THE HIGH COURT OF SINDH, KARACHI

Suit No. 1740 of 2014

[Sadan General Trading LLC versus Trading Corporation of Pakistan & another]

Plaintiff	:	Sadan General Trading LLC through its local agent KZK Industrial & Commercial Co., through Ms. Sana Akram Minhas, Advocate.
Defendant 1	:	Trading Corporation of Pakistan through Mr. Irtifa-ur-Rehman, Advocate.
Defendant 2	:	Federation of Pakistan through Mr. Hussain Bohra, Assistant Attorney General for Pakistan.
Dates of hearing	:	11-02-2020, 25-02-2020 & 17-03-2020.
Date of decision	:	25-06-2020.

O R D E R

Adnan Iqbal Chaudhry J. - Arbitration Award dated 09-09-2014 was filed in Court on 13-09-2014 pursuant to section 14(2) of the Arbitration Act, 1940 and Rule 282(1) of the Sindh Chief Court Rules (O.S.). This order decides objections to the said Award filed by the Plaintiff and the Defendant No.1 under sections 30 and 33 of the Arbitration Act, 1940.

2. Pursuant to tender dated 08-01-2010, the Defendant No.1, Trading Corporation of Pakistan [TCP] awarded contract dated 19-02-2010 to the Plaintiff for supplying 50,000 metric tons of white sugar @ USD 585 per metric ton. To substitute a performance guarantee, the Plaintiff made a deposit of USD 585,000/- with the TCP ('the performance amount'). The sugar was to be imported by the Plaintiff from Brazil. Under clause 15 of the contract, the first shipment of 12,500 metric tons was to be made by the Plaintiff within three weeks of Letters of Credit [LC] established by the TCP excluding the period of voyage; and subsequent shipments of the same quantity were to be made after every one week. However, clause 17 of the contract provided that:

> *"17. LATE SHIPMENT PENALTY:*
> *If the goods are not shipped within the contracted period, the Buyer will accept late shipment for a maximum period of ten (10) days subject to payment by the seller of penalty at US$ 0.10 per metric ton per day. Any further extension will be at the sole discretion of buyer at seller's risk and cost."*

3. The LC was established by TCP on 06-03-2010. Counting three weeks from that date, the first shipment was to leave Brazil by 27-03-2010. However, by virtue of clause 17 of the contract, the TCP was obliged to accept the shipment even if it was late by 10 days excluding the period of voyage but subject to payment of penalty by the Plaintiff. Hence, the first shipment could be made from Brazil by 06-04-2010. Per the LC, the date of last shipment was 19-04-2010. In case of non-delivery within the specified period, clause 13 of the contract stipulated that the performance amount would be forfeited, and clause 26 stipulated that the TCP would be entitled to cancel the contract. The said facts are not disputed between the parties.

4. On 07-04-2010, the TCP cancelled the contract and forfeited the performance amount on the ground that the Plaintiff failed to make shipment by 06-04-2010 i.e., the date as extended by 10 days under clause 17 of the contract.

5. Before the Arbitrator, the Plaintiff's statement of claim was that by letters dated 26-03-2010 and 29-03-2010 it had informed the TCP that the first shipment was being delayed due to religious holidays in Brazil; that despite receiving the Plaintiff's letters, the TCP did not respond until 01-04-2010 when it threatened cancellation of the contract; that by letters dated 01-04-2010 and 06-04-2010, the Plaintiff again informed TCP reasons of the delay, clarified that the delay would only effect the first shipment, and requested the TCP for an extension of 15 days to make shipment, which request was inclusive of the 10 days envisaged under clause 17 of the contract; but that the TCP did not respond so as to keep the Plaintiff guessing whether the date of shipment was being extended or not until the TCP cancelled the contract on 07-04-2010. It was averred that the cancellation was premature as the TCP had never communicated to the Plaintiff that it

was being given the 10-day extension under clause 17 of the contract; that in any case, the TCP could not have cancelled the contract before the date of the last shipment which was 19-04-2020, and which was also extendable by 10-days upto 29-04-2010 under clause 17 of the contract; that it was normal practice of the TCP to give extension in the date of shipment well beyond 10 days and it had done so for other sellers, and hence the Plaintiff was discriminated. The Plaintiff claimed damages of USD 2,794,645/- which included the performance amount with markup, LC expenses, travelling expenses, loss of reputation, mental torture and loss of opportunity.

6. While replying to the Plaintiff's claim, the TCP also made a counter-claim. It averred that uptill 06-04-2010, ie., one day before the contract was cancelled, no stock whatsoever had been made available for inspection prior to loading on the vessel; that by email dated 01-04-2010, the TCP had warned the Plaintiff to make shipment latest by 05-04-2010 failing which the TCP reserved the right to cancel the contract and forfeit the performance amount; that given the sugar crises in the country at that time, the time for making delivery was of the essence; that given the delay in first shipment, it was apparent that the Plaintiff could not also make subsequent shipments within the agreed dates; that the TCP was not under any contractual obligation to extend the date of first shipment beyond 06-04-2010 which included the 10-day extension envisaged under clause 17 of the contract; that there was no discrimination with the Plaintiff as it was drawing a comparison with supply of different goods in different circumstances; that due to non-delivery, the TCP was forced to buy sugar at a higher price of USD 724.95 per metric ton under a contract dated 02-08-2010. For the loss suffered, the TCP claimed damages of Rs. 863,285,592/- which included the price difference between USD 585 per metric ton and USD 724.95 per metric ton, advertisement expenses; LC expenses, and markup.

7. The following issues were framed by the learned Arbitrator:

> *"1. Whether the Trading Corporation of Pakistan (TCP) is entitled to lodge a Counter-Claim pursuant to the order dated 10-05-2012 passed by*

the Honourable Division Bench of the High Court of Sindh in Constitution Petition No.D-2038/2010 ?

2. Whether the tender allegedly awarded on 2nd August, 2010 by the Counter-Claimant (TCP) was awarded as a replacement of the Plaintiff's cancelled contract ?

3. Which of the parties committed breach of the contract?

4. Which of the parties is entitled to claim damages, if any, from the other ?

5. What should the Award be ?

8. Issue No.1 was decided in favour of TCP. However, Ms. Sana Minhas, learned counsel for the Plaintiff did not agitate that finding any further.

Issue No.2 was apparently framed to measure the loss allegedly suffered by TCP due to non-delivery by the Plaintiff. The learned Arbitrator held that the TCP could not prove that the contract dated 02-08-2010 was the one awarded in replacement as the TCP had cited three different dates for the purchase of sugar after non-delivery by the Plaintiff; and that it was implausible that TCP would wait for 5 months before awarding a contract in replacement. The learned Arbitrator held that Annexure C-1 to TCP's claim reflected that at the relevant time the rate of sugar was more or less the same as under the cancelled contract.

On Issue No.3, the learned Arbitrator held that the evidence was that the Plaintiff was not in a position to supply sugar within the contracted period; that it was admitted that the Plaintiff did not make the first shipment even within the 10-day extension envisaged under clause 17 of the contract; and thus the Plaintiff was in breach of contract.

9. Regards Issue No.4, the learned Arbitrator after discussing the cases of *Province of West Pakistan v. Mistri Patel & Co.* (PLD 1969 SC 80) (hereinafter *'Mistri Patel'*) and *Sibte Raza v. Habib Bank* (PLD 1971 SC 743), held that:

"The ratio decidendi of the above cases seems to be that a breach of contract containing a clause of liquidated damages cannot be enforced if the facts of the case are that factually the aggrieved party has not suffered any loss because of the above breach but has made a profit. Furthermore, the Court

has to decide the question of forfeiture after taking into consideration the facts of the case and other equitable circumstances. In the present case, it is an admitted position that the Respondent (TCP) has not made any profit and they must have suffered some loss on account of non supply of contracted sugar. In my view, it would be just and equitable if the Respondent would be allowed to retain 50% of the above amount of USD 585,000/- namely USD 292,500/-.

As regards the Counter Claim of the Respondent quoted hereinabove, it may be pointed out that the Respondent failed to prove actual date for the purchase of cancelled contract. They had given three different dates as pointed out by Ms. Sana Akram Minhas. Therefore, their claim for direct loss on account of purchase at the rate of USD 724.95 has not been substantiated. Similarly the other items mentioned have not been substantiated. Some of them are even not legally sustainable as the claim of markup at the rate of 15% and advertisement expenses. Their claim is not sustainable. In conclusion I award a sum of USD 292,500 to the Plaintiff or an equivalent amount in rupee on the basis of rate of US Dollar obtaining on the date of payment with 10% interest thereon from the date of this award till the payment."

10. On the finding of breach of contract, Ms. Sana Akram Minhas, learned counsel for the Plaintiff submitted that the learned Arbitrator had misread the evidence and misinterpreted clause 17 of the contract. She submitted that the 10-day extension in the date of shipment under clause 17 of the contract was mandatory; that the TCP did not give such extension to the Plaintiff, in that, the TCP never communicated that the 10-day extension had begun to run, nor did it communicate that the Plaintiff's request for the additional 5 days was being declined. She submitted that this was deliberately done to keep the Plaintiff in the dark. Further, learned counsel submitted that the Arbitrator did not address the ground that cancellation of the contract was discriminatory. On the award of compensation to TCP, learned counsel submitted that even assuming that the Plaintiff had committed breach, once the Arbitrator had concluded that TCP was unable to prove actual loss, there was no basis for awarding 50% of the performance amount to the TCP under section 74 of the Contract Act and that in doing so the Arbitrator misconstrued the decision in *Mistri Patel*.

11. Mr. Irtifa-ur Rehman, learned counsel for TCP submitted that the learned Arbitrator mis-read Annexure C-1 to TCP's claim which showed that on 22-02-2010 and 27-02-2010 the TCP had contracted to

purchase sugar @ USD 779.95 and USD 649 per metric ton respectively, the latter being from the Plaintiff itself under a different contract. He submitted that the learned Arbitrator erred in discarding the replacement contract dated 02-08-2010 as evidence of the loss suffered by TCP. On the finding of compensation, learned counsel submitted that once the Arbitrator had concluded that the Plaintiff was in breach of contract, there was no legal basis to award 50% of the performance amount to the Plaintiff. Learned counsel relied on *Space Telecom (Pvt.) Ltd. v. Pakistan Telecommunication Authority* (2019 SCMR 101) to submit that the award of only half the performance amount to the TCP was not reasonable compensation within the meaning of section 74 of the Contract Act.

12. Heard the learned counsel and perused the record.

13. It was not disputed by the Plaintiff that counting the 10-day extension under clause 17 of the contract, the first shipment was to sail from Brazil by 06-04-2010, and that under clause 26 of the contract the TCP was entitled to cancel the contract on non-delivery by the agreed date. It was also not disputed that the first shipment had not sailed when the contract was cancelled by the TCP on 07-04-2010. The argument of learned counsel for the Plaintiff was essentially that the 10-day extension under clause 17 of the contract did not run until expressly communicated by the TCP. Firstly, there is nothing in clause 17 of the contract to suggest that the TCP was required to notify the commencement of the 10-day extension; and secondly, if the 10-day extension was mandatory, as argued by learned counsel, then there was no occasion for TCP to issue notice to bring it into effect. Therefore, I do not see how clause 17 of the contract was misinterpreted, nor was learned counsel able to demonstrate mis-reading of evidence leading to the finding of breach of contract.

14. Learned counsel for the Plaintiff had then submitted that the Arbitrator did not address the question whether cancellation of contract by the TCP was discriminatory as the TCP had granted extension in shipment to other sellers well beyond the 10 days

envisaged in clause 17 of the contract. While that question may have been raised by the Plaintiff in its claim, but then, the learned Arbitrator had never framed such an issue, nor does the Award reflect that arguments were advanced on that question before the Arbitrator. If the Plaintiff was of the view that such issue was crucial to its claim, then it ought to have moved the Arbitrator for recasting the issues or framing an additional issue. It is not the Plaintiff's case that the Arbitrator had refused such a request.

15. Adverting now to TCP's objection on the finding that TCP was unable to prove actual loss. Learned counsel for the TCP had argued that the Arbitrator had erred in discarding the contract dated 02-08-2010 as evidence of TCP's loss, which contract showed that after non-delivery by the Plaintiff, the TCP contracted to purchase sugar from another seller @ USD 724.95 per metric ton. However, as rightly observed by the learned Arbitrator, that contract dated 02-08-2010 was quite some time after cancellation of the Plaintiff's contract on 07-04-2010, and hence not relevant. It is settled law that under section 73 of the Contract Act, the measure of a buyer's general damages for non-delivery of goods is the difference between the contract price and the price of the goods <u>at the time when the contract is broken</u>, provided of course that there is an available market for such goods as is the case here. Such measure of damages is elucidated in illustration (a) of section 73 of the Contract Act which reads as follows:

> "(a) A contracts to sell and deliver 50 maunds of saltpetre to B at a certain price to be paid on delivery. A breaks his promise. B is entitled to receive from A, by way of compensation, the sum, if any, by which the contract price falls short of the price for which B might have obtained 50 maunds of saltpetre of like quality <u>at the time when the saltpetre ought to have been delivered</u>". (Underlining for emphasis).

Therefore, to assess what loss was suffered by TCP as a result of non-delivery by the Plaintiff, the evidence relevant would be the price of sugar on the dates of shipment agreed between the parties, i.e. from 06-04-2010 to 19-04-2010, and not the price under the contract dated 02-08-2010. It appears that the only document produced by the TCP in evidence in that regard was Annexure C-1 to its claim, which

was an unsigned and unsubstantiated list of contracts along with their price, said to have been awarded by TCP in 2010 for purchasing sugar. If that list was anything to go by, it did not show that between 06-04-2010 and 19-04-2010 the price of sugar was higher than USD 585 per metric ton which was the price under the cancelled contract. Therefore, the finding of the learned Arbitrator that the TCP was unable to prove damages, does not call for any interference.

16. On the point of compensation under section 74 of the Contract Act discussed under Issue No.4, the argument advanced by learned counsel for TCP was that after concluding that the Plaintiff was in breach of contract, there was no legal basis for the Arbitrator to award 50% of the performance amount to the Plaintiff. That argument misconstrues the finding of the learned Arbitrator. Since the amount in question was the Plaintiff's deposit lying with TCP in lieu of a performance guarantee, it is not that the learned Arbitrator has awarded any damages or compensation to the Plaintiff, but in essence he has held that it would be reasonable compensation to TCP if it is allowed to forfeit/retain 50% of the performance amount. The award to refund the remaining 50% to the Plaintiff was consequential.

Learned counsel for the TCP had then argued that the award of only 50% of the performance amount to the TCP (USD 292,500/-) was not reasonable compensation within the meaning of section 74 of the Contract Act. On the other hand, the argument of the Plaintiff's counsel was that since the TCP had not proved actual loss, it was not entitled to any compensation under section 74 of the Contract Act. In my humble view, both learned counsel have not entirely appreciated the scope of section 74 of the Contract Act and the decision in *Mistri Patel*.

17. The argument of the Plaintiff's counsel does not appreciate that compensation under section 74 of the Contract Act is premised on the existence of a penalty clause in the contract and '<u>whether or not actual damages or loss is proved to have been caused</u>'. Thus, even if a claimant is unable to prove actual loss/damage under section 73 of the Contract Act, that by itself would not be enough to oust

compensation under section 74 of the Contract Act. That difference between damages and compensation under sections 73 and 74 of the Contract Act respectively, has been elucidated in *Sibte Raza v. Habib Bank Ltd.* (PLD 1971 SC 743).

18. To determine how reasonable compensation is to be assessed under section 74 of the Contract Act, the Honourable Supreme Court of Pakistan in *Mistri Patel* had discussed the cases of *Stockloser v. Johnson* [(1954) 1 A E R 630] and *Trustees of the Port of the Karachi v. Ghulamali Habib Rawjee* (PLD 1961 Karachi 623). In *Stockloser* it was observed by Lord Denning that despite a forfeiture clause, equity can relieve the defaulting buyer from forfeiture of the money and order the seller to repay it on such terms as the Courts thinks fit; and amongst the circumstances that give rise to such equity, "two things are necessary: first, the forfeiture clause must be of a penal nature, in the sense that the sum forfeited must be out of all proportion to the damage; and secondly, it must be unconscionable for the seller to retain the money." In *Ghulamali Habib Rawjee* also, it was held by a learned Division Bench of the High Court of Sindh that: "But in cases in which from the consideration of all the relevant circumstances the forfeiture and the retention of the amount by seller would be unconscionable, the Court would upon equitable principles intervene and grant relief to the defaulting purchaser. ……. In determining whether the forfeiture is unconscionable the Court will take into consideration the nature of the contract, the conduct of the parties and the proportion of the amount of deposit to the sale price." Placing reliance on that discourse, the Supreme Court observed (in *Mistri Patel*): "We are, therefore, unable to accept the argument of the learned counsel for the Appellant that simply because there was a forfeiture clause in the agreement the plaintiff was entitled to the amount covered by the bank guarantee irrespective of any other consideration." However, the Supreme Court differed with the case of *Ghulamali Habib Rawjee* on the point that section 74 of the Contact Act does not apply to a case of forfeiture of earnest money and held that a forfeiture clause would be 'other stipulation by way of penalty' within the meaning of section 74 of the Contract Act.

19. *Mistri Patel* went on to hold that:

> "The award of compensation by the Court under section 74 of the Contract Act will depend upon its finding as to what in the facts and circumstances of the case is reasonable compensation subject to the limit of the amount mentioned in the contract. It is true that the aggrieved party is entitled to recover compensation from the party who is guilty of breach of the contract whether or not actual damage or loss is proved to have been caused thereby. …….. It will be wrong to argue that since the firm had agreed to deposit a sum as earnest money and in lieu thereof furnished bank guarantee for the said amount the Government would be entitled to claim the whole of this amount simply because there was a breach of the contract by the firm."

In the facts of that case, the evidence was that the plaintiff had in fact made a profit on the subsequent sale, and thus the Supreme Court held that the plaintiff was not entitled to retain any party of the amount forfeited.

20. In *Sibte Raza v. Habib Bank Ltd.* (PLD 1971 SC 743), the employee claimed refund of his security deposit after resigning prior to the agreed term of the contract. The contract had bound the employee to liquidated damages of Rs. 2000/- in the event he left employment prior to the agreed term. The Supreme Court observed that though reasonable compensation under section 74 of the Contract Act did not require proof of actual loss, "but in working out the amount of reasonable compensation, it would certainly be relevant to consider whether any loss has or has not accrued to the party, which has suffered on account of the breach, and the extent of that loss." In the circumstances of that case the Supreme Court concluded that there was evidence to show that the employer had spent more than the amount of the security deposit on the training of the employee and therefore it could not be said that the amount of the security deposit forfeited by the employer was unconscionable or excessive.

In *Khanzada Muhammad Abdul Haq Khan Khattak v. WAPDA* (1991 SCMR 1436), it was held that: "However, where the Court considers that the amount mentioned in the contract as liquidated damages is oppressive or highly penal in nature, the Court may

refrain to grant such amount and itself determine the amount which is reasonable in the circumstances of a particular case."

In *Space Telecom (Pvt.) Ltd. v. Pakistan Telecommunication Authority* (2019 SCMR 101), the petitioner had breached the contract for the award of a mobile cellular license by not depositing the bid within the stipulated date. The PTA forfeited the earnest money. On a challenge to the forfeiture, even though the PTA had subsequently awarded the license at the same price to another bidder, the Supreme Court declined leave to appeal by observing that the amount forfeited was only 1.8% of the total bid amount and therefore its forfeiture could not be termed as oppressive or highly penal in nature.

21. The principle that emerges from the above case-law is that for the purposes of determining reasonable compensation under section 74 of the Contract Act, the assessment by the Court whether the party relying on the forfeiture clause had suffered loss or not, is only one of the ways to see whether the forfeiture was unconscionable or highly penal in nature. The ultimate analysis remains one of unconscionability and the extent of the penalty. What is unconscionable and what is reasonable compensation, that is a question of fact that the Court (or arbitrator) determines in the peculiar facts and circumstances of each case, for what may seem reasonable to the Court in one set of circumstances may not seem reasonable in another. Therefore, the Plaintiff's argument that no compensation could follow for the TCP under section 74 of the Contract Act simply because no loss was proved, is misconceived. So also, TCP's argument that the finding of breach of contract was sufficient to entitle it to forfeit the entire amount, that too is misconceived.

22. As regards the contention of learned counsel on the quantum of reasonable compensation awarded to the TCP under section 74 of the Contract Act; that it is excessive per the Plaintiff, and that it is insufficient per the TCP; that is asking the Court to reappraise the facts and circumstances in which the Arbitrator arrived at such quantum. Needless to state that this is not an appeal but objections to

an arbitration award where the jurisdiction of this Court to interfere in findings of fact and law arrived by the arbitrator are circumscribed by section 30 of the Arbitration Act, 1940 and the well settled principle that unless findings appear to be perverse on the face of the award, no interference is warranted. As discussed, learned counsel were unable to make out a case for interference.

23. Consequently, objections to the award filed by the Plaintiff and the Defendant No.1 [TCP] are dismissed. The award is made rule of Court with the clarification that in terms of section 29 of the Arbitration Act, 1940 and the case of *Ghulam Abbas v. Trustees of the Port of Karachi* (PLD 1987 SC 393), the interest awarded by the Arbitrator is to be computed only upto the date of the decree, whenceforth the Plaintiff is granted interest @ 10% per annum from the date of decree till realization.

JUDGE

Karachi:
Dated: 25-06-2020