
(2022) 05 DEL CK 0334

In the Delhi High Court

Case No : First Appeal From Order (OS) (COMM) No. 125 Of 2022

Hindustan Petroleum Corporation Ltd

APPELLANT

Vs

M/S Dhampur Sugar Mills

RESPONDENT

Date of Decision : 18-05-2022

Acts Referred:

Indian Contract Act, 1872 — Section 73, 74

Citation : (2022) 05 DEL CK 0334

Hon'ble Judges : Rajiv Shakdher, J; Tara Vitasta Ganju, J

Bench : Division Bench

Advocate : Sunil Dalal, Naveen K. Raheja, Prasenjit Keswani

Final Decision : Dismissed

Judgement

Rajiv Shakdher, J

CM APPL. 23414/2022

1. Allowed, subject to just exceptions.

FAO (OS) (COMM) 125/2022 and CM APPL. 23413/2022[Application filed on behalf of the appellant seeking stay on operation/implementation of the order/judgement dated 06.01.2022.]

2. This appeal is directed against the judgment of the learned single judge dated 06.01.2022.

3. The learned single judge, via the impugned judgment, has set aside the award dated 23.08.2012 rendered by the sole arbitrator.

3.1. To be noted, the sole arbitrator was, admittedly, appointed by the appellant.

4. Mr Sunil Dalal, learned senior counsel, who appears on behalf of the appellant, confines his challenge to one issue, which is, that the learned single judge has, according to him, wrongly set aside the award dated 23.08.2012 qua damages claimed by the appellant.

4.1. Insofar as the sole arbitrator is concerned, he had awarded, to the appellant, towards damages Rs.88,14,785/-.

4.2. Pertinently, Mr Dalal pitches the appellant's claim for damages on the applicability of the following clause, which is, found in the five agreements that obtained between the parties i.e., Clause 3 [To be noted, Clause 3 of the Initial Agreements and Clause 5 of the Fifth Agreement are similarly worded.]. In particular, our attention has been drawn to sub-clause (vi) of the said clause. For the sake of convenience, Clause 3 is extracted hereafter:

"3. TAKE OR PAY/SUPPLY OR PAY:

The both parties agree to supply/uplift minimum 90% of the supply order quantity. In case of failure from either party, this "Take or Pay/Supply or Pay" clause shall be applicable in addition to the other terms & conditions of the contract. The modalities shall be as under:

i. The purchaser shall issue the supply orders on financial year basis i.e., the first supply order shall be for the period starting from the effective date of contract till end of that financial year and subsequent supply orders shall be for the remaining period of the contract during that financial year and the subsequent supply orders shall be issued 30 days prior to start of the next financial year.

ii. The Location shall place monthly indents/schedule for supplies of ethanol by the Suppliers.

iii The Supplier will make the supplies as per the indents/ schedule placed by the purchaser. The Supplier shall strictly adhere to the supply schedule. In case of failure to supply, the committed quantity shall reduce on prorata basis for the period so delayed on weekly basis or part thereof. For the purpose of calculating prorata quantity, date of receipt at location shall be taken as date of supply and scheduled date provided by the location shall be considered as requirement date for this purpose.

iv. The above reconciliation of quantity supplied visa-a-visa indents/schedule will be done on calendar month basis by the indenting locations.

v. The reconciliation and settlement of amounts of the committed quantity for the State(s) will be done on financial year basis.

vi. Amount of Rs.2150/- per KL (Rupees Two Thousand One Hundred and Fifty Only per KL) (equivalent to 10% of the basic rate) shall be payable by the Supplier for the undelivered quantity on financial year basis from minimum quantity of 90% of the order quantity (which according to the party is true estimated value of the damage/loss).

vii. Amount of Rs.2150/- per KL (Rupees Two Thousand One Hundred and Fifty Only per KL) (equivalent to 10% of the basic rate) shall be payable by the Purchaser for the un-indented quantity from minimum 90% of the order quantity minus prorata quantity arrived as per clause 3 (iii) above on financial

year basis (which according to the party is true estimated value of the damage/ loss).

viii. State Excise controls the movement of ethanol. The delay in issuance of requisite permissions/clearances by State Excise shall affect the indents/schedule of supplies. The both parties agree that delays and prorated quantity thereof due to non-availability of requisite permissions/clearances by Statutory Authorities shall be reconciled on case-to-case basis."

5. Mr Dalal goes on to submit that the learned arbitrator has returned a finding of fact, to the effect, that the respondent did not make the requisite supplies. It is, therefore, Mr Dalal's submission, that in view of this finding, Clause 3 (vi) gets automatically kicked in.

5.1. In support of his submission, Mr Dalal has drawn our attention to the following finding of fact returned by the learned arbitrator.

"...15. Respondent is liable to pay sales tax at applicable rate, including at higher rate, if any, due to late furnishing of Form-C. There was delay in number of instances in furnishing Form-C by respondent but no Form-C is pending. As such claimant was not justified in withholding supplies. This issue is decided against the claimant and partly against respondent.

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Issue No. (iv) Whether respondent is entitled to receive his counter claim made at page No, 17 para 1 to 3? If yes to what extent?

Ld. Counsel of claimant has referred to and relied upon following case law.

(1) Union of India Vs. Raman Iron Foundry

(2) Fateh Chand Vs. Balkrishan Das

(3) Bharat Sanchar Nigam Ltd. v. Motorola India (P) Ltd.

This case law does not help him since facts and ratio of the judgments is different. Further claimant himself has claimed damages under clause 3 of the agreements. This Tribunal cannot ignore the specific provisions made in clause 3 of the agreements. As such this plea of the claimant cannot be accepted.

While deciding issue No. 1 and 2 it has been held that claimant failed to deliver supplies against indents placed as per agreement and that claimant was not justified in withholding supplies. Respondent's counter claim is under the clause "supply or pay/take or pay" of the contract. As such this counter claim is allowed. However out of this counter claim of Rs. 88,14,785/- respondent has already recovered/received an amount of Rs. 56,86,050/-, deducted from invoices raised by claimant under agreement dated 11.11.2010. Therefore respondent is entitled to receive from the claimant a balance amount of Rs. 31,28,735/-. Respondent's prayer for award of interest @ 18% p.a. is rejected. Cost of arbitration proceedings i.e. fee paid to the Sole Arbitrator shall be shared 50% each by the

claimant and the respondent. After making payment of Bill of fee to the Sole Arbitrator, respondent shall provide details of payment made along with the copy of the Bill to the claimant. Claimant shall pay 50% of the Bill to the respondent within 15 days from receipt of details..."

6. During the course of the submissions, we have queried Mr Dalal, as to whether the appellant had pleaded injury with regard to deficiency in the supply of ethanol by the respondent.

6.1 In response to the same, Mr Dalal has drawn our attention to the following assertions made in the sur-rejoinder, which included the appellant's counterclaim:

"4. In the preliminary in page-3, Respondent had duly already sought the leave of the Arbitrator to file additional documents and affidavits for proper adjudication of the case. Hence, for this reason while submitting this sur-rejoinder before you, this Respondent also file its counter claim statement enclosed herewith as Annexure-RS-1 for a sum of Rs.88,14,785/-. The said counter claim is in respect of penalty liable to be paid by the Claimant under the "Take or Pay/Supply or Pay" clause in respect of supplies pertaining to various locations as tabulated in the said statement for the financial years 2008-09 and 2009-10 for the said locations falling in the administrative jurisdiction of the North Zone, North Central Zone and North West Zone of the Respondent Corporation. The said statement clearly specifies in tabulated form the supply order quota against each location which was to be supplied by the Claimant vis-a-vis the quantities actually supplied by the Claimant for each location and the quantities yet to be supplied by the Claimant in respect of each location. The quantity thus failed to be supplied by the Claimant was attracting penalty under the "Take or Pay/Supply or pay" clause@ Rs.2150/- per KL of Ethanol being the 10% basic rate per KL of such quantity thus failed to be supplied by the Claimant in respect of each location and in all totaling Rs.88,14,785/- (Rupees Eighty Eight Lakhs Fourteen Thousand Seven Hundred and Eighty Five Only) on a quantity of 4099.9 KLs thus failed to be supplied by the Claimant.

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The counter claim of the Respondent

Dhampur Sugar Mills Ltd., Bijnor, Dhampur

Year

Location

Supply Order QTY

90%

Qty of PO

Qty Supplied

Qty not supplied (Penable qty)

Rate Rs. 2150per kl (10% of Basic Rate)

Penalty Calculation=2150 per Kl i.e. 10% Basic Rate (Rs.

21500 KL)

Penalty "under tak or Pay clause (Rs.)

NZ

2008-

09

Ambala

340

306

100

206

2150

4429

Sangrur

238

214.25

108

106.2

2150

2283

Jalandar

214

192.6

100

92.6

2150

1990

Bijwasan

1537
1383.3
540
843.3
2150
18130
Shakurbasti
438
394.2
300
94.2
2150
2025
NCZ
2008-
09
Meerut
30
27
0
27
2150
58025
NWZ
2008-
09
Ajmer
160
144
0

144
2150
309600
NZ
2009-
10
Ambala
300
270
0
270
2150
580500
Bahadurgarh
176
158.4
0
158.4
2150
340560
Jalandar
340
306
0
306
2150
657900
Sangrur
268
241.2

0

241.2

2150

518580

Shakurbasti

1260

1134

0

1134

2150

2438100

Bijwasan

530

477

0

477

2150

1025550

Total

5831

5247.9

1148

4099.9

8814785

PRAYER

1. Based on the above, it is submitted that the Claimant is liable to pay the above sum of Rs. 88,14,785/- being the penalty under the "Take or Pay/supply or pay" clause to the Respondent. It is because the Claimant has failed to supply a total quantity of 4099.9 Kls and the penalty levied being @ Rs.2150/- per KL being the 10% basic rate of Rs.21,500/- per KL, Rs.2150/- per KL thus amounting to Rs.88,14,785/- liable to be paid by the Claimant to the Respondent. Accordingly, the Hon'ble Arbitrator may be pleased to pass an award

of Rs.88,14,785/- to be payable by the Claimant to the Respondent.

2. Additionally, the Respondent also prays that the Sole Arbitrator may be pleased to award an interest @ 18% per annum on the sum of Rs.88,14,785/- from the date of the award till the said account is paid to the Respondent by the Claimant.” [Emphasis is ours.]

7. Based on the aforesaid i.e., the clause, which we have referred to hereinabove, and the pleadings, it is Mr Dalal’s contention that the learned single judge ought not to have disturbed the award, insofar as it awarded damages to the appellant amounting to Rs.88,14,785/-.

8. On the other hand, Mr Prasenjit Keswani, who appears on behalf of the respondent, contends that in the very least what the appellant was required to do was to plead damages.

8.1. It is Mr Keswani’s submission that material pleas qua claim for damages were not made and, therefore, the question as to whether or not the appellant was required to prove the same really did not arise in this case.

8.2. Mr Keswani has, in this context, drawn our attention to the reply filed by the respondent, which reads as follows:

“.....Further, in reply it is stated that the claims made in the claim statement pertain to the illegal deductions being made by the Respondent as also amounts which the Claimant is entitled to by virtue of the various defaults committed by the Respondent. The Respondent at no point of time has sought to establish any of its alleged claims and in fact never sought to establish any of its alleged claims and the statements are being made at this belated stage to get its counter claim entertained, which right the Respondent has already lost. In fact, even after the last date of hearing on 22.2.2012, the Respondent did not prefer its counter claim in the time granted and on this ground alone its counter claim ought not to be entertained more so in view of the fact that the claim statement of the Claimant had been filed as early as 10.10.2011 and the Counter claim filed after five months ought not to be entertained...”

[Emphasis is ours.]

8.3. Mr Keswani says the stand taken by the respondent before the learned arbitrator was that the appellant had failed to establish its alleged claim for damages.

9. We have heard learned counsel for the parties.

10. We are of the view while dealing with a claim concerning damages, there are three basic components that should be kept in mind by an adjudicator.

10.1. The three essential components, in our opinion, that are required to be pleaded by a party claiming damages are: firstly, that there is a breach of the obligations undertaken by the defendant; second, that the breach is the

proximate and/or the direct cause of injury suffered by the plaintiff which arose naturally in the usual course of things; and thirdly, that the breach and the resultant injury has resulted in the plaintiff i.e., the aggrieved party suffering damage/ loss.

10.2. Failure on the part of the adjudicator to direct his mind to these components, in our view, constitutes patent illegality, especially having regard to the law laid down by various courts, including the Supreme Court in the following cases:

(i) Bhai Panna Singh v. Firm Bhai Arjan Singh - Bhajan Singh - Surjan Singh 117 Indian Cases 485 PC

(ii) Maula Bux v. Union of India (1969) 2 SCC 554

(iii) Fateh Chand v. Balkishan Dass (1964) 1 SCR 515

(iv) Kailash Nath v. Delhi Development Authority & Anr. (2015) 4 SCC 136.

(v) Indian Oil Corporation v. Lloyds Steel Industries Ltd., 2007 SCC OnLine Del 1169, cited with approval in Vishal Engineers & Builders v. Indian Oil Corporation Limited 2011 SCC OnLine Del 5124.

"41. 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 there from 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 in spite 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 usual 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.

42. It is too preposterous on the part of the petitioner to submit that it should get the liquidated damages stipulated in the contract even when no loss is suffered."

11. Mr Dalal's contention that Clause 3(vi) constitutes a genuine pre-estimate of loss, and, therefore, no loss had to be proved is, in our view, the third component of any claim for damages. The first two components, if they are missing, as they are in this case, would mean that the third component does not come into play.

11.1. We have extracted above the relevant pleadings placed before the learned arbitrator.

11.2. A careful perusal of the same would show that the appellant claimed "penalty". Penalty is generally construed as a sum stipulated in terrorem. On the other hand, damages, liquidated or unliquidated, when awarded, have a compensatory flavour to it. Liquidated damages are awarded by a court only if construed as a genuine pre-estimate of the loss that is caused in the event of breach. It is no different from unliquidated damages i.e., it cannot be granted if

there is no loss or injury. Where parties have agreed to incorporation of a liquidated damages clause in the contract, the Court will grant only reasonable compensation, not exceeding the sum stipulated. Liquidated damages does away with proof where loss or damage cannot be proved, but not otherwise. Thus, the party suffering damages can be awarded only a reasonable compensation, which would put such party in the same position, in which the party would have been had the breach not been committed. The appellant's pleadings are woefully deficient in this regard. Unless loss is pleaded and proved, where it capable of being proved, it cannot be recovered. [See Hindustan Petroleum Corpn. Ltd. v. Offshore Infrastructure Ltd., 2015 SCC OnLine Bom 4146.]

"28. This Court in case of Continental Transport Organisation Pvt. Ltd. v. Oil and Natural Gas Corporation Ltd., decided on 21st April, 2015 in Arbitration Petition No. 372 of 2013 has after adverting to the judgment of the Supreme Court in case of Kailash Nath Associates v. Delhi Development Authority, decided on 9th January, 2015 in Civil Appeal No. 193 of 2015 has held that unless loss is pleaded and proved, it cannot be recovered. There cannot be any windfall in favour of the respondent to recover liquidated damages even if no loss is suffered or proved."

11.3. The learned single judge has adverted to the line of case law on the subject, which includes the judgment of the Supreme Court rendered in Kailash Nath. Reference to the same is made in paragraph 52 of the impugned judgment.

"52. Mr Raheja's contention that HPCL was not required to either plead or prove any loss is difficult to accept. In Kailash Nath Associates v. Delhi Development Authority and Anr. (supra), the Supreme Court had referred to Section 74 of the Indian Contract Act, 1872 and had held as under:-

"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 wellknown 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."

11.4 This is the position of law as settled by the "superior courts" in several judgements, as noticed above, and hence was binding on the learned arbitrator. It is not a case of wrong application of law. It is an error which would go to the root of the matter and therefore would constitute a patent illegality. [See Associate Builders v. DDA, (2015) 3 SCC 49 and Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131.]

"Fundamental Policy of Indian Law

27. Coming to each of the heads contained in Saw Pipes [(2003) 5 SCC 705 : AIR 2003 SC 2629] judgment, we will first deal with the head "fundamental policy of Indian law". It has already been seen from Renusagar [Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644] judgment that violation of the Foreign Exchange Act and disregarding orders of superior courts in India would be regarded as being contrary to the fundamental policy of Indian law. To this it could be added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian law.

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42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:

"28. Rules applicable to substance of dispute.—(1) Where the place of arbitration is situated in India—

(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"

" 37. Insofar as domestic awards made in India are concerned, an additional

ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality."

12. It may also be relevant to note, at this point, that based on the very same clause to which Mr Dalal had referred i.e., Clause 3, damages to the tune of Rs. 8,45,034/- were awarded by the learned arbitrator in favour of the respondent. Counsel for the respondent, before the learned single judge, in our view, took the correct stand by not insisting on that part of the award being sustained.

12.1. The learned single judge has recorded the concession made by the counsel for the respondent and, accordingly, excised the same from the award as well.

13. Given the aforesaid position, we are of the view that the impugned judgment of the learned single judge need not be interfered with.

14 The appeal is, accordingly, dismissed.

15. Parties will, however, bear their own respective costs.

16. Pending application shall stand closed.