

\$~

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

+ **OMP No. 453/2008**

Reserved on: January 31, 2017
Date of Decision: March 28, 2017

UNION OF INDIA & ANR. Petitioners
Through: Ms. Geetanjali Mohan, Advocate.

versus

JAYASWAL NECO LTD. Respondent
Through: Mr. Devashish Bharuka, Mr. Ravi Bharuka
and Mr. Rahul Pandey, Advocates.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T
28.03.2017

%

1. This petition by the Union of India through the Ministry of Railways under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act') challenges an Award dated 23rd October, 2007 passed by the sole Arbitrator in the disputes between the Petitioner and the Respondent Jayaswal Neco Ltd. ('JNL').

Background facts

2. The disputes between the Petitioner and the predecessor-in-interest of JNL, Nagpur Alloys Castings Ltd. (NACL), arose out of a contract dated 9th August, 1991 whereby NACL had to manufacture and supply 8 lakhs Metre Gauge (MG) Malleable Cast Iron (MCI) Inserts and 56 lakhs Broad Gauge

(BG) MCI inserts within 18 months from the date of the contract.

3. By a scheme of amalgamation approved by the High Court Judicature at Bombay, Nagpur Bench by the order dated 11th December 1997, NACL merged with JNL. By virtue of the said scheme of amalgamation JNL took over all the rights, benefits and privileges of NACL and was entitled to prosecute and proceed with all legal proceedings for an on behalf of NACL.

4. The case of NACL was that the Petitioner short closed the supply of MG MCI Inserts abruptly by its letter dated 25th February, 1992 without assigning reasons. As a result, NACL incurred a huge loss on 2,40,500 MG MCI manufactured by it.

5. The contract *inter alia* provided that the Petitioner had the right to invoke the "supply tolerance" clause under which the Petitioner reserved its right to enhance or reduce the quantity up to 25% at the accepted rate, terms and conditions at its sole discretion. The Petitioner had to exercise this right, at least, 30 days in advance of the due date of completion of the contracted quantity.

6. The said clause was apparently invoked by the Petitioner after accepting 75% of the ordered quantity under the contract. It was stated in the letter dated 10th September 1991 written by the Petitioner that it would "direct the inspecting authority to continue inspection even beyond 75% of the contracted quantity" provided NACL agreed that the payment would be finalised in the ensuing tender with the condition that a provisional rate of 90% of the contract rate without any escalation for the time being would be

applied. Further it had to be agreed that the final payment against the quantity so supplied after the date of receipt of the Petitioner's letter dated 24th August, 1992 could be made at the rate that would be finalised against ensuing tender by the Railway Board or at the existing rate whichever is lower. It is stated that NACL accepted the above condition and commenced supply of the balance 25% of the ordered quantity.

7. It is stated that the Petitioner thereafter enhanced the ordered quantity for the BG MCI inserts by 14 lakh by the letter dated 12th November, 1992 on the following conditions:

“i. The payment against the enhanced quantity of 14 lac nos. of inserts shall be provisionally made at a final destination price of 90% of the contract rate of Rs.31.50 per insert. For the time being, there was to be no payment towards escalation.

.....

iii. The final payment for the enhanced quantity of 14 lac nos. Shall be at the existing rate, terms and conditions or at the rate that would be accepted by the Board for established supplies against the new tender of the Railway Board whichever is lower of the two rates.”

8. It is stated that NACL accepted the above condition as well and supplied 14 lakh of BG MCI inserts. The dispute arose since according to NACL, the Petitioner did not adhere to the payment terms in respect of 28 lakh BG MCI inserts supplied.

First round of arbitration

9. NACL invoked Clause 2P of the IRS conditions of contract which contained the arbitration clause. It envisaged arbitration by a Gazetted Railway Officer. Letters dated 28th May, 1994, 29th June, 1995, 11th April, 1996 and 3rd August, 1996 were written by the Respondent to the Petitioner

requesting for appointment of the Arbitrator. It is stated that ultimately on 3rd October, 1996, the Petitioner appointed one Mr. J.D. Kalla, Chief Track Engineer, Northern Railway as the sole Arbitrator. Mr. Kalla entered upon reference and held several meetings of the arbitration proceedings between 13th May, 1997 and 12th April, 2000. In the meanwhile NACL was substituted by JNL. On or around 12th April, 2000, the hearing in the arbitration proceedings concluded and the Award was reserved.

10. A letter dated 25th October, 2001 was written by Mr. Kalla to the parties *inter alia* stating that it would not be proper for him to give the Award for the reasons stated in the letter. *Inter alia* the reason was that in an arbitration between the Railway Board and M/s. Bakshi Steels Limited, New Delhi the Railway Board had challenged the Award made by Mr. Kalla, which was therefore *sub judice*.

11. As a result JNL filed OMP No.400/2001 in this Court praying for the appointment of an Arbitrator. By the order dated 18th November, 2002, this Court appointed a former Judge of this Court as the sole Arbitrator to decide the disputes afresh.

Fresh arbitration proceedings

12. Before the sole Arbitrator, JNL filed a statement of claim on 10th February, 2003 against the Railways claiming in the aggregate a sum of Rs.11,06,09,962 together with interest at 24% per annum with quarterly rests till the date of payment apart from costs of the arbitration proceedings.

13. The case of JNL in the statement of claim was that the Railways was the

monopoly purchaser of the MCI inserts. Consequently NACL was forced to accept the terms and conditions including Clause 10 styled as “supply tolerance” which was unconscionable. However, it was contended that Clause 6.3 of the contract dated 9th August, 1991 did not permit any change of rates for a period of 18 months. It was stated that by the time the additional quantify of 14 lakh BG MCI inserts was placed by the Petitioner on NACL by the letter dated 12th November, 1992, the rate of BG inserts had become Rs.31.50 plus price variation of Rs.5, i.e. Rs.36.50 approximately. However, a revised Price Variation Clause (PVC) was published by the Petitioner in January, 1993. Whereas under the earlier tender the price escalation accounted for only 66% of the cost of inputs leaving the balance 34% to market vagaries, in the new tender the PVC covered 92% of the input costs and balance 8% was left to market vagaries.

14. It is stated that the new tender was opened on 4th February, 1993 and the prices quoted by different parties for the supply of BG was in the range of Rs.36 and Rs.36.85. After several rounds of negotiations the Railway Board on 5th November, 1993 finalised the price of each BG MCI insert at Rs.33.50. NACL contended that for the said supplies it ought to have been paid the price under the first order, which was in the range of Rs.36.50 per insert.

15. JNL contended that the above acts of the Petitioner were “unilateral, arbitrary, unconscionable.” NACL “was made to agree on the dotted line contract” as it was not in a bargaining position at the relevant time. JNL accordingly claimed the difference of price quantified at Rs.79,77,266 on the

original contracted price together with interest. It is further contended that JNL was entitled to get additional order of 25% of contracted quantity, i.e., 16 lakh Nos. of MCI inserts. However, the Petitioner placed an order only for 14 lakh MCI inserts. Due to this shortfall JNL suffered a loss to the extent of Rs.7 lakh. JNL also claimed interest @ 24% per annum.

16. Accordingly as on 31st December, 2002, the claims preferred by JNL were as under:

- | | | |
|----|--|-------------------|
| a. | Loss due to abrupt cancellation of order for MG MCI Inserts and non acceptance of 2,40,500 Nos. IVIG/MCI Inserts lying manufactured with the Claimant. | Rs.50,50,500.00 |
| b. | Short payment of 28,00,000 Nos. of BG MCI Inserts supplied against contract in question due to application of revised price and terms by Railway Board. | Rs. 79,77,266.00 |
| c. | Loss of production and consequent financial loss incurred by the Claimant due to discrimination and short placement of order to the extent of 2,00,000.Nos. of BG MCI Inserts. | Rs.7,00,000.00 |
| | Claim | Rs.1,37,27,766.00 |
| d. | Interest @ of 24% per annum on the aforesaid amount till 31st December, 2002. | Rs.9,68,82,196.00 |

Total Claim with interest

Rs.11,06,09,962.00”

17. The case of the Petitioner in its reply before the Arbitrator was that they never entered into a contract with JNL but only with NACL. It was further stated that the cause of action arose on 18th November, 1992 the date on which NACL accepted the Amendment No.2 dated 12th November, 1992 issued by the Petitioner. NACL invoked the arbitration clause only on 3rd August, 1996. Therefore, the claim was barred by limitation. Thirdly, it was submitted that JNL was estopped from making the claim as NACL itself had requested for amendment of the contract which when made was accepted by it unconditionally.

18. It is further submitted that the “supply tolerance” clause was invoked by NACL by its letter dated 10th September 1992, which was accepted by the Respondent by its reply dated 3rd October, 1992. The Petitioner denied the assertion of JNL that 2,40,000 MG MCI inserts were lying ready for inspection. On the contrary by the letter dated 5th March 1992, NACL had stated that they had a stock of 1 lakh MG MCI inserts. Amendment No.2 became necessary at the request of NACL for conversion of the balance quantity of 7,40,500 MG MCI inserts to BG MCI inserts. The conditions on which this was granted were accepted by NACL by the letter dated 17th November, 1992. NACL had, thus, benefited by an additional business amounting to Rs.70,34,750. Hence the claim of Rs.50,50,500 was untenable.

19. As regards the second claim for the additional price for the short supply it was submitted by the Petitioners that NACL had agreed to supply BG

Inserts at Rs.33.50 as finalised in the ensuring tender on 5th November 1993 unconditionally. It was further contended that no two tenders could be the same. It was never promised that the terms and conditions of the next tender would be the same. It was also contended by the Petitioner that by converting the MG MCI Inserts into BG additional business of Rs.1.14 crores was given to NACL. Also it had received the payment for 14 lakhs BG inserts without protest. Hence the claim that NACL had suffered any loss was untenable. The Petitioner denies that there was any loss of production or consequential financial loss to NACL on account of short placement of 2 lakhs of BG MCI Inserts.

20. On the basis of the pleadings, the learned Arbitrator framed the following issues for consideration:

- “i. Whether the claimants are estopped from raising any claim? O.P.R.
- ii. Whether the claimants are estopped from raising any claim? O.P.R.
- iii. To what amount, if any, Claimant is entitled to? O.P.C.
- iv. Interest, if any, payable if so, at what rate? O.P.C.
- v. Relief.”

The impugned Award

21. By the impugned Award, the learned Arbitrator had returned the following findings:

- (i) The demand for appointment of an Arbitrator was first made by NACL on a letter dated 12th August 1994 which was within limitation. The demand was reiterated by the letters dated 14th October 1994, 29th June 1995, 11th April 1996 and 3rd August 1996. JNL filed the original registered AD cards

in respect of each of the above letters. Consequently, it could not be said that any of the claims of JNL were barred by limitation.

(ii) While the amendment letter dated 12th November 1992 permitted conversion of 6,40,500 MG MCI Inserts into BG MCI inserts and this was with the condition that NACL would not have any claim against cancelled MG MCI Inserts. The said letter was silent about its claims towards loss incurred due to scrapping of the MG Inserts already manufactured. NACL had manufactured additional 2,40,500 MG Inserts during January-February, 1992 and these were lying idle for more than 9 months i.e. till 12th November 1992 the date when the amendment letter was issued.

(iii) The reason for cancellation by the Petitioner of the order for MG MCI inserts was not due to any lock out in the factory of NACL. During cross-examination, the Petitioner's witness admitted that due to a change in the gauge policy, a letter dated 25th February 1992 was issued to NACL since MG MCI Inserts were no longer required by the Petitioner. The Arbitrator accordingly held that the instructions to NACL to stop further supply of MG MCI Inserts amounted to infringement of the contract since by then NACL had already manufactured 2 lakhs MG MCI Inserts.

(iv) Further, despite repeated requests, the Petitioner did not advise RITES to inspect the manufactured quantity. Consequently, there was no estoppel against JNL raising a claim for the loss due to abrupt cancellation of the order for MG MCI Inserts and non-acceptance of additional 2,40,500 MGMCI Inserts which were manufactured and kept ready for inspection. The said claim was accordingly allowed.

(v) Clause 6 of the contract prevented the parties from altering or amending the rate during the pendency of the contract. Despite this the Petitioner issued the amendment letter dated 12th November 1992 and compelled NACL to accept the conditions stipulated therein failing which it would not advise RITES to inspect BG MCI Inserts in excess of 75% of the contracted quantity. The unilateral alteration of the price of inserts was held to be a blatant violation of Clause 6 of the contract. Also the Petitioner compelled NACL to agree to the rate mentioned in the letter dated 10th September 1992 and accept the mode of payment at 90% without any escalation and balance 10% on finalisation of the rate of ensuring tender or existing rate whichever is less. This amounted to deviation from Clause 8 in terms of which the Petitioner agreed to make the payment at 97% on the inspection and passing of the material by RITES and balance 2% on the issuance of certificate by the consignees.

(vi) There could be no comparison between the executed tender and the ensuring tender particularly since in the former tender the PVC was fixed 64% and 36% was left to market vagaries whereas in the ensuring tender PVC fixed the input cost on 92% and only 8% was left to market vagaries. NACL agreed to supply Inserts in order to avoid closure of the factory. However after execution of the contract, the final rate of the ensuing tender was communicated to NACL after one year of imposing the payment condition i.e. on 12th November 1993.

(vii) The Despite the Petitioner being called upon to file their comments on the affidavit filed by JNL the Petitioner failed to do so. Resultantly, the

Petitioner failed to give any facts and figures to contradict the value of the contract under the existing contract and that under the new contract.

(viii) The only question was whether the supply under the new contract would be at a higher rate than the existing contract after providing for escalation or vice versa. The Petitioner in its reply had not stated what the price would have been on the date the new contract was finalised after providing for escalation etc. The materials placed by JNL on record were analysed and it was held that the supply under the new contract was at a higher rate. However, the claim of discrimination against JNL for not placing an order for 2 lakhs BG MCI Inserts was rejected.

22. While allowing Claims 1 and 2, the learned Arbitrator awarded the interest @ 18% per annum from the date of lodging of the claim before the Railway Board up to 31st March 2004. After that date interest till the date of payment shall be at 12% per annum. Rs.75,000 was awarded towards Arbitrator's fees.

Submissions of counsel for the Petitioner

23. Ms. Geetanjali Mohan, learned counsel for the Petitioner, submitted that the learned Arbitrator wrongly recorded that NACL had been compelled to agree to the condition for change of quality and type of supply of BG MCI Inserts. She pointed out that though in the impugned Award it was noted that NACL had accepted the condition set out in the letter dated 10th September 1991 and 12th November 1992 and the rates for 28 lakhs BG Inserts were to be lower of the rates applicable to the executed contract and the ensuing contract, the learned Arbitrator came to an erroneous conclusion that in the

ensuring contract though the base price of the Inserts was less, the updated price by applying price escalation was more and, therefore, the claimant (Respondent) was liable to be paid on the basis of the existing contract. Mere filing of the Reserve Bank of India ('RBI's) price index would not be sufficient to ascertain whether the rates in the new contracts were higher or otherwise.

24. Ms. Mohan also pointed out that there was inconsistency in the figures of the manufactured stock of the MG MCI Inserts. There was a variation in the letters dated 5th March 1992, 1st July 1992 and 27th August 1992. Therefore, there was no evidence even to support Claim No.1.

25. It was next submitted by Ms Mohan that Rs.79,77,266 was erroneously awarded under Claim No.2 for short supply. NACL was not entitled to any price increase between 23rd February 1993 and 31st July 1993. A comparison of the two tenders was not done despite that being the most important factor for deciding the claims. Further JNL's claims were grossly exaggerated. The amounts as per the Petitioner's calculation for Claim No.2 worked out to Rs.28,26,222.

26. Even as regards the rate of interest awarded, it is submitted by Ms Mohan that the average of the prime lending rate (PLR) of State Bank of India (SBI) during the period 18th October 1994 to 1st January 2004 worked out only to 12% and not 18%..

Submissions of counsel for the Respondent

27. Countering the above submissions, it was submitted by Mr. Devashish

Bharuka, learned counsel appearing for the Respondents, that the learned Arbitrator had returned a finding of fact that despite repeated requests, no inspection of the quantity of the MG Inserts manufactured by NACL was not undertaken by the Petitioner. The Petitioner's during cross-examination admitted that "no need was felt to verify" the number of manufactured MG Inserts and those under process before advising the Respondent to stop the supply.

28. Mr. Bharuka referred to the statement of defence where it was stated that NACL was asked not to dispatch MG Inserts "on account of lock out" in NACL's factory. On the other hand, the Petitioner's witness admitted during cross-examination that the abrupt stopping of the supply of MG Inserts and issuance of the letter dated 25th February 1992 was on account of change in the gauge policy of the Ministry. Mr. Bharuka referred to the cross-examination of the Respondent's witness where it was reiterated that the Respondent had not given up all claims with regard to the MG Inserts which were lying unmanufactured.

29. As regards the Award of Rs.79,77,266 on account of short payment for BG Inserts, Mr. Bharuka pointed out that the shortfall was on account of two lots of dispatches. Lot-I was 75% of the contract quantity and Lot-II was additional 25% beyond 100% by invoking the supply tolerance clause. It is pointed out that the imposition of the new price was under coercion as found by the learned Arbitrator. Further the letter dated 10th September 1992 from the Petitioner to NACL required lower of the two rates to be adopted-the original rate at Rs.31.50 per insert or the rate finalised against the ensuring

tender which worked out to Rs.33.50 per BG insert. The other terms and conditions including the PVC as per the original agreement was to be applied to the base rate. However with the new condition being imposed by the Railways by the letter dated 12th November 1993 and by ceiling the escalated rate at Rs.33.50, it was not open to Railways to impose unilaterally a new condition of change in the rate based on PVC. All changes in the rate for Lot-I merged in the Amendment No.2 dated 12th November 1992 which clearly required Rs.31.50 per BG Insert as the base rate. The other terms and conditions including PVC were to be applied as per the original contract. It is further pointed out by Mr. Bharuka that NACL did not give up its claim for supply of 28 lakhs BG Inserts. On every final bill raised by it, NACL endorsed 'bills raised under protest'. The authenticity of these bills was not challenged by the Railways.

30. As regards the short payment of Lot-II, the arguments were more or less as per Lot-I. It is pointed out that the Railways chose not to prove any facts and figures to contradict the figures of the claim which showed that the amount of Rs.79,77,266 under the executed contract was lesser than Rs.1,85,54,514 in the ensuring contract. The facts and figures relied upon by the Railways in the written submissions have been mentioned for the first time.

31. Finally, Mr. Bharuka submitted that the decision in ***Union of India v. Bakshi Steel Limited 2005 (83) DRJ 670*** clearly applied on all fours to the present case. The award of rate of interest was as per the SBI's PLR from the date of lodging the claim before the Railway Board up to 31st March 2004

and therefore not unreasonable. Future interest was ordered at 12% per annum.

Limitation

32. As far as the plea of limitation is concerned, the Court finds that the learned Arbitrator has gone purely on a factual basis as to the earliest date that NACL made a demand for reference of its disputes to arbitration. Factually that date has been determined as 12th August 1994 which was well within time. This being a purely factual finding and not shown to be contrary to the record, does not call for interference.

Estoppel

33. The Court also finds no error having been committed by learned Arbitrator in holding that the second amendment letter dated 12th November 1992 as not precluding NACL from raising a claim in respect of the MG MCI Inserts though already stood manufactured as of that date. In this regard the learned Arbitrator's finding is fully supported by the evidence on record. Although there can be some variation in the figures in the pleadings on behalf of the Respondent, the fact remains that the Award dated 11th November 1997 counter-signed by Superintendent Central Excise, Nagpur and the Award dated 13th August 1998 issued by the Statutory Auditor, both of which documents remained uncontroverted, showed that NACL had around 1.5 lakhs ready stock as also 1 lakh under different stages of production on the date of the unilateral suspension of the orders by the letter dated 25th February 1992. Further the Petitioner's witness during cross-examination admitted that "no need was felt to verify" the number of

manufactured MG Inserts and those under the process. Consequently, the Court is unable to find any legal or factual error having been committed by the learned Arbitrator in this regard.

34. Initially the stand of the Railways was that the Respondent was asked not to dispatch MG Inserts on account of lock out in the Respondent's factory. This was found to be factually incorrect. The real reason for stopping the supply of MG Inserts was on account of change of the gauge policy of the Ministry of Railways. Here again the Court is unable to find any error having been committed by the learned Arbitrator.

Award on Claims

35. Detailed reasons have been given by the learned Arbitrator in allowing the claim in the sum of Rs.50,50,500 for loss caused to the Respondent due to the Petitioner not taking delivery of 2,50,000 MG Inserts which had already been manufactured by the time there was a unilateral suspension of the acceptance of supplies by the Petitioners.

36. Consequently, this Court is not persuaded to agree with Ms. Mohan that the Award of Rs.50,50,500 towards Claim No.1 is opposed to the fundamental policy of Indian law and is required to be interfered with under any of the grounds under Section 34 of the Act.

37. On the second claim regarding short payment of BG Inserts in the sum of Rs.79,77,266, the learned Arbitrator has in a detailed discussion come to the factual determination that the base price settled under the new tender appear to be lower but when other factors such as escalation are added under

the new contract it turned out to be higher than the existing contract with the claimant. Thus the actual price under the new tender payable for such products worked out to more than the existing contract. The learned Arbitrator held that JNL would be entitled to be paid only on the basis of the existing contract.

38. Interestingly, an affidavit was filed after the conclusion of final arguments by counsel for JNL before the learned Arbitrator placing on record calculations based on the RBI Publication regarding consumer price index. The learned Arbitrator gave an opportunity to the Petitioner to file a reply thereto. Initially, the reply dated 5th October 2007 filed by the Petitioner was unsupported by any affidavit. The Petitioner finally filed an affidavit on 15th October 2007. However, as found by the learned Arbitrator, the Petitioner failed to give any facts and figures to contradict the submissions of JNL regarding the price under the new contract.

39. The only question that then remained was whether the supply under the new contract would be at a rate higher than the existing contract after providing for escalation or vice versa. It is in those circumstances, the learned Arbitrator accepted the material placed on record by JNL and held that the supplies under the new contract would be at a higher rate. This formed the basis for the learned Arbitrator holding that the Respondent would be entitled to Rs.79,77,266 towards short payment against supply of 28 lakhs BG MCI Inserts "being the lower of the two rates imposed by the Railways by the letters dated 10th September 1992 and 12th November 1992" and accepted by the Petitioner.

40. Mr. Bharuka has been able to demonstrate before the Court that the two tenders i.e. the one being executed and the new tender could not be compared in terms of the PVC in both tenders. It is pointed out that before this Court again the Railways have attempted to produce figures which are unsupported by any documents and being produced for the first time before the Court. The Court concurs with the above submission and declines to permit the Petitioner to place any new fact unsupported by documents and not urged during the arbitration proceedings. The basis on which the learned Arbitrator proceeded to award Claim No.2 in the sum of Rs.79,77,266 has not been shown by the Railways to be perverse or arbitrary.

41. Finally the Court notices that the decision in ***Union of India v. Bakshi Steel Limited*** (*supra*) supports the case of JNL since it was a decision given more or less on the same set of facts. As far as the Railways are concerned, from the letter dated 12th November 1993 it is apparent that the case of JNL as well as that of Bakshi Steel was more or less considered together by the Railways. In fact the earlier Arbitrator Mr. J.D. Kalla had in the arbitration between the Railways and Bakshi Steel given an Award in favour of Bakshi Steel. Mr. Kalla sought to recuse himself from the present arbitration only because he had given an Award in favour of Bakshi Steel and the present case, according to Mr. Kalla, was identical. The Railways having accepted the recusal of Mr. Kalla is estopped from denying that there is any difference between the two cases on facts.

42. In ***Union of India v. Bakshi Steel Limited*** (*supra*) it was observed that the principal amount awarded by the learned Arbitrator was rightly not

challenged by the Railways since it could not be said that “the real price under the new tender was in fact lower than the price available under the contract in question.” It is not in dispute that the Railways have not challenged the decision in *Union of India v. Bakshi Steel Limited* (*supra*).

43. For the aforementioned reasons, the Court finds that the Award in respect of Claim No.2 does not call for interference.

44. Even on the aspect of interest, the learned Arbitrator has given detailed reasons for granting @ 18% *pendente lite* and 12% future interest. This part of the Award also, therefore, does not call for interference.

45. For all the aforementioned reasons, the Court finds no merit in this petition and the petition is accordingly dismissed but in the circumstances with no order as to costs.

MARCH 28, 2017

dn

S. MURALIDHAR, J