

F-17

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ O.M.P. 91/2001

M.M.T.C. LTD. Petitioner/Objector
Through: Mr. Sanjeev Puri, Senior Advocate.
with Mr. Rohit Puri, Advocate.
versus

G. PREMJEE TRADING P. LTD. Respondent
Through: Mr. Rajiv Bakshi, Advocate.

% Date of Decision : March 03, 2010

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. To be referred to the Reporter or not? | No |
| 3. Whether the judgment should be reported in the Digest? | No |

J U D G M E N T

MANMOHAN, J (ORAL)

1. Present objection petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act, 1996) challenging the majority Arbitral Award dated 18th January, 2001, insofar as it rejects petitioner-objector's claim for USD 1,17,500 with regard to Contract No.15.

2. The facts relevant for this case are that petitioner-objector entered into various purchase contracts with respondent whereunder respondent was to supply various quantities of Urea. However, dispute in the present petition relates to Contract No.15 dated 07th June, 1994 for supply of 55,000 MTs ($\pm$ 10%) of Urea @ US\$ 143.50 per metric ton.

In August, 1994, the quantity to be supplied under Contract No.15 was amended to 45,000 – 55,000 MTs ($\pm$ 5%) of Urea @ US \$ 149 per metric ton.

3. In December, 1994, respondent supplied 22,976.45 metric tons towards Contract No.15. On 30th December, 1994, respondent loaded 25,259.596 metric tons of Urea on vessel MV Mike – K towards Contract No.15 which sailed from Constanza, Romania.

4. On 23rd January, 1995, just one day prior to vessel arriving in India, respondent wrote to petitioner-objector stating that out of the loaded cargo, 17,523.55 MTs (being alleged minimum quantity) be treated as full and final supply under Contract No.15 and the balance quantity i.e. 7,735.09 metric tons be adjusted towards Contract No.99 @ US\$ 201 per metric ton. It is pertinent to mention that Contract No.99 dated 30th November, 1994 was for supply of 20,000 metric tons ($\pm$ 5%) of Urea @ US\$ 201 per metric ton. The relevant portion of respondent's letter dated 23rd January, 1995 is reproduced hereinbelow:

“.....we would like to convey to you that the quantity load on board the vessel is 25,259.56 M.T. and as per the contract we have to supply minimum of 17523.55 M.T. at US \$149 P.M.T. to fulfill our obligation under contract No. 15 and the balance of 7,736.046 MT is to be considered as the part execution of contract No. 99 at US \$ 201 P.M.T.

We have already clarified the same to you vide our letter No. 1115/VNK dated 17.1.95 and subsequent reminder vide letter No. 333/VNK dated 18.1.95.

Kindly confirm by return fax that you are accepting 17,523.45 MT at US \$ 149 PMT against Contract No. 15 as full and final execution of the contract and balance 7,736.046 MT at US \$ 201 PMT as part execution of contract No. 99”

(emphasis supplied)

5. Petitioner-objector replied to the aforesaid letter vide its fax dated 23rd January, 1995, which reads as under:

“VSL MIKE-K sailed with 25,259.596 MT urea from Constanza on 20.12.94. Department of Fertilizer has nominated discharge port as Vizag. Quantity of VSL MIKE-K will be adjusted as under:

<i>Contract No. & date</i>	<i>Qty.</i>	<i>Price PMT</i>
<i><u>1. MMTC/94-95/FZ (U)</u></i>	<i><u>17,523.500</u></i>	<i><u>US\$ 149.00</u></i>
<i><u>/15 dated 7.6.94</u></i>		<i><u>C&F.FO</u></i>
<i><u>2. MMTC/94-95/FZ(U)</u></i>	<i><u>7,736.096</u></i>	<i><u>US\$ 201.00</u></i>
<i><u>/99 dated 30.11.94</u></i>		<i><u>C&F. FO</u></i>

Request to prepare B/L as mentioned above and draw invoice accordingly. Please send original shipping documents immediately to MMTC for payment and onward transmission to DOF. Regards.

(emphasis supplied)

6. On 24th April, 1995, petitioner-objector informed the respondent that though bifurcation of Urea on vessel MV Mike - K had been approved, there was a shortfall of 4500 metric tons of Urea under Contract No.15 and a further shortfall of 1482.645 metric tons of Urea under contract No.99. The relevant portion of the said letter reads as under:

“The competent authority has approved the settlement of supply of Urea against vessel Mike-K on the following basis :

MMTC shall pay only for quantity of 7,736.09 MT @ US \$ 201.00 PMT C&F FO. This quantity shall be taken towards adjustment of contract No. MMTC/94-95/FZ(U)/99 dated 30.11.94.

The above quantity shall be taken towards adjustment of the balance quantity remaining to be performed in contract No. 99. This contract was for 20000 MTs $\pm$ 5% (shipping tolerance). Against this contract M/s G. Premjee supplied

through Vessel DARIN- NAREE quantity of 10781.265 MTs. Out of the balance quantity for performance is 9218.735 MTs, after adjusting the quantity of 7736.09 MTs, there is a shortfall of 1482.645 MTs towards full and final performance of the contract.

Under the circumstances, we request you to supply the balance latest by 31st July 1995 failing which we will be constrained to invoke the contractual provisions relating to short-fall/non-supply of the contracted quantity. In addition, G. Premjee needs to fulfill the original contract No. 15 with the quantity duly amended to 45000-55000 MTs + 5% (shipping tolerance). It has been agreed to take minimum quantity of the range that is to say 45000 MTs for the purpose of contract performance. By reckoning the above minimum quantity of 45000 MTs and reducing the actual performance of 40500 MTs (22,976.45 + 17,524) done by G. Premjee, shortfall still to be performed equals to 4500 MTs. You are kindly required to make good the shortfall as soon as possible but not later than 31st July 1995.

Please note that in respect of the shortfall in the above referred contracts of 1482.645 MTs under contract No. 99 and 4500 MTs under contract No. 15, in case of failure to supply the said quantities by 31st July 1995, you are liable to compensate MMTC under the risk purchase clause of our standard purchase contract. Accordingly, the differential of the price between the above two contracts respectively and MMTC's recent purchase price of US \$ 245 PMT. CNFFO shall be the basis for the calculation of the total amount. Under contract No. 99 you have to compensate us at a differential rate of \$ 44 PMT for the quantity 1482.645 MTs and under contract No. 15 at \$ 96 PMT for quantity of 4500 MTs.

We propose the above towards full and final settlement of the above contracts without prejudice to our rights provided in the contract. You may kindly inform us the remittance channel and the bank account through which we can arrange the above remittance "immediately".

(emphasis supplied)

7. On 26th April, 1995, petitioner-objector once again called upon respondent to supply the shortfall of 4500 metric tons of Urea and 1482.645 metric tons of Urea under Contracts No. 15 and 99, respectively. The relevant portion of letter dated 26th April, 1995, reads as under:

“3. Our letter dated 23.1.1995 informing you to claim 17,523.5 MT under Contract No. 15 and 7,736.09 MT under Contract No. 99 is for the purpose of payment of shipment per M V MIKE-K only and to suit our sale/discharge requirements with the separate shipping documents for the said quantities and such split up of quantities in Shipping documents of one Vessel can not be interpreted to mean that the balance left over Contracted quantity need not be supplied. Therefore, we can not at all appreciate your contention in this regard. We have never informed you that with the solid (sic) split up of the quantities per MIKE-K, the contract No. 15 to be (sic) completed.”

(emphasis supplied)

8. On 05th May, 1995, petitioner-objector sent another fax to respondent which reads as under:-

“Sub: PAYMENT FOR 7736.09 MT UREA PER MV MIKE-K..... We wish to inform you that competent authority has approved the following :

- 1. Pyament at US \$201 PMT for a quantity of 7736.09 MT per the subject vessel.*
- 2. You have to supply balance quantity of 1482.645 MT at US \$ 201 under the contract No. 99 and this supply should be completed before end of May 1995;*
- 3. We are not agreeable to recognize and/or pay any interest indicated in your various communications in respect of settlement of Mike-K invoices.*

This adjustment is full and final settlement of the subject case and no further claims of any nature related to contract No. 15 and/or contract No. 99 shall be entertained by us.”

(emphasis supplied)

9. On 08th September, 1995, petitioner-objector wrote to respondent disputing the fact that supply of 40500 metric tons of Urea constituted full execution of Contract No.15. In the said letter, petitioner-objector alleged that it had suffered substantial losses on account of shortfall of

supply of Urea under Contracts No. 15 and 99. The said letter reads as under:-

“Reg: Contract No. 15:

“The Contracted quantity was 45,000-55,000 MT, $\pm 5\%$ shipping tolerance, bulk urea stop. You had supplied Urea against the above contract in two lots:

<i>MV DARIN N</i>	<i>22,976.450 MT</i>
<i>MV MIKE-K</i>	<i>17,523.550 MT</i>
	<i>-----</i>
	<i>40,500.000 MT</i>
	<i>-----</i>

VSL MIKE-K brought a total quantity of 25,259.596 MT and the quantity was bifurcated 17,523.550 MT against contract No. 15 and balance quantity of 7736.046 MT against contract No. 99 STOP. The basis for bifurcation of the quantities are not correct STOP Department of Fertilizers, Govt. of India, did not agree with this contention.

In terms of the contract, the minimum quantity of urea to be supplied is 45000 MT $\pm 5\%$ shipping tolerance stop. This shipping tolerance is to be exercised by the captain of the VSL on the basis of loading capacity of the VSL STOP. In case of MIKE-K the loading capacity is not restricted to 17523.50 MT and as such the shipping tolerance has not been exercised as the Vessel contained a total quantity of 25,259.546 MT and bifurcating the quantity against two different contracts is against the contracted obligation.

The Department of Fertilizers had taken the contention that since the VSL contained higher quantity, they had the right to exercise the option of limiting the quantity under the contract No. 15 to 47250 MT (i.e. 45000 + 2250 being 5 percent tolerance). STOP In fact they intended to adjust the entire quantity against contract No. 15 but were persuaded to restrict the quantity as above.

Your contention that the contract has been fully executed with supply of 40500 MT by exercising the tolerance limits is, therefore, not tenable STOP Department of Fertilizers has accordingly made the adjustments from the amount payable to MMTC STOP MMTC had suffered substantial loss on this account and the details were explained to Mr. Navrattan Mittal, your Regional Manager STOP MMTC is therefore, fully justified invocation of the said PG.”

(emphasis supplied)

10. As the petitioner-objector invoked the performance guarantees furnished by the respondent, respondent invoked the disputes resolution mechanism in the contracts namely, the Arbitration clauses.

11. On 21st April, 1998, this Court appointed Mr. Justice (Retd.) Rajinder Sachar and Mr. Justice (Retd.) S.S. Chadha as the Arbitrators to adjudicate upon the claims and counter claims arising out of the purchase contracts. The two Arbitrators appointed Mr. Justice S. Ranganathan, a retired Supreme Court Judge, as the Presiding Arbitrator.

12. On 18th January, 2001, the Arbitral Tribunal passed a majority Award in favour of respondent. The relevant portion of the majority Arbitral Award reads as under:-

“25. Oral evidence was also given on behalf of Premjee that, at the time of discussion preceding the amendment in August 1994, no variation in the tolerance limit from 5% to 10% was discussed and hence the letter of 8.8.94. On behalf of the MMTC it is suggested that this letter was only a request for amending the tolerance from 5% to 10%, a request that has not been accepted by the MMTC. It was an after thought following on the letters of 17.1.95 and 18.1.95, as, it is said, the MMTC’s records show it as having been received only on 20.1.95. On this issue, the correct position is not clear. On the one hand, the original contract had provided for a $\pm 10\%$ tolerance and the insertion of the figures $\pm 5\%$ could be a slip or mistake but Premjee does not specifically say so. On the other hand, as pointed out for MMTC, the original contract was for 55000 MT and it is equally possible that while reducing the quantity to be supplied, the tolerance margin was also agreed to be reduced. On the part of Premjee, there is the evidence of Shri Mittal that the tolerance level was not agreed to be changed and that the letter of 8.8.94 was delivered by him personally, as a covering letter to the amendment, to Shri Jaiswal. There has been no cross examination of Shri Mittal on this. On the other hand, MMTC has led no oral evidence but produced, at a later stage, a photocopy of the letter said to have been received and

endorsed by Shri I.S. Khanna and Premjee has had no opportunity to cross-examine that officer. The only witness for MMTC was an officer who had no personal knowledge of the transactions and could speak only from the record. It is however, unnecessary to pursue this, for if the tolerance level had not been intended to be changed in the discussions between the parties for amendment as suggested, Premjee would and should have declined to sign the amendment in the form proposed. Its mere unilateral reservation, while appending its signature to the written amendment, cannot have the effect of modifying the terms of the written amendment signed by both the parties, particularly in view of clause XXIV of the contract. This aspect of the claim Premjee has therefore to fail.

26. *The second, and more substantial, answer of Premjee to MMTC's claim is that a variation of the contract to the above effect has been accepted by MMTC by its fax dated 23.1.95 by which MMTC has accepted the delivery of 40500 MTs on DARIN-N and MIKE-K as constituting full performance of Contract No. 15. In support of this contention, Premjee relies on the fax sent by MMTC in response to the requests made in Premjee's letter of 17, 18 and 23 January 1995 to accept 40500 MT in fulfillment of the obligations under contract No. 15. On the other hand, the plea of MMTC is that Premjee's request consisted of two parts – one, that payment for the cargo on MIKE-K be made on a bifurcated basis and two, that supply of 40500 tons be considered to be full discharge of contract No. 15. By its fax of 23.1.95, MMTC, it is claimed, only accepted the first part of the request viz. the bifurcation of the cargo on board MIKE-K as between contract No. 15 and 99 but that the fax of 23.1.95 does not specifically deal with, or spell out any acceptance of, the second part of the request to treat contract No. 15 as fulfilled or discharged with the supply of 40500 MT. To appreciate the factual basis for these contentions it is necessary to refer to certain further correspondence that ensued between the parties.*

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33. *Looking in isolation at, and on a cursory reading of, the two letters dated 23.1.1995, one of Premjee and one of MMTC, MMTC's plea that Premjee had made two requests, only, one of which MMTC accepted and that the silence of the MMTC in regard to the other cannot be taken as its acceptance may seem plausible. It is argued that, in the absence of a clear and positive written acceptance of the second request, MMTC cannot be held to have agreed to accept 40,500 MTs as full discharge of Contract No. 15, particularly in view of the failure of Premjee to establish its plea that Contract No. 15 had been amended to provide a 10% latitude so as render the supply of 40,500 MT adequate to fulfill the contract.*

34. On the other hand, attention is drawn by Premjee to several circumstances and pieces of correspondence to show that MMTC had in fact accepted the consignments aggregating to 40500 tons on DARIN-N and MIKE-K in full discharge of Contract No. 15 and that the plea that further quantities remained to be supplied thereunder is an after thought, perhaps because of a contrary view taken by the D.O.F. We have considered carefully the entire correspondence and evidence. We have come to the conclusion that the following circumstances fully support of the contention of Premjee:

(a) A comparison of three contracts entered into between Premjee and MMTC and referred to in the above correspondence discloses a very significant trend. The prices agreed upon in contract No. 15 were USD 143.50 PMT on 7.6.94 and USD 149 per MT in the amendment of 8.8.94; they went upto USD 201 per MT in the contract of 30.11.94 and USD 245 per MT under Contract No. 6 of 21.3.95. In other words, it was a rising market and it is also clear that suppliers had difficulties in securing and making adequate supplies. In these circumstances it was that Premjee, having performed a substantial part of contract No. 15 sent the letters of 17,18 and 23.1.1995. These letters did not contain two separate requests as alleged by MMTC. It was a single consolidated request to accept 40,500 tons in full discharge of Contract No. 15 and so to permit the balance of the cargo on MIKE-K to be apportioned to contract No. 99. The separate basis of payment asked for was not an independent request but an immediate and direct consequence of the above plea. It was not, and could not have been, the intention of Premjee to supply the residuary balance in contract No. 15 at USD 149 out of goods which had to be purchased necessarily at higher prices, on a later date. Nor was there any basis or justification for MMTC to accept the division of payment without necessarily accepting the basic request of discharge of contract No. 15. For if, according to MMTC, the quantity to be supplied under contract No. 15 originally was to be adhered to and Premjee had to supply 45000 or 42750 MT (or indeed, 47250 MT as is said to have been the stand of DOF), it would not and should not have agreed to be bifurcation as proposed. It would have taken and paid for the entire cargo on MIKE-K at 149 USD PMT or directed a different basis of bifurcation and specifically restricted its liability to pay at 201 USD PMT to a smaller extent.

(b) It is said that Premjee had anyhow to supply cargo at 201 USD per MT under contract No. 99 and that this bifurcation of prices did not prejudicially affect MMTC and was merely intended as a concession to Premjee. This contention does not ring true. No business organization like the MMTC could have agreed to pay at 201 USD PMT for a

part of the cargo which it was entitled to receive at 149 USD PMT particularly in the state of the market that prevailed. No doubt a concession was shown to Premjee but, on a reasonable construction of the letters of 23.1.95, it seems to us that the concession made was not that, though Premjee had still to supply goods under contract No. 15, it would be paid at 201 USD PMT for a part of the cargo on MIKE-K with a liability to supply an unspecified balance later at 149 USD PMT. It was, we think, an acceptance of the request of Premjee that contract No. 15 be varied to accept a tolerance of 10% and to accept 17,523.55 tons on MIKE-K in full discharge of that contract, the balance being appropriated to contract No. 99. It is only such acceptance that can explain the permitted bifurcation of quantity. Shri J.S. Kuberi, Senior Manager, is duly authorized to act on behalf of the MMTC. He is the officer who has signed the original contract dated 17.06.1994 and it is he who has signed the letter dated 23.01.95. If it had been intended to preserve MMTC's rights and Premjee's obligations for further supplies under that contract, MMTC would and should have made it expressly clear and failure to do this is very significant particularly when Premjee had asserted its request in three letters.

(c) It is significant that MMTC did not reply to any of Premjee's letters rejecting Premjee's request that 40500 MT be accepted as the quantity to be supplied under contract No. 15. It is true that MMTC was not bound to reply to an incorrect claim of Premjee but since Premji's claim for bifurcation was based on this request or claim and it is said that MMTC accepted the bifurcation but not the claim, it had a duty to clarify the position in its response. It is certainly reasonable to infer that it was because the basic request was accepted that the bifurcation was allowed without any reservation. It will be appreciated that, before sending response to Premjee's letter of 23.1.1995, MMTC had to apply its mind to the plea of Premjee that it should be taken as having discharged contract No. 15 in full by the delivery of the part of the cargo on MIKE-K. It could not have remained indifferent to or silent on that request as is now alleged. According to MMTC, Premji's letter of 8.8.94 had been delivered to it only on 20.1.95. The recipient, Shri I.S. Khanna, clearly understood it as a plea to accept a tolerance of 10% which was not what the contract provided for. If so, at least at that stage, a denial of the request should have been issued. In this situation and considering that there was a single comprehensive request made by Premjee which had two consequences and that the fax of 23.1.1995 was in direct response to Premjee's letters explaining the basis of the bifurcation, we are of the view that the two letters of 23.1.1995 together constitute a written agreement between the parties modifying the terms of contract No.15 to accept supply of 40500 MT in full discharge and that MMTC cannot demand

further supplies under the contract or seek to recover any portion of the moneys paid in respect of the goods on MIKE-K.

(d) Even as per MMTC, there had been a clear cut concession on its part to pay 201 USD PMT for 7736.04 MT on MIKE-K (though Premjee was not entitled to it) and this should have been paid immediately on the production of the bills on 28.1.95. It has not been explained why this undisputed payment was not made despite repeated requests. The only possible explanation is that second thoughts had surfaced regarding the correctness or wisdom of the decision taken on 23.1.1995.

(e) It will be seen that by 23.1.1995, the time for delivery under contract No.15 had already expired. So, one would have expected MMTC at once to write to Premjee and indicate the quantity remaining due under that contract and also stipulating a time for its delivery. This was not done till very much later. The reason for this is also obvious. First, it accepted Premjee's request to bifurcate the cargo on MIKE-K into two portions one allocable to Contract No.15 and the other to contract No.99. This has been the root cause of all the controversy in the present case. In the letters of April 1995 its case was that 7736.49 MTs on MIKE-K having been appropriated to contract No.99, it will be paid for at the rate of 201 USD PMT but that, since this meant that only 17523.500 MT had been supplied against Contract No.15, there was a deficit supply of 4500 MT which should be made good by 31.7.1995. From the letter dated 8.9.95, it is seen that it was the DOF that was not prepared to accept Premjee's contention and that it had been claiming a deficiency of 4750 MT in contract No.15 which it has been "persuaded" to restrict to 4500 MT. Also, according to the letter of 26.4.95 the short supply of 4500 tons would have to be compensated at the rate of US \$ 96 PMT (245-149). In the statement of claim, however, a concession was made that the quantity to be supplied under the contract would be treated as 42750 MT and the deficit supply only as 2250 MT. It was however, claimed that as MMTC has paid for 2250 MT at 201 USD PMT as against 149 USD PMT it was entitled to a refund of $2250 \times (201 - 149) = 1,17,000$ US \$. This is certainly not consistent with the position earlier set out that 7736.09 MT had been adjusted against contract No.99 and so rightly paid for at 201 US \$ PMT. The claim now put forward by counsel Sri Sanjeev Puri, is therefore, slightly different. It is this, that since there has been a default on the part of Premjee to supply 2250 MT (on contract No.15), MMTC is entitled to claim damages for breach of contract at the difference between the contract price of \$ 149 and \$ 201 the market price of the goods as reflected by the price mentioned in contract No.99 on which supplies were made at the same time. This also comes to 1,17,000 US \$ but

this is on a basis different from that pleaded in the statement of claim. In other words, the MMTC has not been able to take a clear, cogent and consistent stand regarding the quantity of short supply and the rate at which it should be compensated. Having given the go-by to the acceptance of 23.1.1995, MMTC has been trying to grope about for a basis for claims of further supplies under the contract. The omission of this claim in the first instance, is also indicative of its vacillations.

35. *There is one more important circumstance that calls for mention. The stand of the MMTC in its letters dated 24.4.95, 26.4.95 and 5.5.95 is admittedly based on an approval by the MMTC's 'competent authority'. The minutes of the competent authority at its meeting of 19.4.1995 were produced by Shri Puri after initial objections to their relevance and confidentiality (which were over-ruled) and make interesting reading. The relevant item on the agenda is stated to be "supply of urea by M/s G. Premjee against contract No.15" and reads thus:*

"The Committee was informed that the Division had sent a communication to M/s G. Premjeet on 23.1.95 confirming acceptance of higher quantity of 7736 tones shipped against contract No.99 in vessel Mike-K. Having regard to the commitment already made by the Division to the supplier, the case had become fait accompli. The Committee, however, directed the Division to take note of the following issues while settling the case with the supplier:

- i) That adjustment be made, while settling the final accounts at USD 201 per ton for a quantity of 2236 tons delivered short by the supplier against contract No.99.*
- ii) No claim for overdue interest, as demanded by the supplier, should be entertained and that the settlement to be made with the party should be full and final."*

(emphasis supplied)

13. Mr. Sanjeev Puri, learned senior counsel for petitioner submitted that impugned majority Arbitral Award was a contradictory one and based on inferences. He submitted that the majority Arbitral Award's reliance upon petitioner-objector's internal communications was erroneous as they were confidential in nature. He pointed out that the

majority Award after concluding in paras 25 and 33 that the margin/tolerance limit was $\pm 5\%$ instead of $\pm 10\%$ had disallowed the petitioner-objector's claim on account of shortfall of supply of Urea under Contracts No. 15 and 99 on the ground that letter and fax dated 23rd January, 1995 constituted a variation of the Contract No. 15.

14. According to Mr. Puri, silence on the part of petitioner-objector in its fax dated 23rd January, 1995 could not be construed as variation of the contract executed between the parties. He submitted that the majority Award erroneously relied upon the minutes of the meeting dated 19th April, 1995 as the same were confidential in nature. Mr. Puri submitted that the minority Award correctly interpreted the contractual provisions as well as the contemporaneous correspondence exchanged between the parties. In this connection, he relied upon paras 61, 63, 77 and 79 of the minority Award which read as under:-

“61. Mr. Puri’s contention is that this is a superficial reading of the material on record. Apart from the fact that such an important amendment cannot be just slipped in and has to be done in specific and certain manner, he says that the letter of 17th January was an attempt suddenly thought of to get out of the liability arising out of contract No.15, and the claimant knew fully well that amended contract No.15 permitted shipping tolerance of $\pm 5\%$ on 45,000 PMT. He has drawn our attention to the fact, which is admitted in his evidence by Mittal, that when the cargo was loaded on Vessel Mike K on 30th December, 1994, the whole quantity of 25,289 MT on board was in respect of contract No.15. It is also admitted by Mr. Mittal that inspection done by Premjee’s authorised agent on 4th January, 1995 also shows that whole quantity on board Mike K was with respect of contract No.15. It is also the evidence that no attempt was made by Premjee to ask for shipment papers to be modified earlier to 23rd January, 1995 to seek bifurcation. It is relevant to note that Mike K arrived at port on 24th January. So this maneuvering to

purport to suggest by correspondence to MMTC that contract No.15 was being fulfilled was just a clear maneuver to seek to avoid to supplying against contract No.15 which was priced at USD 149 and to substitute that by attempting to supply it against contract No.99 priced at US Dollar 201 M.T.

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63. The quantity of 25,259 MT in Mike K fits in with amended clause of + 5% contract No.15. It is common case that prior to loading ship Mike K 17,523 MT had been supplied. Adding these two 25,259 + 17,523 comes to 42,782. Contract No.15 postulated minimum quantity of 45,000 MT. Now adjusting + 5% from 45,000 the quantity comes to 45,000 – 2250 = 42,750. The closeness of both quantities cannot be just accidental. By supply from whole lot of Mike K , contract No.15 could be executed fully. That alone can explain the fact of full loading for contract No.15, the absence of any attempt at bifurcation earlier than 30th December. Mr. Puri, therefore, suggests, and not without force, that having got the split up from friendly personnel in the department this story of further purported amendment of shipping tolerance, even when there is no specific entry to that effect is being put forth.

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77. The strongest argument of Mr. Bhatnagar is founded on the silence on the part of MMTC at not immediately repudiating the suggestion of + 10% given by Premjee in its letter of 17th January, 1995. Now it is possible to say that not repudiating promptly the interpretation being put by Premjee reflects poorly on the officers dealing with the matter. I can agree. But surely no contract can be deemed to have been modified by the instance of unilateral conduct of one party. The inefficiency or remissness of junior officials cannot lead to a deemed amendment of a solemn contract entered into by the competent authority. As it is the decision repudiating the suggestion of Premjee was communicated by MMTC by letter of 24th April, 26th April and 5th May, 1995, in pursuance of the decision of the competent authority dated 19th April, 1995.

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79. A reference to the minutes would show that the decision was invited with regard to Contract N0.99 above for which no payment was being made to Premjee. The

question of considering and accepting less quantity with regard to Contract No. 15 never figured in the minutes. As mentioned before payment with regard to Contract No.15 had already been made, in February, 1995. Apparently the competent authority had withheld the payment for supply with regard to contract No.99 because it presumably felt that officers below were not justified in having agreed to receive quantity of 7736 against contract No.99 which had a higher price when the balance quantity of contract No.15 was still outstanding. That is why it mentioned that having regard to the commitment already made by the Division to the supplier the case has become fait accompli and that is why a direction was given as to how to settle the financial account and adjust the short delivery against contract no.99. That these minutes were so understood properly by no less by a person than Mrs. Bhan who was not unsympathetic to the Claimant is clear from the letter of 24th April written by her stating what the competent authority had decided regarding Contract No.99 about 7736 MT and specifically pointing out that there was a shortfall in the supply with regard to the contract No.15 and that Premjee had to supply the balance quantity against Contract No.15. Similar repudiation of any modification of $\pm$ 5% tolerance having taken place was also specifically reiterated in subsequent letter of 26th April.

80. In the award by Mr. Justice Ranganathan and Mr. Justice S.S. Chadha it has been mentioned that there is no allegations pleadings and no evidence in support of the assertion by MMTC that Mrs. Girija Bhan, Chief General manager later resigned from MMTC and took up employment with Premjee. This probably has been mentioned by an oversight because though there was no pleadings yet Mr. Mittal was cross-examined on this aspect and has admitted in his evidence and Mrs. Bhan has resigned from MMTC and later on taken an employment with Premjee. I mention this to show that Mrs. Bhan's understanding of the decision that balance had to be supplied in contract No.15 was not that of unsympathetic or a hostile officer but an officer who was quite sympathetically inclined to Premjee and therefore, her writing the letter specifically mentioning that balance of quantity from Contract No.15 was yet to be supplied by Premjee must carry significant confirmation of the stand taken by MMTC before us.

81. This clearly shows that even when no disputes had arisen, persons dealing with the matter had no doubt as to

what the decision was and that no amendment of $\pm$ 5% tolerance had been made. I have no doubt that the story by Claimant of amendment having taken place was a make believe.”

(emphasis supplied)

15. On the other hand, Mr. Rajiv Bakshi, learned counsel for respondent submitted that letters dated 23rd January, 1995, 24th April, 1995, 26th April, 1995 and 05th May, 1995 along with minutes of meeting dated 19th April, 1995 constituted a variation of Contract No. 15. Mr. Bakshi further submitted that quantity was rightly accepted by the petitioner-objector as the supply of 17,523.55 metric tons of Urea against Contract No.15 constituted a full and final execution of the said contract.

16. Having heard the parties at length and having perused the impugned majority Award, I am of the view that it would be appropriate to first outline the circumstances in which a Court can interfere with an arbitral award passed under the Act, 1996. The Supreme Court in *Delhi Development Authority Vs. R.S. Sharma and Company, New Delhi* reported in (2008) 13 SCC 80 after referring to a catena of judgments including *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.* reported in (2003) 5 SCC 705 has held that an arbitral award is open to interference by a court under Section 34(2) of the Act, 1996 if it is:-

- (i) contrary to substantive provisions of law; or
- (ii) contrary to the provisions of the Arbitration and Conciliation Act, 1996; or
- (iii) against the terms of the respective contract; or

- (iv) patently illegal; or
- (v) prejudicial to the rights of the parties.

17. The Supreme Court has further held in the aforesaid judgment that an award can be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality.

18. I am of the opinion that in the present case, the majority Award contradicts itself and ignores specific terms of the contract executed between the parties such as Clause 24 and is based on internal communication/deliberations of petitioner-objector's officers. The majority Arbitral Award is contrary to the contractual term as it holds that petitioner-objector's silence in response to respondent's letter dated 23rd January, 1995, constituted a variation of quantities to be supplied under Contract No. 15 even though Clause 24 of the Contract specifically stipulated that modification of the contract could only take place, if the said modification was in writing and signed by both the parties. The relevant portion of the Clause 24 reads as under:

".....No modifications, waiver or discharge of this contract or any of its terms shall bind either party unless in writing and signed by both parties."

(emphasis supplied)

19. I am also in agreement with Mr. Puri's submissions that the majority Award could not have relied upon deliberations/discussions of officers of petitioner-objector as they were confidential in nature. In any event, the said internal note did not constitute a variation of the

contract. Moreover, as rightly observed by the minority Award, the minutes of meeting dated 19th April, 1995 pertained to dispute arising under Contract No. 99 and not with regard to Contract No.15 with which, this Court is concerned in the present proceedings.

20. The majority Award is further based on surmises and conjectures as is apparent from para 34 of the Arbitral Award. The majority Award is also contradictory inasmuch as after coming to the conclusion in para 25 that respondent's unilateral amendment of the tolerance limit $\pm 5\%$ to $\pm 10\%$ was contrary to the procedure prescribed in Clause 24 and could not have the effect of modifying the written contract, the two Arbitrators have concluded in para 34 (b) of the Award that the tolerance limit stood varied from $\pm 5\%$ to $\pm 10\%$.

21. In view of the aforesaid, the impugned Arbitral Award dated 18th January, 2001 passed by the majority Arbitrators in respect of Contract No.15 is set aside and the petitioner-objector is held entitled to a sum of USD 1,17,500 along with the rate of interest as awarded by the Arbitral Tribunal on the claims filed by the respondent. Petition stands allowed accordingly. However, petitioner is directed to pay costs imposed vide orders 20th February, 2009 and 12th May, 2009 to the respondent within a period of one week from today.

MANMOHAN,J.

MARCH 03, 2010
js