$~R-115

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

\+ **O.M.P. 387/2008**

HINDUSTAN LATEX LIMITED & ANR. ..... Petitioners

Through: Mr. Anand Sukumar & Mr. S. Sukumaran, Advocates.

versus

NESTOR PHARMACEUTICALS LIMITED & ORS. ..... Respondents

Through: Mr. Vikas Sharma, proxy counsel for Mr. Rajesh Yadav, Advocate.

CORAM: JUSTICE S. MURALIDHAR

<u>O R D E R</u>

% **25.11.2016**

1. The challenge in this petition under Section 34 of the Arbitration & Conciliation Act, 1996 (the Act) by Hindustan Latex Limited (HLL) is to an Award dated 4th April, 2008 passed by the sole Arbitrator in the disputes between Petitioner No.1 on the one hand and Nestor Pharmaceuticals Limited (NPL)/Respondent No.1 on the other.

2. Petitioner No.1/HLL, which is a Government of India (GoI) undertaking was appointed by the GoI as Procurement Agent for procuring and supplying insecticides, larvicides and medicines required for distribution under the National Anti-Malaria Programme. HLL floated a tender inviting bids on 2nd August, 2002 for procurement of different medicines and pursuant thereto NPL and three other parties submitted their respective bids for Chloroquine Phosphate Tablets 250 mg (CP Tablets). The

invitation for bid comprised of the bid document, which contained instructions to bidders (ITB), General Conditions of Contract (GCC), Special Conditions of Contract (SCC) and other documents. Under clause 6.1(a), the conditions concerning 'Bid Price' were indicated and the said clause reads as under:

> "6.1(a) The Price bid for each line item to be commensurate with scope of supply indicated under each line items and should indicate all inclusive lump sum price offered for each line item including cost of the stores, freight, transit insurance, packing and forwarding, Sales Tax, Excise Duty inspection/inspective certificate charges, etc. The all inclusive lump sum price should be on F O R destination basis and free delivery at consignees place for the above and inclusive of all charges stated hereinabove. The all inclusive lump sum price needs to be accompanied by a statement indicating a clear "break up" of all inclusive lump sum price of its various components constituting it along with values/amount indicating against each of such components adding to arrive at all inclusive lump sum price. The prices are to be kept valid for acceptance up to 90 days from the date of the opening of bids. The prices should be lump sum prices only for each of the line item. No other charges in addition will be payable on any account over and above the lump sum quoted. The prices should be given both in figures and words. Offers with price variation clause will not be accepted, the rates quoted in ambiguous terms such as "freight on actual basis" or "taxes as applicable extra" or "packing forwarding extra" will render the bid liable for rejection. Sales Tax will be either local Sales Tax or concessional Sales Tax (CST) (for inter State sales) @ 4% against issue of form 'D' by NAMP and whichever Sales Tax amount is applicable will be incorporated in the above all inclusive lump sum price. Custom duty exemption certificate and octroi exemption certificate will be issued by consignee/NAMP and price to be quoted accordingly.
>
> Bidders in their own interest shall ascertain the eligibility of whatsoever concessions and exemptions eligible and applicable and shall advice the purchase and quote accordingly. Bidders shall indicate the actual amount of octroi, excise duty, normal sales tax, etc. which becomes otherwise payable in the extreme event of

> consignee not in a position to release certificates like CDEC, Octroi Exemption Certificate, Form D."

3. Clause 24.1 of the contract made it clear that "supplier shall be entirely responsible for all taxes, stamp duties, licence fees, etc. incurred until delivery of the contract goods to the Purchaser." Under clause 3 of the SCC, the burden was on the supplier to arrange Custom Duty Exemption Certificate (CDEC) and it was only upon advance notice of the supplier that the purchaser was to provide the CDEC, Octroi Exemption Certificate, etc.

4. At the time of bidding for the aforementioned contract for supply of the medicines the NPL indicated the origin of goods as 'India'. However, after being awarded the contract on 10th March, 2003, NPL addressed a letter dated 14th March, 2003 to the Petitioner seeking issuance of CDEC in terms of clause 10 of the contract. NPL stated that it had to import 50 MT of CP Phosphate BP. Despite a query from the Petitioner No. 1 by the letter dated 10th April, 2003 seeking clarification as to why CDEC was required, NPL wrote a letter on 17th April, 2003 insisted that CDEC forms an integral part of the bid but did not explain why it was necessary when the country of origin was 'India'.

5. Thereafter a letter was addressed on 9th May, 2003 by NPL to HLL stating that if the CDEC was not furnished by 13th May, 2003, the burden of customs duty would be borne by HLL. On 3rd June 2003, NPL informed HLL that a sum of Rs. 52,71,973 has been paid towards customs duty and additional customs duty on the shipment of 37 MT CP BP and accordingly demanded that Rs.52,72,000 be reimbursed due to alleged failure on the

part of HLL to issue CDEC.

6. The above dispute resulted in a legal notice being sent by NPL to HLL invoking the arbitration clause claiming reimbursement of customs duty together with interest @ 18 per cent per annum from 29th September, 2004 till realisation.

7. Before the learned sole Arbitrator the only issue that was to be decided concerned the claim of NPL on account of CDEC. HLL was the Respondent before the learned Arbitrator. The two issues framed by the learned Arbitrator were as under:

> "1. Whether the Respondent was bound under the terms of the contract to issue Customs Duty Exemption Certificate (CDEC) to the claimant?
>
> 2. Whether the Respondent was justified in refusing issuance of the CDEC?"

8. In coming to the conclusion in favour of NPL, the learned Arbitrator referred to Notification No.21/2002-CUS dated 1st March, 2002, in terms of which, according to the learned Arbitrator, NPL was eligible for CDEC. The learned Arbitrator referred to clause 6.1(a) of the ITB and held that it did not make NPL's advice to HLL about the existence of any notification as "a pre-condition of a notification for issuance of CDEC." According to the learned Arbitrator, NPL had proved the existence of the relevant notification and therefore, the contention of HLL that there was no notification was not valid.

9. The learned Arbitrator held that the SCC did not anywhere stipulate that the issuance of CDEC would be applicable only to import origin goods.

The Arbitrator further held that NPL's "omission of the information on the points mentioned by the Respondents, therefore, cannot absolve the Respondent from the responsibility of issuance of the CDEC." According to the learned Arbitrator it was evident from para 6.1(a) that "there is a clear provision for Customs Duty Exemption Certificate to be issued by consignee/NAMP and price has to be quoted accordingly, which means that price quoted is not supposed to take into account the element of custom duty." It was observed that NPL had rightly quoted the price without taking into account any element of customs duty in view of the fact that he had already requested for issue of CDEC vide serial No.10 of the bid (Other Terms & Conditions). In the circumstances HLL was asked to pay NPL Rs.52,71,973 as reimbursement of customs duty paid by them for the import of the raw material for manufacturing of CP tablets as HLL failed to arrange the issuance of CDEC. Further interest @ 18 per cent per annum was awarded from 19th May, 2003, i.e., the date of payment of customs duty, up to the date of payment.

10. This Court has heard the submissions of Mr. Anand Sukumar, learned counsel for the Petitioner. None appeared for the Respondents during the hearing. When after the hearing, the order was being dictated, a proxy counsel appeared on behalf of Mr. Rajesh Yadav, learned counsel for the Respondents and sought an adjournment. The Court having heard the matter at length and having also considered the objections of NPL was not inclined to grant any adjournment.

11. In the first instance, the Court finds that the interpretation of clause 6.1(a) of the bid document by the learned Arbitrator to be both incorrect

and incomplete. The second portion of clause 6.1(a) appears to have been completely ignored by the learned Arbitrator. That required the bidders "in their own interest to ascertain the eligibility for concessions and exemptions and to advise the purchaser accordingly." It appears that after the hearing before the learned Arbitrator was concluded NPL produced before the learned Arbitrator a copy of the notification No.21/2002-CUS dated 1st March, 2002 to claim that it was eligible for CDEC in terms thereof.

12. The Court finds that the learned Arbitrator erred in overlooking the fact that the particular item of import, i.e., raw material for the manufacture of CP tablets was not, in fact, eligible for issuance of an CDEC in terms of the said notification. The Court has been shown a copy of the notification. Entry 83 in the table appended to the notification states that the following goods would qualify for customs duty exemption:

> "(A) Life saving drugs/medicines including their salts and esters and diagnostic test kits specified in List 4.
>
> (B) Bulk drugs used in the manufacture of life saving drugs or medicines at (A) above.
>
> (C) Other life saving drugs or medicines."

13. The above table has to be read along with list 4, which is appended thereto. The said list 4, in fact, lists out 126 medicines and drugs but CP tablets is not included therein. In other words there was no exemption available for the said drug in terms of the notification. This responsibility of ascertaining whether it was, in fact, eligible for exemption from payment of customs duty was on NPL, which it failed to discharge that

burden. In the absence of such ascertainment there was no obligation on HLL to issue any CDEC.

14. In any event CDEC had to be issued only where the importer was eligible in terms of the notification issued by the Government of India under Section 25 of the Customs Act, 1962.

15. The Court is satisfied that the learned Arbitrator committed a patent error in overlooking the legal and factual position in this regard. Therefore the learned arbitrator's interpretation of clause 6.1(a) of the bid document is both incomplete and incorrect. The liability for 'reimbursing' the customs duty paid by NPL for the import of the above consignment was erroneously fastened on HLL based on incorrect reading of the clauses of the contract as well as applicable notification regarding customs duty exemption.

16. For the aforementioned reasons the Court finds that the impugned Award is unsustainable in law and it is hereby set aside. The petition is allowed but in the circumstances no orders as to costs.

S. MURALIDHAR, J.

NOVEMBER 25, 2016
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