

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 442 of 2004

Reserved on: May 9, 2012

Decision on: June 1, 2012

HINDALCO INDUSTRIES

..... Petitioner

Through: Mr. Dushyant Dave, Senior
Advocate with Mr. Bharat Sangal,
Ms. Srijana Lama, Ms. G.Reshma
Sharma and Mr. Anirudh
Deshmukh, Advocates.

versus

INDIAN FARMERS FERTILIZERS

COOPERATIVE LIMITED

..... Respondent

Through: Mr. Ravinder Sethi, Sr. Advocate
with Mr. Manoj Verma and Mr.
Rajiv Kumar Ghawana, Advocates

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

01.06.2012

1. Hindalco Industries ('Hindalco') [Unit of Birla Copper, a part of the Indo-Gulf Fertilizers and Chemicals Corporation Ltd. ('IGCL')] has filed this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') challenging the majority Award dated 12th July 2004 of the Arbitral Tribunal which adjudicated the disputes between the Petitioner and Respondent Indian Farmers Fertilizers Cooperative Ltd. ('IFFCO') arising out of a Memorandum of Understanding ('MoU') dated 19th January 1999 for long term supply of phosphoric acid.

2. The MoU was for a period of three years commencing 1st January 1999 and ending on 31st December 2001. It was stated that if the extension of

agreement was not agreed upon mutually by buyer or seller on or before 30th June 2001, the agreement would expire on 31st December 2001. The specifications of the Phosphoric acid were set out in Article 2.1.0. It was indicated therein that the analysis of the elements comprising of phosphoric acid were to serve only as guidance. However, “the figure binding for seller shall be the guaranteed minimum concentration of P₂O₅ and maximum suspended solids.” Under Article 2.2.1, the buyer IFFCO was to have the right to reject any parcel having suspended solid content above 1.75% and P₂O₅ content below 51.5% subject to relevant clauses in the MoU.

3. Under Article 3.1.0, the seller, i.e., IGCL undertook to supply to IFFCO the following quantities in metric tonnes (‘MT’) of phosphoric acid (P₂O₅) on 100% P₂O₅ basis confirming to the specification set out in Article-II:-

From 1.1.1999 to 31.12.1999 50000 MT +/- 10%

From 1.1.2000 onwards 60000 MT +/- 10% per annum

4. Under Article 3.1.1, it was stated that in case IGCL was unable to supply the complete quantity then IFFCO would purchase the same from other suppliers at the risk and cost of IGCL with due consultation with the seller keeping in view the best interest of both parties subject to *force majeure* clause.

5. In case the agreement was extended beyond 31st December 2001, the quantity of the delivery and the contract conditions had to be mutually decided for the extended period “at least six months prior to expiry of the contract”.

6. Under Article 4.1.0, the total quantity to be supplied in a contract year would be divided into a quarterly schedule and further broken down into a monthly schedule. Importantly, under Article 4.1.0, the schedule “shall be discussed and finalised mutually by the seller and the buyer, three months in advance”.

7. Article 4.2.1 stipulated that the despatches shall be effected by road tankers from the buyer’s Kandla works and/or by sea to buyer’s jetty at Kandla. Preference was always to be given to despatches by sea. The despatches by road tankers were to be effected only till the seller’s jetty was commissioned and during monsoon period from 15th May to 15th September when the loading of ships was difficult at the seller’s jetty. The facilities for unloading of acid and its storage were to be installed by IFFCO at its site and the cost incurred for such installations were to be recovered from IGCL subject to maximum of Rs. 5 lakhs. The installations were to be used by IFFCO so long as the acid was received through road tankers and was to be transferred to IGCL after expiry of the agreement.

8. In terms of Article 5.1.1 the price was to be based on C&F price denominated in US Dollars (‘USD’) and as finalized by Fertilizer Association of India (‘FAI’) with the overseas suppliers from time to time. In case for any particular period(s), the C&F price was not fixed, then the C&F of the preceding period shall be deemed to be the applicable C&F price. Article 5.1.4 set out the manner of arriving at the C&F Kandla price in USD which would then be converted into Indian Rupees as per the USD - Rupee parity based on the average of TT selling rate and buying rate on the date of payment as published in State Bank of India daily Card rate. For the despatches effected during 1st to 15th of the

month, payment was to be made on or before 10th of the next month. For the despatches between 15th to 30th/31st of the month, the payment was to be made on or before 25th of the next month.

9. Article – XII dealt with the *force majeure* conditions. Under Article 12.1.0, the failure to observe any of the terms of contract on account of the circumstances defined in the said Article, would be constituted *force majeure* and will therefore not be breach of the contract. Under Article 12.6.0, when a party is unable to fulfil its engagements then it was to inform other party within seven days of the occurrence of those circumstances which prevented the performance of its obligations. A certificate issued by Local Chamber of Commerce was to be a sufficient proof of the existence of the circumstances and the duration. It was to be specifically stated that “non-availability of raw material shall not be an excuse for the seller and non-availability of the market shall not be an excuse for the buyer for not performing his obligations under this agreement”. Under Article 12.7.0 if the circumstances continued to exist for more than three months, the other party would have the right to refuse further performance of the agreement. Under Article 12.8.0 if IFFCO due to an event of ‘*Force Majeure*’ was unable to buy acid in any specific period, then IFFCO and IGCL were to agree to mutually discuss and decide as to the method of disposal of any or all of the acid produced during that period. Article 13.1.0 contained the arbitration clause.

10. The negotiations began between the parties with a letter dated 3rd February 1995 written by IGCL to IFFCO stating that IGCL was setting up a 1,00,000 ton per annum (‘TPA’) Copper Project at Dahej, Bharuch, Gujarat which was consist of a port, copper, smelter, electrolytic refinery, sulphuric acid plant, phosphoric acid plant, captive power and oxygen

plant. It was informed that about 3,00,000 TPA of sulphuric acid was to be produced as a byproduct and the same was to be converted into 1,00,000 TPA phosphoric acid 52 – 54% (P205), and that the said phosphoric acid will be available for sale from IGCL's plant with effect from July 1997. IFFCO was asked to indicate if it would like to buy the said quantity of phosphoric acid on a regular basis from IGCL's plant.

11. In response to the above letter dated 3rd February 1995, IFFCO conveyed its in-principle consent to purchase the indicated quantity of 1,00,000 MTPA phosphoric acid from July 1997. It was thereafter that the MoU was entered into between the parties.

12. The first supply of phosphoric acid from IGCL's plant to the Kandla Fertilizer Plant of IFFCO took place in March 1999. However, on 22nd March 1999 IFFCO directed IGCL to suspend the supplies up to 31st March 1999 and resume it thereafter. It is stated that after supplies were resumed in April 1999, on 3rd August 1999 IFFCO again requested IGCL to suspend supplies. By letters dated 11th August 1999 and 13th August 1999 IGCL requested IFFCO to allow the resumption of supplies. Thereafter IFFCO permitted IGCL to supply limited quantities of phosphoric acid which was enhanced 150 MT per day on 28th September 1999. Again on 7th February 2000 IFFCO directed the Petitioner to suspend supplies of phosphoric acid to its port in Kandla unit and that it should not resume its supplies till directed by IFFCO. Again the IGCL requested IFFCO by letters dated 7th February 2000, 10th February 2000, 13th February 2000 and 23rd February 2000 to resume supplies. It is stated by IGCL that due to suspension of supplies the production of phosphoric acid in IGCL's Kandla plant had to be stopped. On 23rd March 2000, IFFCO expressed its inability to accept any supply of phosphoric acid till

the end of March 2000. IGCL pointed out that such stoppage would result in closure of the plant as the entire process of sulphuric acid and phosphoric acid was interconnected. By a further letter dated 25th February 2000, IGCL protested against the stoppage by pointing out that this would lead to a distress situation of having to shut down its plant due to accumulation of stock. IFFCO was to give due notice for the future suspensions and any stoppage instruction issued unilaterally would be treated as a repudiation of the contract.

13. Thereafter supplies were resumed in March 2000 but on 24th May 2000, IFFCO again directed IGCL to suspend supply stating that it should resume supply only after intimation by IFFCO. IGCL states that in view of the above circumstances, it was constrained to stop production of phosphoric acid. It had no option but to send small quantities by clearing out the plant and after June 2000 the IGCL stopped shipments. Since IFFCO did not issue instructions for resumption of supplies, IGCL had no option but to conclude that IFFCO was unable to utilize the supply of phosphoric acid and abandon the MoU.

14. According to IGCL, all of a sudden on 4th September 2000, IFFCO wrote to it stating that it was IGCL which had stopped the supply of phosphoric acid and requested it to resume supplies immediately. By a letter dated 15th September 2000, IGCL pointed out that the request for stoppage of supplies made by IFFCO was contrary to terms and conditions of the MoU and in view of the previous communication dated 24th May 2000, IGCL could not have resumed the supplies without a specific communication from IFFCO. Further, since there was no provision in the MoU which permitted unilateral suspension of supplies, the prolonged suspension for more than three and a half months showed

that IFFCO was in breach of the MoU and had practically abandoned the MoU by its actions and omissions. By a further letter dated 9th November 2000 IGCL pointed out that the above actions and omissions and stoppage of supply had resulted in substantial losses to IGCL.

15. Reference should be made at this stage to letter dated 20th September 2000 by IFFCO in which it was stated that till then only two shipments were arranged by Birla Copper and those two shipments were performed “after multiple changes in the lay days probably to suit the convenience of Birla Copper or the shipper”. IFFCO alleged that the number of changes in the proposed shipment schedule “was disturbing our overseas receipts from other nine sources”. It alleged that on more than one occasion after having confirmed a firm schedule, Birla Copper at the eleventh hour conveyed the cancellation of shipment on account of non-availability of vessel, clearance from Ministry and various other reasons. It was pointed out by IFFCO that the last attempt for delivery of shipment by sea was made in May 2000 but after having a confirmed schedule IGCL had conveyed its helplessness to perform delivery. IFFCO then agreed to receive supplies through road tanker and despite several hassles it honoured its obligations under the MoU. IFFCO stated that it had not received any communication from IGCL committing any quantity on quarterly basis in advance and that it was IGCL which had unilaterally suspended the phosphoric acid supplies from July 2000 onwards.

16. On 30th November 2000, IFFCO wrote to IGCL as under:-

“M/s Indo Gulf Corporation Ltd.
(Unit Birla Copper),
PO-Dahej
Gujarat

Attn: Mr. D.D. Jalan, Sr.Jt. EP (F&C)

Sub: Notice for purchase at your risk and cost.

Dear Sir,

You have failed to make supplied of Phosphoric Acid w.e.f. July 2000 in fulfillment of your contractual obligations under the MOU dated 19th January 1999, despite several reminders from us. We understand that you have resorted to this deliberate breach with a view to benefit your own installation. This is not only a breach of contract but also a breach of trust.

You are hereby called upon to fulfill your contractual obligation by:

- (i) supplying 25,000 MT of P₂O₅ towards the supply commitment between July to November 2000 latest by 31st December 2000, and
- (ii) resuming immediate supplies of Phos-Acid to Kandla for delivering the committed quantity from December 2000 onwards.

In the event of your failing to fulfill the above contractual obligations, we will be left with no option but to take recourse to the remedial measures in accordance with law.

We hereby put you on notice that should you fail to supply the quantity mentioned at sr. No.(i) above by the above mentioned date, we will purchase the same at your risk and costs.

Thanking you,

Yours faithfully,

For Indian Farmers Fertiliser Cooperative Limited

Sd.

(A.K. DIXIT)

Executive Director (TSD)”

17. On 3rd January 2001, IGCL wrote to IFFCO denying the allegations and *inter alia* stating as under:-

“We have made our position amply clear in a number of letters particularly the letters dated 15th September and 9th November 2000.

Your letter seems to suggest that there has been a deliberate breach by us with a view to benefiting our own installation. Whilst denying any breach on our part, we feel you are resorting to coercion to prevent our installation from competing with your installation.

The current impasse' is your own making and it is not open to you to act as you please and seek to revive the so-called contractual obligation at your sweet will and convenience.

You are also not entitled to make any risk purchase and any cost that you may incur will be solely to your account.

You are not entitled to any remedies at law and if you take recourse to any remedial measures we will contest the same at your cost. We will also be making our claim on you for the loss that we had to incur on account of your breach of the MoU provisions which resulted in closing down of our Phosphoric Acid plant.”

18. A three-member Arbitral Tribunal was constituted to adjudicate the disputes between the parties. IFFCO filed its statement of claims in which it claimed from IGCL the price differential in the sum of Rs. 7,19,01,540 on account of repurchase of 48767 MT of P₂O₅ from other suppliers; general damages in the sum of Rs. 4,50,94,302 on the balance quantity of 25418 MT as per price applicable for 2000-01 at USD 37.747. Thus in all, IFFCO claimed a sum of Rs. 11,69,95,842 together with interest at 18% per annum and costs of the proceedings.

19. A Counter-Claim was filed by IGCL for the sum of Rs. 77,32,000 on account of damages for loss of profit for being prevented from making sale of phosphoric acid between the period 22nd February 2000 to 29th February 2000; a sum of Rs. 4,08,24,000 on account of damages for loss of profit for being prevented from making sale of phosphoric acid during the period June 2000 to September 2000 and sum of Rs. 1,89,18,000 being the price differential in sale of sulphuric acid due to distress sale in

the period between June 2000 and September 2000 and interest with effect from 1st October 2000 till reference, interest *pendente lite* and future interest as well at 16% per annum on the aforementioned sums claimed till the date of payment.

20. While two of the Arbitrators gave the majority Award on 12th July 2004, the dissenting Arbitrator gave his Award on 5th July 2004.

21. The majority Award written by one of the Arbitrators, Shri K. Parthasarthy, held that IFFCO was entitled to sum of Rs. 7,19,01,540 along with interest at the rate of 10.25% per annum from 15th October 2001 till the date of payment. According to the majority there were several questions that arose for which the answers given by IGCL were unsatisfactory. It was held that IFFCO's letter dated 24th May 2000 had been rendered a nullity and stood impliedly recalled by the conduct of IFFCO in accepting the June consignment. Further after receiving the letter dated 24th May 2000 IGCL did not break the supply even for one day. Consequently, there was no need for IFFCO to have sent any letter for resumption of supply. By stopping the supply by the letter dated 15th September 2000 IGCL had committed the breach of contract. Further, IGCL could not wriggle out of its two letters dated 30th May 2000 and 31st May 2000 and the consequences of sending the June 2000 consignment. The conduct of both parties relegated them to the pre 24th May 2000 position. It was held that the IGCL had already taken a decision in the month of March to set up its own DAP plant for manufacturing fertilizer and use its phosphoric acid for that plant and the entire defence set up by the IGCL was to save itself from the liability of damages. In view of the fact that it was IGCL which was in breach of the MoU, its counter-claims were rejected. As regards the quantum of damages, pursuant to the

direction issued by the Arbitral Tribunal, IFFCO had on 15th February 2004 to file a detailed statement of the amounts which indicated the FAI Consortium Price per MT of phosphoric acid at the relevant period. On the said basis, the amount payable was worked out.

22. A day prior to the above Award of Shri K. Parthasarthy, the dissenting Award of Shri R.P. Bhat was passed on 5th July 2004. In his dissenting Award, Shri R.P. Bhat came to the following conclusions:

(i) As against the normal monthly supply of 5,000 MT, only 1,799 MT was supplied in June and thereafter the supply was stopped. IFFCO had been unable to explain the silence of 3 ½ months after issuance of the letter dated 24th May 2000. Section 46 of the Indian Contract Act, 1872 ('ICA') required parties to perform their obligations within a reasonable time. Consequently the inexplicable silence of 3 ½ months on the part of IFFCO after requesting for a suspension of supplies constituted a breach of the MoU notwithstanding the fact that the IGCL had supplied negligible quantities of phosphoric acid derived from clearing of the rock phosphate silos and their pipelines. Once IFFCO was unwilling to carry out its part of the contract, there was no question of IGCL proceeding to carry out its obligations under the contract.

(ii) IFFCO had accepted road shipments without protest. Also IGCL had complied with the requirement of setting up unloading facilities and had made shipments by sea from its port. IGCL had complied with the terms and conditions of the MoU. Request for suspension of supplies were made by IFFCO only due to ullage restrictions at their end and not due to supply by road tankers.

(iii) No notice of *force majeure* was given by IFFCO to IGCL and therefore whether IFFCO's plant was closed due to earthquake from 26th January 2001 to 25th March 2001 was not relevant. IFFCO was not therefore entitled to claim damages for its risk purchases.

(iv) The Arbitral Tribunal had jurisdiction to entertain the counter-claim of IGCL and that the request for stoppage of supplies 1 lakh MT, the production of phosphoric acid and sulphuric acid produced by the IGCL were interlinked.

(v) The counter-claim of IGCL was allowed and IFFCO was directed to make a payment of Rs. 6,74,74,000 with interest at 12% per annum from the date of counter-claim till the date of payment.

23. The Presiding Arbitrator, Shri MP Singh appended a hand-written note below the Award of Shri K. Parthasarthy as under:-

"M. P. Singh

I have the privilege of perusing both the Awards of my Co-Arbitrators Mr. R.P. Bhatt and Mr. K. Parthasarthy, one dismissing the claim petition and allowing the counter claim and the other allowing the claim petition and dismissing the counter claim.

On a deep consideration of the Awards, I am of the view that the Award given by Mr. K. Parthasarthy is more appealing to me. I fully agree with the reasons given and conclusions arrived at by him. There hardly remains any point to be added by me. His Award should be treated as my Award too. It is a majority Award.

Sd/-
M.P. Singh
12/7/2004"

24. This Court has heard the submissions of Mr. Dushyant Dave, learned
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Senior counsel and Mr. Bharat Sangal, learned counsel appearing for the Petitioner and Mr. Ravinder Sethi, learned Sennior counsel appearing for IFFCO.

25. Much of the argument turned around the letter dated 24th May 2000 and about IFFCO requesting IGCL to suspend the supplies and the response of IGCL by its letters dated 30th May 2000 and 31st May 2000. At this stage it must be noticed that the scope of interference by this Court under Section 34 of the Act is limited. The Court is not expected to re-appreciate evidence as an appellate court. Unless the impugned majority Award can be said to be suffering from a patent illegality, interference would not be called for.

26. A careful reading of the letter dated 24th May 2000 addressed by IFFCO to IGCL shows that it had requested IGCL to “arrange to suspend the Phosphoric Acid supplies in road tankers with immediate effect”. This is to be read along with the subsequent letter IGCL wrote on 30th May 2000 as under:

“Dear Sir,

We are perturbed by the communication vide fax no.PD/IM/068(BC) dated 24th May 2000 from your office advising us to stop the supplies immediately. We have also explained the adverse implication for such stoppages to us during your last stoppage instruction in Feb. '00, a copy of our letter is enclosed for your perusal please. The same issue was also explained during our personal meeting at Delhi.

Further please be informed that we have made two shipments by sea route, but because of procedural and regulatory issues, we are not able to arrange further shipments although we have lined up vessel for another two voyages. Under these circumstances, we have left with no alternative, but to continue the road dispatches.

We, therefore, request you that you may kindly review your decisions and permit us to dispatch the material immediately.

Thanking you,

Yours faithfully

For Indo Gulf Corporation Ltd.,

(Unit : Birla Copper)”

27. This was followed by another letter on 31st May 2000 from IGCL to IFFCO as under:-

“Dear Sir,

We are perturbed by the communication vide fax no.PD/IM/068(BC) dated 24th May 2000 from your office advising us to stop the supplies immediately. We have also explained the adverse implication for such stoppages to us during your last stoppage instruction in Feb. '00, a copy of our letter is enclosed for your perusal please. The same issue was also explained during our personal meeting at Delhi.

Further please be informed that we have made two shipments by sea route, but because of procedural and regulatory issues, we are not able to arrange further shipments although we had lined up vessel for another two voyages. Under these circumstances, we have left with no alternative, but to continue the road dispatches.

This is for your taking appropriate action please.

Thanking you,

Yours faithfully

For Indo Gulf Corporation Ltd.,

(Unit : Birla Copper)”

28. Therefore, it was clear that the dispute was pertaining to whether the despatches by road should continue. While indeed IFFCO did not immediately write to IGCL about resumption of supplies, given that in the past the continuous requests for stoppage of supplies and resumption were

complied with by the IGCL, there was no need for IFFCO to presume that there was any novation of the contract or abandoning of the contract by either party. The contention of IGCL that it was surprised by the letter dated 4th September 2000 of IFFCO complaining about supplies not reaching in Kandla unit for quite some time has to be appreciated in the above context. The response of IGCL in its letter dated 15th September 2000 that IFFCO “should hence accept this MOU as repudiated by your own conduct” only showed that it was not IFFCO which had in fact stated that it was abandoning the contract but it was IGCL which drew the inference of repudiation of contract by IFFCO by conduct. This is further clear from the communication of the same date in which IGCL stated that it was treating the MoU as cancelled since no response was received to its letter dated 31st May 2000. It was IGCL which stated “you should hence consider the MOU as repudiated by your own decisions”. It does appear that at this stage it was IGCL which wanted to wriggle out of the contract and not IFFCO.

29. A reading of Article 4.1.0 to 4.3.1 makes it clear that the essential mode of transport was by sea. The supply by road tankers was really only in exceptional circumstances. It appears to the Court that the view taken by the majority that the letter dated 24th May 2000 by IFFCO was in relation to stoppage of supplies by road tankers was a plausible view to take. In fact the letter dated 30th May 2000 shows inability of the IGCL to supply by ship since although they had lined up shipments for two voyages they had not obtained requisite clearances. In fact, supply by road tankers continued till 30th June 2000 with 1800 MT of phosphoric acid accepted by IFFCO without any objection. This was consistent with the request made by the IGCL by its letters dated 30th May 2000 and 31st May 2000. In fact, no letters were written by IGCL itself thereafter that no

supplies were made till July and August 2000. Apart from the two letters dated 15th September 2000, through a third letter undated IGCL invoked Article IV stating that since supply schedule had to be discussed three months in advance and since IFFCO was demanding immediate supplies it had breached the MoU.

30. It was contended on behalf of the IGCL that IFFCO had made claim in respect of its purchase of 48767 MT of P₂O₅ from other suppliers for the period 1st April 2001 to 30th June 2001 whereas the total supply for a whole year was only 60000 MT. This point that IFFCO could not have purchased 48767 MT of phosphoric acid within a period of three months was not raised by IGCL before the Arbitral Tribunal. It cannot now be permitted to raise this point for the first time in these proceedings. Further, there is no denying that IFFCO had in fact given notice on 30th November 2000 of risk purchase. No such plea is taken in the reply dated 3rd January 2001 of IGCL.

31. As regards Section 46 of the ICA which had been referred to in the minority Award, the finding of the majority is that it was IGCL which was in breach of the contract. The majority view appears to be a probable one, in the facts and circumstances, and in light of the evidence discussed by the Arbitral Tribunal.

32. Another aspect which was considered in the majority Award was that the IGCL stopped import of rock phosphate from March 2000 to October 2000, and there was in fact no production of phosphoric acid. The decision of IGCL to close its plant in March 2000 itself had nothing to do with IFFCO's request on 24th May 2000 to IGCL to stop supplies. This finding of the majority is consistent with the evidence on record before

the Arbitral tribunal. It is not a mere coincidence that after its DAP plant got commissioned on 28th September 2000, IGCL restarted importing rock phosphate from 30th October 2000.

33. It is seen from the arbitral record and the Award of the majority that IFFCO had produced evidence to show that it had procured phosphoric acid from foreign suppliers, viz., OCT and GCT for which customs duty was also paid. IFFCO was able to demonstrate the loss suffered by it at USD 31.37 per MT.

34. This Court is satisfied that the view taken by the majority does not suffer from any patent illegality and is not contrary to the provisions of the ICA or of the MoU between the parties. There are no grounds made out for interference.

35. The petition is dismissed with costs of Rs. 10,000 which should be paid by the Petitioner to the Respondent IFFCO within a period of four weeks from today.

S. MURALIDHAR, J.

JUNE 1, 2012

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