Punj Lloyd Ltd Vs IOT Infrastructure And Energy Services Ltd

Court: Bombay High Court

Date of Decision: Dec. 14, 2018

Acts Referred: Arbitration and Conciliation Act, 1996 â€" Section 9
Indian Contract Act, 1872 â€" Section 34(2A), 73, 74

Hon'ble Judges: S.C.Gupte, J

Bench: Single Bench

Advocate: Nishant Sasidharan, Nakul Jain, Nivit Srivastava, Sneha Patil, Maniar Srivastava, Vikramaditya Deshmukh, Nishit Dhruva, Prakash Shinde, Chirag Bhavsar

Final Decision: Allowed

Judgement

S.C.GUPTE, J

1. This arbitration petition challenges an award dated 31 August 2012 passed by a sole arbitrator. The disputes between the parties arise out of a

construction and engineering contract for works to be carried out at Paradip Port in Orissa.

2. In March 2004, a tender notice was issued by Indian Oil Corporation Ltd. ('IOCL') for the work of design, fabrication and erection of tanks at

Paradip in Orissa for a project known as Ã¢â‚¬Å“ParadipÃ‚Haldia Crude Oil Pipeline ProjectÃ¢â‚¬ or for short Ã¢â‚¬Å“Paradip Refinery ProjectÃ¢â‚¬. The

Respondent ('IOT') was one of the bidders in response to this tender notice. On or about 16 March 2004, the Respondent entered into a Memorandum

of Understanding with the Petitioner agreeing inter alia that if the Respondent were to be successful in its bid for the Paradip Refinery Project, the

parties would enter into a subÃ‚contracting agreement on a back to back basis. IOCL proceeded to award the design, fabrication and erection contract

to the Respondent. The contract was in respect of tankage work of 7 nos. 60,000 KL each capacity double deck floating roof crude oil storage tanks

and 2 nos. 10,000 KL capacity each cone roof water storage tanks for Paradip Refinery Project. On 6 November 2004, by a Letter of Intent (LOI),

the Respondent awarded the subÃ‚contract for design, fabrication and erection of tanks to the Petitioner herein for a total consideration of Rs.27.90

crores. The date of the LOI was treated as the project start date. A bank guarantee was furnished by the Petitioner in favour of the Respondent in

terms of the contract. On 14 January 2005, a work order placed by the Respondent on the Petitioner, which inter alia fixed the time for completion of

the project work as thirteen months from the date of the LOI. On 30 March 2005, in terms of the work order, the Petitioner and the Respondent

entered into a formal subÃ,contract. The subÃ,contract was on a back to back basis on similar terms of contract as between IOCL and the

Respondent IOT. Clause 26 of the subÃ,contract stipulated that the agreement between the Petitioner and the Respondent was subject to the IOCLÃ,â€■

IOT contract. It is the Petitioner's case that the project got extended beyond the agreed completion date; yet the Petitioner continued with the work at

site which progressed slowly due to delays and defaults attributable to the Respondent such as delay in obtaining approvals, law and order disturbance,

water logging and poor drainage facility at site, delayed handing over of foundations, hold ups on tank pads, etc. Eventually the Petitioner completed

the scope of its work in the project by 27 May 2007. The Respondent confirmed such completion, though the date of completion was treated by the

Respondent as 5 June 2007. The Petitioner thereafter submitted its final bill as also its claims including the claims towards idling of resources,

extended stay, etc. The Respondent, for its part, did not accept any of these claims or clear any outstandings but called upon the Petitioner to furnish a

bank guarantee to secure the Respondent's claim on account of price discount, threatening in the event of the latter's failure to furnish such price

discount guarantee to invoke the original bank guarantee provided by the Petitioner at the time of entering into the contract. In these circumstances,

the Petitioner approached this court invoking its jurisdiction under Section 9 of the Arbitration and Conciliation Act, 1996 ('Act'). This court, by its

order dated 10 July 2012, directed the guaranteeing bank to deposit a sum of Rs.2.79 crores with the Prothonotary & Senior Master with directions to

invest the amount in Fixed Deposit of a Nationalised Bank. In the meantime, the parties prosecuted their arbitration reference before the learned

arbitrator. The Petitioner's claim before the arbitrator included a claim for extension of time for completion of the work till 5 June 2007, payment of its

final bill and release of bank guarantee as also of the amount withheld from its RA bills and its claim for damages on account of idling of resources,

extended stay and interest. The Respondent, for its part, raised a counterÃ,claim for a sum of Rs.2.79 crores towards liquidated damages along with

interest. The learned arbitrator passed his award on 31 August 2012 allowing some of the Petitioner's claims, whilst rejecting the others and also

allowing the counterÃ,claim of the Respondent in the sum of Rs.2.79 crores. As a result of the award of the Petitioner's claims and the Respondent's

counterÃ‚claim, the Petitioner was required to pay a net amount of Rs.1.02 crores to the Respondent. This award has been challenged by the

Petitioner in the present petition to the extent of award of the counterÃ‚â€‹claim and rejection of the Petitioner's other claims.

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3. It is mainly contended by learned Counsel for the Petitioner that the learned arbitrator has wrongly awarded the Respondent's counterÃ‚ claim of

liquidated damages. Learned Counsel submits that under the applicable law of liquidated damages in India, under Section 74 of the Contract Act, only

reasonable damages can be awarded against a party committing a breach of contract subject to the upper limit of the estimation of liquidated damages

made under the contract. Learned Counsel submits that for this assessment, it is necessary for the party, who has suffered breach of contract, to

prove the factum of loss or damages even in a case where liquidated damages fixed under the contract are treated by the court as a genuine preÃ‚â€■

estimate of damages. Learned Counsel relies on several judgments starting from the old Allahabad High Court case of Nait Ram vs. Shib Dat

1882 (Vol.V) Indian Law Reports 238 and through practically the whole of the case law, including the cases of Bhai Panna Singh vs. Firm Bhai Arjan

Singh Privy Council Vol.XXXIII 949F, ateh Chand vs. Balkishan Dass (1964) 1 SCR 515 : AIR 1963 SC 140, 5Maula Bux vs. Union of India1969(2)

SCC 554, Oil & Natural Gas Commission, Mumbai vs. MacqreqorÃ‚Navire Port Equipment, Mumbai 2002(3) Mh.L.J. 313O, il and Natural Gas

Corporation Ltd. vs. Saw Pipes Ltd. (2003) 5 SCC 70 5and leading upto the recent judgment of the Supreme Court in Kailash Nath Associates vs.

Delhi Development Authority(2015) 4 SCC 136

4. On the other hand, it is submitted by learned Counsel for the Respondent that a party committing a breach of contract, in particular by delaying

completion of the contract work, is liable to compensate the other party in accordance with the contract between the parties. Learned Counsel submits

that if the provision for liquidated damages made in the contract is treated by the parties as a genuine preÃ‚estimate of damages, it is not necessary for

the aggrieved party to tender any proof of damages. Learned Counsel submits that the burden to show that no loss was actually caused to the

aggrieved party by reason of the delay, or that the amount stipulated as liquidated damages for breach of contract was really in the nature of penalty,

is always upon the party committing the breach. Learned Counsel argues that besides, loss in appropriate cases could even be assumed without any

proof and in the absence of specific evidence to show actual loss suffered by the aggrieved party, it is permissible to the court to award damages

under the stipulation of liquidated damages made in the contract. Learned Counsel submits that the learned arbitrator, in the present case, has

precisely done that and this court, whilst entertaining a challenge to the award, has to simply consider whether the view of the learned arbitrator is a

possible view and if it is so, refrain from interfering with the award. Learned Counsel relies on the Supreme Court judgments in Construction and

Design Services vs. Delhi Development Authority MANU/SC/0099/2015 andB harat Sanchar Nigam Ltd. vs. Reliance Communication Ltd. (2011) 1

SCC 394, and the judgments of Delhi High Court in the cases of Gail (India) Ltd. vs. Punj Lloyd Ltd. 2017 SCC OnLine Del 8301 and Pure Pharma

Ltd. vs. Union of India MANU/DE/0949/2008.

5. Sections 73 and 74 of the Indian Contract Act, coming under Chapter VI titled Ã¢â‚¬Å“Of the Consequences of Breach of ContractÃ¢â‚¬, provide for

compensation for loss or damage caused by breach of contract. Damages for such breach by the defendant are a compensation to the plaintiff for the

damage, loss or injury suffered by him through that breach. Section 73 provides for the general principles for award of such compensation. In the first

place, it rules that compensation is to be awarded to the plaintiff for loss or damage (a) that arose in the usual course of things from such breach; or

(b) which the parties knew at the time they made the contract as likely to result from such breach. It then explains, firstly, that no compensation is

payable for any remote or indirect loss or damage; and secondly, that in estimating such loss or damage, the means which existed of remedying the

inconvenience caused by nonÃ‚performance ought to be considered. Section 74, on the other hand, deals with two particular classes of cases, i.e. (i)

where the contract names a sum to be paid in case of a breach or (ii) where the contract contains any other stipulation by way of penalty. In these

two classes of cases, it, in the first place, provides for entitlement of the aggrieved party to receive from the party who has broken the contract

reasonable compensation not exceeding the amount so named or the penalty so stipulated and makes it unqualified, by making it clear that such

entitlement exists whether or not actual damage or loss is proved to have been caused by the breach. Section 74, as explained by our courts, makes a

deliberate departure from the English common law doctrine of damages which distinguishes liquidated damages from a penalty provided for breach of

contract. Under the common law, a genuine preÃ‚estimate of damages by mutual agreement is regarded as a stipulation of liquidated damages and is

binding between the parties; whilst a stipulation in a contract in terrorem, the purpose of which is to secure performance rather than genuinely provide

for an amount payable in lieu of performance, is a penalty. The court refuses to enforce the penalty; it merely awards to the aggrieved party

reasonable compensation. Elaborate refinements were introduced by courts in England involving a web of rules and presumptions for making this

distinction between contractual stipulations in practice. The Indian law (Section 74), on the other hand, cuts across this web, Ã¢â‚¬Å“by enacting a uniform

principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penaltyÃ¢â‚¬. In assessing damages in

every case of a contractual stipulation, whether named as a sum or a penalty, Section 74 gives a uniform discretion to the court to award reasonable

damages, having regard to the circumstances of the case, the only limiting factor being the maximum amount of such damages that may be awarded;

the maximum cannot exceed the sum named or penalty stipulated in the contract.

6. This was recognized soon after the enactment of the Indian Contract Act by an old decision of Allahabad High Court in the case of Nait Ram vs.

Shib Dat (supra) in the following words :

Ã¢â‚¬Å“Whatever the distinction between liquidated damages and penalty may be, the terms of s. 74 of the Contract Act are broad enough to include both

classes of cases, and the words of the section clearly give a wide discretion to the Courts in the assessment of damages, even in cases where the

parties to the contract have in anticipation of the breach expressly determined by agreement what shall be the sum payable as damages for the

breach. The section appears to have been introduced to obviate the difficulties which exist in distinghishing liquidated damages from penalty under the

English Law, and the effect of it is, that the Courts are not bound to award the entire amount of damages agreed upon by the parties anticipation of

the breach of contract. The only restriction is that the Court cannot decree damages exceeding the amount previously agreed upon by the parties. The

discretion of the Court in the matter of reducing the amount of damages agreed upon is left unqualified by any specific limitations, though of course the

expression Ã¢â‚¬Å“reasonable compensationÃ¢â‚¬ used in the section necessarily implies that the discretion so vested must be exercised with care, caution,

and on sound principles.Ã¢â‚¬â€‹

7. The principle was underlined by the Privy Council in Bhai Panna Singh's case (supra) where a contract for sale of a serai provided for pashemana

(damages) of Rs.10,000 payable by the party retracting from the contract. The purchaser retracted and the vendor had to sell the property to another

purchaser at a loss of Rs.1000. The Privy Council held the original purchaser to be liable to pay damages of only Rs.500, considering that the vendor

had already received Rs.500 as earnest money from the original purchaser, observing as follows :

Ã¢â‚¬Å“The effect of the Indian Contract Act of 1872, sec.74, is to disentitle the Plaintiffs to recover simpliciter the sum of Rs.10,000, whether as penalty

or liquidated damages. The Plaintiffs must prove the damages they have suffered. The only evidence of loss is that of the loss on resale by

Rs.1,000.Ã¢â‚¬‹

8. One may here find, at the first blush, a somewhat contradictory result. What is, after all, implied by the insistence on the plaintiff proving damages,

when the section provides for reasonable damages not exceeding the named sum, or stipulated penalty Ã¢â‚¬Å“whether or not actual damage or loss is

proved to have been causedÃ¢â‚¬. On a closer scrutiny it would be clear that it is not really so and this was explained by the Supreme Court in Fateh

Chand's case (supra) in the following words :

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Ã¢â‚¬Å“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 Ã¢â‚¬Å“actual loss or damageÃ¢â‚¬; 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.Ã¢â‚¬‹

9. The position was explained further by the Supreme Court in Maula Bux (supra) in the following words :

Ã¢â‚¬Å“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 if it be regarded as a genuine preestimate 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.Ã¢â‚¬‹

10. The Supreme Court had an occasion to revisit the whole law in the well known case of ONGC vs. Saw Pipes (supra). The court particularly

focussed on the question of burden to prove actual loss or the want of it. The court held that the emphasis in Section 74 was on reasonable

compensation and went on to observe as follows :

Ã¢â‚¬Å“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 preÃ, 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. Take for illustration: if the parties have agreed to purchase cotton bales and the same were only to be kept as a stockÃ,inÃ,trade. Such bales

are not delivered on the due date and thereafter the bales are delivered beyond the stipulated time, hence there is breach of the contract. Question

which would arise for consideration is Ã, whether by such breach party has suffered any loss. If the price of cotton bales fluctuated during that time,

loss or gain could easily be proved. But if cotton bales are to be purchased for manufacturing yarn, consideration would be different.Ã¢â‚¬â€‹

11. In its latest judgment on the point in Kailash Nath Associates' case (supra), the Supreme Court has once again reviewed the entire case law and

laid down the following principles, on a conspectus of all authorities :

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Ã¢â‚¬Å“43.1 Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as

reasonable compensation such liquidated amount only if it is a genuine preÃ,estimate of damages fixed by both parties and found to be such by the

Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be

awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can

be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant

reasonable compensation.

43.2 Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in

Section 73 of the Contract Act.

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

for the applicability of the Section.

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

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

43.6 The expression ""whether or not actual damage or loss is proved to have been caused thereby"" means that where it is possible to prove actual

damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount

named in the contract, if a genuine preÃ‚â€‹estimate of damage or loss, can be awarded.

43.7 Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and

conditions of a public auction before agreement is reached, Section 74 would have no application.Ã¢â‚¬â€‹

12. Relying on the case law cited above and particularly the principles stated in Kailash Nath Associates, learned Counsel for the Respondent, for

supporting the impugned award, submits that whenever a contract provides for 'liquidated damages', which are a genuine preÃ, estimate of damages

contractually made and not a stipulation by way of penalty, proof of damages on the part of the party aggrieved by breach is altogether dispensed

with; if it is the case of the opponent, who has committed the breach, that no damages have been suffered or the actual loss or damage is other than in

the named sum, it is for the opponent to offer proof in support of such case. Learned Counsel is not right there. It is not the policy of Indian law that in

a case where liquidated damages are found to be a genuine preÃ‚estimate of damages, such damages are to be awarded simply on the proof of breach

of contract and without reference to actual loss or damage.

13. The cases, which are discussed above, indicate an established policy of law so far as India is concerned of only reasonable damages to be

awarded in case of breach of contract. In the first place, it important to note that damages are awarded by Indian courts as a compensatory measure

and never as a punitive measure. The rationale behind such award is that the party who suffers from a breach of contract must be put in the same

position that it would have been in had the contract not been broken. This is universally accepted in India both as a correct rationale and measure of

damages. Section 73 of the Contract Act contains a general principle for award of such damages, and Section 74 is merely an extension of it, to be

applied, as we have seen above, to particular cases where either a sum is mentioned in the contract as payable in case of a breach or a penalty is

stipulated. Section 74, as we have seen above, has to be read along with Section 73. It does not confer any special benefit upon any party; it merely

provides for award of reasonable compensation not exceeding the amount of liquidated damages or penalty stipulated in the contract, whether or not

actual damage or loss is proved to have been caused by breach of contract. It does not follow that because it so provides, it dispenses with loss or

damage by itself. Obviously, when no loss is suffered, it cannot be said that the amount stipulated as liquidated damages should still be awarded. The

very clause of liquidated damages operates when loss is suffered. As the Supreme Court has reiterated in Kailash Nath Associates (supra), damage

or loss caused is a sine qua non for the applicability of Section 74. What the expression Ã¢â‚¬Å“whether or not actual damage or loss is proved to have

been caused therebyÃ¢â‚¬ means is that where it is possible to prove actual damage or loss, it is only such damage or loss that may be compensated for

as reasonable damages; and in cases where such damage or loss is difficult or impossible to prove, then the liquidated amount named in the contract, if

a genuine preÃ‚estimate of damage or loss, may be awarded. That merely reflects on the court's discretion in the matter and its exercise. The

liquidated sum named in the contract, in other words, is to be taken into account for ascertaining reasonableness of compensation and not as a

dispensation of proof of loss or damage. In sum, even in a case the contract provides for liquidated damages and the court is of the view that what is

provided for is in fact a genuine preÃ‚estimate of damages, it is imperative for the party who has suffered breach of contract to plead and make out a

case of having suffered a loss. There may be cases where the factum of such loss may be obvious, but its actual measure may not be capable of

proof or may be difficult to prove. In that case, if the court finds that the liquidated amount named in the contract is a genuine preÃ‚estimate of

damage or loss contractually made by the parties, the court may award such amount as reasonable damage in its discretion. The statement of law to

be found in paragraph 43.1 of Kailash Nath Associates in this behalf only means that it will be legitimate for the court to award the liquidated sum

named in the contract as reasonable compensation wherever such sum is a genuine preÃ‚estimate of damages fixed by both parties and found to be

such by the court; it does not imply that in all cases when it is so, the court is bound to award such liquidated sum. The award of such liquidated sum,

or any compensation for that matter, is within the discretion of the court and such discretion must be exercised on sound principles applicable under

Section 73 with particular reference to the injury or loss resulting from the breach of contract complained of. Wherever it is possible to prove actual

damage or loss, the party complaining of breach must tender its proof. If such proof is impossible or difficult to produce, the aggrieved party must

make out such case and thereafter, call upon the court to award the liquidated amount named in the contract as reasonable damages, and the court

may do so in exercise of its discretion.

14. None of the Supreme Court cases relied upon by learned Counsel for the Respondent detracts from this position. In Construction and Design

Services (supra), the contract was for construction of a sewerage pumping station within the stipulated (or extended) time. The pumping station

clearly was a public utility to maintain and preserve clean environment, the absence of which could result in environmental degradation by stagnation

of water in low lying areas. (The delay would also have resulted in loss of interest on blocked capital of the employer.) What the court said was that in

the premises, in a case like this, loss could be assumed even without proof and the burden would be on the contractor who committed the breach to

show that no loss was caused by the delay or that the amount stipulated as damages for breach of contract was in the nature of a penalty. In other

words, this was a case where the loss was obvious but was not actually quantifiable in exact monetary terms. It was, by its very nature, incapable of

any precise proof. The case is, thus, clearly within the dicta of the Supreme Court in Kailash Nath Associates. In Bharat Sanchar Nigam Limited., the

agreement was an interconnection agreement with the appellantÃ,BSNL, the respondent being a basic telecom service provider using interconnection

facilities made available by the former. Their disputes pertained to underÃ,paying 'access deficit charges' by the respondent by resorting to callÃ,â€■

masking techniques and by landing incoming international calls at wrong points of interconnection. The agreement provided for liquidated damages in

case of unauthorized calls or wrongly routed calls based on a formula provided therein. The court noted that both (a) in case of calls other than

specified for the particular trunk group, if detected, for which the applicable interconnected usage charges were higher than the interconnected

charges applicable for calls prescribed in that trunk route and (b) calls received by BSNL without calling line identification or modified or tampered

calling line identification, the same economic and financial consequences followed and that was the reason the clause of liquidated damages provided

for reasonable preÃ,estimate of such damages. Besides, it was not possible to trace such unauthorized calls, particularly their nature, as to from which

place they originated and even if it was possible, the cost of tracing such calls might be much more than the actual damage, if ascertainable, and

therefore, the Ã¢â‚¬Å“rough and ready measureÃ¢â‚¬ provided in clause 6.4.6 was treated as a reasonable preÃ,estimate of damages. In other words, even in

this case, the actual measure of damage was difficult, if not impossible, to prove and accordingly liquidated damages provided in the clause, which

were treated by the court as a genuine preÃ,â€‹estimate of damages, were accepted as a reasonable measure of damages.

15. In the present case, there is a complete want of a plea of loss suffered by the Respondent employer. The statement of claim is altogether silent on

the Respondent having suffered any injury or loss as a result of the breach of contract alleged on the part of the Petitioner. Naturally, even in the

evidence tendered by the Respondent, there is no whisper of any injury or loss suffered by it as a result of the alleged breach. There is no plea either

that actual damage or injury flowing from such breach was impossible or difficult to prove. Damages are claimed by the Respondent simply on the

footing that there has been a breach of contract on the part of the Petitioner and the contract names a sum of liquidated damages payable in case of

such breach. That, as we have noted above, is not by itself sufficient for award of damages. In addition, the court must apply its mind to the aspect of

reasonable damages flowing from such breach, by considering the injury involving loss or damage. There is no application of mind to this aspect of the

matter, and indeed, as we have noted above, there was no such case before the arbitral tribunal.

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16. Even otherwise, considering the fact that the two contracts, that is to say, the contract between the parties herein, and the contract between IOCL

and the Respondent IOT, being back to back, it is important to note if the Respondent has suffered any loss or damage so far as its contractual

entitlement under the IOCLÃ,IOT contract is concerned. The disputes between IOCL and the Respondent were adjudicated by an arbitral forum, the

award rendered by whom forms part of the record and proceedings in the arbitration reference herein. The award shows that the arbitral forum

wholly rejected IOCL's case for any price discount or damages on account of delay in completion or commissioning of the project. Before the arbitral

forum, the entire case of the Respondent herein was along the same lines as what has been submitted in the present reference and in the present

challenge by the Petitioner herein. This entire case of the Respondent on price discount or damages, which is nothing but a mere paraphrasing of what

the Petitioner has submitted in the present case, has been accepted in toto by the arbitral forum, and IOCL has been called upon to refund the entire

amount claimed by it towards price discount or damages to the Respondent herein. The arbitrator has held that though there had been delay in

completion of the project, it could not be entirely attributed to the Respondent herein and IOCL having allowed the Respondent herein to complete the

work without putting it on notice that the relevant clauses of the contract concerning price discount or damages would be attracted for extension of

time for completion, its counterÃ,claim for delay discount was liable to be rejected. In other words, not only is there no plea of legal injury or loss

caused to the Respondent as a result of breach of contract by the Petitioner, the record of the case indicates that, in fact and as determined by a

competent legal forum, there is no liability fastened on the Respondent for any delay in completion or commissioning of the project. If that is so, the

Respondent could never be said to have suffered any injury or loss insofar as its back to back subÃ‚contract with the Petitioner is concerned. The

learned arbitrator appears to have brushed aside the submission that the Respondent did not suffer any injury or loss as regards its main contract with

IOCL on the ground that the award passed by the sole arbitrator in the reference between the Respondent and IOCL had been challenged before a

competent court. The arbitrator lost sight of the fact that as of date, there was no case of the Respondent having suffered any injury or loss on

account of the alleged delay in completion or commissioning of the project; the employer's claim of damages on account of such delay had been

comprehensively rejected by a competent forum. It is important to note here that the Petitioner makes an offer at the hearing of this petition that in

case IOCL's challenge to the arbitration award is accepted by the court and the award is set aside and any part of IOCL's claim towards delay

discount is allowed in future, the Petitioner shall make good the loss of the Respondent herein towards such delay discount, and in the meantime, the

Respondent can continue to withhold the amount not paid so far by it to the Petitioner towards such claim. The Respondent, for its part, makes an

offer to refund the amount currently withheld from the Petitioner's claim awarded by the arbitrator if its challenge to the IOCLÃ‚IOT award is decided

against IOCL. These statements should properly take care of the loss, if any, suffered by the Respondent herein in the IOCLÃ‚IOT contract on

account of any delay caused by the Petitioner.

17. Besides, there is no discussion in the award for finding the liquidated sum named in the contract as a genuine preÃ‚estimate of damages. It is not

sufficient that the sum is named by the parties in their contract as a genuine preÃ‚estimate of damages; the court awarding damages on its basis must

also find it to be so.

18. In the premises, the impugned award of the learned arbitrator suffers from a breach of public policy of India. It also exhibits an illegality in the

face of the award, which goes to the root of the matter in a way as to make it amenable to a challenge under SubÃ‚section (2Ã‚A) of Section 34 of the

Act. The award on liquidated damages, in the premises, deserves to be set aside.

19. As far as the rejected claims of the Petitioner are concerned, the impugned award clearly takes a possible view of the matter. On the claim of

idling of resources, after examining the material placed before him, the learned arbitrator has come to a conclusion that the Petitioner's deployment of

resources at all stages was for below the contractual requirements and accordingly, there was no question of idling of resources. On the claim for

extended stay at site, the arbitrator has held that factually it was the Petitioner who was liable for inordinate delay in completion of work, even after

setting off the period of hindrance caused by the Respondent by belatedly handling over tank pad foundations. The arbitrator has held that the

Petitioner failed to establish convincingly that the Petitioner was otherwise ready and competent to complete the work within the stipulated time or that

the execution of work was delayed solely on account of delays or defaults on the part of the Respondent. These are questions of fact and nothing is

shown to suggest that the arbitrator's views on the questions are either impossible or such as no fair and judiciously minded person could have taken or

as would shock the conscience of the court. There is, accordingly, no infirmity in the impugned award so far as these claims are concerned.

20. In the premises, the arbitration petition is allowed by setting aside the impugned award to the extent it grants the Respondent's claim of liquidated

damages in the sum of Rs.2.79 crores with interest. The rest of the award is maintained.

21. The statement of learned Counsel for the Petitioner, on instructions, that his client undertakes by way of a corporate guarantee to pay to the

Respondent a sum of Rs.1,02,07,917.92 and the statement of learned Counsel for the Respondent to refund the amount of Rs.1,76,92,083.92 withheld

from the Petitioner's claims awarded by the learned arbitrator, in the circumstances noted above, are accepted. It is made clear that these statements

are made by the respective parties and accepted by the court without prejudice to the rights and contentions of the parties in respect of the impugned

award and the present order.

22 .Since the award granting the liquidated damages' claim of the Respondent is set aside, the Petitioner will be entitled to withdrawal of the amount of

Rs.2.79 crores deposited in this court and invested by the Prothonotary & Senior Master with accrued interest. The Prothonotary shall, accordingly,

make over the amount of the deposit together with accrued interest to the Petitioner or its nominee.