

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

Present :-

THE HON'BLE JUSTICE MOUSHUMI BHATTACHARYA

A.P. 1735 of 2015

M/s. Satellite Electric Company

Vs.

The Board of Trustees for the Port of Kolkata

For the Petitioner : Mr. Arik Banerjee, Adv.
Mr. Shaunak Ghosh, Adv.
Mr. Sourav Mondal, Adv.

For the Respondent : Mr. Probal Kr. Mukherjee, Sr. Adv.

Reserved on : 03.09.2021.

Delivered on : 20.09.2021.

MOUSHUMI BHATTACHARYA, J.

1. This is an application under Section 34 of The Arbitration and Conciliation Act, 1996, for setting aside of an Award dated 12th September, 2015 passed by a learned Sole Arbitrator in an arbitration between the

petitioner herein, who was the claimant in the arbitration and the respondent.

2. The petitioner herein is a contractor who made a claim against refusal on the part of the respondent to refund the deducted amount towards liquidated damages which was imposed by the respondent upon the petitioner for alleged delay in the completion of work. The dispute arose out of an agreement dated 20th September, 2007 for renovation of a 6 KV Indoor Sub-Station for the Kolkata Port. By the impugned Award, the Arbitrator held that the Kolkata Port Trust has the right to levy liquidated damages from the petitioner herein under the terms of the contract by reason of the delay in the execution of the contract and further that the amount deducted as liquidated damages is not refundable to the petitioner. The petitioner was awarded the work of renovation of a 6 KV Indoor Sub-Station by the respondent for a total sum of Rs.92,56,341/- and by an agreement dated 20th September, 2007, the petitioner was to complete the work within six months from 31st July, 2007 ending on 31st January, 2008. The Work Order issued to the petitioner on 31st July, 2007 indicates that the completion period was six calendar months from the date of the Work Order.

3. According to Mr. Arik Banerjee, learned counsel appearing for the petitioner, the petitioner was prevented from completing the work within the first time frame due to the laches of the respondent, including delay in approval of the drawings which were provided by the petitioner to the respondent. Counsel states that the impugned Award suffers from perversity

and gross impropriety. Counsel submits that the Award is in conflict with the public policy of India and is also in contravention with the terms of the contract and hence against the relevant provisions of the 1996 Act. Counsel relies on Clause 8.2 of the General Conditions of Contract governing the agreement between the parties pertaining to liquidated damages to submit that the contractor (petitioner in this case) would only be liable to pay compensation in the nature of liquidated damages to the respondent if the contractor fails to complete the work within the stipulated date or within the extended period as granted by the Engineer of the respondent. Counsel submits that the Arbitrator has disregarded Clause 8.2(a) in refusing to grant refund of the liquidated damages and has also disregarded the fact that the respondent extended the time for completion of the contract of thirty days by a letter dated 7th February, 2008. Counsel relies on *Associate Builders vs. Delhi Development Authority*; (2015)3 SCC 49 for the proposition that an arbitral Tribunal must take into account the terms of the contract and on *Karam Chand Thapar and Bros. (P) Ltd. vs. H.H. Jethanandani*; 76 CWN 338, and *Union of India vs. Raman Iron Foundry*; AIR 1974 SC 1265 for the proposition that an assessment of actual loss is required to be done for a claim of liquidated damages and the onus of such being on the person making the claim.

4. Mr. Probal Mukherjee, learned Senior Counsel appearing for the respondent, Port Trust / KoPT, submits that the Arbitrator was wholly justified in holding that the parties to the contract expressly agreed under Clause 8.2 that KoPT would be entitled to liquidated damages in the event

KoPT suffered for the inability of the petitioner to complete the work within the stipulated time. Counsel submits that there was an admitted delay of 67 weeks on the part of the petitioner from the scheduled date of completion and further submits that the Arbitrator hence found that although the respondent KoPT was liable for the delay of seven weeks, the remaining sixty weeks of delay was attributable to the petitioner. Counsel cites *Oil and Natural Gas Corporation Ltd. vs. Saw Pipes Ltd.*; (2003) 5 SCC 705 on the proposition that when the terms of a contract are clear and unambiguous, stipulating liquidated damages in case of breach, the party who has committed the breach is required to pay such compensation as provided under Section 73 of the Contract Act. Counsel relies on *P.R. Shah, Shares and Stock Brokers Pvt. Ltd. vs. B.H.H. Securities Pvt. Ltd.*; (2012) 1 SCC 594 for the proposition that a court does not sit in appeal over the Award of an Arbitrator by re-assessing or re-appreciating the evidence and on *Kailash Nath Associates vs. Delhi Development Authority*; (2015) 4 SCC 136 for the proposition that where a sum is named in a contract as 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 the parties or by the court. Counsel relies on *Construction and Design Services vs. Delhi Development Authority*; (2015) 14 SCC 263 in support of the contention that once it is held that the respondent may have suffered loss on account of breach of contract, the respondent would be entitled to compensation to the extent of loss suffered and it is for the other party to show that stipulated damages are by way of a penalty. Counsel concludes that the Award is a reasoned Award which has

taken into consideration all relevant materials including the terms of the contract executed between the parties.

5. From the submissions made on behalf of the parties, this court is of the view that the grounds for setting aside the impugned Award dated 12th September, 2015 should be tested against the findings of the Arbitrator and whether the findings are substantiated from the material which was before the Arbitrator. The Award reflects that the petitioner herein was selected as the successful party for completing the job pursuant to a tender published by the respondent on 16th January, 2007 and the Work Order was issued on that basis to the petitioner by way of a letter dated 31st July, 2007. The period for completing the work was six weeks calendar months from the date of the Work Order that, i.e., 30th January, 2008. The Award mentions the dates on which different components of the contract were completed by the petitioner and notes the allegations levelled by the parties against each other in respect of delay in approving the drawings and giving site clearance on the part of the respondent and the delay on the part of the petitioner in completing the work within the time frame agreed upon by the parties. Although the Award outlines the basic factual details and arrives at the conclusion that a total of seven weeks delay may be attributable to the respondent KoPT by reason of failing to approve the drawings within time and that the petitioner was responsible for sixty weeks delay, the aforesaid findings as well as certain other findings of the Arbitrator do not appear to have any factual basis.

6. The first of such issues is the finding that the petitioner is liable for a delay of 60 weeks justifying imposition of liquidated damages. Certain documents shown by counsel appearing for the parties may be referred to in this context. By a letter dated 9th February, 2008 (the exact date is unclear), KoPT extended the time period up to thirty days up to 01-03-2008 for completing the project. The reply of the petitioner dated 21st February, 2008 raises the point of KoPT failing to provide necessary site clearance for executing the work. The letter issued by KoPT dated 30th July, 2010 is significant since by the said letter, the additional work of the project is approved and extended till 08-05-2009 but with imposition of 10% liquidated damages on the contract price. An amount of Rs.9,25,634.14/- was deducted from the petitioner's bills on that basis. An Installation and Job Completion Certificate issued by KoPT certified that the installation work was completed and handed over to KoPT by the petitioner on 7th August, 2006 and that the delivering, testing, commissioning, etc., have been inspected and found to be in order. Read together, the letters appear to suggest that KoPT extended the time for completing the contract until 08-05-2009 but imposed liquidated damages at 10% of the contract price at the same time. The Completion Certificate does not contain any complaints with regard to the quality of the work or any other failures on the part of the petitioner-contractor. The Award significantly does not refer to any of these documents, particularly the letter dated 30th July, 2010 by which KoPT imposed liquidated damages but extended the contract at the same time.

7. The second issue is the finding of the Arbitrator that KoPT had the right to levy liquidated damages 10% of the contract price despite the unequivocal finding that KoPT was responsible for a delay of seven weeks. If this be the case, absolving KoPT of the consequences of such delay and the absence of a consequent and corresponding decrease in the imposition of liquidated damages of 10% on the petitioner is unreasonable on the face of the impugned decision. There is no reasonable link between the finding of delay of seven weeks being attributable to KoPT and KoPT being entitled to levy the total quantum of liquidated damages on the petitioner as found to be rightfully done by the Arbitrator.

8. The other significant issue which is required to be gone into is whether the finding of the Arbitrator of KoPT being entitled to impose liquidated damages of 10% of the contract price on the petitioner is within the terms agreed upon by the parties. Clause 8 of the General Conditions of Contract (GCC) sanctioned by the Trustees on 27th May, 1993 provides for "Delay /extension of completion time / liquidated damage / termination of contract". Sub-clause 8.1 thereunder provides, *inter alia*, that the Contractor shall apply to the Engineer (of KoPT) in writing for suitable extension of completion time and the Engineer, upon considering the reasons stated, shall either reject or allow the extension period in writing with or without imposition of liquidated damages on the Contractor. Clause 8.2 a) is the relevant clause in the present factual context and provides that if the Contractor fails to complete the work within the stipulated dates or the extension given by the Engineer in writing, the Contractor shall pay, as

compensation liquidated damages to the Trustees, ½% of the total value of work as mentioned in the Letter of Acceptance for other work of the unfinished work provided that the amount of such compensation shall not exceed 10% of the value of work. Sub-clause 8.3 provides for absolute discretion of the Trustees to terminate the contract on the occurrence of any of the events or reasons as provided therein.

9. Upon a plain meaning of Sub-clause 8.2, it would be clear that the imposition of liquidated damages to a maximum limit of 10% of the total value of work will only arise if the Contractor fails to complete the work within the stipulated dates or within the extended period of time as provided under Clause 8.1. Hence, the entitlement of KoPT imposing liquidated damages under Clause 8.1 is qualified by Clause 8.2 which stipulates the conditions for imposition of liquidated damages on the Contractor. In the present case, the letter dated 30th July, 2010 from KoPT to the petitioner / Contractor is dichotomous in that the “Competent Authority” of KoPT, while extending the time, has also imposed liquidated damages on the contractor / petitioner. This stand of KoPT is not only contradictory in logic and in effect, but is also in contravention to Clause 8.2 a) of the contract governing the rights and obligations of the parties. The fact that the petitioner wrote several letters objecting to the imposition of liquidated damages on 12th August, 2010, 27th December, 2010, 7th February, 2011, 6th April, 2011, 8th July, 2011, 5th September, 2011 and 7th May, 2012 have not been referred to in the impugned Award at all. The finding, therefore, that the quantum of liquidated damages was agreed to by both the parties is perverse as not

based on the available evidence and has disregarded the material which was before the Arbitrator.

10. The construction of Clause 8.2 a) and the effect given to it must also therefore be seen as against the contract and in disregard to the terms of the contract as provided under Section 28(3) of the 1996 Act.

11. The next finding which is found to be *de hors* the settled law on the subject is the finding that a party (KoPT in this case) is not required to prove actual loss suffered by it in order to show its entitlement to retain an amount as liquidated damages. The material-on-record and those before the Arbitrator, particularly letters from KoPT, do not contain any statement with regard to loss suffered by KoPT on account of either breach of the terms of the contract or delay on the part of the petitioner. In fact, there are letters from the petitioner including of 5th September, 2011, asking KoPT to establish the loss suffered by it in the delay on the part of the petitioner. In *Kailash Nath Associates vs. Delhi Development Authority*; (2015) 4 SCC 136, the Supreme Court relied on Section 73 and Section 74 of The Contract Act, 1872 to hold that whether a sum is named in a contract as an amount payable by way of damages, the party complaining of breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both the parties and found to be such by the court. The Supreme Court further held that damage or loss caused by reason of breach of a contract is a *sine qua non* for the applicability of Section 74 of the Act. *Mahanagar Telephone Nigam Ltd. vs. Tata*

Communications Ltd.; (2019) 5 SCC 341 reiterated the dictum of *Kailash Nath* to hold that proof of actual damage is not dispensed with where it is possible to prove actual damage or loss and where such proof is impossible, a liquidated amount named in the contract can be awarded on a genuine pre-estimate of damage or loss. *Union of India vs. Raman Iron Foundry*; AIR 1974 SC 1265 and *Karam Chand Thapar and Bros. (P) Ltd. vs. H.H. Jethanandani*; 76 CWN 338 are propositions for the requirement of a genuine pre-estimation of damages which may be suffered in case of breach. It is clear from the authorities cited that *Kailash Nath* has explained the scope and effect of Section 74 of the Act and that where a sum is named in the contract as the amount to be paid in case of breach, the party complaining of such breach is entitled to receive from the party who has broken the contract reasonable compensation not exceeding the amount named in the contract. Hence, even if 10% of the contract price as liquidated damages is mentioned in 8.2 a), in order to claim such amount, KoPT would be required to receive such amount only if it is a genuine pre-estimate of damages fixed by the parties and found to be such by the court. There is no discussion either in the Award or any indication in the correspondence exchanged between the parties that 10% of the contract price satisfied any of the foresaid conditions.

12. The decisions relied upon by learned counsel for the respondent/Award Holder are required to be placed in context. *Oil and Natural Gas Corporation Ltd. vs. Saw Pipes Ltd.*; (2003) 5 SCC 705 proceeds on the basis that the terms of the contract are required to be taken into consideration for

the conclusion whether the party claiming damages is entitled to the same and that a party who is committed the breach is required to pay compensation for the breach. Counsel has relied on the aforesaid decision together with *Kailash Nath* and *MTNL* for the proposition that under Section 74 of the Contract Act, the person who has suffered the breach is not required to prove the actual loss or damage for claiming a decree and that a court is competent to award reasonable compensation for breach even if the actual damage is not proved in consequence of the breach. This court is of the view that *Kailash Nath* and *MTNL*, being the latest pronouncements of the law on the subject, have held in favour of the requirement of a) proof of actual damage or loss and b) where the same is not possible, a genuine pre-estimate of damage or loss by the parties or by finding of the court. The decision of the Arbitrator that KoPT was entitled to levy such liquidated damages and retain the same is not premised on the requirements of either *Kailash Nath* or *MTNL*. As also stated above, the balancing of the 10% liquidated damages with the delay of 7 weeks which was attributed to KoPT has not been done in the award. *P.R. Shah, Shares and Stock Brokers Pvt. Ltd. vs. B.H.H. Securities Pvt. Ltd.*; (2012) 1 SCC 594 cautions the court against reassessing or re-appreciating the evidence in an application for setting aside of an award. There is no doubt that the aforesaid dictum finds place in Section 34 of the 1996 Act itself in the proviso to 34 (2A). An Award however can be interfered with if it is found to be vulnerable under any of the grounds in Section 34 including being in contravention with the fundamental policy of Indian law or vitiated by patent illegality appearing on the face of the Award under 34(2) (b) (ii) and 34 (2A), respectively.

13. In the present case the Award suffers from an absence of reasons for coming to the specific findings. Second, the findings are also not supported by a correct construction of the contractual terms governing the parties which is the mandate of the Tribunal under Section 28 (3) of the 1996 Act. The Arbitrator did not consider relevant correspondence exchanged between the parties which was on record for arriving at several of the findings particularly in relation to imposition of liquidated damages. The absence of evidence in coming to the conclusions or disregarding relevant evidence where such evidence should have been taken into account for the conclusions arrived at would make the Award perverse: Ref. *Associate Builders vs Delhi Development Authority*; (2015) 3 SCC 49. Although the Award is dated 12th September, 2015, that is before the additional ground of challenge under Section 12 was brought in relation to a connection which an Arbitrator may have to any of the parties, the fact that the Arbitrator in the present case was a departmental nominee of KoPT cannot be wholly discounted. The emphasis placed by counsel for the petitioner on the Arbitrator deciding to make a site inspection without being asked to do so by the parties is not considered to be relevant since nothing turned on it with regard to the ultimate findings arrived at by the Arbitrator.

14. By reason of the foregoing discussion, the impugned Award is found to be one where the Arbitrator has arrived at conclusions without indicating the basis thereof coupled with an incorrect construction of the contractual terms and the intention of the parties as evinced by correspondence exchanged thereafter. The Award hence cannot be sustained on the grounds

contained in Section 34 of the 1996 Act and A.P. 1735 of 2015 is accordingly allowed and disposed of by setting aside the impugned Award dated 12th September, 2015.

Urgent Photostat certified copy of this Judgment, if applied for, be supplied to the parties upon compliance of all requisite formalities

(Moushumi Bhattacharya, J.)