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

Date of Decision: 08.01.2019

+ **FAO(OS) (COMM) 228/2018 & CM APPL. 42082/2018**

JAGTAR SINGH Appellant

Through: Mr.Arun Batta, Advocate.

versus

NORTH DELHI MUNICIPAL CORPORATION Respondent

Through: Ms.Supreet Bimbra, Advocate.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

G.S. SISTANI, J. (ORAL)

1. The appellant is aggrieved by the order dated 30.07.2018 by which the objections to the award filed under Section 34 of the Arbitration and Conciliation Act, 1996 have been rejected. Subject matter of dispute between the parties was in relation to 'Agreement relating to Ordinary/Road Side/Car/Scooter/Bus/Tempo parking site at Court Market, Jama Masjid' dated 05.01.2011.
2. The appellant herein is primarily aggrieved by the award rendered by the Arbitrator, by which, for the period the appellant overstayed, damages at double the monthly license fee during the period of

unauthorized occupation have been awarded. This was the only ground that was urged by the appellant at the time of hearing of the objections to the award and the same has been rejected by the learned Single Judge.

3. We may note that the Arbitrator in the impugned award has allowed remission of 50% of the license fee payable by the appellant to the respondent for the first and second year of the contract. However, since the appellant had failed to vacate the site, the Arbitrator has awarded misuse charge/damages at double the monthly license fee after taking into consideration the remission of 50% as awarded.
4. Mr.Arun Batta, learned counsel for the appellant submits that the appellant has continuously suffered losses after the parking site was handed over as initially the area allotted by the respondent was 4800 square metre for use in parking space but only 1349 square metre was made available by the respondent to the appellant.
5. Mr.Batta, learned counsel further contends that the respondent had every opportunity and occasion to assess the damages suffered, if any as same very site was re-tendered atleast twice at a price lesser than that awarded to the appellant herein, and which documents were placed on record before the Arbitrator. It is, thus, contended that the reliance on the judgment in the case of *Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.*, 2003 (5) SCC 705, relied upon by the learned Single Judge would be misplaced. He further submits that the respondent had sought double the rent by way of penalty and, thus, the judgment in the case of *Saw Pipes* (supra) would not enure to the benefit of the respondent in the facts of the present case. He relies

on paras 39, 42, 68 and 69 of the said judgment to support his submissions.

6. Learned counsel appearing on behalf of the respondent submits that there is no infirmity either in the award rendered by the Arbitrator or in the judgment passed by the learned Single Judge, by which the objections to the award have been dismissed. Learned counsel further submits that even after the contract came to an end, the appellant continued to occupy the parking space and thereafter filed a suit in which an interim order was passed and due to which the parking site was not handed over nor could be readvertised. She further submits that reading of the relevant clause itself would show that the amount so fixed and agreed upon between the parties were in the form of liquidated pre-estimated damages and not penalty. She submits that the appellant cannot read or interpret the terms of the contract in a manner other than the way it has been framed. Learned counsel further submits that the parties entered into an agreement with open eyes and damages so quantified are not unreasonable and, thus, award and the judgment does not call for any interference from this court.
7. We have heard learned counsel for the parties, examined the award as also the judgment of the learned Single Judge, impugned before us.
8. Learned counsel for appellant has urged before us that the amount of misuse charges/damages so fixed were, in fact, in the form of penalty and, thus, the judgment of *Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.*, would not come to the aid and rescue of the respondent.

9. Clause-1 of the Agreement which is relevant for the purpose of appreciating the submission of the learned counsel for the parties is re-produced below:

“1. Duration of contract:

The contract will be duration of two years with effect from the date of handing over the site to the licensee but the contract shall be renewed after the expiry or one year with the enhancement of monthly license fee by 10% (ten percent) for the next year, subject to the satisfactory completion of period of first year of contract. However, if the allottee continues to operate the site after expiry of contract, he shall be liable to pay to the corporation the misuse/damages charges @ double the monthly license fee for such period of unauthorised occupation.”

10. A mere reading of this clause would leave no room for doubt that the parties were *ad-idem* and had agreed that in case the allottee continues to operate at the site after expiry of the contract, he shall be liable to pay the misuse charges/damages at double the monthly license fee for such period of unauthorized occupation. In view of the specific clause, the submission that amount was in the form of penalty cannot be accepted.
11. Learned counsel for the appellant relied upon para 69 in the case of *Saw Pipes* (supra) to submit that in the present case it was not impossible for the respondent to assess the compensation and, thus, in the absence of the respondent having proved the actual damages suffered, no damages could have been awarded.

12. In our view, learned Single Judge has considered this submission. In para 12 of the order, learned Single Judge has noted that the extended period of license would have expired on 05.01.2013. However, on the respondent asking the appellant to vacate the parking site, the appellant filed a suit praying for restraining the respondent for re-tendering the said site. On 07.02.2013, an interim order was passed in favour of the appellant herein, restraining the respondent from re-tendering the parking site and the appellant continued to retain the parking site till 06.06.2014 and eventually by an order dated 27.06.2014, the said order was vacated. Learned Single Judge in para 13 has relied on the observations made in the case of *Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.* which we re-produce below:

“64. It is apparent from the aforesaid reasoning recorded by the Arbitral Tribunal that it failed to consider Section 73 and 74 of the Contract Act and the ratio laid down in Fateh Chand case [Fateh Chand v. Balkishan Dass, (1964) 1 SCR 515 : AIR 1963 SC 1405], SCR at p. 526 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 emphasises 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....

(Emphasis Supplied)”

13. Submission of learned counsel for the appellant that since the respondent has not proved actual damages suffered, the Arbitrator could not have awarded damages, in our view is without any force. The conclusion in the case of *Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.*, in para 69 which we re-produce below:

“From the aforesaid discussions, it can be held that:-

(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same;

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of

damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequences of the breach of a contract.

(4) In some contracts, it would be impossible for the Court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, Court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.”

The present case is to be decided on the touchstone of the law laid down by the Apex Court. The parameters have been clearly laid down in the said judgment. Thus on examining the issue, raised in the present case, the court would first take into consideration, whether upon reading of the terms of the contract, the parties are entitled to damages. In the present case, terms are clearly stated in clause (I), which has been reproduced by us above. Second parameter which has to be taken into consideration is as to whether the estimate of damages/compensation is unreasonable or is it by way of penalty. In case it is not so, the party in breach has to pay the compensation. In the present case, the estimate of damages/compensation cannot be held unreasonable. The appellant not only over stayed at the site but also filed suit wherein a restraint order was passed against the

respondent for re-tendering. Thus, the restraint order not only prevented the respondent from taking the possession but also from re-tendering. The appellant is thus liable to pay the said damages.

14. We may also note that the submission made by Mr.Batta, learned counsel for appellant that the amount of license fee for re-tendering was lower than the license fee which was being paid by the appellant, has no force. This was bound to be so for the reason that the site in question was under litigation and, thus, no benefit can be given on this ground to the appellant.
15. Both parties had entered into the agreement with open eyes and had thus agreed to the terms incorporated in Clause (I). We find that the view of the Arbitrator cannot be faulted and does not require interference in an appeal filed under Section 37 of the Arbitration and Conciliation Act, the scope of which is narrow in deciding the objections against an award.
16. This court time and again in its earlier judgments, FAO (OS) (COMM.) 86/2016 titled as M/S. L.G. Electronics India Pvt. Ltd. Vs. Dinesh Kalra, FAO (OS)(COMM.) 55/2018 titled as M.L. Lakhanpal vs. Darshan Lal & Anr. and in FAO (OS)(COMM.) 201/2017 titled as ADTV Communication Pvt. Ltd. Vs. Vibha Goel & Ors., has repeatedly mapped the limited scope of intervention in an appeal under section 37 of the Act and has held as under:-

"It has been repeatedly held that while entertaining appeals under Section 37 of the Act, the Court is not actually sitting as a Court of appeal over the award of the Arbitral Tribunal and therefore, the Court would not re-

appreciate or re-assess the evidence. In the case of State Trading Corporation of India Ltd. v. Toepfer International Asia Pte. Ltd., reported at 2014 (144) DRJ 220 (DB), in para 16 it has been held as under:

16. The senior counsel for the respondent has in this regard rightly argued that the scope of appeal under Section 37 is even more restricted. It has been so held by the Division Benches of this Court in Thyssen Krupp Werkstoffe v. Steel Authority of India and Shree Vinayaka Cement Clearing Agency v. Cement Corporation of India 147 (2007) DLT 385. It is also the contention of the senior counsel for the respondent that the argument made by the appellant before the learned Single Judge and being made before this Court, that the particular clause in the contract is a contract of indemnification, was not even raised before the Arbitral Tribunal and did not form the ground in the OMP filed under Section 34 of the Act and was raised for the first time in the arguments."

17. The Apex Court in J.G. Engineers (P) Ltd. v. Union of India, reported at (2011) 5 SCC 758, demarcated the boundary while explaining the ambit of section 34(2) of the Act. The Court in the aforesaid judgment relied upon the pronouncement of ONGC Ltd. v. Saw Pipes, in paragraph 19, held as under:--

27. Interpreting the said provisions, this Court in ONGC Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705 held that a court can set aside an award Under Section 34(2)(b)(ii) of the Act, as being in conflict with the public policy of India, if it is (a) contrary to the fundamental policy of Indian law; or (b) contrary to the interests of India; or (c) contrary to

justice or morality; or (d) patently illegal. This Court explained that to hold an award to be opposed to public policy, the patent illegality should go to the very root of the matter and not a trivial illegality. It is also observed that an award could be set aside if it is so unfair and unreasonable that it shocks the conscience of the court, as then it would be opposed to public policy."

18. The Supreme Court of India has consistently held that an arbitration award should not be lightly interfered with. (See *Renusagar Power Co. Ltd. v. General Electric*, (1994) *Supp. 1 SCC*; *ONGC v. Saw Pipes*, (2003) *5 SCC 705*, *Hindustan Zinc Ltd. v. Friends Coal Carbonisation*, (2006) *4 SCC 445*; and *Associate Builders v. DDA*, (2015) *3 SCC 49*).
19. We find no merit in the appeal and the same is, accordingly, dismissed. No other ground was pressed before us.

G.S.SISTANI, J.

JYOTI SINGH, J

JANUARY 08, 2019

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