
Sudhir Gensets Ltd. Vs Indian Oil Corporation Ltd.

FAO 253 of 2008

Court: Delhi High Court

Date of Decision: Feb. 11, 2011

Citation: (2011) 1 ARBLR 351 : (2011) 177 DLT 438

Hon'ble Judges: Mool Chand Garg, J

Bench: Single Bench

Advocate: Anurag Kumar Aggarwal and Umesh Mishra, for the Appellant; M.M. Kalra and Kunal Kalra, for the Respondent

Final Decision: Dismissed

Judgement

Mool Chand Garg, J.

This appeal arises out of order dated 05.05.2008 passed by the Additional District Judge Delhi dismissing the

objections filed by the Appellant to the award dated 01.05.2007. By the impugned order the Court while dismissing the objections upheld the

findings returned by the Arbitral Forum that it was the Appellants, who were responsible for having delayed the supply and installation of the Gen-

sets beyond the time limit and that the Respondents could not have been blamed for the same as was pleaded by the Appellants before the

Arbitrator and in the Lower Court. The Additional District Judge has also not agreed with the Appellants that the recovery of a sum of Rs.

10,77,714/- by the Respondents as Liquidated damages by invoking Clause 13 of STCC by deducting the said amount out of dues payable was

not in violation of Section 73 and 74 of the Contract Act and thus refused to direct the Respondents to return the said amount. Hence this appeal.

2. The learned ADJ vide impugned order not only held that the delay was caused in this case by the Appellant in supply, testing and commissioning

of DG sets but also held that in a case where damages are pre-estimated in accordance with the terms and conditions of the contract for which

both the parties had agreed, such damage claimed as liquidated damages in terms of the contract were fully justified and, therefore, the award

delivered by the Arbitrator in this case was sustainable in law and was not required to be set aside.

3. Briefly stating, the facts of the case are that the Respondent placed upon the Appellant work order W.O No. LPG/Engg/3335 dated

20.07.2000 and LPG/Engg/3386 dated 15.09.2000 for supplying, testing and commissioning of DG sets at various locations. The work was to be

completed by stipulated dates i.e. by 17.11.2000 and 12.01.2001 respectively. However, the work was not completed by the specified dates and

therefore the Appellant sought extension of time from the Respondent. The extension of time was not granted. The Respondent also withheld an

amount of Rs. 10,77,714/- as liquidated damage from the dues payable to the Appellant as per Clause 13 of Special Terms and Conditions.

Vendor hereby agrees to pay to the corporation by way of liquidated damages and not as a penalty, an amount equal to (one half percent) of the

arerial so delayed for each week part thereof of such delay in sitting of the equipment subject to a maximum of 10% (ten [percent] of such prices.

4. The Appellant raised a claim for recovery of the aforesaid amount by invoking Clause 23 of Special Terms and Conditions of the Contract

(hereinafter referred to as the ?STCC) before the Arbitrator. The Arbitrator vide award dated 01.05.2007 came to the conclusion that the time

was essence of the contract. Delay was caused by the claimant i.e. the Appellant in supplying, testing and commissioning of DG sets. The

Arbitrator further observed that Respondent has a right to withhold the said amount of Rs. 10,77,714/- as liquidated damages. So, there was no

question of making refund of the same and it was them who were at fault in causing the delay in performance of the contract in question.

5. Appellant filed objections to the award before the Addl. District Judge by pleading that not only that the impugned order was illegal, perverse

and against substantial provisions of law but it was also in ignorance of the material available on record inasmuch as arbitrator has not considered

letter dated 16.11.2000 issued by the Respondent. The arbitrator also failed to notice that there was no evidence led on behalf of the Respondent

for invoking Clause 13 of the agreement and to withhold a sum of Rs. 10,77,714/- out of the dues payable to the Appellant without proving the

damages caused to them. The Appellant has relied upon the provisions contained u/s 73 and 74 of the Contract Act to substantiate his arguments.

6. The ADJ rejected the plea of the Appellant to set aside the arbitral award and dismissed the petition of the Appellant. The relevant part of the

order is produced hereunder:

In the present case, the damage was pre-estimated. Both the parties have agreed for the same. It was not in the form of penalty. Therefore, the

Petitioner could not get refund of the legal damages imposed by the Respondent as the same were in accordance with the terms and conditions of

the contract between the parties. The case of the Petitioner is not covered by the ground provided for setting aside award. The arbitral agreement

was not invalid. There is no dispute regarding giving prior notice of the appointment of the arbitrator and the arbitration tribunal has not dealt with

the dispute, not contemplated falling with the terms and condition of arbitration. It is not against the public policy of India.

In view of the above position of facts and circumstances, the Petitioner failed to establish any ground to set aside the arbitral award. Accordingly,

the same is hereby dismissed.

7. In this appeal filed u/s 39 of the Act, similar pleas which were taken before the Addl. District judge have been reiterated. It has been submitted

that u/s 73 and 74 of The Indian Contract Act, 1872, the compensation can only be granted to the other party on account of breach of a contract

but where no loss has been occasioned, no question of award of compensation arises. The Appellant further submits that the language of Section

74 of the said Act, provides that the award of compensation only be given to the extent fixed in the contract and in some cases it only dispenses

with the proof of "quantum of loss" on the basis of "genuine-pre-estimate" already arrived at between the parties to the contract. Thus according

to Appellant no compensation could be awarded where no loss or damage has been pleaded or proved and in this regard, he relies on the

following judgments.

(1) AIR 1929 179 (Privy Council)

(2) Satyanarayan Amolakchand Bhut Vs. Vithal Narayan Jamdar,

(3) Union of India (UOI) Vs. Vasudeo Agarwal and Another,

(4) N. Hardip Singh Vs. Hira Films and Others,

(5) Fateh Chand Vs. Balkishan Das,

(6) Maula Bux Vs. Union of India (UOI),

(7) Union of India (UOI) Vs. Rampur Distillery and Chemical Co., Ltd.,

(8) Nagpur Nagarik Sahakari Bank Ltd. and Another Vs. Union of India and Another,

(9) Ennore Port Ltd. Chemical v. Hindustan Construction Company Ltd Mumbai and Ors. 2006 Raj 114 (MAD)

(10) Indian Oil Corporation v. M/S Lloys Steel Industries Ltd. 2008(1) RAJ 170 (Delhi)

8. The Appellant further submitted that the DG sets were inspected on 28th March, 2001 and they were dispatched to respective sites on 31st

March, 2001 but the Ld. Arbitrator left out of consideration, material pieces of evidence i.e. letter dated 16.11.2000 and letter dated 19.09.2001

wherein the Appellant had provided the date wise progress of work and also the causes relating to delay in work which were attributable to the

Respondent and its inspection agency and asked the Respondent for formal extension of time which was refused by the Respondent. It is therefore

submitted that all the aforesaid facts reveals that it was the Respondent who were responsible for the delay.

9. The Appellant in this regard has also relied on the following judgments:

(1) Hindustan Liver Ltd v. Shiv Kumar 2008(3) Raj 612 (Delhi)

(2) M/S Engineering Development Corporation v. Municipal Corporation of Delhi 2008 (2) Raj 81 (Delhi)

(3) Smt. Saroj Bala Vs. Rajive Stock Brokers Ltd. and Another,

(4) Som Datt Builders Ltd. Vs. State of Kerala,

10. It is the case of the Appellant that since in the award the arbitrator has not given any reasons for holding that the Appellant was responsible for

the delay and how the Respondents were entitled to claim damages without proving actual loss the impugned order passed by the Addl. District

Judge is not sustainable and in fact the award in question is liable to be set aside. In this regard, Appellant also submitted that in the absence of any

evidence regarding Respondent having sustained any loss on account of alleged delay in supply of equipment in question; the Respondent was not

entitled to deduct a sum of Rs. 10,77,714/- towards liquidated damages.

11. On the other hand it has been submitted by the Respondents that in this case there is no infirmity in the order passed by the Addl. District judge

inasmuch as the record shows that the delay in supplying the goods was on the part of the Appellant. Extension sought for extending the delivery

period was not granted by the Respondent. In these circumstances, the Respondent was entitled to invoke Clause 13 of the STCC without proving

actual loss because the Clause provided that the liquidated damages as agreed to between the parties was a pre-estimate of the losses suffered by

the Respondent. Such damages were not required to be proved by them by leading any evidence. They have relied upon the following judgments:

(1) T.P. George Vs. State of Kerala and Another,

(2) Hindustan Tea Co. Vs. K. Sashikant Co. and Another,

(3) Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.,

(4) DDA v. Bhagat Construction Co. Ltd 2004 (3) A . LR 548 (Delhi) (DB)

(5) College of Vocational Studies v. S.S. Jaitely AIR 1987 Delhi 134

(6) Delhi Development Authority Vs. Alkaram,

(7) M.L. Mahajan Contractor v. DDA 169 (2010) DLT 734 (DB)

(8) M.L. Mahajan Vs. Delhi Development Authority and Another,

(9) Sumitomo Heavy Industries Limited Vs. Oil and Natural Gas Commission of India,

(10) Sh. Balabir Singh Ahlawat v. Indian Oil Corporation Ltd. DATED 13.01.2010 Passed by Hon"ble Valmiki .J. Mehta IN OMP No.

58/2002.

12. I have heard the parties and have also gone through the award as well as the impugned order. I have also perused the written synopsis filed by

the Appellant and the judgments cited by both the Appellants as well the Respondents.

13. Let me first examine as to whether there is a delay in supplying installation and testing of the equipments. Admittedly, the equipment was not

supplied by the Appellant by the stipulated dates. The equipment was supposed to be supplied on 25.11.2000 and 21.01.2001, however

Appellant requested the completion date to be 25.03.2001 and 21.04.2001. The Appellant requested for extension of time which was not

accepted by the Respondent.

14. Even though it was the allegation of the Appellant that it was Respondent who caused the delay, it may be observed that the Appellant vide

letter dated 16.11.2000 asked Respondent for postponement of delivery schedule for all four sites with the plea that the alternator for DG sets are

of special design features, to which Respondent had replied vide letter dated 5.12.2000 that delivery schedule for DG sets are already known to

the Appellant and approval of drawing from consultant, site visits are very well in their scope. Therefore, extension of time requested for delivery

schedule is not justified and were also requested to supply DG sets at respective sites without further loss of time. Hence, it would be incorrect to

say that the delay was on the part of the Respondent.

15. It would be appropriate to refer to the letters written by the Appellant dated 16.11.2000 and the reply of the Respondent dated 05.12.2000

which reads as under:

Ref. SGL/IOCL1/RC/RSB/2K

Date: November 16, 2000

The Sr. LPG Manager (Engg.)

M/s. Indian oil Corporation Ltd.,

LPG Engg. Section,

New Delhi

Kind Attn.: Mr. K.S. Mishra

Subject: Your requirement of DG Sets for GAIL TOPS at Ajmer, Jaipur and Loni and LPG Bottling Plant at Nabha.

Subject: Your P.O. Nos. LPG/ENG/3335 dated 20.07.2000 and LPG/ENG/3386 dated 15.09.2000.

Dear Sir,

This refers to your P Os as above for SITC of DG sets at various locations. Please refer to our following communications till date.

1. Letter No. SGL/00-01P dated 31.08.2000 addressed to LPG Bottling Plant. Dy. Manager LPG(E), Jaipur/Ajmer requiring existing DG Room

layout details at site and the details regarding preparedness of site- Response from Jaipur received on 11.09.2000.

2. Letter No. 3SGL/00-01/V dated 9th September, 2000 addressed to Manager, LPG(E), LPG Bottling Plant, Ghaziabad enclosing DG Set

foundation drawing, earthing drawing, fuel tank GA drawing and cable pipe trenches drawing.

Same letters with enclosures were also addressed to Dy. Manager LPG(E), LPG Bottling Plant, Jaipur and Site Incharge Bottling Plant Project at

Ajmer.

3. Letter No. NIL dated 18th September, 2000 addressed to your office, enclosing AMF Panel drawings for IOCL, Ajmer, Jaipur, Loni for your

approval.

Revised Panel drawings were submitted in the last week of October, 2000. Final approval drawings are still awaited.

4. Letter No. SGL/00-01/K dated 23rd September, 2000 enclosing the Data Sheet for 500, 250 and 100 KVA Alternator Manufacturer and

details of AVR/Excitation System.

5. Letter No. SGL/2K/SPA/SEPT dated 29th September, 2000 addressed to your office enclosing various drawings. We had also requested

your goodself to release Contract Agreement for Ajmer, Loni, Jaipur and Nabha Projects - Your office"s response is still awaited.

6. Letter No. SGL/PPIL.IOCL/RC/RS/2K dated 9th November, 2000 addressed to PDIL directly, enclosing revised Data Sheet and GA

Drawings for 500/250/100 KVA Alternator, as per PDIL"s commented drawings against Sl. No. 4 - above, PDIL"s response still awaited.

7. Letter No. SGL/PDIL.IOCL/RC/RS/2K dated 13th November, 2000 enclosing engine data sheets and GA drawing for models VTA-28-G.

NTA-855-G, NTA-28-G, NTA-855-G and NT-495-G- PDIL"s response still awaited.

You would appreciate that the Alternator (which are of special design features and construction as per your requirement) and AMF Panels can

only be started for manufacturing after receipt of final approved drawings. As clear from above, we are still awaiting final approved drawings from

IOCL/PDIL"s end. The contractual delivery date for Jaipur, Ajmer and Loni sites is 25.11.2000 and for Nabha is 21.01.2001.

We are enclosing a letter from our Alternator manufacturer M/s. Jyoti Ltd., which is self explanatory.

In view of the above, we would request your goodself to kindly consider our application for extension of delivery date, as below:

i) PO LPG/ENG/3335-Contractual Date: 25.11.2000

Requested Completion Date: 25.03.2001

ii) PO LPG/ENG/3786 Contractual Date: 21.01.2001

Requested Completion Date: 21.04.2001

We, fervently look forward to your favorable response in this regard.

Thanking you and assuring you our best services always.

Yours faithfully

For Sudhir Gensets Ltd.

Encl.: As above

Sd/-

R.S. Banga Associate

Vice President

16. The reply given by the Respondent dated 15.12.2000 to the aforesaid letter reads as under:

Ref. No. LPG/ENG/3335 and 3386

Dated: 15.12.2000

M/s. Sudhir Gensets Ltd.,

507, International Trade Tower,

Nehru Place,

New Delhi - 110 019

Sub: P.O. Nos LPG/ENG/3335 dated 20.07.2000 and LPG/ENG/3386 dated 15.09.2000.

Dear Sir,

This has reference to your letter No. SGL/IOCL1/RC/RSB/2K dated 16.11.2000. This is to inform you that all the points mentioned by you are

already known to you before quoting the deliveries as per tender.

The approval of drawing from consultant visit to the site and other activities involved is in your scope and for any delay in the above activities is

your responsibility.

The extension of time requested by you is not justified. Since you have already delayed the supply as per contractual completion we request you to

immediately supply the DG Set at respective sites without further loss of time.

Thanking you and assuring you of our best co-operation at all times.

Yours sincerely,

For Indian Oil Corporation Ltd (MD)

Sd/-

(K.S. Mishra)

For Senior LPG Manager (Engg.)

17. The arbitrator has dealt with this matter and has made the following observations:

Whether there has been any delay on the part of the claimant in performance of the contract in question?

The claimant has stated that the delay in the execution of the work has been caused on account of the Respondent. It is admitted fact between the

parties that the Respondent has placed work order with the claimant for supply, testing and commission of DG sets and as per the terms of the

work order the entire supply of material was required to be completed within 16 weeks from the date of the work order. It is also admitted by the

parties that as per Clause 6 of the technical specification the entire material was required to be inspected by the consultant of the Respondent,

namely, M/s Project and development India Ltd. (PDIL) The contention of the claimant is that there was delay in the approval of the drawings and,

therefore, there was delay. The Respondent on the other hand has filed documents to show that there was no delay in approval of the drawings by

the PDIL. The Respondent has placed on record the documents wherein it is proved that the claimant has even been sending the misleading

inspection calls to M/s PDIL. It is also clearly mentioned in Clause 5 of the agreement that the time given for delivery/ dispatch shall commence

from the date of the purchase order/ contract by the seller and it is also mentioned that the time shall be deemed to be the essence of the contract

and I am, therefore, satisfied from the records that the delay has been caused by the claimant and, therefore this issue is decided against the

claimant and in favour of the Respondent.

I award that the delay has been caused on account of the fault of the claimant in performance of the contract in question.

18. According to the Respondents the aforesaid observation of the arbitrator shows application of mind. They have made a reference to the

correspondence exchanged between the parties. It was not necessary for them to have quoted the actual lines. The mention of the correspondence

between the parties shows application of mind. Therefore, the finding returned by them that it was the Appellant who was responsible for delay is

based on facts and has been given after application of mind.

19. Now coming to the second issue as to whether the Respondent were not entitled to deduct damages from the amount payable by the

Appellant by invoking Clause 13 of the STCC. The Appellant has cited Fateh Chand v. Balkishan Dass AIR 1963 SC 145, wherein it has been

held that:

The measure of damages in the case of breach of a stipulation by way of penalty is by Section 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 stipulated; 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 damage or loss is proved to have been caused by the breach. Thereby it merely

dispenses with proof of "actual loss or damages"; 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.

20. The Appellant has also relied upon a judgment delivered in the case of Maula Bux v. Union of India AIR 1970 SC 1995, wherein it has been

held:

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 if it be regarded as a genuine pre-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.

21. Same is the principle laid down in the case of Union of India (UOI) Vs. Rampur Distillery and Chemical Co., Ltd., , the other judgment cited

by the Appellant at bar.

22. In this regard Respondents have relied upon a judgment of the Apex Court in the case of Oil and Natural Gas Corporation Ltd. Vs. SAW

Pipes Ltd., , wherein Respondent contractor entered into a contract with Appellant ONGC to supply pipes of specified description by the

specified date. The terms of the contract entitled ONGC to recover damages at the stipulated rate , for delay, if any , in supply of the goods and

further stated the same to be agreed as genuine pre-estimate of damages and not as penalty. Further, the terms of the contract authorized ONGC

to deduct the amount of such damages from the contractor"s bill. At a subsequent stage, at the contractor"s request, ONGC extended the time for

the supply of the goods subject to the condition that ONGC would recover the agreed stipulated damages. Therefore ONGC deducted damages

accordingly. The contractor disputed such deduction before the Arbitrator. The Id. Arbitrator held the deduction to be wrongful on the ground that

ONGC had failed to establish that it had suffered any monetary loss, and directed the same to be refunded together with interest

23. It was observed by the Apex Court that:

It cannot be disputed that for construction of the contract, it is settled law that the intention of the parties is to be gathered from the words used in

the agreement. If words are unambiguous and are used after full understanding of their meaning by experts, it would be difficult to gather their

intention different from the language used in the agreement. If upon a reading of the document as a whole, it can fairly be deduced from the words

actually used therein that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. Further,

in construing a contract, the court must look at the words used in the contract unless they are such that one may suspect that they do not convey

the intention correctly. If the words are clear, there is very little the court can do about it.

41. Therefore, when parties have expressly agreed that recovery from the contractor for breach of the contract is pre-estimated genuine liquidated

damages and is not by way of penalty duly agreed by the parties, there was no justifiable reason for the Arbitral Tribunal to arrive at a conclusion

that still the purchaser should prove loss suffered by it because of delay in supply of goods.

42. Further, in arbitration proceedings, the Arbitral Tribunal is required to decide the dispute in accordance with the terms of the contract. The

agreement between the parties specifically provides that without prejudice to any other right or remedy if the contractor fails to deliver the stores

within the stipulated time, the Appellant will be entitled to recover from the contractor, as agreed, liquidated damages equivalent to 1% of the

contract price of the whole unit per week for such delay. Such recovery of liquidated damages could be at the most up to 10% of the contract

price of whole unit of stores. Not only this, it was also agreed that:

(a) liquidated damages for delay in supplies will be recovered by paying the authority from the bill for payment of cost of material submitted by the

contractor;

(b) liquidated damages were not by way of penalty and it was agreed to be genuine pre-estimate of damages duly agreed by the parties;

(c) this pre-estimate of liquidated damages is not assailed by the Respondent as unreasonable assessment of damages by the parties.

24. It was further observed by the Apex court that:

Further, at the time when the Respondent sought extension of time for supply of goods, time was extended by letter dated 4-12-1996 with a

specific demand that the clause for liquidated damages would be invoked and the Appellant would recover the same for such delay. Despite this

specific letter written by the Appellant, the Respondent had supplied the goods which would indicate that even at that stage, the Respondent was

agreeable to pay liquidated damages.

Relevant parts of Sections 73 and 74 of the Contract Act are 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.

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.

46. From the aforesaid sections, it can be held that when a contract has been broken, the party who suffers by such breach is entitled to receive

compensation for any loss which naturally arises in the usual course of things from such breach. These sections further contemplate that if parties

knew when they made the contract that a particular loss is likely to result from such breach, they can agree for payment of such compensation. In

such a case, there may not be any necessity of leading evidence for proving damages, unless the court arrives at the conclusion that no loss is likely

to occur because of such breach. Further, in case where the court arrives at the conclusion that the term contemplating damages is by way of

penalty, the court may grant reasonable compensation not exceeding the amount so named in the contract on proof of damages. However, when

the terms of the contract are clear and unambiguous then its meaning is to be gathered only from the words used therein. In a case where

agreement is executed by experts in the field, it would be difficult to hold that the intention of the parties was different from the language used

therein. In such a case, it is for the party who contends that stipulated amount is not reasonable compensation, to prove the same.

The next question is - whether the legal proposition which is the basis of the award for arriving at the conclusion that ONGC was not entitled to

recover the stipulated liquidated damages as it has failed to establish that it has suffered any loss is erroneous on the face of it. The Arbitral Tribunal

after considering the decisions rendered by this Court in the cases of Fateh Chand¹⁸, Maula Bux¹⁹ and Rampur Distillery²⁰ arrived at the

conclusion that

in view of these three decisions of the Supreme Court, it is clear that it was for the Respondents to establish that they had suffered any loss

because of the breach committed by the claimant in the supply of goods under the contract between the parties after 14-11-1996. In the words we

have emphasized in Maula Bux decision 19, it is clear that if loss in terms of money can be determined, the party claiming the compensation =must

prove" the loss suffered by him.

Finally, the Arbitral Tribunal held that as the Appellant has failed to prove the loss suffered because of delay in supply of goods as set out in the

contract between the parties, it is required to refund the amount deducted by way of liquidated damages from the specified amount payable to the

Respondent.

It is apparent from the aforesaid reasoning recorded by the Arbitral Tribunal that it failed to consider Sections 73 and 74 of the Indian Contract

Act and the ratio laid down in Fateh Chand case¹⁸ wherein it is specifically held that jurisdiction of the court to award compensation in case of

breach of contract is unqualified except as to the maximum stipulated; and compensation has to be reasonable. u/s 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.

25. Thus the Apex Court held that:

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

entitled to the same.

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate

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

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

(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 can 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 a contract.

(4) In some contracts, it would be 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.

69. For the reasons stated above, the impugned award directing the Appellant to refund the amount deducted for the breach as per contractual

terms requires to be set aside and is hereby set aside.

(B)(1) The impugned award requires to be set aside mainly on the grounds:

(i) there is specific stipulation in the agreement that the time and date of delivery of the goods was of the essence of the contract;

(ii) in case of failure to deliver the goods within the period fixed for such delivery in the schedule, ONGC was entitled to recover from the

contractor liquidated damages as agreed;

(iii) it was also explicitly understood that the agreed liquidated damages were genuine pre-estimate of damages;

(iv) on the request of the Respondent to extend the time-limit for supply of goods, ONGC informed specifically that time was extended but

stipulated liquidated damages as agreed would be recovered;

(v) liquidated damages for delay in supply of goods were to be recovered by paying authorities from the bills for payment of cost of material

supplied by the contractor;

(vi) there is nothing on record to suggest that stipulation for recovering liquidated damages was by way of penalty or that the said sum was in any

way unreasonable.

(vii) In certain contracts, it is impossible to assess the damages or prove the same. Such situation is taken care of by Sections 73 and 74 of the

Contract Act and in the present case by specific terms of the contract.

75. For the reasons stated above, the impugned award directing the Appellant to refund US \$ 3,04,970.20 and Rs. 15,75,559 with interest which

were deducted for the breach of contract as per the agreement requires to be set aside and is hereby set aside. The appeal is allowed accordingly.

There shall be no order as to costs.

26. The aforesaid judgment lays down the law as to how the provision of Section 73 and 74 of the Contract Act are to be interpreted while

dealing with Clauses providing for pre-estimate of damages in the form of liquidated damages. The discussion by the Apex Court in this matter

clarifies the issues subject matter of this appeal. In the instant case also the Appellant had agreed with the Respondent vide Clause 13 of the

Special Terms and Conditions of the contract that if there is a delay in delivery of material, the Appellant would pay the Respondent by way of

liquidated damages and not as penalty, an amount equal to one half percent of the material so delayed for each week of such delay in sitting of the

equipment subject to a maximum of ten percent of such prices. Admittedly there was delay in completing the Job and it is the Appellant who are

responsible for the delay as has been held by the Arbitrator in view of the Correspondence between the parties, the Arbitrator was right in passing

the award in the favour of the Respondent.

27. Further, in regards to the objection taken by the Appellant that in order to claim damage Respondent has to prove that he suffered actual loss,

in the light of the apex Court's decision in ONGC (supra), when a contract is broken and 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.

28. This is also so provided u/s 74 of the Contract Act. As such, the party claiming breach of contract is entitled to receive reasonable

compensation whether or not actual loss is proved to have been caused by such breach. In view of ONGC v. Saw Pipes (supra), wherever there

is a pre-determined amount for the damages, in such a situation the said amount can be deducted by way of liquidated damages by way of

specified amount payable by the Respondent. Thus, if the compensation is named in the contract 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. This is the case in hand in view of

Clause 13 of STCC.

29. I have also gone through the other judgments cited by the Appellant in support of his contention that unless and until the claimant proves the

damages which they have suffered, the Court should not award the compensation as claimed, more so, when no loss whatsoever have been

caused to the claimant. Further, unless the claimant proves the damages suffered by him, he should not be allowed to claim compensation.

Moreover, the compensation to be awarded should be reasonable and if they are capable of being determinable, the amount should not be claimed

more than the maximum. However, in the light of the judgment discussed above in the case of ONGC v. Sawpipes (supra), none of the judgments

cited by the Appellant are of any help to the case of the Appellant. Moreover, in the case of ONGC v. Sawpipes (supra), the Apex Court has

discussed the ratio of judgments in the case of Fateh Chand v. Balkishan Dass, Maula Bux v. Union of India and Union of India v. Rampur

Distillery and Chemical Co. Ltd. (supra) on which the Appellant has placed heavy reliance. After dealing with the ratio of these judgments, the

Apex Court held that:

It is apparent from the aforesaid reasoning recorded by the Arbitral Tribunal that it failed to consider Sections 73 and 74 of the Indian Contract

Act and the ratio laid down in Fateh Chand case¹⁸ wherein it is specifically held that jurisdiction of the court to award compensation in case of

breach of contract is unqualified except as to the maximum stipulated; and compensation has to be reasonable. u/s 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.

30. In these circumstances, when it is apparent that the parties had agreed to fix the liability of the Appellant in terms of Clause 13 for payment of

damages as per the formula contained in that Clause 13, it was not a case of penalty but what was recovered is the amount of damages pre-fixed

by the parties with regard to loss suffered by the Respondent on account of delay in supplying the equipment. In such circumstances, it was not

necessary for the Respondent to prove actual damages. Thus, the arbitrator was justified in dismissing the claim of the Appellant directing return of

the amount out of the dues payable by virtue of Clause 13 of the STCC. The Additional District Judge has upheld the aforesaid order. It is also

well settled that the Civil Court is not to act as an Appellate Court to dissect the reasoning of the Arbitral Forum. The scope of objections are

limited by Section 34 of the Act. Once the Court is satisfied that the Arbitrator has given the award after taking into consideration all the available

facts and the said award is in accordance with the applicable law, the scope of interference is nil. In these circumstances, the decision given by the

Addl. District Judge on both the issues relating to delay and liquidated damages by way of deduction of the amount payable to the Appellant is fully

justified and does not call for any interference by this Court. Consequently, the appeal filed by the Appellant is dismissed with no orders as to

costs.

31. TCR be sent back forthwith along with a copy of this order.