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

+ OMP No. 381/2003

UNION OF INDIA

..... Petitioner

Through: Mr. R.V.Sinha, Mr. R.N.Singh & Mr.
A.S.Singh, Advocates

versus

MECANO EXPORTIMPORT S.A.

..... Respondent

Through: M/s S.N.Tripathy, Sunil Kumar
Tiwary & Hari Ram Tiwary,
Advocates

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

ORDER

03.01.2014

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This petition has been preferred by the Union of India under Section 34 of the Arbitration and Conciliation Act, 1996, to assail the arbitral Award dated 27.06.2003 passed by the Arbitral Tribunal, whereby certain claims of the respondent have been allowed and the counter claims of the petitioner have been disallowed.

2. The petitioner floated a global tender for purchaser of wheel sets of a particular specification. The respondent/claimant gave its bid and by letter dated 14.08.1996, the petitioner intimated its acceptance of the offer to purchase 10,000 wheel sets. A contract was executed between the parties on 29.08.1996 (C/4) specifying detailed terms, including a supply schedule.

Under the supply schedule, 1500-2000 units were to be supplied within 90 days and the balance quantities were to be offered in six monthly instalments. Detailed provisions were made for inspection by the petitioner's representatives and payments. Clause 17 of the contract provided for levy of liquidated damages for non-compliance of seller's/respondent's obligation, including timely supply of the material. As noticed by the Arbitral Tribunal, the Contract underwent five amendments, mostly in regard to the schedule of delivery. By the first amendment, the period of 90 days was changed to 135 days for supply of the initial lot of 1500-2000 wheel sets. The petitioner imposed 10% liquidated damages for delayed supply. The Arbitral Tribunal also notes that subsequent extensions/alterations-though allowed on the request of the respondent/claimant, were not made subject to levy of penalty. The respondent/claimant eventually supplied 5297 wheel sets to the petitioner. The agreement contained an arbitration clause and, since the respondent/claimant had several claims, the respondent invoked the arbitration clause leading to the constitution of Arbitral Tribunal consisting of three learned Arbitrators. The gist of the claims raised by the respondent, as set out in the present petition, is as follows:

- “(i) The respondent is liable to pay a sum of US\$ 403,712.50 for the deduction made toward the liquidated damages.*
- (ii) The respondent is liable to pay a sum of US\$ 159,313.00 towards conservation, protection and storage charges paid by the claimant for the 3000 wheel sets.*
- (iii) The respondent is liable to pay a sum of US\$ 62424.50 representing Bank charges for L/C due to delayed payments and delay in inspection at the respondent's end.*

(iv) The respondent is liable to pay a sum of US\$ 364,023 paid as additional interest for availing the credit of 3000 wheel sets.

(v) The respondent is liable to pay a sum of US\$ 39,259.16 towards labour charges for withholding a sum of US\$ 403,712.50.

(vi) The respondent is liable to pay sum of US\$ 33712 towards the LC extension charges as paid by the claimant.

(vii) The respondent is also liable to pay interest at rate of 21% per annum till the realization of the total claim of US\$ 10,62,444.16.

(viii) The respondent is also liable to pay the cost of the proceedings before this Tribunal.

(ix) The respondent must pay such other amounts or do such other things as this Hon'ble Tribunal may direct and deem fit and appropriate."

3. I may note that the use of the expression, "respondent" in the aforesaid quotation refers to the petitioner herein.

4. The petitioner also raised its counter claims, the gist whereof has been set out in this petition and the same reads as follows:

"(i) Claim for an amount of US\$ 19,450,810 equivalent to Rs. 8,25,686,958.00 ps as on the date of the last payment to the claimant i.e. 22.03.1999 towards additional expenditure due to delay in supplies and additional loss of earning capacity on account of delay in production of 750 wagons due to delay in supply of 3000 wheel sets.

(ii) As per Clause 23 of General Conditions of Contract, respondents are entitled to recover the cost of 156 rejected wheel sets supplied by the claimant which comes to US\$ 3,44,570 (Rs. 14,674,784.00).

(iii) Respondent entitled to recover interest @ 16% i.e. the prevailing Bank interest rate till realization of the total counter claim of US\$ 19,795,380 from the claimant.

(iv) Respondent is entitled to recover from the claimant the entire cost of the arbitration proceedings.”

5. Once again, I may note that the use of the expression, “respondent” in the aforesaid quotation refers to the petitioner herein.

6. The Arbitral Tribunal rendered its unanimous Award dated 27.06.2003. The Arbitral Tribunal generally held that from the manner in which the supply schedule had been altered from time to time, it was clear that time was not of the essence of the contract. One of the pertinent findings returned by the Tribunal, with which I will deal with a little later, is that there was no provision for reduction of quantity of wheel sets in the contract, yet the total agreed quantity of 10000 wheel sets was reduced first to 7044, and ultimately to 5297 by the petitioner. The Award records that no reason had been indicated to the Tribunal, and none was on record, as to why the quantity was reduced. It also records that the claimant/respondent herein raised objection to the reduction, and has used the said reduction as a ground to prop up its claim for compensation. The Tribunal observed that the reduction in the quantity of purchase-almost by 50%, had upset the manufacture-planning of the claimant and put it to loss. The Tribunal observes that it was not at all difficult to assume that this unreasonable reduction had a bearing on the claim, and the same had changed the parameters to be applied to a dispute of this type.

7. The Tribunal records that the inspection had not been done in a timely manner by the petitioner. The Tribunal records that there is material to justify the stand of the claimant that the clearance by the petitioners inspectors was delayed without any rhyme or reason and, on account of this difficulty, the despatches were delayed and heavy sums of money of the

respondent were locked up by way of investment, and other financial liabilities were suffered by the respondent-claimant. The Tribunal holds that the manner in which the parties had conducted themselves and the several alterations about the schedule of supply agreed to, without any penalty, leads the Tribunal to hold that there is no justification for levying liquidated damages in the manner done.

8. On the aspect of the bank guarantee charges incurred by the respondent/claimant, the Tribunal holds that since the quantity had been reduced to nearly 50%, there was no justification for the petitioner to require the furnishing of the bank guarantee for the entire amount.

9. The Arbitral Award records that on 27.04.2003, discussions on the claims took place with reference to the entire material on record. In fact, the Arbitral Award sets out the proceedings recorded on 27.04.2003. The same is relevant and reads as follows:

“After discussing the claims at length with reference to the entire material on record, we have come to the following conclusions:

The claim of liquidated damages raised by the respondent shall be confined to 1% uniformly for the entire supply in respect of all the three consignments.

The claimant shall be entitled to the price of the material supplied at the stipulated rate (5297 sets) for which no payment has been made.

The costs actually incurred by the claimant for the LC charges shall be confined to 50%.

In respect of the amount in excess of 1% which will now become refundable to the claimant, interest shall be payable at 6% only.

We assess the costs of the proceeding at US\$ Ten thousand payable to the claimant.

Parties shall now be called upon to clearly indicate within four weeks from today the exact amounts under each head, and on the basis thereof claimant's dues shall be quantified to determine the stamp duty for the award.

Other claims of the claimant and all the claims raised by the respondents are negated.

We are of the unanimous view that if the dues of the claimant to be stated in the award are paid within ninety days from the date of the award, no interest shall be payable; otherwise interest @ 18% shall be payable from the date of the award till recovery."

10. Both the parties gave their respective submissions in terms of the order dated 27.04.2003 passed by the Arbitral Tribunal. I may note that there is hardly any difference in the calculations submitted before the Arbitral Tribunal by both the parties in terms of order dated 27.04.2003.

11. A perusal of the order dated 27.04.2003, which really forms the foundation of the Award shows that the Arbitral Tribunal reduced the liquidated damages from 10% to 1% uniformly for the entire supply in respect of the three consignments. The Arbitral Tribunal also awarded the price for the material supplied at the stipulated rate i.e. for 5297 wheel sets. The Tribunal also awarded the costs actually incurred by the respondent-claimant for the LC charges to the extent of 50%. In respect of the excess liquidated damages imposed i.e. to the extent of 9%-which became refundable, interest was awarded @ 6% per annum. Though in terms of the order dated 27.04.2003, the costs of the proceedings were assessed at US\$ 10000-payable to the respondent-claimant, while passing the impugned

award, the tribunal revised the same upward to US\$ 25,000.

12. The Arbitral Award also directed that the respondent-claimant shall be entitled to interest @ 6% on the dues computed in the Award, and in case the claimants dues were not to be settled in full by 31.08.2003, interest was to run on the entire awarded amount @ 18% “per month” effective from the date of the Award,-the earlier directions of 6% interest upto 31.08.2003 notwithstanding. Counsel for the respondent states that the use of the expression, “per month” was a mere typographical error inasmuch, as, the same should read as, “per annum”. In this regard, he places reliance on the aforesaid extract from the order dated 27.04.2003 passed by the Tribunal which forms the basis of the Award. I am informed that the petitioner paid the Award amount on or before 31.08.2003, so as to ward of the higher rate of interest without prejudice to the present objections.

13. The objections were earlier heard by this Court and disposed of on 08.02.2006 on the premise that the Award is on consensual terms and, therefore, it is not open to challenge by the petitioner. That decision was rendered on 08.02.2006. The petitioner preferred an appeal being FAO(OS) No. 8/2007, which was decided on 04.07.2008 by the Division Bench. The Division Bench set aside the order dated 08.02.2006 holding that the Award was not a consensual award. The Division Bench directed that the matter be remanded to the learned Single Judge for consideration of the objections on merits, without proceeding on the assumption that the Award is a consensual Award. It is in this background the arguments of learned counsels have been heard.

14. The first submission of learned counsel for the petitioner,

Mr. R.V.Sinha, is that the findings returned by the Arbitral Tribunal with regard to the reduction in the number of wheel sets under the contract from 10000 to 5297 is a patent error, and the findings have been arrived at by completely ignoring the evidence which had been brought on record. The Arbitral Tribunal had, in fact, acted contrary to the contractual terms while returning the said finding. In this regard, he has placed reliance on amendment Nos. 3 and 4 of the contract. Mr. Sinha submits that the amendment No. 3 i.e. C/18 was issued on 31.10.1997 on the request of the respondent-claimant contained in their letter dated 14.08.1997 for revising the delivery period for outstanding quantity of 7703 numbers of wheel sets and for deletion of two clauses of the purchase order. While issuing amendment No. 3, the petitioner/purchaser conveyed its decision to reduce the total quantity of wheel sets under the subject contract to 7044, and refixed the delivery period for the balance quantity of 4747 numbers (the remaining having already been supplied) without levy of liquidated damages but subject to the condition that the extension charges for the letter of credit will be to the contractors/respondent's account. Mr. Sinha points out that this amendment to the contract was expressly consented to and agreed upon by the respondent, as is evident from the second page of C/18. A perusal of the said document shows that it bears the endorsement, "*I accept this amendment No. 3 on conditions stipulated in this, for and on behalf of M/s Mecanoexportimport, Romania*". It also bears the seal of the respondent apart from the signature of the authorized representative. Mr. Sinha submits that by this amendment, the contract between the parties stood novated, inter alia, in respect of the quantity agreed under the original contract and the same stood reduced from 10000 to 7044. The time period was also extended

in terms of the said amendment letter. Mr. Sinha further submits that amendment No. 4 to the contract was issued on 30.09.1998 vide C/21. By this amendment, the petitioner again considered the request of the respondent-claimant contained in their letter No. 18/738 dated 09.07.1998, and the petitioner conveyed its decision to reduce the scope of the contract from 7044 to 5297 wheel sets. The time period for supply of the outstanding balance of 3000 wheel sets (the balance having been supplied in the meantime) was extended for a period of three months from the date of issuance of the amendment with liquidated damages of 10% of the value of stores. The respondent-claimant was required to convey its acceptance to the said amendment. Mr. Sinha submits that the respondent sent its communication No. 18/1171 dated 12.10.1998 (C/22). In this communication, the respondent only raised the grievance with regard to levy of 10% liquidated damages. However, the respondent accepted the reduction in the quantity of wheel sets. In this communication, the respondent stated as follows:

“We together with our producer would like to appeal that considering our above mentioned difficulties and great losses, kindly withdraw 10% L.D. and other financial implications, L/C extension charges as well as allow delivery for Inspection readiness with following schedule:

<u>Instalment</u>	<u>Due date for Inspection readiness</u>
<i>First lot of 1000 Wheelsets</i>	<i>By end November, 1998</i>
<i>Second lot of 1000</i>	<i>By end December, 1998</i>

wheelsets

*Third lot of 1000
wheelsets*

By end January, 1999

We are enclosing herewith the Amendment No. 4 duly signed and stamped subject to without L.D. charges, Denial Clauses, L/C charges and any other financial losses. Kindly issue the Amendment to the contract and L/C accordingly.”

(Emphasis supplied)

15. Mr. Sinha submits that the aforesaid evidence was placed on record before the Arbitral Tribunal. The Tribunal has also noticed and referred to the several amendments to the contract in the impugned Award. Even in the face of the said evidence, the Arbitral Tribunal has returned the finding that there was no provision in the contract for reduction of the scope from 10000 wheel sets to any lesser quantity. The Tribunal also returned the finding that the said reduction gave a cause of action to the respondent to claim damages from the petitioner. He submits that the Tribunal records that the claimant raised objection to the reduction. However, there is no such objection to be found. Mr. Sinha submits that there was no need for the petitioner to offer any justification or reasons for reduction of the quantity since it was consensual. The parties were at liberty to alter the terms of the contract mutually.

16. So far as reduction in the quantum of liquidated damages from 10% to 1% is concerned, the submission of Mr. Sinha is that there are no reasons to be found in the impugned Award justifying the said reduction. All that the Tribunal has done is to hold that the manner in which the parties had

conducted themselves and the several alterations about the schedule of supply agreed to without any penalty leads the Tribunal to hold that there is no justification for levying liquidated damages in the manner done. In the order dated 27.04.2003, the Tribunal only records its conclusions. One of the conclusions recorded is that the claim for liquidated damages raised by the petitioner herein shall be confined to 1% uniformly for the entire supply in respect of the three consignments. However, there is no justification or reasoning offered by the Tribunal as to why the imposition of 10% liquidated damages by the petitioner as imposed in amendment Nos. 4 and 5 has been reduced to 1%. He submits that the extensions were granted on the request of the respondent, and the levy of liquidated damages was a contractual right of the petitioner.

17. Mr. Sinha further submits that having assessed the cost of the proceedings at US\$ 10,000 in the order dated 27.04.2003, the Tribunal did not have the jurisdiction to review the said finding and to enhance the same to US\$ 25,000.

18. In support of his submissions, Mr. Sinha has placed reliance on the decision of the Supreme Court in ***Delhi Development Authority Vs. M/s R.S.Sharma and Co., New Delhi*** 2008(4) R.A.J. 177(SC) wherein the Supreme Court has culled out from its earlier decision in ***ONGC Ltd. Vs. Saw Pipes Ltd.*** (2003) 5 SCC 705, the principles applicable for examination of an Arbitral Award by a Court are as under:

“(a) *An Award, which is*

- (i) *contrary to substantive provisions of law; or*
- (ii) *the provisions of the Arbitration and Conciliation Act, 1996, or*

- (iii) *against the terms of the respective contract; or*
- (iv) *patently illegal, or*
- (v) *prejudicial to the rights of the parties, is open to interference by the Court under Section 34(2) of the Act.*
- (b) *Award could be set aside if it is contrary to:*
 - (a) *fundamental policy of Indian Law; or*
 - (b) *the interest of India; or*
 - (c) *justice or morality;*
- (c) *The Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court.*
- (d) *It is open to the Court to consider whether the Award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.”*

19. Mr. Sinha also places reliance on the judgment of the Supreme Court in ***McDermott International Inc. Vs. Burn Standard Co. Ltd. and others*** (2006) 11 SCC 181 wherein the Court has explained as to what is meant by the obligation of the Tribunal to give reasons in the following words;

“55. Another important change which has been made by reason of the provisions of the 1996 Act is that unlike the 1940 Act, the arbitrator is required to assign reasons in support of the award. A question may invariably arise as to what would be meant by a reasoned award.

56. In Bachawat's Law of Arbitration and Conciliation, 4th Edn., pp. 855-56, it is stated:

“... ‘Reason’ is a ground or motive for a belief or a course of action, a statement in justification or explanation of belief or action. It is in this sense

that the award must state reasons for the amount awarded.

The rationale of the requirement of reasons is that reasons assure that the arbitrator has not acted capriciously. Reasons reveal the grounds on which the arbitrator reached the conclusion which adversely affects the interests of a party. The contractual stipulation of reasons means, as held in Poyser and Mills' Arbitration. In re, 'proper, adequate reasons'. Such reasons shall not only be intelligible but shall be a reason connected with the case which the court can see is proper. Contradictory reasons are equal to lack of reasons.

The meaning of the word 'reason' was explained by the Kerala High Court in the contest of a reasoned award....

'Reasons are the links between the materials on which certain conclusions are based and the actual conclusions....'

A mere statement of reasons does not satisfy the requirements of Section 31(3). Reasons must be based upon the materials submitted before the Arbitral Tribunal. The Tribunal has to give its reasons on consideration of the relevant materials while the irrelevant material may be ignored....

Statement of reasons is a mandatory requirement unless dispensed with by the parties or by a statutory provision."

57. *In Konkan Rly. Corpn. Ltd. v. Mehul Construction Co. [(2000) 7 SCC 201] this Court emphasised the mandatoriness of giving reasons unless the arbitration agreement provides otherwise."*

20. On the other hand, the submission of learned counsel for the respondent is that the Tribunal has not awarded any amount on account of reduction of the quantity / scope of the contract from 10000 to 5297 wheel sets. All that the Tribunal has done is to observe that the said reduction would have upset the manufacture-planning of the wheel sets by the respondent. He submits that so far as the findings with regard to delay on the part of the petitioners are concerned-in matters relating to inspection of the wheel sets, the same is a finding returned by the Tribunal on the basis of the record.

21. Learned counsel for the respondent has placed reliance on several decisions with regard to the scope of the proceedings under Section 34 of the Act. Reference is made to the judgment of the learned Single Judge of this Court in CS(OS) No. 2524A/1995 titled *M/s Scandia Shipbrokering & Agency Ltd Vs. MMTC Ltd.*, wherein the Court has held that while hearing objections to an Arbitral Award, this Court does not sit in appeal to decide whether the Arbitrator did not properly appreciate the evidence adduced on record. The challenge to the Award, on its merits, is not sustainable. The Court while dealing with an application to set aside the Award is not to consider whether the view of the Arbitrator on the evidence is justified. As the Arbitrator is a Tribunal selected by the parties, its adjudication is generally considered as binding between the parties and the power of the Court to set aside the Award is restricted to cases as set out under the Act. The Court does not sit in appeal over the Award and cannot reappraise the evidence and attempt to come to a different view than that arrived by the

Arbitrator. Merely because the Court may on the same set of evidence, come to a different view, would not be a ground to interfere with the Award.

22. Reliance is placed on ***NTPC Ltd. Vs. Marathan Electric Motors India Ltd.*** 194 (2012) DLT 404 wherein the Court observed,

“38. The scope of challenge to an award under Section 34 of the Act does not open to the parties to challenge the ground that the arbitrator has reached at a wrong conclusion or has failed to appreciate the facts. The appreciation of evidence by the arbitrator is never a matter which the Court considers in the proceedings under Section 34 of the Act, as the Court is not sitting in appeal over the adjudication of the arbitrator.”

23. Reliance is also placed on a decision of this Court in ***Ramesh Kumar and Anr. Vs. Mandip Singh and Anr.*** in OMP No. 294/2010 decided on 21.10.2013 (MANU/DE/404/2013) wherein the Court has again observed that this Court does not sit in appeal over an Award of the Arbitral Tribunal and the Court cannot go into the reasonableness of the contents of the Award.

24. It is well settled that where an Arbitral Award either ignores relevant evidence (and it is not a mere case of appreciation of evidence), or where the contractual terms are ignored by the Arbitral Tribunal (and it is not a mere case of misinterpretation of the contractual terms), this Court would be justified, when called upon, to interfere with the Award to the extent it is necessary. In this regard, I may refer to the decision reported as ***Delhi Development Authority Vs. K.C. Goyal***, 2011 II AD (Del) 116.

25. In the present case, the Arbitral Award has taken note of the five amendments to the contract. It is evident from the aforesaid narration of facts and the submissions of Mr. Sinha, that the reduction in the quantity

from 10000 to first 7044 and ultimately to 5297 wheel sets was not a unilateral reduction by the petitioner. Rather, it was a clear case of novation of the contract mutually by the parties. The amendments sought to be made by the petitioner, inter alia, reducing the scope of supply were mere proposals which were expressly accepted by the respondent-claimant without protest or demur in that regard. The aspect that the contract was novated twice over has completely escaped the notice of the Arbitral Tribunal, even though, the said novations were clearly evidenced from the documents placed on record and even taken note of by the Arbitral Tribunal.

26. There was no question of requiring the petitioner to offer any justification, since novation of the contract was mutual. No grievance could have been raised by the respondent on account of the said novation as it was consensual. A perusal of the impugned Award shows that the aspect of reduction of the scope of supply did weigh on the mind of the Tribunal while making the impugned Award. Once the contract stood novated, neither party could have raised a grievance with regard to the said novation as it was consensual. If the offer made by the petitioner in the amendments – thereby purporting to reduce the scope of supply, firstly, to 7044 and ultimately to 5297 wheel sets was not acceptable to the respondent, the respondent could have raised a dispute contemporaneously rather than accepting the same. Having accepted the said offer and novated the contract repeatedly, the respondent could not have preferred any claim on account of reduction in the scope of the contract from 10000 to 5297 wheel sets and the said aspect would not have weighed in the mind of the Tribunal while making the impugned Award. The observations made by the Tribunal in the

impugned Award against the petitioner in respect of the said reduction, therefore, constitute a patent error inasmuch, as, the Tribunal has ignored not only the relevant and pertinent evidence of novation, but has also ignored the terms of novation which also form part of the contract between the parties. The Arbitral Tribunal was bound by the contractual terms, as noted, and could not have ignored relevant and material evidence/ documents placed before it.

27. The Arbitral Tribunal was obliged to give a reasoned Award. So far as the reduction in the liquidated damages from 10% to 1% is concerned, a perusal of the Award does not disclose the reasons for the said reduction. At one stage, the Tribunal observes, *“The manner in which the parties have conducted themselves and the several alterations about the schedule of supply agreed to without any penalty leads us to hold that there is no justification for levying liquidated damages in the manner done.”*

28. Apart from the aforesaid observations, there is nothing stated in the Award which could be considered as a, “reason” or “justification” for the reduction of the levy of liquidated damages from 10% to 1%. It is well settled that it is not enough for the Tribunal to observe that it has carefully examined the pleadings, documents and evidence and heard the oral submissions of the parties and that it has threadbare analyzed the same while making the Award. Such an observation cannot be construed as a “reason” for the Award as rightly pointed out by Mr. Sinha. “Reason” is a ground or motive for a belief or a course of action. It is a statement in justification or explanation of belief or action. On a perusal of the Award, it is not at all discernible as to on what basis the Arbitral Tribunal concluded that

liquidated damages only to the extent of 1% was justified, and to the extent of 10% was not justified. There is no discussion to be found in the Award on this aspect. It is also not clear as to what the Tribunal means when it observes, *“that the manner in which the parties have conducted themselves and the several alterations about the schedule of supply agreed to without any penalty leads it to hold that there is no justification for levying liquidated damages in the manner done.”* The said observation is rather general and does not throw any light on the grounds on which the Arbitrators have reached the conclusion that the liquidated damages should be only 1% and not 10% as levied by the petitioner. As observed by the Supreme Court in ***McDermott International Inc.***(supra), a mere statement of reasons does not satisfy the requirements of Section 31(3) of the Act. Reasons must be based upon the materials submitted before the Arbitral Tribunal. It cannot be ruled out that the observations made by the Tribunal with regard to reduction in the scope of supply from 10000 wheel sets to 5297 wheel sets (which have been found to be a result of non-application of mind by the Tribunal to the aspect of novation) may have played up in the mind of the Tribunal while reducing the liquidated damages from 10% to 1%. Consequently, the impugned Award insofar as it directs levy of liquidated damages to the extent of only 1%, and further directs refund of the liquidated damages to the extent of 9% cannot be sustained, and is set aside as it is totally bereft of reasons.

29. The Arbitral Tribunal has given its reasons for reducing the burden of bank guarantee charges to 50%. The reason for the same is stated to be the reduction in the scope of supply from 10000 wheel sets to 5297 wheel sets.

In my view, there is no error in the impugned Award insofar as the Award of 50% of the costs incurred by the respondent-claimant for LC charges in favour of the respondent is concerned. The grant of interest @ 6% per annum also does not call for interference. However, it would need examination whether any interest is payable in view of the aforesaid.

30. There is another aspect which needs to be taken note of. The Arbitral Tribunal assessed that costs of the proceedings at US\$ 10000 while passing the order dated 27.04.2003. A perusal of the said order as extracted above shows that the same, in fact, constitute the Award itself. The parties were only required to furnish the figures in terms of that order before passing the formal Award. The Arbitral Tribunal is not vested with the power of review. Having expressed their view in writing in the order dated 27.04.2003 that the costs to be awarded to the respondent-claimant should be US\$ 10000, the Arbitral Tribunal did not have the jurisdiction to subsequently raise the same to US\$ 25000 as done by it while passing the impugned Award. In my view, the impugned Award, insofar as it revises the Award of costs from US\$ 10000 to US\$ 25000 in favour of the respondent, can also not be sustained as the same has been done without jurisdiction and to that extent the Award is liable to be set aside.

31. I also find merit in the submission of learned counsel for the petitioner that there is no basis for the observation made by the Arbitral Tribunal that the respondent ever protested against the reduction in the scope of supply from 10000 wheel sets to 7044, and ultimately further reduction to 5297 wheel sets. On the contrary, the respondent accepted the said reduction by giving its consent thereto.

32. Mr. Sinha has not disputed, and rightly so, that the respondents were entitled to receive the price for 5297 wheel sets supplied by the respondents. The Award made by the Tribunal to that extent does not call for interference.

33. In view of the above, the Award accordingly stands modified as aforesaid. The parties are left to bear their respective costs. It shall be open to the parties to take recourse to further action in accordance with law in the light of this judgment.

VIPIN SANGHI, J

JANUARY 03, 2014
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