

penal, delayed and additional charges Rs. 19,18,870/- ii) claim towards instalments paid for remaining eight months of the agreement which the claimant was required to tender amounting to Rs. 26,29,200/- iii) claims towards passenger tax, rendered by the claimant, which the respondent was obligated to pay amounting to Rs. 1,28,000/- iv) claims towards insurance paid by the claimant of the vehicles purchased by him for Rs. 2,69,160/- v) claim towards statutory charges Rs. 50,000/- vi) claims towards depreciation of vehicles Rs. 23,47,327/- vii) claims towards salaries of drivers for unutilized period Rs. 7,69,648/- viii) claims for cost of repair and maintenance Rs. 4,00,000/- ix) claims towards advance rent and purchase of wireless system Rs. 6,48,000/- x) claims towards loss of profit Rs. 14,40,000/-

4. The arbitrator has held that the formation of the opinion by the respondent that the petitioner was in breach of its obligations under the agreement was not justified and thus held that the termination of the contract by the respondent forthwith and without notice was not a valid termination.

5. As far as the monetary claims of the petitioner were concerned, the arbitrator held that the petitioner had deposited Rs 1,28,000/- towards passenger tax; that under the agreement the respondent was to bear the liability of passenger tax and hence the arbitrator held the petitioner entitled to recover the said amount from the respondent. The arbitrator, against the claim of the petitioner for Rs 14,40,000/- towards loss of profit for the balance period of the contract i.e., from 10th May, 2003 to 31st December, 2003 awarded a sum of Rs 2 lacs to the petitioner. Thus, an award for recovery of Rs 3,28,000/- together with interest was passed in favour of the petitioner and against the respondent.

6. The grievance of the petitioner is to, disallowance by the arbitrator of the claims for Rs 19,18,870/- towards penal and additional charges. It was the case of the petitioner that it had purchased 25 vehicles by raising loan from banks and financial institution for the performance of its obligations under the agreement; owing to the illegal termination of the contract, the petitioner had to incur penal charges because of the defaults. The arbitrator held that it was not a part of the contract that the petitioner should purchase new vehicles and if the petitioner had purchased new vehicles the respondent could not be burdened with liabilities by way of damages as a result of certain loans etc raised by the petitioner.

7. The petitioner had also claimed Rs 26,29,200/- for instalments for the remaining eight months of the agreement; it was the case of the petitioner that the petitioner had kept a fleet of 25 vehicles for the purposes of the contract and the loan taken for the purchase of the vehicles had to repay from the earnings from the respondent and because the contract had been illegally terminated, the petitioner was entitled to recover the said amount. The arbitrator rejected the said claim holding that since the petitioner was carrying on the tourist business after the termination of the contract also, the vehicles stated to be purchased by the petitioner for use by the respondent appeared to be diverted to other business of the petitioner and the petitioner could not thus be stated to have suffered a loss on this account.

8. The next claim of the petitioner was towards insurance paid for the vehicles. The arbitrator held that under the agreement the liability for payment of insurance of the vehicles was of the petitioner only and the petitioner was thus not entitled to recover the same from the respondent.

9. The next claim of the petitioner was for statutory charges with respect to the vehicles. The arbitrator held that under the contract with the respondent the same were payable by the petitioner and not recoverable from the respondent.

10. Similarly, the claim of the petitioner for depreciation, salaries of drivers, cost of repairs of the vehicles and cost of wireless system were also not held recoverable for the reason that the same under the agreement were the liability of the petitioner only. The arbitrator also held the claims to have not been proved.

11. The petition under Section 34 of the Arbitration Act urges that the arbitrator has misread the documents exchanged between the parties to come to the conclusion that the petitioner was not under the contract required to purchase new vehicles. It is further urged that the finding of the arbitrator that the petitioner was running other business and had diverted the vehicles to the said other business was without any basis; that since the entire fleet was created for the purposes of the respondent, the respondent was liable to make good all the expenses towards statutory charges, insurance, salary of drivers, depreciation, repairs, maintenance and cost of wireless system to the petitioner. It was also urged that petty amount of Rs 2 lacs only against loss of profit was arbitrarily awarded. It was also urged that the award failed to deal with the claim for loss of goodwill and reputation.

12. The counsel for the petitioner has urged that the arbitrator having found the termination of the agreement wrongful, the petitioner was entitled to damages for loss of profit for the entire balance term of the agreement.

13. Though the arbitrator has given his own reasons for disallowing the claims with respect to which objections have been taken but, in my view, the claims of the petitioner before the arbitrator were even otherwise not tenable. Under Section 73 of the Indian Contract Act the wronged party is entitled to be placed in the same position in which it would have been, had the contract not been breached by the other party. Thus all that the petitioner would have been entitled to, if the contract had not been breached by the respondent was loss of profit. The petitioner, however, besides loss of profit also claimed other amounts with respect to the vehicles and which amounts under the contract were to be borne by the petitioner only. The petitioner, owing to the breach of the contract by the respondent can not be placed on a better footing than it would have been had the contract not been breached by the respondent. The petitioner has not challenged the finding of the arbitrator of the various claims disallowed, under the contract between the parties being the liability of the petitioner itself. If that were to be so, the said claims of the petitioner were, in any case, not maintainable in law and even though the arbitrator has while

disallowing the said claims not given the said reason, the challenge thereto cannot, in any case, be made.

14. While it is correct that the arbitrator has not dealt with the claim of the petitioner for loss of reputation and goodwill but again I do not find that to be a reason enough to exercise the power under Section 34(3) of the Act. The Apex Court in Ghaziabad Development Authority v Union of India (2000) 6 SCC 113 has, while approving Chitty on Contracts (27th Edition), held that normally, no damages in contract will be awarded for injury to the plaintiff's feeling, or for his mental distress, anguish, annoyance, loss of reputation or social discredit caused by the breach of contract; the exception is limited to contract whose performance is to provide peace of mind or freedom from distress - in those cases damages may also be awarded for nervous shock or any anxiety suffered by the plaintiff, if that was, at the time the contract was made, within the contemplation of the parties as a not unlikely consequence of the breach of contract. Nothing has been stated in the petition as to how the instant contract would fall in the exception aforesaid. The plaintiff, in any case, is a juristic person and not a natural person. In view of the matter not being *res integra* no useful purpose would be served in issuing notice of the petition on this ground. It is more so since as per the terms of the contract the same was terminable by either party by a 30 days notice and there can be no claims for loss of reputation, on termination of such a contract.

15. When the matter was listed first on 14th November, 2008 attention of the counsel was drawn to the judgment of the Apex court in Indian Oil Corporation Ltd v Amritsar Gas Service (1991) 1 SCC 533 and it was put to the counsel that since the agreement between the parties was terminable in its very nature with a 30 days notice, even if the respondent had wrongfully terminated the agreement forthwith, the maximum which the petitioner could be entitled to was damages for loss of profit for 30 days, the notice for which period was not given and the respondent could not claim damages for loss of profit for the entire balance term of the agreement. On request the matter was adjourned to today.

16. The counsel for the petitioner has today sought to distinguish Amritsar Gas Service (*supra*) by urging that the claim therein was for specific performance and not for damages for loss of profit for the balance period of the agreement as in the present case. It is further urged that in that case it was the plea of the counsel for Indian Oil Corporation Ltd before the Apex Court that in view of agreement being terminable with a thirty days notice, only loss of profit for 30 days could be awarded. It was argued that no such plea was taken by the respondent before the arbitrator and has also not been discussed by the arbitrator.

17. The provisions of Order 2 Rule 2 of CPC are also relied upon and it is argued that even though the CPC is not applicable to arbitration proceedings, principles thereof would apply and the respondent having not taken the said plea before the arbitrator was debarred from taking the said plea before the court. Reliance in this regard was placed upon *Sidramappa v Rajashetty* AIR 1970 SC 1059.

18. The Apex Court in Amritsar Gas Service (supra), inter alia, held as under: 14. The question now is of the relief which could be granted by the arbitrator on its finding that termination of the distributorship was not validly made under clause 27 of the agreement. No doubt the notice of termination of distributorship dated March 11, 1983 specified the several acts of the distributor on which the termination was based and there were complaints to that effect made against the distributor which had the effect of prejudicing the reputation of the appellant-Corporation; and such acts would permit exercise of the right of termination of distributorship under clause 27. However, the arbitrator having held that clause 27 was not available to the appellant Corporation, the question of grant of relief on that finding has to proceed on that basis. In such a situation, the agreement being revocable by either party in accordance with clause 28 by giving 30 days notice, the only relief which could be granted was the award of compensation for the period of notice, that is, 30 days. The plaintiff-respondent 1 is, therefore, entitled to compensation being the loss of earnings for the notice period of 30 days instead of restoration of the distributorship. The award has, therefore, to be modified accordingly. The compensation for 30 days notice period from March 11, 1983 is to be calculated on the basis of earnings during that period disclosed from the records of the Indian Oil corporation Ltd.

19. From a reading of the above, it is clear that even in that case, the arbitrator had not considered the aspect of the contract therein being terminable otherwise by a 30 days notice. The position, in my view, is identical in the present case. The Apex Court in the said position held that even after coming to the conclusion that the contract was not terminable forthwith, the only relief which could be granted was loss of profit for 30 days, the agreement being revocable by its very nature/terms.

20. As far as the arguments of Order 2 Rule 2 of the CPC is concerned, the same bars a claim and merely because the plea is not taken in defence would not bar the court from considering the relief which alone could have been granted in terms of the contract as done in Amritsar Gas Service (supra).

21. The role of the court even otherwise in a Section 34 proceeding is limited. The jurisdiction of the court is only to consider that no injustice is done to any of the parties to the arbitration. Even though the arbitrator in the present case has not discussed the claims in the light of the contract being terminable by its very term but I find that the arbitrator has, in the award, set out the clause 22 aforesaid including the portion making the contract terminable without any reason by either party by a 30 days notice.

22. It has not been urged that the damages of Rs 2 lacs which has been awarded are less than the loss of profit for 30 days. Even otherwise considering the claim of Rs 14,40,000/- for loss of profit for the entire balance period of 8 months, I am of the view that the award of Rs 2 lacs for loss of profit for 30 days is not inappropriate.

23. In the circumstances no ground is found to issue a notice of the petition under Section 34. The same is dismissed with no orders as to costs.

Sd./-
RAJIV SAHAI ENDLAW,J

December 02, 2008