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**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

FAO No. 4535 of 2007 (O&M)

Date of decision : 19.09.2016

Ballarpur Industries Ltd.

... Appellant

Versus

M/s Arjun Gases Ltd. and another

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Rajiv Atma Ram, Senior Advocate with
Mr. Rajat Khanna, Advocate
for the appellant.

Mr. D.S. Patwalia, Senior Advocate with
Mr. Sehaj Bir Singh, Advocate
for respondent No.1.

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporters or not?
3. Whether the judgment should be reported in the digest?

AMIT RAWAL, J. (ORAL)

The appellant is aggrieved of the impugned order dated 04.08.2007, whereby the objections under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter called 'the 1996 Act') for setting aside the Award dated 27.07.2005, have been dismissed.

Mr. Rajiv Atma Ram, learned Senior Counsel assisted by Mr. Rajat Khanna, learned counsel appearing on behalf of the appellant submits that the appellant had a caustic soda plant at Yamuna Nagar, Haryana and Hydrogen gas was one of its by-products of the said plant. Respondent No.1-M/s Arjun Gases Ltd. approached the appellant with a proposal for bottling the said gas and accordingly, an agreement dated 03.01.1996 for

supply and bottling of Hydrogen gas was entered into between the parties on various terms and conditions. He submits that the supplier i.e. the appellant agreed to provide, on lease hold basis land, approximately 1320 square metres adjacent to factory premises to respondent No.1-buyer on the mutually agreed terms and conditions. As per the aforementioned agreement, both the parties were required to enter into a lease deed and the buyer i.e. the respondent was required to construct the building and install plant and machinery for its compressing and bottling plant at its own costs. It was also mutually agreed between the parties that agreement for bottling of the gas was valid for 10 years and lease agreement was executed in respect of land for a period of 15 years. It was also mutually agreed upon between the parties to pay the cost of constructed building, boundary walls, various foundations and also electrical installations thereon and the gas-holder constructed/built over the demised premises, to respondent No.1-buyer and the necessary documents were to be executed by the buyer-respondent at its own costs in favour of the appellant-supplier, but plant and machinery equipments including the generator, compressor, cylinder manifolds, cylinders etc. shall be of respondent No.1-buyer.

Clause 14 of the agreement provided, that the buyer shall have full responsibility for maintenance and safe operation of piping and other installation for Hydrogen Gas supply within its premises and Clause 15 provided that the responsibility of installation/operation of the Hydrogen compressing and bottling plant was, as per the agreement, entirely that of the respondent No.1-buyer. The agreement could be terminated after giving three months' notice, in case of any contravention on the part of respondent No.1. Clause 21 contained, the resolution of dispute through arbitration. On

10.01.1996, the lease deed, was executed between the parties containing various terms and conditions and as per condition No.(iii), the lessee-respondent was mandatorily required to comply with and bound by building, health, drainage and other by-laws for the time being in force in the said premises and the lessee shall construct the building and factory at its own costs. The lessee was also required for arrange for appropriate insurance cover for the building constructed, plant and machinery installed on the lease-hold premises. Clause X provided, that the lessee for its use and occupation of the demised premises shall have its own separate “Entry and Exit” and Clause XI dealt with the indemnification of the lessor on behalf of the lessee. The supply continued approximately close to 5 years, however, on 14.11.2000, an explosion took place in the bottling plant, wherein three workers died and others were injured, resultantly the plant became non-functional as the supply of the gas to the plant was stopped by the appellant. The incident report dated 30.11.2000 is the part and parcel of the record as Annexure A-7.

He submits that respondent No.1 did not take any effective steps to repair the plant and make it functional, much less, did not renew the explosive licence or necessary permission from the office of Chief Inspector of Factories was ever sought. These facts are evident from the letters dated 10.01.2001 written by the Additional Chief Inspector of Factories to the respondent No.1-buyer, 21.08.2001 (Annexure-A12) written by Chief Controller of Explosive and reply dated 05.09.2001 of respondent No.1 to the Chief Controller of Explosive. The factum of having not taken any effective steps to repair the plant is also evident from the letter dated 16.06.2001 addressed by respondent No.1 to the Insurance Company and as

well as letter dated 30.03.2001 of respondent No.1 to the appellant, wherein an undertaking with regard to the installation of various safety measures and as well as the additional fire-fighting, and only thereafter, would seek permission to operate. All these factors have not been into consideration by the Arbitrator yet the Arbitrator attributed the contributory negligence.

He further submits that since, respondent No.1-buyer had not taken any steps, the agreement dated 03.01.1996 was terminated on 31.07.2002. The Arbitrator has erroneously awarded the compensation and also interest @ 18% in the absence of any evidence viz-a-viz the damages. In fact, the Arbitrator declined to grant the part of expected loss of profit, but by adjudicating claim No.2 which pertained to interest factor, treated the same, as damages and erroneously, granted the compensation of ₹ 2,30,00,000/- and also assessed the investment made by respondent No.1 to the tune of ₹ 10,55,000/- thus while granting the costs of proceedings of ₹ 40,000/- and all awarded ₹ 2,40,95,000 which is a patent illegality.

He has drawn the attention of this Court to the findings rendered by the Arbitrator, to urge that the Award of the Arbitrator is not in consonance with the provisions of sub-Section 3 of Section 31 of the 1996 Act, in essence, lacking cogent reasons.

He further submits that even the grant of interest without any evidence of respondent No.1 @ 18%, is too phenomenal and in this regard, relied upon the judgments of the Hon'ble Supreme Court in **“Associate Builders V/s Delhi Development Authority” (2015) 3 SCC 49**, to contend that no doubt the Arbitrator must decide the claim in accordance the terms of the contract, but he is entitled to construe the terms of the contract in a reasonable manner, which was not done thus entitling the Award to be set

aside, as there has to be a fair minded and reasonable approach; “NHAI V/s ITD Cementation India Ltd.” 215 (5) SCALE 554, wherein, it has been held that the scope of public policy has been expanded expression a 'Patent Illegality' has also been brought within its ambit, in essence, the Court while considering the challenge to the Award of the Arbitrator, though, does not sit in appeal over the findings and decision, but can notice to whether, it suffers from patent illegality or not, “State of Orrisa V/s M/s Samantary Constn.” 2015 AIR (SCW) 6492, to contend that it has been held that the award has to be in consonance with the provisions of sub-Section 3 of the Section 31 of the 1996 Act and the similar view was taken in “State of Rajasthan V/s Ferro Concrete”, (2009) 12 SCC 1.

As regards the awarding of interest @ 18%, he has referred to the judgments rendered by the Hon'ble Supreme Court in “McDermott International Inc. V/s Burn Standard Co. Ltd.” (2006) 11 SCC 181 and “Krishna Bhagya Jala Nigam Ltd. V/s G. Harischandra Reddy” (2007) 2 SCC 720.

Per contra, Mr. D.S. Patwalia, learned Senior Counsel assisted by Mr. Sehaj Bir Singh, learned counsel appearing on behalf of respondent No.1-Buyer submits that the Award of the Arbitrator is in consonance with the provisions of the Contract/Agreement. This Court cannot sit in an appeal and re-appreciate the evidence. The scope of interference under Section 34 of the 1996 is very limited. The termination of the contract was not in consonance with the terms and conditions of the agreement as the appellant did not send three months' notice, in essence, no opportunity of hearing was given, much less, show cause notice. The claim of damages is based upon the appraisal report of HSIDC, from whom respondent No.1 had

obtained the loan for setting up the plant for running of the business, whereas on the contrary, the appellant has not been able to rebut the same or lead different evidence. This aspect has been considered by the Arbitrator while awarding the compensation viz-a-viz damages. The permission had already been obtained and it was unfortunate that the accident had taken place. Had it been so, the appellant would not have allowed respondent No.1 to run the business for a period of approximately 5 years. The respondent-claimant before the Arbitrator has not been able to lead evidence that at any point of time, the Chief Controller of Explosive or under the Gas Cylinders Rules 2004, refused to grant the amend or renew the licence, in essence, all the bottling was done in pursuance to the terms and conditions of the prevailing laws and rules. The Arbitrator has reasonably granted the amount of compensation on account of loss of profit which should not be interfered with. As against claim No.2 of ₹ 10,44,73,000/-, it was on account of interest awarded the amount aforementioned, over and above, ₹ 10,55,000/- qua the investment. In support of his contentions, he relies upon the judgment rendered by the Hon'ble Supreme Court in “Associate Builders' case” (supra) to contend that the public policy would entail the compliance with statutes and judicial precedents, need for judicial approach, natural justice, justice or morality, much less, patent illegality i.e. the contravention of the substantive law of India or terms and conditions of the Contract Act. The objections were not falling within the realm of Section 34 of the 1996 Act and therefore, rightly so, have been rejected.

He also relied upon the judgment rendered by the Hon'ble Supreme Court in “Navodaya Mass Entertainment Ltd. V/s J.M.”

Combines” (2015) 5 SCC 698, to contend that the reappraisal of the material on record by the Court and substituting its own view, in place of arbitrator's view, is not permissible in the absence of perversity, even if, two views are possible, which the appellant has failed to prove on record, thus, urges this Court for dismissal of the appeal with exemplary cost.

In rebuttal, Mr. Rajiv Atma Ram, learned Senior Counsel, submits that there has been a gross illegality, perversity as the statements of the witnesses have not been adverted to, inasmuch, as that the respondent-claimant in the affidavit filed, even, did not rely upon the appraisal report of HSIDC which fact is evident from Annexure R-13 i.e. affidavit of Mohinder Allagh son of late Sh. Arjun Dev, Director of M/s Arjun Gases Ltd., there is no utterance of a word with regard to the loss of profit, whereas on the contrary, Mr. V.K. Banth, Deputy Manager, CSCP, appeared and was also subjected to extensive cross-examination. In the affidavit, he submitted that the explosion occurred in the premises of the plant set up by the claimant/respondent was reported by the Assistant Manager (Security) of the Respondent, who is an Ex-Serviceman and even an FIR, in this regard, was lodged. He had also stated in evidence, that a team constituted including the representative of the claimant to study the security measures, visited the similar plants situated at various places and it was found that respondent No.1-claimant had not taken the safety measures i.e. one taken in the three plants, rather they were wanting, in fact, the claimant had given full opportunity to take remedial/safety measures, but respondent No.1-claimant did not do so and rightly so, the supply of the Hydrogen gas was stopped. The aforementioned witness was cross-examined regarding meeting and answer was in “Affirmative”. He submits that there is no reference to the cross-

examination of Mohinder Alagh CW-1, the witness of the claimant, who to a specific question in the cross-examination admitted that the safety unit was not conducted, thus, urges this Court for allowing of the appeal.

I have heard the learned counsel for the parties and appraised the paper book.

During the course of the hearing, this Court called upon the learned counsel representing their respective parties as to whether the terms and conditions of the agreement/lease deed referred to above, had been misinterpreted or not and both the counsel were *ad idem* that the terms and conditions of the agreement/lease deed are not in dispute, yet I am of the view that it would be apt to reproduce the certain clauses, for, the Objecting Court has exceeded jurisdiction while dismissing the objections holding that no separate Entry and Exit point was provided by the appellant which was not the case set up by the claimant before the Arbitrator. For the sake of brevity, Clause No.10 of the lease deed read thus:-

*"X. The Lessee shall be entitled to use and occupation of the demised premises and shall have its own separate **“Entry and Exit”**. The Lessee shall use the demised premises in a manner so as not to cause any disturbance or any kind whatsoever to the operations of the Lessor and shall not enter/access the premises or facilities of the Lessor in the course of use of the demised premises unless and otherwise agreed upon between the parties in writing".*

I have gone through the Award and the record of the Arbitrator. Before I delve upon the impugned order and Award of the Arbitrator, it would be apt to reproduce the claims lodged by the claimant, the same reads thus:-

Sr. No.	Particulars	Amount (₹)
1	Investment made in the unit at BILT Campus, Yamuna Nagar	4,64,78,000.00
2	Delayed and Penal Interest	72,15,000.00
3	Loss of Profit	10,44,73,000.00
4	Assets Damaged/Mitigation Losses	64,54,000.00
5	Accident Expenses	7,63,000.00
6	Loss of Image/Good Will	3,35,78,000/-
7	Costs of Proceedings	5,03,000.00
	Total	19,94,61,000.00

On perusal of the aforementioned list of the claims, the claimant claimed a sum of ₹ 19,94,61,000/- under various heads. In paragraph No.7, respondent No.1-claimant specifically pleaded that the claimant shall pay mutually agreed cost of the price of constructed building, boundary walls, various foundations and electricity connections and the same has not been emphatically denied.

In order to appreciate the arguments of Mr. Rajiv Atma Ram, whether the award of the Arbitrator is in consonance with the provisions of sub-Section 3 of Section 31 of the 1996 Act or not, I would be failing in my duty in not extracting the relevant portion of the Award of the Arbitrator, the same reads thus:-

Claim No.3

Now I take up for consideration the Loss of Profit of ₹ 10,44,73,000/- (Rupees Ten Crore Forty Four Lakhs and Seventy Three thousands only). The claimant has made out a case that the accident in question on 14.11.2000, the blasting of one cylinder a combastable item which might burst on its own without any operational lacks. It is submitted that there are many instances where the cylinders go bursted while lying in storage and godowns, during the transportation and even in

the house hold kitchens. In any case assurance was given by the respondent to the claimant that after removal of certain defects in the premises, the supply would be resumed. So much so the Chief Inspector of factories Haryana and the Chief Controller of explosives of Nagpur had given their approval for the restart of the plant vide their letter No.9 dated 10.01.2001 and GC (NCF 91) NH respectively. Copies of these letters have been filed as Annexure I and J to the Statement of Claim.

*The includes a claim of ₹ 48,12,000/- on account of the so called effect of Closure of Unit No.2 on Unit No.1. The non-supply of hydrogen gas is said to have resulted in reducing the cash flow to Zero level adversely affecting its functioning. That apart, recurring expenses direct or indirect Unit No.2 continued to be born by the claimant. It also adversely affected the loss of production in Unit No.1 at Argon. CW1 has purported to support this claim in his evidence. Vide his evidence in paragraph 364 as well as the appraisal report prepared by HI HSIDC Ex.CW1/362. It was submitted by the learned Advocate for the respondent on the hand that in their reply, no question has been raised by the claimant regarding any expected loss of profit by them. Having examined the facts and circumstances, **I am of the view that this part of the claim is not admissible as apart from being outside of the purview of this references it is also a case of remote damages. It is accordingly disallowed**, now I take up for consideration the main claim for Unit No.2. The plant remained in operation from Jan. 1996 to 14.11.2000, the date of accident i.e. for a period of about 5 years. The original period of lease is fixed for 10 years “on the terms to be mutually agreed.” The claimant has calculated the claim under this head upto the extended period upto 3.1.2001. In my view for the purpose of calculation the relevant period should be taken only 10 years being definite and fixed one. Once this*

view is taken than the amount of ₹ 9966100/- would stand at half of the same i.e. ₹ 4983100/-.

The claimant has based the claim on the estimated sales of ₹ 228.43 lacs per annum, as projected by its financier namely HSIDC in its report in March, 1999. On the basis of the sale in the previous year vide Annexure L to the Statement of claim, as also Ex. 1/363, where the detail of the computation is mentioned. No challenge was made by the respondent the veracity of the calculation much less any thing was pointed to discredit or disregard of the accounting.

In support of this claim reliance was placed by the claimant on the case of ONGC Vs. Saw Pipes JT 2003 (5) SCC 705 which has laid down the well known and settled principle of law that when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for such loss which necessarily arises in the usual course from such a breach. In the case of Dwarks Das Vs. State of M.P. (AIR 1999, SC 1031) where on a breach of works contract for construction of a hostel on account of some obstruction in the progress of work when contract was rescinded by Government, damages as loss of expected profit was allowed.

In reply to this claim on behalf of Respondents it was submitted with Vehemence by MR. Das the learned Senior Advocate for the respondent that the contract in question had become impossible of performance having been frustrated and rendered void. Reference was made to Sections 23, 51 and 56 of Indian Contract Act. It was submitted that various infirmities were found by the authorities in the fittings and fixtures of the plant and information was sent to the claimant after inspection of the premises for compliance and removal of those and other defects and directions, particularly to increase the Supervisory Staff. A letter dated 27.9.1996 was sent to the claimant by the General manager (Engineering) pointing out

compliance of the various matters.

Reliance was also placed on the letter issued by Chief Inspector of Factories, Haryana to CW-I dated 10.01.2001 issuing various directions to the claimants categorically stated there that “compliance of the said directions was to be affected before re-starting the plant and that additional safety measures were also got examined by the Department.”

It was pointed out that CWI in his cross examination after his recall in evidence has admitted that those directions were not carried forward. Then reliance was placed to the letter from the Chief Controller explosives (at page 112 of the Statement of Claim) asking the claimant to submit a report of the plan of enhancing safety measures in the plant without any further delay. This letter was issued about 9 months after the accident. From Ex.R-1 at page 13 to 19 along with some other documents it was shown that safety measures had been reduced and some officers were also removed from the plant. Relying upon the provisions of Section 51 and 56 of the Contract Act, it was submitted on behalf of the respondent that even assuming that the contract was not suffering from any legal defect or otherwise in the beginning, it became impossible for performance thereafter. It would have amounted for a respondents to defeating the provisions of Indian Explosives Act involving the injury to the persons and properties, and therefore the obligation to give 3 months prior notice to terminate the contract would not arise. That obligation would be attracted only if one of the parties to the contract desired to get out of the contract when it was a going concern. Plant had been shut down at once on account of the happening of the occurrence and continued to remain suspended for the obvious reasons for which the claimant itself was responsible and therefore it was the claimant who was responsible for the breach in question. This also caused loss of

business to the respondent, as the raw material was always available in store which went on wasted. In other words, the business of bottling was not resumed for no fault of the respondent. The bottling business could not have been carried out and if this was the situation then the question of earning/suffering any profit did not arise.

The bottling plant came into operation is September, 1996 and things went on normally until 14.11.2000 when the unfortunate accident took place in the bursting of one gas cylinder in which 3 workmen died and some other were injured. This led to the stoppage of the supply of gas by the Respondent. The accident was reported to CCE and an investigation was carried out. According to the report the cylinder in question (No.A7920) was due for periodical check up in March 2001 which is done every five years. This report does not allege any violation of any obligation.

In reply it was submitted on behalf of the claimants that the respondents had already terminated the contract and had adopted a tough attitude to revive the same. The claimants had already made huge investments and unless they could be assured that the contract would be revived, they could not venture to take up the rectifications for which they were always anxious. The claimants had been examining similar projects at different places, examining all the factors eagerly and were running from pillar to post to restart the plant only waiting for a “go-on” signal from them requesting the respondent to cooperate and respond in this regard but they remained unmoved/leaving the claimant a helpless lot which is root cause of all the misfortune and the respondent, must be held to be liable to pay for the resultant all the damages consequential loss of profit to them. I find substance in this submissions advanced on their behalf and accordingly hold that the respondents can not escape the liability for this situation altogether. However, I will consider

the pros and cons of the respective Conduct and attitude of both the parties as I do not persuaded to give all clean chit to the claimants either, which will have a bearing in assessing the question of damages.

Now having once recorded finding of fault on the part of the respondent, I come to the question of assessing the amount of damages to be paid to the claimant. In this regard I may observe that the claimant had still a long period of about 5 years left for operating the plant. In the usual course in running operating a plant of industry breakdowns stoppage of work and various obstructions do take place. The plant and the electrical equipments were bound to suffer trippings in usual course of things. The plant could not run continuously day out and day in. I would therefore reduce the claim amount of the expected loss of profit at least by 10%. Giving further thought to this complex matter I feel that for earning this profit for 5 years, constant involvement of time labour and money was necessary when the claimants are getting the compensations without any effort pain or sweat. The apart, I have held them to have committed contributory negligence in the matter of complying with the directions/requirements in rectifying the defects. If sincere and effective efforts/pressure would have been put by them on the respondents directly or through the official machinery there should have been a restoration of the contract as well as resumption of the supply. I would therefore reduce the above amount of ₹ 4,48,47,450/- further by half of the same. Thus making both the parties to suffer and bear the burden in equal measures, which in my view would be fair and equitable. The calculation is made as under:-

Details Calculation

Total amount of claim for 10 yrs.	₹ 9,96,61,000/-
Less – half above for the remaining	

<i>5 yrs. Period</i>	<i>₹ 4983050</i>	<i>₹ 4,98,30,509/-</i>
<i>Less by 10% for :</i>	<i>₹ 4983050</i>	<i>₹ 4,48,47,450/-</i>
<i>Breakdowns etc.</i>		
<i>Less reduced on a/c of contributory</i>		
<i>Negligence of the claimant by half</i>		<i>₹ 2,24,23,725/-</i>
		<i>Rounded up to</i>
		<i>₹ 2,30,000,00/-</i>
<i>(Two Crores and Thirty lacs only)"</i>		

While dealing with the claim on the loss of profit, the Arbitrator gave the finding that the part of the claim was not admissible being outside the purview of the references on the premise that after disallowing the part of the claim on remote damages, he assessed the claim for Unit No.2 and observed that the plant remained in operation from January 1996 to 14.11.2001 i.e. for a period of five years, since the original period of lease was 10 years and the claimant calculated the claim by taking 10 years being definite and fixed one, assessed the amount of ₹ 9,96,61,000/- and by taking it to the half, assessed ₹ 4,98,30,500/-. He also relied upon the report (Ex.1/363) of the HSIDC regarding the estimated sales for the month of March 1999 after rejecting the loss of profit and remote damages, but yet after discussing the respective contentions that too again on the amount of damages, failed to refer the letters referred above. For the sake of brevity, the letters referred to above read thus:-

Letter dated 10.01.2001

"From

*Chief Inspector of Factories,
Haryana, Chandigarh.*

To

*Shri Mohinder Allagh,
Managing Director,
M/s Arjun Gases Limited,
Unit-II, Campus BILT,*

Yamuna Nagar.

No.25

Dated 10.01.2001

Subject:- Incident of Fire and explosion on 14.11.2000.

Reference your letter dated 19.12.2000 followed by 2.1.2001 on the subject cited above.

In view of the position explained in the above letter as well as at the time of personal hearing on 08.01.2001, a strict note of warning is issued with the directions to comply with the following:-

- 1. "Safety Audit" of the plant should be conducted from the reputed safety experts and the plant should not be recommissioned till effective measures have been taken by incorporating additional safety systems at the gas filling station.*
- 2. Effective steps should be taken to prevent the gas Cylinders from falling at the time of filling.*
- 3. Training should be provided to the workers in a systemic way when the factory is recommissioned.*

Compliance of the above be effected before re-starting the plant and the additional safety measures be got examined from the department.

*Addl. Chief Inspector of Factories
for Chief Inspector of Factories
Haryana"*

Letter dated 21.08.2001

*Government of India
Department of Explosives,
CGO Complex, 5th Floor, Seminary Hills*

*No.OC (NC)F-91/11N
Nagpur, dated 21.08.2001*

To

*M/s Arjun Gases Limited
O-17, Industrial Area,
Yamunanagar – 135001, Haryana*

Sub:- Hydrogen filling plant at Yamunanagar (Haryana)

covered under License No.GC(NC)F-91/HN-Accidental occurred on 14.11.2000-Reg.

Dear Sir,

Reference detailed discussions on the matter held between M.D. Of your company, your Consultant Shri A.R. Singh and Chief Controller of Explosives in this office sometime in February 2001.

During the discussion, they were advised to submit a report/plant of enhancing safety in the plant. You are hereby requested to submit the same without any further delay. You are also requested to let this office know about the status of the case registered by the police.

Yours faithfully,

(A.N. Biswas)

*Dy. Chief Controller of Explosives
for Chief Controller of Explosives”*

Letter dated 05.09.2001

*The Chief Controller of Explosives
ECO Complex, 5th Floor,
Nagpur.*

Subject:- Hydrogen Filling Plant at Yamunanagar Covered under Licence No.GC(NC)F-91/HN – Accident occurred on 14.11.200-Reg.

Dear Sir,

This is with your letter No.GC(NC)F-91/HN Nagpur dated 21.08.2001 and please note that our above unit is in the premise of Ballarpur Industries Limited, Yamuna Nagar, who were supplying us Hydrogen Gas through a pipeline there is delay from Ballarpur Industries Limited for supply of Hydrogen Gas which is going to take some more time and after that we shall revert back to your.

Thanking you,

Yours faithfully,

for Arjun Gas Limited,

Director

*CC: The Joint Controller of Explosives,
North Circle,
Faridabad.”*

“AGL/BILT/2000-01

30.03.2001

*Ballarpur Industries Ltd.,
Unit Shree Gopal,
Yamuna Nagar*

*Kind Attn :- Mr. S.K. Singh,
GM (Comm.)*

Dear Sir,

Sub:- Hydrogen Bottling Station.

We are thankful to your organisation for extending us co-operation from time to time for smooth running of our business. Please refer to the discussion undersigned had with you and we are to submit as under:-

- 1. In our above bottling station safety features are installed unparalleled in the hydrogen compressing industry. List of safety features installed in our unit is enclosed.*
- 2. We shall carry out following additional safety precautions after carrying out repair of plant and before operation of the plant.*
 - a) All the Electrical fitting and wiring system will be thoroughly checked for flame proofing.*
 - b) Entire high pressure pipe line will be tested pneumatically at 1.25 times of the working pressure.*
 - c) All safety equipment will be re-checked thoroughly for proper functioning.*
 - d) Additional fire fighting equipment and hydrogen will be installed.*
 - e) Final safety audit will be conducted before applying to Department of Explosives for permission to operate.*

- f) The Department of Explosives will conduct safety inspection before permitting operation of plant.*
- g) Chief Inspector of Factories will permit us to re-start the plant after final safety audit by reputed safety expert of hydrogen gas.*
- h) Literate and trained staff and supervisors will be for round the clock operations.*
- i) Systems of examination and testing of cylinders will be further tightened.*
- j) Records of such examination and testing will be regularly verified by the plant manager.*
- k) Retraining of staff on regular basis will be systemized.*
- l) We shall provide personal protective equipment like hand gloves and goggles of the workmen engaged in the hydrogen filling.*
- m) We will ensure that cylinders fastened to the manifold during the filling operation do not fall down in the process for this we will take guidance from our technical consultant.*

We ensure you that we shall take above mentioned additional steps before operation of plant and after re-checking of our existing safety features installed. If need be we can take your senior technical persons to nearby similar bottling plant for reviewing the safety aspects.

Further we would like to mention here that we have made an investment of ₹ 400.00 Lacs for establishing Hydrogen bottling station during the year 1996-1997 and we have raised term loan of ₹ 250 Lacs from State Financial Institution for setting up above plant.

We are incurring heavy losses every month on account of fixed overhead like interest on term loan, salary to staff other expenses and repayment of term loan to the tune of ₹ 15.00 Lacs per month and our customer are switching over to other bottlers for their hydrogen requirements. BILT is also suffering

*Revenue loss of ₹ 10.00 Lac p.m. As hydrogen is vented in air.
We again assure you of safety of plant and workman and
request you to allow us to re-start the plant in order to avoid
further losses to AGI & BILT.*

*With best regards and Thanks,
For Arjun Gases Ltd.
Mohinder Allagh,
Director.”*

The aforementioned letters are part and parcel of the record of the Arbitrator and the cumulative effect of the aforementioned letters would be that respondent No.1 had not taken any effective/remedial/safety measures and sought permission to operate as late as upto June 2001, whereby they had intimated this fact to the Insurance Company. The contents of the letter reads thus:-

“ AGI/UNITED/7/2001-02

16.05.2001

*The Senior Manager,
United India Insurance,
Jagadhri Road,
Yamuna Nagar – 135001*

*Reg:- Loss of building, plant and machinery and cylinders, etc.
on 14.11.2000 in our unit situated at near gate No.9 in
BILT Compound, Yamuna Nagar.*

Dear Sir,

*Please refer to our letter No.AGL/UNITED/2000
dated 15.11.2000 and subsequent visit of your Surveyor on
21.11.2000. Please note that we have not yet started repair of
the building and plant and machinery as we have yet to receive
permission to re-start from BILT, which is expected by June
end. After that the repair work shall be carried out and final
loss can be estimated. We cannot ____ out the possibility of*

internal loss to the following machineries installed in above unit:-

- 1. Compressor*
- 2. Electrical Motor Flame Proof*
- 3. Oxygen Analyser Teledyne*
- 4. Oxygen Analyser Nucon*
- 5. Shaw Moisture Meter (2 Nos.)*
- 6. Birla Kent Kathrometer*
- 7. Generator Set*
- 8. Flame Proof Lighting*
- 9. Electrical Panel*
- 10. Cylinder filling manifold*
- 11. Pressure, Gauges, Safety Relief valve, Globe valves etc.*
- 12. Cylinder attached to manifold at the time of accident*

In the meantime you are requested to please depute the Surveyor to take photographs of plant and machinery and assess our loss accordingly,

Thanking you,

Your faithfully,

For Arjun Gases Ltd.

Mohinder Allagh,

Director.”

and ultimately, the contract was terminated on 31.07.2002.

Having not taken the effective steps, it leads to an irresistible conclusion that respondent No.1 had never intended to carry on the bottling process and the factum of the safety measures being noticed by the team visited the other plants, was more than one, in which the incident had taken place. In my view, the Arbitrator has not assigned any reasons, much less, cogent reasons in assessing the damages once, as it declined the same in first breath. The appraisal report would not be a clincher for assessing the loss of profit and

damages. The damages claimed are to be quantified as per the provisions of Section 73 of the contract Act, in my view, the appellant has not led any independent evidence for assessing the claim on account of the loss of profit and damages particularly, when there was no cross-objection viz-a-viz the findings rejecting the claim of remote damages. In my view, the aforementioned findings of the Arbitrator were falling within the ratio decidendi culled out by the Hon'ble Supreme Court in **“Associate Builders’ case”** (supra) as there is a “patent illegality” of the statutory law i.e. Sub-Section 3 of Section 31 of the 1996 Act. At the best, respondent No.1 was/is entitled to claim a sum of ₹ 10 Lacs an odd amount, as assessed by the Arbitrator with regard to the cost of building, foundations etc., and interest @ 9% instead of @ 18%. I am in agreement with the ratio decidendi rendered by the Hon'ble Supreme Court in **“NHAI’s case”** (supra) wherein it reiterated the findings that the Award of the Arbitrator suffers from “patent illegality” can be interfered with. It is not a case where the Arbitrator has misconstrued the terms and conditions of the agreement, but, as noticed above, did not refer to the provisions of Section 73 of the Contract Act which are the parameters for claiming the damages in terms of money i.e. liquidated damages and therefore, as per the ratio decidendi culled out in the judgment rendered by the Hon'ble Supreme Court in **“State of Orrisa’s case”** (supra), the Award is unreasonable, lacking reasons.

I do not beg to differ from the ratio decidendi in **“Navodaya Mass Entertainment Ltd.’s case”** (supra) for reappraisal of the material/evidence on record by having a different view, but the fact remains and as noticed above, the Award is wanting the reasons and therefore, there is a patent illegality. Once, the Arbitrator has declined the claim on the loss

of profit, but did not assign any reason while arriving at a completely opposite stand in awarding compensation of ₹ 2,30,00,000/- under the head of claim No.3.

The aforementioned finding of mine is not based upon the re-appreciation of the material on record, in fact, there is no reference to the same. Had the Arbitrator referred to and formed a different opinion, perhaps my findings would have been tantamounting to reappraisal of the evidence, but as already noticed above, the Arbitrator, who is enjoined upon an obligation to refer to each and every material on record, in case, abdicates in referring the same, the Award would definitely fall within the expression “patent illegality”. I cannot remain oblivious of the fact that agreement envisage termination of contract by advance notice of three months whereas as noticed, it was terminated on 31.07.2002, and for such period respondent is entitled to damages in terms of money subject to furnishing of calculation during execution proceedings.

There is no reference to the cross-examination of Mohinder Alagh CW-1, the witness of the claimant, who to a specific question in the cross-examination admitted that the safety unit was not conducted. The question and answer given, in this regard, reads thus:-

“Q. Was any safety audit conducted of the factory after the accident?”

A. Safety audit was not conducted but investigation of the cause of the accident was carried out by Director Safety/Chief Inspector of Factory/Chief Controller of Explosive and jointly with Mr. A.R. Singh, our Technical Consultant. No special training was given to the workers after the accident, as Respondent has not given green signal for resumption of supply.”

It does not lie in the mouth of Mr. D.S. Patwalia, to contend that this Court while deciding the objections would be prevented from reappraising the evidence.

For the foregoing reasons, I am of the view that respondent No.1 is only entitled to claim the amount assessed under claim No.1 i.e. ₹ 10,55,000/- and cost of proceedings of ₹ 40,000/- in all ₹ 11,05,000/- and interest awarded @ 18% being a commercial in view of judgment of Hon'ble Supreme Court in "M/S Hyder Consulting(UK) Ltd vs Governor, State Of Orissa" (2016) 6 Supreme Court Cases 362.

However, I cannot remain also oblivious of one other aspect that the Objecting Court set up a new case which was neither pleaded or projected. For the sake brevity, the finding of the Objecting Court, in this regard, reads thus:-

“It is made out from the facts of the case and the documents referred to by Mr. Ajit Pudussery, Advocate, the learned counsel for the petitioner, that the premises in question are owned by the Ballarpur Industries Limited/the petitioner and that the respondent No.1 could have no access to the premises without the permission of the petitioner. It is also established that there was no violation of safety measures on the part of the respondent No.1 and that one cylinder had burst on November 14, 2002 because of the reasons beyond the control of respondent No.1. The explosion had taken place on November 14, 2000 whereas the termination inspection of the cylinder was to be carried out in the month of March, 2001. Sh. Ajit Pudussery, Advocate, the learned counsel for the objector, failed to point out even one irregularity on the part of the respondent which may have contributed to the explosion

which had occurred in the premises on November 14, 2000. He has also not mentioned anything about the measures which were required to be taken by the respondent for proper and safe commissioning of the bottling plant. Therefore, it cannot be said that the Arbitrator did not appreciate the evidence placed before him properly or that the award is based on surmises and conjectures. There is thus no material available on record to hold that the Arbitrator had misconduct himself in any manner whatsoever. The Arbitrator was perfectly justified to refuse to give clean chit to either of the parties while deciding claim No.3.”

I am afraid the aforementioned findings are neither here nor there, much less, totally off the record, as referred to above as claimed, supra has not been read into and accordingly, the findings of the Objecting Court to the aforementioned extent are also expunged and the Award of the Arbitrator is upheld to the extent aforementioned and claim No.3 is hereby rejected.

With the aforesaid observations, the appeal is partly allowed.

19.09.2016
yogesh

(AMIT RAWAL)
JUDGE

	✓
Whether speaking/reasoned	Yes/ No
	✓
Whether Reportable	Yes/ No