

(2004) 08 DEL CK 0074

In the Delhi High Court

Case No : OMP No's. 268 of 2003 and 157 of 2004 and is No's. 3347, 3475 and 3708 of 2004

Creative Entrepreneurs

APPELLANT

Vs

Mahanagar Telephone Nigam Ltd.
 Vichitra
Construction Co. Pvt. Ltd.

RESPONDENT

Date of Decision : 25-08-2004

Acts Referred:

Arbitration Act, 1940 — Section 41
Contract Act, 1872 — Section 33, 74

Citation : (2004) 08 DEL CK 0074

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : Vipin Sanghi and Saundraya Singh and Ravindra Sethi, for the Appellant; Dinesh Agnani, for the Respondent

Judgement

Vikramajit Sen, J.—The question, of some complexity, that arises in these Petitions is whether the Respondent/MTNL is empowered or justified in making payments to the Petitioners at the rate of Rs.230/- per meter of stretchless cables installed by the Petitioners. It is not in dispute that the rate initially agreed upon was Rs.412/- per meter. Although payments have been released by MTNL to the Petitioners at the latter rate, MTNL has threatened to effect recoveries for the differential amounts from other pending bills. However, there are stipulations in subsequent contracts broadly to the effect that during the extended period the lower of the two rates viz. -

(a) at the current approved rate or

(b) approved rates of new tender going to be opened shortly will be applicable. The critical date is stated to be 30.12.2002 on which date the Techno Commercial Bids were opened and considered. Mr. Sanghi, learned counsel for the Petitioner states that with regard to the Work Orders placed on the Petitioners after 30.12.2002 the Respondents may, for the present, make

payments at the rate of Rs.230/- per meter, subject to adjudication in arbitral proceedings.

2. The stand of the Respondents, however, is that since the Petitioners had been put to notice that the lesser of the two rates would be paid to the Petitioners, in their letters dated 11.3.2002 and 17.6.2002 etc. these rates should also be applicable to Work executed after 30.12.2002, even though the Contracts/Work Orders may have been placed much earlier. The Petitions contain correspondence between the various officials of the MTNL bringing to the surface the possible disputes that may arise in the event that the MTNL were to make payments on the post 30.12.2002 rates even in respect of the Work Orders awarded earlier and which were in the process of execution. In OMP No.268/2003 the arbitration proceedings have already commenced. Mr. Sanghi states that the Petitioner in OMP No.157/2004 also intends to invoke the Arbitration Clause and shall initiate arbitration proceedings in the very near future.

3. Reliance has been placed by both sides on Clause 16.3 which reads as follows:-

Any sum of money due and payable to the contractors (indicating P.G./security deposit returnable to them) under this contract may be appropriated by the MTNL and set-off against any claim of the MTNL for the payment of any sum of money arising out of or

4. Attention has been directed to the observations of the Hon''ble Supreme Court in Union of India (UOI) Vs. Raman Iron Foundry, . Reliance has also been placed on Rose Educational Scientific and Cultural Society (Regd.) and others Vs. Union of India and others, for the proposition that the rates or the terms of an agreement cannot be unilaterally altered. Similar views have also been expressed in Magnum Films Vs. Golcha Properties Pvt. Ltd., . Whether it was open to the Respondents to alter the rates is a question which will necessarily have to be adjudicated upon by the learned Arbitrator.

5. The cognate question which immediately arises is whether a contractual stipulation quantifying or adumbrating the consequences of a breach of the contract can be automatically and unilaterally be given effect to by adjustment or set-off against other dues. In Raman Iron Foundry's case (supra) the Hon''ble Supreme Court had approved the extracted view of Justice Chagla while considering the Indian position on this aspect of the law - The other party.

As already stated, the only right which he has is the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to not, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary

liability which already existed. The Court in the first.

6. The very question has thereafter been dealt with by the Apex Court in *Fateh Chand Vs. Balkishan Das*, where these observations can be found - plaintiff the right to forfeit Rs.24,000/- out of the amount paid by the defendant was a stipulation in the nature of penalty, and the plaintiff can retain that amount or part thereof only if he establishes that in consequence of the breach by the defendant, he suffered loss, and in the view of the Court the amount or part thereof is reasonable compensation for that loss. We agree with the Attorney-General that the amount of Rs. 24,000/- was not of the nature of earnest money. The agreement express performance of the contract. No such case appears to have been made out in the plaint and the finding of the High Court on that point is based on no evidence. It cannot be assumed that because there is a stipulation for forfeiture the amount paid must bear the character of a deposit for due performance of the contract.

8. The claim made by the plaintiff to forfeit the amount of Rs. 24,000/- may be adjudged in the light of S.74 of the Indian Contract Act, which in its material part provides:

The section is clearly an attempt to eliminate the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties; a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty.

9. The second clause of the contract provides that if for any reason the vendee fails to get the sale-deed registered by the date stipulated, the amount of Rs. 25,000/-(Rs.1,000 paid as earnest money and Rs. 24,000/- paid out of the price of delivery of possession) shall stand forfeited and the agreement shall be deemed cancelled. The covenant for forfeiture of Rs. 24,000/- is manifestly a stipulation by way of penalty.

10. Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has,

subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable; and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damage", it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.

11. Before turning to the question about the compensation which may be awarded to the plaintiff, it is necessary to consider whether S.74 applies to the stipulations for forfeiture of amounts deposited or paid under the contract. It was urged that the section deals in terms with the right to receive from the party who has broken the contract reasonable compensation and not the right to forfeit what has already been received by the party aggrieved. There is however no warrant for the assumption made by some of the High Courts in India, that S. 74 applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract and not to cases where upon breach of contract an amount received under the contract is sought to be forfeited. In our judgment the expression "the contract contains any other stipulation by of penalty" comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon Courts by S. 74. In all cases, Therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the Court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified following Clause 18 of the General Conditions of Contract had to be interpreted in both cases:-

Whenever any claim for the payment of a sum of money arises out of or under the contract against the contractor, the purchaser shall be entitled to recover such sum by appropriating in whole or in part, the security, if any, deposited by the contractor, and for the purpose aforesaid, shall be entitled to sell and/or, realise securities forming the whole or part of any such security deposit. In the event of the security being insufficient, the balance and if no security has been taken from the contractor, the entire sum recoverable shall be recovered by appropriating any sum then due or which at any time thereafter may become due to the contractor under the contract or any other contract with the purchaser

or the Government or any person contracting through clause 18, to recover the amount of such claim by appropriating other sums due to the contractor. On this view, it is not necessary for us to consider the other contention raised on behalf of the respondent namely, that on a proper construction of clause 18, the purchaser is entitled to exercise the right conferred under that clause only where the claim for payment of a sum of money is either admitted by the contractor, or in case of dispute, adjudicated upon by a Court or other adjudicatory authority. We must, Therefore, hold that the appellant had no right or authority under Clause 18 to appropriate the amounts of other pending bills of the respondent in or towards satisfaction of its claim for damages against the respondent and the learned Judge was jet Supreme Court:-

when the present standard form was introduced and instead the words "whenever any claim for payment of a sum of money arises" were substituted and this change in phraseology indicated that in order to attract the applicability of the present Cl.18, it was not necessary that there should be a sum of money due and payable by the contractor to the purchaser, but it was enough if there was a mere claim on the part of the purchaser for payment of a sum of money by the contractor irrespective of the fact whether such sum of money was presently due and payable or not. This Court, however, did not attach importance to this aspect of the matter by observing:

that if the legislature has departed from the language used by it in an earlier enactment, it would be a fair presumption to make that the alteration in the language was deliberate and it was intended to convey a different meaning. It is a clause in a

30. We are clearly of the view that an injunction order restraining the respondents from withholding the amount due under other pending bills to the contractor virtually amounts to a direction to pay the amount to the contractor-appellant. Such an order was clearly beyond the purview of Clause (b) of Section 41 of the Arbitration Act. The Union of India has no objection to the grant of an injunction restraining it from recovering or appropriating the amount lying with it in respect of other claims of the contractor towards its claim for damages. But certainly Cl.18 of the standard contract confers ample power upon the Union of India to withhold the amount and no injunction order could be passed restraining the Union of India from withholding the amount

8. Contrary to the contention of Mr. Sanghi the law so far as the Court's power to grant injunctions has changed only in form but not in substance, as will be manifest from the juxtaposed provisions of the erstwhile 1940 Act and the present 1996 Act. This is relevant for the reason that the observations of the Hon"ble Supreme Court in the Ansari Judgment continues to hold sway. 1996 Act

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following

matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it. 1940 Act

41. Procedure and Powers of Court.-- Subject to the provisions of this Act and of rules made there under:

(a) the provisions of the Code of Civil Procedure, 1908 (5 of 1908), shall apply to all proceedings before the Court, and to all appeals, under this Act, and

(b) the Court shall have, for the purpose of, and in relation to arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to any proceedings before the Court:

Provided that nothing in Cl. (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters.

THE SECOND SCHEDULE

(See Section 41)

POWERS OF COURT

1. The preservation, interim custody or sale of any goods which are the subject-matter of the reference.

2. Securing the amount in difference in the reference.

3. The detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon or into any land or building in the possession of any party to the reference, or

authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.

4. Interim injunctions or the appointment of a receiver.

5. The appointment of a guardian for a minor or person of unsound mind for the purposes of arbitration proceedings.

9. In Ansari's case (supra) the Petitioner (Ansari) had filed an action u/s 33 of the repealed 1940 Act but adopting the stance that a concluded contract had not come into effect and hence no arbitration clause existed between the parties and had prayed for an adjudication by the Court on this issue. Faced with the threat of the Union of India to withhold amounts due under another contract, the prayer for an injunction restraining the Union of India from appropriating, withholding or recovering used contract between the parties containing an arbitration clause it will be difficult to say that the application for injunction moved by the appellant was for the purpose of and in relation to arbitration proceedings. This apart, the amount due under the pending bills to the appellant was not the subject-matter of the present proceedings and, Therefore, the injunction order restraining the respondents from withholding the amount due to the appellant under the pending bills in respect of other contract could not be said to be for the purpose of and in relation to the present arbitration proceedings. In this view of the matter it was not open to the Court to pass the interim injunction restraining the respondents from withholding the amount due to the

10. On a careful reading of the Ansari's case (supra) it will be patent that the Apex Court had affirmed the view expressed by in the Raman Iron Foundry case, namely, that an injunction restraining the appropriation of amounts "due" or "claimable" could have been issued by the Court under the erstwhile Arbitration Act. In the latter case it had clarified that upon a party being restrained from carrying out an adjustment such party was in fact mandated into making payment, and it was only the contrary opinion in the former case which had not been approved. Furthermore, since the Petitioner in the latter case had denied the contract and Therefore the arbitration clause contained in it, the Hon'ble Supreme Court had observed that if an injunction were to be granted it could not be seen as being related to the subject-matter of the arbitration, viz. the Petitioners could not be permitted to approbate and reprobate on the same issue. The opinion of Chagla J. was not struck down or looked askance at. The Court that may still remain is dispelled by the fact that the Court recorded that the Union of India had no objection restraining it from recovering or appropriating the amount lying with it in respect of other claims of the contractor towards its (sic. UOI's) claim for damages. The order of the Hon'ble Supreme Court read in isolation of the Petitioners' denial of the existence of an arbitration clause whilst nevertheless invoking Section 41 of the old Arbitration Act, leads to the erroneous understanding that it had overruled the Raman Iron Foundry ratio in its entirety.

11. Returning to Clause 16.6 of the Contract which has already been extracted above, it does not envisage a "claim" in contradistinction to an amount due and payable. The power of MTNL to set off is akin to the old clause and not the new clause that came to be considered by the Hon"ble Supreme Court in Ansari's case (supra). Therefore, there may be very little scope available to MTNL to effect a set off without a proper adjudication.

12. When the Court is called upon to grant an injunction it has to consider whether a prima facie case exists in favor of its granting equitable relief. For reasons best known to the learned counsel for the parties a copy of the decision of the Hon"ble Division Bench in a related litigation between them was handed over by learned counsel for the MTNL only at the conclusion of the arguments. Those Writ Petitions came to be filed in relation to the present contract itself. The Hon"ble Division Bench had disposed of the Writ Petitions as late as on April 28, 2003 in the following terms:-

1) the relaxation in the eligibility conditions post tender opening are invalid and all those bidders who would not have been eligible at the time of opening of the tender on 30.12.2002 except on account of such relaxation would be deemed to be non-responsive bidders and would not fall in the zone of consideration for awarding the works under the present tender;

2) the works under the said NIT dated 13.11.2002 would be awarded on the basis of the revised financial bids pursuant to the corrigenda of 27.1.2003 and 11.2.2003.

Therefore, there can be no gainsaying that till that date, and not necessarily 30.12.2002, none of the parties had any firm and abiding knowledge of the rates finalised in respect of the contract. Although learned counsel for the Petitioners had pegged their claims to the former date, I find that the situation was in a state of flux, and was certainly nebulous. The assertion of the Petitioners that they should be paid at the rate of Rs.430/- per meter is, Therefore, not bereft any foundation and is a matter which requires arbitral adjudication. Till July, 2003 the MTNL had itself stated that Works executed up to 30.12.2002 rates as given in the Award Letter shall be applicable as final rates but recoveries are sought to be made by it contrary thereto. In that very communication MTNL has admitted to make a distinction between the Works executed before and after 30.12.2002 and not contracts awarded after that date; this will invariably lead to disputes. It is also contrary to the observations made by the CO (CCN), Naraina of the Respondent in the Letter dated 6.9.2003 inter alia to the following effect:-

Old rates and new rates) whichever is lower becomes payable. This was the MTNL policy since the last so many years. Now after going through the contents of the letters under reference it is evident that MTNL has changed its policies deciding the criteria of

13. Viewed from any perspective it cannot reasonably be argued that the Petitioners have not established a prima facie case and or that the Petitions are

malafide and seek only to defer, delay, or circumvent their liabilities to return or permit adjustment of so-called alleged over-payments by the MTNL. It would also work injustice on the Petitioner if I ignore or overlook the fact that even after 30.12.2002 the MTNL continued to make payments at the rate of Rs.412/- per meter and not Rs.230/- per meter This is obviously because of the pendency of the CWP before the Hon'ble Division Bench of this Court.

14. Learned counsel for the Petitioners have also vehemently argued that if the MTNL is directed to carry out adjustments from the pending bills the effect would be to commercially emasculate the Petitioners, and lead them into abyss of insolvency. Even during the arbitration proceedings the Petitioners are executing contracts placed on them. The submissions have merit. respondents provided the Respondents deposit 50 per cent of the total amount then due. I propose to charter the same course in order to ensure that justice is meted out to the adversaries during the pendency of arbitration.

16. In these circumstances it is ordered that to avail of the benefits extended to the Petitioners by these Orders, M/s. Creative Entrepreneurs must invoke the Arbitration Clause and register/file its Claims before the learned Arbitrator within thirty days from today. MTNL shall also be free and entitled to register and lodge its claims in respect of these transactions before the learned Arbitrator. As per the formula suggested by learned counsel for the Petitioners, which formula I find to be equitable to both sides, for Work Orders issued prior to the cut off date, that is, 30.12.2002, MTNL is restrained from making any adjustments/set off in respect of any amounts payable at the rate of Rs.412/-, subject to the Petitioners furnishing Bank Guarantees for Rupees Twenty lacs in respect of the differential of Rs.182/- which is calculated by subtracting Rs.230/- from Rs.412/- In order to enable the Petitioners to furnish further Bank Guarantees the MTNL is directed to release payments for a sum equivalent to the value of the Bank Guarantee furnished by the Petitioners within seven days of the submissions and acceptance of the Bank Guarantees. These Bank Guarantees shall be freshly provided and shall not be adjustable against any other transaction between the parties. Each of them shall be kept alive during the arbitration proceedings.

17. These Petitions are disposed of in the above terms, leaving the parties to bear their respective costs.