IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 04.05.2022

\+ **O.M.P. (COMM) 511/2019 & IA Nos. 17282/2019 & 17283/2019**

DIRECTOR GENERAL CENTRAL RESERVE POLICE FORCE .....Petitioner

Versus

FIBROPLAST MARINE PVT. LTD. .....Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Praveen Kumar Jain and Ms Bhavna Ruia, Advocates.
For the Respondent: Mr Sudhanshu Batra, Senior Advocate with Ms Gurinderpal Singh and Ms Jaya Bajpai, Advocates.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter the '**A&C Act**') impugning an arbitral award dated 31.05.2019 (hereafter the '**impugned award**') rendered by an Arbitral Tribunal comprising of a Sole Arbitrator (hereafter the '**Arbitral Tribunal**').

2. On 17.07.2008, the petitioner floated a tender bearing no. U.II.708(A)/2008-09-PROC-(NDRF) inviting bids for supply of 288 numbers of Boat Assault Universal Type (hereafter '**BAUT**') and 288 numbers of 50 HP Out Board Motor (hereafter '**OBM**'). In response to the same, the respondent submitted its bid and was declared as the lowest bidder.

3. Subsequently, on 17.07.2009, the parties entered into an agreement bearing number U.II.708(A)/2008-09-PROC-(NDRF)-II for supply of 288 numbers of BAUTs and 288 numbers of OBMs (hereafter the '**Agreement**') at a consideration of ₹16,87,79,520/-. The respondent was liable to pay inspection charges quantified at 2% of the said contract value along with applicable service tax as levied by the Inspecting Agency under the Directorate General Quality Assurance, Ministry of Defence (hereafter '**CQAE**').

4. In terms of the Agreement, the respondent was required to submit two pilot samples of the BAUTs and OBMs within a period of two months from the date of the supply order, that is, by 15.09.2009. However, the respondent was unable to comply with the deadline due to various reasons, which it stated were beyond its control. By its letter dated 03.09.2009, it sought extension of one month to submit the two pilot samples. The petitioner accepted the same and by its letter dated 15.09.2009, extended the time till 15.10.2009. On 08.10.2009, the pilot samples were delivered and was received by the CQAE on 12.10.2009.

5. Thereafter, by its letter dated 21.10.2009, the CQAE raised concerns in respect of the pilot samples delivered by the respondent on the ground that the same was submitted after the expiry of the stipulated delivery period. However, in response to the said letter, the respondent informed the CQAE that the petitioner had already extended the time period for delivery of the pilot samples and further, requested the petitioner to issue a formal delivery period extension to the CQAE. The respondent informed the CQAE that it had provided the raw material test specimen and further assured it, that a delivery inspection would be submitted within a period of ten days.

6. The CQAE rejected the pilot samples submitted by the respondent due to certain discrepancies in some materials and informed the same to the respondent by its letter dated 15.03.2010. The respondent requested the CQAE to re-test the pilot samples and the said request was accepted by the CQAE on 15.04.2010. On 28.04.2010, the respondent also provided fresh samples, however, it was found that the same did not conform to the specifications.

7. On 21.12.2010, the respondent submitted fresh samples for evaluation by the CQAE and the pilot samples were finally approved by the CQAE on 24.03.2011. Accordingly, the respondent received clearance for bulk production. The CQAE, by its letter dated 24.03.2011, informed the petitioner to issue re-fixation of the bulk delivery period till 24.09.2011 in terms of Clause 9(ii) of the Agreement. On 04.04.2011, the respondent, once again, requested the petitioner to re-fix the delivery period of the bulk supplies for a period

of six months from the date of the Clearance Certificate as per Clause 9(ii) of the Agreement. However, on the same date, that is 04.04.2011, the petitioner informed the respondent that only 48 numbers of BAUTs with OBMs are required instead of the earlier agreed quantity of 288 numbers of BAUTs with OBMs.

8. By its letter dated 13.04.2011, the respondent denied the petitioner's request for supply of the reduced quantities and informed the petitioner that it had already made a substantial investment of over ₹ 6,00,00,000/- for execution of the Agreement. The respondent sent several communications from May to August 2011, requesting the petitioner to adhere to the original terms of the Agreement and to consider re-fixation of the delivery period as it was suffering substantial financial losses.

9. On 15.11.2011, the Board of Officers, in furtherance to the letter dated 09.09.2011 issued by the Directorate General, National Disaster Response Force, visited the respondent's premises for inspection of the material. The respondent, in its letter dated 16.11.2011, informed the Joint Secretary (PM), Ministry of Home Affairs that the Board of Officers had inspected 91 numbers of BAUTs and 87 numbers of OBMs along with raw materials at its production facility.

10. The petitioner informed CQAE by its letter dated 21.11.2011 that the delivery period could not be re-fixed due to certain administrative reasons and further, requested to not initiate any inspection unless intimated by it. Subsequently, a joint meeting of the parties was held at

the office of Joint Secretary, Ministry of Home Affairs on 15.12.2011. At the said meeting, the petitioner, once again, proposed to reduce the supply of 288 numbers of BAUTs with OBMs. However, the same was not acceptable to the respondent and, the respondent was willing to re-negotiate the contract terms for a reduced quantity of 180 numbers of BAUTs subject to it being allowed to supply the balance OBMs to any international brand; further three months to remobilize; and, for the inspecting authority to restart the stage of inspection.

11. The respondent claims that the petitioner failed to re-fix the delivery period and the petitioner did not amend the Agreement to provide for the reduced quantities of BAUTs and OBMs. The respondent sent several communications in this regard from February 2012 to April 2013. The respondent states that the petitioner failed to respond to any of its letters.

12. In view of the disputes between the parties, on 19.04.2013, the respondent invoked the agreement to refer the disputes to arbitration.

13. Thereafter, the petitioner issued a letter dated 30.09.2013 requesting the respondent to get the pilot/advance samples of BAUTs with OBMs (Yamaha) approved from the inspecting authority. On 17.10.2013, the respondent informed the petitioner that it could not get the pilot samples approved as the petitioner had failed to inform the inspecting authority about the inspection of the subject order and by its previous letter dated 22.11.2011, the petitioner had informed the inspecting authority to not initiate any inspection. The respondent, once

again, requested the petitioner to issue an amended agreement changing the quantity of BAUTs with OBMs required as well as to re-fix the time for submission of the advance sample from two months to five months.

14. In the meanwhile, the respondent at several instances renewed the Bank Guarantees at the petitioner's request. The petitioner, by its letter dated 28.01.2014, informed the respondent that it had requested the inspecting authority to complete the inspection of the pilot samples of BAUTs (with OBMs Yamaha 50 HP). On 12.02.2014, the respondent informed the petitioner that it had initiated the procedure for importing 50 HP Yamaha OBMs and not the BAUTs, which had already been cleared for inspection by the CQAE on 23.03.2011. The respondent requested the petitioner to clear the supply of 87 numbers of BAUTs with Mercury OBMs as it was already inspected and lying in stock since the past three years. It further requested the petitioner to refix the delivery period as nine months for the 87 numbers of BAUTs with Mercury OBMs and the balance 93 numbers of BAUTs with Yamaha OBMs.

15. However, the respondent claims that the petitioner failed to intimate it about re-fixation of the delivery period for the supplies despite several follow ups and a meeting with the Additional Secretary (Foreigners), Ministry of Home Affairs. The petitioner further failed to act in terms of the Arbitration Clause for appointment of an arbitrator.

16. Thereafter, the respondent approached this Court by way of a petition under Section 11 of the A&C Act [being Arb P. 346/2014]

seeking appointment of an arbitrator. This Court, by an order dated 29.09.2014, appointed the learned Sole Arbitrator to adjudicate the disputes between the parties and further, directed that the arbitration be conducted under the aegis of the Delhi International Arbitration Centre (hereafter **'DIAC'**).

17. Before the Arbitral Tribunal, the respondent filed its Statement of Claims and claimed the following:

S. NO.	CLAIM	AMOUNT
1.	Loss of Gross Profit	₹ 4,56,62,518/-
2.	Cost of Inventories	₹ 4,53,31,048/-
3.	Cost incurred for storage of inventories	₹ 76,49,775/-
4.	Cost of Performance Bank Guarantees	₹ 17,92,786/-
5.	Payment of Inspection Charges	₹ 9,80,490/-
6.	Manpower cost incurred after 30.9.2011	₹ 29,36,839/-
7.	Maintenance/Service of BAUTs and OBMs	₹ 6,42,500/-
8.	Loss of Business Opportunity	₹ 19,10,65,751/-
9.	Loss of Goodwill and reputation	₹ 5,00,00,000/-
10.	Loss of time, director stress and trauma	₹ 5,00,00,000/-
11.	Cost of Arbitration	₹ 25,00,000/-

12.	Interest	18% per annum

18. The petitioner filed its Statement of Defence, however, it did not file any counter-claims.

19. The Arbitral Tribunal considered the rival contentions. In respect of Claim No. 1, the Arbitral Tribunal observed that the petitioner refused to procure 288 numbers of BAUTs with OBMs as agreed under the Agreement. The petitioner had also failed to amend the Agreement for reducing the quantity of supplies to 180 numbers of BAUTs. The Arbitral Tribunal found that the petitioner was in breach of the Agreement and the respondent was entitled to damages. The Arbitral Tribunal allowed the respondent's claim for loss of profit and awarded a sum of ₹ 4,66,62,518/-, in its favor.

20. The respondent further claimed expenditure incurred due to cost of inventories and cost incurred for storage of inventories (Claim Nos. 2 and 3, respectively). The Arbitral Tribunal found that 91 numbers of BAUTs and 87 numbers of OBMs were already manufactured and inspected by the CQAE on 15.11.2011 and lying in stock at the *godown* hired by the respondent for which it spent monthly rent of ₹1,10,000/-. The Arbitral Tribunal relied on the Surveyors' Report and held that the respondent is entitled to storage cost amounting to ₹ 76,49,775/-. The Arbitral Tribunal further found that the Agreement for supply of 288 numbers of BAUTs was still in force and thus, the respondent rightfully claimed costs for storage and inventories for the number of BAUTs and

OBMs to be supplied. The Arbitral Tribunal, accordingly, awarded an amount of ₹4,53,31,048/- as costs of inventories.

21. The Arbitral Tribunal further awarded a sum of ₹29,36,839/- towards costs incurred for hiring manpower from 30.09.2011 till January 2013 (Claim No. 6). The Arbitral Tribunal found that even though no manufacturing of the BAUTs took place from November 2011 till 28.01.2014, nonetheless, the Agreement between the parties was still subsisting. Thus, the respondent had engaged workers even during the aforesaid period as the petitioner could, at any time, request the respondent to resume inspection and manufacture the balance BAUTs with OBMs and hence, the Arbitral Tribunal allowed the respondent's claim.

22. In respect of Claim No. 7, that is, cost incurred for maintenance of the BAUTs with OBMs, which were already manufactured, the Arbitral Tribunal held that the petitioner had failed to take delivery of the same and thus, the respondent had to bear maintenance charges for inspection purposes until delivery of the BAUTs. The respondent quantified its claim for maintenance of the BAUTs with OBMs at ₹7,385/- per BAUT with OBM for a period of forty-two months (that is, from August, 2011 till January, 2015). Accordingly, the Arbitral Tribunal awarded an amount of ₹6,42,500/- towards maintenance of service of BAUTs and OBMs from August, 2011 till January, 2015.

23. The Arbitral Tribunal clubbed the respondent's claims concerning loss of business opportunity (Claim No. 8), loss of goodwill

and reputation (Claim No. 9) and, loss of time, director stress and trauma (Claim No. 10). The Arbitral Tribunal found that resources of the respondent remained blocked in the form of Bank Guarantees and inventories adversely affecting the respondent's business. The Arbitral Tribunal further referred to the annual returns of the respondent from 2011-2012 to 2013-14 and found that due to blocking of funds by the petitioner, the turnover of the respondent had reduced during the aforesaid period. However, the Arbitral Tribunal held that the respondent had failed to furnish any evidence indicating loss of goodwill and reputation. In view of the aforesaid, the Arbitral Tribunal assessed the damage for loss of business opportunity and loss of time, stress and trauma caused to directors at ₹8,00,00,000/-.

24. The Arbitral Tribunal rejected the respondent's claim for cost incurred due to charges paid for execution of the Bank Guarantee and for its renewal from time to time during the subsistence of the Agreement. The Arbitral Tribunal held that since the respondent had not placed any certificate of the Bank regarding payment made for execution of the Bank Guarantee and for its renewal, the petitioner cannot be held to be liable for the same. The Arbitral Tribunal further denied the respondent's claim for recovery of inspection charges. The Arbitral Tribunal found that as per the terms of the Agreement, the liability to pay inspection charges was on the respondent and thus, it could not claim payment of the same.

25. Accordingly, the Arbitral Tribunal passed an award of ₹18,32,22,680/-, in favour of the respondent along with costs quantified

at ₹8,00,000/-. In addition, the Arbitral Tribunal also awarded pre-reference and *pendente-lite* interest at the rate of 18% per annum. Further, the Arbitral Tribunal also awarded future interest on the awarded amount.

Submissions

26. Mr. Jain, learned counsel appearing for the petitioner, has assailed the impugned award on several grounds. First, he submitted that there was an inordinate delay in rendering the impugned award. He further submitted that the same was rendered almost eighteen months after the conclusion of the hearing. He submitted that there was no explanation of this delay and therefore, the impugned award is liable to be set aside. He relied on the decision of this Court in ***Harji Engineering Works Pvt. Ltd. v. Bharat Heavy Electricals Ltd. & Anr.: 2008 SCC OnLine Del 1080***, the decision of the Madras High Court in ***M.K. Dhanasekar Engineering Contractor v. Union of India &Ors.: O.P. No. 4 of 2015 and O.A. No. 31 of 2015, decided on 10.09.2019*** and the decision of the Supreme Court in ***State of Punjab v. Hardyal: 1985 (2) SCC 629***, in support of his contention. In addition, he submitted that the impugned award is also contrary to the Rules of the Delhi International Arbitration Centre (DIAC), which expressly requires the arbitral proceedings to be completed within a period of six months.

27. Second, he submitted that the impugned award is, *ex facie*, perverse as the Arbitral Tribunal awarded an amount of ₹18,32,22,680/-, whereas the total consideration payable for 288 BAUTs was agreed at

₹16,87,79,520/-. Thus, the awarded amount, in fact, exceeds the total consideration as agreed between the parties. In addition, the Arbitral Tribunal also awarded pre-reference interest, *pendente lite* interest and future interest at the rate of 18% per annum.

28. Third, he submitted that the Arbitral Tribunal accepted Gross Profit Margin by 37.47% and awarded a sum of ₹4,66,62,518/- on account of loss of profit, which according to the petitioner is exorbitant. He submitted that although the Arbitral Tribunal, at one point, doubted that the respondent would have earned a gross profit of 25%, nonetheless, it accepted the respondent's claim for a Gross Profit Margin of 37.47%. He submitted that it was also admitted that the respondent had agreed to reduce the order to 180 numbers of BAUTs, yet the Arbitral Tribunal awarded loss of profit in respect of 288 numbers of BAUTs. He submitted that the Arbitral Tribunal held that the Gross Profit Margin as computed was less than the Gross Profit Margin as reflected in the audited accounts of the respondent but the said audited accounts were not placed on record.

29. Fourth, he contended that that award of ₹4,53,31,048/- towards inventory and ₹76,49,775/- towards storage charges were also excessive and without sufficient material. He also assailed the decision of the Arbitral Tribunal to award a sum of ₹29,36,839/- towards claim of manpower employed during the period 2011 to January, 2013 and further, maintenance charges quantified at ₹6,42,500/-.

30. Fifth, he contended that the award of ₹8,00,00,000/- on account of loss of business opportunity, loss of time, stress and trauma was inconsistent with the findings of the Arbitral Tribunal and also without any basis.

31. Lastly, he submitted that interest at the rate of 18% per annum was exorbitant.

32. Mr. Batra, learned senior counsel appearing for the respondent, has countered the aforesaid submissions. He submitted that the delay in rendering the award was on account of delay on the part of the petitioner in furnishing the written submissions after the hearing was concluded. He submitted that the record of the case was voluminous and the Arbitral Tribunal thus, required sufficient time to examine the same. He further stated that the impugned award was based on sufficient material. He stated that the loss of profit awarded to the respondent was based on the report of the Surveyor appointed by the respondent. He also contended that although oral submissions were made challenging the computation of the Gross Profit Margin, however, there were no averments in the present petition to the said effect. He submitted that the Surveyor was an expert and had calculated the loss of profit. He had also calculated the Gross Profit Margin on the basis of the balance sheets for the year 2011-12 and 2012-13, which worked out to be 44.06% instead of 37.47% as was computed by the Surveyor and accepted by the Arbitral Tribunal.

33. He countered the submissions that the award against cost of inventory was without evidence. He stated that the auditor had furnished a Certificate certifying the value at ₹4,53,31,048/-. He stated that the element of fixed expenses was reduced from the value of the said inventory as the same had been considered in the award for loss of profits. He further submitted that the petitioner had not challenged the quantification with regard to cost of inventories, storage costs and manpower costs. He further submitted that the petitioner had produced ample evidence on record regarding the financial constraints faced by the respondent resulting from the breach of the Agreement. He submitted that CW-1 was also not cross-examined on most of the aspects.

34. Lastly, he submitted that the rate of interest is at the discretion of the Arbitral Tribunal and the respondent had placed on record the Auditor's Certificate certifying the interest charged by the respondent's bank on working capital loan during the period 2011 to 2014 and the same has not been denied.

Reasons and Conclusion

35. There is merit in the contention that there was an inordinate delay in rendering the award. The learned Arbitrator was appointed on 29.09.2014 and the first hearing before the Arbitral Tribunal was held on 06.04.2015. The hearing spanned for more than two years and the last hearing was held on 23.12.2017. The award was rendered on 31.05.2019, which was also subsequently corrected by the learned Arbitrator on 09.08.2019.

36. According to the respondent, the delay was on account of failure on the part of the petitioner to file its submissions. The Arbitral Tribunal had granted six weeks' time to both the parties to file their written submissions. It is stated that none of the parties filed their written submissions within the said period. The respondent did so on 02.04.2018, but the petitioner did not file the same. The DIAC sent various reminders to the petitioner (that is, on 25.06.2018, 06.07.2018, 28.09.2018 and 14.12.2018). However, the petitioner did not respond to any of the said reminders. Finally, the petitioner sent a communication dated 15.12.2018, that is, almost a year after the hearing was concluded stating that it did not wish to submit any written submissions. The impugned award was delivered within a period of six months thereafter.

37. One of the principal reasons for ensuring that the arbitral award is rendered within a reasonable period of time is to ensure that the efficacy of oral submissions is not lost. A large time gap between hearing of the oral submissions and rendering the decision would, in effect, debilitate the purpose of resorting to arbitration for expeditious adjudication of the disputes. No person can be expected to remember the same after a long period of time.

38. In the facts of the present case, the petitioner had not filed any written submissions and therefore, the Arbitral Tribunal also did not have the benefit of ready reference to the submissions made during the course of the arbitral proceedings. It is relevant to refer to the observations made by a Coordinate Bench of this Court in ***Harji***

Engineering Works Pvt. Ltd. v. Bharat Heavy Electricals Ltd. &Anr. (*supra*). The same are set out below:

> "20. It is natural and normal for any arbitrator to forget contentions and pleas raised by the parties during the course of arguments, if there is a huge gap between the last date of hearing and the date on which the award is made. An Arbitrator should make and publish an award within a reasonable time. What is reasonable time is flexible and depends upon facts and circumstances of each case. In case there is delay, it should be explained. Abnormal delay without satisfactory explanation is undue delay and causes prejudice. Each case has an element of public policy in it. Arbitration proceedings to be effective, just & fair, must be concluded expeditiously. Counsel for the respondent had submitted that this Court should examine and go into merits and demerits of the claims and counter claims with reference to the written submissions, claim petition, reply, document etc. for deciding whether the award is justified. In other words, counsel for the respondent wanted the Court to step into the shoes of the Arbitrator or as an appellate court decide the present objections under Section 34 of the Act with reference to the said documents. This should not be permitted and allowed as it will defeat the very purpose of arbitration and would result into full fledged hearing or trial before the Court, while adjudicating objections under Section 34 of the Act. Objections are required to be decided on entirely different principles and an award is not a judgment. Under the Act, an Arbitrator is supposed to be sole judge of facts and law. Courts have limited power to set aside an award as provided in Section 34 of the Act. The Act, therefore, imposes additional responsibility and obligation upon an Arbitrator to make and publish an award within a reasonable time and without undue delay. Arbitrators are not required to give detailed judgments, but only indicate grounds or reasons for rejecting or accepting claims. A party must have satisfaction that the learned Arbitrator was conscious and had taken into consideration their contentions and pleas before

> rejecting or partly rejecting their claims. This is a right of a party before an Arbitrator and the same should not be denied. An award which is passed after a period of three years from the date of last effective hearing, without satisfactory explanation for the delay, will be contrary to justice and would defeat justice. It defeats the very purpose and the fundamental basis for alternative dispute redressal. Delay which is patently bad and unexplained, constitutes undue delay and therefore unjust."

39. In the present case, the arbitration was conducted under the aegis of the DIAC. Rule 36 of the DIAC Rules, 2007, which was required to be followed, expressly provides that an arbitral tribunal must render the final award within a period of six months from the date on which it receives the file. However, an arbitral tribunal could extend the same upto a further period of six months. Rule 36 of the DIAC Rules, 2007 is set out below:

> **"Article (36) Time limit for the award:**
>
> 36.1 By submitting to arbitration under these Rules the parties shall so deemed to have agreed that the provisions of this Article shall apply to extending the time limit for rendering the final award.
>
> 36.2 The time limit within which the Tribunal must render its final Award is six months from the date the sole arbitrator (or the Chairman in the case of three arbitrators) receives the file.
>
> 36.3 The Tribunal may, on its own initiative, extend the time-limit for up to additional six months."

40. The parties having submitted to arbitration under the aegis of DIAC had agreed that the award would be rendered within the stipulated period. However, the fact that the parties had participated in the arbitration proceedings even after the expiry of the period of one year clearly indicates that there was consensus between the parties for extending the time for the Arbitral Tribunal to make an award. Nonetheless, the award was required to be made within a reasonable period. It is difficult to accept that a period of almost one and a half years is reasonable in the given facts and circumstances of this case.

41. The question whether the delay in making the impugned award rendered it liable to be set aside as opposed to public policy would also necessarily have to be considered in the context of the challenge now raised by the petitioner on merits.

42. In ***Peak Chemical Corporation Inc. v. National Aluminium Co. Ltd.: 2012 SCC OnLine Del 759***, a Coordinate Bench of this Court had declined to set aside an arbitral award on the ground that the award was pronounced after an inordinate delay. The relevant extract of the said decision is set out below:

> "29. The question whether the delay in the pronouncement of an Award after final arguments have concluded vitiates the Award will depend on the facts and circumstances of each case. The decisions relied upon by Mr. Ganguli turned on their peculiar facts. No two cases are the same. Significantly, delay has not been specified as one of the grounds under Section 34 of the Act for setting aside an Award. It would be straining the language of that provision to hold that

> delay in the pronouncement of an Award would by itself place it in "conflict with the public policy of India" within the meaning of Section 34(2)(b)(ii) of the Act. As will be discussed hereafter, the impugned Award sets out comprehensively the facts as pleaded by the parties, the evidence, the submissions of counsel, the analysis of the facts and evidence, and the detailed reasons issue-wise. Another factor that requires to be accounted for is that the dispute between the parties has been pending since 1996. It would not be in the interests of justice to set aside the impugned Award only on the ground of delay and remand it for a fresh determination. The learned Arbitrator who passed the impugned Award has since expired. A fresh arbitration before another arbitrator would not be justified considering the time and money already spent in the arbitral proceedings thus far. Therefore, it is not considered expedient to simply set aside the impugned Award on the sole ground of delay in the pronouncement of the Award. This plea is accordingly rejected."

43. It is apparent from the above that the Court had held that an arbitral award cannot be set aside solely on the ground that there was delay in its pronouncement. The Court observed that delay in pronouncing the award is not one of the grounds as specified under Section 34 of the A&C Act. The question whether the delay in pronouncement of the arbitral award places it in conflict with the public policy of India must be construed in the facts of each case. The said Bench had also reiterated the aforesaid view in three other decisions – ***Alfa Laval (India) Ltd. v. J.K. Papers Limited and Ors.: O.M.P. No. 402/2005, decided on 05.03.2012***, ***Oil India Ltd. v. Essar Oil: 192***

(2012) DLT 417; and ***Union of India v. Niko Resources: 191 (2012) DLT 668***.

44. The decision in ***Peak Chemical Corporation Inc*** (*supra*) is somewhat in variance with the observations made by this Court in ***Harji Engineering Works Pvt. Ltd. v. Bharat Heavy Electricals Ltd. & Anr*** (*supra*). In that case, the Court had held that the award passed after an inordinate and unexplained delay would be "*contrary to justice and would defeat justice*". Clearly, the award which defeats justice would be in conflict with the public policy of India. However, it is not necessary to further examine whether there is any conflict in between the two decisions. This is because, in the present case the delay in making the award is not the sole reason for setting aside the award. The delay is also compiled with the Arbitral Tribunal overlooking vital aspects of the dispute as is discussed hereafter.

45. In the given circumstances, this Court is of the view that inordinate, and unexplained delay in rendering the award makes it amenable to challenge under Section 34(2)(b)(ii) of the A&C Act – that is, being in conflict with the public policy of India.

46. In the present case, the Arbitral Tribunal had found that the petitioner was in breach of the Agreement. This Court finds no ground to find fault with the aforesaid view. On 24.03.2011, the pilot samples submitted by the respondent were found to be conforming to the specifications and the Bulk Production Clearance was accorded to the respondent. The petitioner was required to re-fix the bulk delivery

period in accordance with Clause 9(ii) of the Agreement. The conduct of the petitioner clearly indicates that it repudiated the Agreement as it did not provide the schedule for delivery of bulk supplies (288 numbers of BAUTs). The petitioner sent a letter dated 04.04.2011 stating that there was a change in scenario and it no longer required 288 numbers of BAUTs as agreed; it now stated that it required only 48 numbers of BAUTs. It called upon the respondent to accept the offer for supply of the reduced quantity of 48 numbers of BAUTs, however, the respondent did not agree to the novation of the Agreement. The Arbitral Tribunal also noted that the petitioner issued a communication to the CQAE informing it that the delivery period had not been fixed due to administrative reasons and advising it not to initiate any fresh inspection without further information.

47. Although, negotiations were held between the parties for reducing the quantity of BAUTs to 180, the said negotiations also did not fructify. The respondent confirmed by a communication dated 26.12.2011 that it was willing to supply 180 numbers of BAUTs *albeit* subject to certain conditions. However, the Agreement between the parties was not amended.

48. The Arbitral Tribunal also found that the petitioner had not terminated the Agreement and therefore, the same could be treated as subsisting.

49. Undisputedly, in view of the above, the respondent was entitled to be compensated for breach of the Agreement by the petitioner.

50. The question as to quantification of the said damages is a contentious one.

51. Mr Batra had also contended that the petitioner has not raised any specific ground regarding quantification of claims and therefore, the learned counsel for the petitioner is precluded from raising any grievance in this regard. The said contention is unpersuasive as the petitioner has challenged the award in its entirety and the contentions advanced cannot be stated to be beyond the rubric of the grounds as raised in the present petition.

Re: Claim for loss of profits (Claim No.1)

52. The Arbitral Tribunal accepted that the respondent was entitled to loss of profits that it would have earned on supplying 288 numbers of BAUTs along with OBMs. The total consideration for the same was agreed at ₹16,87,79,520/-. The Arbitral Tribunal accepted that the Gross Profit Margin on the said supply was 37.47% as computed by the Surveyor (CW-2) appointed by the respondent, in its report. The Gross Profit Margin calculated on the aforesaid basis would work out to ₹6,08,09,314/-. The said margin was reduced in respect of certain expenses included in the valuation of stocks. Accordingly, CW-2 computed the loss of profits at ₹4,66,62,518/- and the Arbitral Tribunal accepted the same.

53. The report submitted by CW-2 indicates that it had included salaries and wages as part of the fixed costs and thus, included the same as part of the Gross Profit Margin. In fact, a closer examination of the

report indicates that it has not calculated the profit but the revenue contribution for 288 numbers of BAUTs. The contribution being profits plus fixed expenses. The assumption that salaries and wages are part of the fixed costs is, *ex facie,* erroneous.

54. The report (which is the sole basis on which the aforesaid profit margin has been computed) indicates that CW-2 had computed the fixed expenses for the year 2010-11 at ₹5,75,72,465/- and the fixed expenses for the year 2011-12 at ₹5,11,32,848/-. The said fixed expenses included a sum of ₹2,79,03,670/- and ₹2,00,35,432/- as salary and wages incurred during the respective years. The assumption that salaries and wages would remain fixed and would not vary with the quantum of work being executed is, *ex facie,* erroneous. This is also apparent as there has been a substantial decrease in salary and wages during the year 2011-12 as compared to the year 2010-11 (that is, from ₹2,79,03,670/- to ₹2,00,35,432/-). However, by considering salary and wages as fixed expenses, CW-2 has included the same in the Gross Profit Margin. Thus, significantly increasing the same.

55. The learned counsel appearing for the petitioner contended that the calculation of the profit had to be based on the audited financial statements for the years 2010-11 and 2011-12. The said contention was rejected by the Arbitral Tribunal by observing that the gross profit ratio based on that audited financial statements would be higher at 46.27%. This is evident from paragraph 37 of the impugned award, which is set out below:

> "37. Ld. Counsel for the Respondent has urged that calculation of gross profit should be based on the audited financial statements and not based on the bills and costs specific to the project in question. The audited average gross profit of the Claimant for the year2010-11 and 2011-12 i.e. the years before the impact of losses, due to delay in Respondent amending delivery period were felt in the reducing annual turnover profits of the Claimant. If the method as suggested by the Counsel for the Respondent is accepted, the gross profit ratio would be 46.27%. Claim on account of gross profit accordingly would be much more then what the Claimant has claimed."

56. However, the audited financial statements were not produced by the respondent. A copy of the profit and loss accounts for the year ended 31.03.2011 is appended to the report submitted by CW-2 (Surveyor appointed by the respondent). The same indicates that the total revenue for the year ended 31.03.2011 was ₹19,66,37,274.91/- and the total expenses incurred during the said year reflected at ₹17,65,31,302.56/-. Profit before tax for the said year reflected at ₹2,01,05,972.35/-. Thus, the profit before tax as reflected is 10.22% of the total revenues.

57. Although, the Arbitral Tribunal has observed that the profit margin based on the audited accounts for the relevant years would be

higher and therefore, rejected the claim of the petitioner, however, there is no material (except the statement made in the report of CW-2) to substantiate the same. The Arbitral Tribunal has also not indicated any calculation in support of the said conclusion.

58. The scope of examination under Section 34 of the A&C Act is limited to examining whether the impugned award falls foul of any of the grounds as set out under Section 34 of the A&C Act. This Court has briefly examined the dispute regarding computation of the loss of profits and the same indicates that there are contentious issues in regard to computations that require to be addressed but the same have been overlooked. The Arbitral Tribunal merely proceeded on the report submitted by CW-2 without any further examination. As stated above, the said report is based on assumptions that are, *ex facie*, erroneous.

Re: Claim for cost of inventory (Claim No.2)

59. The Arbitral Tribunal awarded a sum of ₹4,53,31,048/- on account of cost of inventory as well as ₹76,49,775/- as storage costs. The said award is also based entirely on the report submitted by CW-2. More importantly, there is an assumption that the entire inventory is of no value. The certificate issued by the Chartered Accountant annexed to CW-2's report indicates the value of total inventory as ₹4,53,31,048.82/-. The tabular statement indicating the value of inventory as certified by the auditor is reproduced below:

"DESCRIPTION	Qty.	Unit	RATE	Amount
1. Raw Material / Outboard Motors				
55 HP Mercury OBM	1	nos	187393.0	187393.00
50 HP Yamaha OBM	2	nos	214216.0	428432.00
Al. Bar Rods	1003	Kg	199.5	200088.47
Aluminium Blind Rivets, Imported item	150000	nos	0.20	30000.00
Engine Spares / OBM Spares required as per Contract			942103.0	942103.00
		(a)		**1788016.47**
2. Work IN PROCESS				
Boat Components, Cut sheet and misc. Items (Raw Material Coast-4,55,301/-+ Processing Cost – 3,06,812/-)				762112.35
		(b)		**762112.35**
3. Finished / Semi Finished Boats				
Aluminium Bat inspected and approved for Final Trials with 55HP Mercury OBM	40	nos	507150.0	20286000.00
Aluminium Baut Ready for stage inspection with 55HP Mercury OBM Un Painted	39	nos	495880.0	19339320.00
Aluminium Boat Under Process with 55HP Mercury OBM	7	nos	263527.0	1844689.00
55 HP Mercury OBM	7	nos	187273.0	1310911.00
				42780920.0
GRAND TOTAL		**(a+b+c)**		**4,53,31,048.82**
In words: Four Crores Fifty Three Lacs Thirty One Thousand Forty Eight and Eighty Two Paisa Only"				

60. A plain reading of the aforesaid tabular statement indicates that the value of raw material includes 3 numbers of OBM and 1003 Kgs of aluminum bar rods. Clearly, this material cannot be without any value. Similarly, the inventory also included 79 numbers of finished / semi-finished BAUTs. It is difficult to accept that this would be of insignificant value. According to the respondent, the BAUTS had been stored and maintained. The Arbitral Tribunal has awarded both the storage charges as well as maintenance charges; yet the impugned

award rests on the assumption that the inventory including finished BAUTs are of no realizable value.

61. It is also important to note that in terms of the certificate issued by the auditor of the respondent, this was the only stock available with the respondent as on 22.12.2014. Although, the respondent had claimed that it had 87 completed BAUTs and further BAUTs were work in process, the said certificate does not support the said view. It indicates 79 numbers of BAUTS (40 plus 39) in finished condition and 7 numbers of BAUTS with OBMs in semi-finished condition. The certificate indicates that the total stock available with the respondent includes raw material as well as finished BAUTs.

62. The Arbitral Tribunal awarded the entire value of the inventory without making any provision for the realizable value of the said inventory. Mr Batra contended that the same have no sales value. This contention is without any material and is clearly unsustainable. It is not possible to accept that the commodities such as aluminum bar rods as well as outboard motors would have no value at all. Thus, awarding the cost of entire inventory by overlooking its salvage value and not directing its transfer to the petitioner, is manifestly erroneous.

Re: Cost of Storage (Claim No. 3)

63. The Arbitral Tribunal awarded a sum of ₹76,49,775/- as costs of storage of inventory solely on the report of CW-2. It calculated the cost of storing inventory at the rate of ₹1,75,000/- per month for the period October, 2011 to September, 2012 and thereafter, with an annual

escalation of 10%. It is relevant to note that the said calculation of ₹1,56,135/- is based on rent purportedly paid by the respondent for another premises from August, 2011 to September, 2012; security charges for the said period; and, electricity charges. The same was certified by the Chartered Accountant as aggregating to ₹20,29,755/-. Thus, CW-2 had computed the average rate per month to ₹1,56,135/-. He had thereafter, added ₹20,000/- per month over and above the same as administrative costs. It is important to note that the respondent had not produced any evidence as to the costs of storage after September, 2012. Admittedly, the respondent had surrendered the leased premises on the ground that the cost of storage was *"quite exorbitant"*. Notwithstanding the same, CW-2 had added annual escalation of 10% over that amount for the further period of twenty-seven months to arrive at the figure of ₹76,49,775/-. Paragraphs 10.04, 10.05 and 10.06 of the said report, which were accepted by the Arbitral Tribunal, are relevant and set out below:

> "10.04 Since the execution of order was taking time and cost of storage was quite exorbitant, they decided to shift the material to their existing factory. They made some alteration at the existing premises for storage of materials. It occupied most of their existing space arid affected their existing operations to some extent.
>
> 10.05 The Company claimed the storage costs from October 2012 onward as well at cost similar to the actual paid during the period Aug.2011 to September 2012 with escalation of 10% per annum.

10.06 Thus claim for storage cost is worked out as under:

-

Particulars	No. of Months	Cost per month	Amount (Rs.)
October 2011 to September 2012	12	175000	21,00,000
October 2012 to September, 2013	12	192500	23,10,000
October 2013 to September 2014	12	211750	25,41,000
October 2014 to December 2014	3	232925	6,98,775
Total			76,49,775

(Rupees Seventy Six Lakhs Forty Nine Thousand Seven Hundred & Seventy Five Only)

Remark

i) Although additional storage were taken on rent from August 2011 but we considered the same from October 2011 onward because upto 25.11.2011 the purchaser can take the deliveries and till that date the company was supposed to incur the storage costs."

64. It is, at once, clear from the above that the assessment of ₹76,49,755/- is, *ex facie,* erroneous. After having concluded that the material had been shifted to the existing factory on account of exorbitant cost of storage, it would be manifestly erroneous to enhance that cost by an annual escalation of 10% rather than account for reduction in storage cost. There is no discussion in the impugned award in this regard. The Arbitral Tribunal has simply accepted the said computation.

Re Claim for manpower costs (Claim No. 6)

65. The Arbitral Tribunal also awarded a sum of ₹29,96,839/- as manpower costs incurred by the respondent after September, 2011 till January, 2013. This was based on a premise that the parties had agreed to modify the Agreement and the respondent had to hire additional resources and keep them in a state of readiness. It was contended on behalf of the petitioner that the respondent was, obviously, not in the state of readiness as one of the conditions requested by the respondent for supplying of 180 numbers of BAUTs was a period of three months to remobilize. This contention has not been addressed by the Arbitral Tribunal. The award is based solely on the basis of the report submitted by the Surveyor appointed by the respondent (CW 2).

Re: Claim for maintenance charges (Claim No. 7)

66. The Arbitral Tribunal also awarded a sum of ₹6,42,500/- for maintenance of the BAUTs manufactured and OBMs procured by the respondent. According to the respondent, it was not only required to be paid for the storage charges for the inventory but also the costs for maintaining the same. The respondent claimed that it incurred a cost of ₹7,385/- for each BAUT with OBM for the period August, 2011 till January, 2015. Admittedly, there was no material to establish that the respondent had incurred such maintenance costs. However, the Arbitral Tribunal held that the cost was nominal as it worked out to barely ₹175/- per month per BAUT and therefore, accepted the same. An award which is based on no evidence or material is liable to set aside.

67. It is, thus, seen that the Arbitral Tribunal had awarded the entire costs of the inventory, which included BAUTs that were ready for delivery along with OBMs; the profit that the respondent could have earned on the same; the storage surcharges for the same; and the cost of their maintenance. However, the impugned award does not contain any provisions for delivery of the material and BAUTs, the costs of which have been fully awarded to the respondent, in addition to further damages. In this context, this Court finds that the award of damages (maintenance cost without any evidence) is manifestly erroneous and cannot be sustained.

Re: Claim for loss of business opportunity; loss of goodwill and reputation; and damages for mental trauma (Claim Nos. 8, 9 and 10)

68. The respondent had also raised claims for certain other damages. It claimed an amount of ₹19,10,65,751.08/- towards loss of business opportunity (Claim No.8); ₹5 crores towards loss of goodwill and reputation (Claim No.9); and ₹5 crores towards loss of time, directors stress and Trauma (Claim No.10). The Arbitral Tribunal clubbed these claims and awarded a consolidated sum of ₹8 crores.

69. The respondent claimed that various acts of omission and commission committed by the petitioner and its failure to act on its assurances and perform contractual obligations financially strangulated the respondent's business by blocking all its working capital. This had, in addition, gravely effected its goodwill and reputation. The respondent claimed that since its entire working capital had been blocked, it was

unable to perform its obligations towards its other customers resulting in a negative goodwill. It submitted that it had to keep alive its Bank Guarantee and therefore, could not participate in further tenders. The respondent also held the petitioner responsible for down gradation of its credit rating resulting in an increase in finance costs.

70. The respondent claimed that it had secured two orders from IHQ Ministry of Defence (Navy) for landing craft vehicles (four in number) and landing craft assault vehicles (five in number) but it could not service the same for various reasons. Primarily because its working capital funds had been blocked. Further, the inventory of 86 numbers of BAUTs, 87 numbers of OBMs and raw material stored at its approved manufacturing facility left insufficient space for execution of the said orders. The respondent claimed that in addition to the aforesaid orders, there were orders from the Orissa State Disaster Mitigation Authority, Corbett Tiger Reserve, Uttarakhand and DIG Police, Andaman & Nicobar Islands, Port Blair for boats. However, execution of those orders had been delayed for the aforesaid reasons. In addition, the respondent claimed that it had, in anticipation of realizing the monies from the order, committed to an expansion project by entering into an agreement with Ashok Leyland for manufacturing of fishing boats and commissioned a new facility at Karwar, Karnataka. But, since its funds had been blocked in the Agreement in question, it had to wind up that business as well. On the basis of the aforesaid submissions, it claimed a sum of ₹19,10,65,751/- as losses towards business opportunity;

₹5,00,00,000/- as loss of goodwill and reputation; and, ₹5,00,00,000/- as towards loss of time, director stress and trauma.

71. The Arbitral Tribunal examined all the contracts as mentioned by the respondent. Although, the Arbitral Tribunal has not specifically noted that a default in performance of any other contract entered into by the respondent was directly on account of failure on the part of the petitioner to comply with his obligations under the Agreement in question, the Arbitral Tribunal accepted that the business of the respondent was adversely effected as its working capital and its funds had been blocked in execution of the Agreement. Insofar as the loss of goodwill and reputation is concerned, the Arbitral Tribunal held that there was no evidence on record and the same was not *'sustainable'*. However, the Arbitral Tribunal awarded a consolidated sum of ₹8 crores against Claim Nos. 8, 9 and 10 raised by the respondent.

72. This Court finds it difficult to sustain the award of the said sums for various reasons. First, there is no basis for entering an award of damages on account of blocking of any funds considering that the Arbitral Tribunal has also awarded interests from the date on which the awarded amounts became due and payable. The Arbitral Tribunal's award of ₹8 crores as damages fails both on account of proximity and measure. The causes of damages are remote and there is no substance in quantifying the said damages. The said award is vitiated by patent illegality. Award of damages arbitrarily and without any basis also falls foul of the public policy of India.

Re: Award of Interest and costs

73. The Arbitral Tribunal also awarded interest at the rate of 18% per annum on all the awarded amounts including loss of profits; cost of inventories; costs for storage of inventories; loss of business opportunity; goodwill; reputation and stress. The Arbitral Tribunal has further included pre-award interest as a part of the award and awarded pre-reference *pendente lite* and future interest at the rate of 18% per annum on the awarded amounts.

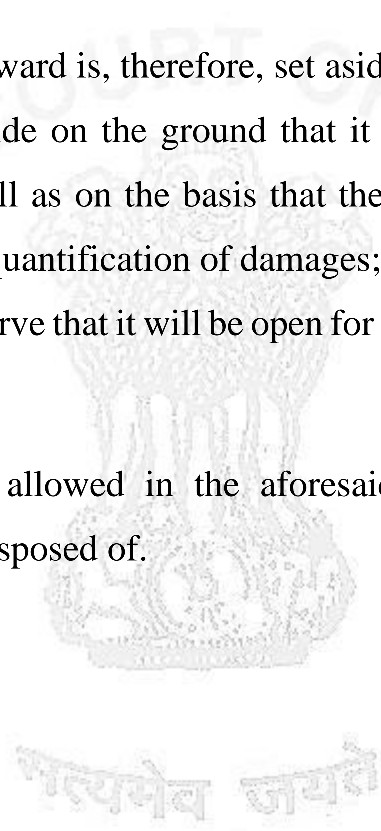
74. In addition, the Arbitral Tribunal also awarded costs quantified at ₹8 lakhs.

75. Undeniably, the Arbitral Tribunal has a wide discretion in awarding interest and although the interest, as awarded, appears to be on a higher side, the same would not warrant any interference by this Court.

76. The net result of the award is that the respondent would be entitled to receive a sum of ₹18,32,22,680/- along with costs quantified at ₹8 lakhs with pre-reference interest and *pendente lite* interest at the rate of 18% per annum. In addition, the respondent was also awarded future interest at the rate of 18% per annum. The total amount that was thus, awarded is in excess of ₹50 crores. This is against an order for purchase of BAUTs for an aggregate value of ₹16,87,79,520/-. Although, the respondent was awarded complete costs of the inventory along with interest and further costs purportedly incurred therewith,

there is no mention in the award for delivery of the manufactured BAUTs to the petitioner.

77. As noted at the outset, the impugned award was rendered after an inordinate and unexplained delay. Further, considering the impugned award on merits, this Court is of the view that the same is vitiated by patent illegality and in conflict with the public policy of India.



78. The impugned award is, therefore, set aside. Since the impugned award has been set aside on the ground that it was rendered after an inordinate delay as well as on the basis that the Arbitral Tribunal has erred in accepting the quantification of damages; this Court considers it apposite to further observe that it will be open for the parties to re-agitate the disputes afresh.

79. The petition is allowed in the aforesaid terms. All pending applications are also disposed of.

VIBHU BAKHRU, J

MAY 4, 2022
'gsr'pkv

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