$~P-1 (Original Side)

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 21st October, 2024

\+ **O.M.P. (COMM) 369/2022, I.A. 14345/2022 & I.A. 14347/2022**

UNION OF INDIA ..... Petitioner

Through: Ms. Arunima Dwivedi, CGSC with Ms. Pinky Pawar, Mr. Aakash Pathak and Mr. Akash Banerjee, Advocates.

versus

MS KRISHNA CONSTRUCTIONS COMPANY ..... Respondent

Through: Mr. Jai Sahai Endlaw, Mr. Vivek Mathur, Mr. Ivan and Mr. Ashish Kumar, Advocates.

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

J U D G M E N T

1. By way of this petition, under Section 34 of the Arbitration and Conciliation Act, 1996 ["the Act"], the petitioner – Union of India ["the Union"], assails an arbitral award dated 17.12.2021, by which a learned sole arbitrator has awarded a sum of Rs.1,05,56,800/- to the respondent, alongwith interest.

A. Facts

2. The disputes between the parties arose out of a contract for construction of a school building and quarters, for a Kendriya Vidyalaya at Chhindwara, Madhya Pradesh. The contract stipulated that work was to commence on 01.01.2017 and be completed within 12 months, i.e., by

31.12.2017.

3. The Union contended that progress of the work was inadequate, and therefore, terminated the contract on 04.04.2019. The final bill was passed in May 2020.

4. The respondent contended that the termination was unlawful and invoked the dispute resolution procedure under the contract, which contemplated reference to a Dispute Resolution Committee. As it was not satisfied with the resolution, at the hands of the Committee, it raised the following claims before the learned Arbitrator:

Claim no.	***Particulars***	***Amount Claimed in Rs.***
1	*Refund of Performance Guarantee since the delay suffered and hindrance occurred in the work is solely attributable to the department and the contract of the work is determined illegally by EE thereby leading to forfeiture of PG.*	*46,90,051/-*
2	*Payment of 3 Nos Milestones which were withheld from running account bills amounting for Rs. 35,17,538/-*	*35,17,538/-*
3	*Refund of GST on RA Bills (4th and 5th)*	*10,86,040/-*
4	*Simple Interest @ 7.5% p.a. on the account of delay in payment of 3rd RA Bill vide Claimant letter no. 080 dated 25.02.2019*	*2,64,310/-*
5	*Refund of GST on 10CA as per OM/SE/TAS/GST/12 dated 02.1.2018 by DG, CPWD.*	*2,92,416/-*
6	*Release of Security deposit with the department.*	*25,23,137/-*
7	*Release of Misc. amount kept withheld towards QCTA.*	*50,000/-*
8	*Loss of anticipated profit of 15% on balance quantity and work done (on Rs8,93,10,672) – Modified to set aside the penalty order made under Clause 2 of the agreement whereby penalty for Rs. 93,80,102/- is imposed.*	*93,80,102/-*
9	*Payment towards balance measurement and final bill including Electric work for Rs. 50,00,000/-*	*60,04,408/-*
10	*Cost of Arbitration.*	*10,00,000/-*
	TOTAL	***Rs. 2,88,08,002/-***
11	*Pre-arbitration, Pendant lite and post arbitration*	

	interest.	

5. The Union also made the following three counter claims before the learned Arbitrator:

Counter Claim No.	***Particulars***	***Amount in Rs.***
1	*On account of 6th & final bill*	*66,08,978/-*
2	*Cost of Arbitration & Litigation*	*10,00,000/-*
	TOTAL	***Rs. 76,08,978/-***
3	*On account of Pendant lite and future interest @ 10% p.a. on the above sum from date of amount due till date of passing award & future interest upto date of realization.*	

6. Before the learned Arbitrator, the parties agreed that the case would be decided on documents, and did not lead oral evidence.

7. By way of the impugned award, the learned Arbitrator concluded that both parties were responsible for delay in completion of the contractual work. The learned Arbitrator found that the Union had delayed in handing over drawings to the respondent; in particular, that the foundational drawings had not been handed over for the first seven months, out of a total contract execution period of twelve months. However, the learned Arbitrator also found that the respondent had delayed in executing the work, and had not deployed sufficient resources to the contract. While the proportion of delay attributable to each of the parties was not ascertainable, the learned Arbitrator upheld the decision of the Union to determine the contract and to get the balance job executed through a different agency.

8. However, the learned Arbitrator found that the Union was not

entitled to retain the bank guarantee amount, security deposit, or levy any compensation upon the respondent, as it had failed to establish that it had suffered any loss at all. He, therefore, awarded the respondent's claims and rejected the Union's counter claims to the following extent:

CLAIMS		
Claim No.	***Particulars***	***Awarded Amount in Rs.***
1	*Refund of Performance Guarantee since the delay suffered and hindrance occurred in the work is solely attributable to the department and the contract of the work is determined illegally by EE thereby leading to forfeiture of PG.*	*46,90,000/-*
2	*Payment of 3 Nos Milestones which were withheld from running account bills amounting for Rs. 35,17,538/-*	*35,17,500/-*
3	*Refund of GST on RA Bills (4th and 5th)*	*NIL*
4	*Simple Interest @ 7.5% p.a. on the account of delay in payment of 3rd RA Bill vide Claimant letter no. 080 dated 25.02.2019*	*NIL (Withdrawn by Respondent)*
5	*Refund of GST on 10CA as per OM/SE/TAS/GST/12 dated 02.1.2018 by DG, CPWD.*	*NIL*
6	*Release of Security deposit with the department.*	*5,53,700/-*
7	*Release of Misc. amount kept withheld towards QCTA.*	*50,000/-*
8	*Loss of anticipated profit of 15% on balance quantity and work done (on Rs8,93,10,672) – Modified to set aside the penalty order made under Clause 2 of the agreement whereby penalty for Rs. 93,80,102/- is imposed.*	*NIL*
9	*Payment towards balance measurement and final bill including Electric work for Rs. 50,00,000/-*	*17,05,600/-*
10	*Cost of Arbitration.*	*40,000/-*
	TOTAL	***Rs. 1,05,56,800/-***
11	*Pre-arbitration, Pendant lite and post arbitration interest.*	*Awarded 8.5% p.a. interest against Claim No. 1, 2 ,6, 7 & 9 from 15.09.2020 to date of award, i.e., 17.12.2021*

		& post award @ 11%
<u>COUNTER CLAIMS</u>		
Counter Claim No.	***Particulars***	***Amount in Rs.***
1	*On account of 6th & final bill*	*NIL*
2	*Cost of Arbitration & Litigation*	*NIL*
	TOTAL	***NIL***
3	*On account of Pendant lite and future interest @ 10% p.a. on the above sum from date of amount due till date of passing award & future interest upto date of realization.*	*NIL*

<u>B. Contractual Clauses</u>

9. The relevant extracts of the contractual clauses pertinent to the present dispute are as follows:

> "***CLAUSE 1 (Performance Guarantee)***
> ***<u>(i) The contractor shall submit an irrevocable Performance Guarantee of 5% (Five percent) of the tendered amount in addition to other deposits mentioned elsewhere in the contract for his proper performance of the contract agreement,</u>*** *(not withstanding and/or without prejudice to any other provisions in the contract) within period specified in Schedule 'F' from the date of issue of letter of acceptance….*
> *(ii) The Performance Guarantee shall be initially valid up to the stipulated date of completion-plus 60 days beyond that. In case the time for completion of work gets enlarged, the contractor shall get the validity of Pe1iormance Guarantee extended to cover such enlarged time for completion of work.* ***<u>After recording of the completion certificate for the work by the competent authority, the performance guarantee shall be returned to the contractor without any interest</u>****. However, in case of contracts involving maintenance of building and services/any other work after construction of same building and services/other work, then 50% of Performance Guarantee shall be retained as Security Deposit The same shall be returned year wise proportionately.*
> *(iii)* ***<u>The Engineer-in-Charge shall not make a claim under the performance guarantee except for amounts to which the President of</u>***

India is entitled under the contract (notwithstanding and/or without prejudice to any other provisions in the contract agreement) in the event of:

(a) Failure by the contractor to extend the validity of the Performance Guarantee as described herein above, in which event the Engineer-in-Charge may claim the full amount of the Performance Guarantee.

(b) Failure by the contractor to pay President of India any amount due either as agreed by the contractor or determined under any of the Clauses/Conditions of the agreement, within 30 days of the service of notice to this effect by Engineer-in-Charge.

(iv) ***In the event of the contract being determined or rescinded under provision of any of the Clause/Condition of the agreement, the performance guarantee shall stand forfeited in full and shall be absolutely at the disposal of the President of India.***

CLAUSE 1A (Recovery of Security Deposit)

The person/persons whose tender(s) may be accepted (hereinafter called the contractor) shall permit Government at the time of making any payment to him for work done under the contract to deduct a sum at the rate of 2.5% of the gross amount of each running and final bill till the sum deducted will amount to security deposit of 2.5% of the tendered value of the work. *Such deductions will be made and held by Government by way of Security Deposit unless he/they has/have deposited the amount of Security at the rate mentioned above in cash or in the form of Government Securities or fixed deposit receipts. In case a fixed deposit receipt of any Bank is furnished by the contractor to the Government as part of the security deposit and the Bank is unable to make payment against the said fixed deposit receipt, the loss caused thereby shall fall on the contractor and the contractor shall forthwith on demand furnish additional security to the Government to make good the deficit.*

All compensations or the other sums of money payable by the contractor under the terms of this contract may be deducted from, or paid by the sale of a sufficient part of his security deposit or from the interest arising therefrom, *or from any sums which may be due to or may become due to the contractor by Government on any account whatsoever and in the event of his Security Deposit being reduced by reason of any such deductions or sale as aforesaid, the contractor shall within 10 days make good in cash or fixed deposit receipt*

tendered by the State Bank of India or by Scheduled Banks or Government Securities (if deposited for more than 12 months) endorsed in favour of the Engineer-in-Charge, any sum or sums which may have been deducted from, or raised by sale of his security deposit or any part thereof. The security deposit shall be collected from the running bills and the final bill of the contractor at the rates mentioned above.

xxx xxx xxx

CLAUSE 3 (When contract can be determined)

Subject to other provisions contained in this clause, the Engineer-in-Charge may, without prejudice to his any other rights or remedy against the contractor in respect of any delay, inferior workmanship, any claims for damages and/or any other provisions of this contract or otherwise, and whether the date of completion has or has not elapsed, by notice in writing absolutely determine the contract in any of the following cases:

xxx xxx xxx

When the contractor has made himself liable for action under any of the cases aforesaid, the Engineer-in-Charge on behalf of the President of India shall have powers:

(a) To determine the contract as aforesaid (of which termination notice in writing to the contractor under the hand of the Engineer-in-Charge shall be conclusive evidence). Upon such determination, the Security Deposit already recovered and Performance Guarantee under the contract shall be liable to be forfeited and shall be absolutely at the disposal of the Government

(b) After giving notice .to the contractor to measure up the work of the contractor and to take such whole, or the balance or part thereof, as shall be un-executed out of his hands and to give it to another contractor to complete the work. The contractor, whose contract is determined as above, shall not be allowed to participate in the tendering process for the balance work.

In the event of above courses being adopted by the Engineer-in-Charge, the contractor shall have no claim to compensation for any loss sustained by him by reasons of his having purchased or procured any materials or entered into any engagements or made any advances on account or with a view to the execution of the work or the performance of the contract. And in case action is taken under

<u>any of the provision aforesaid, the contractor shall not be entitled to recover or be paid any sum for any work thereof or actually performed under this contract unless and until the Engineer-in-Charge has certified in writing the performance of such work and the value payable in respect thereof and he shall only be entitled to be paid the value so certified.</u>

Clause 5

The time allowed for execution of the Works as specified in the Schedule 'F' or the extended time in accordance with these conditions shall be the essence of the Contract. The execution of the works shall commence from such time period as mentioned in schedule 'F' or from the date of handing over of the site whichever is later. ***<u>If the Contractor commits default in commencing the execution of the work as aforesaid, Government shall without prejudice to any other right or remedy available in law, be at liberty to forfeit the performance guarantee absolutely.</u>***"[1]

<u>C. Submissions of counsel</u>

10. With regard to Claim No. 1 and Claim No. 6, by which the learned Arbitrator has restituted the respondent for the amount recovered by the Union towards a performance bank guarantee and security deposit furnished by it, Ms. Arunima Dwivedi, learned Central Government Standing Counsel, submitted that the contractual provisions, as held by the learned Arbitrator, clearly provided for withholding the bank guarantee and security deposit in the event of termination by the Union. She contended that, having upheld the termination, the learned Arbitrator has erred in finding that the Union had failed to establish any loss whatsoever so as to sustain its claims. She relied upon the judgment of

[1] Emphasis supplied.

the Supreme Court in *ONGC Ltd. v. Saw Pipes Ltd.*[2], in support of this contention.

11. As far as Claim No. 2 is concerned i.e., an award for restitution of compensation levied for delay in achievement of milestones, Ms. Dwivedi submitted that the Union was entitled to such compensation, but the levy had also been rejected by the learned Arbitrator on the same erroneous finding, that loss and damage had not been proved.

12. On the same reasoning, Ms. Dwivedi assailed the award on Claim No. 9, i.e., for refund of deductions on the final bill raised by the respondent, and submitted that the consequential counter claim No. 1 ought to have been allowed.

13. Mr. Jai Sahai Endlaw, learned counsel for the respondent, on the other hand, argued that the contentions raised by the Union do not merit interference with the award, in the limited jurisdiction of the Court, under Section 34 of the Act. He contended that the learned Arbitrator had rightly taken a view that no loss had been demonstrated by the Union, and that the recovery of any amount towards performance bank guarantee, security deposit, or alleged compensation for delay in achievement of milestone, was contrary to the principles of Sections 73 and 74 of the Indian Contract Act, 1872. Mr. Endlaw argued that the parties had, by consent, agreed that no oral evidence would be led before the learned Arbitrator and that there was no documentary evidence to demonstrate loss. He cited the judgment of a Coordinate Bench in *R.B.*

[2] (2003) 5 SCC 705

Enterprises v. Union of India[3], in support of his contention that, in such circumstances, the learned Arbitrator's decision was correct and, in any event, not an arbitrary or perverse adjudication, so as to require interference under Section 34 of the Act.

14. As far as Claim No. 2 is concerned, Mr. Endlaw drew my attention to the finding in the award that the justified extension of 99 days had been assessed by the Superintending Engineer after the termination of the contract, which ought to have been assessed and conveyed contemporaneously. He submitted that this finding is based on a plausible interpretation of Clause 2 of the contract and the milestones provided in Schedule F.[4]

D. Analysis

15. The principal question to be decided in this petition is with regard to the learned Arbitrator's finding that the Union was not entitled to invoke the performance bank guarantee, the appropriate security deposit, or to levy compensation, for delayed achievement of milestones.

16. The learned Arbitrator has relied upon several judgments of the Supreme Court, including *Fateh Chand v. Balkishan Dass*[5], *Maula Bux v. Union of India*[6], *Kailash Nath Associates v. DDA*[7], alongwith a judgement of this Court in *Indian Oil Corpn. v. Lloyds Steel Industries*

---

[3] 2023 SCC OnLine Del 8321

[4] A point was raised in the course of hearing as to whether the award is vitiated by the fact that the learned Arbitrator was unilaterally appointed by the Union. However, learned counsel for both sides have taken instructions, and placed documents on record, to show that both the Union and the respondent had waived the applicability of Section 12(5) of the Act in writing.

[5] (1964) 1 SCR 515

[6] (1969) 2 SCC 554

[7] (2015) 4 SCC 136

Ltd.[8], in support of his conclusion that compensation can only be awarded in favour of a person, who has suffered loss or damage. Although the extent of loss or damage is not required to be proven, the fact that loss or damage has been suffered must be established, even to claim liquidated damages or penalty.

17. This principle has, in my view, been correctly appreciated by the learned Arbitrator. The authorities on this point, including the judgments referred to in the impugned award, have been analysed in the recent judgment of a Coordinate Bench in *R.B. Enterprises*[9], making reference to all earlier judgments unnecessary. This Court has traced the jurisprudence on Sections 73 and 74 of the Indian Contract Act, 1872, commencing with the judgment in *Fateh Chand*[10], which held that no compensation can be awarded as a consequence of breach, in the absence of any resulting legal injury. An arbitral award was set aside in *R.B. Enterprises*[11], as damages had been awarded in the absence of any evidence as to the loss suffered. It was specifically held that, in a case where the parties led no evidence, reliance on a finding of breach of contract, and a stipulation of pre-estimated damages, were insufficient. Conversely, in the present case, the absence of evidence would, as held by the learned Arbitrator, lead to a justified denial of the Union's counter claims.

18. In the Division Bench decision of this Court in *Vishal Engineers &*

---

[8] 2007 SCC OnLine Del 1169
[9] Supra (note 3).
[10] Supra (note 5).
[11] Supra (note 3).

Builders v. Indian Oil Corporation Limited[12], it was clarified that *Saw Pipes Ltd.,*[13] cited by Ms. Dwivedi, must be read in the context of the Constitution Bench judgment in *Fateh Chand*[14], and cannot be interpreted as holding that a breach is compensable in damages, even if no loss is shown to have been suffered. The judgment in *Saw Pipes Ltd.*[15], thus, only goes to the extent of holding that liquidated damages can be awarded without proof of loss, if it constitutes a genuine pre-estimate of damages.

19. The Division Bench has taken a similar view *in Sudershan Kumar Bhayana v. Vinod Seth*,[16] as evident from the following extracts of the said judgment:

> *"16. One of the main challenges to the impugned award related to the quantum of damages as awarded. The builder claimed that the Owners had not proved that they had suffered any damages and thus no damages could be awarded without any evidence to establish the same. The builder founded his challenge on the law as laid down by the Supreme Court in Fateh Chand v. Balkishan Dass1 and Kailash Nath Associates v. Delhi Development Authority.*
>
> *xxx xxx xxx*
>
> *34. Admittedly, the Owners had not produced any evidence in support of their claim for damages. It is also not the Owner's case that it is difficult or impossible for them to quantify and prove the damages suffered by them.* ***We are unable to concur with the view of the learned Single Judge that an award of damages based on no material at all could be sustained on the basis of a penalty clause in the Collaboration Agreement.***
>
> *xxx xxx xxx*
>
> *37. Although, we concur with Mr. Sistani that the impugned order is liable to be set aside but we are unable to concur with the second limb*

[12] 2011 SCC OnLine Del 5124
[13] Supra (note 2).
[14] Supra (note 5).
[15] Supra (note 2).
[16] 2023 SCC OnLine Del 6097

of his argument that the impugned award is liable to be upheld. Admittedly, the Owners had not led any evidence or produced any material to establish the loss suffered by them. They relied solely on Clause 7 of the Collaboration Agreement which is set out below:

> *"7. That the time period fixed from starting to end i.e. upto finishing upto third floor, with all easement is 12 month or earlier providing the vacant land and a further grace period of two months can be given. Afterwards second party will pay Rs. 10,000/- per day as penalty to the first party apart from whatsoever the reason may be for the delayed period. In case of any calamity, any specific reason beyond the control of human being and/or non-availability of building materials etc. the above clause will be applicable only after the time period further extended which has been delayed."*

38. A plain reading of the aforesaid clause indicates that the amount of Rs. 10,000/- per day is stipulated as penalty. ***Even if, it is assumed that the said clause provides for liquidated damages; nonetheless the Owners were required to prove the same. Damages could not be awarded on the ground that the Collaboration Agreement had stipulated the same unless it was established that the same are reasonable damages and the same were suffered by the Owners. Admittedly, the Owners had not led any evidence to establish the damages suffered by them.*** *It is also not their case that the damages suffered by them were incapable of being proved.*

xxx xxx xxx

47. The Division Bench of this Court in Hindustan Petroleum Corporation Ltd. v. Dhampur Sugar Mills5 had upheld the decision of the learned Single Judge setting aside an arbitral award awarding damages on the basis of a penalty clause. In the aforesaid context, the Division Bench of this Court had observed as under:

> *"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 it 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."

48. In Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI)6 the Supreme Court had observed that, "Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality.""[17]

20. Factually, in the present case, the learned Arbitrator has specifically recorded a finding against the Union on the question of whether any loss had been suffered:

"The facts of present case do not show any loss to the respondent as a consequence of determination. The respondent has nowhere contended that he suffered loss due to the breach of contract by other party leading to determination of contract. The respondent has placed no case to show that they spent more money to get the left over job (i.e. the balance work), executed through 2nd agency in comparison to what would have been payable to the claimant. I find that there is no evidence even of a causal type to prove that the stated breach of contract has resulted in any legal injury to the respondent. The respondent has placed no such document."

21. This position leads to the inevitable conclusion that the Union had wrongly withheld the amounts recovered by way of performance bank guarantee and security deposit, and Claim Nos. 1 and 6 asserted by the respondent were correctly sustained by the learned Arbitrator.

22. As far as Claim No. 2 is concerned, the learned Arbitrator first found that the dispute as to the respondent's liability for milestone related compensation was arbitrable, although the quantification of such

[17] Emphasis supplied.

compensation was to be determined by the Superintending Engineer. This aspect is not under challenge, but Ms. Dwivedi submitted that the learned Arbitrator has erred in awarding the amount recovered by the Union on this account to the respondent. I find that the learned Arbitrator's analysis on this point[18] also turns on a finding that no loss had been proven. The award is therefore sustained on a reasoning similar to Claim Nos. 1 and 6.

23. Claim No. 9 and counter claim No. 1, both relate to measurement and payment in respect of respondent's final bill. These are also, in fact, consequential upon the determination of the Union's entitlement to damages. It is only on the basis that the Union is entitled to damages, that it has withheld payment of the final bill and claimed that some amount is due from the respondent. For the reasons stated above, the challenge on these claims also fails.

24. For the aforesaid reasons, I am of the view that the impugned award does not suffer from any infirmity so as to attract the jurisdiction of this Court under Section 34 of the Act.

E. Conclusion

25. The petition, alongwith pending applications, is therefore dismissed, but with no order as to costs.

PRATEEK JALAN, J.

OCTOBER 21, 2024
'Bhupi/Ainesh'/

[18] Paragraph 2.9 of the award