(2018) 11 DEL CK 0212

In the Delhi High Court

Case No : Original Miscellaneous Petition No.92 Of 2008

Philips Electronics India Ltd APPELLANT

Vs

Uoi Thr Director General Of Health Services & Anr RESPONDENT

Date of Decision : 26-11-2018

Acts Referred:
Indian Contract Act, 1872 — Section 73, 74

Citation : (2018) 11 DEL CK 0212

Hon'ble Judges : Prathiba M. Singh, J

Bench : Single Bench

Advocate : Ankit Virmani, Rinkel Singh, R.V. Sinha, A.S. Singh

Final Decision : Disposed Off

Judgement

Prathiba M. Singh, J

1. The Petitioner has challenged the impugned award dated 16th November, 2007 by which the Ld. Arbitrator awarded liquidated damages and

adjusted the same towards the 50% agentsâ?? commission which was to be paid.

2. The brief background is that a notice inviting tender was called on 10th October, 1993 by the Director General of Health Services (DGHS),

Ministry of Health for supply and installing Cardiac Catheterisation at JIPMER, Puduchery. The Petitioner â?" Philips Medical Systems India Pvt.

Ltd., now known as Philips India Ltd. quoted a price of NLG 14,12,825, which included a commission of NLG 99,039, payable to the Petitioner (NLG

= Netherland Guilders). The opening of the tender took place on 10th February, 1994. The Petitioner had written letter dated 17th February 1994, to

the Respondents that if the letter of credit was opened by 28th February, 1994 the supplies would be made by 31st March, 1994. The acceptance was issued by the Respondent on 21st March, 1994. Thereafter, the L/C was opened by the Respondents only on 24th March, 1994.

3. Considering that the L/C was opened on 24th March, 1994, the Petitioner sought an extension for making the supplies to the Respondents.

Clarifications/extensions were sought on 29th March 1994, 31st March, 1994, 12 th April, 1994, 20th May, 1994 and again on 17th January, 1995.

4. The initial extension for supplies was granted by the Respondent until 16 th August, 1994 vide letter dated 3rd May, 1994. In this letter, the

extension was subject to levy of liquidated damages as per the Contract. In response to the second extension request, vide letter dated 8th June, 1994,

the Respondent stated that the withdrawal of penalty would be considered at the time of finalisation of contract. This letter made it clear that the

supplies ought to be made on or before 16th August, 1994.

5. Admittedly, the machinery was despatched on 8th August 1994 and arrived in Puducherry on 24th August 1994. The machinery reached JIPMER

only on 3rd September, 1994. For various reasons, according to the Petitioner since the site was not ready, the installation could not take place and

hence another extension was sought on 17th January, 1995 and extension was granted till 28th February, 1995. Finally, the installation was completed

on 31 st January, 1995. On 17th January, 1995, the Petitioner had informed the Respondents that the handing over of the systems would take place on

or before 31st January, 1995.

6. Under these circumstances, the Respondents imposed liquidated damages for a period of five months calculated from 31st March, 1994 to 16th

August, 1994 i.e. four months and eight days rounded off to five months.

7. The Ld. Arbitrator, awarded the entire liquidated damages as imposed by the Respondents. However, the Arbitrator also awarded the 50% of the

commission which had been withheld, to the Petitioner. The operative portion of the impugned award is set out below: -

â??(vi). It is pertinent to mention here that the subject matter of the A/T i.e., supply of Cardiac Catherisation Equipment was delayed by the

Respondent and they have even admitted this in their pleadings as, â??the stores were duly delivered with the extended D.P.â?? vide para 6 page at 20

of their Statement of Defence/Reply. Now the question is whether the levying the L.D. during extended D.P. is justifiable or not.

(vii). Before dealing with the aforesaid issue we would like to highlight, at the outset, the terms and conditions of the contract, as follows:-

(a) It is to be seen that the General Conditions of Contract as contained in DGS&D-68 (Revised) are part and parcel of the A/T (Contract) under

reference. As per Clause 14(7)(i) of DGS&D-68 (Revised) reads as follows:-

â??If the Contractor fails to deliver the stores or any installment thereof within the period of fixed for such delivery or at any time repudiates the

Contract before the expiry of such period, the Secretary may without prejudice to the right of the purchaser to recover damages for breach of

contract, (i) to recover from the Contractor as agreed liquidated damages including administrative expenses and not by way of penalty, a sum

equivalent 2% of the price of any stores which the Contractor has failed to deliver within the period fixed for delivery in the schedule for each month

or part of a month during which the delivery of such stores may be in arrears where delivery thereof is expected after expiry of aforesaid period,

provided that total damages, so claimed, shall not exceed 10% of the total contract price.â??

(viii). It may be seen that, in the present, case respondentâ?s firms i.e. M/s Philips Electronics Limited miserably failed to deliver the stores i.e.,

Cardiac Catherisation Equipment to be installed at ZIPMER at Pondicherry within original D.P. i.e. up to 31st March 1994. However, it was supplied

and installed during extended period of D.P. and this fact was even admitted by respondent in their various pleadings i.e., Statement of

Defence/Reply, Sur Rejoinder filed on behalf of Respondent and even their written arguments filed in lieu of oral submission. That being the position,

the various objections raised by the Respondent at various junctures seem to be legally untenable and even not justified.

(ix). Furthermore, Section 73 and 74 of the Indian Contract Act, 1972 (the Act) deals with the issue relating to levy of compensation for â??loss or

damagesâ? caused by breach of contract. Honâ?ble Supreme Court in its judgment pronounced in case of Oil and Natural Gas Corporation Limited

Vs. Saw Pipes Limited [(2003) 5 SCC 705]have already well interpreted Section 73 and 74 of the Act. As per the judgment (para 65) â??â?¦â?¦ if

the compensation named in the contract for such breach is genuine pre-estimate of loss which the Parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such Party is not required to lead evidence to prove actual loss

suffered by himâ?¦.â??

(x). It is further seen that Honâ?ble Supreme Court have laid down some principles for assessment of compensation/damages in case of breach of

contract as follows (Vide para 69):

(a) Terms of the contract are required to be taken into consideration before arriving at the conclusion Â whether Â the Â party Â claiming damages is

entitled to the same.

(b) â??If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract, unless it is held that such

estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation

and that is what is provided in Section 73 of the Contract Act.

(c) Section 74 is to be read alongwith Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not

required to prove actual loss or damage suffered by him before he can claim a decree.

Â The Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in

consequence of the breach of the contract.Â

(d) In some contract, it would be impossible for the court to assess the compensation arising from Â breach Â and Â if Â the Â compensation

contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine, pre-estimate by the parties as the measure of

reasonable compensation.â??

(xi). It is to be seen that, in the present case, the Respondent-firm who miserable failed to supply the stores with the original DP however, the store

was initially supplied on 24.08.1994 and the short-shipped items were further supplied on 3rd September 1994 and this fact was even admitted by the

Respondents themselves. Not only this as per Claimantâ?s letter dated 3rd May 1994 (Annexure â??Dâ?) whereby the first extension of three

months was granted and DP was extended from 31st March 1994 to 16th August 1994 by reserving their right to levy LD for delayed supplied of the stores. It is significant to mention that earlier stipulation regarding reserving the right to levy the LD was kept intact while granting even the second

extension of DP up to 28th February 1995 vide Departmentâ?s/Claimantâ?s letter dated 2nd February 1995 (Annexure â??Hâ?). It is also pertinent

to mention here that the right to levy LD was never either withdrawn or waived off by the Claimant though once it was requested on behalf of the

Respondent to withdraw the same but it was turned down by the Claimant while finalizing the contract and regularizing the DP (Annexure â??Iâ??). In

view of this, the Claimantâ??s claims appear to be legally tenable and even justified in this regard.

(xii). In view of the above, it is an admitted fact that there was a delay of about five months (vide Annexure â??Kâ?) and it is also undisputed fact

that Respondentâ?" firm were in full knowledge of the condition regarding levying of LD in case of delay of the supplying of the stores even at the

time of entering into the Contract and getting extension of DP. Thus, it is a â??pre-estimated conditionâ? regarding levying of LD in case of delay in

supplying the stores. According to the Supreme Courtâ?s judgment above, the Claimant is legally entitled to levy the LD. Therefore, all objections

raised by Respondent in this regard appears to be devoid of merit and deserve for rejection. As such, all objections raised by the Respondents, on the

issue under reference, rejected accordingly.

AWARD

By virtue of legal position as stated above, and in the light of judgment of Supreme Court in case of Oil and Natural Gas Corporation Limited, which

squarely covers the present case, Claimant is legally entitled to claim the balance amount of LD imposed under Clause 14(7)(i) of DGS&D-68

(Revised). Therefore, Claimantâ??s claim to the tune of Rs.15,02,160 is allowed in toto.

â?¦â?¦

AWARD

It is to be seen that the Respondentâ?s main claim is Counter Claim No.1 i.e., Rs.8,10,634/- on account of balance 50% Indian Agentâ?s commission.

In this regard, it is to be seen that the Claimants have already admitted this counter claim of the Respondent vide para 9 of their statement of claims.

However, the same was adjusted towards liquidated damage amounting to

Rs.23,12,794/- imposed by the Claimant under Clause 14(7)(i) of DGS&D-

68 (Revised) on the ground of delayed supply of stores by the Respondent and for this, Claimant vide their letter No.Y.11016/08/93-

PC/Philips/ZIPMER/017/Amdt/012 dated 9th January, 1993 (Annexure â??Jâ?) already intimated to Respondent to deposit the balance amount of

LD (Rs.15,02,160/-) to the Claimant by 24th January 2003 and failing which the interest @ 10% p.a. was also to be paid with effect from 10th

December, 2002 to the date of its payment. Again as per para 6 of the written arguments submitted on behalf of Claimant, the amount of

Rs.8,10,634/-, as claimed by the Respondent in their Counter Claim No.1, was adjusted against the total amount of LD i.e., Rs.23,12,794/- and

Respondent was asked to pay the balance amount of Rs.15,02,160/- of LD to the Claimant and failing which the interest @ 10% p.a. was also to be

paid.

(ii). In view of the above, it is abundantly clear that the Respondentâ?s Counter Claim No.1 was already acceded to by the Claimant and amount of

the counter claim was already got adjusted against the amount of LD to the tune of Rs.23,12,794/-. As such, nothing seems to be due on this

account.â??

8. The submission of Mr. Virmani, Ld. Counsel for the Petitioner is that the letter of credit having been delayed for more than 20 days, the delivery

period of 31st March, 1994 could not have been adhered to in any case. He further submits that even after the arrival of the equipment, the site was

not ready and hence the installation could not take place. Thus, the Petitioner could not be held responsible for the delay from August, 1994 and

thereafter. He took the Court through the award and also submitted that various observations were made by the Arbitrator against the counsel who

had appeared in the arbitration proceedings, which were completely uncalled for.

9. On the other hand, Mr. R.V. Sinha, Ld. Counsel for the Respondents submits that the clause for liquidated damages is quite clear. It permits the

Respondents to impose damages to the tune of 2% to 10% of the price. The Petitioner itself sought repeated extensions which were granted subject to

levy of liquidated damages. On one occasion, the extension was granted without levy of liquidated damages, provided the supplies were made by 16th

August, 1994. Since, there was delay by the Petitioner, the liquidated damages cannot be waived.

10. This Court has perused the award and correspondence between the parties. It is quite clear that the initial 21 days cannot be counted in the period

for which the liquidated damages can be imposed. Without the letter of credit being opened, the supplies could not have been made by the Petitioner.

The Government had in fact agreed to consider a request for withdrawal of penalty provided the supplies were made by 16th August, 1994. However,

as it turned out, the final supplies were Â made only in September, 1994. The facts point to a situation where there was correspondence between the

Petitioner and Respondents, which does show that the Petitioner was committed to make the supplies. There is admitted delay in the supplies,

however, the same may not call for the maximum percentage of liquidated damages, which has been levied by the Arbitrator.

11. The observations made by the Ld. Arbitrator against the counsel are struck off from the award. The Ld. Arbitrator has awarded the maximum

amount of liquidated damages. The present was not a case for award of such a high level of liquidated damages. There is discretion available in the

clause itself for award of liquidated damages between 2% to 10%, as is evident from the following:

â??(7) Failure and termination â?" If the contractor fails to deliver the sores or any instalments thereof within the period fixed for such delivery or at

any time repudiates the contract before the expiry of such period, the Secretary may without prejudice to the right of the Purchaser, to recover

damages for breach of the contract:-

(i) recover from the contractor as agreed liquidated damages including administrative expenses and not by way of penalty a sum equivalent to 2% of

the price of any stores which the contractor has failed to deliver within the period fixed for delivery in the schedule for each month or part of a month

during which the delivery of such stores may be in arrears where delivery thereof is accepted after expiry of the aforesaid period, provided that the

total damages so claimed shall not exceed 10% of the total contract price.â??

12. In the facts and circumstances of this case, considering the correspondence and the clauses, it is clear that the Petitioner was following up right

earnest, for the supply of the machinery. The delay cannot be characterised as being deliberate or intentional. Moreover, there were delays both in the opening of the Letter of credit as also in the readiness in the site in erecting the machinery which is not attributable to the Petitioner. So though the

machinery arrived in August/September 1994, it was not until February 1995 that it was fully installed due to the fact that JIPMERâ??s site was not

ready. Thus the delay did not impact the use of the machinery by JIPMER. It is accordingly directed that liquidated damages would be payable @ 5%

of the total contract price i.e., Rs.11,56,397/-. The adjustment of 50% of the commission which was to be paid to the Petitioner to the tune of

Rs.8,10,634/- is also given and upheld as given by the Arbitrator. The amount payable to the Respondent, is thus Rs.3,45,763/-, along with simple

interest @ 8% p.a. from the date of filing of the claim petition till date. The awarded amount, as per this order, be paid within a period of 8 weeks.

13. OMP is disposed of.