

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. No. 210 of 2002

Reserved on: 16th August, 2012

Decision on: 30th August, 2012

INDIAN ACRYLICS LIMITED

..... Petitioner

Through: Mr. Nidhesh Gupta, Sr. Advocate
with Ms. Nidhi Gupta and
Mr. Tarun Gupta, Advocates.

Versus

E.I. DU PONT DE NEMOURS AND ORS.

..... Respondents

Through: Mr. Sandeep Sethi, Sr. Advocate
with Ms. Jaspreet Sareen and
Mr. Angad Varma, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

30.08.2012

1. Indian Acrylics Limited ('IAL') in this petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') has challenged the majority Award dated 16th March 2002 of the arbitral Tribunal ('Tribunal') adjudicating the disputes between IAL and Respondent No.1- E.I. Du Pont De Nemours ('Du Pont') arising out of a know-how agreement, an assistance agreement, an engineering information agreement all dated 1st June 1988, an equipment supply agreement dated 31st May 1988 and a supplementary agreement dated 10th September 1993 between the parties.

The Four Agreements

2. The know-how agreement was entered into between IAL and Du Pont

on 1st June 1988 under which Du Pont as licensor agreed to grant IAL as a licensee a non-exclusive license to use Du Pont's confidential information and know-how as defined and specified in the agreement to use polymer in the manufacture of a product defined as "acrylic monocomponent fiber and tow" as specified in Annexure IA thereof, "essentially equivalent to 'Orlon Type 42' ". The expressions 'process', 'process equipment', 'plant' and 'know-how' were defined in the agreement as under:

“ 'Process' means a method for producing Product consisting of polymerizing acrylonitrile, methyl acrylate and a sulfonic acid salt in a water slurry; subsequently separating drying, dissolving in dimethylformamide; extruding the resultant solution through spinning cells into filament bundles by a dry spinning process' subsequently purifying, drawing, crimping, drying, cutting and packaging as practised at Du Pont's plant at Waynesboro, Virginia, U.S.A. and explained in Annexure IE.

'Process Equipment' means the equipment useful in operating the process, listed in Annex 2A of the Equipment Supply-Agreement between the parties.

'Plant' means the first commercial facility built by or for Licensee in the Republic of India using the Process Equipment according to design and engineering provided under this and/or accompanying agreements of even date, the Plant having an initial capacity of producing at least 15,000 metric tons per annum of Product, based on 3.0 denier product, where a year is defined as eight thousand (8000) operating hours.

'Know-How' means latest commercial technical information in the possession of Du Pont to be used for designing, construction and installation of the 'Plant' capable of manufacturing the 'Product' by using the 'Process', which information is in Du Pont's opinion sufficiently comprehensive that an

engineering organization skilled in the design of chemical plants can design and erect and Licensee can operate the Plant. Know-How includes the items specified in Annex 1B hereof. That Annex 1B specifies timing of delivery.”

3. The term ‘expansion’ was defined as under:

“‘Expansion’ means an increase in Product capacity in India by addition of one or more polymerization reactors and/or spinning position either (i) in the Plant or (ii) in a new facility of Licensee or any Sub-licensee referred to in Article V.2.

4. Under Article V in consideration of the transfer to the licensee of know-how, IAL was to pay Du Pont five million US Dollars (‘USD’) 5,000,000 net of taxes with tax liability to be borne by IAL, in the manner indicated therein. Article V.2 dealt with payment of the ‘Expansion Fee’. It set out the amounts payable as expansion fee in the event there was “any expansion of the plant or new facility of Licensee or any Sub-licensee utilizing the Process to make Product, on which construction is started prior to the fifteenth (15th) anniversary of the Effective Date”. The fee was to be paid within 30 days after construction was begun on the expansion or new facility.

5. The effective date was specified under Article XII. Under Article XIV IAL was given a non-exclusive right to use improvement in making acrylic polymer within India. Annexure IA to the know-how agreement listed out the make specified and quality characteristics, which *inter alia* reads as under:-

“95 percent of packed fiber will meet “A” quality fiber requirements and 5 percent will meet “B” quality fiber “A” quality fiber is defined as finished,

boled staple fiber in meeting all property specifications as designated in this annexure.

“B” quality is defined as finished packaged staple fiber nearly equivalent to “A” quality, but failing to meet one or more of the designated property specifications. This product can be used for non-critical end uses.”

6. The agreement also gave a description of the technology transfer in Annexure 1B and the process was described in annexure 1E.

7. It must be mentioned that even prior to the know-how agreement, IAL had on 8th October 1987 applied to the Government of India in the Ministry of Industry (‘MoI’) for approval of its proposed foreign collaboration with Du Pont for manufacture of Acrylic Staple Fibers. The MoI issued its approval subject to the certain conditions including those set out in Annexures 1 and 2 to the said letter, which were to be added as conditions to the agreement. The conditions included Clause 11 which stated that “there should be no provision for payment of interest of delayed payments”. The conditions in the letter dated 18th January 1988 of the Reserve Bank of India (‘RBI’) to IAL granting approval from the exchange control angle also contained a similar prohibition on payment of interest.

8. The second agreement was the assistance agreement entered into by the parties on 1st June 1988 under which Du Pont agreed to provide IAL with technical assistance through its experts which was to include design assistance, procurement assistance, technical assistance and advice in respect of process operation. Du Pont also agreed to train IAL employees on the information and administration of the plant.

9. The third agreement was the engineering information agreement also executed on 1st June 1988 under which Du Pont agreed to supply basic engineering information and technical documents for the design and construction of the plant. Article IV of this agreement provided certain guarantees with respect to performance of the plant and penalties to be levied in case of shortfall in performance.

10. The fourth agreement was the equipment supply agreement entered into by the parties on 31st May 1988 under which Du Pont agreed to supply IAL specified process equipment and spare-parts to be installed in the plant for manufacturing the product. Article VI of the agreement stipulated inspection of the equipment by IAL's personnel at the Manufacturer's workshop prior to their shipment. The assistance agreement, the equipment supply agreement and the engineering information agreement were assigned by Du Pont to M/s Chemtex Fibres Inc., USA ('Chemtex') as per the provisions of the said agreement.

Events following the Agreements

11. It is stated that the senior management team of IAL visited USA during 5th to 9th September 1988. The team was taken on a tour of Du Pont's plant at Waynesboro and the Product Development Centre at Wilmington. IAL states that the Directors of Du Pont assured IAL of fulfilling their obligations under the agreements. IAL remitted the first instalment of the know-how and basic engineering fee amounting to USD 21,66,667 on 8th November 1988. A design conference was held in New York in the first week of December 1988. It was attended by representatives of IAL, Chemtex, Du Pont and Chemtex Engineering India Limited. IAL states that assurances were again made at the

conference regarding continuation of operation on the part of Du Pont at Waynesboro and no indication was given regarding Du Pont's plan to reconstruct the acrylic fibre business or any change of operation at the Waynesboro plant.

12. IAL established a Letter of Credit ('LoC') dated 17th January 1989 for USD 43,33,333 valid up to 29th November 1992 under the know-how agreement and the engineering information agreement for the balance 2/3rd amount. LoC for the process machinery under the equipment supply agreement was also established on 21st February 1989. On 17th March 1989, the assignee of Chemtex, notified the Petitioner that it had merged with its parent corporation, M/s Chemtex Inc. On 6th February 1990 it was informed that M/s Chemtex Inc. had transferred its engineering organization and international offices to M/s Chemtex International Inc. which in turn had been purchased by M/s Mitsubishi Corporation. On 26th April 1990, Du Pont encashed the LOC towards payment of the know-how and basic engineering fees amounting to USD 21,66,667.

13. Du Pont announced closure of its acrylic fibre production business in June 1990 and that both the production plants in Waynesboro and Camden were proposed to be closed. This information came to the notice of IAL by way of a news item published in a magazine called "Chemical Week", International Edition, dated 20th June 1990. IAL states that Du Pont deliberately concealed the information with the intent of making as much profit as possible even while deciding to close down acrylic fibre production business. IAL states that the design assistance, procurement assistance, erection of plant, start-up assistance, technical services and all other aspects of the agreement were adversely affected by the

development since Du Pont's assignee was no longer in a position to fulfill any of its obligations.

14. IAL states that the plant erection was completed in July 1992 as per the design and specifications provided by Du Pont under the supervision of their own experts deputed for the purpose. It is stated that after the team of engineers of Du Pont visited the plant and satisfied themselves about the mechanical correctness of the plant, Du Pont decided to feed raw materials to the plant on 25th November 1992. It is stated that the major problem developed in the plant on 26th November 1992 when large amount of Sulfur Dioxide leaked to the atmosphere. A meeting was held on 12th December 1992 to discuss the plant problems. The plant start-up was done on 31st December 1992 but the Emerson Inverter System supplied by Du Pont was found defective. The plant problems were again discussed on 23rd January 1992. The meeting held on 4th/5th February 1992 listed 42 problems in the plant, product and process. According to IAL, Du Pont failed to take any action in spite of reminders. This situation continued and Du Pont was unable to carry out the test runs on the entire plant as was stipulated under the agreement. IAL states that in the meanwhile it extended the LoC of the last know-how payment.

The September Agreement

15. An agreement was arrived at between the parties at a meeting held on 9th/10th September 1993. The said agreement (hereafter 'the September Agreement') provided, *inter alia*, that IAL shall pay Du Pont the net amount of USD 696,439 "in 9 equal monthly installments commencing in September, 1994." Both parties agreed "to implement the path forward set out in Annexure 1" attached to the September Agreement. They further

agreed that “all claims related to project CF-704 are included in this Memorandum and all remaining obligations of DuPont/Chemtex are a set out in this Agreement including Annexure 1.” The September Agreement was signed by the representatives of IAL, Du Pont and Chemtex. Annexure 1 set out a tabulated chart indicating in separate columns the process related problem, the tests to be performed by each party including IAL, Chemtex and Du Pont and the time within which the specified tasks were to be performed.

16. According to IAL, the question of payment by it of USD 696,439 to Du Pont did not arise since the responsibilities of Du Pont as set out in Annexure 1 to the September Agreement were not fulfilled. Du Pont was also not able to show the desired results of plant performance in the tests carried out in May and June 1993. The plant was facing technical problems and Du Pont had failed to rectify the defects. On 29th November 1993, IAL sent a telex message to Du Pont indicating the status of compliance of the obligations of each party under the September Agreement. It showed that many of the obligations of Du Pont were still to be performed.

17. IAL states that with the plant not being able to perform at its potential as envisaged in the agreements, it had to make rectifications in the various sections of the plant. Reference is made to the annual financial reports of IAL to show that the plant performance norms were far lower than those guaranteed by Du Pont in the agreements. *Inter alia* it is stated that contrary to the assurance given by Du Pont, the plant design supplied to IAL was not based on Waynesboro plant of Du Pont. It is stated that the know-how agreement stipulated that IAL should get complete technology

to produce both staple as well as tow of quality equivalent to Orlon Type 42. According to IAL it did not get the technology as stipulated under the contract and Du Pont failed to rectify the situation in spite of several reminders by IAL.

18. IAL states that the failure on the part of Du Pont to supply the latest commercial technical information and to supply technology for production of the product, as defined in the agreement, constituted fundamental breaches of the contract. Further, the product was unable to compete with the wet spun product available in the Indian market and was not even equivalent to dry spun product produced by Du Pont's own plant. IAL states that Du Pont misrepresented the product quality in its proposals made prior to the agreements being entered into. Further, since Du Pont closed its plant in June 1990 it was not capable of providing any improvement and up-gradation as contemplated in the agreement.

Du Pont's claim and IAL's counter claim

19. On 20th January 1999, Du Pont made a request for arbitration to the International Chamber of Commerce, Paris in terms of the relevant clause in the know-how agreement. In the statement of claim before the Tribunal, a reference was made to a letter dated 17th January 1994 whereby IAL's Managing Director ('MD') informed the President of Chemtex that IAL had successfully achieved the rated capacity of the plant and that the raw material and the utilities consumption were within the stipulated norms and the product quality was acceptable. Du Pont stated that it had reminded IAL by a communication dated 15th August 1994 about the payments that had been promised by IAL under the September Agreement, however, no payment was made by IAL. It was

then stated that sometime in November 1994, Du Pont learnt that IAL was considering installation of a fifth and sixth spinning machine in the plant along with other balancing equipment as a part of its expansion plan. It was stated that Chemtex along with Du Pont's assistance aided, assisted and supported the expansion of the plant. Du Pont claimed that IAL was required to pay expansion fee in the sum of USD 1,200,000.

20. The reliefs sought by Du Pont before the Tribunal were:

“A) That the Tribunal may award to the Claimant an amount of US \$ 696,439 against the Respondent for the field services provided by the Claimant's technicians/experts under the provisions of the Assistance Agreement and as agreed to under the September Agreement.

B) That the Tribunal may award to the Claimant an amount of US \$ 1,500,000 against the Respondent for the three expansions in the Plant spinning/polymerization capacity effected during the period 1994 to 1997 by the Respondent under the provision of the Know-How Agreement and may further declare that the Respondent shall pay to the Claimant such expansion fee that may be payable for any further expansion that may be effected by the Respondent till the year 2003.

C) That the Tribunal may award to the Claimant interest on the aforesaid amount @18% for the period pre-reference, *pendente lite* and till the realization/satisfaction of the award.

D) That the Tribunal may award costs of these proceedings in favour of the Claimant and against the Respondent.”

21. Apart from filing its reply to the aforesaid claims, IAL filed its counter claims for the recovery of USD 66,881,000 which was

subsequently reduced to USD 38,50,000. This included refund of know-how fee, refund of taxes paid thereon, losses suffered due to misrepresentation by Du Pont on product quality and non-provision of additional product technologies, refund of engineering information fee, taxes on the above and lower productivity in plant, refund and claims against faulty equipments and refund of expatriate assistance fee.

The majority and dissenting Awards

22. On the basis of the pleadings, the three member Tribunal formulated sixteen issues. IAL raised a preliminary plea that Du Pont's claims for USD 696,439 and Expansion Fee of USD 150,000 were barred by limitation. Accordingly Issue No. 13 was whether any of Du Pont's claims were barred by time? While the dissenting Award dealt with the issue of limitation first, the majority Award, dealt first with Issues (3) and (6) first. These were:

“3. Did the claimant conceal material and relevant facts and/or misrepresent facts before entering into the Agreement(s) with the respondent? If so, to what effect? Are the Counter Claims by the respondent or any of them not maintainable and/or barred for the reasons alleged by the claimant in its pleadings?

6. Is the respondent entitled to refund of US \$ 15,00,000 or any part thereof, paid in respect of the Engineering Information Agreement?”

23. The majority Award concluded that Du Pont's claims were within time. On Issues 3 and 6, the majority Award decided against IAL. The majority Award deducted 25% from the claimed sum of USD 696, 439 on account of Du Pont not fulfilling its obligations and granted it USD 522, 329. As regards the claim for fees for expansion, while it found the claim

for the first expansion to be barred by time, the majority Award deducted USD 500,000 from the sum payable for the second and third expansions and awarded Du Pont USD 500,000. Barring this, all of IAL's counter-claims were rejected. The majority granted Du Pont post-Award interest at 4% per annum on both sums.

24. The dissenting Award concluded that Du Pont's claims were barred by limitation. This was reiterated in a separate note of "supplementary reasons" of the dissenting Member. The dissenting Award allowed the counter claim of IAL to the extent of USD 1,786,000 towards misrepresentations made by Du Pont in their proposals made about the product. Interest at 12% per annum on the said sum was allowed from 1st December 1997 till realization.

Were Du Pont's claims barred by limitation?

25. The issue of limitation is required to be addressed first. It is contended by Mr. Nidhesh Gupta, learned Senior Counsel for IAL that in terms of the September Agreement, the payment of USD 696, 439 had to be made by IAL to Du Pont in nine equal instalments beginning September 1994 with the last instalment falling due in May 1995. Despite three years elapsing after the last instalment fell due, Du Pont did not invoke the arbitration clause and therefore its claim for USD 696,439 was barred by limitation. As regards the expansion fee, while the majority held that the claim for the first expansion was barred by time, it erred in holding that the claim for the other two expansions were within time. It is submitted that the fee was to be paid within 30 days after construction is begun on the expansion or on the new facility. The limitation for each expansion therefore began upon commencement of construction work. In the case of

the second and third expansions it began in the middle of 1993 and therefore the claim made by legal notice of 1st June 1998 was also time barred. It was submitted that the majority Award misinterpreted the September Agreement as well as the clause in the agreement pertaining to expansion fee.

26. Countering the above submissions, it was first urged by Mr. Sandeep Sethi, learned Senior counsel for Du Pont, that the finding of the majority Award in relation to limitation was a plausible view to take. He submitted that given the limited scope of interference by the Court under Section 34 of the Act, the majority Award on this aspect could not be said to be patently illegal or opposed to the public policy of India. He submitted that in terms of the September Agreement the sum of USD 696,439 was kept as a security in the hands of IAL for performance of the obligations thereunder. The limitation would under Article 113 of the Limitation Act 1963 ('LA') commence only when the obligations were discharged and the work was completed. Therefore limitation did not commence when each of the nine instalments fell due. Reliance was placed on the decision of the Bombay High Court in ***Shankar Moreshwar Kulkarni Chinchwadkar v. State of Maharashtra AIR 1970 Bom 8***. As regards the expansion fee, he supported the reasoning of the majority Award that the 30 day period would apply only where the expansion was of a new facility and not when it was of an existing facility.

27. The Court proposes to first address the issue whether Du Pont's claim for USD 696,439 were barred by limitation. The origin for this claim is the September Agreement which reads thus:

“Agreement

This Agreement is entered into this 10th day of September, 1993, among the following companies:

- Indian Acylics Ltd. (hereinafter IAL)
- E.I. Du Pont de Nemours & Co. (hereinafter DuPont)
- Chemtex, Inc. (hereinafter Chemtex)

The parties hereto have agreed to the following with respect to project CF-704 (contracts between DuPont and IAL dated 6/1/88).

1) IAL agrees that the testing which has been undertaken thus far for the IAL acyclic fiber Plant will suffice and no Test Run is or will be required to be performed. IAL will arrange for DuPont to be able to draw L/C No. IFC/SW/UD/6/89 in the amount of US \$2,166,667 covering the final know-how and engineering payments prior to the L/C expiry date of September 30, 1993. All documents required for drawdown of the L/C will be provided by IAL with the exception of the invoice which will be prepared by DuPont. No performance bond is required, since the amount due to DuPont/Chemtex pursuant to paragraph 3 below is sufficient to secure their remaining obligations. In the event for any reason such L/C is not drawn by September 30, 1993, IAL agrees to extend at its cost the L/C validity date as necessary to permit drawdown.

2) The parties agree to implement the path forward set out in Annexure 1 attached hereto. The timing for all items set out therein shall commence with the date on which the L/C described in paragraph 1 above is drawn down by DuPont. DuPont/Chemtex will perform their specified scope of work at their own cost; provided, however, that IAL will provide the following for personnel deputed by DuPont/Chemtex: lodging, means, local transportation and local rupee per diem; and provided further that services provided by DuPont in India pursuant to Annexure 1 shall be limited to 150 man days. IAL agrees to maintain the same security measures as agreed during the July 1992 meeting in Delhi.

3) DuPont/Chemtex agree to bear the sum of US \$294,600 covering customs duties which have been or might be

incurred by IAL with respect to equipment replaced by DuPont/Chemtex pursuant to warranty. IAL agrees to bear the amount of US \$ 991,039 representing per diems and expenses due to DuPont/Chemtex. The net amount of US \$ 696,439 shall be paid by IAL in 9 equal monthly installments commencing in September, 1994.

4) The parties agree that all claims related to project CF-704 are included in this Memorandum and all remaining obligations of DuPont/Chemtex are a set out in this Agreement including Annexure 1.

5) This Agreement shall be effective upon signature by representatives of the parties hereto.”

28. Clause (1) does show that the parties agreed that Du Pont need not furnish IAL a performance bond “since the amount due to DuPont/Chemtex pursuant to paragraph 3 below is sufficient to secure their remaining obligations.” However, that did not mean that IAL’s obligation under Clause (3) to begin making payment of USD 696,439 in nine equal instalments beginning September 1994 was dispensed with or made conditional upon Du Pont’s fulfilment of its obligations. There is nothing in the above clauses, whether read separately or together, that can lead to the inference that the sum of USD 696, 439 was an amount kept as ‘a security’ with IAL to ensure performance by Du Pont of its obligations. Clause (3) is unambiguous that IAL’s obligation to make payment of USD 696, 439 to Du Pont commenced in September 1994 when the first instalment fell due. This did not hinge upon fulfilment by Du Pont of all or any of its obligations.

29. The conclusion in the majority Award that the said sum was in the nature of “security kept for performance of the obligation or the Performance Bond” and that in such even limitation would begin only

“when the obligations are discharged or the work is completed” is plainly unsupportable even on a plain reading of the September Agreement. The second difficulty with the reasoning of the majority Award is that it is contrary to Du Pont’s own case that it had in fact discharged its obligations which is why it insisted on the payment of the first instalment by its notice dated 15th August 1994 to IAL. The decision in ***Shankar Moreshwar Kulkarni Chinchwadkar*** is distinguishable on facts. The agreement in that case was not similarly worded as the September Agreement.

30. The erroneous interpretation of Clauses (1) and (3) of the September Agreement in the majority Award was compounded by the question that it posed: “whether the obligations as identified within the areas of responsibilities of the claimant, individually or within the area of the respondent and claimant jointly, Chemtex and the claimant jointly, and Chemtex individually were discharged and if so to what extent?” In fact the majority did not get any clear answers to this question. It observed in para 185 of its Award that “as far as the claimant is concerned, it can be safely held that some items were not attended to because in his affidavit Mr. Weber stated that some problems were resolved but no details have been given.” The lack of clarity on whether Du Pont had fulfilled its obligations led the majority Award to reduce Du Pont’s claim for USD 696,439 by 25% which was a random and arbitrary assessment of the extent of non-compliance by Du Pont of its obligations, which as will be seen hereafter, was not the case pleaded even by Du Pont.

31. While dealing with Issue (1) whether Du Pont was entitled to USD 696,439, the majority Award noted in para 178 the following statement of

Mr. Weber in his affidavit: “I had visited IAL toward the end of May/early June 1994 when it had been indicated to me that matters in the area of Du Pont’s responsibilities stood resolved and in respect of most of the items there was no issue and problems had been resolved.” The majority in fact concluded in para 179 of its Award that Du Pont had taken steps to “substantially implement the items identified in Annexure 1 which were within the area of responsibility of the claimant.” It drew support from the letter of 17th January 1994 written by the MD of IAL in which he stated that IAL “has successfully achieved rated capacity of the plant and that the contractual guaranteed parameters have also been successfully met.”

32. The inescapable conclusion from the above evidence was that even according to Du Pont, it had fulfilled its obligations prior to 15th August 1994 and definitely before the first instalment fell due in September 1994. Even if the conclusion of the majority that “the right to sue accrued only after all the obligations mentioned in September Agreement were to be performed” is to be tested, Du Pont’s claim for USD 696, 439 was barred by limitation.

33. The next issue is whether Du Pont’s claim for expansion fee was barred by limitation. The majority Award accepted the interpretation placed on Article V.2 by Du Pont to conclude that since the expansion was not “of a new facility” the period of thirty days was not applicable. It relied on the Director’s reports of IAL, which showed that the first expansion was completed in 1994-95 whereas the other two expansions were completed from 1996 onwards. Accordingly, it held that while the claim in respect of the first expansion was barred by limitation, the claim

for fees in respect of the other two expansions was within time.

34. Article V.2 of the know-how agreement sets out the fees payable “for any expansion of the plant **or** new facility of Licensee or any Sub-licensee utilizing the Process to make Product” and goes on to say:

“Expansion fees shall be paid within thirty (30) days after construction is begun on the expansion **of** new facility. Construction shall be deemed to begin for each such facility when the first item of process equipment for the project is placed on its foundation for the purpose of erection. If the construction of such expansion or new facility is begun subsequent to Date of Start-Up of the Plant contemplated by this Agreement, then the expansion fee shall be increased at the rate of eight (8) percent per year, compounded annually, for the period commencing with the Date of Start-Up and ending with the date construction is begun. Licensee shall either do the engineering work themselves or shall use Chemtex Fibers. Inc. of New York as the engineering company subject to their offer being acceptable to Licensee.”

35. The controversy arose whether the word “of” occurring in the above sub-para of Article V.2 was a typographical error and should actually read as “or”, in which case the sentence would read: “Expansion fees shall be paid within thirty (30) days after construction is begun on the expansion or new facility.” This is also consistent with the earlier and later portions of Article V.2. The immediately following sentence reads: “If the construction of such expansion **or** new facility is begun subsequent to Date of Start-Up of the Plant..” Therefore the word “of” in the first sentence of the above sub-para was obviously a typographical error and had to be read as “or”. Otherwise there would be an absurd and impossible situation of “expansion of a new facility” when in fact there

can be an expansion only of an “existing” facility. In refusing to read the said sentence in its logical and correct way, the majority Award came to a conclusion contrary to the contract. IAL’s witnesses had deposed that the construction work for the second and third expansion commenced in 1993 itself. The fees for the said expansions was payable on the expiry of thirty days thereafter. Du Pont’s claim for fees for the second and third expansions, made for the first time in its notice dated 1st June 1998 was barred by time.

36. The majority also did not take note of what was actually pleaded by Du Pont in its statement of claim. Paras VII.20 and VII.21 thereof read as under:

“VII.20 When no payment was made, despite promises and assurances, of the aforesaid amount for field services and Plant expansions, the Claimant by its letter of August 5, 1996 demanded payment of the sum of US\$ 696,439 which had been agreed to be paid vide the September Agreement, as also the sum in respect of the fees for Plant expansion and installation in terms of the Know-How Agreement, which worked out to over US\$ 1,200,000. The Claimant also pointed out to the Respondent, that the tax receipts for deduction of tax were of no use in reducing the Claimant’s tax liability in USA.

VII. 21 The Respondent wrongfully sought to deny the aforesaid payments vide its attorney’s letter of November 2, 1996. In complete disregard of the earlier agreements, the fact that the Plant operations had been successfully achieved, and that the Claimant had provided the requisite know-how, engineering information, equipment and technical assistance that had resulted in the Plant functioning at full capacity, the Respondent sought to raise unnecessary and irrelevant pleas so as to

dispute and deny the payments to which the Claimant was entitled as per the agreements and commitments made by the Respondent.

It is submitted that the averments made in the aforesaid letter obfuscate the true facts and are an effort to deny the Claimant its lawful dues.”

37. There was no such letter of 2nd November 1996 of IAL which formed part of the arbitral record and counsel for the parties were also unable to produce a copy thereof. In any event the majority Award does not even discuss such letter. Going by the statement of claims, there is no explanation of Du Pont to have waited till 1st June 1998 to invoke the arbitration clause when the default was committed by IAL from September 1994 onwards. There was no acknowledgment of liability by IAL at any point of time after 1st September 1994 for the purpose of extension of the period of limitation. On the other hand, Exhibit A/4 produced by Du Pont showed that in January 1995 itself IAL disputed its liability to pay the sum demanded in Du Pont’s letter dated 15th August 1994. The period of limitation which commenced as regards the first instalment from September 1994 onwards and as regards the ninth instalment from May 1995 onwards did not cease to run. The limitation expired at the conclusion of three years from May 1995 i.e. in May 1998. Admittedly this was prior to the invocation of the arbitration clause by Du Pont.

38. Consequently, the Court concludes that the majority Award committed a patent illegality in holding that Du Pont’s claim with regard to USD 696,439 and with regard to the fees for the second and third expansions was not barred by time. The said claims were barred by limitation and could not have been entertained. The LA has been made

expressly applicable to arbitration proceedings by Section 43 of the Act. The LA is part of the public policy of India inasmuch as it prohibits the entertaining of monetary claims that are time barred. An Award contrary to the express provisions of the LA would be in conflict with the public policy of India. The impugned majority Award to the extent it has entertained and allowed the claims of Du Pont is therefore liable to be set aside under Section 34 (2) (b) (ii) of the Act.

IAL's counter claims

39. This Court is not inclined to interfere with the majority Award to the extent it negatives the counter-claims of IAL on the same yardstick of limitation. Prior to Du Pont filing its claims, IAL had not raised any demand in regard to any of its counter-claims. However, it requires to be noticed that while deciding Issue VII.5 pertaining to IAL's counter-claim for refund of know-how fee in the revised sum of USD 750,000, the majority Award holds in para 211: "For the reasons given in deciding Issues VII.3 and VII.6, we disallow the claim of the respondent except the deductions allowed while deciding Issue VII.2." In para 196, while deciding Issue VII.2, the majority Award directed the reduction of the expansion fees payable to Du Pont by USD 500,000 which it terms as an allowance for "non-availability" to IAL of the "benefits of improvements, if any, that might have occurred." Du Pont has not challenged this portion of the impugned majority Award.

Conclusion

40. The impugned majority Award dated 16th March 2002 to the extent it has entertained and allowed the claims of Du Pont (including the award of interest) is set aside. The impugned majority Award dated 16th March

2002 to the extent it has rejected the counter-claims of IAL is upheld.

41. O.M.P. No. 210 of 2002 is disposed of in the above terms with costs of Rs.20,000 which will be paid by Du Pont to IAL within four weeks.

S. MURALIDHAR, J.

AUGUST 30, 2012

AK