2024:DHC:8911-DB

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 20.11.2024

\+ **FAO (OS)(COMM) 114/2019 and CM No.24305/2019**

INDIAN OIL CORPORATION LTD. ..... Appellant

versus

M/S FIBERFILL ENGINEERS ..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Huzefa Ahmedi, Sr Advocate with Ms Mala Narayan, Mr Shashwat Goel, Mr Rohan Sharma and Ms Isha Ray, Advocates.

For the Respondent : Mr Amit Gupta, Mr Kshitij Vaibhav, Ms Muskan Nagpal and Mr H. S. Mahapatra, Advocates.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MR JUSTICE SACHIN DATTA

JUDGMENT

VIBHU BAKHRU, J

1. Indian Oil Corporation Ltd. (hereafter *IOCL*) has filed the present intra court appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereafter *the A&C Act*) impugning an order dated 29.03.2019 (hereafter *the impugned order*) passed by the learned Single Judge in OMP(COMM) No.303/2017 captioned *Fiberfill Engineers v. Indian Oil Corporation Limited.* The respondent (hereafter referred to

as *Fiberfill*) had filed the aforementioned petition under Section 34 of the A&C Act for setting aside an arbitral award dated 12.04.2017 (hereafter *the impugned award*) rendered by the Arbitral Tribunal (hereafter *the Arbitral Tribunal*) comprising of a Sole Arbitrator.

2. The impugned award was rendered in the context of disputes that had arisen between the parties in connection with an agreement dated 11.01.2007 for designing, supplying, installation, testing and commissioning of high mast signage systems of various heights and types at various IOCL retail outlets in the State of Tamil Nadu and Union Territory of Pondicherry (hereafter referred to as *the Work Order)*.

3. Fiberfill had made five claims, which were the subject matter of arbitration before the Arbitral Tribunal. The same included a claim of ₹22,08,528/- being an amount that was deducted by IOCL towards price adjustment from the bills raised by Fiberfill for the work done; interest at the rate of 18% on the sum of ₹22,08,528/- from the date the amounts were withheld by IOCL till the actual date of release; ₹75,50,000/- towards Escalation; ₹1,50,00,000/- towards Loss of Business Opportunity; and ₹80,00,640/- towards Manpower Retention. The Arbitral Tribunal rejected all the aforesaid claims and found that Fiberfill is not entitled to any relief.

4. During the course of proceedings relating to Fiberfill's petition for setting aside the impugned award under Section 34 of the A&C Act, Fiberfill had confined its challenge to the impugned award to the extent of denial of its claim for the amount of ₹22,08,528/- withheld by IOCL

and the interest payable thereon. The learned Single Judge sustained the said challenge and set aside the impugned award to the extent that it rejected Fiberfill's claim for the amount of ₹22,08,528/- and interest thereon. The learned Single Judge held that Fiberfill is entitled to the sum of ₹22,08,528/- along with interest at the rate of 8% per annum from the date the amounts were withheld till the date of release.

5. The amount of ₹22,08,528/- was withheld by IOCL in terms of Clause 9 of the Special Instructions to Tenderers (hereafter *SIT*) as compensation for delay in performance of the work. The learned Single Judge faulted the Arbitral Tribunal for accepting IOCL's claim for compensation on account of delay in execution of the works without returning any finding that IOCL had suffered damages on account of delay or that the amount withheld was a reasonable compensation for the delay in execution of the work on the part of Fiberfill. The learned Single Judge held that to the aforesaid extent, the impugned award was vitiated by patent illegality. The Arbitral Tribunal ignored the relevant material and also awarded liquidated damages by way of price adjustment without recording a finding as to whether IOCL had suffered any loss or injury.

6. The controversy in the present appeal is, thus, confined to the question whether the Arbitral Tribunal had erred in rejecting Fiberfill's claim for the amount of ₹22,08,528/- withheld by IOCL as compensation by way of reduction in price payable for the work done.

FACTUAL CONTEXT

7. IOCL is a Public Sector Undertaking, *inter alia*, engaged in the business of distribution of Oil and Petroleum Products. IOCL had invited tenders for designing, supplying, installing, testing and commissioning of the high mast signage systems of various heights and types at its various retail outlets in the State of Tamil Nadu and the Union Territory of Pondicherry. The invitation was, essentially, to enter into a rate contract and the tenderer was required to offer rates expressed in the form of percentages of Schedule of rates specified by IOCL.

8. Fiberfill is a partnership firm registered under the Indian Partnership Act, 1932. It is primarily engaged in the business of steel fabrication and executing civil and electrical engineering contracts.

9. The bid documents included the SIT, which *inter alia*, stated the procedure for awarding the contract. It was expressly provided that the SIT and the bid documents would form an integral part of the Contract. Clause 8.0 of the SIT provided that the "*the Rate Contract shall be valid for a period of One year from the date of its finalization and shall not be extendable for a further period of one year with mutual consent*"[1].

10. It was expressly provided that the finalization of the contract would not entail any right to the contractors for securing the work orders from IOCL. The SIT further stated that IOCL intended to shortlist two contractors and to award 60% of the total value of work to the tenderer

[1] Clause 8 of the SIT

quoting the lowest acceptable rate (L-1) and balance 40% of the work to a contractor offering the next lowest rate (L-2).

11. Clause 9 of the SIT expressly provided that the work was required to be completed in all respects within a period of twelve weeks from the date of issuance of "Call up Order".

12. Clause 9.2 of the SIT provided that IOCL would be entitled to recover compensation by way of price adjustment as mentioned in General Conditions of the Contract (GCC) up to an amount not exceeding 10% of the total individual work order value.

13. Fiberfill submitted its bid pursuant to the tenders invited by IOCL. Its bid was accepted and Fiberfill was awarded the contract for designing, manufacturing, supply and erection of 12 Meters, 15 Meters and 17 Meters high mast signages including foundation at the retail outlets in the State of Tamil Nadu and the Union Territory of Pondicherry in terms of the Work Order issued by IOCL.

14. The Work Order specified the maximum financial limit of the value of works as ₹408,19,734.42. Fiberfill was required to make a security deposit equivalent to 10% of the value of the Work Order in the manner as stipulated in the Work Order. Clause 3 of the Work Order is relevant and set out below:

> "3. The maximum financial limit (value of works) you will be likely to carry out will be Rs.408,19,734.42 (Rupees Four Crores eight lakhs nineteen thousand seven hundred and thirty four and paise forty two only). This is only an indication but however there

> is no assurance to the quantum of work that will be given under this Rate Contract. Moreover, individual call up orders will be placed from time to time as and when the need arises, during the period of contract. The installation of the High Mast Signage including provision of foundation should be completed within 60 days from the date of issue of call up letter."

15. Fiberfill was required to install one hundred and five (105) signages under the Work Order pursuant to the Call up Orders that were issued subsequently. In all, twelve (12) Call up Orders were issued to Fiberfill. The Work Order was valid for a period of one year; that is, till 10.01.2008. However, the same was extended by mutual consent for a further period of one year in terms of Clause 8 of the SIT. IOCL extended the Work Order for a further period till 10.01.2009 in terms of its letter dated 05.02.2008. Undisputedly, till the said date (that is, till 05.02.2008) only six Call up Orders were issued by IOCL which covered only thirty (30) sites. The balance six Call up Orders were issued thereafter.

16. There was a delay in completion of the Work Order. Apart from the fact that there was delay in issuance of the Call-up Orders – as noted above, IOCL had issued six Call up Orders after the initial term of the Contract had expired – there was also a delay in installation of the high mast signages for various reasons.

17. According to IOCL, the delay in execution of installation of the high mast signages exceeded the period of sixty days as extended by the period of delay on account of justifiable reasons or those that were not

attributable to Fiberfill. IOCL, thus, withheld an amount of ₹22,08,528/- from the amounts payable to Fiberfill. IOCL claimed that the said deductions were made in accordance with Clause 4.4.0.0 of the GCC and Clause 9 of the SIT. A tabular statement setting out the period of delay on account of which IOCL withheld the payments is set out below:

CALL UP ORDER NO.	**DATE, BY WHICH, THE RESPONDENT WAS TO COMPLETE WORKS**	**DATE, BY WHICH, THE RESPONDENT HAD ACTUALLY COMPLETED WORKS**	**NO. OF DAYS, BY WHICH, WORK HAS BEEN DELAYED**
2nd	11.02.2008	16.09.2008	217 days
6th	04.08.2008	10.11.2008	98 days
8th	01.12.2008	03.07.2009	210 days
9th	13.03.2009	01.04.2011	More than 730 days
11th	24.06.2009	12.07.2010	More than 365 days
12th	11.11.2009	15.05.2011	More than 1 and a half year

18. According to Fiberfill, the delays were not attributable to it and were, for the reasons, beyond its control, which also included delays on the part of IOCL in the appointment of a Third Party Inspection Agency (TPI Agency).

19. Accordingly, Fiberfill sent communications including emails dated 20.07.2012 and 23.07.2012, calling upon the IOCL to release the payment for the amount of ₹8,38,581/- for the work done. However, the payment was not released. IOCL acknowledged that the amount has been withheld on account of the liquidated damages.

20. Fiberfill once again sent a letter dated 10.10.2012 calling upon IOCL to release the amount of ₹22,08,528/- withheld by it along with interest at the rate of 18% per annum from the dates on which the

amounts were withheld till the actual date of payment. However, IOCL did not respond to the said letter.

21. Thereafter, on 30.09.2013, Fiberfill sent a legal notice (which was corrected on 03.10.2013), calling upon IOCL to immediately release the amount of ₹22,08,528/- along with interest at the rate of 18% per annum from the dates the amounts were withheld to the actual date of payment. However, IOCL did not respond to the said legal notice. Consequently, by a letter dated 21.01.2014, Fiberfill invoked the Arbitration Clause (Clause 9.0.1.0 of the Work Order) and called upon IOCL to furnish a panel of three arbitrators to enable it to nominate an arbitrator. The notice dated 21.01.2014 also did not elicit any positive response from IOCL.

22. In view of the above, Fiberfill filed a petition under Section 11(6) of the A&C Act (being Arbitration Petition No.155/2014) before this Court seeking appointment of an arbitrator. The said petition was disposed of by an order dated 01.08.2014, whereby IOCL was directed to furnish the names of three arbitrators for Fiberfill to nominate one of them.

23. In compliance with the said order, the Arbitral Tribunal comprising of a sole arbitrator was constituted. The Arbitral Tribunal sent a letter dated 14.11.2014 calling upon Fiberfill to file its statement of claim and for IOCL to file its counter statement.

24. Pursuant to the above, Fiberfill filed its statement of claim. Paragraph 42 of the said statement, which summarises Fiberfill's claims is reproduced below:

> "42. That this Claim Petition raises the following claims:
>
> **I. Claim due, wrongfully deducted on account of liquidated damages/Penalty**:
>
> The Claimant is entitled to Rs. 22,08,528/- deducted from the bills on account of Liquidated damages/penalty alongwith interest @ 18% p.a. from the date the amounts have been withheld i.e. 01.05.2008 till 31.12.2014 amounting to Rs. 26,59,917/-
>
> **II) Claim due to delay damages.**
>
> i) Escalation Amount (On material, transportation, execution cost etc) aggregating to Rs. 75,50,000/-.
>
> ii) Loss of Business Opportunity aggregating to Rs. 1,50,00,000/-.
>
> iii) Manpower recruitment cost over a period of 4 year @Rs.20 Lacs p.a aggregating to Rs. 80,00,640/-, the break-up is provided below:
>
> a) Engineers for 48 Months @Rs.65,000/- per month Rs.31,20,000/-
>
> b) 3 Nos. Supervisor for 48 Months @Rs.28,000/- per month Rs.40,32,000/-
>
> c) Mason & Labour Cost Rs.8,48,640/-"

25. IOCL countered the aforesaid claims by filing its written statement of defence.

26. The arbitral proceedings culminated in the impugned award whereby the claims made by Fiberfill were rejected.

27. Fiberfill filed a petition assailing the impugned award under Section 34 of the A&C Act, which was partly allowed in terms of the impugned order.

REASONS AND CONCLUSION

28. As stated at the outset, the controversy in the present appeal relates to the decision of the learned Single Judge to set aside the impugned award to the extent that Fiberfill's claims for the recovery of an amount of ₹22,08,528/- withheld by IOCL and the interest thereon, were rejected. It is also material to note that the learned Single Judge also proceeded to hold that Fiberfill would be entitled to the principal sum of ₹22,08,528/- along with simple interest at the rate of 8% per annum from the date on which the said deductions were made from the bills submitted by Fiberfill. The dispositive part of the impugned order is set out below:

> "21. Having regard to the aforesaid, I am of the view that the findings and conclusion reached in the award insofar as claim No.1 is concerned (which is replicated as issue No.1 in the award), cannot be sustained.
>
> 21.1 As noted above, the result of claim No.2 (i.e. issue No.2) is dependent on the result of claim No.1. Via claim No.2, FFE only sought interest on the sum retained by IOCL.
>
> 21.2 In view of the above, the impugned award is set aside to the extent it pertains to claim No.1 and 2. FFE would be

> entitled to a principal sum of Rs.22,08,528/- which was retained by IOCL along with interest at the rate of 8% (simple) per annum from the date when deductions were made from the bills of FFE till the date of payment."

29. At the outset, it is material to note that the scope of proceedings under Section 34 of the A&C Act are confined to examining whether the impugned award is required to be set aside on the grounds as set out in Section 34(2) and 34(2A) of the A&C Act. The court's jurisdiction does not extend to modifying the arbitral award or to pass a decree in respect of the claims that were the subject matter of the arbitral proceedings. In the present case, the learned Single Judge has proceeded to adjudicate Fiberfill's claim for interest – Claim no.2 before the Arbitral Tribunal – and has held that Fiberfill is entitled to interest at the rate of 8% per annum interest on the amount of ₹22,08,528/-. This amounts to adjudicating Fiberfill's claim, which is beyond the scope of the court's jurisdiction under Section 34 of the A&C Act.

30. We may now proceed to examine IOCL's challenge to the impugned order to the extent that it sets aside the impugned award. As noted above, the controversy is confined to Fiberfill's Claim nos.1 and 2 – Fiberfill's claim for amount of ₹22,08,528/-, which was deducted by IOCL from its bills, and interest at the rate of 18% per annum on the said amount.

31. It was contended on behalf of IOCL that the learned Single Judge had erred in proceeding on the basis that IOCL was required to establish that it had suffered any loss for sustaining a deduction of the aforesaid amount from the bills raised by Fiberfill. It was submitted that the said

deduction was in accordance with Clause 9 of the SIT and Clause 4.4.2.0 of the GCC and the learned Single Judge had erred in proceeding on the basis that Clause 4.4.2.0 of the GCC provides for liquidated damages while ignoring Clause 4.4.2.2 of the GCC, which expressly provided that the provisions of the said Clause 4.4.2.0 of the GCC were not to be understood or construed as liquidated damages or penalty under Section 74 of the Indian Contract Act, 1872. It was further contended that even if the price adjustment clause was to be read as providing for levy of liquidated damages on account of delay in setting up of the high mast signages, there is an inherent presumption that IOCL would have suffered a loss on the said account. Mr. Ahmedi, the learned senior counsel for IOCL argued that if a part of the filling station is dug-up and cordoned off for an indefinite period of time, the same would inevitably cause inconvenience to the customers and staff of IOCL. Therefore, it is obvious that IOCL would have suffered a loss on the said account, although the same may not be quantifiable in exact terms. He also submitted that unless anything contrary is proved, it must be assumed that the liquidated damages as provided in Clause 4.4.2.0 of the GCC is a reasonable measure of damages.

32. The learned senior counsel for IOCL also relied upon the decisions of the Supreme Court in ***Construction and Design Services v. Delhi Development Authority: (2015) 14 SCC 263***; ***A.S. Motors Private Limited v. Union of India and Ors.: (2013) 10 SCC 114***; ***Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.: (2003) 5 SCC 705***; and ***Kailash Nath Associates v. Delhi Development Authority and***

Anr.: (2015) 4 SCC 136 in support of the contention that if a contract is broken, the party which has not broken the contract is entitled to receive the agreed genuine pre-estimate of loss as compensation without being required to produce to prove the same.

33. Before addressing the controversy, it is necessary to note that there is no dispute that the execution of the Work Order was inordinately delayed. The term of the Work Order was one year, which could be extended by a further period of one year by mutual consent. Admittedly, Call up Orders comprising of only thirty sites (out of the total of one hundred and five sites) had been issued prior to the expiry of initial term of one year of the Work Order. IOCL had extended the term of the Work Order by a period of one year in terms of its letter dated 05.02.2008. However, three of the Call up Orders had been issued by IOCL beyond the extended period.

34. In the aforesaid context, Fiberfill disputes that IOCL could withhold any amount by invoking Clause 4.4.0.0 of the GCC. Apart from disputing that there was any delay that was attributable to it, Fiberfill also claimed that time was not the essence of the contract as was evidenced by the conduct of the parties including on account of extension of the term of the Work Order. Further, IOCL had accepted the delayed performance and therefore, was not entitled to claim any damages. Additionally, it was contended that IOCL had neither suffered any loss nor established the same and therefore, it could not claim any compensation.

35. It was also Fiberfill's case that Clause 4.4.0.0 of the GCC was in the nature of penalty inasmuch as it provided for compensation even if there was a delay in execution of a single signage tower.

36. The Arbitral Tribunal found that out of twelve Call up Orders placed by IOCL, work pertaining to six Call up Orders were inordinately delayed. IOCL had, thus, recovered compensation only in respect of six Call up Orders. The Arbitral Tribunal noted that IOCL had granted time extensions to Fiberfill whenever the same was considered justifiable. However, extension of time on account of various reasons including late appointment of the TPI Agency or excessive rains etc. could not be construed as waiver of the contractual clause, which specifically provided that the time was the essence of the contract.

37. The learned Single Judge has declined to interfere with either of the two aforesaid findings given the limited scope of examination under Section 34 of the A&C Act. We concur with the said view. The findings of the Arbitral Tribunal that there was delay on the part of Fiberfill in executing six Call up Orders, and that the time was the essence of the Contract, did not warrant any interference in proceedings under Section 34 of the A&C Act.

38. The only question to be examined is whether IOCL is entitled to the amount of compensation as contemplated under Clause 4.4.0.0 of the GCC. In this regard, it is necessary to refer to the said Clause as well as Clause 9 of the SIT:

"4.4.0.0 PRICE ADJUSTMENT FOR DELAY IN COMPLETION

4.4.1.0 The contractual price payable shall be subject to adjustment by way of discount hereinafter specified, if the Unit(s) are mechanically completed or the contractual works are finally completed, subsequent to the date of Mechanical Completion/final completion specified in the Progress Schedule.

4.4.2.0 If Mechanical Completion of the Unit(s)/final completion of the works is not achieved by the last date of Mechanical Completion of the Unit(s)/final completion of the works specified in the Progress Schedule (hereinafter referred to as the "starting date for discount calculation"), the OWNER shall be entitled to adjustment by way of discount in time price of the works and services in a sum equivalent to the percent of the total contract value as specified below namely:

(i) For Mechanical Completion of time Unit(s)/final completion of time works achieved within (one) week of the starting date for discount calculation -1/2 % of the total contract value.

(ii) For Mechanical Completion of the unit[s]/ final completion of the works achieved within 2 (two) weeks of the starting date for discount calculation 1% of the total contract value.

(iii) For Mechanical Completion of the Unit[s)/ final completion of the works achieved within 3 (three) weeks of time starting date for discount calculation – 1 ½ % of the total contract value.

(iv) For Mechanical Completion of the Unit(s)/ final completion of the works achieved within [four) weeks of time starting date for discount calculation-2% of the total contract value.

(v) For Mechanical Completion of the Unit(s)/ final completion of the works achieved within 5 (five) weeks of the starting date for discount calculation-2 ½ % of the total contact value.

(vi) For Mechanical Completion of the Unit(s)/ final completion of the works achieved within 6 (six) weeks of time starting date for discount calculation -3% of the total contract value.

(vii) For Mechanical Completion of the Unit(s)/ final completion of the works achieved within 7 (seven) weeks of time starting date for discount calculation 3 ½ % of the total contract value.

(viii) For Mechanical Completion of the Unit(s) final completion of the works achieved within 8 (eight) weeks of the starting date for discount calculation -4% of the total contract value.

(ix) For Mechanical Completion of the Unit(s)/ final completion of the works achieved within 9 (Nine) weeks of the starting date for discount calculation-4 ½ % of the total contract value.

(x) For Mechanical Completion of the Unit(s)/ final completion of the works achieved within 10 (ten) weeks of the starting date for discount calculation 5% of the total contract value.

(xi) For Mechanical Completion of the Unit(s)/ final completion of the works achieved within 11 (eleven) weeks of the starting date for discount calculation – 5 ½ % of the total contract value.

(xii) For Mechanical Completion of the Unit(s)/ final completion of the works achieved within 12 (twelve) weeks of the starting date for discount calculation-6 ½ % of the total contract value.

(xiii) For Mechanical Completion of the Unit(s)/ final completion of the works achieved within 13 (thirteen) weeks of the starting date for discount calculation 6 ½ % of the total contract value.

(xiv) For Mechanical Completion of the Unit(s)/ final completion of the works achieved within 14 (fourteen) weeks of the starting date for discount calculation - 7% of the total contract value.

(xv) For Mechanical Completion of the Unit(s)/ final completion of the works achieved within 15 (fifteen) weeks of the starting date for discount calculation – 7 ½ % of the total contract value.

(xvi) For Mechanical Completion of the Unit(s)/ final completion of the works achieved within 16 (sixteen) weeks of the starting date for discount calculation – 8 % of the total contract value.

(xvii) For Mechanical Completion of the Unit(s)/ final completion of the works achieved within 17 (seventeen) weeks of the starting date for discount calculation – 8 ½ % of the total contract value.

(xviii) For Mechanical Completion of the Unit(s)/ final completion of the works achieved within 18 (eighteen) weeks of the starting date for discount calculation-9% of the total contract value.

(xix) For Mechanical Completion of the Unit(s)/ final completion of the works achieved within 19 (nineteen) weeks of the starting date for discount calculation-9 ½ % of the total contract value.

(xx) For Mechanical Completion of the Unit(s)/ final completion of the works. achieved within 20 (twenty) weeks of the starting date for discount calculation-10% of time total contract value.

(xxi) The reduction in the contract price hereunder by way of price discount shall in no event exceed 10% (ten percent) of the total contract value.

4.4.2.1 Time starting date for discount calculation shall be subject to variation upon extension of time date for Mechanical Completion of the Unit(s)/final completion of the works with a view that upon any such extension there shall be an equivalent extension in the starting date for discount calculation under Clause 4.4.2.0 thereof.

4.4.2.2 It is specifically acknowledged that the provisions of Clause 4.4.2.0 constitute purely a provision for price adjustment and/or fixation and are not be understood or construed as a provision for liquidated damages or penalty under Section 74 of the Indian Contract Act or otherwise.

4.4.3.0 Application of price adjustment under Clause 4.4.2.0 above shall be without prejudice to any other right of the OWNER, including the right of termination under Clause 7.0.1.0 and associated clauses thereunder.

4.4.4.0 Nothing in Clause 4.4.2.0 above shall prevent the OWNER from exercising its right of termination of Contract under Clause 7.0.1.0 hereof and associated clauses thereunder, and OWNER shall be entitled, in the event of exercising its said right of termination after the

last date for Mechanical Completion of the Unit(s) and/or final completion of the works as stipulated in the relative Progress Schedule without prejudice to any other right or remedy available to the OWNER, to discount as aforesaid in the contractual price of services in addition to any amount as may be due consequent to a termination under Clause 7.0.1.0 hereof and associated clauses there under."

"9.0 WORKING TIME AND COMPLETION PERIOD:

The work entrusted in each call up order shall be completed in all respect within 12 (Twelve) weeks from the date of issuance of Call Up order.

9.1 The contractor shall have to carry out the works during the normal working hours of the Corporation. However, with the concurrence of the location/site in charge the contractor may be permitted to work beyond the normal working hours and the expenses if any shall be borne by the contractor.

9.2 The entire work must be completed within the stipulated time of completion. if the contractor falls on the performance of the contract within the time fixed in the contract & does not complete the entire work on the due date, the Corporation shall be entitled to recover, and the contractor agrees to pay to the corporation as & by way of compensation, price adjustment as mentioned in General Conditions of Contract of this tender up to an amount not exceeding 10% of the total individual work order value.

9.3 The progress of work should be proportionate to the time of completion as mentioned in the completion schedule. If at any stage the progress

is found to be behind schedule, the corporation will have option to cancel the work order and get the balance work executed from other agencies at the risk and cost of consequences of the contractor.

9.4 After issuance of the work order, under some special circumstances, the Indian Oil may advise postponement of commencement date or to carry out the work in stages, in such case the time of completion shall be extended / adjusted suitably depending upon the actual delay/interruptions caused. The Corporation will not however be liable under any circumstances for payment of compensations of any nature to the contractor for such delay or interruptions.

9.5 The contractor if desires can make an application sufficiently in advance before the completion time, if they anticipate any obstacle/hindrances in completion of their work, before the scheduled date of completion. Any application received beyond this date may not be considered. The Corporation however shall not be bound to give any extension of time if the delay is on the part of the contractor.

9.6 At times, Corporation may have to foreclose/suspend the work at particular site due to some unavoidable reasons. In the event of such foreclosure/suspension of work, contractor will not be having any right to ask for compensation on any ground whatsoever. Only actual work done till that stage will be paid."

[emphasis added]

39. It was Fiberfill's case before the Arbitral Tribunal that Clause 4.4.2.0 of the GCC is in the nature of a penalty and not a measure of

reasonable damages. Paragraph 33 of the statement of claim is relevant and is set out below:

> "33. That, however, an amount of Rs.22,08,528/- has been deducted by the Respondent on account of delay in completion of the work. It is relevant to point out that even though the Clauses 4.4.0.0, 4.4.1.0, 4.4.2.0 of Section 3 of the General Conditions of Contract state that the Respondent can adjust price for delay in completion, the deduction of the amount payable to the Claimant on account the purported delay is in essence a penalty/liquidated damaged imposed on the Claimant, which is impermissible under the law. The said Clauses are harsh, penal in nature and unenforceable inasmuch as the penalty imposed is a percentage of the total contract value even for a delay in mechanical completion of one unit of the work order."

40. IOCL countered the said assertion. It denied that the Clause 4.4.2.0 of the GCC read with Clause 9.0 of the SIT was in the nature of imposing a penalty or that the liquidated damages imposed by IOCL were impermissible. IOCL claimed that it was "*permissible in law that contracting parties can pre-estimate the damages and arising out of any breach and quantify the same including delay and such pre-estimation of damages is legally valid and enforceable*". The said averment is suggestive of IOCL's stand that the clause 4.4.2.0 of the GCC provides for a genuine pre-estimate of loss that IOCL would suffer if there was a delay in completion of the works.

41. There is no averment in IOCL's written statement that Clause 4.4.2.0 of the GCC was not a clause for liquidated damages under Section 74 of the Indian Contract Act, 1872 and was merely a price

adjustment clause. It is important to note IOCL did not place any reliance on Clause 4.4.2.2 of the GCC before the Arbitral Tribunal. On the contrary, IOCL placed reliance on Clause 9.2 of the SIT, which expressly refers to the amount payable in terms of the GCC as "compensation" payable on account of delay. Clause 17 of the SIT also indicates that SIT is required to be accorded precedence over the GCC in case of any conflict.

42. In the written submissions filed on behalf of IOCL before the Tribunal, it was submitted that *"respondent will be entitled to claim compensation for any delay as per clause 4.4.0.0 of GCC and Clause 9 of Special instruction to Tenderers, an amount which was based on pre-estimation of damages as agreed by both parties*"

43. The parties had also led their evidence. Fiberfill referred to the communications (email dated 26.07.2012) emanating from the officials of IOCL acknowledging that Clause 4.4.0.0 of the GCC provided for liquidated damages. Clause 9.2 of the SIT also clearly mentions that the amount as contemplated under the GCC would be payable "*by way of compensation*". In addition, Fiberfill had relied upon the testimony of IOCL's witness. IOCL's witness had testified in his cross-examination that "*the penalty has been imposed based on the delays by the contractor in completion of the works as per the terms and conditions of the contract*"[2].

[2] Mr C. Ramprasad's response to Question no.27 during his cross-examination.

44. The Arbitral Tribunal neither considered the aforesaid testimony nor analysed Clause 9.2 of the SIT. The Arbitral Tribunal did not address the question whether Clause 4.4.2.0 of the GCC provided for a genuine pre-estimate of damages as claimed by IOCL. It also did not refer to Clause 4.4.2.2 of the GCC.

45. However, the Arbitral Tribunal rejected Fiberfill's contention that the amount deducted was by way of penalty as IOCL had not made any claim for loss or injury. The relevant extract of the Arbitral Tribunal's conclusion is set out below:

> "…. Thus the deductions made in the bills of the Claimant, which were on account of the price adjustments for the delayed completion of works by them, being in line with Clause 4.4.0.0 of the GCC and Clause 9 of Special Instructions to Tenderers/Contractors were contractual and valid.
>
> The argument of the Claimants as to that "the amount deducted by the respondent is by way of penalty and not compensation, since the Respondent makes no claim for loss or injury" is not acceptable in as much as the deductions were made by Respondents strictly in line with terms and conditions of the contract."

46. It is also important to note that there is no finding of the Arbitral Tribunal to the effect that Clause 4.4.2.0 of the GCC embodies a measure for genuine pre-estimate of damages on account of delay – a case that was canvassed on behalf of IOCL before us as well.

47. Concededly, IOCL had made no averment in its written statement claiming that it had suffered any loss. The contention advanced that

such loss was obvious as the customers and the staff of IOCL would be inconvenienced by the area being dug off or cordoned off, does not appear to have been made before the Arbitral Tribunal. In any view, the Arbitral Tribunal has not returned any finding on any such contention. It is also important to note that Fiberfill contests the said contention by drawing sustenance from the contractual provisions, which required Fiberfill to execute the work without inconveniencing the customers. More importantly, there is no averment that any of the customers or the staff at any particular site had been inconvenienced.

48. Thus, the Arbitral Tribunal has in effect awarded damages in favour of IOCL without there being any averment to the effect that IOCL had suffered any loss/damages or that Clause 4.4.2.0 of the GCC contained a genuine pre-estimate of damages/loss that would be suffered by IOCL on account of delay. In ***Kailash Nath Associates v. Delhi Development Authority and Anr.*** (*supra*), the Supreme Court had summarised the law relating to the compensation for breach of Contract under Section 74 of the Indian Contract Act, 1872 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]

49. In ***Mahanagar Telephone Nigam Ltd. v. Finolex Cables Limited, 2017 SCC OnLine Del 10497***, a Division Bench of this Court had considered a case where damages had been imposed on account of

delay in the delivery of stores. The levy of compensation on account of delay was more or less in similar terms as contemplated under the GCC as applicable to the Work Order in this case. The contractual clause as considered by the court in the aforesaid case is set out below:

> *"17.* ***Liquidated Damages***
>
> *17.1 The date of delivery of the stores stipulated in the acceptance of Purchase Order should be deemed to be the essence of the contract and delivery must be completed not later than the dates specified therein. Extension will not be given except in exceptional circumstances. Should, however, deliveries be made after expiry of the contract and be accepted by the Consignee, such deliveries will not deprive the Purchaser of his right to recover liquidated damages under Clause 17.2 below, where, however, supplies are made within 21 (twenty one) days of the contracted original delivery period, the consignee may accept the stores and in such cases the provisions of clause 17.2 will not apply.*
>
> *Should the tenderer fail to deliver the stores or any consignment thereof within the period prescribed for delivery, the Chairman Cum Managing Director, MTNL, shall be entitled to recover ½% of the undelivered stores value of the Order placed; for each week of delay or part thereof, subject to a maximum of 10% of the value of the Order placed."*

50. The court rejected Mahanagar Telephone Nigam Ltd.'s claim under the said Clause on the ground that it had not proved that it had suffered any loss. The relevant extract of the said decision is set out below:

"34. It is trite that under Section 74 of the Contract Act, that to claim liquidated damages even where liquidated damages may be specified, the party so claiming, is entitled only to "reasonable compensation" not exceeding the amount specified. Even in a contract, where it is difficult to prove the actual damage or loss, proof thereof is not dispensed with to arrive at "reasonable compensation". It is only in cases where damages or loss was impossible to prove, that the amount named in the contract as liquidated damages, if it is a genuine pre-estimate of damage or loss, can be so awarded.

35. It has been held by the ld. Single Judge therefore, that even assuming that clause 7.4 signifies a genuine pre-estimate of damages, MTNL was not relieved of showing that it had suffered some loss. Both legally and factually, this is the correct position.

36. On application of the above well settled principle, there can be no manner of doubt, that it was incumbent on MTNL to prove before the Arbitrator that it had suffered some loss, even though it may not have to prove the actual loss.

xxx xxx xxx

47. It is to be noted that the arbitral tribunal rejected the counter claim of the MTNL, yet proceeded to award liquidated damages. We are unable to agree with Mr. Abhinav Vasisht, ld. Senior Counsel for the appellant - MTNL that the contract was of such nature that it was not possible to evaluate the damages and therefore, that 10% of the amount quantified in the contract between the parties as liquidated damages had to be treated as being reasonable award of damages.

48. It is clearly stated in para 43.6 of Kailash Nath that in case where damages are difficult or impossible to prove, the claimants would be entitled to the liquidated

damages if they were a genuine pre-estimate of the damage. No material at all in this regard was produced before the arbitral award. MTNL has not even asserted that it had suffered loss."

51. Before concluding, we must add that in a given case where contractual terms provide for a variable consideration depending on the performance of the agreement, the said term is required to be enforced. It is not necessary that in all cases where the parties have agreed to reduction in consideration on the basis of performance, that the contractual term to that effect is to be construed as the clause for damages. In such cases, the contractual clause must be read as an integral part of the rights and obligations of the parties, which are required to be performed. Clause 4.2.2.2 of the GCC is suggestive of Clause 4.2.2.0 being a clause specifying variable consideration and not a clause for damages. If the Arbitral Tribunal had interpreted the said clause in the manner as was canvassed by the IOCL before this Court, perhaps the outcome of the petition filed by Fiberfill may have been different. However, IOCL did not run its case before the Arbitral Tribunal based on Clause 4.2.2.2 of the GCC. There is no mention of the said clause in IOCL's pleadings before the Arbitral Tribunal. On the contrary, IOCL had urged that Clause 4.2.2.0 of the GCC was a clause stipulating damages. It also relied on Clause 9.2 of the SIT to support its claim that *compensation* was payable to it on account of delays in performance of the work order by Fiberfill. As noted above, IOCL's witnesses testified to the effect that the amounts were withheld from the bills raised by Fiberfill as penalty. Whilst IOCL claimed that

it was entitled to compensation and liquidated damages, Fiberfill claimed that Clause 4.2.2.2 of the GCC contains the provision for levy of penalty, which was impermissible. The scope of adjudication before the Arbitral Tribunal was thus confined to the aforesaid rival stands.

52. In view of the above, we concur with the decision of the learned Single Judge that the impugned award is vitiated by patent illegality on the ground that the Arbitral Tribunal has awarded liquidated damages/ compensation by way of price adjustment in absence of any averment by IOCL that it had suffered any loss whatsoever and without any finding to the said effect. The Arbitral Tribunal has also not returned a finding that the provisions of Clause 4.4.0.0 of the GCC provides a measure for a genuine pre-estimate of damages.

53. Thus, the impugned award to the extent rejecting Fiberfill's claim for recovery of the amount withheld by IOCL along with interest has been rightly set aside by the learned Single Judge. However, as observed at the outset, the decision of the learned Single Judge to award the said claim or interest at the rate of 8% per annum cannot be sustained, given that the scope of examination under Section 34 of the A&C Act does not extend to re-adjudication of the disputes but merely to consider whether the arbitral award is liable to be set aside on the grounds as set under Section 34 of the A&C Act.

54. The impugned order inasmuch as it awards Fiberfill's Claim nos.1 and 2 (as raised before the Arbitral Tribunal) in its favour is set aside. The impugned award rejecting Fiberfill's Claim nos.1 and 2 is

also set aside and the parties are at liberty to initiate the proceedings in order to re-agitate the same in arbitration, in accordance with law.

VIBHU BAKHRU, J

SACHIN DATTA, J

NOVEMBER 20, 2024
RK/gsr