

\$~42

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

Date of decision: 12th February, 2018

+ **O.M.P. (COMM) 70/2018**

VEDANTA LIMITED

..... Petitioner

Through: Mr. Sandeep Sethi and Mr. Akhi Sibal, Senior Advocates with Mr. Ranjana Roy Gawai, Mr. Vasudha Sen, Mr. Arjun Asthana, Ms. Rishika Raha, Advocates.

versus

SHENZHEN SHANDONG NULCEAR POWER CONSTRUCTION
COMPANY LIMITED

..... Respondent

Through: Mr. C.S. Vaidyanathan and Mr. Amit Sibal, Senior Advocates with Mr. Ranjit Prakash, Mr. Kamal Nijhawan, Mr. Sumit Gaur, Mr. Anshuman Pande, Ms. Mahima Sareen, Advocates.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

I.A. 2044/2018

Allowed, subject to all just exceptions.

O.M.P. (COMM) 70/2018

1. This petition under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 9th November, 2017. The learned

senior counsel for the petitioner submits that the Arbitral Tribunal has acted in ignorance of the terms of the Agreement between the parties while awarding the amounts in favour of the petitioner. In this regard, the learned senior counsel for the petitioner has drawn my attention to clause 35.2 of the Agreement and submits that in case of termination of the contract by the supplier i.e. the respondent herein, pursuant to the suspension of the contract/work ordered by the purchasers i.e. the petitioner herein, the respondent would be entitled to 105% of the “cost incurred by the supplier”. He submits that, in the present case, the Arbitral Tribunal, instead of awarding the “cost incurred by the respondent”, has taken into account the price of the contract, which would certainly be more than the cost and, therefore, the award is liable to be set aside. He further submits that in absence of proof of any loss suffered by the respondent, the Arbitral Tribunal could not have awarded 105% of the price of the contract in favour of the respondent. The learned senior counsel, to support the above arguments, has relied upon the definition of “contract price” as given in the contract as also the payment schedule agreed between the parties.

2. I have considered the submission made by learned senior counsel for the petitioner, however, I am unable to agree with the same. Clause 35 of the Agreement is reproduced herein under:-

*“35 Termination und Suspension
35.1 Termination*

35.1.1 The Purchaser may at any time on breach of this Contract by the Suppliers under Clause 32.1 hereof, give them a written notice of such breach. If the Supplier do

not commence appropriate measure within a period of 30 (thirty) days after issuance of such notice to remedy that breach, then the Purchaser may terminate this Contract at any time thereafter stating therein the date of termination. The Supplier shall then be liable the Purchaser in accordance with Clause 32.3 hereinabove.

35.1.2 The Purchaser reserves the right to terminate the Contract at any time by giving a notice of no less than 1 (one) month without assigning any reason. The Supplier shall stop the performance of the Contract from the date of termination and hand over all the drawings, documents, plant and equipment including all the rights of work to the Purchaser. The Purchaser shall pay to the Supplier 105% (one hundred and five percent) of the cost incurred by the Supplier till the date of termination as compensation after adjusting payments already made till the termination. No consequential damages shall be payable by the Purchaser to the Supplier in the event of such termination.

35.1.3 If the Purchaser fails to pay to the Supplier any undisputed payment as required hereunder and such failure continues for 45 (forty five) days after written notice thereof has been given to the Purchaser by the Supplier, then the Supplier shall give 10 (ten) days prior notice to the Purchaser and thereafter may suspend any Works or part thereof as per Clause 35.2 thereof.

35.2 Suspension

- 35.2.1 *The Purchaser may suspend the work in whole or in part at any time by giving Supplier notice in writing to such effect stating the nature, the date and the anticipated duration of such suspension. On receiving the notice of suspension, the Supplier shall stop all such work which the Purchaser has directed to be suspended with immediate effect. The Supplier shall continue to perform other work in terms of the Contract which the Purchaser has not suspended. The Supplier shall resume the suspended work as expeditiously as possible after receipt of such withdrawal of suspension notice.*
- 35.2.2 *During suspension, the Supplier shall be entitled to receive from the Purchaser a Variation Order covering reasonable costs if any due to suspension and appropriate adjustment for Completion Schedule, and other terms and conditions of the Contract.*
- 35.2.3 *If such suspension continues for more than 180 (one hundred and eighty) days, at the end of the period, the Supplier shall be by a further 30 (thirty) days prior notice, entitled to terminate the Contract and Purchaser shall pay to the Supplier 105% (one hundred and five percent) of the cost incurred by the Supplier till the date of termination as compensation after adjusting payments already made till the termination. No consequential damages shall be payable by the Purchaser to the*

Supplier in the event of such suspension.”

3. Clause 35.2.1 empowers the purchaser to suspend the work in the whole or in part, at any time by giving the notice in this regard to the supplier. Clause 35.2.3 states that if such suspension continues for more than 180 days, the supplier shall be entitled to terminate the contract by giving a further 30 days’ prior notice to the purchaser. The consequence of the termination is also provided in clause 35.2.3 in the form that upon such termination, the purchaser shall pay to the supplier 105% of the costs incurred by the supplier till the date of termination as compensation after adjusting payments already made till the termination. Though the said clause uses the words “costs incurred by the supplier”, this in my opinion, would not make the supplier entitled only to the “costs” of the work done, but is intended to limit the right of the respondent only to the work that has been done by it till the date of termination.

4. It is also to be noted that clause 35.1.2 also entitles the purchaser to terminate the contract at any time after giving a notice of not less than one month and without assigning any reason. The consequence of such termination is again provided as the entitlement of the respondent to 105% of the “costs incurred by the supplier” till the date of termination, as compensation after adjusting payments already made till the termination. A reading of clause 35.1.2 and 35.2.3 would, therefore, show that the word “costs” used in the said clause(s) is not in the literal sense of the word but in the commercial sense of the word. Commercial contracts between the parties have to be read in a commercial sense.

5. In *Antaios Cia Naviera S.A. V. Salen Rederierna A.B.*, [1985] A.C.

191, Lord Diplock said :

“While deprecating the extension of the use of the expression ‘purposive construction’ from the interpretation of statutes to the interpretation of private contract, I agree with the passage I have cited from the arbitrators’ award and I take this opportunity of restating that, if a detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.”

6. In ***Phillips and Strathan v. Dorintal Insurance Ltd.***, [1987] 1 Lloyd’s it is held that:

“Words and phrases in contractual documents do not usually have one immutable meaning. Often there is more than one meaning available for selection. One cannot then simply turn to a dictionary for an answer, in choosing the appropriate meaning, the contextual scene is usually of paramount importance.”

7. Therefore, keeping in mind the context of the word “costs” used in Clause 35.1.2 and 35.2.3, it cannot be construed by its dictionary meaning but keeping in mind the default or the occasion for the said Clause to be attracted and the just consequences thereof.

8. In my opinion, therefore, the words “cost incurred by the supplier” implies that in cases of termination under Clause 35.1.2 or 35.2.3, the respondent would be entitled to “costs” for the work done and such “costs” would be determined keeping in mind the Billing Schedule agreed between the parties. Here I should also mention that the Billing Schedule gives break-up of the Contract Price on completion of various milestones like completion of Boiler Column foundations, completion of bunker bay

foundation etc. Therefore, depending upon the stage of the work completed until termination of contract under Clause 35.1.2 or 35.2.3 vis-a-vis the milestones agreed, the cost of the respondent shall be determined as percentage of Contract Price agreed as per the Billing Schedule.

9. Learned senior counsel for the petitioner further relied upon the Clause 31.5 of the Agreement to contend that in case of *force majeure* events where the contract is terminated, the purchaser i.e. the petitioner has been made liable to make the payment for all the supply done by the supplier till the said *force majeure* has commenced. He submits that in view of the above Clause, using a different terminology as compared to Clause 35.2.3, different meaning has to be given to the two consequences and “costs” as used in Clause 35.2.3 cannot mean the same as “payment for all supplies done”, as used by the parties in Clause 31.5. In my opinion, this argument is fallacious for two reasons. If the argument of the petitioner is to be accepted then in a *force majeure* condition, where the petitioner is not to be blamed, the respondent shall be entitled to claim the price of the supplies done till such *force majeure* events had commenced, whereas, in case of suspension leading to the termination of the contract, which is for reasons attributable solely to the petitioner, the respondent will be entitled to only the “costs” of the supplies made. In my opinion, the parties could not have intended to bring about such an effect. While interpreting a contract it has to be kept in mind that the agreement is not to be read as a statute.

10. In *Colquhoun v. Brooks*, (1888) 21 Q.B.D. 52, while discussing the application of *Latin maxim expressio unius est exclusio alterius*, Lopes L.J. had said as under:

“It is often a valuable servant, but a dangerous master to

follow in the construction of statutes or documents. The exclusion is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject matter to which it is to be applied, leads to inconsistency or injustice.”

11. In any case, the Arbitral Tribunal having considered the above clauses, in its impugned award has held as under:-

“84. The fact that the aforesaid amount was withheld by the Respondent has not been denied by the Respondent in its defence. Further, the Respondent in its cross examination has categorically admitted that the Respondent has withhold the said amount and was also deducting/ adjusting TDS and WCT on the gross value of the invoices. (Reference Q. No.65 and 88 to RW-2). The Respondent has further admitted the fact that the invoices were being raised only for the completed work. (Reference Q.80 to 82 to RW-2). The Respondent has further admitted that the originals of the invoices were with the Respondent and the Respondent has placed the same on the record of the Tribunal. (Reference Q. No.121 and to RW-2). The Respondent has further admitted that the Claimant has also furnished the supporting documents in support of the said invoices. (Reference Q.No.46 to 49 to RW-2).

85. It is not in dispute that it is only due to the indefinite and prolonged suspension of the work and consequent termination that the Claimant has not been able to achieve the last three milestones and as such there has been no default on the part of the Claimant. It is also not in dispute that the Claimant has completed the entire work towards the amount claimed under the invoices as the invoices were raised only for the work which was 100% completed. Therefore, in view of

subsequent development and as the facts stand today, it is not possible to do and complete the last three milestones, which is also an admitted position.

86. *It is also not in dispute that invoices have been raised in terms of the billing schedule already agreed between the parties and comprises the cost of equipment alongwith other costs to be incurred by the Claimant. One consolidated amount was agreed for the same and there was no separate bifurcation. In a question put by the Tribunal, the Respondent has further admitted the fact that the invoices value will include the actual cost of the equipment and other costs to be incurred by the Claimant. (Reference Q. 57 to 60 to RW-2). Thus, the Respondent at is at stage cannot contend that the Claimant is not entitled to the invoice amount and is only entitled to any other lesser amount, which the Respondent has failed to specify.*
87. *There cannot be any dispute of the fact that invoices could be raised by the Claimant only when the works in that regard were completed in their entirety or where entire supplies were made. Consequently, the Claimant in the present case also raised all the 225 invoices only after full and entire completion of work and complete supplied were made. Despite the said fact 20% of the full payment was not made/withheld as the last three milestones at that stage were not completed or performed. However, due to subsequent development of suspension of the work by the Respondent and thereafter termination of the Contracts in terms of the Contracts, the last three milestones cannot be achieved any more. The blame for the same cannot be put on the Claimant as discussed earlier and it was entirely due to the fault of the Respondent. Therefore, the Claimant cannot be denied payment for the jobs already completed and done. The amounts therefore, which the Claimant is*

entitled to in accordance with the terms of the Contracts are required to be paid.

88. *Accordingly, in our opinion the Claimant is entitled to the said amount. The Claimant has filed a detailed chart of 225 invoices and the amounts due under the respective invoices which have not been denied. These invoices are supported by the supporting documents like deductions of TDS and WCT on the gross value of the invoices. Accordingly, we hold that the Claimant is entitled to an amount of Rs.444,897,088/- and Euro 22,588,029 as principal amount due and payable by the Respondent under the 225 invoices.”*
(emphasis supplied)

12. The arbitrators have come to a finding that the respondent had raised all the 225 invoices in question only after entire completion of the work and complete supplies made by it under the contract. The learned senior counsel for the respondent has submitted that the invoices in question do not relate to any goods or services not supplied by it, including the costs that would have been incurred or the price that would have been charged by the respondent for mechanical completion, commissioning or towards the Performance Guarantee Test that comprised the 20% remaining Contract Price. This is not denied by the learned senior counsel for the petitioner.

13. In view of the above, the Arbitrators having interpreted the contract, in my opinion, in a reasonable manner, such interpretation would not be open to challenge under Section 34 of the Act.

14. In *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49, the Supreme Court, while examining the grounds on which an Arbitral Award may be set aside by the Court re-emphasized that:

“42. In the 1996 Act, this principle is substituted by the “patent illegality” principle which, in turn, contains three subheads:

42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:

“28. Rules applicable to substance of dispute.—(1) Where the place of arbitration is situated in India—

(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;”

42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality — for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.

42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

*“28. Rules applicable to substance of dispute.—(1)-(2)****

(3) 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.”

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

43. *In McDermott International Inc. v. Burn Standard Co. Ltd.* [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] , this Court held as under: (SCC pp. 225-26, paras 112-13)

“112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See *Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission* [(2003) 8 SCC 593 : 2003 Supp (4) SCR 561] and *D.D. Sharma v. Union of India* [(2004) 5 SCC 325] .]

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.”

44. *In MSK Projects (I) (JV) Ltd. v. State of Rajasthan* [(2011) 10 SCC 573 : (2012) 3 SCC (Civ) 818] , the Court held: (SCC pp. 581-82, para 17)

“17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The

ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. (See Gobardhan Das v. Lachhmi Ram [AIR 1954 SC 689] , Thawardas Pherumal v. Union of India [AIR 1955 SC 468] , Union of India v. Kishorilal Gupta & Bros. [AIR 1959 SC 1362] , Alopi Parshad & Sons Ltd. v. Union of India [AIR 1960 SC 588], Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji [AIR 1965 SC 214] and Renusagar Power Co. Ltd. v. General Electric Co. [(1984) 4 SCC 679 : AIR 1985 SC 1156])”

45. *In Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran [(2012) 5 SCC 306] , the Court held: (SCC pp. 320-21, paras 43-45)*

“43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in SAIL v. Gupta Brother Steel Tubes Ltd. [(2009) 10 SCC 63 : (2009) 4 SCC (Civ) 16] and which has been referred to above. Similar view has been taken later in Sumitomo Heavy Industries Ltd. v. ONGC Ltd. [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459] to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.

45. This para 43 reads as follows: (Sumitomo case [(2010) 11 SCC 296 : (2010) 4 SCC (Civ) 459], SCC p. 313)

“43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in Kwaliti Mfg. Corpn. v. Central Warehousing Corpn. [(2009) 5 SCC 142 : (2009) 2 SCC (Civ) 406] the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding.”

15. The Supreme Court also cautioned that:

“33. It must clearly be understood that when a court is applying the “public policy” test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as a Judge as follows: “General, you have a sound head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and your heart dictate, to hear both sides patiently, to decide with

firmness in the best manner you can; but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong". It is very important to bear this in mind when awards of lay arbitrators are challenged.] . Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd. [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342] , this Court held: (SCC pp. 601-02, para 21)

"21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

34. It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood."

16. As far as the contention that the respondent could not have been awarded 105% of the price in absence of proof of any loss, the same is also liable to be stated for being rejected.

17. As noted by me above, Clause 35.2.3 of the Agreement comes into operation on a default by the petitioner. It is therefore, in the form of Liquidated Damages. This Court in its judgement dated 18.01.2018 in FAO(OS) No.275/2016, titled as **NTPC Vidyut Vyapar Nigam Limited v. M/s Saisudhir Energy Limited**, discussed the law on Liquidated Damages and held as under:

“19. We have deliberately and intentionally quoted different portions of the majority Award to highlight that the findings recorded therein on the question of liquidated damages and even on the question of public utility are unacceptable and fall foul of the fundamental policy of Indian law and, therefore, challenge thereto merits acceptance. Decision of the Supreme Court in M/s. Kailash Nath Associates (supra) has extensively referred to the earlier case law on the subject, including decisions in the case of Fateh Chand Vs. Balkishan Das, (1964) 1 SCR 515, Maula Bux Vs. Union of India, (1969) 2 SCC 554 and Saw Pipes Ltd. (supra) and has held 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 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.”*

20. *The aforesaid dictum or principles state that in case of breach, the aggrieved party can receive as reasonable compensation, the sum named in the contract as liquidated amount if it is a genuine pre-estimate of damages and is*

found to be such by the Court. In other cases, where a sum is named in contract as liquidated damages, only reasonable compensation can be awarded not exceeding the amount so stated as damages. Similarly where amount fixed is in nature of penalty, only a reasonable amount of compensation not exceeding the penalty amount can be awarded. Reasonable compensation has to be fixed on well-known principles as applicable to the law of contract. In view of language of Section 74, breach of contract, damage or loss caused as a consequence of the breach is a sine qua non. Party must prove actual loss and damage. However, there are class of cases where damage or loss is difficult or impossible to prove and in such cases, liquidated amount named in the contract, if it is a genuine pre-estimate of damage or loss, can be awarded. This is the purport of the expression “whether or not actual damage or loss is proved to have been so caused thereby” used in Section 74 of the Contract Act.

21. *Decision in the case of **BSNL (supra)** observed that if loss accruing to the claimant from default cannot be accurately and reasonably ascertained, then such terms may not be classified as penalty. This strengthens the presumption that a sum agreed between the parties represents a genuine attempt to estimate the damages and to overcome difficulties of proof at trial.*

22. *We would also like to reproduce the relevant observations on Section 74 of the Contract Act in **Saw Pipes Ltd.** (supra), which are as under:-*

“64. It is apparent from the aforesaid reasoning recorded by the Arbitral Tribunal that it failed to consider Sections 73 and 74 of the Contract Act and the ratio laid down in Fateh Chand case [Fateh Chand v. Balkishan Dass, (1964) 1 SCR 515 : AIR 1963 SC 1405] , SCR at p. 526 wherein it is specifically held that jurisdiction of the court to award compensation in case of breach of contract is unqualified except as to the

maximum stipulated; and compensation has to be reasonable. 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 emphasises 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. ..."

[Emphasis supplied]

23. A reading of the aforesaid quotation would show that the Supreme Court has held in the said case that once there was breach of contract, Section 74 mandates that the

complaining party is entitled to receive reasonable compensation, whether or not actual loss is proved. Where compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract, there is no question of proving such loss and the party is not required to lead evidence to prove actual loss. Further, it is for the party contesting the claim to establish that penalty or compensation contemplated was in any way unreasonable. Otherwise, it will be appropriate for the Arbitral Tribunal to rely upon clear and unambiguous terms of the contract.”

18. In the present case, Liquidated Damages stipulated in Clause (s) 35.1.2 or 35.2.3 of the Agreement cannot be said to be unreasonable and, therefore, the respondent was not to prove such loss by leading evidence.

19. A similar challenge on the difference between ‘price’ and ‘cost’ was made with respect to grant of claim in favour of the respondent for the work already done by it, but not forming part of the invoices raised. For this claim, the arbitrators have relied upon the joint measurement taken by the parties, which was not disputed before the Arbitral Tribunal. In view of the above, the objection against the grant of this claim cannot be sustained.

20. The learned senior counsel for the petitioner also raises a grievance with respect to the rate of the interest awarded in favour of the respondent, especially with respect to the amount awarded in “Euro”.

21. I do not find any merit in the said objection as well. The arbitrators have awarded interest at the rate of 9% per annum from the date of initiation of the arbitration proceedings, provided the amount under the said arbitral award is paid/deposited within 120 days of the award. In case of failure to comply, the respondent has been held entitled to interest at the rate of 15%

per annum till the date of realization of the amount. The rate of interest so awarded by the Arbitral Tribunal cannot be said to be unreasonable or perverse so as to justify any interference by this Court in exercise of its powers under Section 34 of the Act. As far as the grant of interest on the amounts awarded to be paid in “Euro” is concerned, the Arbitral Tribunal has held that the amount so awarded would be valued at the exchange rate as prevalent on the date of filing of the claim petition and it would be the rate of interest payable thereon that would protect the respondent’s interest due to the exchange rate fluctuations. The Arbitral Tribunal has, therefore, arrived at a balance between the two competing interest and cannot be faulted only on one part, while trying to take benefit of the other.

22. No other contention has been raised by the petitioner to challenge to the Impugned Arbitral Award.

23. In view of the above, I find no merit in the present petition. The same is accordingly dismissed, with no orders as to costs.

Dasti.

NAVIN CHAWLA, J.

FEBRUARY 12, 2018

Rekha