IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	31.10.2019
Judgment pronounced on	08.11.2019

CORAM

THE HONOURABLE Mr. JUSTICE **SENTHILKUMAR RAMAMOORTHY**

O.P. No.485 of 2014

M/s.Indian Oil Corporation Ltd,
Rep. by its Deputy General Manager(LPG)
Tamil Nadu State Office,
No.139, Nungambakkam High Road,
Chennai – 600 034. ... Petitioner

Vs.

1.M/s.Fabtech Works and Constructions
Plot Nos.H-44/H-43/H-42, M.I.D.C.
Additional Murbad,
Village: Kudavali,
Murbad – 421 401,
Via – Kalyan Dist. Thane(M.S).

2.S.Annamalai,
Sole Arbitrator,
No.139, Nungambakkam High Road,
Chennai – 600 034. ... Respondents

Prayer:- Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award dated 15.05.2014 passed by the 2nd Respondent herein in the un-numbered Arbitration Case.

For Petitioner : M/s.Mohammed Fayaz Ali

For Respondents : M/s.Gowtham Kumar for R-1

ORDER

The respondent in the Arbitration is the Petitioner herein. The dispute between the parties arises out of a contract for the supply of steel plates, fabrication, erection and commissioning of 3X150 T capacity mounded type pressure vessels for LPG storage with cathodic protection at the LPG Bottling plant of the Petitioner at Illayangudi, Tamil Nadu. A letter of intent dated 27.11.2007 was issued in favour of the first Respondent in relation to the above mentioned work at the lump sum price of Rs.4,68,45,000/- inclusive of all taxes and duties. The entire work was required to be completed within a period of 12 months from the date of handing over of the site. Pursuant to the letter of intent, a detailed work order was issued to the first Respondent. The admitted position is that the site was handed over on 10.12.2007. Thereafter, the execution of work is stated to have been delayed by various factors such as delay in approval of designs and drawings by the Third Party Inspection Agency, namely Projects and Development India Limited(PDIL), changes in the orientation of the mounds which necessitated revision in the designs and drawings, heavy rainfall, delay in supply of steel, etc. According to the first Respondent, the work was completed on

26.12.2009, as certified by PDIL, whereas, according to the Petitioner, the work was completed on 30.04.2010.

2.It is also the admitted position that the Petitioner made deductions from the running account bills of the first Respondent. Such deductions were made from amounts due and payable towards RA Bill No.3 dated 28.03.2009, RA Bill No.4 dated 02.05.2009, RA Bill No.5 dated 29.10.2009, RA Bill No.6 dated 15.11.2009, RA Bill No.7 dated 04.02.2010, RA Bill No.8 dated 23.06.2010 and RA Bill No.9 dated 28.09.2010. By making the said deductions, an aggregate sum of Rs.46,84,500/-, which constitutes 10% of the total lump sum contract price, was deducted. Therefore, a dispute arose between the parties and the said dispute was referred to arbitration. In the Arbitration Proceedings, the first Respondent herein claimed the deducted sum of Rs.46,84,500/- and a further sum of Rs.5,00,000/- towards expenses incurred for commissioning the work along with interest thereon. Other claims, such as a sum of Rs.93,69,000/- towards loss of reputation and goodwill, were also made and, in the aggregate, a sum of Rs.2,55,33,436/- was claimed. In the said Proceeding, the Petitioner filed an application under Section 16 of the Arbitration and Conciliation Act,1996(the Arbitration Act) challenging the jurisdiction of the Arbitral Tribunal and the said application was rejected by Order dated 04.07.2013.

Thereafter, the Petitioner filed its reply statement before the Arbitral Tribunal, wherein it refuted the claims of the first Respondent herein and prayed that the said claims be rejected. The learned Arbitrator framed three issues by considering the pleadings of the parties. In substance, these issues are: 1) Whether the invocation of the price adjustment clause by the Petitioner herein is justifiable? 2) Whether the first Respondent herein committed a breach of Contract by delaying the completion of the project? and 3) Whether the first Respondent herein is entitled to the relief as claimed? Both parties adduced oral and documentary evidence: the first Respondent herein exhibited 18 documents as Exs.C-1 to C-18 and the Petitioner herein exhibited 13 documents as Exs.R1 to R-13. Upon consideration of the above, the learned Arbitrator by Arbitral Award dated 15.05.2014 (the Award) directed the Petitioner herein to pay a sum of Rs.46,84,500/- to the first Respondent herein immediately. The said Award is impugned in this Petition.

3.I heard the learned counsel for the Petitioner and the learned counsel for the first Respondent.

4.The learned counsel for the Petitioner submitted that the main question that arises for consideration is with regard to the entitlement of the Petitioner to make deductions as per the price adjustment clause. According to the learned counsel for the Petitioner, the contract between the parties provides for price adjustment in the event of delay by the first Respondent/Contractor. He further submitted that the said clause is neither a liquidated damages clause nor a penalty clause. In order to substantiate this submission, he referred to the said price adjustment clause, which reads inter alia as under:

"**4.4.0.0 PRICE ADJUSTMENT FOR DELAY IN COMPLETION**

4.4.1.0 The contractual price payable shall be subject to adjustment by way of discount hereinafter specified, if the Unit(s) are mechanically completed or the contractual works are finally completed, subsequent to the date of Mechanical Completion/final completion specified in the Progress Schedule.

4.4.2.0 If Mechanical Completion of the Unit(s)/final completion of the works is not achieved by the last date of Mechanical Completion of the Unit(s)/final completion of the works specified in the Progress Schedule (hereinafter referred to as the "starting date for discount calculation"), the OWNER shall be entitled to adjustment by way of discount in time price of the works and services in a sum equivalent to the percent of the total contract value as specified below namely:-

(i)For Mechanical Completion of the Unit(s)/final completion of time works achieved within (one) week of the starting date for discount calculation – ½% of the total contract value.

(ii)For Mechanical Completion of the Unit(s)/final completion of time works achieved within 2 (two) weeks of the starting date for discount calculation – 1% of the total contract value.

(iii)For Mechanical Completion of the Unit(s)/final completion of time works achieved within 3 (three) weeks of the starting date for discount calculation – 1½% of the total contract value.

(iv)For Mechanical Completion of the Unit(s)/final completion of time works achieved within 4(four) weeks of the starting date for discount calculation – 2% of the total contract value.

(v)For Mechanical Completion of the Unit(s)/final completion of time works achieved within 5(five) weeks of the starting date for discount calculation – 2½% of the total contract value.

(vi)For Mechanical Completion of the Unit(s)/final completion of time works achieved within 6(six) weeks of the starting date for discount calculation – 3% of the total contract value.

(vii)For Mechanical Completion of the Unit(s)/final completion of time works achieved within 7(seven) weeks of the starting date for discount calculation – 3½% of the total contract value.

(viii)For Mechanical Completion of the Unit(s)/final completion of time works achieved within 8(eight) weeks of the starting date for discount calculation – 4% of the total contract value.

(ix)For Mechanical Completion of the Unit(s)/final completion of time works achieved within 9(nine) weeks of the starting date for discount calculation – 4½% of the total contract value.

(x)For Mechanical Completion of the Unit(s)/final completion of time works achieved within 10(ten) weeks of the starting date for discount calculation – 5% of the total contract value.

(xi)For Mechanical Completion of the Unit(s)/final completion of time works achieved within 11(eleven) weeks of the starting date for discount calculation – 5½% of the total contract value.

(xii)For Mechanical Completion of the Unit(s)/final completion of time works achieved within 12(twelve) weeks of the starting date for discount calculation – 6% of the total contract value.

(xiii)For Mechanical Completion of the Unit(s)/final completion of time works achieved within 13(thirteen) weeks of the starting date for discount calculation – 6½% of the total contract value.

(xiv)For Mechanical Completion of the Unit(s)/final completion of time works achieved within 14(fourteen) weeks of the starting date for discount calculation – 7% of the total contract value.

(xv)For Mechanical Completion of the Unit(s)/final completion of time works achieved within 15(fifteen) weeks of the starting date for discount calculation – 7½% of the total contract value.

(xvi)For Mechanical Completion of the Unit(s)/final completion of time works achieved within 16(sixteen) weeks of the starting date for discount calculation – 8% of the total contract value.

(xvii)For Mechanical Completion of the Unit(s)/final completion of time works achieved within 17(seventeen) weeks of the starting date for discount calculation – 8½% of the total contract value.

(xviii)For Mechanical Completion of the Unit(s)/final completion of time works achieved within 18(eighteen) weeks of the starting date for discount calculation – 9% of the total contract value.

(xix)For Mechanical Completion of the Unit(s)/final completion of time works achieved within 19(nineteen) weeks of the starting date for discount calculation – 9½% of the total contract value.

(xx)For Mechanical Completion of the Unit(s)/final completion of time works achieved within 20(twenty) weeks of the starting date for discount calculation – 10% of the total contract value.

(xxi)For Mechanical Completion of the Unit(s)/final completion of time works achieved within 21(twenty one) weeks of the starting date for discount calculation – 10½% of the total contract value.

4.4.2.1 Time starting date for discount calculation shall be subject to variation upon extension of time date for Mechanical Completion of the Unit(s)/final completion of the works with a view that upon any such extension there shall be an equivalent extension in the starting date for discount calculation under Clause 4.4.2.0 thereof.

4.4.2.2 It is specifically acknowledged that the provisions of Clause 4.4.2.0 constitute purely a provision for price adjustment and/or fixation and are not be understood or construed as a provision for liquidated damages or penalty under Section 74 of the Indian Contract Act or otherwise."

5. With reference to the delay, he submitted that the contract provides that final completion should be done within 12 months from the date when the site was handed over. In this case, the site was admittedly handed over on 10.12.2007 and, therefore, the work should have been completed on or before 09.12.2008. Instead, he submitted that the first Respondent herein, by letter dated 28.02.2009(Ex.C-10), requested for an extension of time up to 09.06.2009 by citing several reasons as set out in the said letter. He further submitted that in response to the request for extension of time, at the minutes of meeting(Ex.R-8) held on 31.07.2009, it was recorded that the first Respondent confirmed that the entire work would be completed by 30.09.2009. Thereafter, he pointed out that no further extensions were agreed to by the parties. Although the first Respondent had confirmed that it would complete work on or before 30.09.2009, he submitted that admittedly work was not completed by 30.09.2009 and was, in fact, completed only on 30.04.2010. In this regard, he further pointed out that the certificate that was issued by the PDIL on 26.12.2009 (Ex.C-12) is not a completion certificate under the contract. Instead, it is merely a certificate issued by PDIL after inspecting

the 3x150 MT mounded LPG storage bullets. Therefore, he pointed out that there is a delay of 7 months from the last extended date for completion up to the date of actual completion. Consequently, he submitted that the Petitioner was entitled to resort to price adjustment as per the contract.

6.In response to a question as to when deductions were made towards price adjustment, he submitted that the deductions were made from RA Bills 3 to 9 which were submitted between 28.03.2009 and 28.09.2010. He further confirmed that the said details are contained in the statement of claim at page No.276 for Volume – I. In effect, he submitted that the period of delay is about 28 weeks, whereas deductions were made of the stipulated maximum of 10% of the contract price, which is liable to be deducted for a cumulative delay of 20 weeks.

7.In these facts and circumstances, he submitted that the Arbitral Tribunal completely disregarded the contract and, in particular, the price adjustment clause, by allowing the claim to the extent of Rs.46,84,500/-. In support of this submission, he referred to the Award. In specific, he referred to Page No.333 of Volume – I, wherein the Arbitral Tribunal referred to 3 letters from the first Respondent seeking extension of time. In this connection, he pointed out that the letters dated

19.07.2010 and 20.09.2010 were issued after the completion of work on 30.04.2010 and, therefore, the said letters cannot be treated as letters seeking extension of time. However, the learned Arbitrator relied on such irrelevant evidence and held that the resort to the price adjustment clause by the Petitioner herein is not justifiable. He further pointed out that the Arbitral Tribunal also concluded that the first Respondent committed breach of contract by delaying the completion of the project beyond the stipulated time. By referring to the said finding on issue No.2, he submitted that the Arbitral Tribunal committed a patent illegality by, nonetheless, directing the Petitioner to pay a sum of Rs.46,85,500/-.

8.In order to substantiate the above submissions, he referred to and relied upon the judgments which are set out below along with context and principle:

(i)**Cauvery Coffee Traders, Mangalore vs. Hornor Resources (International) Company Ltd, (2011) 10 SCC 420,** wherein, at Paragraphs 31 to 35, the Hon'ble Supreme Court held that a party that received a particular sum as full and final settlement cannot do a complete somersault thereafter. It was further held therein that a person cannot be permitted to approbate and reprobate and that the doctrine of election is based on the rule of estoppel.

(ii) **Indian Oil Corporation Ltd. vs. Man Industries(India) Ltd. (the IOCL case) 2017 SCC Online Del 6452,** wherein the Delhi High Court set aside the Arbitral Award because the contractual clause with regard to price adjustment was overlooked by the Arbitral Tribunal.

(iii)**Chennai Petroleum Corporation Limited vs. HES Infro Private Ltd (the CPCL case) (2018) 3 CTC 764,** wherein this Court held that the no claim certificate is binding in the absence of averments or findings that it was obtained by force or coercion. It was further held in the said judgment that the Award passed in spite of the no claim certificate and contractual clauses prohibiting the claims is against public policy and suffers from patent illegality.

(iv)**Oil & Natural Gas Corporation Ltd vs. SAW Pipes Ltd, (2003) 5 SCC 705 (the ONGC case),** wherein the Hon'ble Supreme Court held that an award, which is contrary to substantive provisions of law or the provisions of the Arbitration and Conciliation Act or against the terms of the contract, would be patently illegal and could be interfered with under Section 34 of the Arbitration and Conciliation Act.

9.In response and to the contrary, the learned counsel for the first Respondent made submissions. He opened by pointing out that the primary obligation of the Petitioner, namely, to hand over the site was not fulfilled within time and the site was handed over only on 20.12.2007. He, thereafter, referred to the fact that the designs and drawings were not approved in time, the mounds were re-oriented thereby entailing modification of the designs and drawings, which were eventually approved by PDIL only on 23.06.2008. In light of the delay in handing over the site and the delayed approval of designs and drawings, he submitted that it was just and necessary to re-fix the time for completion of work and that the first Respondent was entitled to such extension. Therefore, he submitted that extension of time was requested for by the first Respondent both at meetings between the Petitioner and the first Respondent and also by issuing letters requesting for extension of time. By way of illustration, he submitted that extension of time was requested for at the meeting held on 23.07.2008(Ex.R-3) and also by letter dated 28.07.2009(Ex.C-10). He further submitted that, in the meeting held on 29.04.2009(Ex.R-5), it was agreed that final completion would be done by 30.09.2009. He also referred to the minutes of the subsequent meeting held on 31.07.2009 at Page 105 of Volume – II(Ex.R-8) in this connection. He next referred to the letter dated 30.11.2009(Ex.C-11), wherein the first Respondent informed the Petitioner that mechanical works were totally completed for the three bullets and that the total site would be wound up within 10 to 15 days. In order to substantiate the fact that mechanical completion took place on 26.12.2009, he referred to the certificate of PDIL at Page 35 of Volume – II(Ex.C-12). He, thereafter, referred to the letter dated 19.07.2010 (Ex.C-13), wherein the first Respondent stated that the job had been completed on 26.12.2009 and had provided reasons for delay and requested the Petitioner to refrain from levying liquidated damages. He, thereafter, referred to the letter dated 28.09.2010 (Ex. C-14) enclosing the final bill and pointed out as to how the first Respondent did not have any choice or option with regard to the submission of the "no claim certificate" on 26.10.2010 in as much as it was a pre-condition for the processing of the final bill. In this regard, he referred to the said "no claim certificate" at Page 286 of Volume – I and contended that the said "no claim certificate" is not an unequivocal acknowledgment of full and final payment so as to constitute accord and satisfaction. He submitted that payment of the final bill was made on 19.11.2010 after deducting the aggregate sum of Rs.46,84,500/- as per details set out in the statement of claim at Page No.276 of Volume No.1.

10.With regard to the deductions made by the Petitioner, he submitted that both parties understood such deductions to be by way of liquidated damages. In order to substantiate this submission, he referred to the e-mail of 29.07.2010 at page 112 of Volume – II, wherein it is expressly stated that "LD as applicable may please be deducted from the RA Bill." He also referred to the e-mail of 08.10.2010 in respect of the final bill wherein it is stated that "we are going ahead with processing of your final bill and applicable LD would be deducted". In order to substantiate that the "no claim certificate" was not unequivocal, he referred to the reply to the Section 16 application and the order thereon dated 04.07.2013, wherein the contention of the first Respondent, in this regard, was accepted.

11.With specific reference to price adjustment, he pointed out that Clause 4.4.2.1 provides that if extension of time is granted, time should run from the last date of extension and not from the original completion date. He, thereafter, referred to the Award and pointed out as to how the learned Arbitrator entered the definitive factual finding that the delay of 197 days is attributable to the Petitioner. By referring to the said finding of the Arbitral Tribunal, he pointed out that the Petitioner has failed to make out a case for interference under Section 34 of the Arbitration and Conciliation Act. In order to substantiate this submission, he referred to the judgments which are set out below along with context and principle:

(i)**Indian Oil Corporation vs. Lloyds Steel Industries Ltd, 2007 SCC Online Del 1169,** wherein, at Paragraph 44, the Delhi High Court held that time would not be of the essence of the contract when there is no specific provision to that effect. In Paragraph 51 of the same judgment, it was further held that it is necessary to prove that loss was incurred before claiming liquidated damages.

(ii)**The State of Jharkhand and Others vs. M/s.HSS Integrated SDN and another in Special Leave To Appeal(C) No.13117 of 2019,** wherein, at paragraph 6.4, the Hon'ble Supreme Court held that a plausible view by the Arbitral Tribunal should not be interfered with under Section 34 of the Arbitration Act.

(iii)**Wishwa Mittar Bajaj and Sons vs. Shipra Estate Lted and Jaikishan Estate Developers Private Limited, 2018 SCC Online Del 12918,** wherein, at Paragraphs 32 and 34, the Hon'ble Supreme Court held that the scope of interference with an arbitral award is limited and that such an award should not be interfered with if it is reasoned and based on a discussion and analysis of the evidence.

(iv)**Bharat Coking Coal Ltd. vs. Annapurna Construction(the Bharat Coking Coal case), (2003) 8 SCC 154,** wherein, at Paragraph 9, the Hon'ble Supreme Court held that unless a party states unequivocally that it would not raise any further claim such a party cannot be held to be precluded from raising further claims.

(v) **Chairman and MD, NTPC Ltd. vs. Reshmi Constructions, Builders & Contractors (the NTPC case), (2004) 2 SCC 663**, wherein, at Paragraph 26 and 27, the Hon'ble Supreme Court took judicial notice of the fact that the final bill is not ordinarily processed to release the money unless a no demand certificate is signed and that necessity knows no law.

(vi)**National Highway Authority of India vs. Gammon India Limited, 2014 SCC Online Cal 17407,** wherein, at Paragraph 11 to 22, the limited scope of interference with an arbitral award was discussed especially in the context of a plausible view by the Arbitral Tribunal.

(vii)**M/s.L.G. Electronics India(p) Ltd. vs. Dinesh Kalra, 2018 SCC Online Del 8367,** wherein, at Paragraph 15 to 22, once again, the limited scope of interference with an arbitral award was discussed.

12.By way of rejoinder, the learned counsel for the Petitioner pointed out that all the reasons for delay and for seeking extension of time were mentioned in the letter dated 28.02.2009 wherein extension was requested until 30.06.2009. In fact, he pointed out that no additional reason was cited in the letter dated 19.10.2010. Accordingly, he submitted that there is no justification at all for not completing the work within the extended completion date of 30.09.2009 and, therefore, the first Respondent is completely responsible for the delay of 7 months beyond 30.09.2009 up to 30.04.2010. In these facts and circumstances, the learned counsel for the Petitioner concluded by reiterating that the Arbitral Tribunal disregarded the critical clauses of the contract such as the price adjustment clause and relied upon irrelevant evidence such as letters written after completion of work to conclude that the Petitioner was not justified in resorting to price adjustment. He also circulated written submissions and annexed the judgment in **Bank of India vs. K. Mohandas (2009) 5 SCC 313** for the proposition that contractual interpretation should be based on the text of the contract and not on what parties say, in that regard, subsequently. He also relied on the order in **Vedanta Limited vs. SGS India Private Limited, O.P. No.1115 of 2018,** for the principle that an arbitrator cannot decide on the basis of equity and good conscience unless expressly authorised to do so under the contract.

13.The records were examined and the oral and written submissions of the learned counsel for both sides were considered carefully. The preliminary question to be considered is whether the claims made by the first Respondent are liable to be rejected on account of the "no claim certificate" dated 26.10.2010. In order to answer this question, the said certificate should be examined. On perusal thereof, it is clear that the said certificate is in a standard format, which appears to have been prescribed by the Petitioner. Therefore, the question arises as to whether this "no claim certificate" is liable to be reckoned as an unequivocal acceptance of the payment against the final bill as full and final settlement. The answer is obvious upon examining the letter dated

28.09.2010 (Ex.C-14) enclosing the final bill. By this letter, the first Respondent called upon the Petitioner to release the provisional liquidated damages aggregating to Rs.42,02,829/-. This request would qualify as a notified claim for purposes of Clause 6.2.2.0 of the contract. When viewed in this factual context, the "no claim certificate" certainly does not qualify as an unequivocal acceptance of full and final settlement as per the law laid down both in the **Bharat Coking case** and **the NTPC case** and in contrast to **the CPCL case**.

14.This leads to the principal question that is required to be decided, namely, whether the Petitioner is entitled to make deductions from the running account bills of the first Respondent. The price adjustment clause, which is extracted supra, is linked to the completion of works specified in the progress schedule. The progress schedule is a defined term under the contract and is required to be submitted by the contractor or if the contractor fails to submit the same, it is required to be prepared by the Engineer-in-charge. In this case, the original completion date was 12 months from the date of hand over of the site. However, there was admitted delay both in handing over the site and in approval of designs and drawings. Accordingly, requests were made for extension of time and it is clear from the minutes of meeting held on 31.07.2009 that the parties agreed to an extension of time up to 30.09.2009. In fact, it is evident from the said minutes of meeting that the decisions taken at the said meeting have been agreed to by both parties by signing the minutes of meeting. It is also evident that a completion schedule chart was annexed to the minutes of meeting and this completion schedule chart was also signed by both parties. The entitlement to make deductions should be viewed against this factual backdrop. The completion schedule chart annexed to the minutes of the meeting held on 31.07.2009 would qualify as the progress schedule as per clause 4.4 of the GCC. In effect, the last date specified therein, namely, 30.09.2009, would be the starting date for discount calculation as per clause 4.4.2.0. This becomes clear on examining clause 4.4.2.1. However, in this case, deductions were made not from 01.10.2009 but from 28.03.2009 onwards, as evidenced by the table in the statement of claim at Page 276 Volume – I, which is not refuted by the learned counsel for the Petitioner. Therefore, it is clear that deductions were not made in accordance with the price adjustment clause. In addition, it is the admitted position that the first Respondent was not notified about resorting to price adjustment. Although the price adjustment clause does not specifically provide for the issuance of a notice, the requirement of notification is implicit for the reason that price adjustment cannot be resorted to unless the delay in completion of work, as per the progress schedule, is attributable to the contractor/first Respondent. In this case, as stated above, the parties agreed to an extension of time up to 30.09.2009. The Arbitral Tribunal referred to the price adjustment clause and the fact that the price adjustment clause could be operated only with reference to the progress schedule. After adverting to the said clause, the Arbitral Tribunal also recorded that the price adjustment clause was resorted to without reference to the minutes of meeting and the progress schedule agreed to therein. On that basis, the Arbitral Tribunal held that the resort to the price adjustment clause is not justifiable. In view of the above analysis and the fact that the price adjustment clause should have been resorted to only after 30.09.2009, I find that the conclusions of the Arbitral Tribunal are in accordance with the contract and, therefore, interference is not warranted.

15.In addition, the larger legal question as to whether the price adjustment clause is a stipulated compensation or liquidated damages clause should be examined because it would have a material bearing on this case de hors the factual findings on the manner of resort to the price adjustment clause being unjustified. In this regard, it is pertinent to refer to Section 74 of the Contract Act, 1872, which reads, in relevant part, as under:

"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 proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for...."

16.A plain reading of Section 74 evidences that the Contract Act provides for two categories of stipulations that could operate in case of breach. The first category is a sum named in the contract as the amount to be paid in case of breach, which could be described as stipulated compensation, and the second category is any other stipulation by way of penalty. Thus, Section 74 does not use the term "liquidated damages". It is the admitted position, in this case, that there is no clause in respect of compensation for delay except the price adjustment clause. Moreover, paragraph 11 of reply statement before the Arbitral Tribunal, the Petitioner stated as follows:

> "The deduction of Rs.46,84,500/- from the final bill as stated above is not by way of liquidated damages but by way of price adjustment for delay in completion under Clause 4.4.0.0. The purpose behind price adjustment is to safe guard the OWNER from the loss of business due to delay in completion of the work and since the CONTRACTOR under commercial agreement has agreed for such a condition and

having performed the contract and acted upon it, the OWNER is entitled to invoke Clause 4.4.0.0 for price adjustment due to delay."

17.From the above, it is clear that the price adjustment clause is intended to provide compensation for loss of business due to delay in completion of work. In effect, it is stipulated compensation for delay that is attributable to the contractor. In this connection, it may be further noted that this is not an incentive-based clause whereby the contractor could receive additional payment for accelerated completion and, in the converse situation, should provide a discount in the event of delay. On the other hand, it is clearly a breach-based compensation clause. Once there is a contractual stipulation by way of compensation for delay, notwithstanding the terminology or label used to describe it and the stipulation in clause 4.4.2.2. of the contract that it is not by way of liquidated damages or penalty, it amounts to a stipulation by way of compensation as per Section 74 of the Contract Act. In this regard, in **Dunlop Pneumatic Tyre Company Limited v. New Garage and Motor Company Limited [1915] A.C. 79 (HL)(the Dunlop Pneumatic case)**, the House of Lords held, in the speech of Lord Dunedin, at page 86 of the Report, that "though the parties to a contract who use the words "penalty" or "liquidated damages" may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages." The law, in India, is the same on this subject. As stated earlier, Section 74 of the Contract Act does not refer specifically to liquidated damages. On the other hand, it refers to a stipulation by way of compensation. Therefore, Clause 4.4 of the GCC would qualify as a stipulation by way of compensation. Once it qualifies as a stipulation by way of compensation, it became necessary for the Petitioner to prove that loss was incurred as a result of breach, although it may not be necessary to prove the exact quantum of loss, if it is difficult or impossible to prove the same. These are the settled principles as per the decisions of the Hon'ble Supreme Court in **Fateh Chand vs. Balkishan Dass, (1964) 1 SCR 515, Maula Bux vs. Union of India, (1969) 2 SCC 554, Oil & Natural Gas Corporation Ltd vs. Saw Pipes Ltd,(2003) 5 SCC 705 and Kailash Nath vs. DDA(the Kailash Nath case)(2015) 4 SCC 136.** It is sufficient to refer to the **Kailash Nath case,** in specific, wherein, at paragraph 43.3, it was held "since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss is a sine qua non for the applicability of the section." The Petitioner cannot circumvent the legal regime governing the imposition of liquidated damages merely by using the label, price adjustment. Therefore, in the admitted absence of proof of the factum of loss, it would be an *injuria sine damnum* scenario and the

Petitioner is not entitled to compensation by way of price adjustment. Therefore, I do not find any reason to interfere with the Arbitral Award.

18.In the result, the Petition to set aside the Arbitral Award is dismissed.

08.11.2019

Speaking/non speaking order
Index: Yes
Internet: Yes

SENTHILKUMAR RAMAMOORTHY, J.
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Pre Delivery order
in
O.P.No.485 of 2014

08.11.2019