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

Reserved on: 27.2.2019

Pronounced on: 29.03.2019

+ O.M.P. (COMM) 303/2017

FIBERFILL ENGINEERS

..... Petitioner

Through Mr. Amit Gupta, Ms. Mansi Kukreja
and Ms. Vidhi Goel, Advs.

versus

INDIAN OIL CORPORATION LIMITED

..... Respondent

Through Ms. Mala Narayan and Ms. Neha
Dawar, Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.

Preface:

1. This petition is directed against the award dated 12.4.2017 passed by sole Arbitrator appointed out of a panel of names of three Arbitrators given to the petitioner by the respondent. The petition has been preferred under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter referred to as '1996 Act').

2. The petitioner before this Court is a partnership firm by the name: Fiberfill Engineers. For the sake of convenience, hereafter the petitioner will be referred to as 'FFE' while the respondent, that is, Indian Oil Corporation Limited, will be referred to as 'IOCL'. However, collectively

FFE and IOCL will be referred to as the parties unless the context requires otherwise.

3. At the very outset, I may place on record that Mr. Amit Gupta, who, appears on behalf of FFE, says that though the award had been challenged in its entirety, that is, in respect of all claims, which have been rejected by the learned Arbitrator, he is, on instructions, confining his challenge to only Claim Nos.1 and 2.

4. It may be relevant to note that the learned Arbitrator has equated the claims with issues and therefore, claim No.1 and 2 replicate issue No.1 and 2 in the impugned award. These issues, as adverted to in the award, read as follows:

***Issue 1:** Whether the claimant is entitled to a sum of Rs.22,08,528/- (Twenty Two Lakhs Eight Thousand Five Hundred and Twenty Eight only) which had been deducted from the bills of the claimant towards Price Adjustments?*

***Issue 2:** Whether the claimant is entitled to Interest, if any, on the aforesaid amount of Rs.22,08,528/- (Twenty Two Lakhs Eight Thousand Five Hundred and Twenty Eight only) and if so at what rate?"*

5. Via the impugned award, the learned Arbitrator has not only ruled against FFE, that is, the original claimant in respect of issue No.1 and 2, but also rejected its plea with respect to the remaining three substantive issues, that is, issue Nos.3 to 5. Qua these issues, the learned Arbitrator ruled that FFE was not entitled to any money towards escalation and loss of business opportunity as also compensation towards manpower retention. The sums claimed under these heads were Rs.75,50,000/-, Rs.1,50,00,000/-, and Rs.80,00,640/- respectively.

5.1 The residuary issue which was of general nature i.e. as to what reliefs, if any, FFE was entitled to, as indicated above, was also rejected.

Facts:

6. In order to appreciate the contention advanced on behalf of the parties, the following broad facts are required to be noticed.

7. FFE was awarded a contract by IOCL, on 11.1.2007, pursuant to a tender being floated in that behalf, against a bid for designing, supplying, installation, testing and commissioning of high mast signage systems of various heights and types at retail outlets in the State of Tamil Nadu and Pondicherry.

7.1 The tenure of the contract was one year, that is, till 10.1.2008.

7.2 The engagement of FFE was on the rate contract basis. The tenure of the contract was extendable, *albeit*, with mutual consent by a further period of one year. The provision for extension is made in Clause 8 of the Special Instructions to Tenderers/Contractor ('SIT').

7.3 The petitioner was required to install 105 signages pursuant to call-up orders being issued in that behalf.

7.4 In terms of Clause 9 of the SIT, the petitioner was required to complete installation of signages at the retail outlets identified therein within a period of 12 weeks of issuance of such call-up orders.

7.5 The value of the contract was pegged at Rs.4,08,19,734.42/-, inclusive of all taxes and duties.

7.6 Pertinently, under Clause 14 of the SIT, a Third Party Inspection ('TPI') was to be carried out *vis-a-vis* the high mast signage system. Notably, this inspection by the TPI could be carried out as provided in Clause 14 of SIT at every stage of the work, which included the

manufacturers' workshop as well as at the site where installation had to take place. Furthermore, the inspection was to be carried out as per the Quality Assurance Plan ('QAP').

7.7 Thus, the TPI was required to inspect the material at the vendors' workshop prior to dispatch.

7.8 Besides the aforesaid, the arrangement between the parties was that, any delay in the execution of the contract would result in price adjustment to begin with equal to 1/2% of the contract value for first week subject to maximum of 10% of the total contract value. This arrangement is captured in Clause 4.4.0.0 of the General Conditions of Contract (in short "G.C.C").

7.9 The record shows that a total of twelve (12) call-up orders were issued to FFE, out of which, according to the learned Arbitrator, work qua six (6) call-up orders was inordinately delayed and consequently, compensation in terms of Clause 4.4.0.0 of the GCC and Clause 9 of the SIT was recoverable. These six (6) call-up orders were: call-up order No.2; call-up order No.6; call-up order No.8; call-up order No.9; call-up order No.11 and call-up order No.12.

8. The record also shows that on account of delay, which was not attributable to FFE, the period for performance *vis-a-vis* call-up order No.1 and 2 was extended by 90 days.

8.1 It is also not in dispute that the tenure of the contract was extended by a further period of one year, that is, till 10.1.2009 by IOCL. This fact was communicated to FFE by IOCL vide letter dated 5.2.2008. By this time, it appears, only six (6) call-up orders were placed upon FFE covering thirty (30) sites. What is also not in dispute, is that, as a matter of fact, the tenure of the contract was extended for the second time, though there was no

provision for the same in the contract, which resulted in its tenure coming to an end on 10.1.2010.

8.2 The initial delay, to which I have made a reference above, whereby, the time frame for execution of call-up orders No.1 and 2 was extended, was on account of various reasons, which included, the delay in appointment of the TPI for the works in issue (that is, M/s Bureau Veritas), the delay in giving instructions to the supplier of high mast signages i.e. an entity by name: Bajaj Electrical Limited, and the delay in approving the QAP. I need not advert to the correspondence exchanged in this behalf between the parties and the entities referred to above as discussion qua them does not help in adjudicating on the issues at hand. Suffice it to say, the net result was that the time frame for execution of the contract was extended not once, but twice, as alluded to hereinabove by me.

8.3 IOCL, however, deducted a sum of Rs.22,08,528/- on account of delay in execution of the contract. IOCL acknowledged in its letter dated 26.7.2012 that the deduction had been made on account of liquidated damages.

8.4 FFE, being aggrieved, vide communication dated 10.10.2012 wrote to IOCL that it should release the sum of Rs.22,08,528/- adjusted from its bill(s) along with interest at the rate of 18% per annum from the date the amounts were withheld till the actual date of release. FFE followed this up with a notice of demand dated 30.9.2013 and the corrigendum dated 3.10.2013.

8.5 Invocation of the arbitration agreement obtaining between the parties was made by FFE vide its letter dated 21.1.2014.

8.6 Since there was no movement in the matter, FFE instituted a petition

under Section 11(6) of the 1996 Act, in this Court, whereupon, IOCL was called upon to submit a panel of names consisting of three Arbitrators in order to enable the appointment of a sole Arbitrator.

8.7 Upon this exercise being completed, the learned Arbitrator entered upon reference on 14.11.2014. After pleadings were completed and parties had led their evidences in the matter, the impugned award came to be passed.

Submissions of Counsel:

9. As indicated above, arguments on behalf of FFE were addressed by Mr. Amit Gupta, Advocate, while on behalf of IOCL arguments were advanced by Ms. Mala Narayan.

10. Mr. Gupta submitted that the learned Arbitrator had committed a patent illegality inasmuch as it had, in effect, awarded liquidated damages in favour of IOCL without returning a finding as to whether the time was, to begin with, essence of contract, and if so, it continued to remain of essence.

10.1 Furthermore, according to the counsel, the learned Arbitrator had not returned the findings as to whether any loss or injury had been suffered by IOCL as a result of the purported delay in the execution of six (6) out of twelve (12) call-up orders by FFE.

10.2 In this behalf, learned counsel took me through documents pertaining to call-up orders No.1, 3, 4, 5, 7 & 10 to demonstrate that in respect of these call up orders deductions had not been made. In each of these cases, according to the counsel, imposition of liquidated damages was not recommended.

10.3 In fact, in respect of call-up order No.2, learned counsel contended that even though IOCL had concluded that the delay in execution was

beyond the control of FFE, deductions had been made since the work at a place known as: Gingee, had been inordinately delayed.

10.4 In sum, it was the contention of the learned counsel that, the very fact that in respect of seven (7) out of twelve (12) call-up orders delay was not attributable to FFE, time had ceased to be of essence. Furthermore, this submission was sought to be buttressed by referring to the fact that the tenure of the contract, as noted by me above, was extended not once but twice.

10.5 Mr. Gupta emphasized the fact that the second extension of time, whereby the contract attained a total tenure of three years, was contrary to the provisions of Clause 8 of the SIT.

10.6 Besides this, Mr. Gupta submitted that there was no finding of loss or injury in the Award. This submission was sought to be dilated upon by referring to Clause 16 of the SIT wherein it is provided that the work would have to be executed in the manner that it would not hamper the functioning of the retail outlet. In other words, the submission, was that, the assertion (*albeit*, without material particulars), made by IOCL, before the learned Arbitrator that because there was delay in the execution of the contract awarded to FFE, there was impediment in the functioning of retail outlet, was not tenable in law or on facts.

10.7 Mr. Gupta submitted that in any event, though the aforesaid contention was made on behalf of IOCL that it had suffered loss and/or injury, the learned Arbitrator did not return a finding one way or another as to whether or not this position emanated from the record placed before him.

10.8 Besides this, Mr. Gupta submitted that the evidence placed before the learned Arbitrator would show that IOCL's witness had categorized the

price adjustment made qua FFE bills, as penalty.

10.9 In this behalf, my attention was drawn to paragraph 18 and 19 of the witness statement of, one, Mr. C. Ramprasad, Chief Manager (Engineering), IOCL, Tamil Nadu State Office, Chennai. Likewise, my attention was also drawn to the answer given by Mr. C. Ramprasad to Question No.27 during the course of his cross-examination. Evidently, the witness with reference to paragraph 19 of his affidavit of evidence was asked as to what was the extent of monetary damage suffered by IOCL and the calculation made in that regard. The answer of the witness to this question was, to put it pithily, that the penalty had been imposed based on the delays by the contractor (i.e. FFE) in completion of works, as per the terms and conditions of the contract.

10.10 Mr. Gupta, thus, submitted that Section 74 of the Indian Contract Act, 1872 (in short “Contract Act”) which permitted imposition of liquidated damages clearly provided that damages were in the nature of compensation and that only reasonable compensation which arises naturally on account of the breach of contract is required to be paid to the aggrieved party. According to the learned counsel, the fact that IOCL’s witness had accepted that liquidated damages were imposed without application of mind as to whether or not the amount adjusted represented reasonable compensation, the impugned action railed against the concept of damages. This action of IOCL, according to the counsel, fell in the category of a patent illegality.

11. In support of his submissions, learned counsel relied upon the following judgments:

- (i) *Arosan Enterprises Ltd. vs. Union of India & Anr.*, (1999) 9 SCC 449;
- (ii) *Hind Construction Contractors vs. State of Maharashtra*,

- (1979) 2 SCC 70;
- (iii) *M.P. Housing Board vs. Progressive Writers & Publishers*, (2009) 5 SCC 678;
- (iv) *Kailash Nath Associates vs. DDA & Anr.*, (2015) 4 SCC 136;
- (v) *Engineers India Limited vs. Tema Inida Limited*, 2016 SCC OnLine Del 86;
- (vi) *Surjit Singh Bhatia & Anr. Vs. Tej Raj Singh Goel*, 2016 SCC OnLine Del 3357.

12. On the other hand, Ms. Mala Narayan relied largely upon the award to defend IOCL's position. The fact that delay had been attributed to FFE in respect of six (6) out of twelve (12) call-up orders was sought to be emphasized by Ms. Narayan. Ms. Narayan, on being specifically queried, as to whether there was any finding in the award qua loss and/or injury suffered by IOCL took the position that while there was no such finding by the learned Arbitrator, a plea in that behalf had been made by IOCL. In this regard, Ms. Narayan relied upon the contents of paragraph 21 of the impugned award.

12.1 It was Ms. Narayan's contention that the price adjustment provision in the contract which permitted IOCL to make deductions encapsulated a genuine pre-estimate of the damages which were likely to be suffered, if there was delay in the execution of the contract by FFE. In support of this plea, Ms. Narayan relied upon the following extract from the award:

"...Thus the deductions made in the bills of the claimant, which were on account of the price adjustments for the delayed completion of works by them, being in line with Clause 4.4.0.0 of the GCC and Clause 9 of Special Instructions to

Tenderers/Contractors, were contractual and valid.

The argument of the Claimants as to that “the amount deducted by the respondent is by way of penalty and not compensation, since the Respondent makes no claim for loss or injury” is not acceptable in as much as the deductions were made by Respondents strictly in line with terms and conditions of the contract.”

12.2 This apart, Ms. Narayan submitted that it was not a part of the jurisdiction of this Court under Section 34 of 1996 Act to reappreciate the evidence. In other words, according to the counsel, the learned Arbitrator was the sole Judge of both quantity and quality of the evidence and therefore, this Court while exercising jurisdiction in a Section 34 petition should not interfere with the award merely because it would have come to a contrary view had the same evidence been placed before it.

12.3 Ms. Narayan emphasized the fact that the impugned award was a well-reasoned award and therefore, no interference was called for by this Court. She further submitted that the onus was on FFE to establish whether the price adjustment made, was in the nature of penalty or compensation and therefore, unreasonable.

13. In support of her submissions, reliance was placed by Ms. Narayan on the following judgments:

- (i) *Cmdr. S.P. Puri vs. Alankit Assignments Ltd.*, 2008 (3) ArbLR 465 (Delhi);
- (ii) *Associate Builders vs. Delhi Development Authority*, AIR 2015 SC 620;
- (iii) *M/s Arosan Enterprises Ltd. vs. Union of India and Anr.*, AIR 1999 SC 3804.

- (iv) *Construction & Design Services vs. Delhi Development Authority*, AIR 2015 SC 1282.
- (v) *Indian Oil Corporation Ltd. vs. Lloyds Steel Industries Ltd.*, 2007 SCC OnLine Del 1169
- (vi) *ONGC vs. Saw Pipes*, (2003) 5 SCC 705
- (vii) *Kailash Nath Associates vs. Delhi Development Authority*, (2015) 4 SCC 136

Analysis and Reasons:

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

15. To my mind, given the facts and circumstances obtaining in the instant case, qua price adjustment made by IOCL, which was concededly in the nature of liquidated damages, the following needs to be looked at, bearing in mind contours of the jurisdiction of this Court under Section 34 of the 1996 Act:

- (i) Whether or not time was, to begin with, the essence of contract and if so, did it continue to remain so?
- (ii) Was FFE in breach of its obligation under the contract obtaining between the parties?
- (iii) If FFE was in breach, then did it suffer any injury or loss which naturally arose in the usual course of things from such a breach or which parties knew was likely to arise from the breach when they entered into the contract?
- (iv) Was it possible to prove damages in this case?
- (v) If it was not possible to prove damages, what was the reasonable compensation that was payable by FFE subject to the upper limit as stipulated in the liquidated damage clause,

that is, Clause 4.4.0.0 of GCC?

16. In ascertaining whether time is of the essence, which is an aspect, that is covered by Section 55 of the Contract Act, ordinarily, what an adjudicator, be it Court or an Arbitrator, is to look at, is the intention of parties as emerging from the express terms of the contract, the nature and the kind of transaction, which is enveloped in the contract and the circumstances which mill around the contract.

16.1 Section 55 itself provides for three situations: (i) First, the effect of failure by a party to the contract which is obliged to do a certain thing at or before a certain time. According to the provision, it renders the contract voidable at the behest of the aggrieved party if parties intended that time should be of the essence of the contract. (ii) Second, if it is not the intention of the parties that time should be of essence, then, the contract is not voided by failure to do a thing before the specified time, but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure. (iii) Third, where the contract has lent itself being voided by the promisee on account of failure on the part of promisor to perform his promise at the time agreed and despite such a situation obtaining the promisee accepts the performance at a time other than the agreed time, then, the promisee cannot claim compensation for loss occasioned by virtue of non-performance of the promise at the agreed time. However, if at the time of acceptance of performance beyond the agreed time, a notice is given that the acceptance is without prejudice to the right to claim compensation, then, the aggrieved party would be in a position to claim compensation.

17. In the facts of the present case, clearly, in seven (7) out of twelve (12) call-up orders, delay was not attributable to FFE. Out of the seven (7) in six

(6) call-up orders, that is, call-up order Nos 1, 3, 4, 5, 7 & 10, deductions were not made. Concededly, deduction was made only in respect of remaining six (6) call-up orders, viz., call-up order No.2, 6, 8, 9, 11 & 12.

17.1 Pertinently, in respect of call-up order No.2 and call-up order No.6, though it was held that delay was not attributable to FFE, deduction was made.

17.2 That there was a fair amount of delay in executing the call-up orders qua which deductions were made by IOCL is not on dispute. However, what the learned Arbitrator was required to ascertain was the intention of parties when they entered into the contract. In other words, did the parties intend that time would be of essence. Assuming that the learned Arbitrator found that time was of the essence at the commencement of the contract, he was required to examine, since IOCL had accepted performance despite delay, whether it had put FFE to notice that acceptance would be subject to claim for compensation on account of delay.

17.3 Ms. Narayan has not been able to show me any document, which would establish this aspect of the matter. The only document, which I have been shown is an e-mail dated 15.12.2008 sent by an officer of IOCL, which reads as follows:

“...This is in continuation to our email dated 24/11/08 appended below and the progress report dated 15/12/08 furnished by M/s BVI.

We regret to note that in spite of our reminders to expedite the works in time, the progress of the works against our call up No. 7 & 8 are not satisfactory.

Please note that delay in completion of the works warrants "Price adjustment" as per the terms and conditions of the contract.

Hence you may review the attached progress report and take

suitable action to avoid further delay in completion of the works already entrusted to you...”

(emphasis is mine)

17.4 The record shows that by this time only first eight (8) call-up orders had been issued to FFE. The 9th, 11th and 12th call-up orders qua which deductions were made and delay was attributable to FFE were issued on 19.12.2008, 1.4.2009 and 19.8.2009. All call-up orders which were issued prior to 15.12.2008, qua which deductions were made, that is, call-up order Nos.2, 6 and 8, no such caveat was entered by IOCL. In fact, as noticed above, in respect of call-up order nos. 2 and 6, deductions were made, despite extension being given for the reason that the delay was not attributable to FFE.

17.5 As noted above, the tenure of the contract was extended twice. In the first instance, the tenure of the contract was extended till 10.1.2009 and, thereafter, till 10.1.2010, which was not even provided for, under the contract obtaining between the parties.

17.6 In the cross examination, IOCL's witness, Mr. C. Ramprasad, with respect to the tenure of the contract being extended till 10.1.2010 had stated the following:

“...Q3: What was the period for which the present contract was awarded?

A3: It was for l(one) year. VOL This was a rate-contract for one year extendable by mutual consent later.

Q.4:For how much period could the contract be extended?

A4: It could be extended till the entire value of the contract was exhausted on mutually agreed terms.

xxx

xxx

xxx

Q.6: So, you agree with me that there is no clause in the agreement permitting extension till the value of the contract is exhausted?

A6: Yes.

Q.7: Did the IOCL place all the call-up orders within one year of the award of the contract?

A7: No.

Q.8: Did the IOCL place all the call-up orders within two years of the award of the contract?

A8: No, the last call-up order was placed on 19.08.2009.

xxx xxx xxx

Q.21: Is it correct that the time period for execution of works as per the call-up orders was extended by the IOCL for the reasons that delay was beyond the control of the contractor?

A.21: No, the time period for execution of works was extended only in call-up order Nos.1,2,3,4,5&6 where the delay was not attributable to the contractor. Other call-up orders from nos. 7-12 were not extended as the delays were fully attributable to the contractor.

Q.22: Do you accept that there was exchange of correspondence between the contractor and IOCL in relation to the location of Retail Outlet at Gingee?

A.22: Yes.

Q.23: Is it correct that the 11th and 12th call-up orders were placed after the expiry of 2 years from 11.01.2007?

A23: Yes. VOL. These call-up orders were placed after contract period was extended with mutual consent.

Q.24: Did the IOCL send any notice to the contractor for cancellation of the contract alleging delay in execution of the works?

A.24: I don't have any such document available with me at present as I am not carrying entire record. However, we normally send letters in case of inordinate delays.

Q.25: Why were all the call-up orders not placed in the 1st year of the award of the contract, as per the original time period specified?

A.25: These call-up orders are placed, based on the approvals accorded from time to time.

Q.26: Does the contract anywhere provide for extension beyond two years of the award of the contract?

A.26: I can't tell at present."

17.7 Having regard to the testimony of IOCL's witness, it appears that even if time was of the essence at the time when the contract was entered into between the parties, it did not remain an operative condition during the tenure of the contract and beyond.

17.8 That being said, since I am exercising jurisdiction under Section 34 of the 1996, it may not fall within the ambit of my powers to render a contrary finding as it may amount to, perhaps, reappreciation of the evidence.

17.9 Therefore, FFE may have to live with the fact that it cannot have the Court to overrule the award on the ground that time was not of the essence, despite the fact that time did not remain the operative condition during the execution of works and that no notice was issued, (at least, in respect of some of the call-up orders to which I have made reference above), to effect, that the performance was being accepted subject to the right to impose the liquidated damages.

18. This, then, brings me to the other aspect, which is, that did FFE breach its obligation under the contract?

18.1 Clearly, the finding of fact against FFE is that there was delay in execution of at least six (6) out of the twelve (12) call-up orders raised on it, and therefore, it cannot be said that FFE was not in breach.

18.2 On this score, once again, no interference can be made under Section 34 of the 1996 Act.

19. However, the other aspect, which is, that the learned Arbitrator has not recorded a finding that there was loss and injury, is an aspect, which

requires close examination.

19.1 As alluded to hereinabove, Ms. Narayan, candidly, admitted that there was no such finding in the Award. It is Ms. Narayan's contention, though, that a plea was made on behalf of IOCL that the delay in the execution of call-up orders had caused inconvenience to customers and, consequently, sufferance of damages. For this purpose, my attention was drawn to the contentions advanced on behalf of IOCL, which are recorded in paragraph 21 in the Award, under the sub head:- "Arguments advanced by the Respondent"

"21. That the claim for compensation made by the Claimant on the ground of delay of work, loss of earning, overheads on account of manpower, over stay etc are all totally not maintainable as the Claimant was responsible for the delays caused in executing the call up orders and furthermore had enjoyed the benefit of extension of time granted to him to complete the work and also extension of time to conclude the contract. Clause 31 of the Special Instructions states that "No claims on account of the above (delays in running locations due to operational reasons) and any other reason whatsoever shall be entertained by the corporation and work shall be completed by the contractor within the stipulated period considering the above conditions also. The Corporation shall not pay any compensation whatsoever for idling of labour/equipment. It is also submitted that in fact it is the Respondent who has suffered losses/damages on account of the said delays caused by the Claimant as the Retail Outlets had to be dug up and certain portions where the Claimant was executing the said works had to be cordoned off and were not usable leading to inconvenience to customers and consequently losses and damages suffered by the Respondent."

19.2 What follows from the aforesaid stance taken by Ms. Narayanan on behalf of IOCL is that the learned Arbitrator has, concededly, not ruled on whether the inconvenience caused to the customers resulted in loss and/or damage to IOCL. No material, whatsoever, was placed on record, which

would indicate, in the very least, that the delay in execution of work involving installation of high mast signage systems at retail outlets had led to such inconvenience which caused loss and/or damage to IOCL. The learned Arbitrator jumped, to my mind, a crucial stage in ascertaining the damages. The damages recovered by IOCL via price adjustments was sustained simply on the ground that since deductions towards price adjustments were made on account of delayed completion of works, in line, with Clause 4.4.0.0 of GCC and Clause 9 of SIT, the same was valid.

19.3 Disconcertingly, this was also the observation of the learned Arbitrator with regard to the assertion of Mr. Gupta (which is the other issues which I am required to examine) that the price adjustment was in the nature of penalty. The learned Arbitrator held that the price adjustments could not be classified as a penalty as deductions were made in terms of the aforementioned clause of GCC and SIT.

19.4 As noted hereinabove, Ms. Narayan has placed much emphasis upon these observations of the learned Arbitrator.

19.5 To my mind, the learned Arbitrator has committed a patent illegality in not returning a finding on the issue whether the delay in the execution of the contract by FFE caused loss and injury to IOCL. The learned Arbitrator, to my mind, ought to have also recorded that while there was loss and/or injury, it was not possible to prove the same and therefore, the amount deducted towards price adjustment was a reasonable compensation in his view, qua such loss and/or injury. None of these findings are found in the impugned award. These findings are crucial if IOCL's stand *vis-a-vis* price adjustment against bills of FFE is to be sustained. The principles adverted to above have been crystalized and reiterated by the Supreme Court in *Kailash*

Nath Associates vs. DDA, (2015) 4 SCC 136, after considering a plethora of judgments on the issue. The following observations being apposite are culled out hereafter:

“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 damage 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.

43.7. Section 74 will apply to cases of forfeiture of earnest

money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.”

(emphasis is mine)

19.6 I may also advert to the judgment of a Single Judge of this Court rendered by Hon’ble Mr. Justice A.K. Sikri (as he then was) in *India Oil Corporation vs. Lloyds Steel Industries Ltd.*, 2007 SCC OnLine Del 1169, wherein, the Court was required to examine the validity of an award via which IOCL’s stand to impose liquidated damage was repelled by the Arbitrator.

19.7 IOCL had challenged the award by way of a petition filed under Section 34 of the 1996 Act. This Court, *inter alia*, on the ground that the petitioner had not suffered a loss despite delay on the part of the contractor as found by the learned Arbitrator, sustained the award. In other words, the plea of IOCL that delay simplicitor in the execution of the contract would allow for imposition of damages was repelled both by the Arbitrator and this Court. The liquidated damages clause in that case is similar to the clause found in the instant case. The relevant observations made by the Court in this behalf are extracted hereafter:

“47. Insofar as imposition of liquidated damages is concerned, the discussion is predicated on the issue as to whether any loss is suffered by the petitioner or not. Learned Counsel for the petitioner does not dispute that the construction of terminal at Jodhpur was to be treated as integral part of the entire project, i.e. pipeline project for transferring petroleum products from Kandla to Bhatinda. He also could not dispute that the pipeline had not reached Jodhpur by the original date stipulated for completion of terminal at Jodhpur or extended date. It also could not be disputed that terminal at Jodhpur had

been constructed and commissioned by the respondent much before the pipeline reached Jodhpur. In fact, because of delay in the pipeline reaching Jodhpur terminal, this terminal was put to commercial use in August, 1996, whereas the terminal at Jodhpur was commissioned by 31.3.1996. Therefore, because of delay on the part of the respondent, the petitioner had not suffered any loss.

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49. The learned arbitrator, thus, opined that damages could not be claimed unless the loss was proved and, therefore, the petitioner was not justified in imposing the liquidated damages.

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51. Notwithstanding the above, the petitioner still wants damages to be recovered from the respondent on the specious plea that liquidated damages mentioned in the contract are pre-determined damages and, therefore, in view of provisions of Section 74 of the Indian Contract Act, the petitioner was entitled to these damages and it was necessary for the petitioner to prove these damages. The legal position, as explained by the Supreme Court in ONGC v. Saw Pipes (supra), which has already explained above, is not in doubt. However, it is only when there is a loss suffered and once that is proved, it is not for the arbitrator or the Court to examine the actual extent of the loss suffered once there is a pre-estimation thereof. Moreover, the compensation, as stipulated in the contract, has to be reasonable. In a particular case where the defaulting party is able to demonstrate that delay/default has not resulted in any loss being suffered by the other party, then that party cannot claim the damages only because in the contract there is a stipulation regarding liquidated damages. The Supreme Court in ONGC v. Saw Pipes (supra) referred to its earlier judgment in the case of Fateh Chand (supra) and Maula Bux (supra).

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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 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."

(emphasis is mine)

19.8 In the facts of this case, the evidence on record shows that it was conceded by IOCL's witness that the amounts which were deducted by way of price adjustment were in fact in the nature of penalty. This aspect emerges not only from a bare reading of paragraphs 18 and 19 of the affidavit of evidence of IOCL's witness Mr. C. Ramprasad but also upon perusal of the answer given by him to question No.27 during the course of his cross-examination. For the sake of convenience, that part of his cross-

examination is extracted hereafter:

“Q27: With reference to para 19 of your Affidavit of Evidence, please indicate what is the extent of monetary damage suffered as claimed by you; and where is the calculation of the same?”

A27: The penalty has been imposed based on the delays by the contractor in completion of works as per the terms and conditions of the contract.”

19.9 Clearly, learned Arbitrator has committed a patent illegality in not only ignoring completely the relevant material, but also in awarding liquidated damages by way of price adjustment without recording a finding as to whether or not IOCL had suffered loss and/or injury.

19.10 In *Associate Builders vs. Delhi Development Authority*, AIR 2015 SC 620, the Supreme Court has held that an award can be interfered with when such a patent illegality is committed by an Arbitrator. The relevant observations made in this behalf are extracted hereafter:

“31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(i) a finding is based on no evidence, or

(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

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42. In the 1996 Act, this principle is substituted by the “patent illegality” principle which, in turn, contains three subheads:

42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:

“28.Rules applicable to substance of dispute.—(1) Where the place of arbitration is situated in India—

(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;”

(emphasis is mine)

20. Before I conclude, I must briefly touch upon the judgments cited by Ms. Narayan in support of IOCL’s case. First in line is the judgment rendered in ***Construction and Design Services*** (in short “CDS”) case. Ms. Narayan had laid great emphasis on this judgment to support her contention that when parties provide for liquidated damages in the contract obtaining between them, then, damages need not be proved. To my mind, this proposition is not completely correct as it misses the principles enunciated by the Supreme Court in several decisions, including in the matter of ***Kailash Nath Associates***.

20.1 Insofar as the judgment in the matter of CDS is concerned, the same has to be understood in the facts obtaining in that case. This was the case where the DDA had awarded a contract to CDS for constructing a sewerage pumping station. The contract awarded had to be terminated on account of extremely slow pace of its execution by CDS. DDA after terminating the contract proceeded to levy penalty via a consequential order. Since, penalty imposed was not paid, a suit was filed by DDA. In view of the fact that CDS chose not to appear before the trial court, it was proceeded *ex parte*. The suit was, however, dismissed by a single Judge of this Court. Upon appeal being preferred by the DDA, the judgment rendered by the learned

Single Judge was reversed. Pertinently, even before the Appellate Court, CDS was not represented. However, faced with the prospect of having to pay the damages imposed by DDA, CDS preferred an appeal before the Supreme Court. The Supreme Court allowed the appeal, *albeit* partially, and consequently, reduced the damages to half of the amount sought to be recovered by the DDA. A careful perusal, in particular, of observations made in paragraph 14 of the judgment, on which reliance was placed by Ms. Narayan, would show that the Court, in line with its previous judgments, upheld the principle that damages can be awarded where there is no specific evidence available qua the quantum of loss suffered by the aggrieved party. The Supreme Court was not dealing with a situation, as in this case, where there was no finding to the effect by the courts below that DDA had not suffered injury. The fact that the contract was terminated because of delay and that it related to public utility service, brought to fore the factum of injury. This, in my opinion, is a fine distinction between the matter at hand and the judgment rendered in the CDS case.

20.2 The other aspect for which reliance was placed on this judgment was that the onus to prove that there was no injury fell on the party which made such an assertion, in this case, FFE. As noted hereinabove, this submission made by Ms. Narayan could have, perhaps, been accepted if in the very least an averment had been made that IOCL had suffered injury, what I was shown instead, *albeit*, by drawing my attention to paragraph 21 of the Award, that a plea of “inconvenience” had been raised. To my mind, inconvenience caused, if any, by virtue of delay in the execution of the contract cannot be equated with injury.

20.3 This submission takes me to the judgment rendered in ***Commodore***

S.P. Puri versus Alankit Assignments Limited. Ms. Narayan placed reliance on this case only to highlight the fact that the Arbitrator in the instant case not being trained in law could not be expected to achieve exacting standards, which may be expected of a person who has a grounding in law. For this purpose, Ms. Narayan sought to rely upon the observations made by the learned single Judge of this Court (as he then was) to the effect, that Arbitrators need not be “legal luminaries”. Counsel emphasized that Arbitrators could be men of trade and, thus, would enjoy substantial latitude and flexibility in deciding matters *albeit* in a just and equitable manner.

20.4 In my view, the observations made can only be confined to the fact situation obtaining in that matter. The award in that case had been rendered by an Arbitral Tribunal consisting of three Arbitrators appointed by the National Stock Exchange of India Limited. The learned single Judge after having perused the award came to the conclusion that the reasoning given in the award by the Arbitral Tribunal was “explicit, logical and lucid”. There is no observation in the judgment which would suggest that a lay Arbitrator could ignore well established principles of law which over the years have evolved by Courts of law to arrive at a just conclusion. The principle, which has been applied to examine the award in issue, is that, damages cannot be awarded unless an adjudicator, be it a Court or an Arbitrator, returns a finding that the aggrieved party has suffered loss or injury. This principle of law, in my view, does not undergo a change even if parties have provided for a liquidated damages clause. Unliquidated damages and liquidated damages in that sense are not treated differently in the eyes of law. (See ***UOI versus Raman Iron Foundry***, AIR 1974 SC 1265).

20.5 The other judgment cited by Ms. Narayan is the one rendered in

Aroson Enterprises Limited. This judgment was cited to lay stress on the proposition that the Arbitrator was the master of facts and evidence placed before him, which the Court while exercising jurisdiction under Section 34 of the 1996 Act could neither re-visit nor re-appreciate. In my view, one cannot but agree with the principle enunciated in the judgment. It is, when, vital evidence is ignored or an award is rendered, which is contrary to the law enunciated by superior Courts, can the Court interdict an award rendered by the Arbitral Tribunal. As adverted to above, the learned Arbitrator in this case not only ignored vital evidence, but also rendered an award, which was contrary to the substantive law on damages expounded by the Superior Courts.

20.6 That brings me to the judgment rendered by the Supreme Court in ***ONGC Limited versus Saw Pipes's*** case. This judgment has been considered by the Supreme Court in ***Kailash Nath Associate***. The Supreme Court in ***Kailash Nath and Associate***, after examining the ratio of this judgment and other judgments has iterated the principles on which damages could be awarded in a given case. I need not dwell upon it any further only to avoid prolixity (See paragraph 37 on page 159 of the judgment in ***Kailash Nath and Associate***).

21. Having regard to the aforesaid, I am of the view that the findings and conclusion reached in the award insofar as claim No.1 is concerned (which is replicated as issue No.1 in the award), cannot be sustained.

21.1 As noted above, the result of claim No.2 (i.e. issue No.2) is dependent on the result of claim No.1. Via claim No.2, FFE only sought interest on the sum retained by IOCL.

21.2 In view of the above, the impugned award is set aside to the extent it

pertains to claim No.1 and 2. FFE would be entitled to a principal sum of Rs.22,08,528/- which was retained by IOCL along with interest at the rate of 8% (simple) per annum from the date when deductions were made from the bills of FFE till the date of payment.

22. The captioned petition is disposed of in the aforesaid terms.

RAJIV SHAKDHER, J

MARCH 29, 2019

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