

psv

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION**

**COMMERCIAL ARBITRATION PETITION NO.1066 OF 2018
WITH
NOTICE OF MOTION NO.2287 OF 2018**

Nuclear Power Corporation of India Ltd.	..Petitioner
Vs.	
Hydrodyne (India) Pvt. Ltd.	..Respondent

Mr.Arsh Misra with Ms.Hina Shaikh i/b. M/s.M.V. Kini & Co. for
Petitioner.

Mr.Hasmit Trivedi i/b. Sonu Tandon for Respondent.

CORAM : G.S. KULKARNI, J.

DATE : 5th FEBRUARY, 2019

P.C.:

This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, “the ACA”) challenging the award dated 23 January 2018 passed by the learned sole arbitrator whereby the learned arbitrator has *interalia* awarded claims as made by respondent-claimant in regard to an amount of liquidated damages of Rs.56,29,325/- as levied by the petitioner. Following is the award:-

“4.4 Arbitral Tribunal's Decision and Award :-

.....

With this the AT orders that the Respondent do pay the Claimant the sum of Rs.56,29,325/- (Rupees Fifty Six Lakhs Twenty Nine Thousand three hundred twenty five only) towards payment in full of this claim presented by the Claimant to the Arbitral Tribunal.

.....

9.0 SUMMARY OF AWARD

9.1 The total amount of Award in the Dispute is Rs.1,01,81,853/- (Rupees One Crore one lakh eighty one thousand eight hundred fifty three only) and the same is awarded in favour of the Claimant.”

2 Facts:-

The petitioner had issued a tender in the year 2010 for “Design, Qualification of Design by Analysis, Preparation of drawings, Documents, Procedures, Procurement of materials, Manufacture, Assembly, Inspection, Testing, Packing & Forwarding, Safe Delivery to Site and Guarantee of “Moderator Canned Motor Pumps” for KAPP-3&4 and RAPP-7&8 projects.” Respondent participated in the tender process and was successful. A purchase order dated 10 January 2011 was issued to the respondent requiring the respondent to manufacture and supply of 13 numbers of moderator canned motor pumps with support in a phased manner. The period of supply was 36 months starting from 10 January 2011. The date of completion of the contract was stipulated as 9 January 2014. The consideration for the contract was Rs.11.46 crores.

3. Under this supply contract, disputes had arisen between the parties. The respondent/claimant alleged that the petitioner modified the design parameters by an e-mail dated 13 September 2011 and due to this subsequent modification, the design and manufacturing process was delayed which had a cascading effect in delaying and executing the

purchase order. It was also averred that there was considerable delay on the part of the petitioner in communicating its approval for the QAP submitted by the respondent which again resulted in delay in completing the contractual job. The respondent also contended that the petitioner also delayed in communicating its decision to the respondent, about acceptability of rate of corrosion in respect of various components of moderate canned motor pumps. Respondent contended that for all these reasons, the petitioner issued amendment-1 to the contract, granting provisional extension of the contract period, reserving their right to levy liquidated damages.

4. Respondent accordingly filed a statement of claim inter-alia making the following claims:

Claim no.1	Refund of Liquidated damages unlawfully levied by the Respondents	Rs.56,29,325/-
Claim No.2	Amount of money deducted unlawfully by the Respondents towards service Tax from the balance payment of the claimant	Rs.8,44,400/-
Claim No.3	Interest on delayed payment towards release of 10# of contract value	Rs.22,84,858/-
Claim no.4	Payment of interest, ante-lite, Pendente lite, and future interest. Interest payment on due amounts at 18% p.a. as per the provisions of law	
Claim no.5	Cost of Arbitration	

5. The case of the respondent/claimant before the arbitral tribunal was that the petitioner did not suffer any losses on account of any delay

in completion of the work. It was also the case of the respondent that the delay in completion of the work could not be attributed to the respondent and was attributable solely due to the various acts on the part of the petitioner in changing the technical parameters of the pumps to be supplied. The respondent contended that the levy of liquidated damages by the petitioner was contrary to the provisions of the contract as also contrary to the provisions of law.

6. On the other hand, before the arbitral tribunal, the petitioner contended that there was clearly a delay on the part of the respondent in effecting the supplies. It was contended that considering the terms of the agreement as contained in clause 6.2 of the General Conditions of Contract as also Clause No.16.1, the petitioner was entitled for the liquidated damages as deducted from the bills of the respondent.

7. The arbitral tribunal considering the evidence on record and the legal position allowed claim No.1 as made by the respondent in the following terms :-

“4.4 Arbitral Tribunal's Decision and Award :-

The work was delayed by 10 months and 20 days mainly due to Respondents indecision, delayed decisions and inadequate contract provisions. Even the Engineer in Charge of the project of Respondent had recommended the extension of time without levy of liquidated damages. However, these recommendations were rejected by the higher authorities of Respondents without recording any valid reasons for the same. It is also a settled principle of law that damage can

only be recovered when there are proven losses suffered by a party due to default of the other party. In this case, the Respondent has not only failed to prove any default on the part of Claimant but has also not proved that Respondent suffered any losses due to delay in completion of work. The Respondent has not offered any evidence whatsoever to corroborate the proposal of losses suffered by the Respondent due to delay in supplying the pumps. The Respondent have not pleaded that they have suffered any losses due to the delay to supply of pump.

The arguments of the Claimants and their submission of compilation of case laws clearly says that there are three principal criteria in relation to the levying of liquidated damages and that have not been fulfilled by the Respondent.

1) The Respondent has failed to prove that delay is attributable to Claimant.

2) Respondents have not established that they have suffered any losses due to this delay.

3) The clauses on liquidated damages in the contract namely clause No.6.2 of G.C.C. as well as clause No. 16.1 of the purchase order dated 10.01.2011 do not provide for genuine pre-estimate of damages.

As per recent Supreme Court judgments if pre-estimate of the losses suffered by a party claiming damages is not spelt out then in such case the question of recovery towards losses does not arise. It is therefore absolutely essential for the Respondent to prove the quantum of losses suffered if they want to recover the liquidated damages. It is a pre-requisite for the Respondents to establish that they have suffered losses due to this delay failing which Respondents can not levy the liquidated damages. The Arbitral Tribunal agrees with the reasons put forward by the Claimants for the total delay of 10.5 months.

And it is a considered opinion of AT that for this delay Claimant was not at all responsible as is brought out in Claimants submission.

With this the AT orders that the Respondent do pay the Claimant the sum of Rs.56,29,325/- (Rupees Fifty Six Lakhs Twenty Nine Thousand three hundred twenty five only) towards payment in full of this claim presented by the Claimant to the Arbitral Tribunal.”

(emphasis supplied)

8. The only ground as urged by the learned Counsel for the petitioner in assailing the award is in regard to the award of claim No.1

by the arbitral tribunal in favour of the respondent, of refunding the deducted amount of Rs.56,29,325/- as retained by the petitioner towards liquidated damages, for the alleged delay in completion of the work by the respondent, while releasing payment against the respondent's bills. Learned Counsel for the petitioner in assailing the above findings as made in the impugned award submits that the findings of the arbitral tribunal are illegal in as much as the amount which was deducted by the petitioner as liquidated damages was in accordance with the clear terms of the agreement, and thus the petitioner was entitled to retain the said amount as liquidated damages. It is submitted that the findings rendered by the arbitral tribunal that delay was not attributable to the respondent and it was on the part of petitioner is also not correct when tested on the facts of the case. In support of the submission, learned Counsel for the petitioner has relied on the decision of Supreme Court in **Construction and Design Services Versus Delhi Development Authority**¹.

9. On the other hand, learned Counsel for the respondent has supported the findings as made by the learned arbitrator on this limited issue of liquidated damages as urged on behalf of the petitioner. It is submitted that the basic test for the petitioner to become entitled in law to deduct the said amounts as liquidated damages was itself not

¹ (2015) 14 Supreme Court Cases 263

satisfied. It is submitted that Section 74 of the Contract Act which would entitle a party to claim liquidated damages would require a party to satisfy that the amount so agreed as liquidated damage was a reasonable pre-estimate of the damage. It is submitted that none of these conditions are satisfied on the part of petitioner in straightway deducting the amount of Rs.56,29,325/- from the bills as payable to the respondent under the contract. In support of the contention learned Counsel for the respondent has placed reliance on the decision of Supreme Court in case of **Kailash Nath Associates Versus Delhi Development Authority And Another**².

10. I have heard learned Counsel for the parties as also perused the documents placed on record and the impugned award.

11. At the outset, the relevant terms of the contract which provided for liquidated damages are required to be noted. Clause is 6.2 which provides for 'delay in supply' and provides for liquidated damages, rate per week and maximum amount of liquidated damages appearing between 1% to 5%. In the present case, delay is of 10 months and therefore, the relevant clause as applicable would sr. no.1 below clause 6.2.1(a). Clause 6.2 reads thus:-

“6.2 Delay in Supply

² (2015) 4 Supreme Court Cases 136

6.2.1 Should the Contractor fail to deliver the stores or any part thereof Pursuant to GCC sub-clause 6.1.1 within the CDD prescribed for the same, it shall be construed as a breach of the Contract and the Purchaser shall be entitled at his option to the following:

(a) To receive the facilities after prescribed CDD with the right to recover from the Contractor agreed Liquidated Damages (LD) at the rate indicated below:

S. No.	Delivery Period	Liquidated Damages, Rate per Week (1)	Maximum Amount of LD (2)
1.	<u>Delivery period (as originally stipulated) not exceeding one year.</u>	<u>@ 1% of the value of delayed/ undelivered portion of the supplies of Purchase Order, per week or part thereof</u>	<u>5% of the value of delayed/undelivered portion of Supplies of the Purchase Order.</u>
2.	Delivery period (as originally stipulated) exceeding one year but not exceeding two years.	@ 0.5% of the value of delayed/ undelivered portion of the supplies of Purchase Order, per week or part thereof.	5% of the value of delayed/undelivered portion of Supplies of the Purchase Order.
3.	Delivery period (as originally stipulated) exceeding two years.	@ 0.25% of the value of delayed/ undelivered portion of the supplies of Purchase Order, per week or part thereof.	5% of the value of delayed/undelivered portion of Supplies of the Purchase Order.

However, the payment of liquidated damages shall not in any way relieve the Contractor from any of its obligations and liabilities under the Contract.

(b) To terminate the contract in full or in parts as per GCC sub-clause no. 13.2 (Cancellation / Termination of Contract in Full or Part)."

(emphasis supplied)

12. Attention of the Court is also drawn to the amendment to the purchase order when the parties in clause 5.0 under title "Manufacturing/Delivery Schedule" agreed in terms of Clause 5.1.2 that 6 Numbers of Moderator Canned Motor Pumps shall be supplied within

36 months from the date of purchase order i.e. on or before 9th January, 2014, to be amended to an extended period of 30 November, 2014, however, reserving the petitioner's right to levy liquidated damages as per the provisions of the Purchase Order.

13. It so transpired that the petitioner informed the respondent of the levy of liquidated damages of an amount of Rs.56,29,325/-. Thereafter in a meeting held between the parties on 1 August 2016, the respondent requested for release of the liquidated damages as according to the respondent it was wrongfully deducted as also for release of balance 10% payment of the contractual dues as per terms and conditions of the purchase order. In the said meeting the petitioner informed the respondent that the outstanding balance of 10% payment is being processed however the liquidated damages was levied as per the provisions of the contract. The minutes of the meeting recorded as under:-

“NPCIL informed that the request of M/s Hydrodyne towards waiver of Liquidated Damages of Rs.56,29,325.00 and release of total outstanding payment of Rs.1,12,58,650.00 (including LD and balance payment) against supply of Moderator Canned Motor Pumps for RAPP-7&8 has been deliberated in detail. Further, NPCIL informed that the outstanding balance 10% payment is being processed and Liquidated Damages has been levied as per the provisions of the Contract.”

14. On the above background the respondent invoked arbitration and made a claim for refund of liquidated damages which according to the respondent was levied contrary to the contractual terms and conditions and not in accordance with law, taking into consideration the settled principles of law for a claim to be valid on liquidated damages. It needs to be noted that under Section 74 of the Contract Act, the party complaining of the breach is entitled to receive “reasonable compensation”. If the amount so agreed between the parties in the contract is in the nature of a penalty then in that case the party becomes entitled for a reasonable compensation for the loss suffered. The amount so claimed in the contract is required to be a genuine pre-estimate of the damages. Thus the first test to be applied is that the amount so claimed is a reasonable pre-estimate of damages. Sections 73 and 74 of the Contract Act read thus:-

“73. Compensation of loss or damage caused by breach of contract

When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

74. Compensation for breach of contract where penalty stipulated for

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, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is provided to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount

so named, or the case may be, the penalty stipulated for.

Explanation: A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception: When any person enters into any bail bond, recognizance or other instrument of the same nature or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation: A person who enters into a contract with the government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.”

15. The legal position as to in what circumstances liquidated damages can be awarded needs to be seen. In **Kailash Nath Associates** (supra), the Supreme Court taking a review of the law on the issue including the prior decision of the Supreme Court in **Fateh Chand v. Balkishan Dass**³ and **Maula Bux Vs. Union of India**⁴ as also the decision of Supreme Court in the case of **ONGC Ltd. Vs. Saw Pipes Ltd.**⁵ laid down the following principles of law on compensation for breach of contract under Section 74 of the Contract Act:-

“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

3 AIR 1963 SC 1405

4 (1969) 2 SCC 554

5 (2003) 5 SCC 705

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.

44. The Division Bench has gone wrong in principle. As has been pointed out above, there has been no breach of contract by the appellant. Further, we cannot accept the view of the Division Bench that the fact that DDA made a profit from re-auction is irrelevant, as that would fly in the face of the most basic principle on the award of damages – namely, that compensation can only be given for damage or loss suffered. If damage or loss is not suffered, the law does not provide for a windfall.”

16. Adverting to the above principles of law, it needs to be seen as to what was the case of the petitioner before the arbitral tribunal in asserting that it was entitled to retain the amount of Rs.56,29,325/-

towards claim for the liquidated damages. The documents placed on record and as taken into consideration by the arbitral tribunal would show that the first basic test, which the petitioner was required to discharge in law, that the said amount was a reasonable pre-estimate of damages fixed between the parties, was surely not discharged by the petitioner. More particularly when clause 6.2.1 of the contract as noted above provides for a percentage of liquidated damages varying between 1% to 5%. Thus as to what is the percentage of loss suffered within this varied percentage and that whether it was a reasonable compensation for the loss so suffered, was required to be demonstrated by the petitioner who was claiming such liquidated damages. Learned Counsel could not show any material to the effect that this basic burden was discharged by the petitioner.

17. The observations as made by the arbitral tribunal as noted above clearly show that the petitioner could not satisfy this basic test to claim the amount so deducted as liquidated damages.

18. It is thus quite clear from the record that there was no material before the arbitral tribunal by which the petitioner can be said to have proved that the petitioner would be entitled to claim liquidated damages on the ground that the said amount as deducted was reasonable compensation and a genuine pre-estimate of losses suffered by the

petitioner.

19. In so far as decision of the Supreme Court in **Construction and Design Services** (supra) as relied on behalf of the petitioner, in the facts of the present case, would not be applicable. This for the reason that in the said case the Supreme Court was concerned on an issue arising from a suit filed by respondent-Delhi Development Authority. The suit was dismissed by the learned Single Judge of Delhi High Court on the ground as noted in paragraph 6 of the decision following the principles of law under Section 74 of the Contract Act and as laid down in the decision of Supreme Court in **Fateh Chand** (supra), when the learned Single Judge observed that the respondent-plaintiff had extended the time on several occasions and thus, was not entitled to make a claim on liquidated damages. On appeal, the Division Bench reversed the view taken by the learned Single Judge on the ground that the delay in a contract of construction of a public utility service could itself be a ground for compensation without proving the actual loss. However, what needs to be noted are the observations of the Court in paragraph 12 of the decision which clearly recorded that the respondent-plaintiff through its Superintending Engineer had addressed a notice to the appellant-contractor before determining the reasonable amount of compensation and claiming 10% of the project cost which was stipulated

to be the maximum compensation, on account of delay in execution of the project. The appellant-contractor failed to respond to the said notice and on that count, it was observed that there was no scope for the appellant-contractor to contend that the amount as claimed was not a reasonable estimate of damages for the loss caused. It was observed that the burden was on appellant/contractor to show that no loss or lesser loss was suffered by the respondent-plaintiff. It is in these circumstances the Supreme Court made observations in paragraph 15 and in paragraph 17 that it will be fair to award half of the amount claimed as reasonable compensation. Paragraphs 15 and 17 read thus:-

“15. Once it is held that even in the absence of specific evidence, the respondent could be held to have suffered loss on account of breach of contract, and it is entitled to compensation to the extent of loss suffered, it is for the appellant to show that stipulated damages are by way of penalty. In a given case, when the highest limit is stipulated instead of a fixed sum, in the absence of evidence of loss, part of it can be held to be reasonable compensation and the remaining by way of penalty. The party complaining of breach can certainly be allowed reasonable compensation out of the said amount if not the entire amount. If the entire amount stipulated is genuine pre-estimate of loss, the actual loss need not be proved. Burden to prove that no loss was likely to be suffered is on the party committing breach, as already observed.

17. Applying the above principle to the present case, it could certainly be presumed that delay in executing the work resulted in loss for which the respondent was entitled to reasonable compensation. Evidence of precise amount of loss may not be possible but in the absence of any evidence by the party committing breach that no loss was suffered by the party complaining of breach, the court has to proceed on guesswork as to the quantum of compensation to be allowed in the given circumstances. Since the respondent also could have led evidence to show the extent of higher amount paid for the work got done or produce any other specific material

but it did not do so, we are of the view that it will be fair to award half of the amount claimed as reasonable compensation.”

20. Thus, it can be clearly seen that the facts of the present case are in no manner comparable to the facts which fell for consideration of the Supreme Court in the decision in **Construction And Design Services v/s. Delhi Development Authority** (supra). Having perused the reasons as set out by the arbitral tribunal for allowing the claim for liquidated damages, in my opinion, the learned arbitrator has clearly applied the test of law falling under Section 74 of the Contract Act and as laid down by the Supreme Court in the decision in **Kailash Nath Associates V/s. Delhi Development Authority & Anr.** (supra) as noted above.

21. This apart the arbitral tribunal has clearly recorded a finding of fact that the work was delayed for 10 months and 20 days due to the delayed decisions of the petitioners, which was confirmed by the Engineer in charge of the project who had recommended the extension of time without levy of liquidated damages. Further there is no acceptable reason on record as to why the decision of the Engineer in charge of the petitioner was not accepted by the higher authorities of the petitioner, much less for reasons which would satisfy the parameters of law falling under Section 73 and 74 of the Contract Act. The findings

of fact as recorded by the arbitral tribunal cannot be interfered when they are borne out by the record.

22. Resultantly, I do not find that any case is made out in this petition to interfere the impugned award in exercise of the limited jurisdiction under Section 34 of the ACA. Accordingly, the petition fails. It is dismissed. No order as to costs.

23. In view of dismissal of petition, notice of motion would not survive. It is accordingly disposed of.

24. At this stage, learned Counsel for the petitioner seeks that the execution proceedings which are already instituted by the respondent be stayed for sometime. The said request is opposed by learned Counsel for respondent.

25. In the facts and circumstances of the case, to enable the petitioner to assail this order, the execution proceedings shall remain stayed for a period of six weeks from today.

[G.S. KULKARNI, J.]