

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. No. 402/2005

Reserved on: February 10, 2012

Decision on: March 5, 2012

ALFA LAVAL (INDIA) LTD. Petitioner
Through: Mr. V.P. Singh and Mr. D.S. Narula, Senior
Advocates with Mr. S. Vaidyaligam and
Mr. A.S. Narula, Advocates.

versus

J.K. PAPER LIMITED & ORS. Respondents
Through: Mr. Parag P. Tripathi, Senior Advocate with
Mr. Shadan Farasat, Mr. A. Ganguli,
Mr. A.T. Patra, Mr. Ramesh, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

05.03.2012

1. The challenge in this petition under Section 34 of the Arbitration and Conciliation act 1996 ('Act') by the Petitioner Alfa Laval (India) Limited ('ALIL') is to an Award dated 11th August 2005 passed by the Arbitral Tribunal ('Tribunal') holding that ALIL will pay the Respondent J.K. Paper Limited ('JK') [formerly known as JK Corporation Limited] a sum of Rs. 1,71,09,439/- within six months from the date of receipt of the Award with interest @ 7% per annum on the unpaid part of the said amount, if any, from the date of the Award till the date of actual payment.

Background facts

2. ALIL is a subsidiary of Alfa Laval AB, a multinational corporation headquartered in Sweden which deals, *inter alia*, in planning, engineering, manufacturing and commissioning of machines for Black Liquor Evaporator

Plants. ALIL states that since 1968 it has had a technical tie-up with APV Anhydro of Denmark for technical knowhow of 'falling film evaporation plants'. It claims to have executed more than 200 dryer and evaporator projects in various industries in India.

3. JK is a company registered under the Companies Act, 1956 and has a paper mill at Rayagada in Orissa. The paper mill consists of a pulping section and a chemical recovery section. JK was desirous of obtaining a superior technology evaporator plant to process 600 Tons Per Day ('TPD') of black liquor solids producing concentrated black liquor with 65% of total solids ('TS'). In 1995 JK engaged the services of the SPB Projects and Consultancy Limited ('the Consultant') for detailed engineering and evaluation of the expansion of JK's paper mill at Rayagada in Orissa. It was stated that an integral part of the whole expansion project was a 'Tubular Falling Film Black Liquor Evaporation Plant' in the recovery section of JK's paper mill. It was stated that the Consultant floated an enquiry and short listed ALIL as well as three other companies, Enmas, Larsen & Toubro Limited and Pass Engineering Limited. After evaluating the technical specifications and expertise in the field, the Consultant shortlisted ALIL. It was further stated that during the meeting thereafter held between ALIL and JK, the drawings, design specifications and other technical details of the plant in line with the requirements of JK were discussed at length, cross-compared with those of the other bidders and approved by JK. At the meeting held on 6th July 1995 between the representatives of JK, ALIL and APV Anhydro, JK specified that the plant is to be designed on the basis of feed (furnish) of 40% hardwood and 60% bamboo. On 27th November 1995 ALIL confirmed that the basis of design of the said plant would be based on liquor characteristics from a furnish of 40% mixed hardwood and 60% bamboo coming out of Kraft pulping process.

4. On 19th January 1996 ALIL and JK entered into a contract for supply, erection and commissioning of seven bodies with one standby falling black liquor evaporation plant at a contract price of Rs. 10,09,07,000/-, inclusive of all taxes, duties etc. It was to be a 120 TPH evaporator plant with a production capacity guarantee to process 600 TPD Black Liquor solids with product liquor concentration of 65% TS. In terms of the contract ALIL furnished to JK three Performance Guarantees ('PGs') in the sum of Rs. 1,01,36,050. In terms of Clause 13 of the said contract, the limit of damages was fixed at 10% of the value of the contract.

5. According to ALIL, the plant was supplied and erected in terms of the approved drawings in June 1997 and made ready for commissioning by 15th July 1997. It is claimed by ALIL that the plant was thoroughly inspected and found to be as per the approved design and description. According to ALIL, the said plant was run in August 1997 and made ready for continuous trial runs. According to the ALIL, JK expressed that continuous trial runs at 100% capacity and 65% concentration would be possible only after two and a half to three months. ALIL claimed that the said plant was run at 65% concentration intermittently for 3 to 10 hours for five days. It was stated that on being satisfied with the performance and its capabilities, JK took over the plant for regular operation and maintenance on 13th November 1997. By a letter dated 8th December 1997 addressed to ALIL, JK admitted that they were producing product black liquor of 65% solids concentration from the said plant for their new recovery boiler trial run. It is stated by ALIL that JK also admitted that the new recovery boiler was commissioned in April 1998.

6. On 10th January 1998 JK wrote to ALIL stating that the full load performance trial of the evaporation plant would be conducted "after rectification of all process and mechanical problems" including "nitric acid

cleaning, Auma actuated valve problems in standby body changing”, low temperature of product liquor, trimming of impeller of Akay pumps etc. Another letter was sent by JK to ALIL on 9th July 1998 stating that they would like to carry out full load performance trial of the evaporator plant and further that the “AUMA actuator main steam valve problem may please be got attended prior to above performance trial as this job is pending since long.” By a further letter dated 23rd July 1998 JK requested ALIL to depute the concerned engineer for carrying out the full load performance trial from 27th July 1998. According to ALIL, between November 1997 and July 1998 JK had run the plant without proper support and without proper cleaning of calendrias.

7. As noted by the Tribunal in para 6 of the impugned Award, and from the charts submitted to this Court during the hearing, it is seen that in the pulping section ‘wood and bamboo chips’ are mixed with ‘white liquor’ and fed into a ‘digester’. The resultant product is subject to filtration. At this stage the pulp is taken out and the by-product which is ‘weak black liquor’ (‘WBL’) with 15-17% solids at 70-77 degree Celsius is fed into the evaporator plant. The resultant concentrated black liquor consisting of 65% TS @ 102 degree Celsius is fed to the recovery boiler. There it is processed with organic chemicals, burnt and then sent for a weak wash with hot water which results in ‘green liquor.’ This then fed back into the ‘pulping section’. The evaporator plant is, therefore, an integral part of the total chemical recovery process of the paper mill. The performance as well as the operation of the plant depends on the upstream process like ‘pulp mill’ and downstream process which comprises the feed going into the recovery boiler. The plant is designed as a seven effect falling film tubular evaporator. However, there are eight bodies as the first body is equipped as a stand-by effect.

8. According to ALIL, JK insisted that one set of impellers should be trimmed before the performance test could be carried out. According to ALIL although JK was assured that the said job would be taken care of during the full load performance trials, JK threatened to encash the bank guarantee of Rs. 1,01,36,050. ALIL was therefore constrained to trim the impellers in October 1998. According to ALIL, even then JK did not release to ALIL the balance outstanding payment of Rs. 20,15,465 towards the cost of the plant. ALIL stated that it could not undertake the performance test between December 1998 and March 1999 since the paper mill at Rayagada in Orissa was under a lockout. Thereafter JK, without first cleaning the plant, operated the same. According to ALIL, during the warranty period for defects liability, i.e., 12 months from the date of commissioning or 18 months from the date of last despatch, whichever is earlier, there was no complaint received by it from JK of any major defects requiring replacement including the first tubular body and its standby.

9. ALIL stated that after the mill reopened in March 1999, repeated efforts were made by ALIL to get the said plant ready for performance tests. But this was met with stiff resistance by JK on one ground or the other. According to ALIL, the performance test conducted in September/October 1999 revealed deviations made by JK against the design relating to feed temperature, pulping raw material etc.

10. ALIL stated that it received a letter dated 13th November 1999 from its Bank informing it that JK had invoked bank guarantees totalling Rs. 1,01,36,050/-. ALIL filed a petition under Section 9 of the Act in this Court to restrain JK from encashing the bank guarantees. The said petition was rejected. Even before ALIL's appeal against the order could be heard before the Division Bench, JK encashed the bank guarantees. Thereafter, the

disputes were referred to arbitration. The two learned arbitrators nominated by each party appointed the presiding Arbitrator.

Arbitral Proceedings

11. ALIL filed a statement of claim, *inter alia*, claiming that JK should pay it (i) a sum of Rs. 1,01,36,050/- with further interest on Rs. 1,07,44,213/ @ 24% per annum from the date of filing of the statement of claims till its realization (ii) a sum of Rs. 23,33,816/- together with interest @ 24% per annum from the date of filing of the statement of claim till the date of payment and (iii) a sum of Rs. 13,70,439/- together with interest @ 24% per annum from the date of filing of the statement of claims till realization as well costs of arbitration.

12. In its reply before the Tribunal, JK stated that an additional guarantee had been provided by ALIL that in case 65% TS output concentration of liquor was not achieved, 'ALIL shall replace, free of cost, the first tubular body and its standby with plate type and the modifications and for replacement on this account shall be done by ALIL at no cost to the company.' JK pointed out that the performance guarantee was extended thrice, i.e., first upto 28th February 1999, next upto 22nd August 1999 and finally upto 22nd February 2000. JK denied that ALIL had successfully erected the plant. According to JK, although the work for commissioning of the plant was commenced in August 1997, the plant could not achieve the parameters. It was denied that the hardware related problems could have been attended to by JK itself. JK denied that it was not ready for performance trial of the plant. It maintained that ALIL had failed to conduct the full load performance trial of the evaporator plant. ALIL was also alleged not to have extended the period of bank guarantee in the sum of Rs. 20,90,700 resulting in JK not remitting payments to ALIL. It was stated that

although there was a lock out between December 1998 and first week of March 1999 ALIL was not on that account prevented from conducting a full load performance trial run. JK maintained that in March 1999 ALIL requested JK to fabricate modified distribution plates for Calendrias I and II with increased hole diameter which was the responsibility of ALIL but was shifted to JK. It was alleged that the details supplied by ALIL for fabrication of distribution plates were also not correct and were subsequently corrected by a fax dated 1st April 1999. The delay in conducting the performance trial was attributable to ALIL. It demonstrated the method of nitric acid cleaning to JK only in April 1998, i.e., five months after the operation and handing over of the plant on 13th November 1997 to JK. JK also stated that ALIL did not carry out acid cleaning in place ('CIP') before the plant was handed over to JK. It requested ALIL to agree to a proposal of cleaning of bodies I, II and III one by one. It was stated by JK that on practical grounds it was appropriate for JK not to agree to ALIL's proposal. JK also filed its counter claims in the sum of Rs. 13,24,01,300/- after giving credit to ALIL for the bank guarantee of Rs. 1,00,90,700/- encashed by JK with interest @ 24% per annum with costs.

13. At the hearing before the Tribunal on 10th January 2000 both parties consented that Mr. Sarju Singh, former CMD, Hindustan Paper Corporation and Director (Technical) of Indian Agro-Paper Mills' Association ('IAPMA') be appointed as an independent expert to carry out an inspection of the plant and submit a report to the Tribunal. The expert was to opine on the present technical condition and status of the plant and the extent to which it had been functional. Pursuant thereto, Mr. Sarju Singh filed a detailed report on 18th February 2000. Objections were filed to the said report.

14. On the basis of the pleadings of the parties, the following issues were framed by the Tribunal:

- “1. Whether the evaporator plant as supplied by M/s. Alfa Laval fulfils the parameters and standards of the supply contract or is it defective in any respect?
2. Is the claim raised by JK Corporation within the period of warranty under the terms of the contract?
3. Whether JK Corporation have incurred losses as claimed, if so, to what extent are they entitled to be compensated?
4. Whether invocation of bank guarantees by JK Corporation was legal and proper?
5. Whether both the parties under the supply contract have fulfilled their duties and obligations thereunder and, if not, what are the consequences?
6. Is the damages for breach of guaranteed performance limited to 10% of the contract price as contended by Alfa Laval to JK Corporation?
7. Whether JK Corporation is entitled to the claim of Rs. 13,70,439/- mentioned in prayer (c) of the claim of Alfa Laval?
8. Whether JK Corporation is justified in withholding the balance payment of Rs. 23,33,816/- with interest, as claimed?
9. To what relief the respective parties are entitled to?”

The Arbitral Award

15. The Tribunal took up the first two issues together. Issue No. 2 was answered in the affirmative. It was held that both the parties had shown laxity in the observance and fulfilment of the contractual requirement under Article 21 (1) read with Article 12 (vi) concerning of commissioning of the plant. Since JK was not claiming under the warranty clause, it had to be “left out of account.” It was held that although JK took over the plant and commissioned it in its paper mill with effect from 13th November 1997, that

date could not be taken as the date relevant for purposes of Article 12 (vi) whose stipulations had not been complied with and therefore ALIL could not be relieved of its obligation to prove the performance guarantee within six months of commissioning of the plant. Since the conditions in Article 12 (vi) read with Article 21 (1) had not been complied with, the contention of ALIL that JK's claim was beyond the warranty period could not be accepted.

16. Turning to Issue No.1, the Tribunal noted that the basic foundation for the contract between the parties was the assurance in the representations held out by ALIL that it had expertise in the installation of tubular type water evaporators with the technical back up of APV Anhydro and its technical staff. It was a new technology and ALIL claimed to have installed it in two plants in India prior to entering into agreement with JK. It was held by the Tribunal that if the important parameters specified in Section 1 of Schedule A and Article 13 were not satisfied, then ALIL would in any way have to pay damages to JK. The Tribunal then noted the conclusions in para 11.4 of Mr. Sarju Singh's report and proceeded to deal with ALIL's defences. It was held that the plea of ALIL that it was only on account of lack of capacity of JK's recovery boilers to handle black liquor at 600 TPD that hindered achieving the targets was not acceptable and no specific query in that regard was put to the expert witness Mr. A.S. Krishna, an assistant of Mr. Sarju Singh. As regards the contention of ALIL that the plant was capable of producing 65% concentration black liquor, the Tribunal noticed that at the trial runs taken on 4th October 1999 in the presence of the representatives of JK, ALIL and APV Anhydro the net utilisation of the capacity was only 58% without any fault being attributed to JK. Consequently, it was concluded by the Tribunal that "there is no doubt that the plant did not yield black liquor with 65% TS concentration as required

by the contract.” The plea of ALIL that JK failed to maintain proper ratio of bamboo and pulp in the feed, and that this in turn resulted in the plant failing to achieve the required parameters, was held not to have been substantiated by any evidence. The expert had made no adverse comments on the high level of the injection temperature. As regards the condenser temperature the expert had in para 8.1.4.2 of his report concluded that there was no major fault in the condenser.

17. The Tribunal held that the correspondence exchanged between the parties showed that “the evaporator plant was not functioning as per the design parameters”. The plant indeed had not been commissioned as per the contract but “neither party can be exclusively blamed for this situation nor both have to take the consequences of there being no ‘date of commissioning’ within the meaning of the contract.” It was further held that this point was not very significant except for the purpose of defence of limitation in relation to the claim of liquidated damages under Article 13, which however was not claimed by JK. Referring to the additional guarantee in the contract it was held by the Tribunal that ALIL was obliged to replace, at its own cost, the first tubular body and its stand by with a plate type body at no extra cost. It was held that JK was entitled to be reimbursed by ALIL in the sum of Rs. 2,58,00,000/-, which was the cost incurred by JK for the replacement.

18. JK’s claim under Issue No. 3 for losses was upheld only to the extent of Rs. 40 lakhs towards excess expenditure on electricity and Rs. 2.58 crores in respect of the replacement of one plate type lamilla. It was held that the amount of guarantee encashed by JK, i.e., Rs. 1,01,36,050/- would be deducted from the damages of Rs. 2,98,00,000/- awarded to JK. The Tribunal further held that ALIL could not be burdened with the cost of all

the modifications and improvements made by JK but was clearly liable to the extent of the cost incurred for the substitution of the first effect by a body-type lamilla. The claim of ALIL for a sum of Rs. 13,70,439/- was not entertained. The Tribunal held that JK was not justified in withholding the balance payment of Rs. 15,15,465/-. This amount was accordingly awarded to ALIL with 9% interest from 14th November 1997 till the date of realization and 7% from the date of Award till the date of actual payment. In conclusion, it was held by the Tribunal that ALIL will pay JK a sum of Rs. 1,71,09,439/- within six months and interest 7% per annum on the unpaid part of the said amount from the date of the Award till the date of payment.

19. By an order dated 7th February 2006, ALIL was directed by the Court to deposit the awarded amount in the form of a fixed deposit. After this was done, by an order dated 17th September 2008, JK was permitted to withdraw the amount subject to furnishing a bank guarantee.

Submissions of counsel

20. It was first contended by Mr. V.P. Singh, learned Senior counsel for ALIL that the Award was given after expiry of one year and eight months from the conclusion of arguments and that some of the submissions were not dealt with. It was submitted that delay in pronouncing the Award was by itself a reason to set aside the Award as being opposed to the public policy of India. It was further submitted that the demand by JK for replacement of the first tubular body on the ground that 65% TS concentration was not achieved on continuous basis, was made for the first time in December 1998 which was 13 months after the plant was commissioned and during which time JK had been running the plant without proper maintenance. It is submitted that with the Tribunal holding that neither party could be blamed

for not ensuring that the performance trial took place as envisaged in the agreement, JK would be precluded from claiming any damages on that score. It is submitted that Article 14 of the agreement provided for warranties and the discovery of any difficulty was required to be communicated immediately in writing by JK to ALIL. The outer limit for replacement of defective parts was 12 months from the date of commissioning or 18 months from the date of last despatch, whichever was earlier. Even assuming that there was uncertainty about the date of commissioning, no complaint was received from JK within 18 months period from the date of last despatch. According to Mr. V.P. Singh, there was no additional guarantee under Article 12 (viii) or Article 13 and it was mere reiteration of the other guarantees contained in the earlier parts of the agreement. The central thrust of the argument of the Petitioner is that by not holding the performance trials, by not ensuring proper feed and by not cleaning or maintaining it more than 13 months after the date of commissioning, JK could not hold ALIL responsible for the failure of the plant. It was submitted that the findings of the Tribunal are against the terms of the contract. What ALIL was liable to do under Article 12 (viii) was only to 'replace free of cost, the first tubular body and its standby with plate type body' and not provide anything in addition to the tubular body. The contract entered into by JK with Enmas clearly showed that it was seeking an additional tubular body and not its replacement. Reliance is placed on the decision of the Supreme Court in ***McDermott International Inc. v. Burn Standard Co. Limited (2006) 11 SCC 181*** where it was observed that in the assessment of damages, "the Court must consider only strict legal obligations and not the expectations, however reasonable, of one contractor that the other will do something that he has assumed no legal obligation to do." Finally, it was submitted that although JK claimed to have incurred a cost of Rs. 2.58 crore to replace the body-type lamilla, it did not actually

provide any proof of having made such payment to Enmas. Mr. Singh pointed out that by the time Mr. Sarju Singh visited the plant in February 2000 it had already been in operation for several months and his observations made long after the actual commissioning of the plant would not actually indicate whether it was capable of achieving the parameters soon after the commissioning of the plant. He reiterated that a demand for replacement could not have been made after 18 months of the expiry of the last despatch.

21. Mr. Parag P. Tripathi, learned Senior counsel appearing for JK submitted that the very basis of the entire agreement was that the assurances by ALIL that the new technology which was sourced from APV Anhydro was a new technology using tubular evaporators instead of plate type evaporators. Referring to the clause concerning performance guarantee he submitted that at no point in time ALIL had run the plant continuously for 72 hours to demonstrate that there was output of 65% TS. He emphasized that Clause 9 in Section 6 of the Schedule Act of the Agreement which pertained to performance guarantees made it incumbent on ALIL to replace the first tubular body and its standby in case the output of 65% TS was not achieved. He submitted that Mr. Sarju Singh, an expert appointed by the Tribunal opined that the plant could have never achieved 65% TS concentration at any point in time. Since there was no reference to the clause concerning warranties the limitation period specified thereunder did not apply. There was also no claim for liquidated damages. There was no claim with reference to Article 15 as well. As regards the problem of scaling of the bodies it is pointed out that this was an anticipated problem which is why ALIL had assured that “a cleaning in place (CIP) system shall be provided for cleaning effect E-1 and its standby”. There was no effective cross-examination of the expert to substantiate the plea of ALIL that the failure of

the plant to achieve full capacity was on account of improper feed by JK or individual capacity of the boiler plant. As regards the proof of payment of the cost of replacement of the first body to Enmas, it was submitted that this issue was never raised before the Tribunal.

Delay in pronouncing the Award

22. As regards the first ground of delay in the Tribunal pronouncing the Award, it is seen that the impugned Award has discussed the entire evidence in great detail and given elaborate reasons for the conclusions issue-wise. In the circumstances, this Court is not inclined to entertain the challenge to the legality of the impugned Award only on the ground that there was a delay in the Award being pronounced after conclusion of the final arguments. In other words, the delay in pronouncing the Award itself is not a sufficient ground to hold that it was opposed to public policy of India as contended by ALIL.

Delay in JK raising a claim

23. One of the submissions of ALIL is that if at all JK wanted to raise a claim in regard to the defective plant, it should have invoked Article 14 of the contract within the period specified thereunder and not have waited till 13 months after the commissioning of the plant. Article 14 of the contract reads as under:

“14. Alfa Laval’s liabilities for defects:

Alfa Laval shall be liable in accordance with the sub-Section (i) and (ii) below for all defects of whatsoever nature in the supplies made by them. The term defect includes lack of any normal property, quality, design, workmanship or performance guarantees in the contract.

(i) All parts which within 12 months from the date of commissioning or 18 months from the date of last despatch of equipment whichever is earlier shall become unserviceable or shall have their usefulness materially impaired, by any cause whatsoever such as faulty design, inferior material or bad workmanship the same shall be repaired or replaced by Alfa Laval free of cost to the company at company's works. The discovery of any defect shall be immediately communicated in writing to Alfa Laval. Alfa Laval undertakes to replace and/or repair with least possible delay and in reasonable time such defective part or equipment and in case the same is not done in reasonable time, the company shall have full right and liberty but no obligation of procuring such equipment or getting the same repaired from any source at the entire cost, risk and responsibility of Alfa Laval.

(ii) The guarantee by Alfa Laval mentioned above shall apply irrespective of any part or machinery and equipment having been procured by the Alfa Laval from any other manufacturer.”

24. There are two periods stated in Article 14 (i) within which a claim in respect of defects in the supplies can be made. The first is within 12 months from the date of commissioning and the other within 18 months from the date of last despatch. In the event that JK found any difficulty in any of the parts for any cause whatsoever such as faulty design, inferior material or bad workmanship, it was required to communicate in writing to ALIL immediately and then ALIL would replace that part or repair it “at least possible delay and in reasonable time”. While ALIL’s understanding of what this clause requires is correct, the submission fails to account for the fact that JK did not invoke this clause. In other words, as was reiterated by Mr. Parag Tripathi, learned Senior counsel for JK during arguments, JK did not lay its claim with reference to Article 14 at all. The Tribunal too noted in the impugned Award that there is no claim made by JK with reference to the warranty under Article 14. While rejecting a similar plea of ALIL, the Tribunal has noted that irrespective of Article 14, JK could claim damages

for supply of a defective plant, with reference to the other clauses of the contract. The Curt finds no error in the said conclusion and concurs with it.

ALIL's liability to replace the first tubular body and stand by

25. The central issue before the Tribunal was whether the black evaporator equipment erected by ALIL met the required parameters. The clauses of the contract relevant to this issue are as under:

“Article 12 – Guarantee by ALFA Laval

(i) That the plant, machinery and equipment to be supplied by them shall be new and suitable and capable to render the desired performance to the entire satisfaction of the company and shall be free from any defect of whatsoever nature including those arising from the use of any defective materials or faulty design in the manufacture thereof or bad workmanship.

(ii) That each item of the plant, machinery and equipment shall be manufactured in accordance with the specifications contained in Schedule ‘A’ of this contract.

(iii) That each item of plant, machinery and equipment supplied shall operate efficiently and in the manner stipulated in the specifications and as intended in Schedule ‘A’ hereto.

(iv) ALFA Laval guarantee that the evaporator plant to be supplied by ALFA Laval shall be designed and are guaranteed for the following performance:-

ALFA Laval guarantees the following at 100% MCR.

1) Black Liquor solids handling T/24 hr
600

2) Water evaporation capacity with feed T/hr
120

Feed con. of 15.8% total solids at 20 deg c
and product liquor con. of 65% TS at 120 deg C

- | | | |
|--|---------------|---------|
| 3) Product liquor concentration | %TS by weight | |
| 65 | | |
| 4) Steam economy (T.water evaporated | T/S | 6.1 |
| 4/- 2% per T of LP steam) | | |
| 5) Power consumption for pumps | KWH | 301 4/- |
| 2% included in scope of supply (in | | |
| operation to achieve 120TPH water | | |
| evaporation capacity) | | |
| 6) Maximum permissible entrainment | 1 PM | |
| 150 through fooled condensate | | |
| NaOH | | |
| 7) Cooling water to surface condenser | Co.M/hr | |
| 1550 @ 35 deg c. (including inter condenser) | | |

v) To prove the fulfilment of the performance guarantees mentioned herein, tests on the performance of the machinery and equipment shall be carried out as early as practicable after the plant is put into operation but not later than three months after the date of completion and starting of the plant.

vi) Unless otherwise agreed between the company and ALFA Laval tests shall be carried out each last a continuous span of 72 hours. The tests shall be taken in the presence of and with the assistance of ALFA Laval's Technician assigned for this purpose. If in the said tests the required outputs and conditions are not proved and/or the said tests reveal defects and/or deficiencies which prevent the attainment of output stated in Schedule 'A' hereto the tests would be repeated as often as necessary. However, the performance guarantees shall have to be proved within six months from the date of commissioning of the plant. The proof of satisfactory results shall be a statement of results obtained with technical data and comments signed jointly by the persons authorised by ALFA Laval and the company in this regard. At every test, the statement of results obtained with technical comments and agreed proposals for replacements, alterations and/or additions necessary, if any, shall be made and signed jointly by persons authorised by the company and ALFA Laval for the said tests.

vii) ALFA Laval undertake that if for reasons attributable to ALFA Laval these tests are not satisfactory to the company they shall rectify and/or cause to rectify the defect either by modifying or completely replacing such defective machineries or any part thereof to prove the performance set out in Schedule 'A' hereto.

viii) ALFA Laval undertake that in case the 65% output concentration of liquor is not achieved ALFA Laval shall replace free of cost, the first tabular body and its standby with plate type and the modifications and for replacements on this account shall be done by ALFA Laval at no cost to the company.

ix) ALFA Laval shall be deemed to have fulfilled their guarantees upon the issue of the company's notification under the hand of the President (Paper) of the company, which shall not be unreasonably withheld, that the company is satisfied in regard to the various guarantees by ALFA Laval. Such notification shall be issued soon after tests for proving the guarantees are carried out and the performance is found by the company in conformity with the performance guarantees set out in the contract."

21. General

(i) The commissioning of the plant, machinery and equipment for the purposes of this contract shall mean the date on which the entirety of the plant, machinery and equipment supplied under this contract are commissioned for commercial production at full capacity. Alfa Laval and the company through their authorised representatives shall sign the certificate recording the date of commissioning of the plant, machinery and equipment and such certificate alone shall be the evidence to show for the purposes of this contract the date of commissioning of the plant, machinery and equipment.

(ii) The date of despatch of the last consignment of the plant, machinery and equipment under this agreement shall be the

date confirmed to the company by Alfa Laval to be the date of despatch of the last consignment and accepted as such by the company.”

26. The above clauses have to be read cumulatively to understand when according to the contract the ‘commissioning of the plant’ can be said to have taken place. IN terms of Article 21 (1) the commissioning takes place on the date “the entirety of the plant, machinery and equipment supplied under this contract are commissioned for commercial production at full capacity”. Further representatives of ALIL were to sign a certificate recording the date of such commissioning and such certificate “alone shall be conclusive evidence” of the date of commissioning. Admittedly, there was no such certificate of commissioning issued in the instant case. Therefore the Tribunal was called upon to investigate why the commissioning of the plant as envisaged by Article 21 (1) did not take place.

27. Under Article 12 (v) “the performance tests on the performance of the machinery and equipment shall be carried out after the plant is put into operation but not later than three months after the date of completion and starting of the plant.” The case of ALIL, as already noticed hereinabove by the Tribunal, was that the plant was commissioned and taken over by JK on 13th November 1997. The relevant portion of the minutes of the Meeting held between ALIL and JK on 13th November 1997 reads as under:

“Minutes of meeting held between Alfa Laval (I) Limited and J.K. Corporation Limited Jaykaypur on 13th November 1997

Persons present:

M/s. J.K. Corp Ltd.

Ms. ALIL

1. Mr. V.K. Oswal

1. Mr. Prashant S. Dravid

2. Mr. M.L. Devram
Srivastava

2. Mr. V.V. Pathak
3. Mr. Ashok

Sub.: 120 TPH Black Liquor Evaporator Plant Contract No. 13/95-96 dated 19th January 1996.

1. During the various trials, the plant has been run at various capacities from 50% upto 115% at 50-55% TS. The concentration of 65% also has been tried for continuous short of 16 hrs on 29th October 1997 and plant was run at 65% intermittently for 3 to 10 hours for a few days.

The plant is being taken over by JKCL for regular operation and maintenance. Presently the plant is being run continuously at 50% to 55% outlet concentration to feed existing recovery boiler and expected to run at 65% concentration from 20th/21st November 1997. During this run JKCL requested Ms/ ALIL Engineer to be present for few days in order to observe working at 65% solids continuously and to stabilize plant at 65% solids.

2. Regarding performance JCKL informed that performance trials shall be conducted in the month of January/February 1998.”

28. The above minutes show that upto that date the plant was run at various capacities ‘concentration of 65% TS’ for continuous short ‘duration of 16 hrs’ on 29th October 1997 and the plant was run at ‘65% intermittently for 3 to 10 hours for a few days.’ Clearly by that date the performance tests as envisaged by the contract had not been conducted. They were expected to be conducted in the month of January/February 1998. The performance trials did not take place on the said dates. Both the parties had referred to the correspondence exchange between them to show that either was not responsible for postponement of the conduct of the performance trials which ultimately never took place. In fact, the Tribunal has observed that “neither of the parties completely fulfilled its obligations under the contract but

allowed matters to drift by *ad hoc* modifications and improvements without insistence on Article 21.”

29. The Court finds that no error has been committed by the Tribunal in coming to the above conclusion. Indeed, the correspondence showed that JK had been making complaints about scaling and consequent clogging, the need for constant cleaning and trimming the impellers. ALIL appears to have been attending to some of these complaints and writing to JK regarding installation of a new boiler, modification of distributor plate, constant periodical cleaning in place, repairs of condensers. The full load performance test had become impossible after the system had started operating and was interconnected to JK’s paper mill plant and the plant could not be shut down for a period long enough to carry out the actual performance trials. However, as pointed out by the Tribunal the fact that the performance trial could not be carried out as envisaged in the contract did not mean that ALIL was totally absolved of its liability for the failure of the plant to meet the design parameters of performance. Under Article 12 (vii), if the failure to hold performance tests was on account of ALIL, then ALIL “shall rectify and/or cause to rectify the defect either by modifying or completely replacing such defective machineries or any part thereof to prove the performance set out in Schedule ‘A’”. However, the guarantee under Article 12 (viii) is specific to the plant failing to produce black liquor of 65% TS concentration. Since this was central to the contract it was agreed that if this parameter were to fail, then “ALIL shall replace free of cost, the first tubular body and its standby with plate type body.” These guarantees have to be read together with Schedule A which is divided into 11 sections which set out the various design parameters, general description of evaporator plant, specification of various equipments etc. Section 6 relates to performance guarantee. Clause 9 of Section 6 states as under:

“9. Alfa Laval have additionally guaranteed that in the event, Alfa Laval observe that the output concentration of 65% not being maintained as per the performance guarantee, Alfa Laval shall replace free of cost, the first tubular body and its standby with plate type body and the modification required on this account shall be done by Alfa Laval at no additional cost to the company.”

30. The interpretation placed on the above clause by the Tribunal in concluding that even where the performance trials were not held within time and in the manner envisaged under the contract, ALIL could not be relieved of its obligation to replace the first tubular body for failure to achieve 65% TS concentration, cannot be said to be erroneous. The intention of the parties in this regard is made even more explicit in Article 13 which specifies the extent of LD payable to JK by ALIL for failure of the plant to achieve production capacity, water evaporation capacity, steam economy, power consumption, “alkali carry over in condensate expressed in term of PPM NaOH”, and product liquor concentration. Article 13 specifies that “the damages set out within each of the following guarantees category below are not cumulative but independent of each other.” In the penultimate para of Article 13 it is stated “ALFA LAVAL have additionally guaranteed that in the vent of outlet concentration not being achieved at 65% solids, other parameters remaining as per contract, Alfa Laval shall replace free of cost the first tubular body and its stand by with plate type body at no extra cost.” A collective reading of Article 12 (viii), with Clause 9 of Section 6 of Schedule A and the additional guarantee under Article 13 supports the conclusion drawn by the Tribunal that ALIL would be liable to pay damages to JK if the parameters set out thereunder were not satisfied.

31. ALIL’s case, which was rejected by the Tribunal, was that the “other parameters” that Article 13 mentions were required to be ensured by JK and since they were not, the plant could not produce the black liquor of desired

concentration although it was capable of doing so. In approaching this issue, the Tribunal has gone by the report of Mr. Sarju Singh, the expert appointed by it, and the evidence that emerged during the hearings of the Tribunal. The Tribunal while dealing with the issue concerning the handling capacity of the boiler noted the contention of ALIL that even according to Mr. Sarju Singh, JK applied for expansion of the additional mill including a new recovery boiler to handle 300 TPD black liquor solid at 65% concentration and that the effective handling capacity of the boiler with JK was only 510 TPD. It also noted the contention of JK that 510 TPD represented the capacity of the restructured evaporator for which JK had contracted with Enmas and this restricted capacity was intentional as JK was able to replace only one of the bodies by a plate type lamilla due to financial constraints. The Tribunal then proceeded to observe as under:

“29. This controversy would have been easily settled by ALIL putting this to A.S. Krishna, Assistant of Mr. Sarju Singh, who was cross-examined by it in length. A number of questions were put to him about the handling capacities of the new boilers, storage tanks for liquids of different concentration and so on. ALIL had indeed raised objections to Mr. Sarju Singh’s report which were replied to by Mr. Sarju Singh on 24th April 200 (V.13). Mr. Sarju Singh has clearly stated in his report that the black liquor handling capacity of the evaporator was far below the contract parameters and if ALIL wanted to say that this deficiency was attributable not to the evaporator but due to the inadequacy of JK’s boiler they should have put a specific query to the expert to that effect and got the point cleared. Also, as correctly pointed out for JK, the stage of boiler handling is subsequent to that of the evaporator and the question of availability of a boiler which could have handled 600 TPD of solid concentration is totally irrelevant to the issue. At no point of time did ALIL tell JK that the non-availability of boiler of adequate capacity was hindering their achievement of targets. In this state of the record, as it is, it is difficult to accept this explanation of ALIL that this parameter was fulfilled by ALIL’s plant.”

32. It is difficult to appreciate the contention of ALIL that the above conclusion of the Tribunal is either contrary to the evidence on record or to the clause of the contract. Mr. Sarju Singh has in his report stated that “the black liquor handling capacity of the evaporator was far below the contract parameters.” It was apparent that at no point in time the plant achieved 65% TS concentration. This was considered by the Tribunal in some detail in para 30 of its impugned Award where it noticed that in answer to question No. 34, Mr. Sarju Singh conceded the theoretical possibility of the plant achieving 65% TS concentration but in fact the said target was achieved only occasionally. The Tribunal analysed the correspondence between the parties in some detail and then concluded as under:

“There is, therefore, no doubt that the plant did not yield black liquor with 65% TS concentration as required by the contract. That the plant could not achieve this and other parameters as per the contract is borne out by attempts on the part of ALIL to attribute faults to JK in various respects for the deficient working of the system.”

33. The Tribunal also considered the point concerning the variation in feed. Referring to the evidence of Mr. A.S. Krishna, the expert from of the Central Pulp & Paper Research Institute, it observed as under:

“It is also interesting to see that while general questions were put to Sri A. Krishna on the possibility of feed variation affecting the characteristics of the liquor (p.v. 16, Qns 35 to 38) no question was put to him that the concentration output of the black liquor would have been affected by the variation in the composition of the feed to the paper mill. In fact A. Krishna in his answer 36 clearly supports the present stand taken by JK. Insofar as the point made regarding a change of pulp unit process by JK, the answer of A. Krishna (answers 11 to 15) does not substantiate the plea of ALIL. If the composition of the feed were as important as is now sought to be made out, ALIL should have carried out preliminary inspection about this parameter and satisfied themselves that it was alright. The contention that the change in the composition of the feed as between hardwood and bamboo

would have called for a different type of design and that the specifications of the subsequent contract with Enmas support this plea has not been substantiated by any evidence.”

34. The scope of interference under Section 34 of the Act does not permit the Court to re-examine and re-appreciate the evidence in order to come to a different conclusion only because it is possible to do so. The Court is also not inclined to examine the correspondence between the parties to which both counsel referred to substantiate their respective positions as regards which party should be held responsible for the performance tests not having taken place as envisaged by the contract. The conclusion drawn by the Tribunal on appreciation of the evidence placed before it is a perfectly plausible one. As regards the submission that JK did not produce documentary evidence of making a payment of Rs. 2.58 crores to Enmas, indeed it does not appear that such contention was raised before the Tribunal. ALIL cannot be permitted to raise this issue at this stage.

35. No grounds have been made out for interference with the impugned Award of the Tribunal under Section 34 of the Act. The petition is dismissed with costs of Rs. 30,000/- which will be paid by ALIL to JK within a period of four weeks from today. The bank guarantee furnished by JK shall stand discharged.

S. MURALIDHAR, J.

MARCH 5, 2012

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