

Dispute Resolution Hotline

October 27, 2016

A LIQUIDATED DAMAGES CLAUSE DOES NOT OUST THE NEED TO PROVE THE LOSS: BOMBAY HC

- In a claim for liquidated damages, evidence has to be led in support of the same, and such a claim shall be granted on consideration of the basic principles for grant of liquidated damages.
- Relying on precedents, the High Court has reaffirmed that (a) the amount stipulated as liquidated damages has to be a reasonable compensation and a genuine pre-estimate of damages; (b) should not exceed the amount so stated, or the penalty so prescribed;
- The actual loss or injury has to be proved for claiming liquidated damages, and such burden may be dispensed with only when actual damage from breach of contract cannot be proved or calculated.

INTRODUCTION

Recently in *Raheja Universal Pvt. Ltd. ("Appellant") v. B.E. Bilimoria & Co. Ltd.*¹ ("Respondent"), the Bombay High Court ("High Court") elaborated on the scope and implications of liquidated damages under Section 74 of the Indian Contract Act 1872 ("Contract Act") and concluded that the actual loss or injury has to be proved for claiming liquidated damages, and such proof may be exempted when it is not possible to do so, provided that such liquidated damages are a genuine pre-estimate of loss.

FACTS AND BACKGROUND

The Appellant issued a work order on 13 March 2012 but terminated the contract on 27 December 2012, the point at which, the work was 120 days behind schedule. The reasons attributed to the termination were delayed work, non-compliances and defective work. The Appellant claimed liquidated damages as stipulated in the contract. Subsequently, the Respondent filed an arbitration petition to resolve the dispute and the arbitrator was appointed on 4 January 2013. Importantly, the Respondent did not question the termination but challenged the claim awarded to the Appellant at a later point in time.

The arbitrator accepted the entire claim of the Appellant, and accordingly awarded liquidated damages to the Appellant, which subsequently became the subject matter of the challenge before the High Court. The Single Judge set aside the arbitral award on the ground that the arbitrator had not considered the provisions of the contract before awarding liquidated damages. The Single Judge observed that (a) the contract had been terminated in the interim stage before completion of the tenure; (b) as per the contract the claim for liquidated damages could be sought only after giving an extension on the time period for completion of the project @ 0.5% of the contract value per week to a maximum of 5%. Against the judgment of the Single Judge, the Appellant filed an appeal to the Division Bench of the High Court ("Division Bench").

JUDGMENT

The Division Bench approved the findings of the Single Judge. The Division Bench observed that the Appellant had not led any evidence to support its claim for liquidated damages, and in absence of any evidence, the grant of liquidated damages by the Tribunal was unacceptable and thus the award was rightly set aside by the Single Judge.

The Division Bench agreed with the findings of the Single Judge as stipulated in the contract, that are: (a) liquidated damages could be claimed only for the period of delay beyond the original date of completion stipulated in the contract; (b) liquidated damages could not be claimed in a phased manner (at the interim stage of the work) during the extended timeline and before termination of contract. Therefore, the stage for claim of liquidated damages as stipulated in the contract had not arisen.

The Division Bench placed reliance on *Kailash Nath v. Delhi Development Authority*², wherein the Supreme Court had held that (a) the amount stipulated as liquidated damages has to be a reasonable compensation and a genuine pre-estimate of damages fixed by both parties and found to be such by the court; (b) the damages awarded should not exceed the amount so stated, or the penalty so prescribed.

The Division Bench further relied on *Kailash Nath*, where the Supreme Court had interpreted the expression "*whether or not actual damage or loss is proved to have been caused thereby*" arising out of Section 74 of the Contract Act concluded that, only in cases where actual damage from the breach of contract cannot be proved or calculated, the court will take the liquidated amount as pre-determined estimate of the loss caused. If the damages can be calculated the same needs to be alleged and quantified as part of the pleadings.

ANALYSIS

The case provides guidance on a party's obligation to plead and prove actual loss even in a scenario where the

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contract stipulates grant of liquidated damages. The only exception being where damage or loss is difficult, or impossible to prove, then the liquidated amount named in the contract, if it is a genuine pre-estimate of damage or loss, can be awarded. The case also provides a summary and discusses earlier precedents on principles governing grant of liquidated damages.

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You can direct your queries or comments to the authors

¹ (2016) 3 AIR Bom R 637
² (2015) 4 SCC 136

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