

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.06.2019

C O R A M

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

O.P.No.1112 of 2018

Asian Peroxide Ltd.,
Begam Isphani Complex,
II Floor, Armenian Street,
Chennai - 600 001.

... Petitioner

Vs.

Linde India Ltd.,
Oxygen House,
P3, Taratala Road,
Kolkatta - 700 088.

... Respondent

PRAYER: The Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 14.08.2018 passed by the Arbitral Tribunal comprising of Mr.T.R.Rajagopalan, Mr.Sriram Panchu and Ms.Chitra Narayan.

For Petitioner : Mr.Thriyambak J.Kannan
For Respondent/Caveator : Mr.P.Giridharan

ORDER

The original petition has been filed challenging the majority award passed by the arbitrators for the damages, as agreed in the contract.

2. The three arbitrators have passed the award and they have found that the petitioner committed breach of contract. The majority members namely, Mr.T.R.Rajagopalan and Mr.Sriram Panchu, after taking into consideration of the termination value in the agreement and the liquidated damages estimated and also subsequent E-Mail correspondence, passed the award directing the petitioner herein to pay a sum of Rs.43 crores. The minority member namely, Ms.Chitra Narayan, arbitrator has rejected the claim of the petitioner for liquidated damages on the ground that there was no evidence adduced to prove the damages. Challenging the same, the present Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996.

3. The main contention of the learned counsel for the petitioner is that merely because the quantum of liquidated damages is mentioned in the contract amount, without specifying the actual damages suffered, the same cannot be awarded. It is the further contention that there is no evidence to prove the actual liquidated damages stated to have been suffered by the respondent. It is mere

breach of contract and it will not automatically entitle the respondent to get liquidated damages as per the contract. It is the further contention that the E.mail correspondence exchanged between the petitioner and the respondent were not considered by the majority of the arbitrators. It is the further contention that the correspondence is only in the form of negotiation, the same cannot be construed as admission, which has been narrated by the arbitrators. In support of his submission the learned counsel placed reliance of the judgements are as follows :

1. *Fateh Chand V. Bal Kishan Das*, reported in AIR 1963 SC 1405
2. *Maula Bux V. Union of India* reported in (1969) 2 SCC 554.
3. *Oil & Natural Gas Corporation V. Saw Pipes Ltd.*, reported in (2003) 5 SCC 705.
4. *Kailash Nath Associates V. Delhi Development Authority and anr.*, reported in (2015) 4 SCC 136.
5. *State of Kerala & anr V. United Shippers and Dredgers Ltd.*, reported in AIR 1982 Ker 281.
6. *Raheja Universal Pvt. Ltd., V. B.E. Billimoria and Co., Ltd., Mumbai* reported in 2016(5) Mh., L.J 229.
7. *Union of India V. Raman Iron Foundry* reported in (1974) 2 SCC 231.

8. *Gangotri Enterprises Ltd v. Union of India* reported in (2016) 11 SCC 720.
9. *Rickmers Verwaltung GmbH V. Indian Oil Corporation Ltd.*, reported in (1999) 1 SCC 1.
10. *Sri Bauribandhu Mohanty and anr V. Sri Suresh Chandra Mohanty and ors.*, reported in AIR 1992 Ori 136.

4. The learned counsel for the respondent/claimant submitted that admittedly, all the three arbitrators have found that the petitioner has committed breach of contract. In the contract itself, the petitioner has agreed to pay a sum of Rs.43 crores as liquidated damages for the breach, if any, committed by them. When the loss has been estimated at reasonable percentage, it cannot be said to be unreasonable. It is the further contention that the correspondence namely E-mail dated 22.12.2014 would indicate that the petitioner has categorically admitted that the estimated amount is liable to be paid by them, in the event of breach of contract. Hence, it is submitted that when the petitioner himself admitted the liability towards liquidated damages and agreed to pay in the event of breach, it is not unreasonable that Clause 1 of Section 74 of the Indian Contract Act, will come into play. Hence, it is submitted that the majority of the

view of the arbitrators' decision does not requires any interference. In support of his contention, he also relied upon the judgment of this Court in the case of *Tamun Impex Company Private Limited Vs. Ozone Projects Private Limited* reported in 2019-1-LW29.

5. The dispute has been referred to the three member arbitrators, based on the agreement between the parties. The dispute, which is the subject matter before the arbitrators relates to two agreements entered between the petitioner and the respondent dated 14.12.2011 and 05.03.2013, where the parties have entered into a contract for supply of hydrogen for a period of fifteen years. Relevant portion of said the agreement dated 14.12.2011 are as follows :

“ (B) BOCI, a member of The Linde Group, is an experienced and reputed industrial gas company in India, also having expertise in know-how and technology related to Hydrogen and Syngas production. BOCI desires to supply APL's current and future Hydrogen demand at Sullurpet on a Build-Own-Operate (BOO) basis over a 15 years BOO contract (the

“Project”). BOCI will also supply all of the Steam co-produced in the production of Hydrogen to APL.

.....

“1.Definitions and Interpretation

1.1 In this Agreement:

Affiliate : means any entity that controls, is controlled by or is under common control with, such party, where “control” means ownership of more than 50% of an entity’s equity share or the ability to appoint a majority of its board of directors.

Agreement : means this agreement and any articles, appendices and attachments hereto, and any amendments agreed in writing between the parties.

Commencement Date : means the date on which BOCI actually commences supply of Hydrogen to APL under this Agreement.

Contract Year: means each successive 12 month period starting from the Commencement Date.

APL Facility: means APL's land, buildings and facilities at G.N.T.Road, Kotapolur Village, Sullurpet Mandalam, Nellore District, Andhra Pradesh.

Delivery Point(s) : means the point(s) at which the Hydrogen is delivered to APL, specifically identified in APPENDIX A.

Effective Date : means the date of signing of this

Agreement by the parties.

Facility Charge : means the monthly charge to APL for Plant availability, set out in APPENDIX D.

.....

Operating Limitations : means the limitations on Plant operation set out in APPENDIX C.

Party : means either BOCI or APL (as applicable) and "Parties" means both.

Permits : means all permits, licenses and consents that are necessary for carrying out an activity contemplated by this Agreement.

Plant : means the plant to be constructed and Plant Site and owned by BOCI on the Plant Site and associated equipment and pipelines, a brief technical description of which is set out in APPENDIX A.

Plant Site : means the site area within the APL Facility provided by APL, more specifically set out in Attachment to APPENDIX A.

Product Specifications : means the specifications to which Hydrogen and Steam must conform at the Delivery Point(s) as set out in APPENDIX B."

....

13. Breach of Termination

13.1.a) Failure by the defaulting Party to make payment of any amount due to the aggrieved Party under this Agreement, which failure continues for a

period of 30 or more days after receipt from the aggrieved Party of written notice of such non-payment.
.....”

6.It is not in dispute that the time stipulated in the earlier agreement dated 14.12.2011 could not be complied with and the amendment to the earlier agreement came into force on 27.06.2013, between the parties and the same conditions in the earlier agreement were set out in the amended agreement. It is also relevant to note that it is specifically agreed that in the event of breach of terms of the clauses, the contract will be terminated and in such event, the petitioner is liable to pay for a sum of Rs.430 million as liquidated damages and in fact every year estimated damages was calculated and set out in 'Appendix G' of the agreement. For convenience, the Appendix G of termination which reads as follows :

“APPENDIX G - TERMINATION CHARGES

The following termination charges shall be payable by APL:

Period (year of termination)	Termination Charges in Million INR
1	430
2	400
3	370
4	345
5	315
6	290
7	260
8	230
9	200
10	170
11	145
12	145
13	145
14	145
15	145

Note : The above Termination Charges are applicable for the beginning of each Contract Year and shall become applicable from the date of commencement i.e., year 1 of Contract Year and thereafter shall be applicable on a monthly pro-rata basis during any subsequent years. Prior to Commencement Date, the Termination Charges for year -1 of the Contract Year shall be applicable.”

7. It is not in dispute that the breach of contract has been committed by the petitioner. The nature of the agreement clearly stipulates that in the event of breach committed by the petitioner they are liable to pay the liquidated damages as set out in the Appendix G stated above. From the above, the contract would make it clear that the petitioner breached the terms and conditions and therefore, they are liable to pay a sum of Rs.430 million as damages. These facts could not be disputed by the petitioner. However, the dispute with regard to termination of contract has been referred to the three members arbitrator tribunal. Though all the three members have unanimously held that the petitioner has committed breach of terms of the conditions of the contract and the termination of the contract by the respondent is valid, however, the minority member namely Ms.Chitra Narayan has rejected the claim in respect of the liquidated damages mainly on the ground that there is no evidence adduced to prove the actual damages. Whereas the other two arbitrators, taking note of the specific covenant in the agreement held that the petitioner is bound to pay the liquidated damages. The majority of the arbitrators also took note of the correspondence between the petitioner and the respondent, particularly E.mail dated

22.12.2014, wherein the petitioner has admitted to pay the liquidated damages and agreed to pay the contract and to settle the matter and proposed to pay Rs.36 crores. Taking note of this aspect the majority of the arbitrators have took the view. In this regard, it is useful to refer to Section 74 of Indian Contract Act, which reads as follows :

“74. Compensation for breach of contract where penalty stipulated for.-1*[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.”

8. It is very clear that the parties to the contract agreed to pay the damages in the event of breach. When there is a breach of obligations to be performed, the other party is entitled for payment of liquidated damages as per the contract and in consonance with Section 74 clause 1 of Indian Contract Act, which makes it clear that any such compensation awarded, if it is reasonable can be permitted and only stipulation is that the compensation should not exceed the agreed amount in the contract. In this regard reference was made to

the judgment of the Hon'ble Supreme Court *reported in (1964) 1 SCR 515*, by the counsel for the petitioner, which deals with the forfeiture of earnest money. Therefore, the ratio laid down in the above decision will not be applicable to this case. On the contrary, in the case of *Oil & Natural Gas Corporation Ltd., Vs. Saw Pipes Ltd., reported in (2003) 5 SCC 705*, the Hon'ble Supreme Court has held as follows :

“ In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In such a situation, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that the party who has committed breach of the contract is not liable to pay compensation. It would be against the specific provisions of Sections 73 and 74 of the Indian Contract Act. There was nothing on record that compensation contemplated by the parties was in any way unreasonable. It has been specifically mentioned that it was an agreed genuine pre-estimate of damages duly agreed by the parties. It was also mentioned that the liquidated damages are not by way of penalty. It was also provided in the contract that such damages are to be recovered by the purchaser from the bills for payment of the cost of material submitted by

the contractor. No evidence is led by the claimant to establish that the stipulated condition was by way of penalty or the compensation contemplated was, in any way, unreasonable. There was no reason for the Tribunal not to rely upon the clear and unambiguous terms of agreement stipulating pre-estimate damages because of delay in supply of goods. Further, while extending the time for delivery of the goods, the respondent was informed that it would be required to pay stipulated damages.”

9. The above judgment makes it clear that when the contract is difficult to estimate the loss and parties have pre-estimated damages, out of their understanding, such amount agreed certainly has to be awarded towards compensation. Following the above judgment the Hon'ble Supreme Court in *Kailash Nath Associates V. Delhi Development Authority and anr.*, reported in (2015) 4 SCC 136, **paragraph 43** which reads as follows :

“ 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 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 damages 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.”

10. The Hon'ble Supreme Court clearly held only the reasonable compensation can be awarded not exceeding the amount so stated. Further, it also held prove the actual damage or loss is difficult or impossible to prove that the liquidated amount named in the contract and it is genuine or pre-estimated damages agreed between the parties can be awarded. Therefore, from the above judgment it makes clear that the pre-estimated damages are reasonable and agreement between the parties indicate such pre-estimated damages agrees between the parties taking into consideration of nature of contract. It is to be noted that the contract itself is with regard to the supply of Hydrogen Peroxide for a period of 15 years but, it was admittedly terminated within a year. If the contract is continued for a period of 15 years the manner of profit or loss can be ascertained with certainty. Since the contract for the sale of hydrogen is highly

technical in nature and profit or loss cannot be estimated certainty, only for this reason the parties have entered into pre-estimated damages in the contract itself knowing the difficulties involved in the type of business. It is further to be noted that to show the damages after making of amount, the learned arbitrator also rightly taken note of the subsequent correspondence namely E.mail dated 22.12.2014 concluded that it is not the case of the petitioner that pre-estimated damages named in the contract is unreasonable and arrived without any meeting. It is to be noted that based on the various correspondence exchanged between the petitioner and respondent, the pre-estimated damages have been arrived at and the petitioner himself agreed to settle the amount of Rs.43 crores. The above fact makes it clear that pre-estimated damages arrived in the contract with clear understanding of the parties. Taking into understanding of the nature of the business and the contract entered at the earlier stage, it cannot be stated that only upon proof of such damages it could be arrived. When the contract itself is entered after meeting of the parties with clear understanding as to the nature of business, I am of the view that the contention of the learned counsel that without proving actual damage such pre-estimates amount cannot be

ordered cannot be countenanced. The majority view of the arbitrators considered the claim of the claimant and passed detailed order. Hence, the learned arbitrators on appreciation of the terms of the contract between the parties have arrived at such a conclusion and I am of the view that the same cannot be interfered with under Section 34 of the Arbitration and Conciliation Act, 1996. Section 34 of the Act clearly stipulates that unless the decision of the arbitrators is based on irrelevant material particulars or against settled proposition of law, it cannot be interfered with. Therefore, I do not find any illegality or violation of public policy in the award passed by the majority of the arbitrators. Hence, this Original Petition is dismissed. No costs.

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18.06.2019

Index: Yes/No

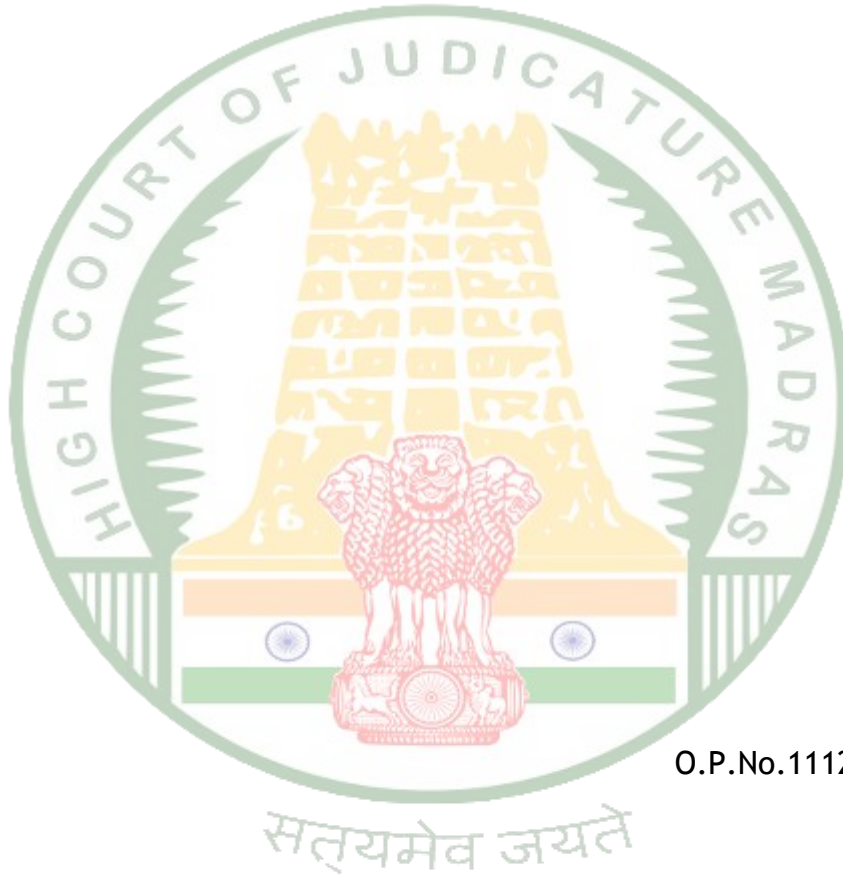
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