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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. 64/2009

Reserved on: January 4, 2017

Decided on: March 6, 2017

LIFT AND SHIFT INDIA PVT. LTD.

..... Petitioner

Through: Mt. Atul Y. Chitale, Senior Advocate
with Ms. Tanvi Kakar, Mr. Gurjyot Sethi and Ms.
Shivangi Khanna, Advocates.

versus

CENTRAL WAREHOUSING CORPORATION

..... Respondent

Through: Mr. K.K. Tyagi, Mr. Iftexhar Ahmed and
Mr. Anoop Kumar, Advocates.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

06.03.2017

1. This is a petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') by Lift and Shift India Pvt. Ltd. challenging an Award dated 4th November, 2008 passed by the sole Arbitrator in the disputes arising out of the award of a contract by the Respondent Central Warehousing Corporation ('CWC') to Natwar Parikh Industries Ltd. ('NPIL') by a letter dated 11th June, 1993.

2. At the outset, it requires to be noted that pursuant to a demerger order dated 11th December, 2006 passed by the High Court of Gujarat in Company Petition No. 204 of 2004 connected with a Company Application No. 493 of

2006 as amended on 4th January 2007, the transport division along with its assets, liabilities and cases of NPIL were demerged and transferred to the Petitioner i.e., Lift and Shift India Pvt. Ltd. with retrospective effect from 1st April, 2006. Accordingly, NPIL which was the claimant in the present arbitration proceedings has been substituted by the Petitioner.

Background facts

3. The above Contract awarded by CWC to NPIL involved handling and transportation of ISO containers and allied services at the Container Yard, Jawaharlal Nehru Port ('CY, JNP'), Railway Siding Container Freight Station (CFS) and in an around the CFS at Dronagiri Node Warehousing Complex, Navi Mumbai (D Node), CFS Export Warehouse, Kalamboli and CFS, Jawaharlal Nehru Port ('CFS, JNP') at Navi Mumbai.

4. According to the Petitioner, subsequent to the commencement of the Contract, CWC started deducting, arbitrarily and unjustifiably, amounts from the periodic bills of NPIL on some or the other pretext in breach of the terms of the Contract without assigning any reason. CWC is also stated to have unilaterally closed down the export CFS, Kalamboli in breach of the terms and conditions of the Contract. Further, CWC refused to grant the difference of the price hike of diesel, oil and petroleum products used by the Petitioner for transportation.

5. By letters dated 19th November 1996, 27th December 1996, 3rd February 1997 and 28th April 1997, NPIL sought the appointment of a sole Arbitrator. Initially, on 27th February 1998, CWC appointed one Shri B.K. Sharma as

the Sole Arbitrator.

The arbitral proceedings

6. On 17th July 1998, the following claims were filed by NPIL:

“(1) Wrongful deductions on account of movement of containers amounting to Rs. 95,07,460/-

(2) Delay in LCL Destuffing amounting to Rs. 11,82,310/-

(3) Wrongful deductions on account of hiring of equipments amounting to Rs. 58,35,153/-

(4) Recovery on account of Electricity Charges amounting to Rs. 15,12,378/-

(5) Recovery on account of Garage Rent amounting to Rs. 7,50,420/-

(6) Recovery of deductions made on account of damages amounting to Rs. 9,11,665/-

(7) Loss of business revenue on account of the closure of Export CFS at Kalamboli from 01.05.1996 to 03.11.1997 amounting to Rs. 2,29,41,360/-

(8) Compensation for rise in the statutory procurement of price of HSD (Diesel), Oil and other petroleum items amounting to Rs. 60,34,344/-

(9) Interest @ 24% p.a. on the aforesaid sums claimed.”

7. CWC filed a statement of defence and raised counter-claims. On the basis of the pleadings the following issues framed by Shri Sharma:

“(1) Whether deductions amounting to Rs. 95,07,460/- on

account of the delay in the movement of containers have been made wrongly? Are the Claimants entitled to the refund?

(2) Was an amount of Rs. 11,82,310/- on account of delay alleged in LCL destuffing deducted wrongly?

(3) Were deductions amounting to Rs.58,35,153/- wrongly made on account of hiring of equipments made wrongly and are the Claimants entitled to its refund?

(4) Was Electricity charges amounting to Rs. 15,12,378/- had been wrongly recovered from the Claimants and are they entitled to its refund?

(5) Was the recovery of Rs. 7,50,420/- on account of Garage rent made wrongly and are the Claimants entitled to its refund?

(6) Are the Claimants entitled to the recovery of deductions made on account of damages amounting to Rs. 9,11,665?

(7) Are the Claimants entitled to compensation amounting to Rs. 2,29,41,360/- on account of loss of business?

(8) Are the Respondent entitled to compensation on account of price rise of diesel etc. amounting to Rs. 60,34,344/?

(9) Are the Claimants entitled to interest @24% p.a. on the aforesaid sums?

(10) Are the Respondent entitled to the recovery of Rs. 10,29,23,600/- as compensation on account of business loss?"

8. Thereafter, Mr. Sharma withdrew himself. The disputes were thereafter referred to Shri S.P. Singha who was appointed as sole Arbitrator by CWC on 15th June, 2004. Sri Singha adopted the same issues that were framed by his predecessor.

9. The affidavit of evidence of Shri Sameer U. Parikh on behalf of NPIL and the affidavit of evidence of Mr. Ajay Khera on behalf of the CWC were filed.

10. On 31st May, 2005, CWC filed an application under Section 16 read with Section 28 of the Act before the sole Arbitrator praying for rejection of NPIL's claims on the ground that they were 'excepted matters'.

Arbitral Award

11. The learned Arbitrator in the impugned Award dated 4th November, 2008 allowed the following claims of NPIL:

Claim No. II - Rs. 11,82,310/-

Claim No. V - Rs. 7,50,420/-

Claim No. VI (f) - Rs. 5,70,075/- instead of Rs. 6,02,322/- as claimed.

Claim No. IX - interest @ 15% on Rs. 25,02,805/- from the date of the filing of the Statement of Claim dated 17th July 1998.

12. The following claims were rejected by the Arbitrator on the ground that they were 'excepted matters':

Claim No. I (1) to (3) - Wrongful deductions on account of movement of containers amounting to Rs. 95,07,460/-

Claim No. III (1) to (3) - Wrongful deductions on account of hiring of equipments amounting to Rs. 58,35,153/-

Claim No. VI (a) to (e) - Recovery of deductions made on account of damages amounting to Rs. 9,11,665/-

13. The Arbitrator rejected the following claims:

Claim No. IV- dealing with refund of deductions made on account of electricity charges amounting to Rs. 15, 12, 378/- from 13th July 1993 to 3rd November 1997.

Claim No. VI (f) to the extent of Rs. 32,247/- dealing with wrongful deductions on account of water tanker charges for fire garage and deductions on account of wrong billings.

Claim No. VII - dealing with compensation on account of loss of business amounting to Rs. 2,29,41,360/-.

Claim No. VIII - dealing with compensation on account of price hike in diesel amounting to Rs. 60,34,340/-.

Claim No. IX - dealing with interest claimed @24% on the above claims from the date when the cause of action arose.

Submissions on behalf of the Petitioner

14. Mr. Atul Chitale, learned Senior counsel appearing for the Petitioner, made the following submissions:

(i) Under Clause XX of the tender conditions of the contract, it was the MD

of CWC who had to decide what the scope of the reference of the disputes to arbitration would be. When he wrote a letter on 27th February, 1998 to Shri B.K. Sharma, the MD specified that Shri Sharma would “adjudicate upon and give his speaking award in the matter of disputes relating to the claim of NPIL Ex- H & T Contractor and counter claim of the CWC.” Having applied his mind, the MD decided to refer all the disputes raised by NPIL to arbitration. The CWC was, therefore, estopped from raising any objection as regards inclusion of ‘excepted matters’. In support of the proposition that only the MD could have decided this issue and not any other official of the CWC, reliance is placed on the decisions in *State of Karnataka v. Shree Rameshwara Rice Mills Thirthahalli* (1987) 2 SCC 160 and *J.G. Engineers Private Limited v. Union of India* (2011) 5 SCC 758.

(ii) There was no explanation offered by CWC for the inordinate delay in filing its application under Section 16 of the Act before the Arbitrator. Between the date of filing of claims by the Petitioner and the filing of the above application more than seven years later in 2005, there was an abandonment/waiver of such objection by the CWC. Reliance was placed on the decision of the Supreme Court in *Food Corporation of India vs. Sreekanth Transport* (1999) 4 SCC 491.

(iii) The claims categorised as excepted matters were in fact not. For instance, in Clause XII(a), for the exception to be attracted there has to be a decision of Regional Manager (RM) of the CFS, JNP “on the question whether the Contractor has committed such a fault or has failed to perform any of the services efficiently and also his liability for payment of

compensation and its quantum shall be final and binding on the Contractor” The question whether CWC had committed default was, therefore, not to be decided by the RM. Here, the claim by NPIL was for the breaches of CWC and the decision thereon was not within the purview of what was to be decided by the RM, CFS, JNP.

(iv) Likewise the subject matter of Clauses XX-2(ii) to (vi), XX-2(ix) and XX-2(x) did not qualify as ‘excepted matters’. The learned Arbitrator failed to point out the clause on the basis of which Claim I (3) could be said to be an ‘excepted matter’. In sum, it is submitted that the learned Arbitrator erred in deciding that Claims I (1) to (3), Claim III (1) to (3) and Claim VI (a) to (e) were excepted matters.

(v) All that the RM CFS could have decided was on the imposition of penalty but not on taking over of the containers as well as transportation of the containers. That issue had to be decided only by the AT. Likewise, the question of whether the Contractor had committed default, whether the Contractor had failed to perform any of the services efficiently or the Contractor was liable for the payment of quantum of compensation could only be ascertained by the AT. No decision of the RM on these aspects was in fact communicated to the Petitioner.

(vi) Likewise, the subject matter of Clause XII (f) was not an ‘excepted matter’ under Clause XX of the Contract. Clause XX only covered Clause XII and not Clause XII (f) as an ‘excepted matter’. It is submitted that Clause XII (f) which was a ‘risk and cost’ payment clause could not be an ‘excepted matter’ as it did not provide for any decision to be given by any

authority. Also, the 'Footnote' in the Contract was not an excepted matter under the arbitration clause i.e., Clause XX. Clause XXII (2) (vii) was not an 'excepted matter' and, therefore, Claim VI (a) to (e) should have been exempted and not termed as 'excepted matters'. No reasons were given by the learned Arbitrator as to how Claims I (1) to (3), Claim III (1) to (3) and Claim VI (a) to (e) were 'excepted matters'. Further, no issues were framed by the learned Arbitrator on the question of 'excepted matters'. Therefore, the claims in regard to such matters should be permitted to be agitated afresh by way of arbitration by the Petitioner.

(vii) Turning to the issue of electricity consumption under Issue No. 4, it was pointed out that CWC had not challenged the evidence of Mr. Parikh which supported the claim of the Petitioner. There was nothing on record which enabled the Arbitrator to conclude that Rs. 90,272 was too small an amount for consumption of electricity by the Petitioner in its office. Once the evidence of Mr. Parikh remained unrebutted, then even in the absence of a separate meter, the learned Arbitrator could have gone by the said evidence as regards the estimate of the electricity consumption by the Petitioner for 52 months.

(viii) There was no clause in the Contract dated 12th July, 1993 or in the Tender Terms and Conditions for recovery of electricity charges. Therefore, the Petitioner was entitled to refund of the electricity charges wrongly recovered from it by CWC. In any event, such recovery had to be limited to what was actually consumed in the office and garage of the Petitioner.

(ix) The assessment of electricity consumption ought to have been based on a rational and scientific estimation as stipulated in the 'Ready Reckoner for Monthly Consumption' of BEST undertakings. No bill had been produced on record by CWC to show on whose name the bill was being raised and who was paying the electricity charges. The electricity charges for the building were payable by JNPT in terms of Clause 15 of the Contract. There was nothing which stipulated that the said electricity charges could be recovered from the Petitioner. The written submission of the Petitioner in this regard has been completely ignored and the Award in this respect is completely without any reasons.

(x) CWC failed to prove that the Petitioner had consumed 6360 units per month during the contract period. On the other hand, the uncontroverted evidence of Mr. Parikh showed that the consumption was of 868 units at Rs. 1,736 per month and, therefore, could not have consumed more than Rs. 90,272 for a period of 52 months. Further, the Petitioner had vacated the garage and the office place *in toto* and shifted to its own premises at Jaskar village in December 1995. CWC, however, did not stop deductions on account of electricity charges until 3rd November, 1997 i.e., till the expiry of the Contract. The deductions made between January 1996 and November 1997 amounted to Rs. 7,22,438.

(xi) As regards Issue No. 7 relating to the compensation on account of loss of business in the sum of Rs. 2,29,41,360, it is pointed out that the Petitioner was awarded a composite Contract for 3 CFS-D Node, CFS JNPT (Import) and CFS Kalamboli (Export) by CWC's Letter of Intent dated 11th June,

1993 and the Contract dated 12th July, 1993. Accordingly, the Petitioner had quoted a rate of Rs. 1,379, Rs. 1,079 and Rs. 621 per Twenty-foot Equivalent Unit (TEU) for Kalamboli H&T Operations, D Node (Export) Operations and Import Operations at JNPCY and D Node CY, respectively.

(xii) The Petitioner claimed, on the basis of the assurance given by CWC, a turnover of more than 2500 TEU per month for each CFS. Accordingly, the Petitioner reduced the rate of Kalamboli CFS to Rs. 1,095 per TEU, expecting an increase in profit. It is, accordingly, claimed that on account of breach of Contract by CWC, the Petitioner was entitled to compensation for loss of profit.

(xiii) The doctrine of frustration of contract under Section 56 of the Indian Contract Act, 1872 ('ICA') would apply only when the entire contract becomes incapable of performance and not only part of it. There was also no *force majeure* clause in the Contract dated 12th July 1993. Therefore, the mere fact that the Customs Public Notice No. 01/90 dated 29th January, 1996 ordering the act of closure of operations at Kalamboli CFS and shifting of examination and carting of export containers from Kalamboli to D-Node did not make the contract impossible of performance, nor did it make the performance of the contract illegal.

(xiv) Reliance was placed on the decision in ***Satyabrata Ghose v. Mugneeram Bangur AIR 1954 SCC 44*** to urge that the onus on the CWC to show the change of circumstances was so fundamental as to be regarded by law as striking at the root of the contract as a whole, failing which, Section 56 of the ICA would not come to the rescue of CWC. It only made the

contract more onerous to perform. Further, it was pointed out that Public Notice is not a notification in the Official Gazette and, therefore, operations permitted under Section 7 (aa) of the Customs Act could not be taken away by issuing a Public Notice. Reliance was also placed on the decision in ***Govindbhai Gordhanbhai Patel v. Gulam Abbas Mulla Allibhai & Ors. (1977) 3 SCC 179.***

(xv) Referring to the evidence of Mr. Samir Parikh, it was pointed out that while the Petitioner was earlier paid Rs. 1,095 per TEU for handling and transportation at Kalamboli CFS, with effect from May 1996 to October 1997, the export aggregation was carried out at D-Node CFS and the Petitioner was given only Rs. 575 per TEU only at the D-Node CFS. Thus, the Petitioner incurred a loss of business revenue of Rs. 520 per TEU for the average export turnover of 2451 TEU's per month of Kalamboli. The total business loss for the period worked out at Rs. 2,21,41,360. Despite the above facts being spelt out in the written submissions by the Petitioner, the learned Arbitrator overlooked them and rejected the claim.

(xvi) Turning to the Issue No. 8 relating to the compensation on account of price rise of diesel, etc. amounting to Rs. 60,34,344 which was again rejected by the learned Arbitrator, it was submitted that the Petitioner could not foresee the steep price increase to the extent of 73% in the price of HSD oil, diesel and other petroleum products prevailing at that time of submitting the tender. It is further submitted that CWC was obliged to reimburse the Petitioner for such additional burden. In this context a reference was made to the decisions in ***Tarapore & Co. v. Cochin Shipyard Ltd., Cochin (1984) 2***

SCC 680, P.M. Paul v. Union of India (1989) Supp (1) SCC 368; Food Corporation of India v. A.H. Ahmed & Co.(2006) 13 SCC 779 and K.N. Sathyapalan (Dead) by LRs v. State of Kerala (2007) 13 SCC 43.

(xvii) It is pointed out that Clause XVII (ii) of the Contract does not come in the way of the claim for escalation as it pertains to a contractual revision of rates. While Clause XVII (ii) prohibits CWC from agreeing to a revision of contractual rates, it did not bar the Petitioner from claiming compensation for additional expenditure incurred by operation of law due to increase in the administered price of diesel. It also did not bar the Arbitrator from awarding compensation for escalation.

(xviii) The learned Arbitrator failed to appreciate that the increase in the price of diesel and oil was only on account of a statutory increase in prices. Further, it is pointed out that under Section 64A of the Sales of Goods Act, 1930, there was a deemed sale of diesel while performing the transportation contract and increases in taxes were to be added to the contract price. This was analogous to a works contract where services are provided and there is also a sale of goods. The Petitioner was thus entitled to be compensated for increase in price of HSDD oil and diesel under Section 64A of the Sale of Goods Act, 1930.

(xix) As regards Issue No. 9 relating to claim of interest by the Petitioner @ 24% per annum, it is pointed out that the learned Arbitrator has awarded a much lower rate of interest @ 15% from the date of filing of the statement of claim dated 17th July, 1998 till the date of actual payment. No reasons were given for reducing the rate of interest from 24% to 15%. Further, why

the claim of future interest was not awarded is not explained in the impugned Award. Reference is placed on decision in *Hyder Consulting (UK) Limited v. Governor, State of Orissa AIR 2015 SC 856*. It is submitted that the Petitioner was entitled to a minimum interest of 18% per annum as stipulated in Section 31 (7) (b) of the Act as far as the further interest is concerned.

Submissions on behalf of CWC

15. Mr. Tyagi, learned counsel appearing for the CWC submitted that the scope of interference by the Court under Section 34 of the Act to the impugned Award is extremely narrow. A reference is made to the decisions in *Union of India v. Kalinga Construction Company Private Limited AIR 1971 SC 1646*; *Sudarshan Trading Company v. Government of Kerala AIR 1989 SC 890*; *M/s. Hind Builders v. Union of India AIR 1990 SC 1340* and *Food Corporation of India v. Joginder Pal, Mahinder Pal AIR 1989 SC 1263*.

16. It is denied that CWC unilaterally closed down CFS Kalamboli in breach of the terms and conditions of the contract. After the closure of CFS Kalamboli, the export operations were shifted to CFS, D Node with effect from 1st March, 1996. This was in terms of the Public Notice No. 1/90 dated 29th January, 1996 issued by the Customs authorities.

17. It is pointed out by Mr. Tyagi that although no issue relating to 'excepted matters' was framed, CWC submitted a separate application in this regard and requested the Arbitrator to decide this issue exclusively. This was finally decided in the final Award. It is submitted that in respect of

every deduction or recovery either falling under a clause or an 'excepted matter' a show cause notice (SCN) was issued to NPIL. The explanation offered was examined and a speaking order was passed by the Competent Authority i.e. the RM. On several occasions, when the Petitioner failed to move the containers, say 100 TEUs per day, penalty was not imposed for the shortfall as the Competent Authority decided in favour of the Petitioner. This was accepted by the Petitioner during the course of arbitration. Therefore, the Petitioner cannot be heard to allege violation of the principles of natural justice in carrying out the deductions.

18. It is denied that the RM did not take any decision as regards the recoveries. It is stated that under the procedure that is followed in CWC, the explanation offered by the Petitioners in response to the SCN is put up to the Competent Authority who decides the case on merits. The decision is then conveyed to the Petitioner by another officer. It cannot, therefore, be said that the decision was taken unilaterally and that too by an administrative order.

19. According to Mr Tyagi, the contention of the Petitioner that the RM has no jurisdiction to impose penalty is “only misleading and deviating from the terms and conditions of the contract.” Reliance was placed on the decisions in *Vishwanath Sood v. Union of India* (1989) 1 SCC 657; *Food Corporation of India v. Surendra, Devendra & Mahendra Transport Co.* (2003) 4 SCC 80; *Harsha Constructions v. Union of India* (2014) 9 SCC 246; *General Manager, Northern Railway v. Sarvesh Chopra* (2002) 4 SCC 45; *Delhi Development Authority v. M/s. Sudhir Brothers* 1995 (2)

Arb.LR 306 and Union of India v. J.N. Constructions 107 (2003) DLT 772 (DB). As regards the claim for escalation not being maintainable, a reliance is placed on the decision in ***Steel Authority of India Limited v. J.C. Budharaja, Government & Mining Contractor (1998) 8 SCC 122.***

20. As regards electricity, it is submitted that the Petitioner ought to have applied for a separate sub-meter. Since it was advantageous to the Petitioner to draw power through the CWC, they did not bother to apply for a separate sub-meter.

'Excepted matters'

21. The above submissions have been considered. In the first instance, the Court would like to deal with the issue relating to the 'excepted matters'. In this regard, it requires to be recalled that according to the learned Arbitrator, Claim Nos. I (1) to (3) for wrongful deductions on account of movement of containers amounting to Rs. 95,07,460, Claim No. III (1) to (3) for wrongful deductions on account of hiring of equipments amounting to Rs. 58,35,153 and Claim No. VI (a) to (e) for recoveries on account of alleged damages amounting to Rs. 9,11,665 were all 'excepted matters' and, therefore, were rejected.

22. It is necessary in this context to refer to Clause XX. The relevant portion of the said clause reads as under:

"Arbitration:

All disputes and differences arising out of or in any way touching or concerning this contract whatsoever (except as to any matter contained in para III to XII, XXI-2 (ii), XXI-5, XXI-10, XXII-2 (ii), 2(iii), 2(v) to 2 (vii), 3 (i), 3 (vi), 3(vii), 3 (viii), 3 (ix) and 3 (x), the

decision of which is expressly provided for in the contract) shall be referred to the sole arbitration of the person appointed by the Managing Director, Central Warehousing Corporation.”

23. There are two requirements for a matter to be an 'excepted matter'. It should be a matter contained in paras 3 to 12 and the other parts indicated hereinabove. Secondly, the decision in respect of such matters must be expressly provided for in the contract.

24. As rightly pointed in the letter dated 27th February, 1998 addressed to the first Arbitrator, Shri B.K. Sharma, the MD of CWC did not exclude any excepted matters. The MD of the Respondent asked the Arbitrator to give a speaking Award in respect of the dispute relating to claim of the contractors and counter-claim of CWC. In fact, even when the issues were framed by Shri Sharma, there was no issue framed on the excepted matters. The second Arbitrator, Shri S. P. Singha, was asked by the MD on 15th June, 2004 to continue as arbitrator from where Shri Sharma left off. This letter did not make any reference to the excepted matters. In fact, Shri Singha also decided to adopt the same issues framed by Shri Sharma. It must be construed, therefore, that CWC abandoned or waived the right to have the 'excepted matters' excluded from arbitration till 31st May, 2005 when it filed an application under Section 16 of the Act to question the jurisdiction of the Arbitrator.

25. A perusal of the impugned Award shows that although the learned Arbitrator also noted the submissions of the Respondent regarding excepted matters, he did not deal with the point raised by the Petitioner that the application itself was made more than seven years after the filing of the

statement of claim and, therefore, was barred by delay and laches.

26. The second aspect of the matter is that in deciding that the above claims pertaining to excepted matters, the learned Arbitrator simply set out the claims and without any reasons stated the claims were excepted matters. This was done in respect of Claim I (1) where he referred to Clauses XII (a), Clause XXI (2) XXII (2) (vi), XXII (3) (ix) and XXII (3) (x). What he has completely missed in each and every clause is the decision in respect of the dispute arising out therein had to be taken by the RM. If there was no decision of the RM on the aspect, then it could not be said that the dispute was an excepted matter.

27. The learned Arbitrator did not pause to consider whether there was any such decision of the RM. Further, he did not consider the submission of the Petitioner that such decision could not be taken unilaterally and in violation of the principles of natural justice. Certainly, the Petitioner had to be told of the alleged breach and asked to explain why the deductions were not to be made for instances under Claim I (1) on account of the delay in movement of containers. It was not a case of the CWC that any such decision, much less a decision by the RM, was taken in respect of each of the deductions. It was incumbent on the CWC to place on record such decision.

28. The decision by the RM is also not an empty formality. It cannot, for instance, be delegated to any other officer in the CWC. This becomes explicit from the decision of the Supreme Court in ***Food Corporation of Delhi v. Surendra, Devendra & Mahendra Transport Co.*** (*supra*) where, again, the agreement provided that adjudication in respect of some of the

claims would be made by the Senior RM, FCI. It was only where such decision is taken by the RM that the claim in this regard would be an excepted matter. When there was no adjudication by the said Senior Officer, then there was an abandonment of the right to adjudication. It was further held that the entering upon reference by the arbitrator in regard to disputes which were excluded from reference and adjudication thereupon would amount to exceeding their exercise of jurisdiction. However, the foundational facts for such execution ought to be satisfied on the facts and circumstances of every case. Likewise, in ***Vishwanath Sood v. Union of India*** (*supra*) and ***General Manager, Northern Railway v. Sarvesh Chopra*** (*supra*), there were general observations about the exclusion of certain matters from the purview of arbitration.

29. In the impugned Award, the arbitrator declined Claim Nos. I (1) to (3), III (1) to (3) and VI (a) to (e) as being excepted matters without actually examining if the foundational conditions for such exclusion were satisfied. It was incumbent on the CWC to show that the facts necessary for invoking the defence of excepted matters existed. In other words, in order to exclude the above claims from the purview of arbitration, there had to be a decision on such disputed issues by the RM. The CWC was unable to produce the copy of any such decision by the RM.

30. The decisions relied upon by Mr Tyagi, including the decision in ***Steel Authority of India Limited v. J.C. Budharaja, Government and Mining Contractor*** (*supra*) did not deal with the situation where the defence of excepted matters was raised by the parties seven years after filing of the

statement of claim. There was no occasion, therefore, to consider the effect of such belated defence.

31. Another aspect is that the question whether a party is in breach cannot obviously be decided by the said party itself. In fact, the wording of Clause XII (a), for instance, talks that the RM, CFS only had the power to decide the “question whether the contractor has committed fault or has failed to perform any of the services...” and did not contemplate a situation where the CWC could be at fault or could be in the breach of the contract. This aspect was highlighted in the decision of the Supreme Court in *State of Karnataka v. Shree Rameshwara Rice Mills (1987) 2 SCC 160* where in para 7 it was observed as under:

“7. On a consideration of the matter we find ourselves unable to accept the contentions of Mr Iyenger. The terms of Clause 12 do not afford scope for a liberal construction being made regarding the powers of the Deputy Commissioner to adjudicate upon a disputed question of breach as well as to assess the damages arising from the breach. The crucial words in Clause 12 are "and for any breach of conditions set forth hereinbefore, the first party shall be liable to pay damages to the second party as may be assessed by the second party". On a plain reading of the words it is clear that the right of the second party to assess damages would arise only if the breach of conditions is admitted or if no issue is made of it. If it was the intention of the parties that the officer acting on behalf of the State was also entitled to adjudicate upon a dispute regarding the breach of conditions the wording of Clause 12 would have been entirely different. It cannot also be argued that a right to adjudicate upon an issue relating to a breach of conditions of the contract would flow from or is inhered in the right conferred to assess the damages arising from a breach of conditions. The power to assess damages, as pointed out by the Full Bench, is a subsidiary and consequential power and not the primary power. Even assuming for argument's sake that the terms of Clause 12 afford scope for being construed as empowering the officer of the

State to decide upon the question of breach as well as assess the quantum of damages, we do not think that adjudication by the officer regarding the breach of the contract can be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interests of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract. The position will, however, be different where there is no dispute or there is consensus between the contracting parties regarding the breach of conditions. In such a case the officer of the State, even though a party to the contract will be well within his rights in assessing the damages occasioned by the breach in view of the specific terms of Clause 12.”

32. In *J.G. Engineers Private Limited v. Union of India* (2011) 5 SCC 758, the Supreme Court adverted to this aspect in relation to clause 3 of the contract and observed as under:

“19. In fact the question whether the other party committed breach cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to decide whether he committed breach or the other party committed breach. That question can only be decided by only an adjudicatory forum, that is, a court or an Arbitral Tribunal.”

33. In the considered view of the Court, the learned Arbitrator was wholly in error in overlooking the applicable law and deciding without any acceptable reasons within the meaning of Section 31 (3) of the Act that all the above claims were ‘excepted matters’.

34. Even assuming that conclusions of the learned Arbitrator in this regard should be taken to be reasons, the Court finds that such conclusions are wholly unsupportable by the very wording of the clauses themselves. There is no indication as to which part of those clauses rendered the claims to be

excepted matters. For instance, Claims I (1) to (3) were for wrongful deductions on account of delay in movement to the containers whereas Clause XII (a) only dealt with the default of providing adequate equipments, vehicles or personnel, damages to containers, and handling and transportation of containers. Clause XXI (2) empowered the RM to take a decision on merits with regard to the penalty for the “shortfall in transport of import loaded containers.” However, the question whether there was any such shortfall was not an excepted matter and had to be decided by the learned Arbitrator. Clause XXII (3) (x) does not provide for any final conclusion and, clearly, this clause is not an excepted matter. The same is true for Clause XXII (3) (ix) and the footnote to Clause XXII.

35. In the considered view of the Court, the dispute in respect of the excepted matters by the learned Arbitrator is in the conflict with the public policy of India as it overlooks the law explained in the above decisions of the Courts and fails to take note of the submissions of the Petitioner in this regard. The Award in this regard is, therefore, in conflict with the public policy of India and deserves to be set aside. The Court makes it clear that a fresh arbitration in respect of these claims will be on the merits of such claims. The question whether these are excepted matters will not be re-opened. They cannot be considered to be excepted matters at all.

Claim 4

36. Now turning to the claims that have been rejected by the learned Arbitrator. First, Claim No. 4 which was for the refund of deductions made on account of electricity charges amounting to Rs. 15,12,378 from 13th July,

1993 to 3rd November, 1997 was rejected. A perusal of the impugned Award reveals that the reasons given by the learned Arbitrator for rejecting the claim were as follows:

“In the absence of any separate meter, it is not feasible for the arbitrator to assess the electricity consumption by the claimants for 52 months. The recovery was being made from the beginning and no objection was raised by the claimants. The Respondents being a PSU and they had spent Rs. 1,26,79,398 for a period of 52 months towards electricity charges for the entire CFS. I, therefore, find no reason to reject the submission of the Respondents that the electricity charges recovered from the claimants was reasonable. It was only by way of reimbursement and the Respondents did not make any profit. The issue is decided in favour of the Respondent. The claim of the claimant is, therefore, rejected.”

37. The central issue to be considered by the learned Arbitrator was whether there was any clause in the contract which permitted recovery of electricity charges. The second issue was whether the electricity charges recovered were disproportionate to the actual consumption.

38. There was positive evidence of Mr. Parikh, CW-1, who stated that the electricity consumption worked out to Rs. 1736 x 52 months i.e., Rs. 90,272 only. Apart from stating that this appears to be too small an amount which the Petitioners would have consumed for their office, garage and repairs etc., there was no basis for the arbitrator to assess the electricity consumption. The Arbitrator appears to have proceeded purely on surmises and conjectures. Merely because the Respondent had paid Rs. 1,26,79,39 towards electricity charges for the entire CFS, the Respondent was not justified in recovering a sum of Rs. 15,12,378 from the Petitioner. There had to be some basis for this. The absence of a separate meter should actually be

construed in favour of the Petitioners. If indeed, the said amount was by way of reimbursement and not profit being made by CWC, then it was incumbent on the CWC to lead evidence in support of such claim. It is not in dispute that the CWC did not install any sub-meter for separate assessment of the electricity consumption by the Petitioner. This was despite reminders by the Petitioner for installation of a separate meter.

39. In the written submissions of the Petitioner before the learned Arbitrator, apart from referring to the evidence of Mr. Parikh, it also referred to “Ready Reckoner for Monthly Consumption” of BEST undertakings. As rightly pointed out, no evidence is produced by CWC to justify the recovery of the above amount. No bill was produced to show in whose name the electricity bill was raised and who was paying the electricity charges. While the electricity charges for the building were payable by JNPT in terms of the contract between JNPT and the CWC, the recovery of such payment could not be made from the Petitioner but from JNPT.

40. Further, in the written submissions, the Petitioner has pointed out that in the documents filed before the learned Arbitrator dated 26th February, 2008, counsel had produced a form for requisition for supply of energy in terms of the schedule to the Indian Electricity Act, 1910 and it also argued that only the ‘consumer’ as defined under Section 2 (c) of the Indian Electricity Act, 1910 read with Section 26 (1) thereof could make a request for the installation/supply of a meter. The Petitioner was only a contractor to the CWC and not a licensee. It was, in fact, the CWC which was a licensee in respect of the JNPT-CFC premises. Therefore, even the sub-meter could

have been applied for only by JNPT or CWC and not by the Petitioner on its own. All these submissions appear to be completely overlooked by the learned Arbitrator and the said claim was wrongly rejected.

41. The Court finds that there was complete lack of a judicious approach by the learned Arbitrator in rejecting this claim. In terms of the law explained by the Supreme Court in *ONGC v. Western Geco International Limited (2014) 9 SCC 263* this part of the impugned Award cannot, therefore be sustained in law.

Claim No. 7

42. The next item was Claim No. 7 relating to compensation on account of loss of business amounting to Rs. 2,29,41,360. Here, again, the Court finds that the case of the Petitioner as set out in the written submissions before the learned Arbitrator was not considered by him. Importantly, what appears to have been overlooked is that as per Section 56 of the Indian Contract Act, the entire contract must have become incapable of performance. The Customs Public Notice No. 01/90 dated 29th January, 1996 was erroneously considered by the learned Arbitrator to be a statutory injunction by a statutory authority. Under Section 7 (aa) of the Indian Customs Act, such Public Notice could not be a statutory notification and the operations could not be shifted elsewhere. The Customs Public Notice did not bring the entire operations to an end but it brought only a part of the operations as envisaged under the composite contract. Therefore, there was no frustration of the contract as a whole which was an essential pre-requisite for Section 56 of the Indian Contract Act to apply.

43. In this context, the following observations of the Supreme Court in ***Govindbhai Gordhanbhai Patel v. Gulam Abbas Mulla Allibhai & Ors.*** (*supra*) are relevant:

“9. Two questions arise for determination in this case---(1) whether the order of the Prant Officer dated December 8, 1958, rendered the aforesaid agreement dated May 16, 1957 impossible of performance and as such void under section 56 of the Indian Contract Act and (2) whether in view of the aforesaid order of refusal by the Prant Officer, Thana dated December 8, 1958, the Additional Collector, Thana, was not competent to grant the sanction and the certificate under section 63 of the Act and Rule 36 of the Rules. The answer to the first question depends on the construction of the expression 'impossible of performance' occurring in section 56 of the Indian Contract Act which lays down:

‘56. An agreement to do an act impossible in itself is void--A contract to do an act which after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.’

10. The meaning of the aforesaid expression 'impossible of performance' as used in the above quoted section would be clear from the, following observation made by Lord Loreburn in ***Tampfin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.*** (1916) 2 AC 397 which is generally considered to contain a classic and terse exposition of the law relating to frustration:

‘The parties shall be excused if substantially the whole contract becomes impossible of performance or in other words impracticable by some cause for which neither was

responsible.’

11. We find ourselves in complete accord with this view which also finds support from the decisions of this Court in *Satyabrata Ghose v. Mugneerarn Bangur and Co. and Anr* (supra) and *Sushila Devi and Anr. v. Hari Singh and Ors* where it was held that the performance of a contract becomes impossible if it becomes impracticable from the point of view of the object and the purpose which the parties had in view and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor found it impossible to do the act which he promised to do. It would be advantageous at this stage to refer to the following observations made by *Mukherjee, J. Satyabrata Ghose v. Mugneerarn Bangur and Co. and Anr* (supra) which is a leading authority on the subject of frustration:

"The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment. This much is clear that the word "impossible" has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor found it impossible to do the act which he promised to do.

Although various theories have been propounded by the Judges and jurists in England regarding the judicial basis of the doctrine of frustration, yet the essential idea upon which the doctrine is

based is that of impossibility of performance of the contract: in fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances, it is said, make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility."

44. The learned Arbitrator made a reference in this regard to the decision in ***MD, Army Welfare Housing Organization v. Sumangal Services (P) Limited (2004) 9 SCC 619*** where refusal to carry out any construction work by the contractor was held to be in violation of the said work notice in terms of Section 204 read with Section 440 of the West Bengal Municipal Act, 1993. That was the situation under which the doctrine of frustration was applied. In the present case, there is no such statutory bar to the performance of the contract. Consequently, the Court is satisfied that the learned Arbitrator erred in applying the doctrine of frustration.

45. Further, the learned Arbitrator appears to have overlooked again the written submissions of the Petitioner where loss was sought to be quantified. It was shown clearly that the distance between JNPT and Kalamboli CFS was about 25 kms. The average monthly movement turnover of Kalamboli CFS was 2451 TEUs and this amounted to a per day movement of 82 TEUs. It was sought to be demonstrated that for about 41 trips of movement per day for about 30 days in a month, 30750 litres of diesel was required. The learned Arbitrator appears to have not dealt with the submissions of the Petitioner that where it was paid Rs. 1,095 per TEU for handling and transportation at Kalamboli CFS. It was given only Rs. 575 per TEU at the D Node CFS and the export aggregation was carried out with effect from

May 1996 to till October 1997. Thus, the business loss of Rs. 520 per TEU has not been discussed by the learned Arbitrator.

46. The rejection of Claim No. 7 appears to therefore be contrary to the evidence on record and opposed to the fundamental policy of Indian law.

Claim No. 8

47. Claim No. 8 was for compensation on account of price hike of diesel amounting to Rs. 60,34,340. In the circumstances, the Court finds that the learned Arbitrator has not discussed any of the decisions cited by the Petitioner before him and, in particular, *Tarapore & Co. v. Cochin Shipyard Ltd., Cochin* (*supra*), *Food Corporation of India v. A.H. Ahmed & Co.* (*supra*) and *K.N. Sathyapalan (dead) by LRs v. State of Kerala* (*supra*). In each of the decisions it has been explained that where one of the parties to the contract is unable to fulfil its obligations on account of increase in price of raw material and costs, then in the absence of escalation clause, the arbitrator had the authority to compensate the second party for the extra costs.

48. As explained in *Tarapore & Co. v. Cochin Shipyard Ltd., Cochin* (*supra*), “when an agreement is predicated upon an agreed fact situation, if the latter ceases to exist the agreement to that extent becomes irrelevant or otiose.” In such a scenario, which was beyond the control of the contractor, it was open to the contractor to make a claim for compensation. On the contrary, the learned Arbitrator has referred to the decision in *Steel Authority of India Limited v. J.C. Budharaja, Govt & Mining Contract* (*supra*), where the question of limits of the arbitrator’s jurisdiction was

discussed. This decision, in the circumstances of the present case as noted hereinbefore, was not relevant.

49. In *State of Orissa v. Sudhakar Das (Dead) by LRs* (2000) 3 SCC 27, which has been relied upon by learned counsel for the CWC, the absence of escalation clause precluded the learned Arbitrator from granting escalation. The question here, however, is different viz., whether the learned Arbitrator can grant compensation to the contractor on account of the increase in costs of materials.

50. The Court finds that the rejection of Claim No. 8 by the learned Arbitrator is based on an erroneous understanding of the legal position and is unsustainable in law. Importantly, the learned Arbitrator also overlooks Section 64A of Sale of Goods Act which treated the increases in taxes to be added to the contract price. Even on this score, increase in the price in diesel, which was a statutory increase, had to be compensated.

51. For the aforesaid reasons, the Court set aside the impugned Award insofar as the rejection of Claim Nos. 7 and 8 by the learned Arbitrator.

Interest

52. Lastly, as regards payment of interest, there was no explanation given by the learned Arbitrator for limiting the award of interest for the period from the date of filing of the statement of claim till the date of the actual payment. Also, there is no explanation for reducing the rate of interest from 24% per annum to 15%. There are absolutely no reasons given for the conclusions which read as under:

“In my considered view, the claimants are entitled to get interest @

15% per annum on the awarded sum of Rs. 25,02,805 from 17th July 1998 (the date of filing claims statement) till actual payment.”

53. Apart from the fact that there are no reasons for the above conclusions, thus violating the requirement under Section 31 (3) of the Act, the learned Arbitrator has given no reasons in denying the Petitioner interest from the date of cause of action i.e., pre-claim interest/pre-interest and not merely the *pendente lite* interest. In ***Hyder Consulting (UK) Limited v. Governor, State of Orissa*** (*supra*), the Supreme Court explained as under:

“36 ... "I take note that the arbitral tribunal has been given the discretionary power of not only imposing interest, but also for determining the rate of interest that could be imposed from the date of cause of action to the date of the award. The arbitral tribunal has the discretion to decide whether such interest would be imposed on the whole or a part of the money awarded, and further whether it would be imposed for the entire duration from the date of cause of action to the date of award, or on a part of it. However, such discretion is not unfettered and is not exercisable upon the mere whims and fancies of the tribunal. In ***Principles of Statutory Interpretation***, Justice G. P. Singh, Thirteenth Edition, 2012, at p. 482, it has been stated as follows:

‘Even where there is not much indication in the Act of the ground upon which discretion is to be exercised it does not mean that its exercise is dependent upon mere fancy of the Court or Tribunal or Authority concerned. It must be exercised in the words of Lord Halsbury, according to the rules of reason and justice, not according to private opinion; according to law and not humour; it is to be not arbitrary, vague and fanciful, but legal and regular.’

37. It can be concluded that the discretion, whether to award interest by the arbitral tribunal under Clause (a), is necessarily to be exercised as per the facts and circumstances of each case. The said discretion must be within the parameters of the statute and in accordance with the rule of law. Furthermore, the said clause states that the rate of interest, if such interest is awarded by the arbitral tribunal, must be as the said tribunal deems reasonable. It is settled law that discretion must always be exercised lawfully.”

54. As far as the future interest is concerned, the Petitioner was entitled to 18% per annum in terms of Section 31 (7) of the Act which aspect has also been completely overlooked by the learned Arbitrator.

55. In respect of Claim No. VI (f), although a prayer has been made in that regard challenging the Award rejecting the said claim, the Court finds that no ground has been raised in the petition. Even during the course of arguments and in the written submissions, no challenge has been made to the Award in that regard.

Conclusion

56. In exercise of its power under Section 34 of the Act, this Court cannot substitute the Award in respect of the claims that have wrongly been rejected by the learned Arbitrator. The Court is nevertheless satisfied that for the aforesaid reasons, the rejection of Claims I (1) to (3), III (1) to (3), VI (a) to (e) on the ground that there were excepted matters, the rejection of Claims IV, VI (f), VII to IX and the denial of interest as explained above was erroneous and the Award to that extent is hereby set aside. It will be open to the Petitioner to seek fresh arbitration in respect of the said claims and for that purpose rely upon Section 43 (4) of the Act.

57. The petition is disposed of in the above terms with costs of Rs. 50,000 which will be paid by CWC to the Petitioner within four weeks from today.

S. MURALIDHAR, J

MARCH 06, 2017*/dn/Rm*