismissed the objections by its detailed judgment by observing that the claim of the appellant was a claim for liquidated damages under Section 74 of the Indian Contract Act, 1872 and since under Section 74 of the Indian Contract Act proof of actual damage or loss caused is a *sine qua non* for applicability of the Section, and, since the appellant had failed to prove any case of having suffered any actual damages on account of the breach, the Arbitrator was hence justified in dismissing the claim petition by the Award dated 16.11.2013.

4. I, completely agree with the conclusions of the court below as also the Arbitrator, inasmuch as, there are three types of contracts. One type of contracts are those type of contracts where there

is no clause of liquidated damages and therefore in such a case the aggrieved party files a suit for recovery of damages on account of losses suffered by it under Section 73 of the Indian Contract Act. The second type of contracts/cases are those cases where on account of breach of contract on account of there being a clause of liquidated damages under the contract the same is sought to be enforced because there is no method of calculating the damages or loss suffered by the breach of contract. The third type of contract/cases are those cases where though the contract provides for liquidated damages the amount of loss caused by the breach can be calculated and thus, the nature of the contract is such that losses can be calculated, and therefore in these third type of contracts/cases though there is only a clause of liquidated damages, the clause of liquidated damages is in the nature of upper limit of damages which can be awarded for breach of the contract provided also that the liquidated damages amount is not in the nature of penalty. That there are these three types of contracts in law is now well established in view of the judgments of the Supreme Court in the cases of *Fateh Chand Vs. Balkishan Das*, AIR 1963 SC 1405, *Oil & Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.* (2003) 5 SCC 705, and *Kailash Nath Associates Vs. Delhi Development Authority and Another*, (2015) 4 SCC 136.

5. In the present case, the nature of contract is such that the damages could always have been calculated because if the respondent did not supply the security guards then the appellant could have engaged security guards from another agency and if for getting security guards engaged from another agency the appellant would have had to pay a higher cost than the cost of security guards provided by the respondent, then in such a case the appellant would have suffered monetary loss and hence would have been entitled to claim damages with the fixed liquated damages being the upper limit of damages which could be awarded. In the present case, there is no pleading or evidence led in the arbitration proceedings on behalf of the appellant pleading that the appellant had to engage alternative security guards at a higher cost and since therefore loss was suffered by the higher costs, hence the security deposited in the form of bank guarantee given by the respondent was sought to be forfeited. Therefore, once there is no pleading at all of the appellant having suffered losses on account of engaging guards from another security agency at a higher cost, and the amount of contract being such that the nature of loss could not have been calculated, appellant therefore could not have maintained the claim petition in the absence of pleadings and proof of the loss

suffered, and which is a *sine qua non*, as rightly held by the court below, for enforcing the claim of damages.

6. Dismissed.

MAY, 09 2017

VALMIKI J. MEHTA, J

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