

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

+ O.M.P. No. 506/2009

HOSPITAL SERVICES CONSULTANCY
CORPORATION (INDIA) LTD. AND ANR. Petitioner
Through: Ms. Geeta Sharma, Advocate

versus

M/S. ISSA INDUSTRIES Respondent
Through: Mr. B.B. Sawhney, Sr. Advocate with
Ms. Yasmin Zafar, Advocate

% Date of Decision : July 16, 2012

CORAM:
HON'BLE MS. JUSTICE REVA KHETRAPAL

J U D G M E N T

: REVA KHETRAPAL, J.

1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 is to the award dated 30.04.2009 passed by the Arbitral Tribunal consisting of Ms. Justice (Retd.) Leila Seth, Mr. Justice (Retd.) Sat Pal and Mr. Justice (Retd.) S.B. Sanyal in a dispute which had arisen out of an Agreement dated

12.08.1999 with the respondent for the supply of single and double nylon mosquito bed-nets to be distributed in North-Eastern States by the Ministry of Health and Family Welfare towards the National Anti-Malaria Programme ('NAMP'), as mentioned in the Agreement.

2. On 12th August, 1999, Union of India through the Ministry of Health and Family Welfare entered into an Agreement with the petitioner No.1 (hereinafter referred to as "HSCC") to be its consultant and procurement agent. By a notice dated 2nd August, 2000, the HSCC invited interested parties to tender bid for supply of 8,00,000 (Eight Lacs) pieces of Nylon Mosquito Nets for single beds and 2,00,000 (Two Lacs) pieces of Nylon Mosquito Nets for double beds under the 'NAMP' and Kala Azar Control Programme. The last date for submission of bids was 31st August, 2000. The respondent (hereinafter referred to as "ISSA"), a SSI concern, was one of the three successful bidders and on 17th October, 2000, the HSCC issued a Supply Order HSCC/210/PR/221 to ISSA for 1,00,000 (One Lac) double bed nets at a unit price of ₹ 213.20, the total being ₹ 2,13,20,000/-. On the same date, a separate Supply Order No.HSCC/210/PR/218 was issued for 2,66,667 single bed nets at a

unit price of ₹ 173.68 aggregating to ₹ 4,63,14,724.56. The supply of goods was subject to the “Standards” as stated in Clause 3 of Section II General Conditions of Contract (G.C.C.) forming part of Invitation for Bids (IFB) dated 02.08.2000 document and description of stores as specified in Annexure ‘C’ to the Contract dated 17.10.2000.

3. Sometime in January, 2001, the first lot of 50,000 double bed nets and 95,000 single bed nets were inspected. Thereafter samples of the nets were sent on 30th January, 2001 to a Government approved laboratory, North India Textile Research Association (NITRA) operating from Ghaziabad for testing regarding compliance to the desired specifications. Subsequently, the balance 1,71,667 single bed nets and 50,000 double bed nets were also inspected and sent for testing. The HSCC admittedly carried out inspection of three different lots on 28.01.2001 and 28.02.2001, drew samples and sent them separately for testing by NITRA. The HSCC thereafter by separate letters dated 05.03.2001 and 09.03.2001 intimated that the bed nets had been *“found to be of acceptable quality and are accepted for dispatch”*. As per instructions of HSCC, ISSA commenced dispatch of the bed-nets to various third party consignees

as specified by the HSCC and raised invoices. However, no payment was effected despite repeated reminders and despite the contractual provision that 95% of the price was to be paid within 15 days of documentary proof of receipt of invoiced goods. True copies of the NITRA Test Report dated 06.02.2001 and letters dated 05.03.2001 and 09.03.2011 are part of the arbitration record.

4. On 17th March, 2001, the Joint Director of Health Services, Assam acknowledged receipt of 1,71,667 single bed nets at Guwahati in good condition and on 29th March, 2001 the Deputy Director, Health Services, Nagaland acknowledged receipt of 10,000 double and 10,000 single bed nets at Kohima in good condition. On 12th April, 2001, the Entomologist, Directorate of Health Services, Mizoram acknowledged receipt of 25,000 single bed-nets in good condition.

5. As already mentioned above, as per the terms of the contract, 95% of the payment was to be received within 15 days of the documentary proof of receipt of invoiced goods. ISSA raised invoices dated 20th March, 2001, 4th April, 2001 and 16th April, 2001 for the aforesaid bed-nets and subsequently sent repeated reminders

on 1st May, 9th May, 3rd August, 20th October and 28th November, 2001 for release of the payment against the outstanding bills in respect of single and double bed nets. On 4th December, 2001, for the first time, HSCC informed ISSA that they were unable to release payment since payment for single bed nets had not been received from the Directorate of NAMP. However, no explanation was given regarding non-payment against supply of double bed nets. On 17th December, 2001, ISSA wrote to HSCC again stating that it was entitled to payment under the contract irrespective of whether payment was received from the Directorate of NAMP or not.

6. In the meanwhile, HSCC received an unsigned Note/Complaint regarding the quality of the bed-nets dated 31st January, 2001, sent to them by the Central Vigilance Commission (CVC) by a letter dated 14th February, 2001, to the effect that the bed-nets supplied by the various firms were not Nylon Mosquito Bed Nets but High Density Polyethylene (HDPE) Mosquito Bed Nets, which cost much less than Nylon. It is the case of ISSA that the Note dated 31st January, 2001 and the letter of CVC, though sought to be used as a pretext by HSCC for non-payment of 95% of the amount of the bills to ISSA within 15

days as agreed to in the contract, did not even pertain to the goods of ISSA as noted by the learned Tribunal. This aspect shall be adverted to at the appropriate stage. Suffice it to state at this stage, that pursuant to the communication of the CVC, on 29.03.2001/31.03.2001, a team of officers was sent to the North-Eastern States (Guwahati and Agartala) to collect the samples of bed-nets supplied under the programme and the samples collected were sent to the Indian Institute of Technology, Delhi (IIT), who submitted a report on 12th April, 2001 indicating that only one set of samples was of Nylon and the other three sets were of HDPE. The HSCC thereupon suspended further delivery and telephonically asked ISSA to await further instructions, without giving any reason except making a vague statement that some complaints regarding quality had been received. On 13th/14th April, 2001, they sealed the godowns in Guwahati. The HSCC claims that they also sent a letter to ISSA dated 16th April, 2001 asking ISSA to recall all the bed-nets which were not delivered and were in transit till further instructions. This letter is, however, denied by ISSA. In the meanwhile, another team visited Guwahati again on 13.04.2001 to collect more samples lying

in the godown at Guwahati. Paradoxically, these “wider samples” were never sent for testing and kept lying sealed in a cupboard in the Ministry of Health, New Delhi.

7. On 21st January, 2003, after a lapse of almost two years from delivery, HSCC wrote to ISSA that it would sample the single and double bed nets supplied by ISSA under the contract during the period 2000-01. On 24th/25th January, 2003, an inspection was carried out by the officials of HSCC at Guwahati. ISSA participated in the said inspection under protest and “*without prejudice to the terms and conditions of the contract*”. During the inspection, only 117 bundles of 100 single bed nets were found in the godowns. There were no double bed nets. A single sample was collected for chemical analysis and further testing.

8. A Report dated 3rd March, 2003 was given by the IIT, Delhi pursuant to the inspection stated to have been carried out by IIT as per IS:9886:1990 Standards though on 28th August, 2000, these Standards stood deleted and the new Standards, namely, IS:14953:2001, which were admittedly an upgradation, were introduced in May, 2001. The only defect pointed out in this Report which relates to a solitary

sample of single bed nets out of a total of 2,06,667 bed-nets, was low GSM (Gross Weight per Square Metre) as per IS:9886. No report with regard to the double bed nets was given.

9. By letters dated 27th March, 2003 and 22nd April, 2003, ISSA was directed to lift the stock since it had been rejected on the basis of the IIT report. It was stated that 1,71,667 bed-nets were lying sealed in the godown at Guwahati. By a letter dated 12.05.2003, ISSA disputed the rejection which had been communicated to it by the letter of 22nd April, 2003 and pointed out that the earlier letters referred to had not been received. On 5th June, 2003, the Ministry of Health unilaterally constituted a so-called “Expert Group” on bed-nets for determining the price, if any, to be paid to ISSA for the bed-nets already distributed. The said Expert Group fixed the price for such goods at 20% of the agreed price. No intimation of the constitution of the Expert Group or its proceedings was given to ISSA; nor was ISSA asked to be present. However, the Report of the Expert Group has not been relied upon by HSCC in the present proceedings and is mentioned only for the purpose of narration of sequence of events.

10. On 3rd October, 2003, HSCC once again asked ISSA to lift its 'stock of single bed nets' from the godown. On 5th January, 2004, ISSA invoked the arbitration proceedings in respect of its claims. HSCC and Union of India filed cross-claims. In respect of all the claims and cross-claims, a unanimous award was made by the Arbitral Tribunal in favour of ISSA. The petitioners have accordingly invoked the jurisdiction of this Court by filing objections under Section 34 of the Act.

11. Based on the pleadings, documents and evidence led before the Arbitral Tribunal, the learned Tribunal in the impugned award dated 30th April, 2009 held as follows:-

- (A) ISSA's **Claim A** for the unpaid price of both single and double bed nets delivered to HSCC as indicated in Arbitration Case Nos.1443 and 1444 of 2004 was liable to be awarded and the total amount payable minus amount released by the interim order of 06.01.2006 was ₹ 2,86,68,389/-.
- (B) ISSA's **Claim B** in Arbitration Case Nos.1443 and 1444 of 2004 with regard to the loss sustained by it in respect of the goods not taken delivery of by HSCC and which ISSA was

forced to sell at a much lower market rate than the contractual price in the sum of ₹ 69,61,840/- for single bed nets and ₹ 98,38,397/- for the double bed nets was liable to be awarded and was accordingly awarded.

(C) ISSA's **Claim C** in Arbitration Case Nos.1443 and 1444 of 2004 pertaining to interest was upheld on the ground that the goods were arbitrarily and unjustifiably rejected by HSCC and the delivery erroneously stopped. ISSA was held entitled to payment of 95% of the contract price within 15 days of the documentary proof of the invoice of goods. So, the claim for interest from 1st May, 2001 both for the 'invoice goods' and the goods 'not taken delivery of' was upheld. Interest @ 18% per annum was deemed reasonable in the facts and circumstances of the case specially as ISSA is a small scale industrial unit. The total interest both on the unpaid amount under the invoice and arising out of goods not taken delivery of was calculated to be ₹ 96,99,692/-.

(D) ISSA's **Claim D** in Arbitration Case Nos.1443 and 1444 of 2004 arising out of increase of Excise Duty was rejected on the

ground that ISSA had not claimed the same in their bills nor shown any break-up of the differential in the Excise Duty.

- (E) ISSA's **Claim E** for loss of business opportunity, reputation and future profit due to closure of business amounting to ₹ 3,59,07,254/- was rejected on the ground that no actual loss had been established by ISSA, and the other relief made available to ISSA for various losses caused by the action or inaction of HSCC as prayed for by ISSA had been adequately addressed.
- (F) HSCC's claims made in Arbitration Case No.1439 of 2004 for storage charges, and for damages due to the supply of defective goods and for non-supply of goods, were rejected as being without merit and on the ground that HSCC had wrongly rejected the goods of ISSA and erroneously stopped delivery of some goods based on the so-called CVC report.
- (G) Simple interest @ 9% per annum was awarded to ISSA from the date of the filing of the statement of claim till the date of the award. The award was to be satisfied within one month of publication, failing which it was to carry simple interest of 12%

per annum till payment. Costs of ₹ 1,00,000/- per case were awarded to ISSA, making a total of ₹ 3,00,000/-.

12. According to HSCC, the Tribunal erroneously held, relying upon the pre-dispatch inspection report submitted by NITRA and the dispatch orders dated 5th and 9th March, 2001, that withholding of payment of bills for the consignment which was received by the Consignee (Objector), was not tenable. In holding so, the learned Tribunal failed to appreciate that IIT, Delhi submitted its inspection report dated 12.04.2001, whereby it was reported that only one set of samples were Nylon and the other three sets were HDPE. Later on, a joint inspection was also carried out on 25.01.2003 and IIT, Delhi again collected the samples. The test report dated 03.03.2003 of the IIT, Delhi pursuant to the said inspection confirmed that the bed-nets failed to meet all the specifications. The HSCC had rejected the goods only upon receipt of the report from IIT, Delhi.

13. ISSA, in the aforesaid context, submitted that as is clear from the award, HSCC had inspected different lots of bed-nets in January and February, 2001 and had sent them to NITRA, which was a grant-aided industrial testing laboratory. NITRA found the bed-nets to be

of acceptable quality and thereupon the entire quantity was accepted for dispatch and directed to be supplied to third party consignees and 2,06,667 single nets and 10,000 double nets were dispatched accordingly. At this stage, HSCC instructed ISSA to suspend further supplies and **await further instructions**. As noted by the learned Tribunal, out of the bed-nets supplied, **a substantial quantity had admittedly been distributed in the field to end users** while most of the remaining had been dispatched from the main godown at Guwahati to different districts for distribution to end users. Invoices/bills sent by ISSA for the supplies, which had been delivered and accepted, remained unpaid despite repeated reminders and **despite contractual obligation to pay 95% of the bills within 15 days of documentary proof of receipt of invoiced goods**. On 21.01.2003, after a lapse of almost two years from delivery, when half the serviceable life of the bed-nets had expired, HSCC wrote to ISSA that HSCC would sample the single/double bed nets and had decided to conduct another inspection. This was **legally impermissible and irrational**. There was no right surviving to inspect/re-inspect and reject the goods at this stage. It long stood lost and exhausted.

14. Reference was made in the aforesaid context by Mr. B.B. Sawhney, the learned counsel for ISSA to Sections 41 and 42 of the Sale of Goods Act, 1930, which, for the sake of facility of reference, are reproduced hereunder:-

“41. Buyer’s right of examining the goods.—

(1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.”

“42. Acceptance.—*The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.”*

15. Mr. Sawhney contended that Sections 41 and 42 of the Sale of Goods Act, 1930 clearly lay down that the buyer’s right of examining the goods is not of an unlimited nature and duration, in that the seller

is to afford only “reasonable opportunity” and “reasonable time” for examining the goods to the buyer for the purpose of ascertaining whether they are in conformity with the contract. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them (as in this case), or when the goods have been delivered by the seller to the buyer and he does any act in relation to them which is inconsistent with the ownership of the seller. Reference was made by Mr. Sawhney to a large number of judicial precedents to substantiate his aforesaid contention, including the following:-

- (i) ***Hardy & Co. vs. Hillerns and Fowler, (1923) All E.R. 275.***
- (ii) ***Nagardas Mathuradas vs. N.V. Velmahomed, AIR 1930 Bombay 249.***
- (iii) ***In Re: Andrew, Yule and Co., AIR 1932 Calcutta 879.***
- (iv) ***Mithan Lal-Inder Narain vs. Suraj Parshad-Madan Gopal, AIR 1932 Lahore 52.***

(v) *Shah Mohanlal Manilal vs. Firm running in the name and style of Dhirubhai Bavajibhai, AIR 1962 Gujarat 56.*

(vi) *Lohmann Rausher Gmbh vs. Medisphere Marketing Pvt. Ltd., 117 (2004) DLT 95.*

16. The common thread running through the aforesaid decisions is that when the buyer sells and delivers part of the goods to the sub-purchasers, he loses his right to reject the goods as his said act results in acceptance of the goods and it is immaterial that he has missed “reasonable opportunity” of examining the goods. Specific reference may be made to the decision of the Delhi High Court rendered in the case of *Lohmann Rausher Gmbh (supra)*, wherein a learned Single Judge of this court relying upon Sections 41 and 42 of the Sale of Goods Act, held that long gap after which goods were ostensibly rejected on the premise that they were defective/sub-standard was clearly fatal to the projected defence that the goods were not in conformity with the contract.

17. It was next contended on behalf of HSCC that the rejection of the goods was in consonance with the terms of the agreement and

could not be faulted. As per Clause 7.4 of Section II General Conditions of Contract (G.C.C.) read with Annexure A titled “Special Instructions”, the HSCC had a right to conduct post delivery inspection. Thus, the dispatch clearance of bed-nets, given by HSCC on 5th and 9th March, 2001, could not be construed as acceptance of goods.

18. Per contra, the contention on behalf of ISSA was that the general conditions in the tender document cannot be of any avail to the objectors after a lapse of two years from the supply, **particularly when the goods had been inspected earlier both prior to dispatch in January and February, 2001 by NITRA and also, as per the case of HSCC themselves, after delivery in end March and mid April, 2001.** It was also submitted that even the report dated 12.04.2001 of IIT in respect of samples claimed to have been collected on 29th/30th March, was of no avail to HSCC on account of the following factors:-

- (i) Samples were collected unilaterally without any notice or information;

- (ii) The witness of HSCC (PW4 Usmani), who was a member of the IIT team which conducted the inspection, admitted that **the report pertained to supplies from the other two suppliers.**
- (iii) Samples were not identifiable **as relatable to any given supplier.**
- (iv) The samples collected were tested **only** to find out whether the material used was **Nylon or HDPE** and not for any specifications/parameters. This is borne out and is evident from the Report which on the face of it shows that the samples were collected only for the aforesaid purpose and also from the testimony of Professor Deopura from the IIT who submitted the report.
- (v) All samples from multiple lots identified to be those of ISSA were found to be of Nylon both by NITRA and IIT. The learned Tribunal, therefore, rightly held that reliance could not be placed on the IIT report dated 12.04.2001.

19. As regards the second IIT report dated 03.03.2003, it was contended on behalf of HSCC that the inspection carried out on 25.01.2003 pursuant to which the aforesaid report was given by IIT

was a joint inspection in which the representative of ISSA was also present. No objection was raised by ISSA with respect to the collection of samples by HSCC. It was, therefore, not open to ISSA to raise objection at a belated stage leading to rejection of the claim of HSCC by the Arbitral Tribunal.

20. Mr. B.B. Sawhney, the learned senior counsel for ISSA, on the other hand, contended that the second IIT report dated 03.03.2003, which in fact formed the only ground of rejection of goods in March, 2003, could not have provided any valid justification or ground for the rejection on account of the following reasons:-

- (i) Only a solitary bed-net was tested out of a quantity of 2,06,667 nets which, by any standard, could not be treated to be a representative sample.
 - Even IS 9886 Clause 8.2 gives Acceptance Quantity level as 2.5% and further provides for guidance for sampling to be derived from **IS 2500** which gives sample size for over 1,50,000 pieces as 800 and Acceptance Quantity level of 2.5% for general inspection.

- The author of the report Professor Deopura from IIT admitted that one bed-net would not be a representative sample.
 - The new **upgraded standard IS 14953** specifically for Nylon bed-nets gives multiple sample sizes for different parameters and the samples lifted in the instant case clearly did not fall within the aforesaid parameters.
- (ii) Specifications/parameters set out in IS 9886 which were only recommended for guidance were wrongly taken to be strict and firm requirements. Professor Chattopadhyay who was one of the signatories to the second IIT report in fact admitted after seeing IS 9886 that there was no fixed standard for Nylon bed-nets therein.
- (iii) Both Professor Deopura and Professor Chattopadhyay from IIT **admitted that they were not experts in respect of bed-nets.** Professor Chattopadhyay in fact deposed that **he had never earlier tested a bed-net** and that **he first read the procedure given in the standards and thereafter instructed the Lab Assistant as to how to perform the procedure.**

- (iv) **Values/parameters of the solitary bed-net** claimed to have been found and reported by the Lab Assistant, even if assumed to be correct, **satisfied the upgraded standard of IS 14953** prescribed specifically for Nylon bed-nets and published in May, 2001. Professor Deopura agreed that the new 'Standards' were the upgradation of the old 'Standards' while Professor Chattopadhyay admitted that the new 'Standards' set out in IS 14953 were also sent to him with IS 9886 and he consulted them and noticed that the bursting strength which fell short of IS 9886, satisfied IS 14953, and may be accepted. He totally overlooked that this applied equally to GSM (Gross Weight Per Square Meter) and number of holes per square inch along base and bias. Upon being confronted with this, he deposed that he went according to instructions and parameters provided by HSCC.
- (v) NITRA is a Government approved industrial laboratory with experience of frequent tests as admitted by Professor Chattopadhyay. NITRA had tested multiple samples from different lots on two separate occasions and found them to be

of acceptable quality as per IS 9886. On the other hand, IIT is an academic institution and as admitted by Professor Deopura and Professor Chattopadhyay only sometimes conducts tests.

- (vi) **The solitary bed-net was tested after half of its serviceable life had expired and after having been stored by HSCC in hot humid conditions.** Even the warranty period of 18 months as per the contract had expired. To be noted that according to HSCC themselves, the life span of a bed-net is 4-5 years. ISSA contends that it is 3-4 years.

21. The next plank of the objections to the report of the Arbitral Tribunal put forth by the HSCC was that the Arbitral Tribunal is to act in accordance with the terms of the contract entered into between the parties, pursuant to which the disputes are referred for arbitration. The Arbitrator cannot change/alter the terms of the contract. The learned Arbitral Tribunal erred in fixing the sample testing criteria of 800 bed-nets and acceptance level of 21 number defective pieces per 100. Fixing of such inspection criteria was beyond the terms of the contract between the parties and also illogical. In this regard, HSCC relied on the judgment of the Supreme Court in ***Bharat Coking Coal***

Ltd. vs. Annapurna Constructions, (2003) 8 SCC 154 to submit that the Arbitral Tribunal derives its jurisdiction from the agreement between the parties and if the award is *de hors* the said agreement, it would be on the face of it illegal. In the instant case, the learned Arbitral Tribunal had travelled beyond its jurisdiction and erred in arriving at the conclusion that the testing procedure employed by HSCC was wholly inadequate.

22. The contention of Mr. Sawhney on behalf of ISSA in the aforesaid context was that the erstwhile standard IS 9886 **was not a firm but only recommendatory standard for guidance** based on Draft Defence Specifications, which came to be amended on 28.08.2000, prior to expiry of the period for submission of bids, **by deletion of Nylon bed-nets therefrom.** IS 9886 was mentioned for specification in the NIT dated 01.08.2000, but later **not mentioned in the supply orders dated 17.10.2000 except only for physical dimensions.** This was a conscious departure made by the HSCC. The contention of HSCC that Standard IS 9886 was still to be complied with is, therefore, not sustainable, the HSCC having deliberately chosen to omit the same.

23. In order to substantiate his aforesaid contention, Mr. Sawhney, learned senior counsel for ISSA referred to the “Special Instructions” forming part of the bid security form and to the Supply Orders, and stated that if the former is read in juxtaposition with the Supply Order, it becomes abundantly clear that the Column pertaining to “Specifications” which is there in “Special Instructions” is significantly missing in the Supply Orders. In the Supply Orders, adherence only to Clause 5.2 of IS 9886 is required insofar as “Description of Stores” is concerned and Clause 6 for “Packing and Marking”. The necessary inference is that the latest standard prescribed at the time of delivery would be the standard applicable insofar as specifications are concerned. This is also borne out by the fact that in the General Conditions of Contract (G.C.C.), Clause 3.1 prescribes that the goods supplied shall conform to the Standards mentioned in the ‘Technical Specifications’ and when no applicable standard is mentioned to the authoritative standard appropriate to the goods and such standards shall be the latest issued by the concerned institution. For the facility of reference, the said Clause is reproduced hereunder:-

“3. STANDARDS:

3.1. *The Goods supplied under this contract shall conform to the standards mentioned in the Technical Specifications, and, when no applicable standards is mentioned to the authoritative standard appropriate to the Goods and such standards shall be the latest issued by the concerned institution.*”

24. It was contended that if the yardstick of the latest applicable standards is taken, then even as per the second IIT report the goods could not have been faulted by HSCC. As already stated, Professor Chattopadhyay of IIT in the course of his evidence admitted that though the bursting strength of the bed-nets fell short of IS 9886, it satisfied IS 14953 and was acceptable as per the said Standard. He totally overlooked that IS 14953 applied also to GSM and number of holes per square inch along base and bias. Upon being confronted with this, he deposed that he went according to the instructions and parameters provided by HSCC.

25. Ms. Geeta Sharma, the learned counsel for HSCC next relied upon the CVC complaint to contend that the complaint of CVC was substantiated by the reports of inspection dated 12.04.2001 and 03.03.2003 submitted by IIT, Delhi. She contended that the learned Tribunal failed to appreciate the fact that the bed-nets supplied after

the pre-dispatch reports were unable to meet quality specifications, and erred in rejecting the claims of HSCC based on the fact that the HSCC could not distribute the faulty bed-nets and had to incur huge expenditure for storage, etc. of the bed-nets lying with it. The award of the Tribunal awarding compensation of ₹ 2,86,68,389/- was, therefore, liable to be set aside as also the award of interest of ₹ 96,99,692/- in favour of the respondent. The high rate of interest awarded to the respondent, on account of its being a small scale industrial unit to which the provisions of Section 4 of the Interest On Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 applied, was also unjustified and liable to be set aside.

26. As regards the CVC report, it was submitted on behalf of ISSA that an unfair ploy had been adopted by HSCC, so as to lay a foundation for its belated rejection of the goods, by seeking to pass on an anonymous unsigned Note as report of CVC investigation. The ploy adopted by HSCC however stood exposed before the Arbitral Tribunal when the CVC file was called for and examined by the learned Tribunal, and it was found from the record of the CVC that a

Note dated 31.01.2001 making sweeping allegations without citing a single specific incident, received by the CVC on 14.02.2001 was forwarded on the same day, i.e., on 14.02.2001 by the CVC to the HSCC without any investigation of any nature. The Note alleged that three suppliers of Nylon bed-nets had become millionaires overnight by supplying HDPE instead of Nylon bed-nets. Significantly, **ISSA had supplied bed-nets only in March-April, 2001 and the Note was dated 31.01.2001.** Furthermore, all bed-nets identified as those of ISSA were found to be of Nylon, not only in the **NITRA report** but also in the report dated 12.04.2001 given by IIT, Delhi.

27. As regards the interest awarded by the learned Tribunal, the contention of ISSA is that the awarded interest @ 9% per annum from the date of the filing of the statement of claim and @ 12% per annum on the awarded amount from the date of the award was on the lower side considering that ISSA, being an S.S.I. unit, was in fact entitled to a higher rate in the light of Section 4 of the Interest On Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993, the provisions whereof are as under:-

“4. Date from which and rate at which interest is payable.— Where any buyer fails to

make payment of the amount to the supplier, as required under Section 3, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or any law for the time being in force, be liable to pay interest to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at such rate which is five per cent, points above the floor rate for comparable lending.”

28. Before dealing with the contentions of the parties and at the outset it may be mentioned that the scope of interference by the Court in a petition under Section 34 is a limited one. The Court while exercising jurisdiction under Section 34 of the Act is not acting as an Appellate Court and is not expected to re-appreciate the evidence only to come to a different conclusion because it is possible to do so.

29. It also deserves to be highlighted that a reading of the arbitral award shows that the learned Arbitral Tribunal examined in great detail not only the pleadings of the parties and the documents filed by them, but also the deposition of the witnesses. The conclusions of the learned Arbitral Tribunal are based on a detailed analysis of the evidence and it has not even been urged by the objectors that the view

taken by the Arbitral Tribunal is not a possible or probable one or that the same is perverse in any manner.

30. The learned Arbitral Tribunal in making the award rightly relied upon the Report of NITRA, a Government approved laboratory, which had inspected different lots of bed-nets in January and February, 2001 and found them to be of acceptable quality. It noted that HSCC issued instructions to ISSA for dispatch of the entire lot of material to the consignees at various locations as specified in the contract, and the goods were so dispatched by the consignor/ISSA on 5th March, 2001 and 9th March, 2001. The Arbitral Tribunal also noted that the end users accepted the said goods dispatched to them and acknowledged receipt thereof **in good condition**. The goods were not rejected nor was there any complaint about non-satisfactory performance of the product. Yet, HSCC without citing any appropriate reason told ISSA not to physically deliver the balance quantity of 60,000 single bed nets until further instructions even though they were manufactured and in a deliverable state and ready for delivery, after having been tested and accepted for dispatch.

31. The Tribunal further noted that HSCC had rejected all the goods on 27th March, 2003 as according to them the report of the samples sent to IIT, Delhi dated 3rd March, 2003 indicated that the required specifications had not been conformed to, which report was obtained consequent to the communication received from the Central Vigilance Commission dated 14th February, 2001. The learned Tribunal however concluded, and this Court thinks rightly so, that the report of the Central Vigilance Commission based on the Note dated 31st January, 2001 was no reason for rejection of the goods of ISSA or for non-payment of 95% of the amount within 15 days as agreed to. It observed as follows:-

“41. On examining the records we found that the note dated 31st January, 2001 was not a note or report of the CVC but an unsigned note given by one Mr. Vivek Singhal (may be a disgruntled bidder) to the CVC. The CVC had in turn just forwarded this note for action, to the Health Secretary UOI, without holding any inquiry of its own. Consequently, we are of the view that not much importance can be attached to this note. Further this note is dated 31st January, 2001 and cannot refer to the supplies made by ISSA as these were only made subsequently in March, 2001. Consequently, we find no reason for the non payment of 95% of the amount within 15 days as agreed to.

42. As noted above, all the goods had originally been examined and tested by NITRA before they were cleared for dispatch on 5th and 9th March, 2001. However, learned counsel for the Respondents submitted that in terms of the IIT report dated 12th April, 2001 the bed nets were not as per specification. We have perused that report and it only indicates whether the samples were HDPE or Nylon. Three of the lots have been shown as HDPE and one lot as Nylon. The Claimant claims that its sample was nylon whereas that of other suppliers may have been HDPE. Further, there is nothing to indicate which sample belonged to which supplier, as the samples were not taken in the presence of parties. Consequently not much reliance can be placed on this report, especially as one of the sample lots was clearly Nylon. Further, the 2001 report of NITRA and the IIT's 3rd March, 2003 report also show ISSA's goods as nylon. So there does not appear to be any dispute on this score. It would therefore appear to us that Respondents instructions to ISSA not to effect further delivery on the basis of the report dated 12th April, 2001 is not justified. It was thus wrong of the Respondents to tell ISSA to recall goods in transit/not delivered and to await further instructions."

32. Dealing with the contention of HSCC that they were entitled to inspect and reject the goods even after two years in view of the Clause 7.4 of the contract, the learned Tribunal made the following pertinent observations:-

“44. It would appear to us that the subsequent testing after two years does not appear to be of much consequence, even if we accept the Respondents contention that they were entitled to test after having carried out two earlier tests. The NITRA test report, for which multiple samples were taken categorically indicated that all the bed nets were within the parameters of bursting strength, weight, number of holes, etc. and the double bed nets were also clearly within the water soluble matter requirements as per IS:9886:1990, whereas the single bed nets were slightly higher. (At the time the revision of water soluble level was also shown in IS:2500 (Part 1): 1973 as acceptable quality level (AQL) if it did not exceed 2.5 percent. All the sample bed nets were certainly within this requirement). That these goods were received by the consignees as abovementioned in good condition is also not in dispute. Having accepted the entire sample inspected goods for dispatch (this includes the goods actually dispatched and those in the process of dispatch) it is not really open to the Respondent to reject them, two years later on 27th March/ 9th May, 2003. This is neither reasonable in time nor in equity.

45. A rejection after two years of the goods having been dispatched and used by the consignees and distributed to the actual users in the field without any complaint from them, is certainly not the type of rejection contemplated by Clause 7.3 and 7.4.....But this inspection and rejection has to be done within a reasonable time. Two years in the facts and circumstances of the case cannot be considered reasonable.”

33. The learned Tribunal, therefore, rightly concluded that the IIT report of 2003 was not important. It also noted that the said report was based on a solitary sample collected after two years of acceptance and dispatch and that also only of single bed nets. The rejection of the entire supply consisting of 2,06,667 single bed nets and 10,000 double bed nets based on this single sample was not justified. It observed that a single sample is grossly inadequate and not truly representative for such a large delivery when more than half of the life of the bed-nets had expired; and that for such large numbers sample size of 800 was to be recommended with an acceptance level of upto 21 number of defective pieces per 100 samples. Pertinently, it noted that the parameters of ISSA's bed-nets satisfied all the specifications of the updated standards namely of IS: 14953/2001. It observed that the standard of diligence and care required to be used for examination of the goods and the proper process to be followed strictly is much more important when accepted goods are to be rejected. The learned Tribunal noted that both the IIT Professors, Prof. Chattopadhyay and Prof. Deopura, who were witnesses for HSCC and UOI and supposed to be expert witnesses, had stated that

the bed-nets would be fit for use if they satisfied the parameters of the new Standards. In fact, Professor Chattopadhyay who prepared the report dated 3rd March, 2003 stated that the HSCC had sent him the new standard IS: 14953/2001 at the time of testing. Both the Professors had also indicated that one sample cannot be considered representative if the number of bed-nets are 1,50,000. Consequently, there is no justification for HSCC and UOI for rejecting the goods as defective after two years.

34. As regards ISSA's Claim A, it noted that ISSA was entitled to the unpaid price of both single and double bed nets delivered as indicated in A.C. 1443 and 1444 of 2004 in the sum of ₹ 2,86,68,389/-. As regards ISSA's Claim B, it held that ISSA was entitled to the amount of loss of ₹ 69,61,840/- for single bed nets and ₹ 98,38,397/- for double bed nets pertaining to goods not taken delivery of by HSCC arbitrarily and wrongfully. The learned Tribunal also allowed ISSA's Claim C pertaining to interest on the unpaid invoices and on the goods of which delivery was not taken to the extent noted above, but rejected ISSA's Claim D for the differential amount of excise duty and ISSA's Claim E for loss of

profit caused to it. It also rejected HSCC's claims made in A.C.1439 of 2004 as set out above on the ground that they had not been established by any cogent and reliable evidence.

35. The above conclusions of the learned Arbitral Tribunal are based on a detailed analysis of the documentary and oral evidence recorded by it. The view taken by the Arbitral Tribunal is a possible one and has been arrived at after threadbare discussion of all the material placed before it including the expert reports and the evidence of the experts relied upon by the parties. This Court does not find any cogent reason to interfere with the analysis of the evidence on record made by the learned Tribunal, which in any event according to this Court cannot be faulted.

36. There is no inconsistency in the findings of the learned Tribunal and the terms of the contract agreed to between the parties. There is also no inconsistency in the findings of the learned Arbitral Tribunal and the expert reports on the basis of which the learned Tribunal arrived at its findings. In the circumstances, the conclusions drawn by the learned Arbitral Tribunal cannot be said to be improbable.

37. No grounds have been made out to interfere with the award of the Arbitral Tribunal dated 30.04.2009. The petition is accordingly dismissed, but in the circumstances with no order as to costs.

**REVA KHETRAPAL
JUDGE**

July 16, 2012
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