IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.4352/2017

RAHEJA UNIVERSAL PVT. LTD. Appellant(s)

VERSUS

B.E. BILLIMORIA AND CO. LTD. Respondent(s)

O R D E R

A notice inviting tender was issued on 27.08.2011 by the appellant for Building and Civil Work for two towers at Kulai, Mangalore. The terms of the tender were clear insofar as time being essence of the contract i.e. the work had to be completed within 21 months. The contract was awarded to the respondent vide a letter of acceptance dated 03.03.2012, once again emphasizing the aspect of 'essence of time' and the work order was issued on 13.03.2012 for a total sum of approximately Rs.86.66 crores.

It appears that the work proceeded at a much slower pace by the respondents. Thus, the appellant came to the conclusion that the pace of work would never let the project be completed within the stipulated time and they took a business call to terminate the contract on 27.12.2012 with effect from 11.01.2013 i.e. after about nine months of awarding the contract to the respondent.

The aforesaid termination gave rise to the claims and counter claims of the parties which were referred for arbitration before Mr. S.R. Tambe, Former Secretary to the Government of Maharashtra. The Arbitrator passed a reasoned award vide order dated 27.03.2014 *inter alia* opining that since time was the essence of the contract, the contract was validly terminated, delay was due to deficient labour and there was some delay on the part of the appellant but the delay on account of the respondent exceeded the same.

In view of the schedule wherein each stage of the work had to be completed against the time period provided, it was opined that instead of reaching the sixth floor minimum at the time of termination, it was only the first floor slab level which was laid. The appellant was held entitled to liquidated

damages while rejecting all other claims. The respondent was held entitled to value of work done etc. After balancing the two amounts, a net loss was found payable by the respondent of Rs.1,66,67,616/-.

The award was not challenged by the appellant but the respondent filed a petition under Section 34 of the Arbitration and Conciliation Act, 1996 before the learned Single Judge of the Bombay High Court which set aside the award to the extent of grant of liquidated damages by an order dated 27.10.2015. The appeal filed by the appellant under Section 37 of the said Act was dismissed by the Division Bench on 31.03.2016.

In the conspectus of the aforesaid facts, the issue before us is in a very limited compass i.e. whether liquidated damages were admissible and recoverable by the appellant from the respondent in case of termination midstream based on the schedule of work and the stage of work which had been carried out. This, in turn, would be dependent on the relevant clause of the contract. Clause 7 of the contract dealing with the aforesaid work is as under:

"7. Liquidated damages:

For all delays which do not merit an extension of time, you shall pay to us as Liquidate Damage at the rate of 0.5% of the contract value per week for delay in the completion of work subject to a maximum of 5% of the contract value.

We shall pay a bonus of 0.25% of the contract value per week of early completion subject to a maximum of 2.5 % of the contract value."

The award of the Arbitrator has been faulted both by the learned Single Judge and the Division Bench based on a reading of the Clause and a finding was rendered that the interpretation given to the Clause 7 by the learned Arbitrator was perverse and no reasonable person could have come to that interpretation.

We have heard learned counsel for parties in respect of the aforesaid aspect. It is no doubt true that time was essence of the contract. It is also correct to state that the respondent was way behind their schedule of the contract as per the stages required of construction vis-a-vis the time period. Thus, there is no doubt that the appellant

was entitled to terminate the contract. However, the issue would be whether they were liable to pay any damages under Clause 7 of the contract providing for liquidated damages, and whether the amount could be so recovered.

A reading of the aforesaid Clause shows that the liquidated damages at the rate of 0.5 per cent of the contract value per week for delay in the "*completion of work*" were provided for, subject to a maximum of five per cent of the contract value. Similarly, work completion bonus was also provided. As to how much extra time was taken for completion of work is an aspect which would be only available when the work was completed. A reading of the Clause as a whole, in our view, lends itself to only one view i.e., it would come into operation in case of delayed completion of contract or an earlier completion of contract, inviting liquidated damages up to a maximum ceiling limited or a bonus as provided therein. It does not envisage a situation where on account of slow progress, the contract is terminated by the appellant midstream. The Arbitrator ventured into an exercise of taking the time period schedule and incorporating it in the liquidated damages Clause to fix the period of delay from the stage at which the contract was and

should have been as per schedule. This, in our view is *de hors* the contract. The purpose of providing a schedule of time for stages of construction is something different. It is also keeping in mind that time was essence of the contract. The concept of liquidated damages arises where no damages are required to be proved but both parties agree on amount being specified as a reasonable pre-estimate of damages.

This Clause will have to be construed in terms of what it states and thus, we cannot countenance application of the time schedule to the liquidated damages clause which comes into play only after the completion of the work.

The two parts of the Clause talking about the damages and the bonus arise on completion of contract.

In view of the aforesaid, we are of the view that the Arbitrator could not have proceeded in the manner as he did, which would amount to a change in the terms of the contract. Thus, the view taken by the learned Judge and the Division Bench cannot be doubted.

The result of the aforesaid is that the appeal is dismissed leaving parties to bear their own costs.

In order to withdraw the amount deposited by the appellant, the respondent had furnished a Bank guarantee. The Bank guarantee thus, stands discharged and may be returned to the respondent.

……..J.
[SANJAY KISHAN KAUL]

……..J.
[B.V. NAGARATHNA]

NEW DELHI;
JANUARY 25, 2023.

ITEM NO.107 COURT NO.2 SECTION III

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s). 4352/2017

RAHEJA UNIVERSAL PVT. LTD. Appellant(s)

VERSUS

B.E. BILLIMORIA AND CO. LTD. Respondent(s)
([REMAIN ON BOARD])

Date : 25-01-2023 This appeal was called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MRS. JUSTICE B.V. NAGARATHNA

For Appellant(s) Mr. Shyam Divan, Sr. Adv.
Mr. Ankit Parhar, Adv.
Ms. Rashi Srivastava, Adv.
Ms. Charanya Lakshmikumaran, AOR

For Respondent(s) Mr. Ranjit Singh, Sr. Adv.
Mr. P. I. Jose, AOR
Mr. Ravi Sagar, Adv.

UPON hearing the counsel the Court made the following

O R D E R

The Court dismissed appeal in terms of the signed order *inter alia* directing as under:

> **"In order to withdraw the amount deposited by the appellant, the respondent had furnished a Bank guarantee. The Bank guarantee thus, stands discharged and may be returned to the respondent."**

Pending application if any, stands disposed of.

(ASHA SUNDRIYAL) (POONAM VAID)
ASTT. REGISTRAR-cum-PS COURT MASTER (NSH)
[Signed order is placed on the file]