

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**ARBA No. 28 of 2018**

1. Managing Director Chhattisgarh Medical Services Corporation,
Raipur Chhattisgarh
2. General Manager (Technical), Chhattisgarh Medical Services
Corporation, Raipur Chhattisgarh.
3. General Manager (Finance), Chhattisgarh Medical Services
Corporation, Raipur Chhattisgarh.

---- Petitioner**Versus**

- Vestergaard Frandesen India Pvt.Ltd. 302, Rectangle One, D-4,
Saket, New Delhi - 110017 India

---- Respondent

For Petitioner	Mr. CJK Rao, Advocate
For Respondent	Mr. Dilman Rati Minj, Advocate

Hon'ble Mr. Justice Prashant Kumar Mishra&**Hon'ble Mrs. Justice Vimla Singh Kapoor****Order On Board By****Prashant Kumar Mishra, J.****10/1/2019**

1. With the consent of learned counsel for the parties, the appeal
is heard finally at motion stage.
2. This appeal under Section 13 of the Commercial Courts,
Commercial Division and Commercial Appellate Division of High
Courts Act, 2015 (in short "the Act, 2015") read with Section 37

of the Arbitration and Conciliation Act, 1996 (in short "the Act, 1996") would challenge the order passed by the Commercial Court affirming the award passed by the Arbitrator allowing the respondent's claim for payment of Rs.1,24,93,530/- as against the total claim of Rs.1,78,47,900/-.

3. The dispute between the parties arose in respect of execution of supply order dated 20.6.2014 for supply of 3,50,000 pieces of long lasting insecticide nets (LLIN) @ 254.97 per piece. As per the terms of the contract, the supply was to be made within 60 days. The respondent executed the contract by supplying the entire quantity by 114th day, therefore, in terms of clause 7 and 8 of the terms of the NIT, the appellant-Corporation imposed penalty @ 20% of the purchase order and withheld the amount of Rs.1,78,47,900/- .
4. The respondent raised arbitration dispute praying for payment of the entire amount on submission that the appellant having received the entire supply without any protest, clause 7 & 8 of the NIT would not apply.
5. The Arbitrator allowed the claim of the respondent for Rs.1,24,93,530/- payable within one month, failing which, it shall carry interest @ 9% per annum. The appellant's application under Section 34 of the Act, 1996 has been rejected by the Commercial Court.
6. Mr. Rao, learned counsel for the appellants, would argue that the respondent having admittedly failed to supply the entire

quantity within the stipulated period of 60 days and even within the extended period of 90 days, the Corporation was fully justified in withholding the payment to the value of 20% as penalty.

7. Mr. Minj, learned counsel for the respondent, would support the award as well as the impugned order.
8. For appreciating the submissions made by Mr. Rao, clause 7 & 8 of the NIT need reference, which are reproduced herein-under :

Clause 7

"7 SUPPLY CONDITIONS

The entire ordered quantity shall be supplied within 60th day from the date of purchase order from the Tender Inviting Authority. Irrespective of any reason even beyond the control of supplier, it should complete the ordered quantity before 90th day of purchase order for which LD would be levied by CGMSC as specified in clause 8 of tender condition. On completion of 90 days from the date of purchase order, the purchase order will be deemed to be cancelled with penalty charge of 20% of PO value for unexecuted quantity and no supply for the balance ordered quantity would be accepted by CGMSC. Firms those cant supply multiple items by 90 days may be black listed and security deposit will be forfeited."

Clause 8

"8. LIQUIDATED DAMAGE

MD, CGMSC may allow extension for a maximum of 30 days, after the stipulated date of supply i.e. 60 days with a penalty of 0.2% per day which will be deducted from the purchase order value as "Liquidated Damage", up to a maximum 6% on the value of the goods."

9. A close reading of clause 7 & 8 of the NIT, as reproduced above, would discern that the appellant-Corporation is entitled to impose penalty of 20% of PO value for unexecuted quantity when supply could not be made within 90 days. Likewise, the liquidated damages can be levied @ 0.2% per day up to maximum 6% on the value of the goods for each day of the delay, when the supply is made after 60 days but within 90 days.
10. The Arbitrator has approved the imposition of penalty @ 6% on the PO value by taking recourse to clause 7 & 8 of the NIT. The Commercial Court has affirmed the order.
11. We have seen both the clauses which apply in the obtaining factual background.
12. The Arbitrator has in fact invoked both the clauses simultaneously and instead of applying penalty of 20% of PO value, it has applied penalty of 6%, which is otherwise applicable as liquidated damages under clause 8. Thus, the Arbitrator has chosen to apply the minimum rate of penalty and has chosen to impose penalty @ 6% per annum of PO value rather than 20% of PO value.
13. Therefore, the action of the Arbitrator appears to be fully

justified and the Arbitrator has rightly awarded the claim only to the extent of 1,24,93,530/-. In other words, the appellant's action in applying penalty @ 20% has rightly been interfered by the Arbitrator, because once the appellant has accepted the supply after extended period of 90 days, it cannot impose penalty of 20% of PO value, which could have been levied only in the event of cancellation of supply order.

14. There being no perversity or misreading of the terms of NIT, there is no scope of interference with the impugned order.

15. The appeal deserves to be and is hereby dismissed.

Sd/-

(Prashant Kumar Mishra)
Judge

Sd/-

(Vimla Singh Kapoor)
Judge

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