

Tema India Ltd. Vs. Engineers India Ltd.

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Court : Delhi

Decided On : Jul-07-2015

Judge : S. Muralidhar

Appellant : Tema India Ltd.

Respondent : Engineers India Ltd.

Advocate for Def. : Mr. Dhruv Dewan, Ms. Reena Choudhary

Advocate for Pet/Ap. : Mr. Akhil Sibal, Mr. Nikhil Chawla, Mr. Aditya Panda, Mr. Shikhar Bhardwaj

Judgement :

\$~ * + IN THE HIGH COURT OF DELHI AT NEW DELHI O.M.P. 239/2013
Reserved on:

27. h May 2015 Decided on:

7. h July 2015 TEMA INDIA LTD. Through: Petitioner Mr. Akhil Sibal, Mr. Nikhil Chawla and Mr. Aditya Panda, Mr. Shikhar Bhardwaj, Advocates versus ENGINEERS INDIA LTD. Through: Respondent Mr. Dhruv Dewan and Ms. Reena Choudhary, Advocates CORAM: JUSTICE S.MURALIDHAR

ORDER

% 07.07.2015 1. This petition under Section 34 of the Arbitration & Conciliation Act, 1996 (Act) is directed against an Award dated 22nd October, 2012 passed by the Sole Arbitrator in the disputes between the parties.

2. The facts are that the Respondent Engineers India Limited (EIL) had placed on the Petitioner TEMA India Limited (TEMA), a Purchase Order (PO) dated 27th February, 2008 for supply of 9 Heat Exchangers - High Pressure (Screw Plug/Breach Lock) on FOT Dispatch Point Basis for consideration of Rs. 29,92,50,000/-. EIL was procuring the said equipments for Chennai Petroleum Corporation Limited (CPCL). The delivery period was 17 months from the date of the PO and delivery was expected to be completed on or before 26th July, 2009. There was in the PO a clause for Price Reduction Schedule (PRS) for delay in delivery'. It was stated that the PRS shall be applicable at 1% of the total order value per week of delivery or part thereof subject to a maximum 10% of the total value.

3. The PO itself stated that in addition to the terms and conditions mentioned in the PO, "the General Purchase Conditions (GPC) and other Commercial Terms & Conditions as sent with the RFQ and Amendment thereon" would apply. Clause 12 of the GPC dealt with delayed delivery and read as under:

"2. Delayed Delivery: The time and date of delivery of materials/equipment as stipulated in the Order shall be deemed to be the essence of the contract. In case of delay in execution of the order beyond the date of delivery stipulated in the order or any extensions sanctioned, the Purchaser may at his option either: i) Accept delayed delivery for Critical items i.e. Refrigeration Package, Reciprocating Compressor, Centrifugal Compressor, Pump Multistage Centrifugal (feed Pump), HP Heat Exchangers (Screw Plug/Breach Lock), at prices reduced by a sum equivalent to one (1%) of the total order value for every week of delay or part thereof, limited to a maximum of ten percent (10%) of the total order value. ii) For all items other than critical items, accept delayed delivery at prices reduced by a sum equivalent to one (1%) of the total value of delayed equipment/item for every week of delay or part thereof, limited to a maximum ten percent (10%) of the total order value; iii) Cancel the order in part or full and purchase such cancelled

quantities from elsewhere on account and at risk and cost of the Seller, without prejudice to its right under (i) & (ii) above in respect to goods delivered."

4. Clause 13 of the GPC dealt with delay due to force majeure and read as under:

"3. Delays Due to Force Majeure: In the event of causes of Force Majeure occurring within the agreed delivery terms, the delivery dates can be extended by the Purchaser on receipt of application from the Seller without imposition of penalty. Only those causes which depend on natural calamities, wars and national strikes which have duration of more than seven consecutive calendar days and Government Acts and other direct legislative enforcement are considered the causes of Force Majeure. The Seller must advise the Purchaser by a registered letter duly certified by the local Chamber of Commerce or statutory authorities, the beginning and the end of such cases of delay immediately, but in no case later than 10 days from the beginning and end of each cause of such Force Majeure condition defined above. The extension of time for completion of work or any part of the work or any operation(s) involved therein shall be the sole remedy of the Seller for any cause or event of delay and the Seller shall not be entitled in addition to or in lieu of such extension to claim any damages or compensation for extended stay or otherwise whether under the law governing contracts or quasi Seller or any other relationship, and the Seller hereby waives and disclaims any and all contrary rights.

5. According to TEMA there was disruption in the supply on account of the Lok Sabha Elections followed by the Assembly Elections between April and September, 2009. Further, there was disruption of labour since workers were lured by the local political parties which affected the works of the Petitioner as well as other businesses in the area where the manufacturing activities were being carried on. This led to TEMA invoking Clause -13 of the GPC by its letter dated 22nd December 2009 addressed to EIL.

6. Another letter was written on 11th January, 2010 by TEMA to EIL enclosing a legal opinion dated 8th January, 2010 substantiating its contention regarding the existence of force majeure conditions. The plea was that no Liquidated Damages (LD) should be levied. The case of TEMA was that despite the above requests,

EIL exercised its rights under Clause 12 (i) of the GPC read with PRS of the PO and retained Rs. 2,99,25,000/- on 25th January, 2010 and Rs. 8,37,500/- on 9th February, 2010. The parties continued to exchange correspondence on the issue of the existence of the force majeure conditions and the retention of aforementioned sums by EIL. TEMA ultimately delivered the heat exchangers to EIL on 16th April, 2010.

7. According to TEMA, more than 4 months later, EIL by a letter dated 12 th August, 2010 informed TEMA that it was not entitled to the benefit of extension of time in terms of Clause 13 of the GPC. It appears that prior to this letter on 14th May, 2010, EIL released to TEMA the withheld amount of Rs. 2,99,25,000/-. However, by letter dated 12th August, 2010, EIL claimed the refund of the said sum from TEMA along with interest @ 18% per annum. By its reply dated 18th August, 2010 TEMA expressed surprise at the demand. A legal notice was sent to TEMA by EIL on 10 th December, 2010 invoking the arbitration clause as per the Arbitration Agreement between the parties. EIL thereafter filed an Arbitration Petition No.24/2011 which was allowed by the High Court on 12th August, 2011 and a former Chief Justice of India was appointed as Sole Arbitrator.

8. Before the learned Arbitrator, EIL filed its Statement of Claims (SOC) seeking to recover from TEMA Rs.2,99,25,000/- along with interest @ 18% per annum from 14th May, 2010 till the date of payment. The defence of TEMA was based on force majeure as constituting the justification for seeking extension of the Contract Delivery Date (CDD) and contending that EIL was not justified in applying the PRS.

9. The issues framed by the learned Arbitrator were as under: i. Whether the claimant is entitled to price reduction in terms of the PRS read with Clause 12 of the GPC?. ii. Whether the claimant is not entitled to impose a penalty on account of Clause 13 of the GPC?. iii. Whether the claimant is entitled to an award in the sum of Rs. 2,99,25,000/- together with interest as prayed for?.

10. In the impugned Award dated 22nd October, 2012, the learned Arbitrator came to the following conclusions on Issue Nos. 1 and 2: (i) Labour absenteeism on account of political unrest was not a force majeure event in terms of Clause 13

GPC; (ii) The existence of force majeure for the entire length of time for which the extension was claimed was not proved by TEMA; (iii) In spite of the so called labour absenteeism some production in the factory of TEMA was going on; iv) The force majeure event was not brought to the notice of EIL by TEMA within the time contemplated under Clauses 12 and 13 of the GPC.

11. Resultantly, the learned Arbitrator held that no case for extension of time in the CDD had been made out by TEMA.

12. The next issue that was addressed by the learned Arbitrator was whether the deduction of Rs. 2,99,25,000/- made by EIL was on account of LD, or by way of penalty or by way of application of PRS in terms of Clause 12 of the GPC.

13. The learned Arbitrator held that a perusal of Clause 7 of the GPC and the PO showed that the deduction made by EIL was by way of PRS and not by way of LD or penalty. The submission of TEMA that the aforementioned plea raised by EIL was an after-thought was rejected by the learned Arbitrator.

14. The learned Arbitrator held that EIL had granted exclusive time only on a provisional basis and not because it was convinced by the existence of the force majeure event. Since the amount initially withheld was released provisionally and under protest because of the duress asserted by TEMA, EIL was entitled to seek restitution of the amount. Learned Arbitrator held that the facts of the case attracted the applicability of Section 61 (2) (b) of the Sale of Goods Act, 1930 (SGA) and awarded interest @ 9% per annum from the date on which refund was claimed by EIL i.e. 12 th August, 2010 from the date of payment.

15. Mr. Akhil Sibal, learned counsel appearing for TEMA, first submitted that the learned Arbitrator exceeded his jurisdiction in seeking to interpret Clause 12 of the GPC differently from what was understood by the parties themselves and as was reflected in their pleadings and arguments. He pointed out that even counsel for EIL had not disputed before the learned Arbitrator that Clause 12 of the GPC was a clause permitting a claim for LD in the event of breach. It is stated that the jurisdiction of the learned Arbitrator arose from the arbitration clause which talks of disputes or differences, between the parties. In fact, Section 34 (2) (iv) of the Act

also establishes that the jurisdiction of an arbitral tribunal is with respect to disputes between the parties. That there being no dispute over Clause 12 providing for LD, the learned Arbitrator ought not to have interpreted the said clause differently from what was understood by the parties. Further, under Section 28(3) of the Act, the learned Arbitrator had to decide the dispute in accordance with the terms of the contract.

16. Mr. Sibal referred to the averments in the Statement of Claims (SOC), the rejoinder and additional written submissions filed by EIL all of which reflected its consistent stand that Clause 12 (i) of PO provided for imposition of LD. He referred to the decisions in *Numaligarh Refinery v. Daelim Industrial Company* (2007) 8 SCC466 and *Gail v. Thermax* (decision dated 30th April 2010 of this Court in OMP208 of 2002) in support of his submission that a PRS clause is in fact a clause for LD. Secondly, he submitted that even in *ONGC v. Saw Pipes* (2003) 5 SCC705 the Supreme Court treated a PRS clause as a clause for LD.

17. It is next submitted that in view of the mandate of Sections 73 and 74 of the Indian Contract Act, 1872 (ICA) and in light of the decisions of the Supreme Court explaining the true scope and purpose of the said provisions, no compensation or damages could be awarded unless EIL was able to show that it actually suffered any loss or damage. It was also not pleaded by EIL that the amount stipulated in the contract was a genuine pre-estimate of the loss likely to be suffered on account of breach. In para 69 of the SOC, EIL averred that any further delay in the supply of CPCL would have exposed EIL to huge damages for late supply. It was not EIL's case that on account of deferred delivery of goods it had to compensate EIL in any manner. In the circumstances, the award of the sum as claimed by EIL amounted to unjust enrichment. In support of the above submission, Mr. Sibal relied on a number of decisions which are discussed hereafter.

18. It is submitted by Mr. Sibal that since the argument that what was sought to be withheld was not LD but the application of the PRS was neither pleaded nor argued before the learned Arbitrator by EIL, TEMA had no opportunity to reply to such contention before the learned Arbitrator. Therefore, this was in breach of the principles of natural justice. It is further submitted that the above error was so

fundamental that it could not be corrected by remitting the matter to the learned Arbitrator. Reliance was placed on the decisions in *Puri Construction Pvt. Ltd. v. Larsen and Toubro Ltd.* [decision dated 30th April 2015 of this Court in FAO (OS) 194 of 2009]. and *State Trading Corporation of India Ltd. v. Toepfer International Asia PTE Ltd.*, 2014(3) Arb LR105(Del).

19. Mr. Dhruv Dewan, learned counsel appearing for EIL, first submitted that there was a distinction between the expression matter submitted to arbitration and disputes submitted to arbitration. The legislative intent of Section 34 (2) (iv) of the Act was to separate out the decisions on matters submitted to arbitration from those that were not submitted to arbitration. According to him, it is plausible in the instant case to save the impugned Award to the extent it was within the scope of the reference of the disputes to arbitration. He then submitted that there was no bar on the counsel for TEMA urging all points before the learned Arbitrator including on the nature of Clause 12 of the GPC. A review of the Award would show that submissions were advanced on the said aspect by the parties and the learned Arbitrator has taken a plausible view as far as the interpretation of Clause 12 of the GPC was concerned. He pointed out that in the petition under Section 34 of the Act no ground has been urged by TEMA to the effect that the learned Arbitrator did not adhere to the principles of natural justice, in as much as a case not urged by either parties was considered and decided by the learned Arbitrator without any opportunity given to the counsel for TEMA to address such issue. Reliance was placed on the decision in *Shree Hanuman Cotton Mills v. Tata Air Craft Limited* (1969) 3 SCC522 and *Phulchand Exports Ltd. v. O.O.O. Patriot* (2011) 10 SCC300 20. Mr. Dewan further urged that in terms of the settled law, it was for TEMA to show that no loss could have been suffered by EIL on account of the failure by TEMA to deliver equipments in time. He referred to the decisions in *Kailash Nath Associates v. DDA* (2015) 4 SCC136 *ONGC v. Saw Pipes Ltd.* (supra), *Mahanagar Telephone Nigam Ltd. v. Haryana Telecom Ltd.* 2010 (2010) 2 Arb LR60 *Pure Pharma v. Union of India* ILR (2009) I Delhi 272, *Rama Construction v. MCD* 2011 SCC Online Del. 5481, *Construction and Designs Services vs. DDA* 2015(2) SCALE48 *Union of India v. Hakam Chand* (2009) 1 Arb LR421 *Indian Oil Corporation v. Lloyds Steel Industries Ltd.* 2007 4 ArbLR84 21. In rejoinder, Mr. Sibal pointed out that Section 74 ICA itself does not use the word

liquidated damages. He submitted that PRS and LD were not conceptually distinct from one another. As long as a clause stipulates that an amount is payable on breach, it would fall within the domain of Section 74 ICA. He pointed out that there was no question of severing the portion of the Award that dealt with clause 12 of the GPC. If that portion of the Award was to be separated then the entire Award would have to go because it formed the very basis for awarding the amount to EIL. He pointed out that although there was no specific ground urged regarding violation of the principles of natural justice, several grounds have been urged to the effect that issues beyond the pleadings were decided by the learned Arbitrator.

22. The central point in issue between the parties is the interpretation of Clause 12 of the GPC. There is merit in the contention of Mr. Sibal that both the parties did understand Clause 12 of the GPC to be a clause providing for LD. In its SOC filed before the learned Arbitrator, it was stated by EIL in para 5 that TEMA had sought extension of the CDD under Clause 13 of the GPC, incorporated by reference in the PO, without levy of LD in terms of the PRS. In para 32 of the SOC, EIL itself stated that on 14th May, 2010 it refunded the monies, retained as liquidated damages in terms of the price reduction schedule subject to the final finding on the issue of force majeure.

In para 33, EIL stated that TEMA was absolutely refusing to release the balance heat exchangers without refund of the moneys retained as liquidated damages.

In its rejoinder before the learned Arbitrator in para 6, EIL again stated that TEMA had invoked Clause 13 of the GPC to avoid imposition of liquidated damages in terms of the contractual provisions.....

. In its additional written submissions, EIL clearly stated in para B.3(ii) and (iii) and B.5 (ii) as under:

B.3 (ii) In view of the undisputed position that Clause 12(i) of the purchase order provides for imposition of LD the burden was on the Respondent to lead evidence for proving that no loss was likely to occur by breach of the PO. Thus, it was not for the Claimant to establish the factum of having suffered some loss but for the Respondent to have affirmatively proved to the contrary. (iii) In any event, once the

contract contains and LD clause, upon occurrence of a breach of contract, the innocent party is not required to lead any evidence to prove actual damage or loss unless the other party proves that the LD clause is in reality a penal clause B.5 (ii) Clause 12(i) of the GPC provided for levy of LD. (The Respondent admitted this position)

23. Significantly there was no issue framed on whether the PRS under Clause 12 of the GPC was neither LD nor a penalty. What appears to have happened is that in the final Award, the learned Arbitrator himself formulated a separate issue as reflected in para X.18 as under:

X. 18 The next question which arises for consideration is, what is the nature of deduction of Rs. 2,99,25,000/- made by the Claimant out of the price?. The Ld. Counsel for the parties have made their submissions centering around following three sub-heads of the issue:(i) (ii) (iii) Whether the deduction was by way of liquidated damages (LD); Whether the deduction was by way of penalty; Whether the deduction was by way of reduction in price contemplated by Clause 12 of GPC read with Price Reduction Schedule i.e. PRS for delay in delivery as provided by the PO and hence, it was neither LD nor a penalty.

24. The above paragraph occurs under the discussion on issues No.1 and 2. In the considered view of the Court, in formulating during the course of the final Award an additional issue on whether the deduction was "neither LD nor a penalty", the learned Arbitrator travelled beyond the scope of the reference and the pleadings and written submissions of the parties.

25. In para X.19 of the impugned Award, the learned Arbitrator noted the submissions of Mr. Sibal, learned Counsel for TEMA, that this was a back to back contract and that if CPCL had levied or recovered any damages from EIL then that should have been pleaded and proved, but that is not so. Accordingly, it was submitted by Mr. Sibal that the deduction sought to be effected by EIL was by way of penalty. Learned Arbitrator also noted the submission of Mr. Dewan, learned counsel for EIL that if the amount be treated as LD, then it was a pre-estimate of the parties of the loss suffered by the purchaser on account of delayed delivery. In other words, neither of the parties submitted before the learned Arbitrator that

Clause 12 of the GPC was neither LD nor a penalty.

26. The learned Arbitrator then proceeded in para X.21 of the impugned award to note that the amount payable under Clause 12 of the GPC was neither LD nor penalty, but it was pure and simple by way of reduction in price of the Heat Exchangers. It was then concluded that the delay in delivery had resulted in reduction of the price at a very moderate and sliding rate. In the circumstances the law concerning LD and/or penalty was inapplicable. Interestingly, in para X.22 of the impugned Award, while answering Issue No.2, whether EIL was not entitled to levy penalty under Clause 13 of the GPC, it was held by the learned Arbitrator that the amount deducted by the Claimant was not by way of any penalty having been imposed on the Respondent.

27. Apart from travelling beyond the scope of the pleadings and holding contrary to the understanding of Clause 13 by the parties themselves, the learned Arbitrator appears to have also gone beyond the scope of reference of the arbitration. Under Section 28(3) of the Act, it was incumbent on the learned Arbitrator to decide in accordance with the terms of the contract. This in turn meant that the learned Arbitrator would have to go by the parties understanding of the contract clauses unless there was a 'dispute' in that regard. In the instant case, there was no dispute at all that Clause 12 was a clause providing for LD. The only question was therefore whether EIL was entitled to such price reduction in terms of the PRS i.e. whether it was entitled to recover LD. There is merit in the contention of Mr. Sibal that the very wording of Clause 12 of the GPC indicates that (i) time was the essence of the contract; (ii) where there was a delay, EIL had option to accept the delayed delivery for the critical items which included Heat Exchangers at prices reduced by 1% of the total order value for every week of delay or part thereof; (iii) the reduction could not exceed 10% of the total order; and (iv) there was an option to cancel the order in part or full and resort to risk purchase.

28. The settled legal position as regards the necessary pleadings for a claimant to recover LD requires to be discussed at this stage. In *Kailash Nath Associates v. DDA* (supra), the Supreme Court has, in para 43, summarised the legal position as regards Section 74 ICA 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:

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.

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.

3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is sine qua non for the applicability of the Section.

4. The Section applies whether a person is a plaintiff or a defendant in a suit.

5. The sum spoken of may already be paid or be payable in future.

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.

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.

29. In Vishal Engineers & Builders v. Indian Oil Corporation 2012 (1) Arb LR253(Del), a Division Bench of this Court summarised the law explained by the Supreme Court as regards Section 73 and 74 ICA including Fateh Chand v. Balkishan Das, (1964) 1 SCR515 Maula Bux v. Union of India, (1969) 2 SCC554 Union of India v. Raman Iron Foundry (1974) 2 SCC231 State of Karnataka v. Shree Rameshwara Rice Mills, (1987) 2 SCC160 The Court also referred to the decision of the Privy Council in Bhai Panna Sing v. Firm Bhai Arjan Singh-Bhajan Singh-Surjan Singh 117 Ind Cas. 485 PC wherein it was held that under Section 74 ICA, a plaintiff must first prove the damages suffered before seeking to recover the same by way of LD.

30. The Court in Vishal Engineers & Builders also discussed the observations in ONGC v. Saw Pipes (supra), which suggested that the Court was competent to award reasonable compensation in case of breach even if no actual damages is proved to have been supplied in consequence of the breach of the contract as in some contracts it would be implausible for the Court to assess compensation arising from the breach.

The Court in Vishal Engineers & Builders then summarised the legal position as under:

In our view these observations have to be read in the context of the pronouncement of the Constitution Bench pronouncement in Fateh Chand case (Supra). If it is so, all that it implies is that where it is impossible to assess the compensation arising from breach and that factor is coupled with the parties having agreed to a pre-determined compensation amount not by way of penalty or unreasonable compensation then that amount can be awarded as a genuine pre-estimate of the loss suffered by a party. It cannot be read to mean that even if no loss whatsoever is caused to party it can still recover amounts merely be reason of the opposite party being in breach.

31. It was concluded that if there was absence of any loss whatsoever, an aggrieved party "cannot claim that it is still entitled to liquidated damages without, at least, proving a semblance of loss."

32. In the present case, there was no averment by EIL that it had, in fact, suffered any loss on account of the delayed delivery of the equipment. What EIL sought to do was to place on record the letter dated 20 th September, 2012 written to it by CPCL stating that the latter was invoking the LD clause in the contract between the parties. However, it is seen that the learned Arbitrator refused to take the said letter on record since it was enclosed with the additional written submissions received on 16 th October, 2012 without seeking leave of the Tribunal. Upholding the objections raised by TEMA, the learned Arbitrator by an e-mail communication dated 20th October, 2012 made it clear that said letter is not taken on record, shall not form part of the record and is not being taken into consideration by me. As a result, there was, in fact, nothing on record before the learned Arbitrator to show that there was any loss suffered by EIL.

33. Clause 12 of the GPC is not in the nature of a no fault liability clause. It is a clause which reflects an agreement between the parties as to the consequence of a delayed delivery in monetary terms. It gives an outer limit of 10% of the total value of the contract which can be sought to be recovered. However, it does not dispense with the need for the party complaining of the breach i.e. EIL to at least aver that it has suffered some loss on account of such breach. This legal position has been explained in *Indian Oil Corporation v. Lloyds Steel Industries Ltd.*(supra), wherein in para 51 it was observed that in the context of Section 74 ICA, the guiding principle was reasonable compensation to be awarded by the Court in its discretion. The Court went on to observe as under:

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 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 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.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.

34. In the instant case, the burden of proof would shift to TEMA to prove that no loss would have been suffered by EIL only if EIL had in the first place pleaded that it had suffered some loss or damage as a result of the delayed delivery. Therefore, the reliance placed by Mr. Dewan on the decision of Phulchand Exports Ltd., to urge that the burden was on TEMA to prove that no loss would have been suffered by EIL is misplaced.

35. The conclusion of the learned Arbitrator that Clause 12 of the GPC was neither a clause for LD nor penalty but a simpliciter clause providing for PRS, which therefore placed it outside the ambit of Sections 73 and 74 ICA, is contrary to the public policy of Indian Law and cannot be sustained in terms of Section 34 (2) (b) (ii) of the Act.

36. There is also merit in the contention that since the above issue was formulated by the learned Arbitrator during the course of framing the final Award and was never put to the parties, there was no occasion for TEMA to address arguments on that issue. The Award is, therefore, additionally vulnerable to invalidation on the ground of violation of the principles of natural justice.

37. The contention of Mr. Dewan that this is a curable defect which can be rectified as long as the Court, in a petition under Section 34 of the Act hears the parties, overlooks the settled legal position that Court while exercising jurisdiction under Section 34 of the Act is not an appellate court before whom the proceedings can be treated as in continuation of the trial. Section 34 of the Act offers the Court a limited scope to interfere with the award of an Arbitrator. In the instant case, with the impugned Award having been invalidated on the issue of interpretation of Clause 12 of the GPC, there is also no scope for invoking Section 34 (4) of the Act for curing such defect. There is also no scope for severing the defective portion of the Award since it is central to the entire Award and nothing would remain if it were to be severed.

38. For the aforementioned reasons, the Court allows the petition and sets aside the impugned Award dated 22nd October 2012. EIL will pay TEMA costs of Rs. 50,000/- within a period of 4 weeks. S.MURALIDHAR, J JULY7 2015/rs

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