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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of decision: 26.02.2024*

\+ **FAO(OS) (COMM) 245/2023 and CM APPL. 57335/2023**

BHARAT HEAVY ELECTRICALS LIMITED ..... Appellant

Through: Mr Neeraj Malhotra, Sr Adv. with Mr Sarojanand Jha, Ms Rajreeta Ghosh, Mr Rahul Kumar and Mr Nimish Gupta, Advs.

versus

KANOHAR ELECTRICALS LIMITED ..... Respondent

Through: Mr Raman Kapur, Sr. Advocate with Mr Varun Kapur, Advocates.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MR JUSTICE AMIT BANSAL

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (ORAL)

1. This appeal is directed against the judgment dated 01.09.2023 rendered by the learned Single Judge. The learned Single Judge, *via* the impugned judgment, has dismissed the appellant's petition preferred under Section 34 of the Arbitration and Conciliation Act, 1996 [in short, "1996 Act"].

1.1 In effect, the learned Single Judge has confirmed the award dated 29.03.2022.

2. The record shows that the learned Arbitrator has awarded

Rs.1,28,52,203/- to the respondent. Furthermore, the award provides that if the appellant fails to pay the amount indicated therein, within 60 days, it would have to pay simple interest at the rate of 8% per annum, commencing from the date of publication of the award.

3. A perusal of the arbitral award discloses that the following claims were lodged by the respondent before the learned Arbitrator:

Claim no.	Particulars	Accepted Yes/No	Reference	Claimed Raised	Claim Accepted
1(i)	Wrong deduction of LD	Yes	8.8c	1,25,60,065/-	1,25,60,065/-
1(ii)	Interest on LD	No	13.1c	34,06,000/-	NIL
2(i)	Unpaid Invoice for supply of spares	Yes	11.4c	1,62,138/-	1,62,138/-
2(ii)	Interest on Unpaid Invoice	No	13.1c	30,384/-	NIL
3	Interest for delay in payment	No	13.1c	20,64,568/-	NIL
4(i)	Demurrage Charges	Yes	11.1c	2,16,200/-	1,30,000/-
4(ii)	Interest on Demurrage Charges	No	13.1c	72,450/-	NIL
5	Interest on delay in lifting spares	No	13.1c	53,972/-	NIL
6	Conciliation Expenses	No	14.1c	42,500/-	NIL
7	Higher material rates	No	11.1c	1,30,28,366/-	NIL
8	Financial & Man-hours	No	11.2c	65,14,183/-	NIL

	losses				
9	Arbitration Expenses	No	14.2c	_____	NIL
10	Payment of interest	No	13.1c	_____	NIL
Total relief					1,28,52,203/-

4. It is common ground that the learned Arbitrator ruled in favour of the respondent concerning claim 1(i), i.e., liquidated damages. The rationale furnished by the learned Arbitrator *qua* this claim was that the appellant did not suffer any loss/injury due to the delay in supply of the subject goods. Besides this, against claim 2(i), which concerned unpaid price for spares, the learned Arbitrator awarded Rs. 1,62,138/-. In addition, thereto, under the award *qua* claim 4(i), demurrage charges were allowed partially, to the extent of Rs. 1,30,000/-.

5. Mr Neeraj Malhotra, learned senior counsel, who appears on behalf of the appellant, with regard to claim 1(i), i.e., liquidated damages, submitted that since the respondent was one of the contractors who enabled the appellant to execute a large Engineering Procurement Construction [EPC] project, it was axiomatic that injuries/losses would have been suffered by the appellant. Both, the learned Arbitrator as well as the learned Single Judge have, as indicated above, concluded to the contrary.

6. The broad backdrop against which the instant appeal has been lodged is the following:

6.1 The appellant had floated a tender for the supply of oil filled service transformers [in short, "transformers"] and mandatory spares for 3 X 660 MW North Karanpura STPP Stage-1. This tender was floated on 11.05.2017.

6.2 On 24.05.2017, the respondent lodged its bid.

6.3 The bid was opened on 25.05.2017, and the offer made by the respondent was accepted.

6.4 This led to two (2) purchase orders being issued in the respondent's favour for the supply of transformers and mandatory spares. The purchase order for transformers bore a site price of Rs.10,92,20,600/-, while the purchase order for mandatory spares had a site price of Rs.16,55,460/-. These purchase orders are dated 30.06.2017.

6.5 The respondent sent its acknowledgment *qua* the purchase orders on 05.07.2017.

7. It is not in dispute that correspondence ensued between the disputants with regard to the submission of drawings/documents through July-August of 2017.

8. Although the Central Goods and Service Tax Act, 2017 was brought into force around June-July of 2017, the purchase orders, erroneously, referred to an earlier tax regime. Upon this aspect being brought to the notice of the appellant, an addendum concerning the purchase orders was issued to the respondent, *via* e-mail, on 03.08.2017, which was confirmed by the respondent *via* an e-mail on 17.10.2017.

9. It is not in dispute that the drawings and documents received the final approval of the appellant on 15.03.2018.

9.1 Resultantly, the final delivery date under the subject contract was fixed as 26.08.2018.

9.2 The record shows (and something which is not in dispute) that under the subject purchase order concerning transformers, the respondent was required to, initially, supply 44 transformers. Later on, though, the quantity

was increased to 46 transformers.

9.3 It is also not in dispute that of the 46 transformers, 42 transformers were delivered within the timeframe agreed to between the parties, i.e., by 26.08.2018. There was a delay of about 4 months with regard to 4 transformers, which were, admittedly, delivered on 31.12.2018.

10. It is the delay in delivering these 4 transformers that propelled the appellant to levy liquidated damages calculated at the rate of 9.5% of the total contract price in terms of clause 16.2 of the GCC Rev 06.

11. This and the other disputes obtaining between the parties led the respondent to invoke, on 23.06.2020, the arbitration agreement arrived at between the parties. Consequently, with the mutual consent of the parties, a sole Arbitrator was appointed on 25.08.2020.

12. It is not in dispute that except claims referred to against nos. 1(i), 2(i), and 4(i), all other claims lodged by the respondent were rejected by the learned Arbitrator.

13. The appellant, being aggrieved, instituted, as noticed above, a petition under Section 34 of the 1996 Act with regard to claims awarded in favour of the respondent by the learned Arbitrator.

14. The learned Single Judge, as alluded to above, rejected the petition filed by the appellant under Section 34 of the 1996 Act.

15. Notably, in the appeal, the grounds taken are directed predominantly towards that part of the award, whereby, refund of the amount retained towards liquidated damages has been ordered by the learned Arbitrator.

16. A perusal of the record would show that the learned Arbitrator directed refund of liquidated damages retained by the appellant, *inter alia*, on the ground that the minutes of the meeting dated 21.03.2021 revealed that

out of 46 transformers supplied by the respondent, only 20 transformers had been installed and of which, only 8 had been commissioned by 21.03.2021.

16.1 As noted above, 42 transformers were delivered on 26.08.2018 and the remaining 4 transformers were delivered on 31.12.2018.

17. Thus, the delay between the supply of transformers and their commissioning, at the very least, was 27 months, when 8 out of 46 transformers supplied were commissioned.

18. Thus, based on the appreciation of evidence placed before the learned Arbitrator, he concluded that the appellant had not suffered any loss/injury due to the delay in supply of transformers. In support of this conclusion, the learned Arbitrator relied upon the judgments rendered in ***Kailash Nath Associates v. Delhi Development Authority***, (2015) 4 SCC 136 and ***Indian Oil Corpn. v. Lloyds Steel Industries Ltd.***, (2007) SCC OnLine Del 1169.

19. We may also note that the learned Arbitrator has returned a finding of fact that the pleadings concerning the injury/loss on account of delay in the supply of transformers are vague since no specific mention was made as to how and in what manner loss had been suffered.

20. The learned Single Judge, while dismissing the petition filed under Section 34 of the 1996 Act, after hearing counsel for the parties and perusing the record, has come to the same conclusion.

21. Mr Malhotra reiterates that since it was an EPC project, the delay in supplying transformers has resulted in injury/loss. Mr Malhotra contends that another entity named NTPC, which was the ultimate employer, had imposed liquidated damages on the appellant.

21.1 Mr Malhotra, however, concedes that this aspect was neither pleaded nor argued before the learned Arbitrator.

21.2 Mr Malhotra fairly concedes that this aspect was also not part of the pleadings in the Section 34 proceedings preferred before the learned Single Judge.

21.3 Furthermore, there is no dispute that no such argument was put forth before the learned Single Judge.

21.4 Insofar as the present appeal is concerned, consistent with its conduct, the appellant has framed no such ground even in the appeal before us. The argument is raised across the Bar.

22. Therefore, we are disinclined to accept this submission as this would amount to ambushing the respondent at the final hearing stage.

23. Furthermore, as last resort, Mr Malhotra seeks to draw our attention to paragraph 11 of internal page 19 of the statement of defence [SOD].

23.1 We have perused the assertions made therein. There is no reference to NTPC in the above-mentioned paragraph of the SOD.

24. Pertinently, although 42 of the 46 transformers were supplied in time, liquidated damages were levied at the rate of 9.5% on the entire contract value. The appellant did not make adjustment for proportionate reduction in liquidated damages concerning 42 transformers which had been delivered by the due date. This apart, since the appellant had retained money and was justifying its retention, we would have expected the appellant to lodge a counter-claim in that behalf.

24.1 No such counter-claim was lodged by the appellant which is besides the fact that there was no specific pleading with regard to the injury and loss.

25. The attempt made on behalf of the appellant, which is to demonstrate loss and injury, by adverting to the fact that the transformers were required to be used in the execution of an EPC project does not impress us. Learned

Arbitrator, as is well-established, is the master of the quality and quantity of evidence, tendered in support of the pleadings placed on record [*See* ***Associate Builders v. DDA***, (2015) 3 SCC 49].

26. The learned Arbitrator has, in our view, rightly concluded that there was no legal justification for the levy of liquidated damages on account of failure to plead and demonstrate legal injury. Liquidated damages, in law, are no different from unliquidated damages that an aggrieved party may claim. In both instances, the aggrieved party is required to demonstrate legal injury.

26.1 Thus, section 74 of The Indian Contract Act, 1872 [in short, "Contract Act"], which alludes to liquidated damages, does not relieve the aggrieved party from proving that it had suffered a legal injury. The aggrieved party cannot claim compensation unless it can establish that it suffered some loss or damage.

26.2 Liquidated damages, as agreed to between the disputants, represents the maximum amount that can be paid to an aggrieved party. Since damages for breach of contract is paid as compensation, the law requires the defaulting party to pay, even under Section 74 of the Contract Act, reasonable compensation. It is only where, for instance, the contract obtaining between the party is inveigled in complexity, that the law dispenses proof of actual loss or damage. This, however, does not relieve the aggrieved party from establishing that it had suffered legal injury as a result of the breach committed by the defaulting party.

27. As noticed above, although the learned Arbitrator noticed that there was some delay in delivering 4 out of the 46 transformers, his conclusion, based on material placed before him, was that, because only 8 of the

transformers had been commissioned, no legal injury was suffered by the appellant.

27.1 In our opinion, the conclusion arrived at by the learned Arbitrator, *albeit*, after appreciating the evidence in the context of the pleadings placed before him, falls completely within the ken of the Arbitrator and was rightly not disturbed by the Single Judge. In this context, the following observations made by A K Sikri J. (as he then was) in the matter of ***Indian Oil Corpn. v. Lloyds Steel Industries Ltd.***, (2007) SCC OnLine Del 1169, being apposite, are extracted hereafter:

> "*47. Insofar as imposition of liquidated damages is concerned, the discussion is predicated on the issue as to whether any loss is suffered by the petitioner or not. Learned Counsel for the petitioner does not dispute that the construction of terminal at Jodhpur was to be treated as integral part of the entire project, i.e. pipeline project for transferring petroleum products from Kandla to Bhatinda. He also could not dispute that the pipeline had not reached Jodhpur by the original date stipulated for completion of terminal at Jodhpur or extended date. It also could not be disputed that terminal at Jodhpur had been constructed and commissioned by the respondent much before the pipeline reached Jodhpur. In fact, because of delay in the pipeline reaching Jodhpur terminal, this terminal was put to commercial use in August, 1996, whereas the terminal at Jodhpur was commissioned by 31.3.1996. Therefore, because of delay on the part of the respondent, the petitioner had not suffered any loss.*
>
> *55.* ***It is clear from the above that Section 74 does not confer a special benefit upon any party, like the petitioner in this case****. In a particular case where there is a clause of liquidated damages the Court will award to the party aggrieved only reasonable compensation which would not exceed an amount of liquidated damages stipulated in the contract.* ***It would not, however, follow therefrom that even when no loss is suffered, the amount stipulated as liquidated damages is to be awarded. Such a clause would operate when loss is suffered but it may normally be difficult to estimate the damages and, therefore, the genesis of providing such a clause is that the damages are pre-estimated. Thus, discretion of the Court in the matter of reducing the amount of damages agreed upon is left unqualified by any specific limitation. The guiding principle is 'reasonable compensation'. In order to see what would be the reasonable compensation in a given case, the Court can adjudge the said compensation in that case.*** *For this purpose, as held in Fateh Chand (supra) it is the duty of the Court to award compensation according to settled principles.* ***Settled principles warrant not to***

award a compensation where no loss is suffered, as one cannot compensate a person who has not suffered any loss or damage. *There may be cases where the actual loss or damage is incapable of proof; facts may be so complicated that it may be difficult for the party to prove actual extent of the loss or damage. Section 74 exempts him from such responsibility and enables him to claim compensation inspite of his failure to prove the actual extent of the loss or damage, provided the basic requirement for award of 'compensation', viz. the fact that he has suffered some loss or damage is established. The proof of this basic requirement is not dispensed with by Section 74. That the party complaining of breach of contract and claiming compensation is entitled to succeed only on proof of 'legal injury' having been suffered by him in the sense of some loss or damage having been sustained on account of such breach, is clear from Sections 73 and 74. Section 74 is only supplementary to Section 73, and it does not make any departure from the principle behind Section 73 in regard to this matter. Every case of compensation for breach of contract has to be dealt with on the basis of Section 73. The words in Section 74 'Whether or not actual damage or loss is proved to have been caused thereby' have been employed to underscore the departure deliberately made by Indian Legislature from the complicated principles of English Common Law, and also to emphasize that reasonable compensation can be granted even in a case where extent of actual loss or damage is incapable of proof or not proved. That is why Section 74 deliberately states that what is to be awarded is reasonable compensation. In a case when the party complaining of breach of the contract has not suffered legal injury in the sense of sustaining loss or damage, there is nothing to compensate him for; there is nothing to recompense, satisfy, or make amends. Therefore, he will not be entitled to compensation [see State of Kerala v. United Shippers and Dredgers Ltd., AIR 1982 Ker 281]. Even in Fateh Chand (supra) the Apex Court observed in no uncertain terms that when the section says that an aggrieved party is entitled to compensation whether actual damage is proved to have been caused by the breach or not, it merely dispenses with the proof of 'actual loss or damage'. It does not justify the award of compensation whether a legal injury has resulted in consequence of the breach, because compensation is awarded to make good the loss or damage which naturally arose in the visual course of things, or which the parties knew when they made the contract, to be likely to result from the breach. If liquidated damages are awarded to the petitioner even when the petitioner has not suffered any loss, it would amount to 'unjust enrichment', which cannot be countenanced and has to be eschewed.*"

[Emphasis is ours]

28. The principle that the imposition of liquidated damages is required to be founded on legal injury was reiterated by the Supreme Court in ***Kailash Nath Associates v. DDA***, (2015) 4 SCC 136. For convenience, the relevant observations are extracted hereafter:

"*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."

[Emphasis is ours]

29. Significantly, the fact that the initial time fixed for delivery by the appellant ceased to be of essence is an aspect that emerges upon perusal of the following findings returned by the Arbitral Tribunal:

"*The minutes of the meeting dated 21st March 2021 (SoC-4, CD-16, page 1) stating that out of 46 transformers supplied by the Claimant by December 2018, only 20 transformers have been installed and 8 have been commissioned by 21st March 2021 le., after 27 months is a strong proof that the Respondent has not suffered any loss due to delayed supply of transformers. These minutes have been signed by a Sr. Officer of the Respondent and Respondent has accepted the*

document. ***More than 27month delay in installation and commissioning of transformers is the strong evidence that timely delivery of transformers was no more the essence of the contract***.”

[Emphasis is ours]

30. Therefore, we are of the view that no interference is called for with the judgment of the learned Single Judge.

31. At this stage, Mr Malhotra says that he would like to file an additional affidavit to bring on record material to demonstrate that liquidated damages were levied on the appellant by NTPC. In our view, evidence cannot be tendered *de hors* the pleadings. Evidence has to follow the pleadings. Since there are no pleadings on record concerning the imposition of liquidated damages by NTPC, no leave can be granted at the second stage of scrutiny.

32 The appeal is dismissed. Costs are quantified at Rs. 20,000/-.

32.1 We had offered to order payment of costs to the respondent. Mr Raman Kapur says that costs can be deposited by the appellant towards a good cause. Accordingly, costs will be deposited with the Delhi High Court Legal Services Committee.

32.2 The proof of deposit of costs will be placed on record.

33. Given the fact that the appeal has been dismissed, the Registry is directed to release the awarded amount to the respondent along with accrued interest, within one (1) week from the receipt of a copy of the order.

34. Consequently, the pending application shall also stand closed.

RAJIV SHAKDHER, J

AMIT BANSAL, J

FEBRUARY 26, 2024 /tr