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Court : Karnataka

Decided On : Jan-21-2011

Judge : N. Kumar &Amp; B. Sreenivase Gowda

Appeal No. : A.C.No.1 of 1996

Appellant : M/S. Engineering Projects (India) Ltd.

Respondent : M/S. B.K. Constructions (Bkc)

Advocate for Pet/Ap. : For the Petitioner: V. Tarakara. Sr. Counsel, Janardhana, Advocate. For the Respondent: K. Raghavendra Rao, Advocate.

Judgement :

1. A.C. No.1/1996 is filed by M/s. Engineering Projects (India) Limited under Section 14 of the Arbitration Act, requesting this Court to make the award passed by the Arbitrator as Rule of this Court.

2. A.C.No.2/1996 is filed by the respondent in the aforesaid proceedings namely M/s. B.K. Constructions (BKC) under Section 30 read with Section 70 of the Arbitration Act, 1940 (hereinafter referred to as ‘the Act’) praying to set aside the award.

3. As the subject matter of both these cases are one and the same and the parties are also same, these appeals are taken up for consideration together and disposed of by this common order:

4. For the purpose of clarity, M/s. B.K. Constructions would be referred to hereinafter as the ‘applicant’ and M/s. Engineering Projects (India) Limited as ‘respondent’, as they were arrayed in the original proceedings.

5. Before we go into the merits of the claim, for proper appreciation, it is necessary to place on record the proceedings leading to the appointment of Arbitrator. The Life Insurance Corporation of India had entered into a contract with the respondent for construction of 144 houses in the Housing Colony. The respondent in turn, entrusted the said work to the applicant as a sub-contractor. The contract was entered into on 31.12.1986. The work order was issued on 14.04.1987. As the progress of work was not in accordance with the terms agreed upon the contract came to be terminated by letter dated 24.06.1988. Clause 17 of the agreement, provided for resolution of dispute through arbitration. However the applicant without availing the said opportunity, filed a suit in O.S.3031/1998 on the file of the Court of City Civil Judge, Bangalore, against the respondent, seeking an order of injunction restraining them from awarding contract to any other person. In the said suit, the respondent filed an application under Section 34 of the Act, for stay of further proceedings in O.S.No.3031/1998, in view of Clause 17 of the contract dated 14.04.1987. Stay was granted. Aggrieved by the said order, the applicant approached this Court, in MFA No.2144/98 and MFA No.2097/98. After hearing the learned Counsel appearing for the parties, this Court allowed both the appeals, set aside the order of the learned Civil Judge and remanded the matter for fresh adjudication in accordance with law. By order dated 31.05.1999, the learned Civil Judge, this time dismissed the application filed under Section 34 of Act. Aggrieved by the said order, the respondent preferred MFA No.1142/1989 before this Court. In the said appeal, this Court, by consent of the parties, appointed Justice V.S. Deshpande, retired Chief Justice of Delhi High Court as Arbitrator under Section 21 of the Act. Pursuant to the said order, the learned Arbitrator entered reference and issued notice to the parties and held sittings at Bangalore, received pleadings, evidence by way of documents adduced by both the parties and thereafter he has proceeded to pass the impugned award, rejecting the claim of the applicant and partially upholding the counter claim preferred by the respondent. It is thereafter the respondent has filed the above application before this Court for making the award as, rule of the Court. Whereas the applicant has filed the above application

for setting aside the award. That is how the matter is before us.

6. Learned Counsel appearing for the applicant urged two grounds. Firstly he contended that though the learned Arbitrator at page 18 of the award has categorically held that the admission made by the respondent to the extent of Rs.2,77,634.05 which can be acted upon, he declined to pass any award even for the said amount in favour of the applicant.

7. Secondly, he contended that it is not in dispute between the parties that the contract came to be terminated before expiry of the agreed period on the ground that the progress of work is not commensurate with the programme of the respondent. Therefore, it is not a case where Clause 13 of the contract is attracted and it applies only to a case of delayed completion of contract for which liquidated damages are stipulated and it has no application to the case of non-completion of contract. For non-completion of contract, when the parties have not stipulated any liquidated damages or penalty. Section 74 is not attracted. Therefore the respondent is entitled to damages only on proof of breach of contract. Admittedly in this case, both the parties have not adduced any evidence and in the absence of any evidence. Section 34 of the Act has no application to the facts of the case, therefore the learned Arbitrator has committed a serious error which is apparent on the face of the record and therefore the award is liable to be set aside.

8. Per contra, Sri V. Tarakaram, learned Senior Counsel appearing for the respondent contended that the terms of contract have to be interpreted. Clauses 13 and 16 of the contract cannot be read in isolation. Once there is breach of contract and the work is not completed, Section 13 is attracted where liquidated damages is specifically mentioned. The said damage is also in the nature of proper estimation of damages as can be gathered from the words used therein. As Section 74 stands, and as it is interpreted by the Apex Court, to award damages for breach of contract where liquidated damages is stipulated by the parties, it is not necessary that the actual damage or loss is to be proved. The person complaining of breach is entitled to receive compensation not exceeding the amount so named or as the case may be, penalty stipulated for and therefore what is awarded by the Arbitrator is strictly in accordance with Clause 13 and no case

for interference by this Court is made out. Therefore he submits that the award passed by the Arbitrator should be made as the Rule of Court.

9. In the light of the aforesaid facts and rival contentions of parties the points that arise for our consideration are:

(i) Whether the learned Arbitrator has committed a serious error in not passing any award for a sum of Rs.2,77,634.05 in favour of the applicant?

(ii) Whether the award passed in favour of the respondent as liquidated damages for a sum of Rs.12,82,736.53 being 10% of the contract amount relying on clause 13 of the Contract is in accordance with Section 74 of the Arbitration Act?

10. The material on record discloses that the respondent by letter dated 31.12.1986 entrusted the work pertaining to construction of 144 residential units at Jeevanbheemanagar (Phase III), HAL III Stage, Bangalore to the applicant for value of Rs.1,55,85,908/- approximately as per the quoted rate by the applicant, subject to such terms as agreed upon by the parties. The scope of the contract included building work, sanitary works and water installation. It shall be according to the schedule of items as per the contract entered into between the applicant and the respondent. The work has to be completed within 18 months from the date of commencement as per the time schedule submitted and accepted. The applicant was called upon to take over the site and start work immediately. It was made clear that the detail work order will be issued shortly. In addition to the contract, it is found that in the printed book they have also entered into a special condition of contract. After entering into such contract, work order was issued on 14.04.1987. On receipt of such work order, the applicant having put in possession of the land, commenced the construction work. The applicant did not complete the construction within the time schedule. There were exchange of letters between the parties, each complaining against the other for not performing their part of contract. Ultimately the respondent sent a letter on 24th June, 1988 accusing the applicant of continuing the work in an insufficient manner and delaying the execution of work. Further it was stated that the applicant will not be able to complete the work by the scheduled date of completion. Therefore the respondent rescinded the contract as per Clause 3 of the condition of the contract.

11. Clause 3 of the contract reads as under:

“Completion schedule shall be strictly followed and agreed prior to start of the work. An average of 150-250 residential unit will be awarded”

Therefore it is clear that the termination of contract was on the ground that the applicant did not construct the houses as per the time schedule. It is in this back ground both the parties have putforth their claim and counter claim.

12. Learned Arbitrator has negatived all the claims putforth by the applicant, whereas he has allowed in part the counterclaim of the respondent. It is in this back ground, we shall answer the points, which arise for consideration.

Point No.1

13. This is a claim of the applicant filed in Claim no.11 under the head “Delay in payment of bills”. After considering the rival contentions, in the end, the Arbitrator has observed as under:

“in this case there are claims made by BKC and cross claims made by EPI. But the parties have not taken care to prove their claim and counter claim by adducing evidences. Neither any affidavit or evidence was filed nor any witnesses examined. These claims and cross claims, therefore, remain unproved and cannot be given effect to.

These remarks apply to the statements o accounts filed by the parties. In Annexure R-7 EPI has purported to explain what were the demands of BKC and how far they were admitted by EPI and then what were the demands of EPI also against the BKC. In its reply to R-17 sent by BIKC on 6.9.1990, BKC has questioned the correctness of the accounts made in R-7. For instance, BKC has complained that out of the claim of Rs.4,17,356.88; made by BKC, EPI has made an arbitrary reduction and admitted the amount of Rs.2,77,634.05 only. But before the BKC can get a finding that Rs.4,17,356.88 was due or two prove that the reduction made that the amount was due or to prove that the reduction made therein by EPI was wrong. In the absence of such proof it is only the admission made by EPI to the extent of the amount of Rs.2,77,634.05 that can be acted upon

by me.

This lack of evidence is common to all the claims and cross-claims in this case. for instance, the breach of contract by BKC in not completing the work in time has been proved. Under S.73 of the Contract Act, therefore, the EPI would have been entitled to damages for the breach of contract and such damages would have been the differences in the contract price and the amount with the EPI had to spend in getting the work completed. But the EPI has not adduced evidence to prove what extra amount the EPI had to spend in getting the work completed and therefore EPI cannot be awarded anything on this head. The BKC was the claimant in this case was about 90% of the time spent in the hearing in this case was devoted to hearing the BKC on its claims. I have also dealt with BKC's claim in detail. But the outcome has been that those claims as also the cross claims of EPI which are based on facts remain unproved claims and unproved cross-claims in respect of which no award can be made. Therefore, as for the amount due to the BKC from the EPI or to EPI from BKC, I am unable to award anything to either party in the absence of any evidence to prove the claim of either party. As both the parties have failed to adduce evidence they are not entitled to any relief on this account".

14. Therefore, from the aforesaid discussion, it is clear that the learned Arbitrator has carefully considered the claim and counter claim of both the parties. Being hot supported by acceptable evidence, has rejected the claim of the applicant. In the middle of the discussion, while referring to a particular letter, he has pointed out the claim made for a sum of Rs.4,17,356.88. The same has not been established by BKC. When the respondent has denied the said claim and admitted the claim to an extent of Rs.2,77,634.05, which is not availed by the applicant, the said amount has not been paid to him. The material on record clearly discloses that periodical bills were submitted by the applicant to the respondent and the respondents were making payments. It is only some claims are disputed. It is not shown by the applicant that the aforesaid damage claimed, is not paid by the respondent. Therefore the said observation of the learned Arbitrator did not lead to an interference merely because the respondent admitted a portion of claim made in the letter is not paid. If we read the discussion as extracted above the documents

produced by the applicant and respondent in support of their respective cases, the Arbitrator has categorically recorded a finding that the claim made by the applicant is not established. Therefore it is not possible to accept the contention of the applicant that the award should have been passed in respect of the said admitted claim. Therefore, we do not find any justification to interfere with the well considered finding recorded by the learned Arbitrator, which is based on the material available on record.

Point No.2

15. In order to appreciate this point, it is necessary to extract two clauses of the contract on which reliance is placed.

“13. “Delay penalty”-Work is to be completed in 18 months time from the date of issue of letter of indent. If the work is not completed in time, L.D. will be levied 1% per fortnight subject to maximum 10% of “contract value”.

16. Work at risk and cost-If the progress of the work is not commensurate with the programme EPI will have right to get the work executed through other agency at the risk and cost of sub-contractor and will “terminate the work”. Work can be withdrawn fully or partly at the description of EPI to meet the progress and sub-contractor will have no right for such withdrawal of work from the scope of the sub-contractor.

16. The learned Arbitrator in answering the counter claim of the respondent under the head “liquidated damages” has taken note of only this portion of Clause 13 as is clear from the extract of the award which reads as under:

“If the work is not completed in time, liquidated damages shall be levied at 1% per fortnight subject to a maximum of 10% contract valued.”

17. While interpreting the word or sentence in part of the clause, the entire clause has to be read. One cannot dissect a portion of it, excluding the context in which it is used in the said clause, as the learned Arbitrator has done in this case, which resulted in an error, which is apparent on the face of the record. Relying on the aforesaid portion of Clause 13 and relying on Section 74 of the Act and also

relying on the observation of the Apex Court in the case of Maule Bux v. Union of India reported in AIR 1970 SC 1955, we hold that the liquidated damages clause of the contract is intended to compensate the loss caused by the delay in performance of the contract. It is impossible to say exactly what is the loss caused to the EPI on account of delay in the performance of the contract on the part of the BKC. Therefore, the first part of the observation made by the Supreme Court applies because it is impossible for the Court to assess compensation arising from the breach consisting of delay. Therefore we proceeded further that in the present case, the contract has been rescinded by the EPI because of the delay in the performance of the contract, on the part of BKC. The liquated damages clause gives EPI, a right to claim maximum of 10% of the contract value for this delay of performance. The EPI has claimed 10% of the contract value for this delay in performance, which costs to Rs.12,82,736.53. This amount is payable by BKC to EPI under the liquidated damages clause, firstly because it is impossible to calculate the loss caused to the EPI by this delay and, secondly, because the stipulation by way of liquidated damages which is gradually worked put, at 1% of the contract value subject to a maximum of 10% of the contract value, is by way of reasonable compensation for the loss caused by delay. Therefore, he held that EPI is entitled to Rs.12,82,736.53 on account of liquidated damages.

18. From the aforesaid reason of the learned Arbitrator, it is clear that he has not kept in mind the difference between the delay in completion of work and non-completion of work. The assessment of damages in the case of delay in completion of contract would be totally different from the assessment of damages in the case of non-completion of work. As he has already negatived the claim of the applicant as referred to supra, wherein he has observed that under Section 74 of the Act, the EPI would have been entitled to damages for the breach of contract and such damages could have been the difference in the contract price and the amount with the EPI to complain in getting the work completed. That is not the measure of damages when the work is completed but not within the time stipulated. That is how the Arbitrator has misdirected himself by applying the Section 74 of the Act which has no application to the facts and circumstances of this case and has erred in passing the award in favour of the respondent. It is in this context it is necessary to look into Sections 73 and 74 of the Act and

documents produced. Sections 73 and 74 of the Act read as under.

“73. Compensation for loss or damage caused by breach of contract-When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract-When, an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation.-In estimating the loss or damage arising from a breach of contract, the means which existed or remedying the inconvenience caused by the non-performance of the contract must be taken into account.”

“74. Compensation for breach of contract where penalty stipulated for-when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation-A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

19. The Apex Court in the case of Shiva Jute Baling Limited v. Hindley and Company Limited reported in AIR 1959 SC 1357 (V 46 C 192) interpreting these two provisions arising out of an arbitration case itself has held as under:

“(14) The argument under this head is that the liquidated damages provided under Cl.(12) of the contract price and the market price on the date of default but also a further sum of 10s. per ton. Reference in this connection is made to Ss.73 and 74 of the Indian Contract Act, 1872 (IX of 1872), and it is said that the extra amount of 10s. per ton included in the sum of liquidated damages is against the provision of these sections and therefore the ward being against the law of India is bad on the face of it and should not be enforced in India. Section 73 provides for compensation for loss or damage caused by breach of contract. It lays down that when a contract has been broken, the party who suffers by such breach is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Section 74 provides for breach of contract where penalty is stipulated for or a sum is named and lays down that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be the penalty stipulated for. What Cl.(12) of the contract provides in this case is the measure of liquidated damages and that consists of two things, namely. (i) the difference between the contract price and the market price on the date of default, and (ii) an addition of 10s. per ton above that. There is no thing in S.73 or S.74 of the Contact Act, which makes the award of such liquidated damages illegal Assuming that the case is covered by S.74, it is provided therein that reasonable compensation may be awarded for breach of contract subject to the maximum amount named in the contract. What the arbitrators have done is to award the maximum amount named in the contract. If the appellant wanted to challenge the reasonableness of that provision in Cl.(12) it should have appeared before the arbitrators and represented its case. It cannot now be heard to say that simply because Cl.(12) provided for a further sum of 10s. per ton over and above the difference between the contract price and the market price on the date of the default, this was per se unreasonable and was therefore

bad according to the law of India as laid down in Ss.73 and 74 of the Contract Act.

20. Again the Apex Court in the case of Fateh Chand v. Balkishan Dass reported in AIR 1963 SC 1405 (v. 50 c 204) has held as under:

“(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.

“When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or as the case may be the penalty stipulated for”.

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 refuse 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.

Xx xx xx xx

“(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 he 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 S.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 stipulation, 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 damages 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 parries knew when they made the contract, to be likely to result from the breach.

Xx xx xx

(11) Before turning to the question about the compensation which may be awarded to plaintiff, it is necessary to consider whether S.74 applies to 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 contact 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 way 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 in the contract as liable to forfeiture. We may briefly refer to certain illustrative cases decided by the High Courts in India which have expressed a different view.

Xx xx xx xx

(15) Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the Court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the Court is not determined by the accidental circumstance the party in default being a plaintiff or a defendant in a suit. Use of the expression “to receive from the party who has broken the contract” does not predicate that the jurisdiction of the Court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The Court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach.

21. Again the Apex Court in the case of Maula Bux v. Union of India reported in AIR 1970 SC 1955 has held as under:

“It is true that 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 and 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 contract. But the expression “whether or not actual damage or loss is proved to have been caused thereby” is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him.

22. Recently the Apex Court in the case of Oil and Natural Gas Corporation ltd. v. Saw Pipes ltd., reported in (2003) 5 SCC 705 : (AIR 2003 SC 2629) has held as under:

“64……under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This section is to be read with Section 74, which deals with penalty stipulated in the contract inter alia (relevant for the present case) provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But 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 him Burden is on the

other party to lead evidence for proving that no loss is likely to occur by such breach.

Xx xx xx xx

(67) In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In such a situation, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that the party who has committed breach of the contract is not liable to pay compensation. It would be against the specific provisions of Sections 73 and 74 of the Indian Contract Act. There was nothing on record that compensation contemplated by the parties was in any way unreasonable. It has been specifically mentioned that it was an agreed genuine pre-estimate of damages duly agreed by the parties. It was also mentioned that the liquidated damages arenot by way of penalty.

Xx xx xx

(68) (3) Section 74 is to be read along with 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 an claim a decree. 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 contract.

ONGC Ltd. v. Saw Pipes Ltd. (shah, J.)

(4) In some contracts, it would he impossible for the Court to assess the compensation arising from breach and if the 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.

23. Therefore what is deducible from the aforesaid judgment is that Section 73 provides for compensation for loss or damage caused by breach of contract. Section 74 provides for breach of contract where penalty is stipulated for or a sum is named. Section 74 is to be read along with Section 73 and, therefore, in every

case of breach of contract, the person aggrieved by the breach is not required to prove the actual loss or damage suffered by him before he can claim a decree. Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined or where there is a stipulation by way of penalty. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon Courts by Section 74. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulation, but compensation has to be reasonable, and that imposes upon the court duty to award compensation according to settled principles. 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. The Court, has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But 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 him.

24. If we look into the contract it is clear that Clause 13 provides for penalty. It applies to a case where the applicant performs the contract but not within the

stipulated time. in other words, there is delay in performing the contract. When there is delay and if that delay has caused loss to the party complaining of breach, he is entitled to compensation if that compensation is prescribed by way of pre-assessment or estimation of the loss.

25. In the instant case, admittedly, the contract is not completed. The reason for breach of the contract is because of the non-completion of the contract and not adhering to the time schedule in completing the contract. Therefore the contract came to be terminated. Therefore whether it is clause 13 or 16 which is attracted to the facts of the case. The condition precedent for application of Clause 13 is that the contract should be completed, construction agreed to be put up was not to be in terms thereof and within the stipulated time. The compensation stipulated in the sub-clause is to compensate for the delay in completing the contract. However, Clause 16 of the contract provides that “if the progress of the work is not commensurate with the programme. EPI will have a right to get the work executed through other agency “at the risk and cost of sub-contractor” and will “terminate the work”. Therefore, the claim for damages by the respondent against the applicant is that the applicant did not perform the contract, he has not completed the contract in which event measure of damage would be the cost of contract awarded to the applicant and after termination of the work, if it is completed by another contractor, it is the cost incurred by the respondent and the difference in the said amount is the damages sustained by the respondent. There is no pre-estimation and there cannot be re-estimation and therefore no stipulation is found in the contract. Insofar as demand of liquidated damages is concerned, in case of termination of contract for not completing the construction, it is here the learned Arbitrator committed serious error in relying Clause 13 which has no application to the facts of this case and in awarding compensation as specified in Clause 13 by applying Section 74 of the Act, which again the no application. As in the instant case for breach of contract, i.e., for terminating the contract for not completing the construction, no damage is stipulated. When no liquidated damages is stipulated in the contract. Section 74 is not attracted. Admittedly both the applicants have not adduced any evidence in support of their respective claims. Respondent has not placed before the Arbitrator what is the additional cost of construction which they have to incur for completing the construction which was entrusted to the applicant.

So the damages which her respondent is entitled to in the case of this nature is cost of construction incurred by them by giving contract to another person and cost of construction as agreed to between the applicant and the respondent. That exercise has not been done. No material is placed on record. No evidence is adduced. In the absence of any evidence, i.e., to show what is the loss sustained by the respondent, the Arbitrator committed serious error in awarding compensation, which is not based on any evidence. Therefore there is an error apparent on the face of record. The award is contrary to law and is liable to be set aside. Hence, we pass the following:

(i) The award of the Arbitrator stands modified to the extent we have indicated above. Both the claim and counter-claims are rejected;

(ii) The award of the Arbitrator is made rule of the Court rejecting both the claim and counter claim;

(iii) Parties to bear their own cost.

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