IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	28.11.2019
Judgment pronounced on	24.01.2020

CORAM

THE HONOURABLE Mr. JUSTICE **SENTHILKUMAR RAMAMOORTHY**

O.P. No.821 of 2019
and
A.Nos.7830 and 7832 of 2019

Electronics Corporation of Tamil Nadu Limited,
No.692, Anna Salai, Nandanam,
Chennai – 600 035. ... Petitioner

Vs.

ICMC Corporation Limited,
No.36, Ambattur Industrial Estate,
Chennai – 600 050. ... Respondent

PRAYER: Original Petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the impugned Award dated 22.08.2019 passed by the Arbitrator in the dispute arising out contracts dated 14.02.2013 and 23.07.2013 and for costs.

For Petitioner : Mr.Vijay Narayan, senior counsel for M/s.King and Partridge

For Respondent : Mr.AR.L.Sundaresan, senior counsel

for Mr.J.James

O R D E R

This dispute arises out of a tender floated by the Petitioner for the purchase of laptop computers. Pursuant to the said tender, the three lowest bidders were selected as the suppliers of laptop computers and the Respondent was selected as L1. Therefore, the Letter of Acceptance dated 17.12.2002 (the First LoA) was issued to the Respondent for the supply of 3,00,000 laptop computers to the Petitioner. Pursuant thereto, a contract dated 14.02.2013 (the First Contract) was executed by the Petitioner and the Respondent. One of the other successful bidders did not fulfil its supply obligation and, therefore, the Petitioner issued a second Letter of Acceptance dated 28.06.2013 (the Second LoA) to the Respondent for the supply of 26,000 laptop computers. Pursuant to the second LoA, a contract dated 15.07.2013 (the Second Contract) was executed by the Petitioner and the Respondent. Supplies of laptop computers were made under the First LoA/Contract by the Respondent belatedly and each party alleged that the other is responsible for such delay. In specific, the First Contract set out a supply schedule in Clause II thereof but the said schedule was not adhered to and the laptop computers were supplied belatedly. At the time of supply, liquidated damages were not imposed by the Petitioner. However, after supplies were completed under the First LoA/Contract, the Petitioner made a

deduction towards liquidated damages(LD) against bills payable under the Second LoA/Contract and, thereafter, released the security deposit and the retention money under the First LoA/Contract. This resulted in a dispute between the parties and the said dispute was referred to Arbitration. In the Arbitration, the Respondent claimed several remedies including declarations that the levy of LD for deviation in the delivery schedule with respect to the First and Second Contract are illegal. The Respondent also prayed for the release of the bank guarantee that was provided by the Respondent for a sum of Rs.26,37,07,807/-; a sum of Rs.25,71,84,000/- towards loss of opportunity; a sum of Rs.21,11,00,000/- towards depreciation loss; and interest of Rs.29,50,90,051/- from the date when the payments became due till the date of filing the statement of claim. By defence statement and additional defence statement, the Petitioner prayed that the claim should be rejected and that, consequently, the Respondent should pay the Petitioner interest at the rate of 15% per annum on the sum of Rs.26,37,07,807/- from 28.03.2018 to the date of invocation of the bank guarantee. By Arbitral Award dated 22.08.2019(the Award), the Arbitral Tribunal concluded that the Petitioner did not incur any loss due to the delayed supply of laptop computers by the Respondent and that, therefore, the levy of LD is illegal. The Arbitral Tribunal further held that there was delay by the Petitioner in making payments towards invoices issued by the Respondent in respect of

the supply of laptop computers. On that basis, the Arbitral Tribunal awarded interest both on the delayed payment of 97% of the invoiced amount for the supply of 3,00,000 laptop computers under the First Contract and for the delayed payment of 3% retention amount in respect of the First Contract. The Arbitral Tribunal also awarded interest on delayed payment of invoices issued in respect of the supply of laptop computers under the Second Contract and on the delayed payment of the retention amount under the Second Contract and towards bank charges incurred for the renewal of the bank guarantee. The Award is under challenge in this Petition under Section 34 of the Arbitration and Conciliation Act,1996 (the Arbitration Act).

2. I heard the learned Advocate General(AG), Mr.Vijay Narayan, on behalf of the Petitioner, and the learned senior counsel, Mr.AR.L.Sundaresan, on behalf of the Respondent.

3. The learned AG opened his submissions by providing an overview of the tender for the supply of 7,00,000 laptop computers. He thereafter made the following submissions. This tender was floated by the Petitioner so as to provide laptop computers to students from the economically lower strata so as to provide such students with facilities and access to information that would otherwise not be available to such

students. The tender documents specified that the bidders should be in the laptop computer manufacturing business in the previous three years and that in case of a bid by a consortium, one of the consortium partners should fulfill this criterion. The tender documents stipulated financial requirements related to average annual turnover and the requirement that the bidder should have sold at least 50,000 laptop computers in any of the two previous audited financial years. The Respondent did not meet this requirement individually and therefore, the Respondent had entered into a consortium with M/s.Shenzhen Hasee Computer Co. Ltd. from the Peoples Republic of China so as to rely upon the manufacturing and financial capabilities of the said consortium partner. The tender documents stipulated that LD would be levied by the Petitioner at the rate of 1% per week on the value of the goods until delivery, if there is a failure to adhere to the delivery schedule. The contract contained a delivery schedule and also provided for levy of LD for non fulfillment of delivery schedule on the same terms as that provided in the tender documents. The delivery schedule under the contract is linked to the LoA and a specified percentage of supplies were required to be made within 60, 90, 135 and 150 days from the date of the LoA. He, thereafter, referred to the written arguments of the Petitioner before the Arbitral Tribunal. In specific, he referred to the table at pages 156 to 160 of Volume I and pointed out that supplies were effected under the First Contract between

04.03.2013 and 17.10.2013, whereas supplies should have been effected between 17.12.2012 and 16.05.2013. Similarly, as regards the Second LoA, supplies should have been effected between 28.06.2013 and 27.11.2013, whereas supplies were effected between 17.06.2014 and 31.07.2014. Therefore, he submitted that the admitted factual position is that the supplies were effected after considerable delay. Consequently, he contended that the Petitioner was contractually entitled to impose LD in accordance with the respective contract. In this connection, he pointed out that, by proceedings dated 06.11.2014, the Managing Director of the Petitioner accorded sanction for the payment of the net sum of Rs.13,90,70,731/- to the Respondent as final payment for the procurement cost of 24,277 laptop computers after deducting LD both under the First and Second LoA. The gross amount payable for the 24,277 laptop computers was Rs.40,75,98,691/-. As against this amount, he pointed out that deductions were made towards 3% warranty costs, a sum of Rs.2,18,00,000/- as LD for the delayed supply under the Second LoA and a sum of Rs.23,45,00,000/- towards LD for delayed supply under the First LoA. Thus, in effect, he pointed out that a total sum of Rs.25,63,00,000/- was deducted as LD and a net sum of Rs.13,91,70,731/- was sanctioned for payment to the Respondent. In these circumstances, he pointed out that the Respondent filed W.P.No.9151 of 2015 for payment of a sum of Rs.25,63,00,005/- with

interest thereon. The said Writ Petition was allowed by order dated 04.01.2016. As against the said order, Writ Appeal Nos.107 of 2016 and 807 of 2016 were filed and the said writ appeals were disposed of by directing the parties to resolve the dispute by arbitration.

4. The learned AG, thereafter, referred to the Award of the Arbitral Tribunal. He pointed out that the Arbitral Tribunal framed 14 issues, which are set out at internal pages 6 and 7 of the Award. In particular, he pointed out that Issue No.2 related to whether the contract for the supply of 3,00,000 laptop computers and the contract for the supply of 26,000 laptop computers are distinct and separate contracts and that Issue No.4 related to whether the levy of LD by the Respondent under the respective contract is unreasonable, illegal and arbitrary. With regard to the issue as to whether the two contracts are separate and distinct, the learned AG pointed out that the Second LoA dated 28.06.2013 refers to the First LoA and also to the tender notification. However, the Arbitral Tribunal disregarded such evidence and concluded, at paragraph 199 of the Award, that a separate LoA was issued instead of modifying the First Contract. He also pointed out the findings at paragraphs 201 to 205 of the Award that the First and Second LoA contained different delivery schedules for the supplies and that the Arbitral Tribunal was completely influenced by these aspects in holding

that these are separate and distinct contracts. According to the learned AG, the above conclusion is patently illegal and the reasoning of the Arbitral Tribunal is perverse.

5. With regard to the findings of the Arbitral Tribunal on the imposition of LD, the learned AG referred to the findings at paragraphs 321 to 339 of the Award. In particular, he referred to the finding at paragraph 326 that the contract had been performed and concluded in its entirety by releasing even the 3% security deposit and the bank guarantee. The said conclusion, according to the learned AG, is factually incorrect because deductions were made from the invoice issued by the Respondent before releasing the security deposit amount and the bank guarantee. Therefore, he contended that the finding that the Petitioner accepted that all obligations were duly discharged by the Respondent is totally at variance with the correct factual position. With regard to the findings on imposition of LD, he referred to paragraph 337 of the Award with regard to the proceedings dated 06.11.2014 and submitted that the conclusion of the Arbitral Tribunal that the authenticity of the proceedings is doubtful is totally unwarranted. He pointed out that merely because the author of the document, namely, the former Managing Director of the Petitioner, was not examined as a witness, does not justify the finding and conclusion of the Arbitral Tribunal that the proceedings are not convincing.

In this connection, he also referred to the counter affidavit dated 14.12.2015 of Mr.Atul Anand, the author of the document dated 06.11.2014, and pointed out that in paragraph 7 of the said counter affidavit, Mr.Atul Anand, had affirmed that there is no dispute with regard to the quantum of LD payable in accordance with the tender terms and conditions. More importantly, it was stated therein that in the month of October 2014, the Petitioner herein had, in hand, 3% of the security deposit and 3% of the warranty costs totalling to 6% of the supply value under the First LoA, which is more than the maximum LD limit of 5%. Thus, he submitted that the findings of the Arbitral Tribunal with regard to the levy of LD by the Petitioner are erroneous and liable to be set aside.

6. In order to substantiate his submissions, the learned AG referred to the judgments of the Hon'ble Supreme Court in **ONCG vs. Saw Pipes (ONGC) (2003) 5 SCC 705** and **Kailash Nath Associates Vs. Delhi Development Authority (Kailash Nath)(2015) 4 SCC 136** with regard to the Petitioner's entitlement to LD**.** In support of his submissions that the First and Second LoA constitute one contract and not two distinct contracts, he relied upon the judgment of the Hon'ble Supreme Court in **S.Chattanatha Karayalar vs. Central Bank of India(Chattanatha), AIR 1965 SC 1856,** wherein, at paragraph 3, the Hon'ble Supreme Court held that it is well established that if the

transaction is contained in more than one document between the same parties they must be read and interpreted together and they have the same legal effect for all purposes as if they are one document. On this issue, he also relied upon the judgment of the Hon'ble Supreme Court in **Her Highness Maharani Shantidevi P.Gaikwad vs. Savijibhai Haribhai Pattel and others (2001) 5 SCC 101,** wherein, at paragraphs 24 and 25, the Hon'ble Supreme Court referred to the various documents that were executed by the parties thereto with regard to one transaction and thereafter relied upon the judgment in **Chattanatha**. The learned AG also relied upon paragraph 11 of the judgment in **Union of India vs Raman Iron Foundry (1974) 2 SCC 231** and paragraph 11 of the judgment in **H.M.Kamaluddin Ansari and Co, vs. Union of India and others (1983) 4 SCC 417** for the proposition that the Union of India can refuse to pay such amounts as it considers not payable and, in such event, the counter parties concerned should file a suit for recovery of such amounts.

7. The learned AG also pointed out that the conclusion at paragraphs 344, 346 and 349 to 350 of the Award that the Petitioner did not suffer any loss, monetary or otherwise, because the laptop computers were to be supplied free of cost to the students is a patently erroneous conclusion. In specific, he submitted that the loss in cases of this nature

cannot be quantified or proved precisely because it is a loss to the students inasmuch as they have been deprived of the use of the laptop computers for a certain period of time and that there would be a consequential economic loss to the Government/State of Tamil Nadu. He also pointed out that the imposition of LD was held to be legitimate in such circumstances in **ONGC** and reiterated in **Kailash Nath.** Because such losses cannot be quantified or proved precisely, he contended that contracts of this nature provide for the payment of LD. He further submitted that the Arbitral Tribunal did not enter any findings as to whether the levy of LD in respect of the Second LoA/Contract is valid even if one proceeds on the basis that the Second Contract is separate and distinct. For all these reasons, he submitted that the Arbitral Award is liable to be set aside.

8. In response and to the contrary, the learned senior counsel, Mr.AR.L.Sundaresan, made submissions. He commenced his submissions by pointing out that the tender notification makes it clear that the supply of laptop computers was intended for the academic year 2012 – 2013. As regards the consortium, he pointed out that the prime bidder was authorized to represent the consortium and that the Respondent is the prime bidder. With reference to the contractual clause on LD, he pointed out that Clause 3.32.1 of the tender documents enables the Petitioner to

levy and automatically deduct LD from the bills submitted by the supplier/Respondent. He also referred to the payment terms under the tender documents which stipulate that 97% payment will be released after successful completion of supply and acceptance by the respective institutions, and that the balance 3% will be released after successful completion of the warranty period of one year from the date of supply and acceptance by the respective institutions. He further submitted that the contracts did not specify a credit period for making payment and therefore, payments should have been made immediately upon supply or within three days thereof. However, the Arbitral Tribunal implied a credit period of 15 days in that regard. After implying a reasonable credit period of 15 days, he pointed out that the Arbitral Tribunal computed the delay in making payment to the Respondent. Accordingly, he submitted that the conclusions of the Arbitral Tribunal, in that regard, are not liable to be interfered with.

9. With regard to the imposition of liquidated damages, he pointed out that there were no pleadings before the Arbitral Tribunal that the amounts specified as LD constitute a genuine pre-estimate of anticipated loss. In the absence of pleadings that the LD constitute a genuine pre-estimate of loss, he submitted that it was mandatory for the Petitioner to prove the losses. In this case, he submitted that there were

two distinct contracts and that all supplies under the First Contract were completed by October 2013. Even with regard to the alleged delay in supply of the laptop computers, he pointed out that the Tamil software, logo and image were to be provided by the Petitioner and that there was a delay by the Petitioner in providing the same. As a result, the supply of laptop computers was delayed. In these facts and circumstances, he submitted that the Respondent is not liable to be held responsible for the delay, which was caused by the default by the Petitioner in supplying Tamil software and the relevant logo and image. As regards the delay in making payment, he referred to the cross examination of RW-1 and, in particular, the answers to questions 17,20,21,25 to 32, 34 to 41, 61, 68, 70, 71 and 76 to 80. By referring to these questions and answers, he submitted that it is the admitted position that the Petitioner failed to make payments within a reasonable time. Consequently, he submitted that the working capital of the Respondent was completely disrupted and that a party in default cannot claim LD. In any event, he pointed out that it is the admitted position that there was no monetary or non-monetary loss to the Petitioner and that, therefore, the deduction is penal in nature.

10. With regard to the findings of the Arbitral Tribunal that the two contracts are distinct and separate, he pointed out that such factual findings on the basis of appraisal of evidence and construction of the

respective contracts cannot be interfered with under Section 34 of the Arbitration Act. On the factual aspects, he concluded by pointing out that no deductions were made from the respective bills either under the First Contract or the Second Contract and that the security deposit amount was released. Both with regard to the First and Second Contracts, he submitted that the Petitioner waived its right to impose LD as correctly concluded by the Arbitral Tribunal. In support of his submissions, Mr.AR.L.Sundaresan relied upon **ONGC** and, in particular, paragraphs 46 and 67 thereof. He also relied upon paragraph 23 of the judgment of this Court in **3i Infotech Limited v. Tamil Nadu E. Government Agency(3i Infotech) in O.P.No.532 of 2014,** paragraph 11 of the judgment in **Ssyangyong Engineering and Construction Co. Ltd. vs. National Highways Authority of India (Ssyangyong)(2019) 5 MLJ 7 (SC), Swan Gold Mining Limited vs. Hindustan Copper Limited(2015) 5 SCC 739** and paragraph 11 of the judgment in **Sutlej Construction Limited vs. Union Territory of Chandigarh (2018) 1 SCC 739.**

11. By way of rejoinder submissions, the learned AG submitted that any delay by the Petitioner in supplying software, logo and image did not affect the Respondent's performance of supply obligations. For this purpose, he relied upon Ex.C6 and Ex.C7, which are letters dated 04.01.2013 and 07.02.2013, respectively (Pages 1 and 10, Volume IV of

documents).

12. By way of sur-rejoinder submissions, the learned senior counsel for the Respondent submitted that the Arbitral Tribunal recorded findings that the laptop computers were intended for the academic year 2012 – 2013 at paragraph 350 of the Award and also that the software was supplied by the Petitioner in February 2013(Paras 337, 340 and 349 of the Award). He further submitted that there was an admission by RW-1 that monetary loss was not caused to the Petitioner in answer to question 67 and 68. He also submitted that in answer to question 34, RW-1 admitted that there were two separate contracts. For all these reasons, he submitted that the Award should not be interfered with.

13. The records were examined and the oral and written submissions of both sides were considered carefully.

14. The first question to be examined is whether there were two separate and distinct contracts or one contract. The starting point of this inquiry should be the tender documents. It is the admitted position that a tender was floated on 22.02.2012 and that both the First Contract and the Second Contract were awarded to the Respondent on the basis of a common tender. The First LoA was issued on 17.12.2012 and the First Contract was executed pursuant thereto on 14.02.2013. The Second LoA

was issued on 28.06.2013 and the Second Contract was executed on 14.07.2013. Both the First and Second LoA referred to the tender notification and the opening of bids on 10.08.2012. Therefore, it is clear that both the First and Second LoA are linked and connected with the tender. In addition to the references to the tender notification, the Second LoA also refers to the First LoA dated 17.12.2012 and to the purchase order dated 14.02.2013 pursuant to the said First LoA. Thus, it is evident, on perusal of the relevant LoAs, that the contracts are not distinct or separate for all purposes.

15. Nevertheless, the question arises as to whether they are required to be treated distinctly and separately for purposes of imposition of LD. In this regard, the LD clause is not contained in the respective LoAs. However, there is a LD clause, namely, clause 3.32.1 in the tender documents. Likewise, clause 15.1 of the First Contract provides for LD for non fulfillment of delivery schedule. Similarly, clause 15.1 of the Second Contract also contains a stipulation for the payment of LD for non fulfillment of the delivery schedule. Each of the contracts, namely, the First and Second Contract also contain a separate and distinct supply schedule at clause 2 of the respective contract. The said supply schedule is linked to the date of the respective LoA. Consequently, the supply schedule under the First LoA mandated the supply of 15% of the ordered

quantity of 3,00,000 laptop computers within 60 days, 45% thereof within 90 days, 80% thereof within 135 days and 100% thereof within 150 days, with all these time limits to be calculated from 17.12.2012. On the other hand, the Second Contract mandated the supply of 15% of the quantity of 26,000 laptop computers within 60 days, 45% thereof within 90 days, 80% thereof within 135 days and 100% thereof within 150 days, with all these time limits to be calculated from 28.06.2013. Moreover, it is clear from the LD clause that LD may be imposed if the above mentioned delivery schedule is not fulfilled. From the aforesaid, it appears that the LD clause, in each contract, is separate and distinct and can only be invoked if the delivery schedule under the respective contract is not complied with. Thus, for purposes of imposition of LD, the contracts are required to be treated separately. Consequently, I do not find any reason to interfere with the findings of the Arbitral Tribunal at paragraphs 199 to 205 of the Award that the two LoAs constitute separate contracts for the purpose of imposition of LD although they may not be separate and distinct contracts for all purposes in view of the link to the tender document and also the link as between the two LoAs.

16. The next question to be considered is whether the LD Clause was validly invoked by the Petitioner. Both Clause 3.32.1 of the tender documents and Clause 15.1 of the First and Second Contract

enable the Petitioner to impose LD at the rate of 1% per week on the value of the un-delivered quantity subject to a maximum of 5% of un-delivered quantity. The said clause further provided that the LD amount would be automatically deducted from the bills submitted by the supplier. Therefore, it has to be considered whether the Petitioner is entitled to impose LD at a later point of time after paying the respective bills. On perusal of clause 15.1(b), which provided that the LD amount will be automatically deducted from the bills submitted by the suppliers, I find that the said clause does not provide that if the Petitioner does not automatically deduct the LD amount from each bill, the Petitioner forfeits its right to levy LD. Therefore, I am of the view that Clause 15.1(b) of the respective contract is an enabling clause. In other words, even if the Petitioner does not deduct the LD amount from each bill, the Petitioner would be entitled to levy LD, provided such levy is at the rate 1% per week on the value of the un-delivered quantity and subject to a maximum of 5% of the un-delivered quantity. In this case, supplies under the First Contract were made between 04.03.2013 and 17.10.2013 and the levy of LD was done pursuant to the proceedings dated 06.11.2014. As of 06.11.2014, the retention amount under the First Contract had not been released. This 3% retention money was liable to be released by 17.10.2014, which is the date of expiry of the warranty period under the First Contract, and the LD amount could have been deducted from this

amount until then. However, this was not done and the said amounts were released on 21.11.2014. From the above, it appears that the Petitioner was in a position to impose and make deductions towards LD in respect of the First Contract up to 17.10.2014. However, such deductions were not made in respect of amounts payable under the First Contract, including the amount payable by way of release of retention money. Instead, the deduction was made in respect of amounts payable under the Second Contract as per details contained in the proceedings dated 06.11.2014. In light of the conclusion that the First and Second Contracts are distinct and separate for purposes of levy of LD, the deduction of amounts towards LD for the delayed supply of laptop computers under the First Contract from and out of amounts payable under the Second Contract is not valid. To that extent, the findings of the Arbitral Tribunal do not warrant interference.

17. Nonetheless, it is necessary to separately consider whether the Petitioner was entitled to impose LD and make deductions as regards the delayed supply under the Second Contract. In this regard, it is relevant to reiterate that supplies were required to be made within a maximum of 150 days from the date of the Second LoA, i.e. on or before 28.06.2013. However, such supplies were admittedly made between 17.06.2014 and 31.07.2014 under the Second Contract. Before proceeding further, it is pertinent to examine whether there was a waiver

of the right to levy LD. I find that there was no express waiver of the right to levy LD and, in my view, the conclusion of the Arbitral Tribunal that there was an implied waiver by conduct is not tenable considering the fact that a decision was taken to impose LD at the proceedings dated 16.11.2014, which was much before the expiry of the warranty period under the Second Contract. As regards the supply under the Second Contract, as on 06.11.2014, the warranty period had commenced in August 2014 and was still in force when the deductions were made. Therefore, the Petitioner was entitled to impose LD and make deductions from the bills. In this case, admittedly the deduction was made from the bills submitted by the Respondent for supply under the Second Contract. Therefore, provided the Petitioner fulfils the requirements for the imposition of LD, the Petitioner would be entitled to LD. Consequently, the law on LD should be considered. In a series of judgments such as **Fateh Chand v. Balkishan Dass AIR 1963 SC 1405, Maulabux vs. Union of India (1969) 2 SCC 554, ONGC** and **Kailash Nath ,** the Hon'ble Supreme Court held that the following requirements should be satisfied in order to successfully enforce a claim for LD:

(i) The amount stipulated in the contract should be a genuine pre-estimate of anticipated loss;

(ii) It should be difficult or impossible to prove the loss; and

(iii) the factum of loss is a *sine qua non* although it

is not necessary to prove quantum.

18. In **Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. [1915] A.C.79**, which is a *locus classicus* on the subject, Lord Dunedin formulated four propositions, in this regard, and the fourth proposition was to the effect that the difficulty or impossibility of precise pre-estimation of the loss does not render the assessment of liquidated damages penal, "on the contrary, that is just the situation when it is probable that the pre-estimated damage was the true bargain between the parties." With regard to the object and purpose of a LD Clause, it was held in **Robophone Facilities Ltd vs. Blank (1996) 1 W.L.R. 1428** as follows:

> "It is good business sense that parties to a contract should know what will be the financial consequences to them of a breach on their part, for circumstances may arise when further performance of the contract may involve them in loss. And the more difficult it is likely to prove and assess the loss which a party will suffer in the event of a breach, the greater the advantages to both parties of fixing by the terms of the contract itself an easily ascertainable sum to be paid in that event. Not only does it enable the parties to know in advance what their position will be if a breach occurs as to avoid litigation at all, but, if litigation cannot be avoided, it eliminates what may be the very heavy legal costs of proving the loss actually sustained which would have to be paid by the

unsuccessful party...."

More recently, the law was restated by the UK Supreme Court in **Cavendish Square Holding BV v. Makdessi [2015] UKSC 67,** wherein the Court refused to either abrogate or extend the penalty rule. In **Cavendish,** Lord Neuberger held, at paragraph 33, that "in a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach", thereby emphasizing that courts would lean in favour of enforcing LD clauses.

19. I had analyzed the law on the subject, including the differences between English and Indian law, and set out the applicable principles in **3i Infotech**. If the above principles are applied to this case, I find that the sum stipulated bears a reasonable correlation to anticipated loss in as much as there is proportionality as between the extent of delay and the amount of LD. Therefore, it may be concluded that it is a genuine pre-estimate of anticipated loss. Given the nature of the contract, namely, the supply of laptop computers free of cost to students, it is evident that the monetary or other losses arising as a consequence of delay would be virtually impossible to establish. Thus, this contract would fall within the categories of contract, where it would be impossible

or difficult to prove loss. As regards factum of loss, the answers of RW-1 to questions 67 and 68 were cited as proof that the Petitioner herein did not suffer monetary or other loss. Nonetheless, the delayed supply of laptop computers to students would certainly cause loss to students by way of delayed access to resources and information and this certainly has an impact, albeit long term, on the economic development of the State and cannot be treated as an *injuria sine damno* situation. Otherwise, all liquidated damages clauses in Government contracts for the welfare of the public at large or of specific segments would be rendered unenforceable because there may not be monetary or other loss to the Government or the implementing agency of the Government. The Supreme Court alluded to this difficulty in paragraph 67 of **ONGC** by providing the illustration of a delay in construction of a road or bridge. At least, in those cases, cost overrun as a result of time overrun could be established unlike in fixed price contracts for implementing welfare schemes of this nature, where the direct loss is to the public or a segment thereof. In **3i Infotech,** I had concluded that there was no loss during a certain period because certain services were not rolled out by then and such rolling out was not the sole responsibility of the contractor concerned and the Government agency also had to play a role in that regard.

20. However, in this case, when the Second Contract was

performed, the supply obligation was entirely that of the Respondent and even the software, logo and image issues were sorted out. For all these reasons, I am of the view that the findings of the Arbitral Tribunal that no loss was caused to the Petitioner merely because the tender was floated for the academic year 2012 – 2013, whereas the Second Contract was finalized in June 2013 and, therefore, the supplies were made in advance of the next academic year is a perverse conclusion especially in light of the admitted factual position that supplies under the Second Contract were made rather belatedly between 17.06.2014 and 31.07.2014 as against the scheduled supply period between 28.06.2013 and 27.11.2013. There is also no indication in the Second Contract that supply for the academic year 2012-2013 is a condition of the contract. It is pertinent to note, in this regard, that supplies were scheduled to be made over a 150 day period as per the contracts and were actually made in a staggered manner both under the First and Second Contract and were not linked to the commencement of or to a particular term of an academic year. Thus, notwithstanding the limited scope of interference with an Arbitral Award especially after the Arbitration and Conciliation (Amendment) Act, 2015, I am of the view that the conclusions of the Arbitral Tribunal as regards the alleged advance supply and the non-occurrence of loss by the Petitioner are perverse and patently illegal and make out a case for interference as per principles laid down in paragraphs 31 and 32 of **Associate Builders**

vs. DDA (2015) 3 SCC 49 read with paragraphs 29, 30 and 43 of **Ssyangyong.** While the Arbitral Tribunal provided some additional justification, in paragraph 354 of the Award, by adverting to the cash crunch caused by delayed payments under the First and Second Contracts, interest was separately awarded in respect of such delayed payment and, therefore, delayed payment cannot justify the rejection of the deduction of LD. Therefore, the Award as regards the Second Contract is liable to be set aside in that respect. As a consequence, the award of interest on the LD amount payable under the Second Contract is also liable to be set aside and the Petitioner would be entitled to this amount with interest at the rate of 15% per annum from the date of payment of this amount to the Respondent, i.e. from 28.03.2018 till the date of payment thereof to the Petitioner.

21. One more aspect is required to be examined, namely, the application of a 15 day credit period for payments by the Petitioner. On this issue, the contention of the learned senior counsel for the Petitioner was that neither the First nor the Second Contract contain a credit period and that the application of a 15 day credit period is arbitrary. By contrast, the contention of the learned senior counsel for the Respondent is that the bills were payable immediately upon supply or, at worst, within 3 days. In the absence of a specific credit period in the contracts, while one could

argue that 15 days is a short credit period in a Government contract, it cannot be said that it is sufficiently unreasonable to warrant interference under Section 34 of the Arbitration Act. As a corollary, the award of interest on payments made beyond 15 days is not liable to be interfered with.

22. In the result, the Arbitral Award dated 22.08.2019 is partly set aside with regard to the declaration that the imposition of LD under the Second Contract is illegal and the consequential direction for the payment of amounts withheld as LD under the Second Contract along with interest thereon. In all other respects, no interference is warranted with the Award. Consequently, Application No.7830 of 2019 is disposed of by vacating the order of interim stay of the Award and by directing the Petitioner to release the bank guarantees provided in terms of the order. The Petitioner shall also bear the bank charges associated with the extension of the bank guarantee for Rs.26,37,07,807.55 after setting off the proportionate bank charges for the sum of Rs.2,18,00,000/- with interest thereon at 15% per annum from the date of payment thereof to the Respondent. Consequently, application No.7832 of 2019 is closed. No costs.

24.01.2020

Speaking order
Index : Yes

Internet: Yes
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NTHILKUMAR RAMAMOORTHY, J.

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