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

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Decided on 13.02.2018

+ **FAO 52/2018, CM APPL. 5013/2018, CM APPL. 5014/2018, CM APPL. 5015/2018**

M/S MICHIGAN RUBBER (INDIA) LTD

..... Appellant

Through: Mr. Jayant Mehta, Mr. Aman Nandrajog,
Mr. Siddharth Sharma, Mr. Sajal Jain and Mr.
Sumeer Sodhi, Advs.

Versus

UNION OF INDIA & ANR

..... Respondents

Through: Mr. Kirtiman Singh and Mr. Saeed
Qadri, Advs.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J. (Oral)

1. This appeal under section 37 of the Arbitration and Conciliation Act, 1996 ('Act') impugns an order passed by the learned ADJ dismissing the appellant's objections to the Arbitration Award dated 20.01.2016.
2. The facts are that in an open tender floated by the Ministry of Defence ('MoD'), the appellant was awarded a contract for the supply of 5,000 tyres of the specification: LV6/MT 14 2610-001519 Tyre PNEU 12.00X20, 18 PR CC (applicable to 5/7.5 Ton 4x4 Stln). They were also issued a Bulk Production Clearance (BPC) on 30.10.2009. As per the appellant/claimant, no separate letter was issued to them for fixing the Delivery Period (DP) post the issuance of the BPC. However, on 03.05.2010 the claimant received a letter from the respondent specifying therein that as per Schedule A, already issued on 10.09.2009, the delivery schedule of the tyres i.e. 180 days

from the receipt of BPC. Notably a date was added in it “bulk supply to be completed in 180 days from the date of receipt of BPC” i.e. by 17th May, 2010, which included several days consumed in delivery of post. As per the claimant, since they received this letter only on 07.05.2010, they were given only ten days to deliver these 5,000 tyres.

3. So by a letter dated 09.07.2010, the appellant intimated the respondent that they had already delivered 2825 tyres, the remaining deliveries could not possibly be made by 17.06.2010, especially since no delivery period was fixed. Simultaneously, they requested for an extension of the delivery period by another 60 days. The period was extended by the respondent upto 15.07.2010 while reserving their right to claim liquidated damages for non delivery of the tyres after 17.05.2010, in case of any further delay. The remaining 2175 tyres were not supplied even in the extended time, till 15.07.2010. So by another letter of 09.07.2010, the appellant sought a further extension of the delivery period upto 30.04.2011. The MoD, extended the time upto 23.09.2010. However, this extension was not accepted by the claimant, on the ground that the extension letter did not contain any assurance that MoD would not exercise its option of enhancing the supply order by an additional 50%, although the terms of supply/contract did provide such an option to the MoD. By their letter dated 03.01.2011, they wrote back to MoD that the remaining tyres could be supplied only if the delivery period was extended upto 30.04.2011. MoD asked the claimant vide letter dated 03.02.2011 to extend the Bank Guarantee upto 31.12.2011. When the tyres were still not supplied, MoD cancelled the purchase order and issued a notice dated 23.11.2011 treating 12.11.2011 as the date of

breach of contract. Thereafter, MoD proceeded to buy the remaining quantity of tyres under the Risk Purchase Clause from the open market in the year 2011 itself and informed the claimant of the same vide their letter dated 14.06.2013.

4. Mr. Jayant Mehta, the learned counsel for the appellant submits that the award is erroneous because it is against public policy. He seeks to substantiate his arguments by referring to the quantum of the award i.e. Rs.1.16 crores. He submits that this quantum has to be substantiated by way of evidence i.e., there should be something on record to show that the respondent had actually suffered a loss to this extent. The mere adducing of documents such as Ex.31 and Ex.33 would by themselves not be sufficient proof of loss having been suffered by the respondent. He relies upon the judgment of the Supreme Court in ***Kailash Nath Associates vs. Delhi Development Authority*** (2015) 4 SCC 136 which held that damages have to be proved in accordance with law, as under:

“33. Section 74 occurs in Chapter 6 of the Indian Contract Act, 1872 which reads "Of the consequences of breach of contract". It is in fact sandwiched between Sections 73 and 75 which deal with compensation for loss or damage caused by breach of contract and compensation for damage which a party may sustain through non-fulfillment of a contract after such party rightfully rescinds such contract. It is important to note that like Sections 73 and 75, compensation is payable for breach of contract Under Section 74 only where damage or loss is caused by such breach.”

43. On a conspectus of the above authorities, the law on compensation for breach of contract Under Section 74 can be stated to be as follows:

43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

43.2. Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.

43.4. The Section applies whether a person is a Plaintiff or a Defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

43.7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application.”

5. However, the Court is of the view that the principal of law as laid down in ***Kailash Nath Associates*** (supra) is hardly an issue to be considered because in the absence of any refutation or challenge to the claim, the learned Arbitrator had no option but to accept the same as uncontested. The appellant had an opportunity to participate in the arbitration proceedings and to contest the claim. However, they chose not to do so. The award took into consideration Exhibits 31 and 33, which are invoices showing the price at which the tyres were purchased from the open market from a large manufacturer, namely M/s. J.K. Tyres. The cost of the tyres was off set against the prices at which the government would have procured it from the appellant. The learned Arbitrator has reasoned as under:

“In view of this it is contended that the plea of biasness of Ld. Arbitrator is nothing but a afterthought on the part of claimant. It is pointed out that no application was ever moved thereafter by the Objector either before Hon'ble High Court or Honble Supreme Court under Section 13 (3) of Arbitration and Conciliation Act, 1996 which reads as under:

Section 13 (3) of Arbitration and Conciliation Act, 1996-

(3) Unless the arbitrator challenged under subsection (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.”

6. The learned counsel for the appellant further submits that the impugned order is erroneous inasmuch as it did not consider the judgment of the Supreme Court in *Associate Builders v. Delhi Development Authority* (2015) 3 SCC 49 which held that an award not rooted in evidence would not be sustainable. He contends that as a sequiter, in a petition under section 34 of the Arbitration and Conciliation Act, 1996, the Court would have to see, whether broadly, the reliefs granted were based upon evidence. *Associate Builders* (*supra*), *inter alia*, held as under:

“28. In a recent judgment, ONGC Ltd. v. Western Geco International Ltd. 2014 (9) SCC 263, this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held:

“35. What then would constitute the "fundamental policy of Indian law" is the question. The decision in ONGC [ONGC Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "fundamental policy of Indian law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a "judicial approach" in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not

have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

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38. *Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated audi alteram partem rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.*

39. *No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no*

reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle [Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation : (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest.””

29. It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

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31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where-

1. finding is based on no evidence, or

2. an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or

3. ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.”

7. The learned counsel next contends that the award has erred in going beyond the Terms of the Reference and the Terms of the Contract i.e it has granted relief for purchases made beyond the tenure of the contract. He submits that the Bulk Clearance Certificate (BCC) was issued to the appellant on 13th October, 2009; the supply of tyres was to be made in 180 days thereafter. The appellant had expressed its inability to do so in view of the fact that the price of Natural Rubber and PBR had gone up by 236% resulting in non-availability of the raw materials. Hence, there was an impossibility of the performance of the contract. Therefore, the risk purchase could not have been done at the cost of the appellant. Furthermore, the appellant had informed the respondent on 09.07.2010 that they would make the supply in terms of the Bulk Production Clearance (BPC) provided delivery period was extended by 60 days. Therefore, 180 days after the said intimation, they ought to have invoked the risk purchase clause on or before 9th July, 2011, but it was invoked on 07.12.2011 and the risk purchase was made in January, 2012 which is beyond the one year period established from the date on which the appellant expressed its inability to make supplies. Therefore, the compensation amount could not be awarded.

8. The Court, however, notes that the sequence of correspondence between the parties makes it clear that extensions were granted to the appellant in terms of their various requests. The BPC was issued a long time ago and subsequent extensions of time for supply of the tyres were granted

at the appellant's request. No supply was made after July, 2010. The appellant's real reason for non-supply was the sharp increase in the cost of the input raw-material. But only the price of the raw-material had increased. It is not that the same was not available in India so as to render the performance of the appellant's duty an impossibility. Price fluctuations are inherent risks in such contracts, which the appellant knowingly entered into. The raw-material, available even at a higher price could have been procured for the manufacture and supply of the tyres. Not all commercial contracts result in profit for the supplier. Business and commerce by its ilk, is susceptible to unforeseen risks, which are factored in by the parties. There cannot be unilateral resiling by a party from a contractual commitment, at one's convenience, to the detriment of the other party. The appellant would therefore, have to walk the course or pay the compensation, which indeed, the award has fixed. Therefore, the appellant's aforesaid arguments are untenable and are rejected.

9. In support of the Award and the impugned order, the learned counsel for the respondents states that there is no error in either of them; indeed, the appellants in their Reply to the Statement of Claim before the learned Arbitrator, have admitted in paras 9 and 10 thereto that the respondents had initiated the process of risk purchase in January, 2012; thus, the appellant has conceded that ample opportunities were given to them to make supplies, for a long period, even after the supplies had been stopped by the appellants in July, 2010. The consistent generosity and accommodation in extending the time, shown by the respondents, cannot be held against them. The appellant had stopped supplies of the tyres because of their economic

interests and not because of any legal constraints or non-availability of the raw material leading to an impossibility of performance of the contract. Neither of which is a ground for challenge under sections 34 or 37 of the Arbitration Act. Furthermore, with respect to *Associate Builders (supra)*, the appellant has not been able to show as to which part of the Award or the impugned order has resulted in miscarriage of justice or how the Award has gone beyond the terms of the contract or the terms of reference. It has also been not shown that the Award is not based on any evidence or that it has taken into account something irrational or that it has ignored a vital evidence and in doing so, has necessarily made the Award perverse.

10. In view of the aforesaid, the Court is of the opinion that neither the reasoning in the impugned order nor conclusion arrived at suffers from any infirmity. There is no reason to interfere with it. Accordingly, the appeal, alongwith pending applications, is dismissed with costs of Rs.20,000/- to be paid within four weeks of receipt of copy of this order, as under:-

- (i) Rs.10,000/- to be paid to the Delhi High Court Mediation and Conciliation Centre; and
- (ii) Rs.10,000/- to be paid to the Delhi High Court Staff Welfare Fund.

NAJMI WAZIRI, J

FEBRUARY 13, 2018/acm/sb