IN THE HIGH COURT OF SINDH AT KARACHI

HCA No. 167 of 2020

[Trading Corporation of Pakistan .....v..... Sadan General Trading LLC & another]

	Present:	**Mr. Justice Yousuf Ali Sayeed** **Mr. Justice Arbab Ali Hakro**
Appellant through	:	M/s. Rafiq Ahmed Kalwar & Muhammad Yasir, Advocates.
Respondents through	:	Mr. Muneer Iqbal and Ibrahim Tahir Siddiqui, Advocates for Respondent No.1. Mr. Qazi Abdul Hameed Siddiqui, DAG. Mr. Syed Raza Mamnoon, Advocate.
Dates of Hearing	:	18.09.2024 & 25.09.2024
Date of Decision	:	18.12.2024

J U D G M E N T

ARBAB ALI HAKRO, J:- The Arbitration Award[1] was submitted by the learned Arbitrator, prompting the Appellant to file objections[2]. After hearing the respective parties, the learned Single Judge dismissed the Appellant's objections and made the Award the Rule of the Court through an Order dated 25.06.2020, with a Decree prepared in pursuance thereof on 06.07.2020 (hereinafter referred to as the "**Impugned Order and Decree**")[3] passed in Suit No. 1740/2014.

2. The Appellant awarded a contract to Respondent No.1 via a letter dated 19.02.2010 for the supply of 50,000 metric tons of sugar. For this purpose, Respondent No.1 submitted a performance guarantee amounting to USD 585,000 to the Appellant. Due to the failure to supply the sugar within the stipulated time, the Appellant cancelled the contract through a letter dated 07.04.2010 and forfeited the performance guarantee in accordance with the terms and conditions of the contract executed between the parties. The matter was subsequently referred to the learned Arbitrator on 27.11.2012. The Arbitrator rejected the Appellant's claim for the loss suffered but awarded compensation to the extent of half of the performance guarantee. The learned Arbitrator then

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[1] 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.), whereby the learned Arbitrator allowed the Appellant to retain only 50% of the Performance amount.

[2] The objections were filed under Section 30 of the Arbitration Act, 1940.

[3] It has been reported by the I.T. Branch of this Court that the Impugned Order has now been reported on the website of Pakistan Law Site as **2021 PLD 57 (Mrs. Sadan General Trading v. Trading Corporation of Pakistan & others).**

referred the matter to the Court, which made the Award the Rule of the Court through the Impugned Order and Decree. Consequently, this appeal has been filed.

3. Learned counsel for the Appellant articulated that the learned Single Judge rendered the Impugned Order and Decree in a haphazard manner and without duly examining the record and proceedings produced by the Appellant. Learned counsel further submits that it was incumbent upon the learned Single Judge to meticulously evaluate the Award before making it the Rule of Court, but the learned Single Judge failed to scrutinize the penalty clauses of the contract executed between the Appellant and Respondent No.1, thereby partially allowing the claim of the Appellant. It was unequivocally agreed between the Appellant and Respondent No.1 at the time of signing the contract that in the event of non-delivery of the consignment of sugar within the stipulated time, the Appellant would be at liberty to cancel[4] the contract and forfeit[5] The performance guarantee was submitted by Respondent No.1. He submitted that the late delivery of the consignment was admitted by Respondent No.1, owing to which the Appellant suffered losses. He articulated that once the learned Arbitrator had concluded that Respondent No.1 committed a breach of contract, there was no legal basis to award only 50% of the performance amount to the Appellant and that the Award of only half the performance amount does not constitute reasonable compensation within the meaning of Section 74 of the Contract Act, 1872. To bolster his submissions, learned counsel relied upon the precedents reported as **PLD 2010 Peshawar 34, 1997 SCMR 66, 2006 YLR 589, 2002 CLD 61, 1991 MLD 422, 1982 SCMR 244, PLD 2011 S.C. 506, and 2023 SCMR 1103.**

4. In response, learned counsel for Respondent No.1 submitted that the learned Arbitrator had misread the evidence and misinterpreted clause 17 of the contract. He argued that the clause mandated a ten-day extension in the shipment date, which the Appellant neither granted to Respondent No.1 nor communicated. He contended that the Appellant's failure to comply with the mandatory extension clause-17 was a deliberate act to keep Respondent No.1 uninformed. Learned counsel further argued that even assuming Respondent No.1 had committed a breach, once the Arbitrator concluded that the Appellant was unable to prove actual loss, there was no basis for awarding 50% of the performance amount to the Appellant under Section 74 of the Contract Act, 1872. He asserted that the learned Single Judge also failed to consider these aspects, rendering the Impugned Order and Decree, making the Award the Rule of the Court. To support his contentions, learned counsel relied on the precedents reported in **2018 SCMR 662, 2023 SCMR 1103, PLD 2006 S.C. 169, PLD 2003 S.C. 301, PLD 1969 S.C. 80, PLD 1971 S.C. 743, PLD 1987 S.C. 461, 1981 CLC 311, 1984 SCMR 597,**

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[4] Per Clause 26 of the Contract Dated 19.02.2010.
[5] Per Clause 13 of the Contract dated 19.02.2010.

2017 CLC 588, PLD 1996 S.C. 108, 2016 CLC 1757, 2005 SCMR 152, and 2014 SCMR 1268.

5. Having carefully heard the learned counsel for the parties and perused the record, the primary issue before this Court is to determine whether there are any irregularities in the Impugned Order and Decree that merit interference upon appeal.

6. Upon assiduously reviewing the contentions of both learned counsel, the pivotal question that arises is whether the learned Single Judge's interpretation and application of the penalty clauses, along with the principles of reasonable compensation under Section 74 of the Contract Act, 1872, were legally sound or whether substantial irregularities were warranting appellate intervention. It is, therefore, imperative to first meticulously analyze Section 74, which pertains to compensation for breach of contract where a penalty is stipulated. This provision addresses scenarios wherein a contract specifies a sum to be paid or a penalty to be imposed in case of a breach, ensuring that the aggrieved party is entitled to reasonable compensation, irrespective of whether actual damage or loss has been demonstrated. The text of Section 74 is as follows:

> "***74. Compensation for breach of contract where penalty stipulated for:*** *Where 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.*
>
> ***Explanation:*** *When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the order of the Federal Government or of any Provincial Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.*
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> ***Explanation:*** *A person who enters into a contract with the Government does not necessarily thereby undertake any public duty or promise to do an act in which the public are interested."*

7. Compensation Despite no proof of actual loss, Section 74 stipulates that even if the aggrieved party cannot prove actual damage or loss, they are still entitled to reasonable compensation for the breach of contract. This ensures that the party at fault cannot avoid liability simply because the other party cannot

quantify the damage.[6] Reasonable compensation not exceeding the penalty**,** the compensation awarded should be reasonable and should not exceed the amount specified in the contract or the penalty stipulated. The aim is to prevent excessive or punitive penalties that are disproportionate to the breach.[7]

8. So, for the first part of Section 73 of the Contract Act, 1872, to be invoked: (1) the existence of a valid contract must be established, (2) a breach must have occurred, and (3) typically, there must be demonstrable loss. In the absence of loss, Section 73 will not stringently apply. The primary objective of awarding damages is to indemnify the plaintiff. The Court does not ordinarily award damages to penalize the defendant for contractual breach. It is incumbent upon the plaintiff to substantiate his loss; failure to do so generally precludes the awarding of damages. Nonetheless, pursuant to the legal maxim "*ubi jus ibi remedium*,"[8] Courts have adjudicated nominal damages in instances where a breach is present, but no tangible loss has been evidenced.[9]

9. Judicial interpretations of Section 74 of the Contract Act, 1872, have consistently upheld the principle that reasonable compensation should be awarded without necessitating proof of actual loss. The judiciary has underscored the significance of evaluating each case based on its specific facts and circumstances to ascertain what constitutes reasonable compensation. Section 74 safeguards contracting parties by ensuring that compensation for breach is equitable and just, even in the absence of demonstrable loss or damage. It serves to avert the imposition of punitive or excessively harsh penalties and fosters equitable justice within contractual relationships.

10. Under the Arbitration Act, the latitude to impugn an arbitration award exists if there are substantive grounds to assert the Award's invalidity or if it was improperly procured. In the present case, after a meticulous examination of the submissions and evidence, the Arbitrator repudiated the Appellant's claim for losses but adjudicated compensation amounting to half of the performance guarantee. The adjudication of reasonable compensation under Section 74 of the Contract Act, 1872, mandates an inquiry into whether the forfeiture is unconscionable. The learned Single Judge determined that the Arbitrator's decision to confer half of the performance guarantee was justified, particularly in the absence of conclusive evidence of actual loss sustained by the Appellant. The

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[6] **Example: Illustration (a):** A contracts with B to pay B Rs. 1,000 if he fails to pay B Rs. 500 on a given day. A fails to pay B Rs. 500 on that day. B is entitled to recover from A such compensation not exceeding Rs. 1,000 as the Court considers reasonable.

[7] **Example: Illustration (b):** A contracts with B that, if A practices as a surgeon within Peshawar, he will pay B Rs. 5,000. A practices as a surgeon in Peshawar. B is entitled to such compensation not exceeding Rs. 5,000 as the Court considers reasonable.

[8] Meaning `where there is right, there is a remedy`; Black, H.C., Black's Law Dictionary (St Paul Minn: West Publishing Co., 1933).

[9] See Commondore Sadeed Anver Malik Kashir (Retd.) v. Bahria Foundation (2005 PLC (C.S) 630)

juridical scrutiny focused on the doctrines of unconscionability and the proportionality of the penalty in consonance with established legal principles.

11. Clause 17 of the contract delineates a penalty for a late shipment, allowing a maximum extension of ten days with an attendant penalty, beyond which any further extension is at the sole discretion of the Buyer. Respondent No.1 contended that the Appellant failed to either grant or communicate this extension, an omission construed as a calculated stratagem to disadvantage the Respondent. Nevertheless, the factual matrix substantiates that Respondent No.1 acknowledged the delayed shipment, resulting in losses for the Appellant. The Arbitrator ascertained that Respondent No.1 contravened the contractual terms yet confined the compensation to 50% of the performance guarantee, consonant with the principle of reasonable compensation prescribed by Section 74 of the Contract Act.

12. In addressing the contention of the learned counsel for respondent No. 1, it was argued that the Arbitrator concluded that the Appellant could not demonstrate actual loss. Therefore, there was no basis for awarding 50% of the performance amount to the Appellant under Section 74 of the Contract Act, 1872. However, the record indicates that when the Award was presented before the learned Single Judge, respondent No. 1 did not raise any objections. Furthermore, after the learned Single Judge passed the impugned Order and Decree, respondent No. 1 chose not to appeal against it. Therefore, the learned counsel's contention questioning both the Award and the impugned Order and Decree of the learned Single Judge is legally untenable.

13. The learned Single Judge's endorsement of the Arbitrator's decision epitomizes a judicious exegesis of contractual obligations and statutory prescriptions. The accentuation on unconscionability underscores the judiciary's vigilance against punitive or inordinately severe penalties that contravene equitable doctrines. The adjudication awarding 50% of the performance guarantee, notwithstanding its failure to encompass the guarantee's entirety, is congruent with the jurisprudential emphasis on proportional and reasonable compensation, thus precluding unjust enrichment. Our contemplation is imbued with the legal maxim "*In jure non remota causa, sed proxima spectatur*," which elucidates that "In law, the immediate, not the remote cause, is regarded." This maxim substantiates the precept that the law concentrates on the proximate cause of the loss or damage when adjudicating compensation, ensuring that an aggrieved party is entitled to reasonable compensation, notwithstanding the absence of proven actual damage or loss. Consequently, the judicial analysis in this purview upholds the sanctity of contractual provisions while ensuring an equitable and just resolution for the implicated parties.

14. Upon meticulous examination of the arguments from both learned counsel, alongside a thorough review of the pertinent legal provisions and precedents, it is clear that the learned Single Judge's findings adhere to established legal principles. The learned Single Judge's approach to evaluating the unconscionability and penal nature of the forfeiture clause on a case-by-case basis is legally sound. The partial acceptance of the Award and its confirmation as the Rule of the Court shows no significant irregularities warranting interference in this appeal. The Appellant's objections do not sufficiently demonstrate that the learned Single Judge either deviated from legal standards or misapplied judicial principles. Consequently, this appeal lacks merit and is **dismissed**. The Impugned Order and Decree, passed by the learned Single Judge, are hereby upheld.

JUDGE

JUDGE