IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.04.2024

CORAM:

THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

Arb.OP(Com.Div)No.480 of 2023

Chennai Port Authority, formerly Chennai Port Trust
by the Chief Engineer, Chennai Port Trust
Chennai-1 Petitioner

Vs

M/s.Srishila-GDCL JV
Bangalore 560 043 Respondent

Prayer:- This Arbitration Original Petition has been filed under Section 34(2) of the Arbitration and Conciliation Act, 1996, against the majority arbitral award, dated 05.05.2023 passed by the Arbitral Tribunal, Madras High Court.

For Petitioner : Mr.P.Ulaganathan

For Respondent : Mr.P.J.Rishikesh

ORDER

1. This Arbitration Original Petition has been filed by the Petitioner Port Trust, who was the Respondent before the Arbitral Tribunal, against the majority arbitral award, dated 05.05.2023 passed by the Arbitral Tribunal, Madras High Court.

2. The facts of the case, in a nutshell, which are leading to filing of this Arbitration Original Petition and necessary for disposal of the same, are as follows:-

(a) According to the Claimant/the Respondent herein, the Claimant, a Joint Venture Firm, was a successful bidder, in the tender floated by the Petitioner Port Trust, who is the Respondent before the Tribunal, for construction of coastal berth at Chennai Port and a letter of acceptance was issued on 15.10.2015 by the Petitioner and a Contract Agreement, dated 21.11.2015 was entered into between the parties. The date of commencement of the project work was 06.12.2015 and the date of completion of the same was 18.04.2017. However, the said project work was completed only on 13.09.2019 and a completion certificate was issued on 25.10.2019. The reasons for the delay in completion of the project work are only attributable to the Petitioner herein and not to the Claimant. Though the Claimant had sought for extension of time for completing the project work, on various occasions, the Petitioner had granted extension of time only upto 07.08.2017, by a letter dated 06.02.2020.

(b) It is the further case of the Claimant that the Petitioner herein, by their letters, has either denied extension of time or come forward to consider the same. Only at the time of processing the bills, the Petitioner levied liquidated damages and recovered the same, without any valid reason. Hence, contending that allowing the Claimant to continue the work even after contractual completion date, without terminating the contract, will prove that the time was not the essence of the contract and that therefore, it was a deemed extension of time and hence, it is not liable to pay the liquidated damages and other consequential sums, which are recovered by the Petitioner Port Trust, the Claimant has fled the claim petition, dated 12.09.2020, before the Arbitral Tribunal, claiming as many as 15 claims, namely, (1) additional expenditure, (2) reimbursement, (3) levy of liquidated damages, (4) release of penal interest, (5) overhead charges, (6) price escalation, (7) loss of profit, (8) financial charges, (9) cost due to additional gantry, (10) outstanding amount from RA Bills and (10A) release of retention of money, (10B) return and release of performance securities, (11) interest, (12) cost of arbitration and (13) lateral load test.

(c) The above claims were resisted by the Petitioner Port Trust, by filing a counter statement,making a counter claim and a rejoinder to the counter statement of the Petitioner Port Trust was also filed by the Claimant. Before the Tribunal, on the pleadings of the parties, necessary issues were framed and CW.1 was examined on the side of the Claimant and RW.1 was examined on the side of the Respondent. On the side of the Claimant, as many as 122 documents were filed and on the side of the Respondent, 163 documents were filed.

(d) The majority of the Arbitrators (two Arbitrators) of the Tribunal, consisting of three Arbitrators, by the impugned award, has allowed the claims nos.3, 6, 10, 10A and 13 made by the Claimant, with interest 12% p.a. from the date of the award till the date of realisation and rejected all other claims of the Claimant and the counter claim of the Petitioner Port

Trust, holding that the Petitioner Port Trust is not justified in levying the liquidated damages and recovering the same from the Claimant. Hence, the Petitioner Port Trust, contending that since the impugned majority arbitral award is patently illegal and contrary to public policy, the impugned majority arbitral award is not sustainable, has filed this Arbitration Original Petition,

3. This Court heard the learned counsel on either side.

4. The learned counsel for the Petitioner has assailed the impugned majority arbitral award mainly on the grounds that it is patently illegal and against the public policy. The learned counsel would submit that even as per the calculation of the Tribunal, there was a delay of 277 days in completing the project work by the Claimant and hence, though the Claimant has made a claim for liquidated damages, by invoking Clause 49 of the Contract Agreement, as per Section 74 of the Act, the reasons for the delay are only attributable to the Claimant and it is not necessary for the Petitioner to prove the loss occurred and that when it is proved that there was a delay as stated above, as found by the Tribunal, the Tribunal has to determine the liquidated damages based upon the period of delay in execution of the work because in the present case since it is a public project, the loss cannot be quantified and that these aspects have not been considered by the Tribunal, while passing the impugned award.

5. The learned counsel for the Petitioner would also mainly advance arguments on the issue of levy of liquidated damages, contending that the

Tribunal erred in considering the claim of liquidated damages though there was a delay on the part of the Claimant in completing the work and that with regard to the other claims in consequential to the liquidated damages claimed by the Petitioner, in the event if this Court considers the issue of recovery of liquidated damages in favour of the Petitioner, consideration of the other claims would automatically arise.

6. Though the learned counsel for the Petitioner, in support of his contentions, has cited several decisions of the Honourable Supreme Court and this Court, he has specifically referred to the decision of the Honourable Supreme Court reported in **CDJ 2015 SC 096 (M/s.Construction and Design Services Vs. Delhi Development Authority).** Relying on the said decision, the learned counsel would further submit that the impugned award is liable to be dismissed on the ground that it is patently illegal and against the public policy.

7. On the other hand, the learned counsel for the Respondent/ Claimant would submit that the grounds raised by the learned counsel for the Petitioner that the impugned award is patently illegal and against the public policy cannot be made applicable to the case on hand, in other words, the said grounds would not arise for the reason that the Tribunal, only after elaborately discussing with regard to the question of liquidated damages, based on the evidence, both oral and documentary, has allowed the said claim in favour of the Claimant. The learned counsel would further submit that only in the event of the Tribunal failing to consider and discuss about the issue of levy

of liquidated damages in the impugned award, certainly the Petitioner is entitled to question about the same on the grounds of patent illegality and public policy, but, it is not so in the case on hand, since the Tribunal has elaborately dealt with that aspect of liquidated damages and also arrived at the conclusion as to how the Petitioner is not entitled for the liquidated damages, considering the materials available before it.

8. The learned counsel for the Respondent/ Claimant would further submit that though the Tribunal gave a finding that there was a delay of 277 days in completing the project work, the Tribunal held that the Petitioner has not proved that due to such delay in completing the project work, the Petitioner incurred loss or legal injury. The learned counsel would further submit that even on the date of deposition i.e. 17.09.2022, the representative of the Petitioner gave oral evidence, deposing that the project was not taken up and it was not completed and that while so, when the project was not taken up, the possible presumption that would arise is that the Petitioner did not sustain any loss or legal injury and that all these aspects have been considered elaborately by the Tribunal and that therefore, the question of payment of liquidated damages would not arise at all and consequently, the question of rejecting the impugned award, ordering to refund the liquidated damages recovered from the Claimant, on the grounds of patent illegality and public policy does not arise.

9. The learned counsel for the Respondent/ Claimant, would, by referring to Clause 49.1. of the Contract Agreement, further submit that the extension

of time can be granted with liquidated damages or without the liquidated damages, but in the present case, upto the date of filing of the Petition claiming liquidated damages, no such claim was made in terms of the Clause 49.1 of the Contract Agreement, which provides that only in the event of extension of time being granted with liquidated damages, the liquidated damages would be recoverable and that when admittedly such extension of time was not granted for completing the work or there was silent in granting such extension and that the Claimant was allowed to continue to complete the project work beyond the period of Contract Agreement, thereby meaning that it was a deemed extension, it would go to always support the case of the Claimant, which means that they waived the right to make the claim of levy of liquidated damages. The learned counsel would further submit that taking into consideration all these aspects, the Tribunal has passed the well considered and reasoned impugned award and that apart, the Tribunal, based on the facts and circumstances of the case, has come to such a conclusion that the levy of liquidated damages is not sustainable and hence, ordered the Petitioner to pay the liquidated damages recovered from the Claimant and that since because the other opinion is possible, this Court cannot substitute the same with the opinion of the Tribunal, which is based on the facts and circumstances of the case.

10. Ultimately, the learned counsel for the Respondent/ Claimant, relying on the decisions of the Honourable Supreme Court reported in **2015 4 SCC 136 (Kailash Nath Associates Vs. DDA) and 2022 4 SCC 116 (UHL Power**

Company Limited Vs. State of HP) and the decision of the Division Bench of this Court reported in **2005 4 LW 319 Madras HC Division Bench (Ennore Port Vs. Hindustan Construction Company Limited),** would further submit that since the impugned award of the Tribunal is based on the facts and circumstances of the case on hand and the materials available on record, the well reasoned impugned award of the Tribunal is not required to be interfered with by this Court, as it is not patently illegal and against the public policy and hence, pray for dismissal of this Arbitration Original Petition.

11. This Court considered the submissions of the learned counsel on either side and also perused the materials placed on record, including the decisions of the Honourable Supreme Court and this Court, relied on by the learned counsel on either side.

12. In an by the impugned award, the claim (3) of the claimant relating to the levy of liquidated damages was allowed in full and the claims (6), (10), (10A) and (13) were all allowed in part in favour of the Claimant and the other claims of the Claimant and the counter claim of the Petitioner Port Trust were rejected.

13. The grounds, on which the learned counsel for the Petitioner has assailed the impugned award of the Tribunal, are that (1) the impugned award is patently illegal and (2) it is against the public policy.

14. In so far as the grounds of patent illegality and public policy are concerned, only when in a situation if something is not considered or is left out by the

Tribunal in spite of there being ample materials very much available, the question of considering the issues of patent illegality and public policy would definitely arise. But, in the case on hand, it is apparent that the Tribunal has not left out anything while considering the materials placed before it, but elaborately discussed in details the entire facts and circumstances of the case, including all the materials and then, arrived at the impugned award, which is, in the opinion of this Court, a well considered and reasoned one and consequently, it cannot be stated that it is against the public policy and patently illegal, as it is evident from its discussions made in paragraph 14.1 of the impugned award.

15. In paragraph 14.1 of the impugned award, the Tribunal, after analysing the entire facts and circumstances of the case, relating to the issue of levy of liquidated damages, has rendered its conclusion in respect of the same, as under:-

> "14.1 Considering the above, we analysed whether the Claimant is entitled for claim no.3 and the Respondent is entitled for the counter claim.
>
> i). The Respondent will be entitled for invoking LD Clause, if two conditions given are satisfied. 1. Reasons for the delay are attributable to the Claimant and 2. The Respondent incurred loss on account of delay by the Claimant. Mere inserting a provision in the contract for levying LD is not sufficient to levy LD. In this case, we have found supra that the delay in completing the project was not due to the Claimant. The reasons put forth by the Claimant before the previous Tribunal were accepted and it was concluded that the Claimant is entitled for the extension of time. So it is clear that the time mentioned in the contract is not the essence to complete the work of the contract. Hence, the Respondent is not entitled for levy of LD on this count alone. Moreover, the Respondent allowed the Claimant to continue the work, even after

the stipulated completion date which also clearly established that the Respondent has not treated the time as the essence of the contract. Further, the Clauses speak about the possibility of occurring delay. The initial breach was caused by the Respondent, which is having cascading effect on the subsequent delay. On completion of the work by the Claimant, the Respondent has accepted the same and issued completion certificate Ex.C4, dated 25.10.2019. As stated in Ex.C3, on completion of the work, the Respondent had a joint inspection and thereafter, the completion certificate was issued. Moreover, nothing is mentioned about their right to levy LD against the Claimant. The learned counsel for the Respondent, during his argument, has not pointed out in what way the Respondent had incurred loss due to belated completion of the work. No material is available to show that the Respondent incurred loss.

ii) In the cross examination of RW.1 he deposed as below:-

Q.No.63: When was the power and water to the deck area for vessels made ready?

Ans: I will check and revert.

Q.No.64:- When was the loading/unloading cranes installed at this berth?

Ans: I will check and revert.

Later through affidavit dated 17.09.2022, replied the above questions.

Q.No.63:- No power supply arrangements to the vessels at coastal berth. Requirement of water supply does not arise to the vessels.

Q.No.64:- Not yet installed.

Iii) From his evidence, it is clear that the berth was not fully ready for commercial operation even on that date of his deposition. The Respondent has not produced any documents about the volume of cargo anticipated at the time of conceptual stage of project and revenue anticipated and thereby loss incurred. Thereby the Respondent has not proved that they had incurred loss on account of delay.

> iv) On the basis of the above discussion, we conclude that the Respondent is not entitled to levy any liquidated damages. Hence, the counter claim sought for by the Respondent for an amount of Rs.6,64,23,055/- is rejected. Consequently, the amount recovered from the Claimant towards LD of Rs.2,04,18,981/- is directed to be paid by the Respondent to the Claimant."

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.
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> 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.
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> iii. The Court has to "adjudge in every case the reasonable compensation" which the innocent party is entitled to, on breach of a contract.
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> iv. Such compensation has to be ascertained having regard to the conditions existing "as on the date of breach".
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> 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 pre-estimate 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.
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> 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.

24. At this juncture, it is pertinent to extract Clause 49.1(i) of the Contract Agreement, as under:-

> "49. **Liquidated Damages**
>
> **49.1** In case of delay in completion of the contract, liquidated damages (learned) may be levied at the rate of ½% of the contract value per week of delay or part thereof subject to a maximum of 10 per cent o the contract price.
>
> (i) The employer, if satisfied, that the works can be completed by the contractor, within a reasonable time after the specified time for completion, may allow further extension of time at its discretion with or without the levy of L.D. In the event of extension granted being with L.D., the employer will be entitled without prejudice to any other right or remedy available in that behalf, to recover from the contractor as agreed damages equivalent to **half per cent ½%)** of the contract value of the works for each week or part of the week subject to the ceiling defined in **Sub-Clause 49.1.** "

25. On a reading of the above said Clause 49.1 of the Contract Agreement, it is very crystal clear that extension can be granted either with liquidated damages or without liquidated damages.

26. In the case on hand, the date of commencement of the work was 06.12.2015 and the date of completion of the work was 18.04.2017. However, the said work was completed only on 13.09.2019 and a completion certificate was issued on 25.10.2019 under ExC3, wherein nothing is stated about the levy of liquidated damages. According to the Claimant, though the Claimant had sought for extension of time on various occasions, the Petitioner had granted extension of time only for 111 days, upto 07.08.2017, by a letter dated 06.02.2020. It is not the case of the Petitioner that the contract was terminated because of the delay in completion of the work, but the Claimant was permitted to continue to complete the work beyond the period of contract, which means that time was not the essence of the contract and it was a deemed extension given by the Petitioner Port Trust.

27. Now, coming to the question as to whether the Petitioner is entitled to recover the liquidated damages or not, even after completion of the project work, they did not make any claim for levy of liquidated damages and even in Ex.C3, completion certificate, nothing is mentioned about levy of liquidated damages. Even after completion of the project, 111 days extension of time was granted and they did not terminate the contract and they allowed the Claimant to complete the work beyond the period of

contract. With regard to the other periods, which were allowed to be extended by the Petitioner to complete the work, i.e. 419 days as allowed by the Tribunal or the period of 277 days as calculated by the Tribunal, the Petitioner has not made any claim with regard to the levy of liquidated damages even as on the date of issue of completion certificate and the Petitioner failed to invoke the provisions of 49.1 of the Contract Agreement at the time till the claim petition was filed by the Claimant. Hence, the Petitioner is now certainly not entitled to make any claim for levy of liquidated damages.

28. A reading of the Clause 49.1 makes its very clear that extension can be made with liquidated damages or without liquidated damages. If at all, the extension should be granted without the liquidated damages only and before granting any extension, by virtue of the acts of the parties, it is deemed that extension was granted without liquidated damages only.

29. To sum and substance, admittedly though there was a considerable delay in completing the project work on the part of the Claimant, which would amount to breach of contract and since the Claimant was allowed to continue to complete the project work beyond the period of the contract, it would go to show that the time was not the essence of the contract and it was a deemed extension of time given to the Claimant to complete the project work by the Petitioner Port Trust. Further, in order to avail the benefit of liquidated damages by virtue of breach of the contract, the Petitioner has not proved that the reasons for the delay are attributable only to the Claimant

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and that the Petitioner incurred loss of legal injury only due to the delay in completing the project work on the part of the Claimant, by letting in valid evidence. On the other hand, the Claimant has proved his case by valid evidence, both oral and documentary, as discussed above. In such view of the matter, this Court is of the considered view that the Petitioner is not entitled to levy of liquidated damages and consequently, the other consequential reliefs made by the Petitioner based on the said claim of levy of liquidated damages are liable to be rejected. Ultimately, this Court is of the view that there is no illegality or infirmity in the impugned award, which warrants interference by this Court and accordingly, it is liable to be confirmed.

30. In fine, this Arbitration Original Petition is dismissed, confirming the impugned majority arbitral award in all respects. No costs.

08.04.2024

Index:Yes/No
Web:Yes/No
Speaking/Non Speaking
Neutral Citation:Yes/No
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