

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

BEFORE:

The Hon'ble JUSTICE DEBANGSU BASAK
AND
The Hon'ble JUSTICE PARTHA SARATHI SEN

APOT 220 of 2022
WITH
WPO 475 OF 2016
IA GA 1 OF 2022
SEBABRATA BOSE AND ASSOCIATES (P) LTD.
Versus
THE KOLKATA METROPOLITAN DEVELOPMENT AUTHORITY AND ORS.

APOT 190 OF 2022
IA GA 1 OF 2022
THE KOLKATA METROPOLITAN DEVELOPMENT AUTHORITY AND ORS.
Versus
SEBABRATA BOSE AND ASSOCIATES (P) LTD.

For the appellant in APOT 220 of 2022 and: Mr. Probal Kr. Mukherjee, Sr.Adv.
for the respondent in APOT 190 of 2022 Mr. Debanik Banerjee, Adv.
Mr. Akash D. Ganguly, Adv.

For the State: Mr. Kishore Datta, Ld. AG
Mr. Satyajit Talukder, Adv.
Mr. Abhisek Guha, Adv.
Ms. Sonal Agarwal, Adv.

Last Heard on: 20.06.2024

Judgement on: 04.07.2024

PARTHA SARATHI SEN, J:-

1. In these two appeals the judgement dated April 25, 2022 as passed by the Learned Single Bench in WPO/475/2016 has been assailed both by the writ petitioner(in APOT No. 220 of 2022) and by the respondent Authority(in APOT No. 190 of 2022).
2. By the judgement impugned the Learned Single Bench allowed the writ petition and directed the respondent Authority of the said writ petition that is; Kolkata Metropolitan Development Authority (herein after referred to as the 'respondent authority' in short) to disburse a sum of Rs.82,48,925/- in favour of the writ petitioner in respect of the work done by the writ petitioner in respect of Uluberia Project along with Rs. 1 crore, deposited by the petitioner with the respondent authorities as security for Uluberia project positively within May 31, 2022.

- 3.** The respondent Authority felt aggrieved and thus preferred appeal vide; APOT No. 190 of 2022.
- 4.** The writ petitioner also felt aggrieved for not grant of any interest upon the claim amount by the Learned Single Judge and thus approached this Court by filling appeal vide; APOT No. 220 of 2022.
- 5.** Since in these two appeals common questions of facts and laws are involved and since the parties to the instant two appeals are identical and also since both these appeals arise out of a common judgement, we propose to dispose the instant two appeals by a common judgement.
- 6.** For effective adjudication of the instant two appeals the facts leading to filling of WPO/475/2016 before the Learned Single Bench is required to be discussed in a nutshell.
- 7.** The respondent authority issued two separate work orders infavour of the writ petitioner, one of such was for the Uluberia project and another was for the Bansberia Project by executing two separate contracts of which Clauses 46(1) and (3) and Clause 48(3) are identical. In respect of Bansberia project, there occurred an alleged delay of the writ petitioner in

carrying out the work for which the respondent Authority deducted a sum of Rs. 82,48,925/- towards liquidated damages from the amount payable to the writ petitioner on account of the work done by the writ petitioner in respect of the Uluberia project.

- 8.** The writ petitioner challenged the aforesaid action of the respondent Authority by filling the aforesaid writ petition.
- 9.** In course of hearing, Mr. Mukherjee, Learned Senior Counsel appearing on behalf of the writ petitioner argued that when the Learned Single Judge by the impugned order has found that the deduction of Rs. 82,48,925/- by the respondent Authority is contrary to the Law as well as contrary to the aforesaid three clauses of the contract, there is no justification on the part of the Learned Single Judge for not granting interest on such illegal deducted amount.
- 10.** Mr. Mukherjee, Learned Senior Counsel appearing on behalf of the writ petitioner thus submits that the appeal being APOT No. 220 of 2022 may be allowed by awarding adequate interest upon the awarded amount.

11. Mr. Mukherjee, Learned Senior Counsel appearing on behalf of the writ petitioner further submits that the Learned Single Bench however in the impugned judgment rightly noticed that the Law of the land as well as the aforesaid three clauses of the contract do not permit the respondent Authorities to recover the alleged liquidated damages by way deduction of the dues of the writ petitioner in connection with a separate project i.e.; Uluberia project and thus APOT No. 190 of 2022 may be dismissed.

12. Per contra, Mr. Dutta Learned Advocate General appearing on behalf of the respondent Authority submits that on meaningful reading of the aforesaid three clauses of the contract it would reveal that the respondent Authority in order to recover the liquidated damages as imposed by it is within its power to deduct from any sum due or which may become due to writ petitioner. It is thus submitted that the Learned Single Bench has failed to visualize that aspect while passing the impugned judgement.

13. Placing his reliance upon the reported decision of ***‘Kearla State Electricity Board & another -vs- Kurien***

E.Kalathil & others' reported in ***(2000) 6 SCC 293***, it is argued by Mr. Dutta Learned Advocate General for the respondent Authority that the Learned Single Judge acted beyond its jurisdiction in interpreting the aforesaid three clauses of the contract while sitting in a writ jurisdiction. Mr. Dutta Learned Advocate General for the respondent Authority thus submits that it is a fit case for allowing APOT No. 190 of 2022 by setting aside the impugned order and for dismissing the APOT No. 220 of 2022.

14. Though the Learned Single Bench in the impugned judgement has quoted the aforesaid three clauses of the contract, we consider it necessary to reproduce the said three clauses once again for effective disposal of the instant appeals.

15. Such clauses of the contract are reproduced herein below in verbatim :-

“46(1) Liquidated Damages for Delay - If the Contractor shall fail to achieve completion of the Works within the time prescribed by Clause 42 hereof, then the Contractor shall pay to the Employer the sum stated in the Contract as liquidated damages for such default and not as a penalty for

every day of part or a day which shall elapse between the time prescribed by Clause 42 hereof and the date of certified completion of the Works. The Employer may without prejudice to any other method of recovery, deduct the amount of such damages from any money in his hands, due or which may become due to the Contractor. The payment or deduction of such damages shall not relieve the Contractor from his obligation to complete the Works, or from any other of his obligations and liabilities under the Contract.”

*“... ... **(3) Extent of Liquidated Damages** – The liquidated damages referred to in sub-clause (1) for delay of each day or part thereof, shall be at the rate of one percent (1%) or such smaller amount as the Employer may decide, or the total value of the Contract Price excluding the value of such part or section of the works as may have been covered by certificate of completion in terms of the provisions of subclause (2) above, Provided however that in no case shall be total amount of liquidated damages exceed ten percent (10%) of the total Contract Price for whole Works.”*

“...48(3) Remedy on contractor’s failure to carry out work required - If the Contractor shall fail to do any such work as aforesaid requirement by the Engineer, the Employer shall be entitled to employ and pay other persons to carry out the same, which in the opinion of the Employer, the Contractor was liable to do at his own expense under the Contract. In the said event, all expenses consequent thereon or incidental thereto shall be recoverable from the Contractor by the Employer, or may be deducted by the Employer from any sum due or which may become due to the Contractor.”

- 16.** It is accepted, not only in India but also in other countries, that the subject of liquidated damages and penalties in the law of contracts is a complex one. There are several conceptual differences as to whether the assessment of reasonable compensation made ex ante (at the time of entering into contract) is binding or is subject to ex post (after the breach) review by the court. There are judgments in the common law countries which widely differ, and there are scores of articles by learned academicians dealing with the advantages and disadvantages of the prospective or ex ante or

first look approach or of the retrospective or ex post or second look approach. It is to be noted that, in legal literature, the former is treated as a traditional concept while the latter is treated as a modern concept.

17. It cannot be disputed that for construction of the contract, it is settled law that the intention of the parties is to be gathered from the words used in the agreement. If words are unambiguous and are used after full understanding of their meaning by experts, it would be difficult to gather their intention different from the language used in the agreement. If upon a reading of the document as a whole, it can fairly be deduced from the words actually used therein that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. Further, in construing a contract, the court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. If the words are clear, there is very little the court can do about it.

18. Coming to factual aspects as involved in these two appeals it appears to us that the Learned Single Bench on

meticulous scrutiny of the aforesaid three clauses of the contract did not find any provision that for recovery of alleged liquidated damages for Bansberia Project from the writ petitioner, the respondent authority can deduct the said sum from the legitimate dues of the writ petitioner from the respondent Authority in respect of Ulberia project and practically on such score, the writ petition was allowed.

19. In our understanding since Clause 48(3) of the said Contract is placed after Clause 46(1) of the self same contract, the later clause is to be interpreted and/or understood keeping in mind the previous clause of the Contract.

20. From the wordings of Clause 46(1) of the Contract it appears to this Court that the parties to the said agreement had agreed that the employer is entitled to deduct of the amount of damages from any money in his hands or which may become due to the contractor and Clause 48(3) of the said Contract postulates that in the event of failure on the part of the contractor to do the work, the expenses consequence thereupon or incidental thereto as incurred by the employer shall be recoverable from the contractor by the employer or

may be deducted by the employer from any sum due or which may become due to the contractor.

21. On conjoint reading of the aforesaid two clauses, it appears to us that it was never the intention of the parties to the said Contract that the employer's right of recovery of damages and/or the expenses incurred by the employer on account of contractor's failure to carry out work is limited to the amount to any sum due or which may become due to the contractor on account of the self same contract only but on the contrary the same can also be recovered from any money in the hands of the contractor or which may become due to the contractor on account of a separate contract in between the same parties as has been done by the respondent/authority which was challenged before the learned single bench by filing the writ petition.

22. We thus find no infirmity in the action of the respondent/authority and thus APOT 190 of 2022 is allowed and APOT 220 of 2022 is dismissed along with all connected applications.

23. Consequently, the judgement dated April 25, 2022 as passed by the learned Single Judge in WPO 475 of 2016 is hereby set aside.

24. There shall be no order as to costs.

25. Urgent Photostat certified copy of this judgement, if applied for, be given to the parties on completion of usual formalities.

[Partha Sarathi Sen, J.]

26. I Agree.

[Debangsu Basak, J.]