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

Date of Decision: 24th August, 2018

+ **O.M.P. 288/2009 & I.As. 6903/2009, 11011/2015**

GAIL (INDIA) LIMITED

..... Petitioner

Through: Mr. Nitesh Jain, Advocate (M-9717955168).

versus

NEWTON ENGINEERING & CHEMICALS LTD. Respondent

Through: Mr. Vivek Chib, Mr. Kushal Gupta,
Mr. Asif Ahmed, Ms. Ruchira Goel,
Advocates (M-8447400234).

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition has been preferred challenging the award dated 29th January, 2009 passed by the Learned Sole Arbitrator Justice N.N. Goswami (Retired). The brief facts are that the Petitioner–GAIL, awarded a contract to the Respondent, for laying of the pipeline and corporate work of K.G. Basin-II. The arbitration clause was contained in clause 107 of the contract. The laying of pipeline and corporate work was for a length of 9.82 Kms in District Rajamundri, Andhra Pradesh. The Respondent was awarded the contract being the lowest bidder. The letter of acceptance was issued on 26th June, 2001 and the total value of the contract was ₹2,46,76,104/- which was subsequently reduced to ₹1.85 crores.

2. The date of commencement of work was 1st June, 2001 and the date

of completion was four months i.e., 30th September, 2001. The factual aspects i.e. in respect of various extensions taken by the Respondent and the actual completion having been achieved only on 26th December, 2002, are not in dispute between the parties.

3. However, disputes arose in respect of the various deductions made by GAIL and the Respondent raised various claims. The Arbitral Tribunal came to the conclusion, after reviewing the entire documentary evidence on record, that there was no reason attributable to GAIL for the delay in the execution of the contract. Out of several claims made by the Respondent, Claims A, E and F were partially allowed by the Ld. Arbitrator. The same are under challenge before this Court by GAIL. The award, in respect of the claims that have been disallowed, has been accepted by the Respondent and no challenge has been raised by the Respondent.

Claim A: Award of liquidated damages

4. This claim was raised by the Respondent on the ground that GAIL had incorrectly deducted sums on account of liquidated damages. The Tribunal after perusing the evidence on record held that the total delay by the Respondent was only to the extent of five weeks and accordingly, by applying the formula for Liquidated damages, as contained in the contract, upheld the deduction in respect of five weeks delay. The discussion of the Arbitral Tribunal is clear to the effect that GAIL was not responsible for the delay. However, vide letter dated 6th November, 2002, extension was given by GAIL for completion of contract by 15th November, 2002. Thus, the Tribunal considered the period between 15th November, 2002 and 26th December, 2002 as the period of delay. The Tribunal thereafter upheld the deduction by GAIL of liquidated damages to the extent of 1/2 % for a period

of five weeks i.e., ₹4,63,319/-. The Respondent was refunded a sum of Rs.13,89,958/-.

5. Mr. Nitesh Jain Ld. counsel appearing for GAIL challenges this portion of the award on two counts:

i) that the contract contains a 'No Waiver' clause which in effect means that even if the extension is being given, GAIL had the right to levy liquidated damages. Thus, the entire period from 30th September, 2001 till 26th December, 2002 should be counted as the period of delay and liquidated damages are leviable for the entire period.

ii) the second ground of challenge is that the Arbitral Tribunal went by clause 27 which prescribe 1/2 % per week as the minimum levy and 10% as the maximum for levy of liquidated damages. However, the Tribunal failed to consider the General Conditions of Contract which had amended the said clause. As per the said clause, the minimum Liquidated damages leviable was 1% and not 1/2%

He relies upon *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705* (hereinafter known as 'ONGC') to argue that in the case of liquidated damages unlike penalty, actual loss need not to be proved.

6. On the other hand, Mr. Vivek Chib, Ld. Counsel appearing for the Respondent submits that under Section 55 of the Indian Contract Act, 1872 if a contract is voidable on account of any delay by a contractor, and if the person awarding the work has accepted to extend the performance date, then unless notice is given at the time of giving the extension, liquidated damages cannot be imposed. He submits that it is a principle of public policy which is mentioned in Section 55 which cannot be overruled by any stipulation in a contract. He relies upon *Simpex Concrete Piles (India) Ltd. V. Union of*

India (2010) ILR 2 Delhi 699 (hereinafter known as ‘Simpex Concrete Piles’) in support of his submission.

7. After hearing the submission of the parties, it is clear that as per clauses 29 and 30 of the Contract, GAIL had the option of terminating the contract if the contractor had delayed performance. GAIL having not exercised its right to terminate and also having not put the Respondent to notice for imposition of liquidated damages, and the extension being unconditional, liquidated damages cannot be levied for the entire 15 weeks period. The ‘No Waiver’ clause 47 relied upon by GAIL reads as under:

“47.0 *NO WAIVER OF RIGHTS*

Neither the inspection by the OWNER or EIL or any of their officials, employees, or agents nor any order by the OWNER or EIL for payment of money or any payment for or acceptance of the whole or any part of the Work by the OWNER nor any extension of time, nor any possession taken by OWNER shall operate as a waiver of any provision of the CONTRACT, or of any power herein reserved to the OWNER, or any right to damages herein provided, nor shall any waiver of any breach in the CONTRACT be held to be a waiver of any other or subsequent breach”

In *Simpex Concrete Piles (supra)*, a Division Bench of this Court has clearly held that rights created under Section 55 cannot be contractually waived. The Court observed as under:

“...Provisions pertaining to the effect of breach of contract, two of which provisions are Sections 73 and 55, in my opinion, are the very heart, foundation and the basis for existence of the Contract Act. This is because a contract which can be broken at will, will destroy the very edifice of the Contract Act. After all, why enter into a contract in the first place when such contracts can be broken by breaches of the other party without any consequential effect upon the guilty party? It therefore is a matter of public policy

that the sanctity of the contracts and the bindingness thereof should be given precedence over the entitlement to breach the same by virtue of contractual clauses with no remedy to the aggrieved party. Contracts are entered into because they are sacrosanct. If Sections 73 and 55 are not allowed to prevail, then, in my opinion, parties would in fact not even enter into contracts because commercial contracts are entered into for the purpose of profits and benefits and which elements will be non-existent if deliberate breaches without any consequences on the guilty party are permitted. If there has to be no benefit and commercial gain out of a contract, because, the same can be broken at will without any consequences on the guilty party, the entire sub-stratum of contractual relations will stand imploded and exploded. It is inconceivable that in contracts performance is at the will of a person without any threat or fear of any consequences of a breach of contract. Putting it differently, the entire commercial world will be in complete turmoil if the effect of Sections 55 and 73 of the Contract Act are taken away...”

It is thus clear that the 'No Waiver' Clause cannot operate over and above Section 55.

8. However, insofar as it relates to the amount of liquidated damages payable, for the five weeks delay beyond 15th November, 2002, the Arbitral Tribunal was clearly in error in ignoring the amended clause in the General Conditions of Contract which reads as under:

“44.0	COMPENSATION	FOR
	DELAY/LIQUIDATED DAMAGES	
44.1	The clause 27.0 of GCC is modified to the following extent.	
44.1.1	Replace ½% (Half Percent) by 1%	

(One percent) in 4th line of 1st paragraph”

9. Thus, the calculation of liquidated damages, ignoring this clause is contrary to the contract binding the parties. As per the judgement of the Supreme Court in *ONGC (supra)* if the estimate of damages is reasonable, then the party committing the breach is liable to compensate the other party. The observations of the Supreme Court are as under:

“68. From the aforesaid discussions, it can be held that:

(1)....

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if contractual damage is proved to have been suffered in consequence of the breach of a contract.”

10. Thus, a reasonable pre-estimate of damages, which is not a penalty, as stipulated in the contract would not fall foul of Section 73 or 74 of the Contract Act. The parties having agreed to pay liquidated damages, the said stipulation is binding. Accordingly, it is directed that instead of 1/2%, the liquidated damages shall be payable by the Respondent at the rate of 1% as per clause 27.1, *(as amended by the General Conditions of Contract)* for the

delayed period of five weeks. The objections in respect of Claim A are disposed of in these terms.

Claim F: Deduction on account of calliper pigging from the final bill of the Respondent:

11. The Respondent had engaged a sub-contractor M/s. Grafin Tech for conducting a procedure known as '*calliper pigging*'. Callipers are tools used to measure the internal geometry of a pipeline which are used for ensuring that there is no blockage within the pipeline and that the pipeline is working properly. The Respondent had submitted its final bill and GAIL had deducted a sum of Rs. 6,78,000/- from the Respondent's final bill by claiming that the amount was paid to the sub-contractor. The Tribunal found that as per Exhibit R-12, the payment made by GAIL to the subcontractor was lesser. The Tribunal thus awarded a refund of Rs. 2,43,094/- to the Respondent.

12. The objection in respect of Claim F, as per Ld. Counsel for the Petitioner is that the Respondent could not have claimed ₹6,78,000/- if the actual invoice of the sub-contractor was for a lesser amount. However, Ld. Counsel for the Respondent submits that the Final bill raised by the Respondent is as per the agreed rates and thus GAIL has wrongly deducted a higher amount.

13. A perusal of the finding of the Arbitral Tribunal under Claim F clearly shows that the actual payment as per Ex.R12 was ₹4,34,906/- to the contractor M/s Grafin Tech. However, GAIL sought to deduct the sum of ₹6,78,000/- despite the actual payment being only ₹4,34,906/- from the final bill submitted by the contractor. This is an appreciation by the Arbitrator of the facts on record and is beyond the scope of interference under Section 34

of the Arbitration and Conciliation Act, 1996. The finding of the Tribunal does not warrant any interference.

14. The objection in respect of Claim E is not pressed.

15. In view of the above, the present objection petition is disposed of in terms as set out above. GAIL is directed to make payment to the Respondent within a period of eight weeks along with interest as directed by the Tribunal. If there is any delay in payment beyond eight weeks, interest @12% per annum would be liable to be paid on the decretal amount.

16. OMP and all pending I.As. stand disposed of.

AUGUST 24, 2018

Rahul

**PRATHIBA M. SINGH
JUDGE**