Research Paper Law

Construction and Design Services v Delhi Development Authority

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KEYWORDS

Facts of the case -
On 4th October, 1995 a contract vide agreement came into existence between the respondent ,*Delhi Development Authority* and the appellant, *Construction and Design Services* for constructing a sewerage pumping station at CGHS area at Kondli Gharoli at Delhi.

Clause 2 as per the agreement stated as follows:
"the contractor shall comply with the said time schedule. In the event of the contractor failing to comply with this condition, he shall be liable to pay as compensation an amount equal to one percent or such smaller amount as the Superintending Engineer Delhi Development Authority (whose decision shall be final) may decide on the said estimated cost of the whole work for everyday that the due quantity of work remains incomplete; provided always that the entire amount of compensation to be paid under the provisions of this clause shall not exceed ten percent of the estimated cost of work as shown in the tender."[3]

The contract was terminated on 17th September, 1999 due to the slow pace of the conduction of work and finally the appellant failed to complete the same. Under Clause 2 of the agreement, the Superintending Engineer of the respondent levied compensation of Rs.20,86,446/- for delay in execution of the project by an order of penalty dated 21st July, 1999 and called upon the appellant to deposit the same. [4]

On failure of the appellant to respond to the above order, the respondent filed suit No.1311 of 2002 before the Delhi High Court for recovery of the said amount with interest. Single Judge dismissed the suit holding that the respondent had not treated the time fixed for performance of the contract as of essence and the compensation stipulated in clause 2 of the contract of the agreement was in the nature of penalty. On appeal, District bench reversed the view taken by the Single Judge and held that delay in a contract of construction of a public utility service

could itself be a ground for compensation without proving the actual loss. Appellant filed a review petition which was dismissed. Hence, instant appeal was granted.[5]

Issue-
Whether the stipulated liquidated damages for breach of a contract are held to be in the nature of penalty in absence of evidence of actual loss.

Whether the stipulation is taken to be the measure of compensation for the loss suffered even in absence of specific evidence.

Whether burden of proving that the amount stipulated as damages for breach of contract was penalty is on the person committing breach.

Whether time was an essence to the contract between the parties.

Rules-
Under Section 50 of Indian Contract Act 1872, Performance in manner or at time prescribed or sanctioned by promisee—"The performance of any promise may be made in any manner or at any time which the promisee prescribes or sanctions".[6]

Under Section 55 of Indian Contract Act 1872, Effect of failure to perform at a fixed time, in contract in which time is essential—"When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract. Effect of such failure when time is not essential.—If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure. Effect of acceptance of performance at time other than that agreed upon.—If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance he gives notice to the promisor of his intention to do so."[7]

Under Section 73 of Indian Contract Act 1872, Compensation for loss or damage caused by breach of contract- "When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. Compensation for failure to discharge obligation resembling those created by contract.—When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract."

"Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."[8]

Under Section 74 of the Indian Contract Act, 1872, 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.[9]

Analysis-
Whether the stipulated liquidated damages for breach of a contract are held to be in the nature of penalty in absence of evidence of actual loss.

The appellants were supposed to build the sewage system by a particular date, i.e, 7.1.1997, but they failed to comply with it. As per the directions by the honourable Supreme Court, the time of completion was extended to June, 1999. Appellants abandoned the work on 6.4.1999 and even have not completed it yet. They have failed to complete the task of building a sewage system even after the expiry of two years six months, after the stipulated time of completion as per the agreement between the parties.

Presently, a Sewage Pumping Station is not something from which Revenue would be produced by the State. It is an open utility administration and has a part to play in keeping up or safeguarding clean environment. On the off chance that Sewage Pumping Station are not situated up, sewage would stagnate as cess pools in low lying regions and would result in natural debasement, both air and soil. That separated in a deferred undertaking, interest on blocked capital would clearly be a measure of damages. The precedents observed by the Supreme Court in para 68 of the decision reported as ONGC v. Saw Pipes Ltd. (2003)[10] are squarely applicable in the instant case as per which delayed constructions such as completing construction of road or bridges within stipulated time would be difficult to be linked with actual losses suffered by the State and in such cases the pre-estimated damages envisaged in the contract have to be paid.

As per the facts of the case and law *per se*, when there is delay in completion of such project which directly affects the interest of public or environment, then there is no need to prove the actual loss occurred in the breach or non-completion. So, as per analysis undertook, this issue and argument followed is true and applicable in the case.

Whether the stipulation is taken to be the measure of compensation for the loss suffered even in absence of specific evidence.

It was further observed that since the claim for compensation was based on sole discretion and not on the basis of loss suffered, the same was in the nature of penalty and thus, the said Clause could not be enforced in view of S. 74 of the Contract Act as laid down in Fateh Chand vs. Bal Kishan Das, (1964)[11], Maula Bux vs. Union of India, (1969)[12], M.L. Devendra Singh vs. Syed Khaja, (1973)[13], P. D'Souza vs. Shondrilo Naidu, (2004)[14] and Oil and Natural Gas Corporation Ltd. vs. Saw Pipes Ltd., (2003)[15], as held by the single judge of the high court of Delhi. His judgement was criticised by the district bench as mistake in law.

Applying the principles laid on section 73 and section 74 of the Act, It could surely be assumed that delay in executing the work brought about loss for which the respondent was qualified for reasonable compensation. Regardless of the possibility that actually the time was not of essence, it couldn't be assumed that delay was of no consequence , regardless of the possibility that there is no particular evidence of loss endured by the respondent-plaintiff, the observations in the request of the Division Bench that the undertaking being an open utility extend, the delay itself can be taken to have brought about loss as environmental degradation and loss of interest on the capital are not with no premise. Evidence of exact amount of loss may not be conceivable yet without any evidence by the gathering submitting break that no loss was endured by the gathering whining of rupture, the Court needs to continue on the guess work as to the quantum of compensation to be permitted in the given circumstances. Since the respondent additionally could have driven evidence to demonstrate the degree of higher amount paid for the work accomplished or create whatever other particular material yet it didn't do as such, we are of the perspective that it will be fair to honour 50% of the amount guaranteed as reasonable compensation. In a given case, when most noteworthy farthest point is stipulated rather than an altered total, without evidence of loss, a piece of it can be held to be reasonable, compensation and the staying by method for

penalty. The gathering griping of break can positively be permitted reasonable compensation out of the said amount if not the entire amount. As per the pronouncement of this Court in Saw Pipes case[16] and also as *the ratio laid down in Fateh Chand case* the emphasis in on the reasonable compensation, the principle laid down are as under, "*If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. If the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that the party who has committed breach of the contract is not liable to pay compensation. It would be against the specific provisions of Ss. 73 and 74 of the* Indian Contract Act.*"*[17]

Both the parties were not able to show the damage caused because of non-completion of project. As per facts of the case, defendant appealed in the court that there is no actual damage caused because of incomplete performance of the act for which the parties went under the contract, but due to lack of the evidence to show no loss from the side of defendant to the plaintiff, defendant was held liable and had to pay compensation as penalty, but since plaintiff was also not able to show that there is loss occurred because of the non-performance of act by defendant, only reasonable amount of penalty was charged. This was a justified judgement given by hon'ble judge of Supreme Court of India.

3.) Whether burden of proving that the amount stipulated as damages for breach of contract was penalty is on the person committing breach.

In these circumstances, loss could be expected, even without proof and burden was on the appellant who committed breach to demonstrate that no loss was brought on by postponement or that the sum stipulated as damages for breach of contract was in the nature of penalty. [18]When it is held that even without specific evidence, the respondent could be held to have suffered loss because of breach of contract, and it is qualified for compensation to the degree of loss suffered, it is for the appellant to demonstrate that stipulated damages are by method for penalty. The party complaining of breach can absolutely be permitted reasonable compensation out of the said sum if not the entire sum. On the off chance that the entire sum stipulated is genuine pre-estimate of loss, the real loss require not be proved. Burden to prove that no loss was likely to be suffered is on party committing breach, as already observed.

The burden of proof, in this case, was on defendant as it was clear from above argument that if there is non-performance or incomplete performance of such act which is done for the interest of public or for benefit of environment. This type of rule in law helps to take initiative for improvement in standard of living and to conserve the well-being of our environment.

Whether time was an essence to the contract between the parties.

As per the judgement, the plaintiff had not treated the time fixed for performance of the contract as of essence and the compensation stipulated in Cl. 2 of the agreement was in the nature of penalty so section 50 in not applicable in this case. The basis for levy of compensation had not been indicated so as to determine whether the compensation claimed was reasonable. Reliance was placed on the judgment of this Court in M/s. Arosan Enterprises Ltd. vs. Union of India and another, (1999)[19] in support of the view that the time stipulated in the agreement was not treated to be of essence.

Judgement analysis-
Accordingly, this appeal is partly allowed and the decree granted by the High Court is modified to the effect that the respondent-plaintiff is entitled to half of the amount claimed with rate of interest as awarded by the Supreme Court. Out of the amount deposited in this Court, the respondent will be entitled to withdraw the said decretal amount and the appellant will be entitled to take back the remaining.

That even though in the order passed by the Superintending Engineer no specific basis has been shown, notice was duly issued to the appellant defendant before determining the reasonable amount of compensation and claiming 10% of the project cost which was stipulated to be the maximum compensation, on account of delay in execution of the project. On failure of the appellant to respond, the entire amount has been rightly held to be the estimate of damages for the loss, *and by way of compensation as stipulated in clause-2 of the agreement.*[20]

Also, the judgement of Learned single Judge of Delhi High Court, that is dismissing the case because the plaintiff did not treated time as an essence was wrongly interpreted as first place as according to the facts of the case, it is clear that the plaintiff, at first place decided the time of completion of project to build the sewage system and also extended (extension for 2 years and 6 months) the time with the acceptance of the other party and court. The facts of the case clearly fulfils 'the factors which make time as an essence', that is "where the delay operates as an injury"[21] and "where the nature and necessity of the contract requires it to be so construed, for example, where the party asks for extension of time for performance"[22]

Hereby, making interpretation of the section 50, section 55, section 73 and section 74 of the Indian Contract Act 1872, that is-

- Section 50- in the contract between the parties, the plaintiff has already mentioned the time of completion of project which is, according to facts of the cases, 7.1.1997. So, there is clear violation of the section 50 of the Act.

- Section 55- if the plaintiff, as per interpretation of single bench learned judge of Delhi High Court, did not treated time as an essence in the case, then also he is entitled to get compensation under section 55, which talks about "effect of failure of performance of contract when time is not an essence", and also under section 46, which says that " when there is no time mentioned to perform act or when time is not an essence, then the engagement must be perform within a reasonable time". In the case the reasonable time must not exceed the time given by the plaintiff for completion of project as this project work was for the public interest and with the delay in completion, it is leading to loss like environmental degradation and nuisance to general public.

- Section 73- this section specifically talks about the remedy or compensation for loss or damage caused by the breach of contract. In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account. In the case, the loss incurred is measured under non-completion of the project work, that is, building sewage system and from the argument it is clear that for such work it is not necessary for plaintiff to show the actual damage.

- Section 74- this section comes into action when the contract contains any sum or penalty amount to be paid in the case of such breach. In the cases, the party complaining of the breach is entitled to receive a reasonable compensation not exceeding the amount so named or as the case may be, the penalty stipulated for, that is, a stipulation for increased interest from the date of default may be a stipulation by the way of penalty. This basically provides assurance to the suffering party to receive liquidated damages when there is a breach with or without any actual damage caused. The party suffering is entitled to get a reasonable amount (mention in the contract) as compensation.

Conclusion-
- Based on the preceding analysis, the court will likely find the defendant guilty under breach of contract.
- The plaintiff will receive compensation under section 73 and section 74 of the Act.
- But since there is no actual loss to the plaintiff, a reasonable amount of compensation should be allowed to plaintiff with amount of interest and amount of penalty.
- Thus, half amount of asked compensation with amount of penalty and interest should be granted.

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