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

+ O.M.P. (COMM) 153/2017 & IA No.3789/2017

**BRAHMAPUTRA CRACKER AND POLYMER  
LIMITED**

..... Petitioner

Through: Mr N. L. Ganapathi and Mr Mitash  
Charan, Advocates.

versus

**RVR PROJECTS PRIVATE LIMITED**

..... Respondent

Through: Mr Sridhar Potaraju and Ms Ankita  
Sharma, Advocates.

**CORAM:**

**HON'BLE MR. JUSTICE VIBHU BAKHRU**

**ORDER**

**30.03.2017**

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**VIBHU BAKHRU, J**

1. Brahmaputra Cracker and Polymer Limited (hereafter 'BCPL') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') for partially setting aside the arbitral award dated 11.01.2017 (hereafter 'the impugned award') to the extent that BCPL has been directed to refund the amount of ₹1,33,21,601/- deducted as price reduction in terms of price reduction schedule from the amount payable to the respondent (hereafter 'RVR'). BCPL is also aggrieved with the award of *pendente lite* and future interest in favour of RVR.

2. BCPL had invited bids for Civil, Structural, Architectural & Electrical Works for the Product Ware House of BCPL's Petrochemical Complex in

Lepetkata, Assam (hereafter 'the works'). RVR submitted its bid, which was accepted by issuance of a Fax of Intent (FOI) dated 14.01.2009 along with a letter of acceptance dated 05.02.2009. Thereafter, the parties entered into an Agreement dated 20.02.2009 (hereafter 'the Agreement'). In terms of the Agreement, the works had to be completed within 16 months from the date of the Fax of Intent; that is, by 13.05.2010.

3. Clause 27 of the General Conditions of Contract (hereafter 'GCC') included as part of the Agreement, provided for a price reduction schedule (hereafter 'PRS') wherein for every complete week's delay (or part thereof) on the part of the contractor, the total contract price was to be reduced by 1/2% subject to a maximum of 5%. The execution of the works was inordinately delayed and the time for completion was extended to 31.07.2011 (by third and final extension). The works were completed on 31.07.2011 after a delay of 444 days.

4. RVR claimed that it was entitled to be compensated for delay and prolongation of the works. On the other hand, BCPL deducted 2% of the contract value on account of delay of 23 days (out of 444 days) that was alleged to be attributable to RVR.

5. Engineers India Limited (hereafter 'EIL') - which was appointed by BCPL as the Engineer-In-Charge for the works - conducted a detailed analysis of the delay and concluded that delay of 23 days was solely attributable to RVR and therefore, decided to apply PRS at 1.64%. The said decision was communicated to BCPL by letter dated 14.03.2012. However, in its meeting dated 22.08.2012, BCPL resolved to apply PRS at 2% on the

final executed value of the Agreement. Consequently, BCPL deducted an amount of ₹1,33,21,601/- from RVR's final bill. This led RVR to invoke the arbitration clause by its letter dated 22.04.2015/14.05.2015.

6. Before the arbitrator, RVR made several claims aggregating ₹14,52,75,018/- which included refund of the amount of ₹1,33,21,601/- deducted under PRS as Claim no.1; ₹1,46,25,434/- being interest on the amount deducted under PRS as Claim no.2; ₹9,40,60,620/- on account of loss due to abnormal increase in labour wages as Claim no.3; ₹2,02,50,456/- on account of overheads for time overrun as Claim no.4; and ₹21,25,700/- as bank charges for extending the bank guarantees beyond the initial period of the Agreement as Claim no.5. RVR also claimed interest and costs.

7. The arbitrator accepted RVR's contention that the execution of the works depended on the work of the earth filling agency for which the tender was not floated even till 14.01.2009 - date of commencement of the Agreement. RVR was also not made available the required land as the area where the works had to be completed was occupied by another agency. Further, the arbitrator considered the observations of BCPL's tender committee recorded in a note sheet dated 22.08.2012; he observed that there was lack of planning on EIL's part leading to delay in completion of the works and therefore, held that levy of PRS on RVR was unjustified.

8. The arbitrator also held that Clause 27 of the GCC - PRS clause - is a clause for levying liquidated damages and thus, cannot be enforced as BCPL had neither alleged nor proved that it had suffered any loss or damage as a result of the delay in the execution of the works nor was it shown that the

amount deducted under the aforesaid clause was a genuine pre-estimate of loss as agreed to by the parties. In light of the above, RVR's claim for refund of ₹1,33,21,601/- was accepted.

9. The arbitrator also held that RVR was entitled to compensation for loss on account of increase in wages but rejected the claim as RVR failed to establish the extent of labour component. Although the arbitrator accepted that RVR was entitled to claim overheads and bank charges, he rejected the said claims as being barred by limitation. Similarly, the claim for interest on amount deducted under PRS also stood rejected.

10. In addition, the arbitrator also awarded *pendente lite* interest from 04.03.2016 till the date of the award and future interest as per Section 31(7)(b) of the Act.

### ***Submissions***

11. Mr Ganapathi, learned counsel for BCPL advanced arguments to assail the award on a solitary ground; he contended that the arbitrator had erred in holding that Clause 27 of the GCC provided for liquidated damages. He submitted that Clause 27 of the GCC only provided for variation in the prices and was neither in the nature of penalty nor liquidated damages. He earnestly urged that it was not the case of RVR that PRS was in the nature of liquidated damages and, therefore, there was no occasion for BCPL to counter the same. He submitted that the arbitrator had exceeded his jurisdiction by recording findings that were beyond the pleadings of the parties.

12. He also submitted that reliance placed by the arbitrator on the decision in the case of **Tema India Ltd. v. Engineers India Ltd.:** (2015) 221 DLT 348 was misplaced as the subject clause interpreted in that case was significantly different from Clause 27 of the GCC. He drew the attention of this Court to paragraph 22 of the said decision wherein this Court had observed that both the parties were treating clause 12 of the General Purchase Conditions (GPC) (the relevant clause in that case) as a clause for levy of liquidated damages and, therefore, the issue was essentially whether EIL was entitled to price reduction in terms of the PRS. He also referred to the decision of the Division Bench rendered in the appeal preferred against the aforesaid decision (**Engineers India Ltd. v. Tema India Ltd.:** (2016) 226 DLT 531) wherein the Division Bench of this Court concurred with the view expressed by the Single Judge that there was no issue as to whether clause 12 of the GPC was for liquidated damages and, therefore, the arbitrator's decision holding that the said clause was neither a clause for levying liquidated damages nor penalty but a *simpliciter* clause for price reduction could not be sustained.

13. Mr Sridhar Potaraju, learned counsel appearing for RVR countered the submissions made by Mr Ganapathi on behalf of BCPL. He submitted that Clause 27 of the GCC was plainly a clause for liquidated damages. He drew the attention of this Court to the pleadings filed before the arbitrator which clearly indicated that it was RVR's case that PRS was being levied on account of delay, which was not attributable to RVR and was thus, wholly unjustified. He submitted that the pleadings of the parties before the arbitrator were premised on the basis that Clause 27 was a clause for

liquidated damages. He also contended that a plain reading of Clause 27 would indicate that parties had agreed to reduction in the price on account of failure of the contractor to complete the works within the stipulated period and, therefore, was plainly in the nature of liquidated damages. He further submitted that the decision of the arbitrator to accept RVR's claim for refund of the amount deducted under PRS was also based on the finding that the delay in completion of the works was not attributable to RVR.

### ***Reasoning and Conclusion***

14. At the outset, it would be necessary to refer to Clause 27 of GCC, which is set out below:-

- "27. Price Reduction Schedule:  
27.1 Time is the essence of the CONTRACT. In case the CONTRACTOR fails to complete the Work within the stipulated period, then, unless such failure is due to Force Majeure as defined in Clause 26 here above or due to EMPLOYER'S default, the Total Contract price shall be reduced by 1/2% of the total Contract Price per complete week of delay or part thereof subject to a maximum of 5% of the Total Contract Price, by way of reduction in price for delay and not as penalty. The said amount will be recovered from amount due to the Contractor/Contractor's Contract Performance Security payable on demand.

The decision of the ENGINEER-IN-CHARGE in regard to applicability of Price Reduction Schedule shall be final and binding on the CONTRACTOR.

27.2 All sums payable under this clause is the reduction in price due to delay in completion period of the above agreed rate."

15. A plain reading of the aforesaid clause indicates that the reduction of price is contemplated as a consequence of delay in completion of the works on the part of the contractor (in this case, RVR); the only exceptions being where the delay is caused due to force majeure events or for reasons attributable to the employer (BCPL). The question whether the said clause is a mere price variation clause or a clause for liquidated damages has to be determined on the basis of the intention of the parties.

16. It could hardly be disputed that the purpose of the said clause is essentially to serve as a disincentive against any delay and to compensate BCPL for the same. The object appears to be to impose damages on the contractor for delays attributable to it. The arbitrator had considered the import of the said clause and held the same to be a clause for levy of liquidated damages. The question relating to the interpretation of a contract falls squarely within the scope of jurisdiction of an arbitrator and his decision in this regard is final unless it is found that his view is perverse or patently illegal. In the present case, it is difficult to accept that the arbitrator's view that the PRS is in essence liquidated damages can be regarded as perverse or patently illegal.

17. Having stated the above, it is necessary to examine Mr Ganapathi's contention that the issue whether PRS was in the nature of liquidated damages was not an issue before the arbitrator and, therefore, the arbitrator had erred in proceeding on the aforesaid basis. There is much merit in the

contention that if a controversy is not raised before the arbitrator, the decision on the same would be outside the scope of arbitrator's reference. Further rendering a decision on an issue neither raised nor debated would militate against juridical approach which the arbitrator must bear while adjudicating the disputes.

18. However, a plain reading of the pleadings indicates that is not so in this case. Although, Mr Ganapathi is correct that the expression "liquidated damages" was not used by RVR in its pleadings, a bare perusal of the same indicates that RVR had placed its case on the fundamental premise that PRS was essentially in the nature of damages and the same could not be levied without BCPL establishing its loss. Paragraphs 75 and 80 of the Statement of Claims filed by RVR before the arbitrator are indicative of the above and are set out below:-

"75. The Claimant submits that the delays and defaults are purely attributable against the Respondent and not against the Claimant. The Claimant has executed the works as and when the fronts were handed over to them. Had the Respondent handed over the entire fronts at a time the Claimant could have completed all the works and would not have suffered any losses. The surprising and astonishing issue is that the party who committed delay in honouring the terms and conditions and obligations intentionally accusing/alleging delay on the other party and imposed PRS against the Claimant without suffering any losses. There is no evidence to show that it has suffered any losses and has not handed over any document to show that because of alleged delay the Respondent has suffered losses. The Respondent after completion of the work i.e., at the time of settling the final bill illegally recovered an amount of Rs.1,33,21,601/- under the guise of PRS. The imposition

and recovery was made 14 months after completion of the work/contract/the defect liability period, keeping Claimant under impression that no PRS will be levied.

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80. The Claimant submits that the Respondent had not given any reasons and valid grounds in support of their decision to impose and recover PRS from the Claimant. Even there is no whisper of any allegation that the Respondent has suffered any loss because of non completion of the work within the stipulated period or in the extended period. The Respondent has not suffered any losses during the tenure of the contract or even after and there is no legal injury to the Respondent hence the imposition of the PRS and recovering the PRS under the guise of the alleged default is illegal, unlawful and is not sustainable."

19. A plain reading of the aforesaid indicates that RVR had challenged the levy of PRS on two grounds. First of all, it had contended that there was no delay on the part of RVR and, therefore, the decision to levy PRS was unjustified; and second, that there was no loss suffered by BCPL and, therefore, there was no legal injury to BCPL warranting imposition of PRS.

20. The second contention is plainly on the basis that Clause 27 is a clause for liquidated damages. In the event, BCPL wanted to contest the above, it had full opportunity to counter the pleadings by stating that PRS is not imposed as damages and, therefore, the fundamental assumption that BCPL has to provide evidence of any loss for imposition of PRS is flawed. However, BCPL did not raise any such pleadings. Whilst BCPL contested RVR's case that it had not delayed the execution of the works, it did not counter RVR's claim that BCPL had not incurred any loss. In its Statement

of Defence filed before the arbitrator, BCPL had simply traversed the contents of paragraphs 75 and 80 of the Statement of Claims by stating that the contents are repetitive and did not warrant any specific reply (see paragraphs 6.75 and 6.80 of the Statement of Defence).

21. It is seen that BCPL had contested RVR's claim in regard to refund of the amount deducted under PRS mainly on the ground that it was an excepted matter and was outside the scope of the arbitration clause. Undoubtedly, RVR's pleadings could have been more specific, but the lack of specific pleadings cannot detract from the substance of the case set up by RVR. In the circumstances, this Court is not persuaded to accept that there was no occasion for BCPL to raise the defence that Clause 27 was not a clause for liquidated damages or levy of PRS was not in the nature of liquidated damages; and, therefore, BCPL was not required to produce evidence of any loss incurred.

22. It is also necessary to observe that although Mr Ganapathi had contended that the question whether PRS was in the nature of liquidated damages was not raised before the arbitrator, he did not question the reasoning that BCPL would have to establish that it had incurred loss on account of delay for claiming liquidated damages. Therefore, if it is accepted that Clause 27 is not in the nature of no fault liability clause - as accepted by the arbitrator - then it would be necessary for BCPL to establish that it had incurred a loss. And, if the loss could not be quantified, BCPL would have to establish that reduction of 1/2% of the contract value per week for every week of delay or part thereof (subject to maximum of 5%) was a reasonable

compensation. In **Vishal Engineers & Builders v. Indian Oil Corporation: 2012 (1) Arb.LR 253 (Delhi)**, a Division Bench of this Court had referred to several decisions and explained that it is not open for a party to claim that it is "*entitled to liquidated damages without, at least, proving a semblance of loss.*"

23. As stated above, this Court is not persuaded to accept the contention that the issue whether the PRS was in the nature of liquidated damages was outside the scope of controversy before the arbitrator as contended by Mr Ganapathi. However, even if the said contention is accepted, the impugned award cannot be set aside because the absence of material to establish any loss to justify the levy of PRS was not the only reason for the arbitrator to award the claim in favour of RVR.

24. According to BCPL, there was a delay of 444 days out of which EIL had recommended that 23 days delay was attributable to RVR. RVR had stoutly contested the aforesaid and had claimed that the delay was attributable to BCPL. The stipulated time for completion of the Agreement was 16 months and the works were to be completed by 13.05.2010. Admittedly, at the time when the contract was awarded, BCPL had not even issued a notice inviting tender for site grading works which was required to be done for RVR to carry out its works. Indisputably, there were substantial delays that were attributable to BCPL/EIL. In addition, the works were also delayed for other reasons that were not attributable to RVR. EIL had examined the reasons for delay and in its letter dated 14.03.2012

recommended that out of 444 days of delay in completion of the works, 23 days were attributable to RVR.

25. RVR had claimed that there was a delay of 21 days on account of changing the scope of "*under reamed piling to open footing foundation*". There was no dispute that the scope of works as claimed by RVR had been changed. However, the same had been denied as EIL concluded that RVR was not geared up to start the works. Similarly, RVR had also claimed that there was a delay of 46 days on account of unprecedented rain. This was also rejected as EIL was of the view that it was RVR's responsibility to keep the site free from water during monsoons.

26. RVR had also claimed that there was delay of 594 days on account of delay in the task of earth filling which was entrusted by BCPL to another agency. However, EIL had only accepted the delay of 312 days. It is, thus, seen that there was a significant controversy as to the reasons for the delay. However, even according to EIL/BCPL, bulk of the delay was not on account of RVR.

27. RVR had also claimed that it should be given benefit for the period taken by the earth filling agency which had been curtailed by EIL to only 312 days. There was also an issue as to the coordination between the agencies as there were also other contractors working at the site. Although, RVR was obliged to coordinate with other agencies, the arbitrator was of the view that the same would be applicable only before the site was handed over to EIL. The arbitrator had considered the above and had concluded that there

was lack of planning on the part of EIL leading to the delays in completion of the job and thus, the levy of PRS on RVR was unjustified.

28. The arbitrator had also noted that the additional work of cabling was awarded to RVR on 08.04.2011 and the Notice to Proceed was issued on 20.04.2011 but only 1/2 a day was added for additional work. Plainly, the arbitrator had not accepted the same as reasonable.

29. The arbitrator had not considered each of the causes of the delay separately but it is apparent that the arbitrator had taken the overall view and had attributed significant delay to lack of planning on the part of EIL; thus, it is apparent that the arbitrator had not concurred with the decision of EIL regarding the delays being attributable to RVR.

30. This is apparent from paragraphs 112 and 113 of the impugned award, wherein the arbitrator observed as under:-

"112. ....Considering the observation of the tender committee as recorded in the note sheet dated 22.08.2012 that there was lack of planning of EIL leading to delay in completion of job, the levy of PRS on the Claimant appears to be unjustified.

113. It has also been noted that additional work of cabling was entrusted to the Claimant on 08.04.2011 and go ahead was given on 20.04.2011. The Claimant was required to purchase the cable from the approved agency of the Respondent. Material had to be transported from Kolkata and thereafter the work had to be executed. The Respondent should have taken the actual time required for the job into consideration. The Respondent has granted

extra time for this additional job on value basis which works out to only 1/2 day. It may be true that the total time granted for increase in value of work is 93 days but most of this time relates to the increase in value due to change in scope of work which was at the initial stages of the contract. Further by this time possession had already been taken over by EIC and other agencies were working in the PWH which was causing obstruction in the working of the Claimant."

31. Plainly, if the arbitrator has not accepted EIL's findings as to the delay attributable to RVR, the question of accepting levy of PRS does not arise. As indicated above, the scope of the present proceedings does not entail re-appreciation of evidence and this Court cannot supplant its view over that of the arbitral tribunal. Thus, unless it is established that the impugned award is perverse, patently illegal or falls foul of the public policy of India, the arbitral award cannot be set aside.

32. In view of the above, this Court is unable to accept that any interference in the impugned award is called for. The petition and the pending application are, accordingly, dismissed. No order as to costs.

**VIBHU BAKHRU, J**

**MARCH 30, 2017**  
**RK**