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

\+ O.M.P. (COMM) 315/2018

INDIAN OIL CORPORATION LIMITED ..... Petitioner

Through Mr. Rajat Navet, Mr. Kishagra Pandit and Ms. Prachi V. Sharma, Advs.

versus

GODREJ & BOYCE MANUFACTURING COMPANY LTD. ..... Respondent

Through None

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

O R D E R

% **25.07.2018**

O.M.P. (COMM) 315/2018

1. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, which seeks to challenge the award dated 24.3.2018.

2. Mr. Navet, counsel for the petitioner says that the challenge is to the only claim awarded in favour of respondent, which is, the claim pertaining to price discount.

3. Importantly, the right vested in the petitioner to claim price discount is contained in Clause 12.3 of the Contract obtaining between parties.

3.1 Therefore, for the sake of convenience, the said clause is extracted hereinbelow:

> "12.3 *If any Material(s) is/are not delivered within the Delivery date(s) stipulated in respect thereof, IOCL shall be entitled to* a *discount by way of price adjustment in* a *sum*

equivalent to 0.5% (one half percent) of the price of such Material(s) per week of part thereof that the Material(s) remain(s) undelivered beyond the stipulated Delivery period in respect thereof; subject to a *maximum discount of* 5% *(five percent) of the Total Contract Value. Such discount shall be given by the Vendor by equivalent reduction in the invoice value before presumption of documents to the Bank/IOCL for payment. Should the Vendor to deliver the Material(s) or to make such adjustment, the discount may be recovered by any other means.*"

4. The learned Arbitrator via the impugned order has awarded, as alluded to above, the claim which pertains to price discount in favour of the respondent. The price discount clause, in effect, as would be evident on a plain reading of the clause allowed the petitioner to retain moneys at the rate indicated therein on the ground of delay in supplying the material(s) which in this case were Quench Towers, within the prescribed delivery period. In other words, the discount was to operate as price adjustment in the invoice value.

5. The learned Arbitrator has likened the price discount clause to a 'liquidated damages' clause as it was predicated on the failure to deliver the prescribed material within the stipulated period. In other words, according to the learned Arbitrator, delay itself would not suffice, the petitioner had to demonstrate that it had suffered injury/loss.

5.1 The learned Arbitrator has returned a finding of fact that the petitioner had suffered no loss due to the delay in supply of Quench Towers.

5.2 Learned Arbitrator has also returned a finding of fact that the project for which the Quench Towers were requisitioned had actually been completed four years after their delivery.

5.3 This fact has not been disputed by the counsel for the petitioner.

6. The findings returned by learned Arbitrator in this behalf is given in paragraphs 51 to 56 of the impugned award. For the sake of convenience, the said parts of the award are extracted hereafter:

> *"51. On the question of loss, claimant submits that respondent suffered no loss on account of delay in the completion of the project and there are no substantial pleadings or any evidence with regard thereto.*
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> *52. On the other hand, as per the respondent, losses were suffered by it on investments already made, expenses on staff and on manpower etc. It is stated that even otherwise, in cases like the present, loss is of such a nature that it cannot be quantified, and as such 'price discount' clause provides a genuine pre-estimate of loss suffered or likely to be suffered. Reliance in this regard has been placed on the judgement of the Supreme Court in the case of ONGC vs Raw Pipes (2003)5 SCC705 and on construction and Design services vs DDA (2015)-14 S.C.C 263.*
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> *53. To begin with, it may be noticed that the delays were not always caused by the claimant, respondent also has to have its share of the blame, as it delayed in giving approvals and changed scope of work towards the end of the contract, though, it is another matter, that such delays did not impact the manufacturing or delivery of Towers. However, respondent cannot take a high moral ground.*
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> *54. Putting aside the apportionment of blame for delay, and coming to the point of damages, the law on pre-estimated damages as summed by the Supreme Court in the case Kailash*

Nath Associates Vs. DDA (2015) SCC 136 demands proof of loss for awarding damages and holds it to be a 'sine-qua-non' for payment of compensation for breach of contract even under section 74 of contract Act.

55. On going through the pleadings, I find that the respondent has made no specific averments about the loss suffered nor adduced any evidence. As a matter of fact it took the respondent nearly 4 years to commission the Padip Refinery after delivery of Towers which speaks volumes about lack of any urgency in the project. In this context following paragraph from a judgement of Delhi High Court in the case of Indian Oil Corporation Vs LLoyds Steel Industries Ltd (2007) 144 DL T 659 are relevant.

> *15. The learned arbitrator then proceeded to discuss the justification in the action of the petitioner in recovering liquidated damages. He opined that to attract Clause 4.4.0.0 and impose liquidated damages, it was necessary for the petitioner to establish that it had suffered loss by reason of delay in completing the construction of the terminal under the principle contract and in completing the works covered by the two supplementary contracts. He found that the terminal could not be put to commercial use before August 1996 as the pipeline had not reached Jodhpur by that time. According to the learned arbitrator, the purpose for which the construction of terminal was intended under the principle contract was to implement the KBPL project and, therefore, the date on which commercial use of the terminal is possible would be relevant. Since the terminal at Jodhpur, covered by the contract, had been constructed and commissioned by 31.3.1996 and it was put to commercial use much beyond that, i.e. in August*

> *1996, it could not be said that by reason of delay the petitioner had suffered any loss.*
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> *51. Notwithstanding the above, the petitioner still wants damages to be recovered from the respondent on the spacious plea that liquidated damages mentioned in the contract are pre-determined damages and, therefore, in view of provisions of Section 74 of the Indian Contract Act, the petitioner was entitled to these damages and it was necessary for the petitioner to prove these damages. The legal position, as explained by the Supreme Court in ONGC v. Saw Pipes (supra), which has already explained above, is not in doubt. However, it is only when there is a loss suffered and once that is proved, it is not for the arbitrator or the Court to examine the actual extent of the loss suffered once there is a pre-estimation thereof. Moreover, the compensation, as stipulated in the contract, has to be reasonable. In a particular case where the defaulting party is able to demonstrate that delay/default has not resulted in any loss being suffered by the other party, then that party cannot claim the damages only because in the contract there is a stipulation regarding liquidated damages.*
>
> *56. It is too preposterous on the part of the petitioner to submit that it should get the liquidated damages stipulated in the contract even when no loss is suffered.*

56. For the forgoing reasons, the claimant is held entitled to refund of Rs.2,33,50,834/- along with interest at 12% per annum from the date recovery was made till payment."

7. According to me, the position of law as articulated by the learned Arbitrator finds resonance in the judgment rendered by the Privy Council in

Bhai Panna Singh and Ors. v. Firm Bhai Arjan Singh-Bhajan Singh-Surjan Singh and Anr., AIR 1929 PC 179. The following observations being apposite are set forth hereafter:

> *"The effect of the Indian Contract Act of 1872, Section 74 is to disentitle the plaintiffs to recover simpliciter the sum of Rs.10,000/- whether penalty or liquidated damages. The plaintiffs must prove the damages they have suffered."*

8. In view of the above, I find no error of fact or law in the impugned award.

9. Accordingly, the petition is dismissed.

<u>I.A. Nos.9708-10/2018</u>

10. Consequently, all pending applications shall stand closed.

RAJIV SHAKDHER, J

JULY 25, 2018
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