IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.06.2024

CORAM

THE HON'BLE Mr. JUSTICE KRISHNAN RAMASAMY

O.P.No.631 of 2004

Tamil Nadu Transmission Corporation Limited, (TANTRANSCO),
Represented by Chief Engineer Transmission,
NPKRR Maaligai,
No.144/800, Anna Salai,
Chennai 600 002.

...Petitioner

[***Amended as per order dated 05.03.2018 in A.No.1823 of 2018]

vs.

1.M/s.W.S.Industries (India) Ltd.,
Porur, Chennai 600 116.

2.Thiru P.Janakiraman, FIE,
Presiding Arbitrator.

3.Thiru S.Elamurugan,
Arbitrator.

4.Thiru.K.C.Rajappa,
Arbitrator.

...Respondent

Prayer:

Arbitration Original Petition filed under Sections 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 30.04.2004 passed by the Arbitral Tribunal, namely respondents 2 to 4; and award cost of this petition.

For Petitioner : Mr.N.C.Ramesh, Senior Counsel,
for Mr.T.Sivaprakasam

For Respondent : Mr.R.Murari, Senior Counsel,
for Mr.Pavan Kumar Gandhi for R1

ORDER

This Arbitration Original Petition has been filed challenging the award passed by the Arbitral Tribunal dated 30.04.2004.

2. This case has a chequered history, which is as follows:

Initially, the present original petition was filed in the year 2004 and disposed of by this Court vide order dated 19.09.2008. Challenging the said order, the petitioner herein had filed an appeal in OSA.No.210 of 2009, in which, vide order dated 18.06.2010, this Court had set aside the aforesaid order dated 19.09.2008 and remanded the matter back to this Court. Thereafter, this Court had once again disposed of this original petition vide order dated 13.02.2012. Subsequently, aggrieved over the said order dated 13.02.2012, the 1st respondent had filed an appeal in OSA.No.109 of 2012, in which, this Court passed an order dated 01.11.2013, whereby once again the order passed in the present petition dated 13.02.2012 was set aside and the matter is again remanded back to this Court. With the aforesaid history, today this matter is taken up for hearing and the respective learned counsel made their submissions before this Court.

3. The case of the petition is that the petitioner herein had floated a tender for the purpose of supply of 3 Lots, which are mentioned below:

Lot-1: 11KV Shunt Capacitor Bank Equipments – 139.2 MVAR (48 substations)

Lot-2: 22KV Shunt Capacitor Bank Equipments – 117.6 MVAR (24 substations)

Lot-3: 11KV Shunt Capacitor Bank Equipments for Arni and Tondiarpet 230 KV substations – 72 MVAR

4. The 1st respondent herein was the successful tenderer for supply of

11KV Shunt Capacitor Bank Equipments (hereinafter called as "SCBE") i.e., Lot-1 and Lot-3. According to the petitioner, the 1st respondent was supposed to supply Lot-1 and Lot-3 in the manner stated below:

Lot No:	***Quantity to be supplied***	***Due date of supply***
1st Lot	1/6th of total quantity	07.08.1996
2nd Lot	1/6th of total quantity	07.09.1996
3rd Lot	1/6th of total quantity	07.10.1996
4th Lot	1/6th of total quantity	07.11.1996
5th Lot	1/6th of total quantity	07.12.1996
6th Lot	1/6th of total quantity	07.01.1997

5. However, since the 1st respondent had failed to supply the quantities in the manner prescribed above, the petitioner has deducted the liquidated damages out of the bills, which were due and payable to the 1st respondent herein as per the terms of the Clause 8.1 and 8.2 of the Special Conditions of Contract (SCC) and Clause 24 of General Conditions of Contract (GCC). Aggrieved over the said deductions, the 1st respondent had filed a claim before the Arbitral Tribunal. After hearing both the parties, the Arbitral Tribunal had passed an award dated 30.04.2004. Challenging the same, the present original petition has been filed.

6. Mr.N.C.Ramesh, learned Senior counsel, would submit that while passing the award, the Tribunal has rightly come to the conclusion that the delay, in supplying the materials, was attributable to the 1st respondent. However, while determining the liquidated damages, the Arbitral Tribunal had calculated the delay from 07.01.1997 instead of considering the delay for each and every Lots independently, i.e., from 07.08.1996 onwards. Therefore, aggrieved over the same, the present original petition has been filed.

7. By referring the Clause 8 of the SCC and Clause 24 of GCC, the learned Senior counsel appearing for the petitioner would submit that they are entitled to charge liquidated damages ½% of the contract price of undelivered equipment for each week or part thereof in equivalent Indian Rupees as per the BC selling rates published by State Bank of India applicable as on the date of opening of bids.

8. Further, he would also referred the Quantity and Delivery Schedule, which was filed in the typed set of papers at page No.157 in Volume II,

wherein, it has been mentioned as follows:

> *"The delivery should commence within six months from the date of Letter of Intent with one sixth (1/6th) of the total quantity and completed within five (5) months thereafter at an uniform rate of one sixth (1/6th) of the total quantity per month."*

9. By referring the above extractions, he would submit that for the purpose of arriving at the liquidated damages, the cut-off date for supply of each and every Lot should have been considered for calculating the delayed period. For example, in the present case, the due date fixed for supply of 1st Lot was on 07.08.1996 and if there is any delay in supplying the machineries for the 1st Lot, the said delay would start from 08.08.1996 onwards. Accordingly, the liquidated damages has to be calculated for each and every lot independently. However, in the present case, the Tribunal has failed to consider the same and taken the cut-off date as 08.01.1997 (the date for the completion of supplying the 6th Lot) instead of 08.08.1996. Hence, he would contend that the award passed by the Tribunal is completely contrary to the provisions of Clause 8 of the SCC and Clause 24 of GCC. Further, since the Tribunal has failed to consider the aforesaid aspects and completely ignored the same, he requests this Court to set aside

the impugned award dated 30.04.2004.

10. Per contra, Mr.R.Murari, learned Senior counsel, appearing for the 1st respondent would submit that in the present case, the Tribunal has considered the Clauses 8.10, 8.20, 8.40 of the SCC and Clause 24 of GCC in proper perspective and arrived at a well reasoned conclusion that the petitioner is entitled to levy the liquidated damages only from 07.01.1997, which was the last date for the completion of the supply of 6th Lot and date for commencement of installation.

11. Further, he would submit that the said Clause 8 of SCC and Clause 24 of GCC would apply only if there is any delay in completion, for which, the petitioner can levy the liquidated damages. In the present case, the commencement commissioning of SCBE would happen only after 07.01.1997 and hence, unless and otherwise the entire materials are supplied, the question of commencement commissioning of SCBE would not arise.

12. That apart, in order to levy the liquidated damages, the petitioner

should have incurred the loss due to the delay in supply. In the present case, the SCBE can be installed only when all the 6 Lots were supplied. The last date for supply of 6th Lot would be 07.01.1997. Therefore, the installation would start only after 07.01.1997. In such case, there is no possibility for completing the installation before 07.01.1997, unless and otherwise, if all the materials are supplied, since the said materials are all the different parts of the 11KV SCBE, which has to be supplied by virtue of Lot 1 and 3, so as to impose the liquidated damages before the commencement date of installation. Therefore, if at all, if there is any loss that is said to have been occurred for the petitioner, it would occurred only after completion of the installation i.e., after 07.01.1997. The Tribunal has considered the same in a proper perspective and interpreted the Clause 8 of SCC and Clause 24 of GCC in a proper way while passing the award and hence, the same needs no interference.

13. In support of this submissions, he referred the judgment dated 08.04.2024 passed by this Court in ***Arb.O.P.(Com.Div.)No.480 of 2023*** [***Chennai Port Authority vs. M/s.Srishila***] and also the judgment of the Hon'ble Apex Court in ***Kailash Nath Associates, vs. Delhi Development***

Authority and another reported in ***2015 SCC OnLine SC 19***.

14. By referring the aforesaid two judgments, he would submit that in terms of the provisions of contract, as per Section 74 of the Contract Act, the petitioner should have sustained injury and it is their part to prove the injuries, which they sustained. In the present case, even if there is any injury sustained by the petitioner, the same would have occurred only after the completion of supply of SCBE i.e., after 07.01.1997 and not before. During the period of supplying the machineries for Lot-1 to Lot-6, i.e., from 07.08.1996 to 07.01.1997, the petitioner will not suffer any loss due to the delay of supply and hence, they are not entitled for any liquidated damages for the said period. Even Clause 8 of SCC and Clause 24 of GCC would clearly states that the liquidated damages has to be calculated only for delay in completion of the project. Hence, he would submit that all these aspects have been properly considered by the Arbitral Tribunal, which requires no interference. Hence, he requested this Court to dismiss the present original petition.

15. I have given due consideration to the submissions made by

Mr.N.C.Ramesh, learned Senior counsel for the petitioner and Mr.R.Murari, learned Senior counsel appearing for the 1st respondent and also perused the materials available on record.

16. In the present case, the 1st respondent was successful tenderer to supply the Lot-1 and Lot-3 SCBE, which are described as below:

Lot-1: 11KV Shunt Capacitor Bank Equipments – 139.2 MVAR (48 substations)

Lot-3: 11KV Shunt Capacitor Bank Equipments for Arni and Tondiarpet 230 KV substations – 72 MVAR

17. Subsequently, to supply the various parts of SCBE, the aforesaid 2 Lots were divided into 6 Lots i.e., 1/6th each in the following manner:

Lot No:	*Quantity to be supplied*	*Due date of supply*
1st Lot	1/6th of total quantity	07.08.1996
2nd Lot	1/6th of total quantity	07.09.1996
3rd Lot	1/6th of total quantity	07.10.1996
4th Lot	1/6th of total quantity	07.11.1996
5th Lot	1/6th of total quantity	07.12.1996
6th Lot	1/6th of total quantity	07.01.1997

18. In each of the 6 Lots, various parts has to be supplied at different substations for installation of Lot-1 and Lot-3 SCBE and after completion of supply, the installation would start.

19. Further, it is relevant to point out here that even at paragraph No.XIV of the grounds of petition, the petitioner had stated that unless and otherwise all the materials, which are required for the erection of SCBE, were supplied, the said SCBE cannot be erected and the relevant paragraph is extracted hereunder:

> *"(XIV) The Arbitral Tribunal failed to appreciate that the issue raised before the Arbitral Tribunal is whether the delivery has been completed in line with the delivery schedule, because unless and until all the materials that go into the erection of the shunt capacitors banks are supplied, the shunt capacitors cannot be erected at all and therefore, the delay in supply of even a single component of the shunt capacitor bank equipments forming of part of set automatically attracts levy of liquidated damages and therefore the petitioner was right in levying liquidated damages."*

20. A perusal of the above ground makes it clear that all the materials for Lot-1 to Lot-6 have to be supplied and unless and otherwise, the entire materials are supplied, the SCBE cannot be erected at all. As per the schedule of supply, the 1st respondent has liberty to complete the supply of machineries to all the 6 Lots up to 07.01.1997. Even if the one of materials is not supplied, the petitioner will not be in a position to commencing the erection of the SCBE. Further, during the supply of 6 Lots, admittedly, the SCBE are not going to be erected. When such being the case, the latest date for commencement of installation would be only on 07.01.1997.

21. When the petitioner made a claim for liquidated damages, in terms of Section 74 of the Contract Act, he is supposed to prove the losses incurred by him. However, in the present case, if at all if there is any loss, the same would occur only after installation. Even assuming that the entire materials were supplied on 07.01.1997 and on 08.01.1997 erection is completed, the petitioner would not incurred any loss. On the other hand, if the 1st respondent has failed to supply all the materials for the purpose of erection of SCBE even after 07.01.1997, then only the question of payment of

liquidated damages would occur for the delayed period after 07.01.1997. At this juncture, it would be apposite to extract the Clauses 8.1.0, 8.2.0, 8.4.0 of SCC and Clause 24 of GCC, which read as follows:

Clause 8 of SCC:

"8.0.0 LIQUIDATED DAMAGES FOR DELAY IN COMPLETION

8.1.0 If the Contractor fails to deliver the equipment and materials within the time fixed under the Contract or any extension thereof granted by the Owner by way of Amendment to Notification of Award/Contract agreement, the Contractor shall pay to the Owner as liquidated damages and not a penalty, the sum of ½% of contract price of undelivered equipment for each week or part thereof delay in equivalent Indian Rupees as per the EC selling rates published by State Bank of India applicable as on the date of opening of bids.

8.2.0 Equipment and materials will be deemed to have been delivered only when all the components, parts are also delivered. If certain components are not delivered in time, the equipment and materials shall be considered as delayed until such time missing parts are also delivered.

8.3.0 ---------

8.40 The total amount of liquidated damages for delay under the contract shall be subject to a maximum of ten *percent (10%) of the total contract price (including supervision charges if applicable) expressed in Indian Rupees as per the BC selling rates published by the State Bank of India, applicable as on the date of opening of Bids."*

Clause 24 of GCC:-

"24.0 LIQUIDATED DAMAGES FOR DELAY IN COMPLETION

24.1 If the Contractor fails to deliver the equipment and materials within the time fixed under the Contract or any extension thereof granted by the Owner, the Contractor shall pay to the Owner as liquidated damages and not a penalty, a sum specified for each specified period of delay. The details of such liquidated damages are brought out in the accompanying Special Conditions of Contract Volume 4B.

24.2 The total amount of liquidated damages for delay under the contract will be subject to a maximum of ten percent (10%) of the total contract price.

24.3 Equipment and materials will be deemed to have been delivered only when all their components, parts are also delivered and the owner has issued an acceptance Certificate to the Contractor. If certain components are not delivered in time, the equipment and materials shall be considered as delayed until such time missing parts are also delivered."

22. A reading of the above clauses would show that the petitioner is entitled for liquidated damages for the delay in completion. If the Contractor fails to deliver the equipments and materials within the time frame fixed under the Contract or any extensions thereof, certainly, the petitioner is entitled for liquidated damages. There is no dispute with the aspect with regard to the delay in delivery of the materials. The respondent had failed to deliver the goods for each and every Lots within the time frame fixed as stated at paragraph No.4 of this order, however, merely, the petitioner is not entitled for any liquidated damages for the said delay. It is the bounded duty of the petitioner to prove that they have sustained loss.

23. In the present case, the materials supplied, by virtue of all the 6 Lots starting from 07.08.1996 to 07.01.1997, is for the purpose of erection of SCBE. The SCBE cannot be erected even if one of the parts, which is supposed to be supplied by virtue of Lot 1 to Lot 6, is not available. Therefore, commencement of erection of SCBE would happen latest by 08.01.1997. If at all if there is any loss, which was incurred, due to the earliest functioning of SCBE, it would be only with effect from 08.01.1997. Until 07.01.1997, there is no question of either commencement or

completion of SCBE. Therefore, if at all if there is any losses to be incurred by the petitioner, that would happen only after the installation. The latest date for the installation would be on 08.01.1997. If there is any delay in supplying any materials, even subsequent to 07.01.1997, all those delays would be attributable to the respondent and the petitioner is certainly entitled for liquidated damages for the said delay.

24. At any cost, the petitioner would not incur any losses during the course of supply of materials by virtue of 6 Lots i.e., starting from 07.08.1996 to 07.01.1997 and the delay in supply of material through 6 Lots is insignificant for the determination of liquidated damages. Further, they have neither produced any evidences nor provide any document to establish that they have incurred losses during the period of supply of materials. All these aspects were considered in proper perspective by the Arbitral Tribunal.

25. At this juncture, it would be apposite to extract the relevant paragraphs of the award, which reads as follows:

"6.5 Decision on LD

6.5.1 The Arbitral Tribunal does hold that time is the essence of contract and the delay in the supply would attract *levy of liquidated damages and the delay in performing the contract is not attributable to the Board now takes up the issue regarding the quantum leviable, considering the facts and circumstances of the case. The Tribunal with due care and caution has gone through the details furnished by the Respondent Board in their memo dated 17th Jan. 04 in compliance of the Tribunal's direction during proceedings held on 10th Jan. 04. The respondent has listed the materials to be supplied adopting one sixth formula, furnishing details regarding the quantities supplied within the due date, quantity supplied beyond the due date, the value of the same and LD leviable thereon vide Annexure-y.*

Therefore whether the supply of materials following one sixth per month to be considered as per terms of contract will attract LD is a question. As already stated the period of supply is from 07/08/96 to 07/01/97 i.e. commencement and completion. The various correspondences from the Board nowhere indicated / insisted the need for supply at one sixth rate per month. On the other hand the Board received and accepted the supplies without any demur and without reserving the rights to claim LD.

6.5.2 Neither the delivery schedule nor the respondent's right at any point of time referred to one sixth formula in *practice. In fact it looked as if the delivery schedule was not acted upon and or the respondent was not keen about it. In other words the respondent neither quantified the one sixth relating to each item or the delivery schedule contained the same. Therefore supply of one sixth every month is only directory and commencement within six months from date of LOI and completion within five months thereafter is mandatory. In these circumstances the Tribunal holds that the respondent Board could be justified in levying damages only for supplies delayed after 07/01/97.*

6.5.3 The data furnished by the respondent in his statement on L D calculation referred above has been carefully scrutinized and found that the claim is limited to Rs.24.11 lakhs + against Rs.42.44 Lakhs in May 2002. Deleting all items which fall within the delivery period of 07/01/97 and taking into account only those items delivered beyond the outer date of delivery i.e.07.01.97, the L D amount is arrived at Rs.7 lakhs +, as below:-

Item	***Sl.No***	***Quantity***	***Dates***	***Amount of LD (Rs.)***
Capacitors (LOT-1)	*5 & 6*	*11 sets*	*25.01.97 to 17.03.97*	*2,48,698.50/ 2,52,646.10/ --------------- 5,01,3,44.60/*
Insulators (Annex to LOT-1)	*4 to 6*	*76 Nos*	*09.01.97 to 13.02.97*	*7,771.50/*

Item	*Sl.No*	*Quantity*	*Dates*	*Amount of LD (Rs.)*
Elevating structures/Capacitors (LOT-3)	*4 to 6*	*15 sets*	*12.02.97 to 13.03.97*	*1,69,726.56/*
Reactors "	*2 to 6*	*138 Nos.*	*10.02.97 to 11.02.97*	*62,878.50/*
Elevating Structures/reactors "	*4 to 6*	*180 sets*	*12.02.97 to 30.03.97*	*55,285.00/*
			Total	*7,97,006.16/*

26. A perusal of the above would make it clear that the Tribunal has come to the conclusion that there was delay in supplying Lot-1 to Lot-6 and by applying the mind, the Arbitral Tribunal had interpreted provision of Clause 24 of GCC and Clause 8 of SCC in proper perspective, particularly while dealing with the liquidated damages for delay in completion as stated in the said clauses and arrived at conclusion that the petitioner is entitled for damages from 07.01.1997 by providing the reason that the erection itself would commence on only 07.01.1997 i.e, after supply of machineries for various Lots. Thus, if there is any delay before 07.01.1997, the question of sustaining loss by the petitioner would not occur and if at all if there is any loss, the same will only occur after completion of erection i.e., after 07.01.1997. Thus, keeping all these aspects in mind, the Tribunal passed the

well considered award. Hence, this Court is of the view that the said award need no interference of this Court.

27. Further, in ***Arb.O.P.(Com.Div.)No.480 of 2023*** (referred above), this Court had elaborately dealt with regard to the determination of liquidated damages and the relevant paragraphs are extracted hereunder:

> *"16.Further, the Tribunal, apart from considering the all evidence placed before it, has considered the various decisions of the Honourable Supreme Court and the High Court, placed before it and extracted the legal position emerged from the said decisions, as under:-*
>
> > *i. In order to be entitled to compensation, existence and proof of legal injury or harm is a must.*
> >
> > *ii. Where a contract contains a stipulation by way of penalty, measure of damages is the reasonable compensation not exceeding the penalty stipulated for. Section 74 merely dispenses with the proof of "actual loss of damage' but does not justify the award of compensation, when in consequence of breach no "legal injury' at all has resulted.*
> >
> > *iii. The Court has to "adjudge in every case the reasonable compensation" which the innocent party is entitled to, on breach of a contract.*
> >
> > *iv. Such compensation has to be ascertained having regard to the conditions existing "as on the date of breach".*

v. In every case of breach of contract, the person aggrieved by the breach is not required to prove the actual loss or damage suffered by him and the Court is competent to award reasonable compensation, in case of breach, even if no actual damage is proved to have been suffered, in consequence of breach. But this is applicable only to classes of contracts wherein "it is impossible for the Court to assess the compensation arising from breach" and further "the sum named by the parties is regarded as genuine pre-estimate". As a corollary where, it is possible for the Court to assess the compensation arising from breach of where a sum named is not "genuine pre-estimate" or is the nature of penalty, the proof of actual damage is required. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him.

vi. If the compensation named in the contract is genuine preestimate of loss, which the parties knew when they made the contract to result from the breach, the innocent party is not require to lead evidence to prove actual loss suffered by him. But "it is open to the party in breach to prove that no loss is likely to occur by such breach".

vii. In Saw Pipe's case, in the facts of the case, the Honourable Supreme Court had found that in case of delay in completing construction, the resultant loss was difficult to prove. It also found that in the said case there was nothing on record that compensation contemplated was in any way unreasonable (see paragraph 67 (2003 5 SCC 705).

viii.Saw Pipe's case does not lay down even in cases where, as on the date of breach, lesser damages or no damages is established, the "sum *named" have to be answered.*

ix. The decision in Saw Pipe's case rendered by two Judges of the Honourable Supreme Court cannot be construed to lay down anything contrary to what is laid down by Five Judges in Fateh Chand's case or three Judges in Maula Bux's Case.

17.The Tribunal, after extracting the legal position, as stated above, has arrived at its conclusion in paragraph 14.1 of the impugned award, as stated above. A reading of the above conclusions of the Tribunal would make it clear that even as on the date of the deposition, i.e. 17.09.2022, the berth was not fully ready for commercial operation and the loading and unloading cranes were not installed, thereby meaning that the project is not put into operation. In the case on hand, the project was completed on 13.09.2019, while the date of commencement of the work was 06.12.2015 and the date of completion of the same was 18.04.2017. Even after a period of about three years, the Petitioner was not able to bring the project into operation, which shows that after completion of the project work, even after the same was handed over to the Petitioner, the project was not put into operation and hence, the question of claiming loss incurred due to delay in completion of the work does not arise. This aspect was rightly taken into account by the Tribunal with the *available facts and circumstances of the case, while passing the impugned award in favour of the claimant and therefore, the Tribunal has refused to grant the relief of levy of liquidated damages to the Petitioner.*

18.According to the learned counsel for the Petitioner, the loss incurred due to the delay in completion of the work need not be proved, in view of the decisions relied on by him and in view of Section 74, as stated above. But, a reading of the decisions cited by him would make it clear that it is not that the compensation can be ordered for the losses said to have been incurred, but without any basis, which means that there must be some basis for awarding the compensation towards liquidated damages. Therefore, in the present case, the Tribunal has elaborately dealt with how the Petitioner is not entitled for the claim towards liquidated damages and ultimately arrived at the conclusion that there was no basis for awarding the compensation for granting the relief of levy of liquidated damages, as stated above.

19. In 2022 4 SCC 116 (UHL Power Company Limited Vs. State of HP) relied on by the learned counsel for the Claimant, it was held as under:-

> *"21. An identical line of reasoning has been adopted in South East Asia Marine Engineering and Constructions Limited*

(SEAMEC Limited) Vs. Oil India Limited (2020 5 SCC 164) and it has been held as follows:- (SCC P.172, paragraphs 12-13):-

"12.It is settled position that a Court can set aside the award only on the grounds as provided in the Arbitration Act as interpreted by the Courts. Recently, this Court in Dyna Technologies (P) Limited Vs. Crompton Greaves Limited laid down the scope of such interference. This Court observed as follows: (Cc P.12, paragraph

'24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant o the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award interest he usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.'

13. It is also settled law that where two views are possible, the Court cannot interfere in the plausible view taken by the arbitrator *supported by reasoning. This Court in Dyna Technologies's case observed as under:- (SCC P.12, paragraph 25):-*

'25. Moreover, umpteen number of judgements of this Court have categorically held that the Court should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The Courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act.'"

20.By referring to the above said ratio laid down in the UHL Power's case, it is contended by the learned counsel for the Claimant that a possible view by the Arbitrator on the facts has necessarily to pass muster, as the Arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award and that therefore, it cannot be said that merely because another different view is available, it can be taken as a ground to interfere with the impugned award. In the case on hand, based on the evidence, both oral and documentary only and by proper reasoning, the Arbitrator has come to the conclusion, which is impugned in this Arbitration Original Petition. This Court is also of the same view that because another different view is possible, this Court cannot substitute the same with the views of the Arbitrator, because it *is not that the Arbitrator has rendered the impugned award without any evidence, but it is only based on the evidence and detailed discussions, about as to how the Petitioner has not incurred the loss and consequently, how the Claimant is entitled to recover the liquidated damages.*

21.In 2015 4 SCC 136 (Kailash Nath Associates Vs. DDA), it was held in paragraph 44 as under:-

> *"44. The Division Bench has gone wrong in principle. As has been pointed out above, there has been no breach of contract by the Appellant. Further, we cannot accept the view of the Division Bench that the fact that DDA made a profit from re-auction is irrelevant, as that would fly in the face of the most basic principle on the award of damages, namely, that compensation can only be given for damage or loss suffered. If damage or loss is not suffered , the law does not provide for a windfall.*

22. A reading of the above said decision would make it clear that merely because Section 74 provides that the loss incurred need not be provided, it does not mean that the Petitioner is not suffering loss and that they are not entitled for the levy of liquidated damages. But, in order to avail the benefit of liquidated damages, the loss or legal injury must be proved, in a manner known to law. In this case, the Petitioner, in the absence of proof of loss sustained, has not proved the loss incurred due to the delay in completion of the *project work, by letting in valid evidence by the quantification of loss by the Arbitrators. In this regard, it is pertinent to refer to the decision of the Division Bench of this Court reported in 2005 4 LW 319 (Ennore Port Limited Vs. Hindustan Construction Company Limited, wherein the Division Bench of this Court, while discussing about the loss or legal injury, has held as under:-*

> *"17. From the aforesaid, it is obvious that where there is a clear finding that breach of contract did not result in any loss or "legal injury", compensation would not be payable. As a matter of first appellate court, a bare reading of the factual scenario in 2003 2 CTC 282 cited supra, clearly indicates that delay in delivery of articles had caused legal injury inasmuch as the entire project had been delayed. Legal injury was writ large because of the delay the project had been delayed, which his not so in the present case. The Division Bench of the Honourable Supreme Court in 2003 2 CTC 282 has purported to follow the ratio of the Constitutional Bench decision in AIR 1963 SC 1405. The said decision, which has been consistently followed, clearly indicates that only where legal injury is caused, the party suffering because of the breach of the contract is entitled to compensation. The subsequent Honourable Supreme Court decision lays down where there is a clear indication that the amount stated in the contract as liquidated damages clearly indicate the intention of the parties, such amount is payable in case of breach*

of contract resulting in legal injury and the party is not required to prove the extent of the loss. 18. In our opinion, the subsequent decision of the Honourable Supreme Court in 2003 2 CTC 282 did not purport to depart from the consistent view taken by the Honourable Supreme Court in AIR 1963 SC 1405, AIR 1970 SC 1955 and AIR 1973 SC 1098. Since in the said decision, legal injury had been caused, the Honourable Supreme Court had observed that the amount stipulated in the contract represented a fair estimate of the loss and therefore, such amount was payable by the party who had caused breach of the contract.

23. The ratio laid down by the Honourable Supreme Court in 2005 4 LW 319 cited supra is that in cases where any breach of contract did not result in any loss or "legal injury", compensation would not be payable. In the case on hand, there was no loss or legal injury, as held by the Tribunal. From the above, it is clear that even the actual loss has to be proved, as has been held by the Honourable Supreme Court as stated above. Therefore, this Court is of the view that the impugned award does not suffer from any patent illegality and that there is no valid reason to hold that the impugned award is against the public policy as well."

28. Further, at paragraph No.43 in the ***Kailash Nath Associates*** case, the Hon'ble Apex Court had held as follows:

"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."

29. On perusal of the above two judgments, it is clear that as per the principle laid down by this Court and the Hon'ble Apex Court, the liquidated damages can be imposed only if the losses are proved by the parties. However, in the present case, the petitioner has not proved that they have incurred losses for the period from 07.08.1996 to 07.01.1997. Therefore, the Arbitral Tribunal has arrived at conclusion that the petitioner is not entitled for liquidated damages for said period. Even clause 24 of GCC and Clause 8 of SCC would state that the liquidated damages can be imposed only when

there is delay in completion. As per the terms of agreement, the latest date for commencement of erection would be last date of the supply of all the 6th Lots i.e., 07.01.1997. Hence, for the delay in supplying the Lot-1 to Lot-6 beyond 07.01.1997, certainly, the petitioner is entitled for liquidated damages. The said aspect was considered by the Tribunal in proper perspective.

30. As discussed above, till the time granted for supplying the machineries for all the 6 Lots, i.e., till 07.01.1997, the question of sustaining loss, so as to claim liquidated damages, would not arise. On the other hand, if there is any delay in supply beyond 07.01.1997, the petitioner cannot commence and complete the installation, the said delay would be attributable to the 1st respondent, since the petitioner would incur losses, for which, the petitioner are entitled for liquidated damages.

31. All these aspects were considered in a proper perspective by the Arbitral Tribunal and hence, this Court is of the considered view that the award passed by the Arbitral Tribunal dated 30.04.2004 needs no interference of this Court.

32. In the result, this Arbitration Original Petition is dismissed. No cost.

11.06.2024

Speaking/Non-speaking order
Index : Yes / No
Neutral Citation: Yes / No
nsa

KRISHNAN RAMASAMY.J.,

nsa

O.P.No.631 of 2004

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