



2024:DHC:3195-DB



IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 24.04.2024

+ **FAO(OS)(COMM) 107/2019**

**DELHI STATE INDUSTRIAL INFRASTRUCTURE
DEVELOPMENT & CORPORATION LTD. Appellant**

versus

**M/S PNC DELHI INDUSTRIAL INFRA
PVT. LTD. Respondent**

Advocates who appeared in this case:

For the Appellant : Ms Anusuya Salwan, Ms Simrank Sakunia
& Ms Sonika Singh, Advocates.

For the Respondent : Mr Vikas Goel, Mr Abhishek Kumar & Mr
Twinkal Katariya, Advocates.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

HON'BLE MS JUSTICE TARA VITASTA GANJU

JUDGMENT

VIBHU BAKHRU, J

1. Delhi State Industrial Infrastructure Development and Corporation Limited (hereafter *DSI IDC*) has filed the present appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereafter *the A&C Act*) impugning a judgment dated 19.02.2019 (hereafter *the impugned judgment*), whereby the learned Single Judge of this Court had rejected DSI IDC's petition (being O.M.P.(COMM) 60/2019 captioned *Delhi State Industrial and Infrastructure*



2024:DHC:3195-DB



Development and Corporation Ltd. v. PNC Delhi Industrial Infra. Pvt. Ltd.).

2. DSIIDC had filed the aforementioned petition [OMP(COMM) 60/2019] under Section 34 of the A&C Act impugning an arbitral award dated 05.10.2018 (hereafter *the impugned award*) delivered by an Arbitral Tribunal constituted by a former Judge of the Supreme Court of India as the Sole Arbitrator (hereafter *the Arbitral Tribunal*).

3. At the outset, it is relevant to note that Ms Anusuya Salwan, learned counsel who addressed submissions on behalf of DSIIDC had confined the challenge in the present appeal to the impugned award in respect of the respondent's Claim nos. 1, 2 and 3, which were partly allowed by the Arbitral Tribunal.

4. The impugned award was rendered in the context of disputes that had arisen between the parties in connection with the Concession Agreement dated 19.07.2011 (hereafter *the Concession Agreement*).

BRIEF FACTS

5. DSIIDC, a company incorporated under the Companies Act, 1956 is a public authority empowered under the Delhi Industrial Development, Operation and Maintenance Act, 2010 to secure and assist in the orderly establishment of industrial areas, industrial estates, and flatted factory complexes in the National Capital Territory of Delhi. DSIIDC invited bids for the execution of work to upgrade, re-develop, augment, operate, maintain and manage the industrial



estate of Narela situated within the National Capital Territory of Delhi on a Public Private Partnership basis.

6. PNC Infratech Limited (hereafter *PNCIL*), a company incorporated under the Companies Act, 1956 furnished its bid pursuant to the said invitation quoting annuity of ₹21.5 crores per annum. The annual annuity payment of a sum of ₹21.5 crores quoted by PNCIL was found to be the lowest. The said bid was accepted and DSIIDC issued a Letter of Award dated 20.06.2011 (hereafter *the LoA*) awarding the contract to PNCIL. In terms of the LoA, PNCIL was required to incorporate a special purpose vehicle for entering into the Concession Agreement. Accordingly, PNCIL incorporated the respondent as a Special Purpose Vehicle. The respondent furnished the requisite Performance Bank Guarantee in the sum of ₹6.5 crores in favour of DSIIDC and thereafter, the parties entered into the Concession Agreement.

7. In terms of the Concession Agreement, the respondent was required to redevelop and manage the Narela Industrial Estate, Delhi for a period of fifteen years on annuity basis. The said term included the construction period. The respondent was required to construct Mandatory Capital Projects for redevelopment of the Narela Industrial Estate such as roads, storm water drainage, water supply, sewage, municipal solid waste, parking, horticulture, street lighting etc. The said projects were required to be completed within the first two years



and, the respondent was required to maintain and operate the Narela Industrial Estate for the remaining thirteen years.

8. The project cost was estimated at ₹175 crores and the same was required to be funded by the respondent. The respondent funded the said cost by equity contribution of ₹35 crores contributed by PNCIL and by availing a loan of ₹140 crores from the Oriental Bank of Commerce (hereafter *OBC*). The respondent states that on 10.12.2011, it entered into a Loan Agreement with *OBC* for securing the finance. The loan was repayable in 121 monthly instalments commencing from 31.12.2013 and with the last instalment being payable on 31.12.2023. In terms of the said Loan Agreement, the respondent opened an Escrow Account with *OBC*. The maintenance charges as well as annuity payments were required to be deposited in the said account.

9. In terms of Section 2.2 of the Concession Agreement, the concession period of fifteen years commenced from the Appointed Date – 15.12.2011. As noted above, the construction period was of two years and the scheduled completion date was 730 days from the Appointed Date.

10. During the Concession Period, the respondent was obliged to demand, collect and deposit maintenance charges from various plot holders in the Narela Industrial Area in the designated account.

11. Section 10.1 of the Concession Agreement required DSIIDC to appoint a Third Party Engineer (*TPE* in short) for monitoring the



execution of the project. Accordingly, DSIIDC appointed the Shriram Institute for Industrial Research as the TPE. The TPE was also required to issue a Completion Certificate (*CC* in short) after being satisfied as to completion of the works and successful tests in respect of the project facilities. The TPE was also obliged to issue a Provisional Completion Certificate (*PCC* in short) if the tests regarding the project facilities were successful and they could be reliably brought to commercial use but some items remained incomplete. The TPE was required to prepare a list of such items (*Punch List*), which was to be attached with the PCC. In terms of Section 9.10 of the Concession Agreement, the date of issuance of the CC or the PCC would be the Annuity Commencement Date (*ACD* in short). The concessionaire would be entitled to receive annuity from DSIIDC in terms of Section 12.1 of the Concession Agreement with effect from the ACD. In terms of the Concession Agreement, DSIIDC was obliged to pay the annual annuity of ₹21.5 crores, subject to the provisions of the Concession Agreement and on the Concessionaire/respondent achieving the ACD.

12. Disputes arose between the parties in connection with the Concession Agreement and the same were referred to arbitration.

13. The respondent filed a Statement of Claim, essentially, raising claims under five heads. The same, as noted in the impugned award, are reproduced below:



“i) Claim for payment of four annuities already fallen due upto 28.02.2017 aggregating to Rs. 86,00,00,000/- with a further direction to the respondent for payment of all future annuities in terms of the Concession Agreement

ii) Claim for payment of Maintenance Charges for the period from 1st November, 2013 to 13th March, 2014 - Rs. 3,95,98,859/-

iii) Claim for loss caused due to non-reduction of interest rate on term loan by Oriental Bank of Commerce on account of delay in payment of Annuity by respondent

iv) Claim for interest on Claim No.1 & 2 as on 28.02.2017 – Rs. 28,56,59,874/-

v) Claim towards Cost of Litigation – Rs. 50,00,000/-”

14. DSIIDC also filed counterclaims (six in number) including a claim for liquidated damages for delay in commencement of Mandatory Capital Projects quantified at ₹2.652 crores and on account of delay in completion of Mandatory Capital Projects quantified at ₹2.545 crores. DSIIDC also claimed damages on account of non-adherence to the Service Level Standard quantified at ₹1.353 crores.

15. The Arbitral Tribunal rendered the impugned award on 05.10.2018. The Arbitral Tribunal allowed Claim no.1 and directed payment of annuities that had fallen due up to 28.02.2017 as well as future annuities in terms of the Concession Agreement. Insofar as Claim no.2 is concerned, the Arbitral Tribunal partly allowed the same to the extent of ₹1,00,95,715/-. The said amount was subsequently corrected by an order dated 17.11.2018 passed under Section 33 of the



A&C Act and increased to ₹1,41,70,767/-. In addition, the Arbitral Tribunal allowed Claim no.3 to the extent of 50% and awarded a sum of ₹1,28,17,360/-. In addition, the Arbitral Tribunal also awarded interest on the sums awarded against Claim nos.1 and 2. Additionally, the Arbitral Tribunal also awarded *pendente lite* and future interest in respect of all the Claims (Claim nos.1 to 4) at the rate of SBI PLR rate plus 2% per annum in terms of Section 20.21 of the Concession Agreement. The Arbitral Tribunal also awarded costs quantified at ₹30,00,000/- (against Claim no.5). The counterclaims raised by DSIIDC were rejected.

16. DSIIDC's filed a petition under Section 34 of the A&C Act assailing the said award, which was rejected by the impugned order.

RIVAL CONTENTIONS

17. Ms Salwan, learned counsel appearing for DSIIDC, submitted that the Arbitral Tribunal had grossly erred in allowing the respondent's claim for annuities with effect from 01.11.2013. She submitted that in terms of Section 12.1 of the Concession Agreement, the annuity was payable subject to the provisions of the Concession Agreement and the concessionaire achieving the ACD. She submitted that the Arbitral Tribunal had failed to appreciate that the respondent had not complied with the terms of the Concession Agreement and therefore, was not entitled to payment of annuity. She stated that in terms of Section 11.7 of the Concession Agreement, the concessionaire was required to maintain books of accounts to record



all receipts from all sources or on account of the project, income, expenditure, payment, assets and liabilities on accrual basis and in accordance with the applicable accounting standards. The respondent was required to appoint an auditor to audit its account and was obliged to provide DSIIDC copies of the audited balance sheet and profit and loss account along with report of the statutory auditors. Further, DSIIDC also had the right to conduct the audit of the respondent's books of accounts either by itself or through an authorized representative. She submitted that the respondent had granted the Engineering Procurement Construction (EPC) contract to execute the construction work to its promoter, PNCIL, and therefore, its books of accounts did not disclose details of payments and expenditure incurred by the sub-contractor in developing the project. Consequently, the auditors appointed by DSIIDC reported that it was not possible to report on the actual deployment of funds by the EPC contractor as the same were not reflected in the respondent's books of accounts. In addition, she submitted that the impugned award was beyond the scope of the claims made inasmuch as the Arbitral Tribunal had not only awarded the claim for four plus one annuity payments that were claimed as due, but had issued directions to pay future annuities as well. She submitted that no such award could be rendered as payment of annuities in future were contingent upon the respondent complying with its obligations.

18. She also submitted that the Arbitral Tribunal had wrongly construed the ACD as 31.10.2013. She submitted that the CC was



issued on 14.03.2014 and therefore, the said date must be construed as the ACD. She submitted that prior to that, the TPE had, by its letter dated 24.10.2013, rejected the respondent's request for a PCC. The PCC dated 31.10.2013 was thereafter forwarded under the cover of a letter dated 23.12.2013 and therefore, the ACD could not be construed as a date prior to 23.12.2013. She contended that the CC was forwarded under the cover of the letter dated 03.03.2014, which was received on 14.03.2014; therefore, that date was required to be construed as the ACD.

19. Ms Salwan contested the award against Claim no.2 – collection of maintenance charges – principally on the same ground, that is, that the Arbitral Tribunal had misconstrued the date for completion of the works. The respondent was entitled to collect the maintenance charges from the date of issuance of the CC and not prior to the said date.

20. Ms Salwan also assailed the impugned award to the extent that the Arbitral Tribunal had allowed the claim of damages in respect of the loss suffered by the respondent on account of non-reduction of interest by OBC. She stated that DSIIDC could not be held liable for the creditworthiness of the respondent, which depends on several factors. She also pointed out that the Arbitral Tribunal had not accepted that timely payment of annuity would have resulted in a 75-basis point reduction in the rate of interest charged by OBC as there was no material to establish the same. Notwithstanding the same, the Arbitral Tribunal had, on a broad assumption, awarded 50% of the



amount claimed without any material or evidence to prove the same. She contended that the learned Single Judge had also erred in upholding the impugned award.

21. Mr Vikas Goel, learned counsel for the respondent had countered the aforesaid submissions.

REASONS AND CONCLUSION

22. At the outset, it is relevant to mention the principal dispute between the parties relates to the Annuity Commencement Date. According to the appellant, the ACD was not the date of issuance of the PCC by the TPE. The PCC was issued on 31.10.2013. Thus, the project was required to be treated as complete for the purposes of payment of annuity. A punch list was prepared by the TPE and the same was also completed on 31.01.2014. TPE issued the CC on 03.03.2014 effective from the date of completion of the punch list items on 31.01.2014. Although there was some delay in communication of the PCC and the CC as the same were forwarded under covers of the letter dated 23.12.2013 and 03.03.2014. DSIIDC claimed that it received the CC on 14.03.2014 and therefore, the annuity payments would commence from the said date. It was the respondent's case that it could not be penalized for the delay in forwarding the PCC or the CC. Further, in terms of the Concession Agreement, the ACD was agreed to be the date of issuance of the PCC. As noted above, it is also DSIIDC's case that the respondent had not complied with the terms of the Concession Agreement inasmuch



as the auditors appointed by DSIIDC were unable to audit the deployment of funds by the sub-contractors.

23. The Arbitral Tribunal had considered the rival contentions and found merit in the respondent's case that it was entitled to annuity from the date of issuance of the PCC. The Arbitral Tribunal held as under:

“23. Since the respondent has taken a defense that Annuity is not at all payable because Claimant did not comply with the requirements of Section 11.7(b) of the CA, it will be useful to take note of Section 11.7 of the CA which relates to Audit and Accounts. There is no dispute that the Concessionaire is a company and its accounts are audited by Statutory Auditors. There is no denial that copies of audited balance sheet and profit and loss account were made available and subsequently DSIIDC has also exercised its right to conduct audit of Claimant's books of account. The grievance of the DSIIDC that the Concessionaire failed to establish and maintain a Quarterly Reporting System to provide storage and ready retrieval of data relating to the construction and operation of the Project is based upon provisions in Section 11.7(b) (ii). It has come in the evidence of Mr. T.R.Rao, CW-I that there was no format mutually agreed between the parties or even imposed by DSIIDC and, therefore, the required informations, as per answer to Question No.53 was made available to the respondent – “in the form of Monthly Progress Reports, designated account of respondent and Escrow Account.” On behalf of the Claimant, it was shown that Section 10.8 require the Concessionaire to provide video recording on quarterly basis covering the status and progress of works in that quarter. There is no grievance that this was not done by the Concessionaire. Auditor's Report dated 21.8.2014 was also referred to by learned counsel for the Claimant for highlighting that everything was done in proper manner and DSIIDC has unnecessarily raised a grievance that the expenditure related vouchers and their supporting bills of the sub-contractor were



not made available to the auditors. The report shows that audits of the books of the sub-contractors was not within the scope of the work of the Auditors. Lastly, it has been forcefully argued and the same deserves acceptance that Section 12.1 of the CA relating to Annuity does not authorize the respondent DSIIDC not to pay the due Annuity when as per provisions of the agreement the Concessionaire had achieved the Annuity Commencement Date. On careful reading of the provisions in Article 12 relating to Annuity, it is found that the clauses – “subject to: (i) the provisions of this agreement, and (ii) the Concessionaire achieving Annuity Commencement Date, DSIIDC agrees and undertakes to pay to the Concessionaire” creates a clear liability upon DSIIDC to pay the Annuity to the Claimant on its achieving the Annuity Commencement Date. Only in some cases the TPE is authorized to decide the amount recoverable from the Concessionaire from the Annuity which is made subject to dispute resolution provisions in the CA. There is no provision in the agreement containing the stipulation that on account of any alleged default in maintenance of account etc., the Annuity payment can be withheld. The provision in Section 12.3 is specific as to how the invoices, adjustment and certification for Annuity payment have to be done. Provisions in Sub-section (d) and (e) make it further clear that these special provisions relating to Annuity have greater binding force and bind DSIIDC to ensure payment of Annuity upon receipt of the invoices together with recommendation payment forwarded by the TPE. The payment is required to be made notwithstanding any dispute, of course, it has to be without prejudice once the dispute is resolved amicably or through arbitration.”

24. It is apparent that the principal dispute is centered around Section 12.1 of the Concession Agreement. The same is reproduced for ready reference:

“12.1 Annuity

In consideration of the Concessionaire accepting the Concession and undertaking to perform and discharge its



obligations in accordance with the terms, conditions and covenants set forth in this Agreement, and subject to: (i) the provisions of this Agreement, and (ii) the Concessionaire achieving Annuity Commencement Date, DSIIDC agrees and undertakes to pay to the Concessionaire, on the Annuity Commencement Date and on each subsequent Annuity Payment Date as set forth in **Schedule 13 (“Annuity Payment Schedule”)**, the sum of Rs.21.5 Cr. (Rupees Twenty One Crore Fifty Lakhs Only) (the “**Annuity**”) as set forth in its Bid.”

25. A plain reading of the said clause indicates that DSIIDC had undertaken to pay the annuity on the ACD and on each subsequent annuity date as set out in the schedule. It is also relevant to refer to Section 9.6 and 9.10 of the Concession Agreement. The same are set out below:

“Section 9.6 Provisional Certificate

- (a) The Third Party Engineer may, at the request of the Concessionaire, issue a provisional certificate of completion (the “Provisional Certificate”) if the Tests are successful and the Project Facilities can be safely and reliably placed in commercial operation though certain works or things forming part thereof are outstanding and not yet complete. In such an event, the Provisional Certificate shall have appended thereto a list of outstanding items signed jointly by the Third Party Engineer and the Concessionaire (the “Punch List”); provided that the Third Party Engineer shall not withhold the Provisional Certificate for reason of any work remaining incomplete if the delay in completion thereof is solely attributable to the DSIIDC.

XXX

XXX

XXX

9.10 Annuity Commencement Date



The Project shall be deemed to be complete when the Completion Certificate or the Provisional Certificate, as the case may be, is issued under the provisions of this Agreement and accordingly the annuity commencement date of the Project shall be the date on which such Completion Certificate or the Provisional Certificate is issued (the “Annuity Commencement Date” or “Commercial Operations Date” (“COD”)) whereupon the Concessionaire shall be entitled to receive Annuity from the DSIIDC in accordance with the provisions of Article 12.”

26. The language of the aforesaid clauses of the Concession Agreement support the conclusion that DSIIDC was obliged to pay annuities from the date of issuance of the PCC.

27. The Arbitral Tribunal had also considered and rejected DSIIDC’s contention that it was entitled to withhold the annuity as there was a failure on the part of the respondent to get the books audited by DSIIDC’s auditors. There is no dispute that the respondent had produced its books of accounts for audit by the auditors appointed by DSIIDC. The principal grievance was that the supporting bills of the sub-contractors had not been produced. The Arbitral Tribunal found that the report furnished by the auditors clearly indicated that the audit of the books of sub-contractors was not within their scope. We are unable to accept that the view of the Arbitral Tribunal is palpably erroneous or vitiates the award on the ground of patent illegality. The Arbitral Tribunal found that the terms of the Concession Agreement did not support the case set up by DSIIDC.



28. The contention that the impugned award is beyond the claims made by the respondent is also insubstantial. A plain reading of Claim no.1, as set out in the impugned award, indicates that the respondent had claimed annuities that had fallen due up to 28.02.2017 aggregating to ₹86,00,00,000/- and had sought a further direction for payment of future annuities in terms of the Concession Agreement. Thus, the award directing DSIIDC to pay future annuities in terms of Concession Agreement, cannot be faulted. The contention that no directions could be issued for payment of future annuities as the same were contingent upon the respondent complying with the conditions of the Concession Agreement, is unmerited. The Arbitral Tribunal has not issued any blanket orders directing payment of future annuities. The respondent had sought an award for payment of future annuities *“in terms of the Concession Agreement”* and the same was awarded. Thus, there is no direction to DSIIDC to pay future annuities notwithstanding that the same are not due in terms of the Concession Agreement.

29. In our view, this amply clarifies that DSIIDC would be liable to pay annuities in accordance with the Concession Agreement and not in disregard of the same.

30. The second question to be examined is in regard to payment of award in respect of Claim no.2. The respondent had claimed maintenance charges for the period of 01.11.2013 to 13.03.2014, which it had quantified at 3,95,98,859/-. The said claim was also



contested by DSIIDC on the same ground as Claim no.1. According to DSIIDC, the maintenance charges could be collected only after completion of the project. In addition, DSIIDC also contested the quantum of the maintenance charges. There is no dispute that if it is accepted that the ACD is 31.10.2013, the respondent would also be entitled to collect maintenance charges from the said date. As held above, the Arbitral Tribunal's decision in accepting the ACD as 31.10.2013, cannot be interfered with in these proceedings. Accordingly, DSIIDC's challenge to the impugned award in respect of Claim no.2 must fail as well.

31. Insofar as DSIIDC's contention regarding quantum of maintenance charges is concerned, the Arbitral Tribunal had duly considered the same and had not accepted the respondent's claim to the full extent and had confined the amount realized by DSIIDC. The same was quantified at ₹1,00,95,715/-, which was subsequently rectified to ₹1,41,70,767/- by an order dated 17.11.2018 passed by the Arbitral Tribunal under Section 33 of the A&C Act.

RE: CLAIM No.3

32. The respondent had claimed compensation for the loss suffered due to non-reduction of interest rate on the term loan availed from OBC. The respondent had availed of a loan of ₹140 crores from OBC in terms of the Loan Agreement dated 10.12.2011. As noted earlier, the loan was to be repaid in 121 monthly installments commencing from 31.12.2013. Admittedly, the rate of interest on which the loan



was advanced was agreed to between the respondent and OBC. It is the respondent's case that had DSIIDC been prompt in paying the annuity charges, OBC would have reduced the rate of interest on which the loan was advanced. The respondent had pleaded that it was an accepted practice in infrastructure project finance that on the successful completion of the project, the banks/financial institutions financing such projects reduce the rate of interest commensurate with the mitigation of risks and commencement of revenue inflows. Once a project is completed, the risks of time and cost overruns cease, and it is the usual practice for banks to reduce the interest on the facilities extended to the project developer.

33. The respondent claimed that it had made a request to OBC for reducing the rate of interest but the same was turned down on the ground that the first annuity of ₹21.5 crores had not been deposited in the account.

34. The respondent relied upon a letter dated 25.04.2014 addressed to OBC informing the said bank that the project was completed successfully on 31.10.2013 and requesting that the rate of interest (which was pegged at base rate plus 75 basis points) be reduced to the base rate with effect from 01.04.2014 onwards. The respondent claimed that the applicable rate of interest (base rate plus 75 basis point) worked out to 11% per annum as on 31.03.2014. If OBC had acceded to the said request, the said rate would be reduced to 10.25% per annum. However, OBC did not accede to the request. OBC issued



a letter dated 08.06.2014 noting that the respondent had become entitled to receipt of the first annuity payment of ₹21.5 crores on achieving the project completion on 31.10.2013. However, the said payment had not been released by DSIIDC even after more than seven months of the completion of the project. Accordingly, OBC informed the respondent that it was concerned regarding the delay and was not aware of the reasons for the same. It was further stated that once the respondent confirmed the receipt of the due annuity payment, the respondent's request for resetting of interest would be "*processed for consideration*". The respondent claimed that since DSIIDC had not released the annuity payments, OBC had not reduced the rate of interest by 75 basis points, resulting in the respondent suffering a loss of ₹2,56,34,720/-.

35. DSIIDC had resisted the aforesaid claim, principally, on the ground that the respondent was not entitled to payment of annuity, which was DSIIDC's defence to the respondent's Claim no.1. The Arbitral Tribunal rejected DSIIDC's defence as discussed above. The Arbitral Tribunal concluded that the respondent had suffered some loss on account of OBC not considering the respondent's request for reduction of interest as DSIIDC had not released the annuity payments due to the respondent. However, the Arbitral Tribunal found that the respondent's claim was not free from doubt as it was open for the bank to reduce the rates of interest as per its discretion and not necessarily by 75 basis point, as requested by the respondent. In view of the above, the Arbitral Tribunal considered it apposite to allow 50%



of the amount claimed and awarded a sum of ₹1,28,17,360/- in favour of the respondent. The relevant extract of the decision of the Arbitral Tribunal is set out below:

“36. The credit rating of Claimant company was not revised upwards till the filing of the claim nor the respondent released any of the Annuity payments. In such circumstances, the Claimant failed to obtain any reduction in the interest rate. The third claim is based on facts which are not in much dispute. Hence, it can be safely and reasonably held that Claimant has suffered some losses as advanced in Claim No.3. But what would be the quantum of such loss is not free from doubt because it was open for the bank to reduce the rate of interest as per its discretion and not necessarily by 75 basis points as claimed by the Claimant. On account of such uncertainty, in spite of accepting the prevailing industry practice, it is deemed just and proper to allow only 50% of Claim No.3. In paragraph-63 of the Claim Petition, the Claimant has itself made an averment that after the commissioning of a Project by a borrower, Banks consider “some reduction” in the rate of interest applicable on a loan agreement of such borrower. Hence, Claim No.3 is allowed only in part to the extent of Rs.1,28,17,360/-.”

36. It is apparent from the above that the Arbitral Tribunal did not consider the incidence and the nature of the damages claimed by the respondent. It is apparent that the respondent’s claim was for an indirect loss and in the nature of special damages. There was no material on record to establish that the respondent, as a matter of right, was entitled to reduction of the rate of interest charged by OBC, on DSIIDC releasing the first annuity.



37. It is also important to note that the question of rate of interest is a matter strictly between OBC and the respondent and would be dependent on several factors. The rate of interest at which loan is advanced by the lender is a matter of negotiations and agreement between the borrower and the lender. Of course, the credit rating of a borrower in the said context may be material. DSIIDC is not involved in determining the rate of interest charged by OBC.

38. Admittedly, OBC had no obligation to reduce the rate of interest on release of the first annuity installment by DSIIDC. There is no document or material which records any such commitment on the part of OBC.

39. It is clear that the claim raised by the respondent of a possible reduction of rate of interest if DSIIDC had released the annuity on time, is a speculative claim. There is also no communication on record from OBC committing to reduce the rate of interest on the release of the first annuity. There is also no communication or material on record to establish that if DSIIDC had released the annuity in time, OBC was obliged to reduce the rate of interest on the loan advanced to the respondent.

40. It is important to note that the claim of compensation for the alleged loss suffered by the respondent, is not a direct incidence of failure on the part of DSIIDC to comply with its obligation to release the first annuity payment. The damages suffered are clearly remote and not proximate to breach on the part of DSIIDC to release the



annuity payment as agreed. It is also apparent that claim would not lie unless DSIIDC was specifically put to notice of a possible loss and such loss was in contemplation of the parties. This court had pointedly asked the counsel for the respondent whether there was any contemporaneous communication at the time when the first annuity payment was due, informing DSIIDC that failure on its part would result in a loss on account of non-reduction of interest rate by OBC. He fairly conceded that there is no such communication on record, whereby the respondent had informed DSIIDC that its failure to release the annuity would result in depriving the respondent in securing a reduced rate of interest from OBC and a financial loss to the extent as claimed. Without DSIIDC being put to prior notice, the respondent's claim for loss of such a nature would not lie.

41. In *State of Kerala v. K. Bhaskaran: AIR 1985 Ker 49*, a Division Bench of the Kerala High Court had referred to the decision in *Hadley v. Baxendale: 156 ER 145* and observed as under:

“11. Alderson B delivering the judgment of the court of exchequer in *Hadley v. Baxendale* stated as follows:

“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.”



It is now well-settled that Section 73 of the Contract Act reflects in full the principles in *Hadley v. Baxendale*. Section 73 reads thus:

“Compensation for loss or damage caused by breach of contract – When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.”

12. So the question that has to be decided by this court is whether the 10% profit claimed by the plaintiff as a loss of gain prevented can fairly and reasonably be considered as a loss “arising naturally”, i.e. according to the usual course of things. We think Section 73 of the Indian Contract Act allows as damages, the loss of reasonable profits arising from a breach of contract. The rule that is applicable can be summarised as follows:

‘The defendant is liable only for "natural and proximate consequences of a breach or those consequences which were in the parties' contemplation at the time of contract." The above quoted phrases are words of art and usually represent two ways of expressing a single requirement. Proximate and natural consequences are those that flow directly or closely from the breach in the usual and normal course of events -- those which a 'reasonable man' or a person of ordinary prudence would when the bargain is made foresee, as expectable results of later breach. The phrase 'in the parties' contemplation' normally means in the reasonable contemplation of the defendant. Thus understood, it has got only the same meaning as the



companion phrase 'natural and proximate'. Brevity and clarity are better served by abandoning these traditional phrases of legal article and using 'instead the gist of their meaning. We propose the following statement of the rule. The defendant is liable only for reasonably foreseeable losses -- those that a normally prudent person, standing in his place possessing his information when contracting would have had reason to foresee as probable consequences of future breach'."

42. It is apparent that the loss, as claimed by the respondent is not one that naturally arises in the usual course of things from a breach on the part of DSIIDC to release the first annuity. It was also not in contemplation of the parties that such loss is likely to result from breach of the Concession Agreement at the time when they entered into the said agreement.

43. In *Karsandas H. Thacker v. M/s. The Saran Engineering Co. Ltd.: AIR 1965 SC 1981*, the Supreme Court rejected the claim for damages for breach of a contract for supply of 200 tons of scrap iron on the ground that the same was remote. The defendant in the said case had failed to deliver 200 tons of scrap iron. At the material time, the price of iron scrap was controlled. The defendant claimed that the plaintiff could not claim any loss as the price of scrap iron on the date of the contract and on the date when it was breached was the same. It was plaintiff's case that it had entered into a contract for export of scrap iron with Export Corporation relying on the supply from the defendant. Since the defendant had failed to supply the scrap iron, the plaintiff had also defaulted in his obligation to supply scrap iron to the



Export Corporation for the purpose of export. The Export Corporation had purchased the scrap iron from the market and recovered the difference in the price at which it had agreed to purchase the goods from the plaintiff and the price at which it had purchased from the market, from the plaintiff. It was urged that the Iron and Steel (Scrap Control) Order, 1943 applies only to cases of sale of scrap iron used within the country. The Court held that the plaintiff was not entitled to damages equal to the difference between the price paid by his vendees (Export Corporation) and the price that he would have paid to the defendant for goods in question (200 tons of scrap iron). The Court held that unless the plaintiff had entered into a contract with the defendant after informing the latter that that he was purchasing the scrap iron for export (if there was no control price applicable to such purchases for export) the plaintiff could not claim such damages. The Court noted that in terms of Section 73 of the Indian Contract Act, 1872, the plaintiff could only claim loss which could have naturally arisen in the usual course of things for the breach of the contract by the defendant.

44. The Supreme Court in the decision of *Authorised Officer, Central Bank of India v. Shanmugavelu*: 2024 SCC OnLine SC 92, observed:

“50. The above principles were explained and clarified by the Court of Appeal in *Victoria Laundry (Windsor) Ltd. v. Newman Industrial Ltd.* [[1949] 2 K.B. 528 (CA).] as under:



“(1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed:...

(2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.

(3) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.

(4) For this purpose, knowledge ‘possessed’ is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the ‘ordinary course of things’ and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the ‘first rule’ in *Hadley v. Baxendale* [[1854] 9 Exch. 341.] . But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the ‘ordinary course of things’, of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the ‘second rule’ so as to make additional loss also recoverable.

(5) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result...

(6) Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge the defendant could, as a reasonable man, foresee that a



breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result. It is indeed enough, to borrow from the language of Lord du Parc in the same case, at page 158, if the loss (or some factor without which it would not have occurred) is a 'serious possibility' or a 'real danger'..."

* * * *

52. Damages can be awarded only for the loss directly suffered on account of the breach and not for any remote or indirect loss sustained by reason of the breach of contract. The general rule is that where two parties enter into a contract and one of them commits breach, the other party will be entitled to receive as damages in respect of such breach of contract, such sum as may fairly and reasonably be considered arising naturally, that is according to the usual course of things, from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. If any special circumstances about the dependency of the performance of other contract(s) by the party complaining of the breach, on the performance of the contract in dispute by the party in breach, had been communicated to the party in breach, and thus known to both parties at the time of entering into the contract, then the damages for the breach of the contract in dispute, may include the compensation for the loss suffered in regard to such other dependent contracts. But, on the other hand, if the special circumstances were not made known to the party breaking the contract, the party breaking the contract, at the most, could only be supposed to have had in its contemplation the amount of injury which would arise generally and directly and not any remote or unknown loss or damage."

45. In the present case, the Arbitral Tribunal has failed to consider that the damages claimed were remote and were not those that arose in the usual course of things from such breach or those that were in the



contemplation of the parties at the time they entered into the Concession Agreement. The Arbitral Tribunal had compensated the respondent for the delay in release of annuity by awarding interest which naturally arises from withholding the amounts due to DSIIDC. Further compensation as claimed by the respondent was not proximate to the breach on the part of DSIIDC.

46. In addition to the above, there is also no certainty as to the quantum of loss suffered assuming that the respondent has suffered the same. The Arbitral Tribunal also acknowledged this aspect, however, proceeded to award 50% of the claim amount. The said measure is not founded on any material or evidence.

47. The impugned award to the extent that it partially allows the respondent's claim in the sum of ₹1,28,17,360/- is patently illegal and cannot be sustained.

48. The Arbitral Tribunal had also awarded interest and DSIIDC had assailed the impugned award in this regard as well. However, we find no infirmity with the award of interest on the award as sustained. It is not necessary to examine DSIIDC's challenge to the award of interest in any detail because as stated at the outset, the learned counsel had confined the present appeal to assailing the impugned award in respect of only three claims (Claim nos. 1, 2 and 3).

49. We also find no ground to interfere with the impugned award insofar as award of costs is concerned. The Arbitral Tribunal had rejected DSIIDC's claim that it was entitled to withhold annuity



payment or the maintenance charges. It is well settled that costs follow events. The respondent had succeeded in its principal claims and the counterclaims raised by DSIIDC were rejected. The dispute being a commercial dispute, the respondent would be entitled to reasonable costs for being compelled to take recourse to its remedies.

50. In view of the above, the impugned award to the extent of the award entered in respect of Claim no. 3 for a sum of ₹1,28,17,360/- is set aside. The impugned judgment to the extent it rejects DSIIDC's challenge to award against Claim no. 3 is erroneous and is set aside

51. The appeal is disposed of in the aforesaid terms.

VIBHU BAKHRU, J

TARA VITASTA GANJU, J

APRIL 24, 2024
RK/GSR