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

Reserved on: 21.12.2021
Date of Decision: 04.01.2022

\+ **FAO(OS) 415/2011& CM APPLs. 44584-5/2021**

BHOPAL DAL UDYOG .....Appellant
Through Mr.Jagdeep Sharma, Adv.

versus

FOOD CORPORTION OF INDIA ..... Respondent
Through Mr.Deepak Dewan, Adv.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J.

1. This appeal has been filed by the appellant challenging the order dated 26.08.2010 passed by the learned Single Judge of this Court in OMP No.480 of 2008 dismissing the objections filed by the appellant under Sections 30 and 33 of the Arbitration Act, 1940 (hereinafter referred to as the 'Act') against the Arbitral Award dated 12.08.2008 (hereinafter referred to as the 'Arbitral Award') passed by the learned Sole Arbitrator.

2. The parties herein had entered into an agreement dated 05.11.1979 (hereinafter referred to as the 'Agreement') whereunder the appellant was to acquire 1200 MTs of Arhar Whole for conversion

into Arhar Dall. The entire milling operation was to be completed within 45 days from the 11th working day after the issue of acceptance of the tender by the respondent.

3. The respondent, alleging that the appellant had failed to make financial arrangements for allowing the lifting of the allotted quantity of Arhar Whole and thereby violating the terms of the Agreement, terminated the Agreement vide its notice dated 28.07.1980. The resultant dispute between the parties was referred to Shri Shiv Prakash, Additional Legal Advisor, Ministry of Law, Justice & Company Affairs, who was appointed as the Sole Arbitrator.

4. The learned Sole Arbitrator passed an Award dated 28.06.1991 (hereinafter referred to as the 'previous Award'), awarding claim nos.3 and 6 of the appellant to the tune of Rs.4,22,400/- (Rupees four lakh twenty-two thousand four hundred only) and Rs.1,94,800/- (Rupees one lakh ninety-four thousand eight hundred only) respectively in favour of the appellant. The previous Award was, however, set aside by the learned Additional District Judge, Delhi vide Judgment dated 06.07.2005 passed in Suit No.122/03/96 registered on the filing of the previous Award by the Arbitrator.

5. The appellant filed an appeal being FAO No.357/2005 challenging the said Judgment dated 06.07.2005. The learned Single Judge of this Court vide order dated 24.01.2006 directed the respondent to appoint fresh Arbitrator in terms of the arbitration clause of the Agreement to adjudicate and decide the claims of the parties.

6. In compliance with the said direction, Sh.Surender Gandodtra was appointed as the Sole Arbitrator.

7. The learned Sole Arbitrator vide his Arbitral Award, allowed the claims of the respondent directing the appellant to pay a sum of Rs.13,36,120.31/- (Rupees thirteen crore thirty-six lakh one hundred twenty and thirty-one paise only) to the respondent along with interest at the rate of 15% per annum. The counter claims of the appellant were rejected by the learned Sole Arbitrator.

8. The appellant challenged the said Arbitral Award by way of an application under Sections 30 and 33 of the Act, being OMP No. 480 of 2008, which has been dismissed by the learned Single Judge of this Court by way of the Impugned Order.

9. The learned counsel for the appellant submits that the impugned Arbitral Award and the Impugned Order passed by the learned Single Judge are liable to be set aside as they failed to appreciate that during the pendency of the challenge of the respondent to the previous Award, the parties had agreed to settle all the disputes and accordingly appointed Justice K.L. Issrani (Retd.) to give his opinion on the dispute, with an undertaking that the opinion given would be binding on the parties. Justice K.L. Issrani (Retd.) had given an opinion that the respondent should accept the previous Award. However, the respondent never shared this opinion with the appellant and allowed its objections to be heard on merit, which were ultimately allowed by the Judgment dated 06.07.2005 passed by the learned Additional District Judge referred hereinabove. He submits that the opinion of

Justice K.L. Issrani (Retd.) was brought to the knowledge of the appellant only pursuant to an application under the Right to Information Act, 2005. The Appellant thereafter placed the opinion before the Arbitrator requesting the learned Sole Arbitrator to pass an Award based on the said opinion. However, the learned Sole Arbitrator passed the impugned Arbitral Award disregarding the settlement reached between the parties.

10. The learned counsel for the appellant further submits that in the present arbitration proceedings also, before the Arbitrator, the respondent had stated that it is willing to settle the disputes if the appellant makes a payment of Rs.37,215/- (Rupees thirty-seven thousand two hundred fifteen only) to it. Inspite of the said offer, the learned Arbitrator had gone ahead and passed the impugned Arbitral Award allowing Rs.13,36,120.31/- in favour of the respondent.

11. The learned counsel for the appellant further submits that in the present case, there was no evidence led by the respondent in support of its claim for damages and therefore, the impugned Arbitral Award was liable to be set aside. He submits that the award of liquidated damages can, in any case, be not sustained in view of actual damages also being awarded. He further submits that there is no basis disclosed in the Arbitral Award for allowing the claim of interest from 03.01.1980 to 28.07.1980 and the quantification thereof.

12. The learned counsel for the appellant also placed reliance on the order dated 01.09.2011 passed by this Court in the present appeal wherein a *prima facie* observation was made by this predecessor

Bench of this Court that the appellant can be directed to pay a sum of Rs.37,215/- together with interest at the rate of 9% per annum forthwith to settle the dispute fully and finally along with the costs of Rs.1,00,000/- (Rupees one lakh only). He submits that the learned counsel for the respondent was called upon to seek instructions on the said offer, however, the said offer was arbitrarily rejected by the respondent.

13. We have considered the submissions made by the learned counsel for the appellant, however, find no merit in the same.

14. As far as the submission that the respondent was bound by the opinion of Justice K.L. Issrani (Retd.), the learned Single Judge in his impugned Order has observed that the note dated 02.05.2005, prepared by the Committee constituted by the respondent to explore the possibility of a settlement, showed that there was no commitment made by the respondent that it would simply accept the opinion of the retired High Court Judge or be bound by such an opinion. The learned Single Judge further observed that in any case, the opinion of the learned Retired High Court Judge was with a rider that in case the Department was sure that they had gathered their evidence to prove their claim and to negate the claim of the appellant and the case is likely to be heard soon, then the Department should wait for the decision to come.

15. In view of the above, we find no binding undertaking of the respondent to be bound by the opinion of Justice Issrani (Retd.) and equally, no infirmity in the view of the learned Single Judge that the

respondent cannot be held bound by the opinion of Justice K.L. Issrani (Retd.).

16. In any case, much water has flown thereafter. As noted hereinabove, the objections filed by the respondent to the previous Award were allowed by the learned Additional District Judge; the Judgment dated 06.07.2005 was upheld by this Court in appeal with a direction to the respondent to appoint a fresh Arbitrator; the Arbitrator was so appointed, who has now rendered his Award. Therefore, in our opinion, no reliance can be placed by the appellant on the purported opinion of Justice K.L. Issrani (Retd.) to challenge the Arbitral Award.

17. As far as the submission based on the offer of the respondent made before the learned Sole Arbitrator to settle the claim, the offer made in the reply of the respondent to an application of the appellant before the learned Sole Arbitrator was conditional on the appellant accepting the same. The learned counsel for the appellant has not been able to show if at any time during the arbitration proceedings the appellant accepted the said offer. Having contested the dispute on the merit therefore, the appellant cannot now turn around and challenge the Arbitral Award passed against the appellant on merit of the dispute, based on the offer of settlement made by the respondent during the course of proceedings in arbitration.

18. As far as the submission on damages not been proved, the learned Sole Arbitrator as also the learned Single Judge have noted that the appellant was in breach of the Agreement. The respondent

having terminated the Agreement, had awarded the work at risk and cost of the appellant to other parties, suffering the additional costs. It was also noted that the appellant did not effectively participate in the arbitral proceedings. Therefore, we find no substance in the submission of the appellant that the award of actual damages suffered by the respondent.

19. However, in the impugned Arbitral Award we find that the learned Sole Arbitrator has awarded liquidated damages to the tune of Rs.8,38,656/- (Rupees eight lakh thirty-eight thousand six hundred fifty-six only) in favour of the respondent relying upon Clause XX of the Agreement between the parties, in addition to the actual loss suffered by the respondent as a result of the breach of contract by the appellant.

20. Section 74 of the Indian Contract Act, 1872 reads as under:

> " ***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.*
>
> *Exception.— When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are*

interested, he shall be liable, upon breach of any condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.— A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested."

21. Interpreting the above provision, on the basis of the earlier judgments of the Supreme Court, in ***Kailash Nath Associates v. DDA & Anr.,*** (2015) 4 SCC 136, the law under Section 74 of the Indian Contract Act, 1872 was stated as under:

" ***43.*** *On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:*

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 pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.*

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 pre-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.*"
>
> ***(Emphasis supplied)***

22. In the present case as the actual damages suffered by the respondent were proven and accepted by the learned Sole Arbitrator, liquidated damages over and above such actual damages could not have been awarded. Accordingly, the Arbitral Award insofar as it grants Rs.8,38,656/- in favour of the respondent is set aside.

23. The learned Sole Arbitrator has also awarded interest charges on 1200 MTs in favour of the respondent from 03.01.1980 to 28.07.1980. The learned counsel for the appellant submitted that there is no basis for award of interest. We, however, find no merit in the same. Due to breach of contract by the Appellant, there was a resultant delay in milling of the Dal and the work had to be awarded by the respondent to third parties. The loss suffered by the respondent for this delay has been compensated by way of award of interest. The said claim is also in conformity with Clause XIV (vi) of the Agreement which is reproduced herein below:

> "*XIV.* ***MILLING OF ARHAR WHOLE***

xxx

(vi) In case of delay in milling the wholegrain or arranging the delivery of milled dall the Food Corporation shall recover from the contractor interest on the value of wholegrain/dall as the case may be @ 12% per annum from the date of stocks of wholegrain were released to the contractor for purposes of milling and arranging delivery after producing dall, without prejudice to its other rights in getting the work under this contract done through some other miller or to get the quantities milled through its mills departmentally (or to purchase the dall in the market)."

24. The reliance of the appellant on the *prima facie* opinion of this Court recorded in the order dated 01.09.2011 also cannot come to the aid of the appellant inasmuch as it was merely a *prima facie* opinion. The said offer having been rejected by the respondent, the appeal has to be considered on merit and has been so considered by way of the present judgment.

25. In view of the above, the Arbitral Award dated 12.08.2008 is set aside to the limited extent of Rs.8,38,656/- being awarded by the learned Sole Arbitrator in favour of the respondent as Liquidated Damages. The remaining Award is made Rule of the Court.

26. The appeal is partly allowed in the above terms. There shall be no order as to cost.

NAVIN CHAWLA, J

MANMOHAN, J

JANUARY 04, 2022
RN/U/AB