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

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Date of Decision: 19.07.2019

+ **O.M.P. (COMM) 114/2019, I.A.Nos.4114/2019 & 4116/2019**

UNION OF INDIA

..... Petitioner

Through : Mr. Jaswinder Singh, Adv.

versus

M/S MKU PVT. LTD.

..... Respondent

Through : Mr. Abhinav Vasisht, Sr. Adv. with
Ms. Geeta Sharma, Ms. Priya Singh
and Ms. Akshita Sachdeva, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL)

I.A.No.4116/2019

1. This is an application seeking condonation of delay in re-filing the petition. According to the petitioner, there is a delay of 14 days.
2. Notice in this application was issued on 19.03.2019. A reply to the application has been filed. Even though objections are taken to condonation of delay, Mr. Abhinav Vasisht, learned senior counsel for the respondent says that since the period of delay is not much and because the court wishes to proceed on the merits of the matter, he has no objection if the court were to condone the delay.
3. Accordingly, delay in re-filing the petition is condoned.
4. The application is disposed of.

O.M.P. (COMM) 114/2019 & I.A.No.4114/2019

Prefatory facts:

5. The main petition which is preferred under Section 34 of the Arbitration and Conciliation Act, 1996 (in short “the 1996 Act”) is directed against the award dated 25.10.2018. The interlocutory application i.e. I.A. No. 4114/2019 has been filed to seek a stay on the operation of the impugned award.

6. Mr. Jaswinder Singh, Advocate, who appears for the petitioner, has argued the matter for considerable period of time but for the reasons given hereafter has not been able to persuade me to interdict the impugned award.

7. I may also record that Mr. Vasisht, learned senior counsel, who appears for the respondent, was also heard at some length in support of the award.

8. Broadly, facts obtaining in the case which are necessary to adjudicate upon the objection raised in the petition are as follows.

8.1. The petitioner had floated a tender on 03.07.2009 for procuring 59,000 bullet proof jackets. The respondent was one of the bidders. The respondent was declared successful in the bidding process and accordingly the bid submitted by the respondent was accepted by the petitioner on 27.04.2010.

8.2 The contract had tenure of 8 months, commencing from 27.04.2010. It is not in dispute that the date of delivery of the bullet proof jackets was revised. In the first instance, the revision took place on 08.01.2011. Via this revision, out of 59,000 bullet proof jackets, the respondent was called upon to supply 29,000 bullet proof jackets by 30.11.2010 and the balance 30,000 bullet proof jackets by 31.03.2011.

9. To be noted, (and this is a fact which is not disputed by Mr. Jaswinder Singh), this revision in the timeframe, as indicated above, was granted without adverting to the provision for liquidated damages which finds mention in Clause 19(e) of contract obtaining between the parties.

10. The second revision of timeframe took place on 09.04.2011 when the timeline qua the entire quantity i.e. 59,000 bullet proof jackets was shifted to 30.06.2011. The record shows (and this is again not disputed by counsel for the petitioner) that the respondent delivered the entire consignment comprising 59,000 bullet proof jackets by 30.06.2011.

11. Furthermore, there is no dispute that there were no quality issues with regard to the supplies finally received, though there were some in the beginning, according to Mr. Singh, which were ultimately cured.

12. It may be relevant to note that while shifting the timeline from 31.03.2011 to 30.06.2011 *vide* communication dated 09.04.2011, the petitioner had reserved the right to levy the liquidated damages.

13. It appears that the respondent thereafter had approached the petitioner to regularise the period of delay. The petitioner, concededly, acceded to the request made by the respondent and issued a communication in that behalf on 19.03.2014.

13.1 This communication was issued under the signature of an officer of the rank of DIG (Provisioning), CRPF who was also the officer who had executed the contract in the first instance on behalf of the petitioner. The relevant portion of this communication has been extracted in the award and forms one of the planks based on which claim No.2, lodged by the respondent has been allowed by the learned arbitrator.

13.2 For the sake of convenience, the same is extracted hereafter:

FOR	<i>Existing Entry</i>
READ	<i>Delivery period of subject store is hereby <u>regularized up to 30/06/2011</u> i.e. the last lot of subject store was received on 30/06/2011, subject to conditions that no price/taxes/ED increased on any account whatsoever which take place after original delivery date of the Acceptance of Tender will be allowed and also subject to condition that recovery endorsed if any on inspection notes copies 2 and 5 will be recovered by the paying authority.</i>

3. *All other terms and conditions of the contract shall remain unaltered.*

5. *Please acknowledge receipt."*

14. It appears that despite issuance of the communication dated 19.03.2014, the petitioner had retained a sum of Rs.5,01,60,825/- towards liquidated damages.

15. The respondent was aggrieved by retention of the said amount by the petitioner. Furthermore, the respondent had other claims against the petitioner which I need not touch upon as the instant petition seeks to assail the award only *qua* claim No.2. The fact that this is so emerges upon perusal of the averments made in the following paragraphs of the petition :

"1. That The Petitioner Union of India through its Competent Officer is partly aggrieved by the award dated 25.10.2018 received on 31.10.2018 passed by Ld. Sole Arbitrator with respect to the dispute arising out of supply of 59000 jackets vide A/T dated 27.04.2010. The impugned award in so far grants Claim No.2 in favour of the Petitioner is legally unsustainable and apart from being violative of public policy of India is also in breach of the fundamental policy of Indian Law.

2. That the brief facts leading to the filing of the present petition are as under:-

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xxx

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(ix) That the Ld. Arbitrator after having heard the parties rejected claim no.1 but allowed claim no. 2 in favour of the respondent which was pertaining to the imposition of liquidated damages. The Ld. Arbitrator directed the release of a sum of Rs.501,60,825/- which was withheld by the petitioner to release in favour of the respondent. It is this portion of the award-which is under challenge in the present petition."

(The emphasis is mine)

15.1 Besides this, even the perusal of the grounds incorporated in the petition reveals that the challenge is made only qua the amount awarded in favour of the respondent by the learned arbitrator vis-a-vis claim No.2.

16. That being said, somehow in the prayer clause, the petitioner seeks a direction for setting aside the impugned award with respect to claim Nos.2 and 3.

16.1 To my mind, this is an aberration as the relief does not correspond with the averments made in the petition. Therefore, my examination of the impugned award is confined to claim no.2. I may also add that even if I had taken a more indulgent view of the matter and allowed the petitioner to amend the petition, in my opinion, the petitioner could not have cured the defect as the period of limitation for filing of Section 34 petition has long expired.

17. Be that as it may, in allowing Claim No.2, the learned arbitrator has adopted the following *reason d'etre*:

- (i) The delay with regard to the performance of contract is attributable to the petitioner.
- (ii) The delay has been regularized by the petitioner via the communication dated 19.03.2014; an aspect which I have noticed

hereinabove.

- (iii) No show cause notice was served on the respondent before imposition of liquidated damages.
- (iv) Even if the communication dated 01.04.2011 was treated as show cause notice, it was not adverted to in the petitioner's communication dated 26.06.2012.
- (v) The petitioner has failed to prove that it incurred any loss due to delay in supplies which had to be made by the respondent.
- (vi) Between the expiry of the initial tenure of the contract and the first extension, there was a hiatus and, therefore, the contract had died its "own death" on 28.12.2010.

Submissions of the Counsel:

18. Mr. Jaswinder Singh, learned counsel for the petitioner, has vociferously argued that the learned arbitrator has completely erred in observing that the contract died its own death after 28.12.2010 and that the contract was lifeless, so to say, between that date and 07.01.2011.

19. It is submitted by Mr. Jaswinder Singh that the learned arbitrator failed to recognise the fact that when the second extension was granted on 09.04.2011, it was made clear by the petitioner that the extension was subject to the right of the petitioner to levy liquidated damages.

20. This apart, Mr. Jaswinder Singh contended that the petitioner was entitled to levy liquidated damages under Clause 19(e) of the contract at the rate of 2% of the contract value and that the learned arbitrator could have taken the amount so calculated as the minimum amount leviable as liquidated damages and based on the evidence made available to him, could have sustained the retention of money by the respondent upto ceiling arrived

at in the manner indicated above.

21. On the other hand, Mr. Vasisht, learned senior counsel says that there are several reasons as to why this court should affirm the award.

21.1 First, that there is in fact no delay on account of the reason that the petitioner *vide* communication dated 09.04.2014 has regularized the delay, if any, caused by the respondent.

21.2 Second, there is a finding of fact returned by the learned arbitrator that the delay, if at all, is attributable to the petitioner.

21.3 Third, there is no averment in the Statement of Defence (in short “SOD”) that the petitioner has suffered any loss and that loss could not be proved in the facts and circumstances of the case.

21.4 Fourth, while exercising jurisdiction under Section 34 of the 1996 Act, this court cannot reappreciate the evidence.

Reasons:

22. I have heard learned counsel for the parties and perused the record.

22.1 According to me, the facts which I have stated above are not in dispute. There is no dispute that the petitioner had accorded two extensions. The first extension was granted on 08.01.2011 while the second extension was given on 09.04.2011. It is also not in dispute that while giving the second extension, the petitioner had reserved the right to levy liquidated damages.

22.2 What has also come through, and *qua* which Mr. Jaswinder Singh has not raised any cavil, is that the respondent delivered the entire quantity of bullet proof jackets by 30.06.2011. The petitioner’s counsel has also accepted the fact, as noticed by me, that the supplies made by the respondent met the specifications stipulated by the petitioner.

23. Therefore, all that this court is required to examine is as to whether or not, in the given facts, the petitioner was entitled to retain money towards liquidated damages. The learned arbitrator via the impugned award has concluded that the retention of money towards liquidated damages was not justified.

24. As noted above, the learned arbitrator has based his conclusion on several limbs. While I am not in agreement with each and every limb of his reasoning, in substance, the following findings of fact cannot be interfered with by me while exercising jurisdiction under Section 34 of the 1996 Act.

25.1 The first finding of fact returned by the learned arbitrator is that the delay is attributable to the petitioner.

25.2 The second finding of fact, returned by the learned arbitrator, is that the petitioner regularized the period of delivery till 30.06.2011. Pertinently, in that letter, there is no caveat entered by the petitioner that it reserves its right to levy the liquidated damages.

26. Given the fact that the respondent, admittedly, had made supplies by 30.06.2011, the petitioner, to my mind, thereafter could not have retained any money towards liquidated damages; assuming that it could be a judge in its own case *qua* which I have serious doubts.

27. That being said, I am, in a sense, in agreement with Mr. Jaswinder Singh's argument that the one limb of the reasoning is clearly suspect, which is, that the contract died its own death on 28.12.2010.

27.1 Mr. Jaswinder Singh is right that if the contract was dead, then the extensions, based on which the supplies were made by the respondent could not have been regularized. In my opinion, this part of the reasoning contained in the award can be excised and the award, to my mind, can be

sustained based on other findings of fact which are referred to hereinabove.

28. In my opinion, the petitioner perhaps could have argued that it was not a case where damages can be quantified. The goods in issue were bullet proof jackets.

28.1 However, the petitioner does not seem to have set up this case. There is no such averment in the SOD, at least none has been shown to me by learned counsel for the petitioner. There is no assertion in the pleadings by the petitioner that on account of delay in the supplies made by the respondent, it had suffered an injury and that injury had resulted in a loss. The petitioner, in my opinion, was required to make such an assertion and thereafter go on to plead that given the nature of the goods in issue, loss could not have been quantified. The principles of law as applicable to levy of liquidated damages has been reiterated several times over in various judgments. The earliest judgment in India is the Privy Council judgment in **Bhai Panna Singh and others v. Bhai Arjun Singh and Ors.**, A.I.R. 1929 P.C. 179¹. The latest summation of the principles enunciated in earlier judgment is made in **Kailash Nath Associates v. Delhi Development Authority & Anr.**, JT 2015 (1) SC 164. Besides this, I may also refer to a judgment of this court in **Indian Oil Corporation v. Lloyds Steel Industries Ltd.**, 2007 SCC OnLine Del 1169. Since on facts it is closer to the instant case, let me extract parts of the judgment to drive home the point.

“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

¹ “The effect of the Indian Contract Act of 1872, sec. 74, is to disentitle the Plaintiffs to recover simplicitor the sum of Rs. 10,000, whether as penalty or liquidated damages. The Plaintiffs must prove the damages they have suffered. ...”

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 therefrom 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 in spite 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.*, AIR 1982 Ker 281]. 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 visual 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."

29. I may also indicate that since the instant action under Section 34 of the 1996 Act has been preferred after the amendment made to the 1996 Act via the Arbitration and Conciliation (Amendment) Act, 2015, the scope of the expression "patent illegality" has been substantially narrowed down.

30. With the insertion of Subsection (2A) in Section 34, the award can be challenged, *inter alia*, on the ground of patent illegality appearing on the face of the award provided it does not relate to either erroneous application of law or reappreciation of evidence. Therefore, according to me, at the highest, all that the petitioner could contend was that there was an erroneous application of law which according to me is not wholly correct as there are facets in the award, to which I made a reference above, based on which the learned arbitrator's ultimate conclusion can be sustained.

31. Thus, for the foregoing reasons, I find no merit in the petition. The petition is accordingly dismissed.

RAJIV SHAKDHER, J

JULY 19, 2019

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