IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
20~08~2019	06~09~2019

CORAM:

THE HONOURABLE MR.JUSTICE **N. SATHISH KUMAR**

O.P.No.503 of 2019
and A.No.4475 of 2019

Chettinad Cement Corporation Pvt. Ltd.,
(Formerly Chettinad Cement Corporation Ltd.,)
Rani Seethai Hall Building,
603, Anna Salai,
Chennai 600006. .. Petitioner/Respondent

.Vs.

Transparent Energy Systems Pvt. Ltd.,
Pushpa Heights, Bibereadi Corner,
Pune-Satara Road,
Pune – 411 037. .. Respondent/Claimant

* * *

Prayer: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 praying to set aside the Award dated 20.02.2019 insofar as it allows claim No.1and claim No.2 in part with interest preferred by the Respondent and rejects the counter claim of the Petitioner.

For Petitioner	:	Mr. Yashodvardhan Senior Counsel for Mr.V. Vijayakumar
For Respondent:		Mr. K. Gowtham Kumar

ORDER

Aggrieved over the Award of the Three Members Arbitral Tribunal, dated 20.02.2019 the present Original Petition has been filed.

2. The brief facts leading to file this Original Petition is as follows:

2(a) The Claimant possesses patent technology for Waste Heat Recovery from exhaust gases generated in the cement making process. The Respondent has a cement manufacturing plant, invited tenders for the supply, installation and commissioning of Waste Heat Recovery System driven Power Generation Plant (WHRPP). Pursuant to the above, the claimant submitted adequate offer dated 16.5.2011. The respondent issued letter of intent (LOI) on 29.06.2011 for a total price of 59.00 crores excluding Excise Duty, CVD, Service Tax and additional import duty. Formal contract dated 14.9.2011 was signed between the parties and work order dated 2.2.2012 for erection, commissioning and provisional acceptance of WHRPP. In terms of contract, the claimant received the first tranche of mobilisation advance on 22.07.2011 and period of execution of the work commenced from the said date. Though the stipulated date of completion was 21.1.2013, the work could not be completed by the stipulated date on account of various reasons not attributable to the claimant, but owing to various defaults and failures on the part of the Respondent/Petitioner. While the delays were attributable to the Respondent, the Respondent withheld legitimate payments due to the claimant and also withheld large sums allegedly towards Liquidated Damages.

2(b) The Claimant commissioned the WHRPP, but the same could not achieve the power generation contemplated under the contract due to inconsistencies in the inputs provided by the Respondent/Petitioner to the Plant. Yet, the Respondent by letter dated 8.6.2015 invoked the

Bank Guarantee of Rs.5.73 Crores furnished by the claimant. The claimant protested the invocation and indicated willingness to extend the performance Bank Guarantee for three months to enable modifications to be made to the Plant and trials taken thereof, by letter dated 8.6.2015. By subsequent letter dated 17.07.2015, the claimant further clarified that the delays in completion were on account of various failures on the part of Respondent/Petitioner and further the WHRPP could not be operated in stable manner due to operation of the cement kiln at varying part load conditions, low exhaust gas temperatures and heavy fluctuation in exhaust gas temperatures. The respondent/Petitioner issued letter dated 30.07.2015 raising incorrect contentions and demanded refund of all amounts paid by the Respondent/Petitioner, which was also replied by the Claimant. As the Respondent/Petitioner herein failed to reply or settle the issue, the claimant invoked Arbitration Proceedings. With the abovesaid pleadings the Claimant/Respondent preferred the following claims:

Claim No.1: Refund of Rs.5,73,00,000/- collected by the respondent by invoking performance Bank Guarantees.

Claim No.2: Payment of Rs.29,13,632/- towards balance amount due for the work completed, as per Ledger Account-3.

Claim No.3: Payment of Rs.51,24,585/- towards interest on account of delay in payment of claimant's invoices.

Claim No.4: Payment of Rs.9,50,862/- on acount of delay in making payment of Bills under the service contract including transportation Bills.

Claim No.5: Payment of Rs.2,54,03,523/- as interest on Rs.5,73,00,000/- collected by the Respondent by unlawfully invoking performance Bank Guarantee for the period 15.6.2015 to 30.11.2017.

Claim No.6: Payment of Rs.16,99,104/- towards interest on overdue amounts as claimed under Claim No.2.

Claim No.7: Payment of Rs.3,73,57,705/- towards damages on account of prolongation of work beyond the stipulated date of completion.

Claim No.8: Interest @ 18% p.a.on the amounts claimed from respective due date till actual date of payment including ante-lite interest, pendente lite interest and future interest.

Claim No.9: Cost of arbitration

3. It is the contention of the Petitioner/Respondent that based on the claimant's proposal the Petitioner/Respondent issued Letter of Indent (LOI) dated 29.06.2011 for design, engineering, manufacture, supply, transportation, erection and commissioning of Waste Heat Recovery based power plant of gross generation of 7.3 MW and net generation of 6.69 MW, with firm contract price fixed at Rs.59.00 Crores. The parties thereafter entered into a contract on 14.09.2011 whereunder the claimant was required to put up the commission As per the contract the project has to be completed within 17 months from the date of LOI and had to secure Provisional Acceptance within one month thereafter, time being the essence of the contract. As against the stipulated date of completion being 21.1.2013, the claimant inordinately delayed the setting up of the Plant. There were number of issues relating to workmanship, design and execution by the claimant. The drawings and designs submitted by the claimant had to undergo several revisions on account of deficiencies pointed out by the consultant. The claimant also inordinately delayed supply of material.

After delayed installation of the Plant, it could not achieve the agreed level of performance.

4. The claimant thereafter carried out several major modifications to rectify the design and engineering deficiencies and the failures in WHR system, but the average gross power generation remained less than 6 MW against the guaranteed gross generation of 7.3 MW. The respondent/Petitioner invoked the Bank Guarantees for 5.73 Crores by communication dated 8.6.2015. The claimant after invocation of performance Bank Guarantees abandoned the Project and failed to perform the obligations in terms thereof. Besides, the claimant also inordinately delayed commissioning of the Plant, it failed to ensure power generation at guaranteed levels and abandoned the project before its completion. The Respondent/Petitioner is entitled to Liquidated Damages of Rs.5.83 Crores in terms of the Contract, which is far less than the actual losses caused to the Respondent/Petitioner. In addition, on account of failure to achieve provisional acceptance of the plaint, the claimant is bound to refund Rs.5.83 crores being 10% of the contract price which the claimant was entitled only after issue of

Provisional Acceptance Certificate. But the Respondent had released the same at the the request of the claimant on assumption that claimant would complete the Project successfully. As the claimant had abandoned the project since June 2015 even prior to provisional acceptance, the claimant is liable to further refund 10% of the contract price amounting to Rs.5.83 crores. The Liquidated Damages stipulated in the contract is only on account of delay in supply and commissioning of the Plant and not towards achieving guaranteed power output. It is their contention that they are entitled to recover from claimant a sum of Rs.17.88 Crores (i.e.5.83 crores towards liquidated damages + 5.83 crores towards 10% contract price payable after issue of provisional acceptance and 5.83 crores towards failure to perform for 12 months after provisional acceptance) after adjusting Rs.5.73 cores realised upon invocation of performance Bank Guarantees, the claimant is liable to pay the balance amount of Rs.12.15 crores to the Respondent/Petitioner herein.

5. Learned Arbitrators have framed the following issues:

(i) Whether the time was the essence of the contract?

(ii) Whether the claimant is entitled for the amounts claimed in Claims 1 to 9 at paragraphs 63 to 71 of the claim statement

(iii) Whether the respondent is entitled to the counter claim made at paragraphs 37 to 41 at pages 17 to 19 in the statement of defence-cum-counter claim?

(iv) Whether the Parties are entitled to interest? If so, at what rate, on the claims to the extent allowed?

(v) What order as to costs?

(vi) To what reliefs the parties are entitled to?

6. Based on the oral and documentary evidence submitted by both sides, the Tribunal has allowed the Claim No.1 and 2 with future interest @ 12% p.a from the date of the Award and rejected the counter claim. Challenging the Award and also rejecting the counter claim the petition is filed.

7. The main contention of the learned Senior Counsel for the

Petitioner is that despite the agreement is for 7.3 MW, the work could not be done within the period of 18 months. It is specifically agreed in the contract that in the event of the delay by claimant the Petitioner is entitled to 7% of liquidated damages. Though the Petition has been challenged for allowing the claim of the claimant and also rejection of the counter claim, the learned senior counsel mainly canvas the argument only in respect of the counter claim and also interest aspect awarded by the Arbitrators.

8. It is the contention of the learned Senior Counsel for the petitioner that although the date of completion as per the contract was 21.1.2013 the claimant agreed to complete the project by 21.11.2013 failing which claimant himself undertaken that the liquidated damages would be leviable thereafter. Therefore, his contention that the project was actually commissioned only in March 2015 which is more than one year and three months, beyond the date of completion committed and undertaken by the claimant. Similarly, the stage of provisional acceptance had to be obtained within one month thereafter by demonstrating guaranteed output was not reached as the gross

power output of the plant was nowhere near the guaranteed out put of 7.3 MW. Even before the stage of provisional acceptance the claimant had abandoned the project and had also committed breach of contractual obligation.

9. It is the contention of the learned Senior Counsel that time is essence of contract. Section 55 of the contract Act indicate that if it was not the intention of the parties that time should be of the essence contract, the contract does not become voidable by the failure to do such thing at or before the specified time. But the promise is entitled to compensation from the promiser for any loss occasioned to him by such failure. The claimant itself had acknowledged that liquidated damages were leviable after 22.11.2013. Hence it is the contention of the learned senior counsel that even if the first para of Section 55 were held to be not applicable, in terms of the second para, the Respondent/Petitioner would be entitled to liquidated damages after the said date as stipulated in the contract. The parties have specifically agreed to levy liquidated damages at the rate of 7% when the damages estimated the respondent/petitioner is not required to

prove actual loss. Hence it is his contention that the learned Arbitrators have not considered the terms of the contract and simply dismissed the counter claim on the ground that the time is not essence of contract.

10. In support of his contention he relied upon the judgment reported in ***Oil and Natural Gas Corporation Ltd., v. Saw Pipes Ltd., [2003 (5) SCC 705]***, wherein the Honoruable Apex Court has held that an Award can be set aside if it is contrary to a) fundamental policy of Indian law; or b) the interest of India; or c) justice or morality; or d) if it is patently illegal. Further an Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

11.Learned counsel for the petitioner further contended that the rate of interest for pre-arbitration period, for pendente lite period and future interest should be reduced in view of the substantial reduction of interest rate after economic reforms in our country. In support of his contention he cited a judgment in ***Krishna Bhagya Jala Nigam Ltd., vs. G.Harischandra Reddy and Another [(2007) 2 SCC 720].***

12. The learned counsel also submitted that the Honurable Apex Court in ***M.P.Power Managemenrt Company Ltd., vs. Renew Clean Energy Pvt. Ltd. & Another [2018 (5) SCALE 357]*** has held that the delay in commissioning project due to unavoidable circumstances, though not force majeure event, time taken by respondent in change of location and construction of plan have to be kept in view for counting delay.

13. It is the contention of the learned counsel for the Respondent/claimant that there was not enough gas available. Article 11.2 of the Contract makes it very clear that suppliers shall submit irrevocable unconditional Performance Bank Guarantee acceptable to the Owner from a first class international bank operating in India and in favour of the Owner in the amount of 10% of the total contract value. The purpose of this bank guarantee is to bind the supplier to ensure the proper performance by the supplier of all his obligations contained in the contract. Whereas there was not enough gas available. It is his contention that the parties have always on discussion as to the foundation. Delay was long condone and

continuously condoned. The Respondent made the performance promise. The letter dated 20.8.2013 is not admission. It is only a request. Ever after the letter there were discussion between the parties. The minutes were entered into between the parties. The tribunal factually found that both are responsible for the delay and time is not essence of contract. Therefore it is his contention that the learned Arbitral Tribunal come to such finding only on the basis of factual aspects. The petitioner is also responsible for delay and time was not the essence of contract. Liquidated damages cannot be claimed in terms of the contract. Hence the Petition is liable to be dismissed.

14. In support of his contention he relied upon the following Judgments:

1. ***2008 (100) DRJ 112 [Mecon Limited vs. Pioneer Fabrications (P) Ltd.,]*** A defaulting party cannot take the benefit of its own default.

2. ***Indian Oil Corporation vs. Lloyds Steel Industries [2007 SCC Online Del 1169]*** Though

there may not be a specific clause in the contract carrying the stipulation that time was of the essence of contract, such inference can be drawn from the nature of the contract.

15. Since the very challenge is only in respect of liquidated damages as per the terms of contract and interest part and there is no challenge made by the learned counsel appearing for the Petitioner with regard to the other claim awarded by the learned Tribunal, this petition is restricted only to the liquidated damages and interest part. Now this Court has to look into the relevant portion of the contract between the parties.

16. Letter of Intent dated 26.06.2011 Clause 2.6 reads as follows:

> ***2.6. Liquidated damages for delay:***
>
> *Liquidated damages for the delay shall be 0.5% (half) per week of the total contract value any week or part thereof subject to maximum 7% (seven) of the contract value.*

17. In the Contract Article 13 reads as follows:

Article 13: Time Schedule and Liquidated Damages for Delays

(a) Provisional Acceptance of the plant shall be completed within 18 (eighteen) months from the date of Contract Coming-Into-Force.

(b) In case of delay in the date of Provisional Acceptance of the Plant beyond the dates mentioned above for reasons attributable to the Contractor, the Owner is entitled, without recourse to Contractor or to any judicial proceedings, to impose and collect penalties of 0.50% of the total Contract price for each full week delay.

(c) The total amount of penalties for such delay shall not exceed seven percent (7%) of the total Contract price. The dates as per Article 13.a. and 13.f. are the only dates of deadlines, which are subject to Owner's Claim for delay.

18. Though the LOI and Contract provides for liquidated damage in the event of delay, the fact remains that the period stipulated in the LOI and Contract is not adhered to by the parties. It is the main contention of the Petitioner that by letter dated 20.8.2013, e-mail communication, the Respondent admitted that there are overall 10

months delay in project schedule than planned starting schedule, Liquidated Damage applicable date works out to be 22.11.2013. According to the Petitioner the Respondent himself admitted that if any delay after 22.11.2013 Liquidated Damages applicable. But the work has completed in the year 2015. Therefore, it is the contention that as per the Contract and LOI they are entitled to Liquidated Pre-estimated Damages. The Liquidated Damages stipulated in the contract is only on account of delay in supply and commissioning of the Plant and not towards achieving guaranteed power output.

19. The learned Arbitrators in Issue No.1 (whether the time is essence of contract?) in para 10.3 factually discussed the various correspondences between the parties. After incorporation of Article 12 of the contract the learned Arbitrators have finally found that the contract itself contemplated the extension of time, provided for levy of liquidated damages in case of delay and also that even after the expiry of period stipulated for achieving provisional acceptance, the parties continued to treat the contract as valid and subsisting it is held that time was not the essence of contract.

20. In issue No.2 the learned three member Arbitrators have factually found that para 11.11 to para 11.41 factually analysed the matter and found that the Respondent viz, Petitioner failed to provide exhaust gases meeting the contractual stipulations and found that the invocation of the Performance Bank Guarantee by the Respondent/Petitioner citing failure of WHRPP was wrongful and unjustified.

21. The liquidated damages claimed on account of any supply and commissioning of the plant. The learned Arbitrators having recorded the factual finding to the effect that time was not essence of the contract and parties both are responsible for delay and the Respondent also failed to provide input as per Section 3.1 of contract, invocation of the Performance Bank Guarantees by the Respondent/Petitioner was wrongful and unjustified and similarly, the parties are contributed to the delay equally as such the counter claim of respondent for damages on said account cannot be granted. It is also well settled that the question whether or not time was essence of

the contract would essentially the question of the intention of the parties to be gathered from the terms of contract. Even where the parties were expressly provided the time is essence of contract, such stipulation will have to be seen along with the conduct of the parties and other provisions. If the time is not essence of contract, or time fixed for completion for supply of the materials have been waived by the contract of the parties, such stipulation is ceased to be applicable. The learned Arbitrator factually found that though there is stipulations in the contract, the parties have waived the stipulations there were meetings and discussion between the parties from 22.11.2014. Therefore, the petitioner also contributed for delay and waived the time stipulated, now they cannot contend that they are entitled to liquidated damages as per the contract.

22. Article 13 stipulates only when the delay is solely attributable to the contract, in that case the owner is entitled to penalty. Whereas the learned Arbitrators factually found that the delay was on the part of both sides. The learned Arbitrators factually analysed all the documents and recorded such finding. When the Arbitrators arrived a

factual finding this court cannot re-appreciate the entire evidence as an appellate court. The clause provided in the contract can be pressed into service only when the delay is solely attributable to the Respondent herein. Whereas in this case the learned Arbitrators have factually recorded their finding. Therefore, submission of the learned counsel that as per the contract counter claim ought to have been allowed cannot be countenanced.

23. In the judgment reported in ***Saw Pipes Ltd., case*** (supra) the Apex Court has held as follows:

> *"It is apparent from the aforesaid reasoning recorded by the arbitral tribunal that it failed to consider Sections 73 and 74 of the Indian Contract Act and the ratio laid down in Fateh Chand's case (supra) 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 emphasizes 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. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach. Take for illustration: if the parties have agreed to purchase cotton bales and the same were only to be kept as a stock-in-trade. Such bales are not delivered on the due date and thereafter the bales are delivered beyond the stipulated time, hence there is breach of the contract. Question which would arise for consideration is - whether by such breach party has suffered any loss. If the price of cotton bales fluctuated during that time, loss or gain could easily be proved. But if cotton bales are to be purchased for manufacturing yarn, consideration would be different. "

The Apex court held that when the genuine pre-estimate clause made in the contract, there is no question of proving such loss or such party is not required to lead evidence to provide actual loss suffered by him. Burden is on the other party.

24. Citing the judgments reported in **Shah Pipes Case** (supra) and **Fateh Chand vs Balkishan Das [1963 AIR 1405]** the Delhi High Court in ***Indian Oil Corporation vs. Lloyds Steel Industries Ltd., [2007 SCC Online Del 1169]*** has held as follows:

> "55. *It is clear from the above that Section 74 does not confer a special benefit upon any party, like the petitioner in this case. In a particular case where there is a clause of liquidated damages the Court will award to the party aggrieved only reasonable compensation which would not exceed an amount of liquidated damages stipulated in the contract. It would not, however, follow there from that even when no loss is suffered, the amount stipulated as liquidated damages is to be awarded. Such a clause would operate when loss is suffered but it may normally be difficult to estimate the damages and, therefore, the genesis of providing such a clause is that the damages are pre-estimated. Thus, discretion of the Court in the matter of reducing the amount of damages agreed upon is left unqualified by any specific limitation. The guiding principle is 'reasonable compensation'. In order to see what would be the reasonable compensation in a given case, the Court can adjudge the said compensation in that case. For this purpose, as held in Fateh Chand (supra) it is the duty of the Court to award compensation according to settled principles. Settled*

principles warrant not to award a compensation where no loss is suffered, as one cannot compensate a person who has not suffered any loss or damage. There may be cases where the actual loss or damage is incapable of proof; facts may be so complicated that it may be difficult for the party to prove actual extent of the loss or damage. Section 74 exempts him from such responsibility and enables him to claim compensation inspite of his failure to prove the actual extent of the loss or damage, provided the basic requirement for award of 'compensation', viz. the fact that he has suffered some loss or damage is established. The proof of this basic requirement is not dispensed with by Section 74. That the party complaining of breach of contract and claiming compensation is entitled to succeed only on proof of 'legal injury' having been suffered by him in the sense of some loss or damage having been sustained on account of such breach, is clear from Sections 73 and 74. Section 74 is only supplementary to Section 73, and it does not make any departure from the principle behind Section 73 in regard to this matter. Every case of compensation for breach of contract has to be dealt with on the basis of Section 73. The words in Section 74 'Whether or not actual damage or loss is proved to have been caused thereby' have been employed to underscore the departure deliberately made by Indian legislature from the complicated principles of English Common Law, and also to emphasize that reasonable compensation can be granted even in a case where extent of actual loss or damage is incapable of proof or not proved. That is why Section 74 deliberately states that what is to be awarded is reasonable compensation. In a case when the party complaining of breach of the contract has not suffered legal injury in the sense of sustaining loss or damage, there is nothing to compensate him for; there is nothing to recompense, satisfy, or make amends.

Therefore, he will not be entitled to compensation See State of Kerala v. United Shippers and Dredgers Ltd. . Even in Fateh Chand (supra) the Apex Court observed in no uncertain terms that when the section says that an aggrieved party is entitled to compensation whether actual damage is proved to have been caused by the breach or not, it merely dispenses with the proof of 'actual loss or damage'. It does not justify the award of compensation whether a legal injury has resulted in consequence of the breach, because compensation is awarded to make good the loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach. If liquidated damages are awarded to the petitioner even when the petitioner has not suffered any loss, it would amount to 'unjust enrichment', which cannot be countenanced and has to be eschewed."

25. considering the above judgments and Article 13 of the Contract when carefully seen that the question of penalty arise only when the delay was solely attributable to the Respondent. Similarly the clauses in LOI dated 29.06.2011 when carefully seen that the scope of supply includes designs, engineering, manufacture, supply, transportation, erection and Commissioning at CCCL Kallur (Sangam) Site Waste Head Recovery based Power Plant. Therefore, the above clause also shows that when the delay in the above work attributable only to respondent such a case Petitioner is entitled to the liquidated

damages. The Arbitrators factually recorded that the test could not be completed on account of inefficient functioning of respondent's cement plant for which no fault lay with the claimant. Therefore, when the delay is also equally to both sides, stipulation of contract cannot be pressed into service. The learned Artbitrators have factually considered the claim and passed the Award. Therefore, this Court is of the view that there is no ground made out to interfere the well considered Award.

26. Learned Arbitrators while allowing the claim have allowed 12% interest. The learned senior counsel placed reliance of the Apex Court judgment in ***Krishna Bhagya Jala Nigam Ltd., case*** *(supra)* and contended that the interest will be reduced. In the above case the Honourable Apex Court has reduced the interest from 19% to 12% taking the economic reforms in the country. Taking into consideration of above aspect and also fluctuation in the bank rate of interest, interest is reduced to 9% from 12% in both pentente lite period and future interest. Accordingly, interest rate is reduced to 9% from 12%. In view of the same, the Original Petition is partly allowed.

27. In the result, Original Petition is partly allowed. The rate of interest for both Pendente Lite Period and Future interest are reduced from 12% to 9% p.a. In all other aspects the Award is confirmed. Consequently, connected Application is closed. No costs.

06.09.2019

Index : Yes / No
Internet: Yes
Speaking/Non-speaking order
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Copy to:

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N. SATHISH KUMAR, J.
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order in:
O.P.No.503 of 2019

06.09.2019