IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

MONDAY, THE 26TH DAY OF MARCH 2018

THE HON'BLE MR. JUSTICE M.M.SUNDRESH

A. No.2210 of 2018
in
O.P.No.532 of 2014

In the matter of disputes between 3I infotech and Tamil Nadu e Governance Agency arising out of the master service agreement dated 08.07.2008
In the matter of the Arbitration and Conciliation act, 1996
In the matter of the arbitral award dated 06.06.2014.

M/s. 3I Infotech Limited
Tower #5, 4th Floor,
International Infotech Park,
Vashi Station Complex,
Vashi, Navi Mumbai 400 703
Rep.by its Authorised Signatory
... Applicant/Petitioner

-Versus-

1. Tamil Nadu e-Governance Agency
3rd Floor, TUFIDCO-POWERFIN Building
490/3, Anna Salai, Nandanam,
Chennai 600 035.

2. Mr.R.Thiagarajan, I.A.S.(Retd.,)
2/640, River View Enclave,
Manapakkam, Chennai 600 125. ... Respondents/Respondents

Application praying that this Hon'ble Court be pleased to adjourn the present proceeding in O.P.No.532 of 2014 for a period of 6 months and refer the issue between the Applicant and the respondents to the Arbitral Tribunal for fresh consideration.

This application coming on this day before this court for hearing the court made the following order:-

Seeking adjournment of the proceedings in O.P.No.532 of 2014 for a period of six months and refer the issue between the applicant and the respondents to the Arbitral Tribunal for fresh consideration, the present application has been filed.

2.On 08.07.2008, a Master Service Agreement (MSA) was entered into between the applicant and the first respondent to roll out common service centres through a Public Private Partnership (PPP).

3.As per the aforesaid contract, the services provided by the common service centres have been categorised such as issuance of land certificates, birth/death/other certificates, application for renewal of learner's licence, collection of motor vehicles taxes and penalties etc., As per the terms of the contract, the applicant was to bear the entire financial burden inclusive of setting up and operationalise the common service centres and the applicant was also to pay a negative bid amount. The benefit to the applicant came through profit arising out of the service being exclusively provided.

4.The applicant could not comply with the terms of the contract. The matter went before the learned Arbitrator. Both the applicant and the first respondent made their respective claims. While rejecting the claim of the applicant, the counter claim was allowed including the liquidated damages. The learned Arbitrator gave a specified amount as sought for by the first respondent for the liquidated damages with the following reasons:

> *"The contention of the claimant in its fourth plank of argument would be, that the clauses of the MSA that stipulate liquidated damages payable are enforceable, it is a pre-requisite for the payment of liquidated damages, the existence of loss needs to be established. Since the Government was in any way in no position to provide G2C services, it suffered no loss in the first place. The claimant would further stress that notwithstanding sec.74 of the Indian Contract Act, 1872, stating that the amount of damages for penalty to be paid whether actual loss/damage is proved or not, the person claiming liquidated damages has to prove a loss suffered by it in consequence of the breach of contract committed.*
>
> *Clause 1.4(a) of RFP Vol. 1 clearly states that the role of the SDA is that of a facilitator and the other SCA M/s.SREi Sahaj on his own and with the assistance of the respondent approached Government departments/agencies and tied up G2C services to be offered through CSCs. M/s.SREi Sahaj had also successfully rolled out CSCs allotted to it. But the claimant failed on both*

the counts and is in material breach of the contract. In this regard, both the claimant and the respondent cite judgments interpreting the provisions of sec.74 of the Indian Contract Act, 1872 both ways. Sec.28(3) of Arbitration and Conciliation Act, 1996 lays down that in all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

It has been clearly and unambiguously stated in Clause 1.2(i) of the MSA that the damages payable by a party to the other party has set forth in the MSA whether on per diem basis or otherwise, are mutually agreed genuine pre-estimated loss and liquidated damages likely to be suffered and incurred by the party entitled to receive the same and not by way of liquidated damages.

In the light of the genuine pre-estimated loss provided for in the MSA, the party aggrieved by the breach of the other party need not prove the loss once again. In the instant case, the claimant 3i Infotech is in material breach of the MSA and hence the respondent TNeGA is entitled to receive the damages payable which are mutually agreed genuine pre-estimated loss."

5.Challenging the award passed, the applicant has filed the present original petition. When the main original petition itself was taken up for hearing, one of the contentions raised by the learned counsel for the applicant is with respect to the liquidated damages awarded in favour of the first respondent.

6.Learned counsel appearing for the applicant would submit that the learned Arbitrator has abdicated his duty in awarding expenses followed by the quantum of the damages. The first respondent has not placed sufficient evidence to substantiate its claim. There is no material to show the actual damage or loss. The onus is on the first respondent. The learned Arbitrator has merely accepted the submission made by the first respondent. Thus the application has to be allowed.

7.Learned counsel appearing for the first respondent would submit that as there was a breach committed by the applicant, which has also been held so, on facts, by the learned Arbitrator, no interference is required. The records available would show that the claim for liquidated damages as awarded by the learned Arbitrator has to be sustained. To substantiate the same, learned counsel has made reliance upon various clauses available in the contract such as Clauses 1(1) and 1(bb) apart from placing reliance upon Clauses 5.6 and 7.2 of RFP. Much reliance has also been made on the business plan as provided under the contract.

8.On a perusal of the award passed qua the liquidated damages, this Court is of the view that the learned Arbitrator has committed a fundamental error by merely accepting the pre-estimated loss provided for in the MSA. There is absolutely no basis for the conclusion that has been arrived at for quantifying the liquidated damages. As rightly submitted by the learned counsel for the applicant for assessing the liquidated damages, the loss followed by quantification is required. The learned Arbitrator did not even consider the basis upon which the liquidated damages was claimed. A factual finding on the damage or loss caused is a condition precedent.

9.Considering the scope of Section 74 of the Indian Contract Act, 1872, the Apex Court in **Kailash Nath Associates Vs. Delhi Development Authority and Another ((2015) 4 SCC 136)** has held 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 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.*

10.From the aforesaid ratio laid down by the Apex Court and taking note of Section 74 of the Indian Contract Act, this Court is of the view that the learned Arbitrator has failed to consider the actual loss or damage leading to the process of quantification. This has to be done based upon materials either factual or under the premise governing the law qua the liquidated damages. Needless to state that it is for the claimant to prove and substantiate the entitlement of liquidated damages.

11.In such view of the matter, this Court is of the view that this application deserves to be allowed and accordingly, it is allowed. Accordingly, the original petition stands adjourned for a period of four weeks while referring the issue of determining the liquidated damages, in the light of the aforesaid observation, by the Arbitral Tribunal on fresh consideration. This Court expects the Tribunal to conclude the same within a period of four months from the date of receipt of a copy of this order. While undertaking the said exercise, it is also well open to the Tribunal to come to the conclusion that the liquidated damages cannot be quantified on facts and therefore it can be awarded as per the terms and conditions. All the issues qua liquidated damages are left open and the parties are at liberty to let in evidence. The Tribunal is also required to permit the parties to examine and cross-examine the witnesses along with documents if any.

Sd/.M.M.S.J
26.03.2018

//Certified to be a true copy//
Dated this the day of 2018

JJ 20/04.2018 COURT OFFICER