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

Date of decision: 22nd July, 2019

+ **O.M.P. (COMM) 88/2017**

SHWETADRI SPECIALITY PAPERS PVT. LTD ... Petitioner
Through: Mr. Shekhar Kumar, Mr. Vikram
Dhokalia and Ms. Saumya Tandon,
Advocates (M: 9871008884)

versus

NATIONAL RESEARCH DEVELOPMENT CORP.
AND ANR. Respondents
Through: Mr. J. M. Kalia and Mr. Bhaulana
Garg, Advocates (M: 9810325510)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This is a Section 34 petition challenging the award dated 29th May, 2006 passed by the Id. Sole Arbitrator. The disputes arise out of a license agreement dated 29th October, 1990 between Shwetadri Speciality Papers Pvt. Ltd. (*hereinafter* 'Petitioner' or 'Claimant') and the National Research Development Corporation (*hereinafter* 'NRDC' or 'Respondent').
2. The Petitioner was interested in obtaining technology for the manufacture of thermographic paper and entered into a license agreement with NRDC for the same. A perusal of the agreement dated 29th October, 1990 reveals that it is a standard form agreement between the Petitioner and the Respondent according to which the Respondent would provide the process for manufacture of thermographic paper which would consist of

laboratory scale process data and, recommendation for plant lay out and manufacturing process. The name of the process is clearly mentioned as being 'thermographic paper'.

3. The Petitioner was wishing to set up a manufacturing facility and had approached the NRDC in 1989. The NRDC had informed the Petitioner that it possessed the technology for manufacture of 'thermographic or fax paper'. This is evident from the letter dated 31st October, 1989. In the said letter, NRDC attached a non-technical note on the process and called upon the Petitioner to visit the Regional Research Laboratory, Jorhat (*hereinafter* 'RRL') to understand the process of manufacture in detail. The Petitioner visited RRL and thereafter signed the licence agreement.

4. On the basis of the process provided by RRL/NRDC, the Petitioner also applied for a loan with IDBI for a sum of Rs.45 Lakhs, which was sanctioned in March, 1991. However, the Petitioner thereafter realised that the process was not working and in fact the thermographic paper which was given to the Petitioner was only for use in ECG machines, Seismographs, Electronic desk calculators, Digital Panel printers etc. and not for fax machines. Several letters were exchanged between the parties. However, the issues regarding the process could not be resolved. This led to the Petitioner invoking the arbitration clause contained in the license agreement.

5. The impugned award dated 29th May, 2006 was then passed by the Id. Arbitrator. The Id. Arbitrator framed the following issues for consideration:

"Issue 1. Whether the C.M.D. of the Claimant Company has any locus standi in the claim.

Issue 2. Whether the jurisdiction of the Arbitrator is vitiated by section 446 of the Companies Act 1956.

Issue 3. Whether the claim Application is barred by

limitation (onus of proof on the Respondent).

Issue 4. Whether the Licence Agreement of 29.10.1990 covers FAX paper also, keeping in view inter alia the letter of the Dev. Engineer (Exports) NRDC dated 31.10.1989 and the application dated 7.9.90 of the Claimant Company for licence. (onus on Claimant)

Issue 5. If not, whether the conduct of the Respondent in trying to help the Claimant Company after 1994, makes them (Respondent) liable under the Licence Agreement to provide technical know-how for the production of FAX paper. (onus on Claimant).

Issue 6. To what relief is the Claimant entitled”

Issue Nos. 1, 2 & 3 were decided in favour of the Petitioner.

6. In Issue No. 4, the Arbitrator had to determine whether the licence covered even fax paper. The Arbitrator records the version of the Managing Director of the Petitioner who had deposed in the proceedings. The Arbitrator came to the conclusion that to presume that thermographic paper was synonymous with fax paper and to not seek any clarification was a mistake by the Petitioner especially when the Petitioner's Chairman cum Managing Director (*hereinafter C.M.D.*) held a post graduate diploma in paper and pulp technology. The Ld. Arbitrator also concluded that the use of the word thermographic paper was in a generic sense only and not as being synonymous with only fax paper. The Arbitrator further noted that no deficiency was raised in the performance or heat sensitivity of the samples of thermographic paper produced by RRL by the Petitioner, including the thermographic paper produced on 1st July, 1994, during the trial runs of the Petitioner's plant. In fact, the C.M.D. certified the trial run paper as being satisfactory with perfect heat sensitivity. Further, the Ld. Arbitrator also relies upon various letters which record that the Petitioner had satisfied itself with

the workability of the process. The Id. Arbitrator, while referring to the letter dated 31st October, 1989 holds that if the process for manufacturing fax paper was so crucial to the entire case, the Petitioner ought to have insisted on fax paper being mentioned in the licence agreement which was clearly not mentioned. In fact, the Arbitrator notes that IDBI's letter dated 12th March, 1991, sanctioning the loan of Rs. 45 lakhs also mentions thermographic and direct copy papers based on technology developed by RRL. Thus, the Arbitrator laid enormous emphasis on the absence of the words fax paper in the licence agreement. The arbitrator further records that the trial runs which were conducted at the Petitioner's establishment in Mysore showed that there was satisfactory performance. Samples were sent by RRL in 1990 but the Petitioner never questioned the same. The Arbitrator finally arrives at the following finding:

“The demand made in the licence application of 1990 was for TGP technology as developed by the Jorhat laboratory, nothing more nothing less. It was for the Claimant to develop the licensed technology further for commercial exploitation with the investment of venture capital.”

7. In fact, the Arbitrator expresses surprise about the fact that from September, 1990 till 17th November, 1994 no grievance was ever raised by the Petitioner. It was the telegram sent by the NRDC dated 17th November, 1994 which triggered the entire dispute itself. Since the Petitioner's C.M.D. signed the joint report which was prepared at the time of the trial runs, if the paper was not fax paper or not as per his understanding, he would have never signed the said report. If the Petitioner was expecting to produce fax paper and if thermographic paper was synonymous with fax paper, it is unusual

that the Petitioner would have maintained silence for so long. Under these circumstances, the Arbitrator concludes as under:

“A harmonious interpretation of the circumstances of the case definitely points out that the term Thermographic paper in the Licence application, Licence Agreement, trial run Report did not include Fax paper for which in any case the technology was neither available with nor licensed by the NRDC.”

8. The Arbitrator deals extensively with the letter dated 31st October, 1989 and holds that the said letter was only a reply letter to the Claimant. The Petitioner knew clearly, the process that was given to it. Under these circumstances, the Arbitrator concludes that the Issue No. 4 is liable to be answered in the negative.

9. On Issue No. 5, the Arbitrator holds that the assistance given by NRDC subsequently, i.e, after 1994, in providing technical know-how for the production of fax paper cannot be construed against NRDC. In fact, NRDC went out of its way to assist the Petitioner as is evident from the fact that it engaged a third party consultant - M/s Chemico Process Company of Kolkata which had developed thermal and fax paper technology. The NRDC, in fact, coordinated extensively with IDBI for further part funding of the loan which was finally refused on 5th March, 1997. The NRDC was also willing to spend a sum of Rs. 6 lakhs for a consultant. The Arbitrator notes that such rendering of assistance cannot constitute waiver under clause 8A of the license agreement. In view of the above, the Arbitrator rejected the claims of the Petitioner.

10. Ld. counsel for the Petitioner has vehemently urged that the NRDC is guilty of misrepresenting proper facts. In fact, the letter dated 31st October,

1989 is clear and categorical in its use of the words 'Thermographic or fax paper' in the subject itself. This shows that the Petitioner had clearly understood the two kinds of paper to be synonymous. The Petitioner was never informed that these two kinds of paper are different in any manner. The ld. counsel thereafter points out the letter dated 31st October, 1989, along with the non-technical report which also used the term thermographic paper and clearly states as under:

**“HEAT SENSITIVE PAPERS OR
THERMOGRAPHIC PAPER
INTRODUCTION**

Thermographic or heat sensitive papers are extensively used in thermographic recording and reproducing systems. Thermographic processes broadly fall into two categories viz. physical process and chemical process. In the physical process colored base paper is coated on one side with non-transparent audible particles. In the recording system, when the hot stylus passes over such paper, the contact point of the coating melts and the base becomes visible. White base paper may also be used for this type of coating in which case one side of the base paper is to be given a colored coating and over the colored coating again white thermosensitive coating is applied. In the chemical system, when the hot stylus of the recording instrument passes over the coated surface of such paper, chemical reaction takes place and visible color appears thereby producing a record.

The paper can be very well used in Fax machine and for recording instruments like ECH, Seismographs, Electronic desk calculators, Digital Panel printers and such other recording instruments.”

Ld. counsel submits that the understanding of both parties was that the process for manufacturing fax paper was to be provided. Ld. counsel places

reliance on the telegram dated 17th November, 1994 which abruptly and suddenly states that fax paper is different from thermographic paper. It is submitted that there was no occasion to send such a telegram and the fact that the NRDC sent such a telegram goes to show that it had erred in providing services and was trying to cover up its deficiency. Reliance is also placed on letters dated 19th September, 1998 and 9th October, 1996 to argue that the NRDC is guilty of misleading the Petitioner. In fact, in the letter dated 9th October, 1996, NRDC uses the term thermographic paper/ fax paper under venture capital. This is a letter addressed to IDBI which clearly shows that NRDC believed the two papers to be one and the same. This is also in stark contrast to the letter dated 19th September, 1998 wherein the NRDC states that it does not have the technology for fax paper. Both these letters are contrary to each other and reveal that NRDC is being unfair with the Petitioner. In fact, the failure of this project had led the Petitioner to liquidation as it had obtained a huge loan from IDBI. Ld. counsel also places reliance on the letter dated 2nd February 1996 issued by the third party consultant, Chemico Process Company, which concluded as under:

*“I. Formulation of Coating material -
The Thermographic paper produced on using the
formulation furnished to Shwetadri Speciality Papers
is of extremely sub-standard quality. It appears that
necessary expertise is not available with RRL, Jorhat
who claims to have produced such Thermographic
paper of marketable quality. Proper ingredients have
not been considered neither the procedure to be
followed for preparation of the coating materials have
been instructed by RRL, Jorhat.
Production of FAX paper require more sophisticated
technology.*

II. Plants & Equipment –

The plant and equipment installed by Shwetadri Specialty Papers is not suitable for either production of Thermographic Paper or FAX paper. The manufacturer of the plant have little or no knowledge in designing a plant required for production of the Thermographic/FAX paper.”

He submits that the Arbitrator ought to have considered the letter of Chemico Process Company and could not have glossed over the same.

11. On the other hand, Id. counsel for the Respondent states that the NRDC was to be paid a sum of Rs. 50,000/- at the time of execution of the agreement and thereafter 2.5% was to be paid as royalty. The NRDC has not received anything more than the sum of Rs. 50,000/- and thus, for the services rendered by NRDC, the amount that was paid by the Petitioner was negligible. He further submits that the agreement is categorical that only the process of manufacture of thermographic paper was being transferred and the words fax paper do not even appear in the agreement.

12. The Court has perused the arbitral record and heard the Id. counsels for the parties.

13. The first and foremost question is whether there is any perversity in the impugned award. A perusal of the award shows that the Arbitrator has referred to a large number of exhibits and has considered the correspondence between the parties in detail. The Id. Arbitrator has also captured the oral evidence led and applied the same to the facts. The Arbitrator has concluded that joint trials were conducted which were satisfactory to the Petitioner and for four years the Petitioner never raised a grievance. The view of the Arbitrator is neither perverse nor contrary to law, the correspondence or the

agreement. The agreement between the parties is clear as to what it was to provide. The turn of events also shows that the NRDC in fact went out of its way to assist the Petitioner in properly implementing the process for production of the paper despite there being no obligation to do so. The Arbitrator has clearly considered the clauses in the agreement, including Clause 8A which reads as under:

“Any indulgence shown by the Licensor to the Licensee in any manner shall not constitute waiver of its rights and remedies against the Licensee.”

This clause provides that if the NRDC shows any indulgence to the Petitioner and helps the Petitioner to implement the process, the same is not to be considered as an admission of responsibility. The Arbitrator specifically notes the conduct of the Petitioner and the expertise which the Petitioner possessed as disqualifying it for any award of damages.

14. The view of the Arbitrator is neither perverse nor contrary to the terms of the contract. In fact, while there is mention of fax paper in some of the background letters, it cannot be said that there is any misrepresentation by the NRDC as the agreement only provided for the process of thermographic paper. Whether thermographic paper and fax paper are the same or not is not an issue on which the Arbitrator has rendered any finding. In fact, the Arbitrator has held that NRDC never possessed the technology for manufacture of fax paper. Thus, it could not have licensed any process for fax paper technology. Moreover, the NRDC also engaged a consultant, Chemico Process Company, however, the said company was never examined before the Arbitrator. The reasons why Chemico Process Company came to the conclusion that the paper was of sub-standard quality is not clear as no

one from Chemico Process Company appeared before the arbitral tribunal. Moreover, as noted by the Arbitrator, the Managing director of the Petitioner was qualified in this very field and ought to have possessed adequate knowledge as to the process which was being licensed. It is unfathomable for the Court that a qualified person could not comprehend the process that was being licensed despite inspection at RRL and despite the trial runs being satisfactory. For whatever reason, the manufacturing could not take off but NRDC cannot be blamed for the same. In fact, from what is on record, it is clear that NRDC and its officials have gone out of the way to assist the manufacturing unit in every mode possible. The absence of the mention of 'fax paper' in the license agreement is conspicuous and significant. The license was only for 'thermographic paper'.

15. Moreover, under Section 73 of the Indian Contract Act, 1872, only direct and proximate damages can be awarded even if breach is found and not indirect damages which are remote. A division bench of the Kerala High Court has, in ***State of Kerala v. K. Bhaskaran, AIR 1985 Kerala 49*** succinctly set out the rule under this Section as follows:

"11. Alderson B delivering the judgment of the court of exchequer in Hadley v. Baxendale stated as follows:

'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable

result of the breach of it.'

It is now well-settled that Section 73 of the Contract Act reflects in full the principles in Hadley v. Baxendale. Section 73 reads thus:

'Compensation for loss or damage caused by

breach of contract—*When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.*

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.'

12. So the question that has to be decided by this court is whether the 10% profit claimed by the plaintiff as a loss of gain prevented can fairly and reasonably be considered as a loss "arising naturally", i.e according to the usual course of things. We think Section 73 of the Indian Contract Act allows as damages, the loss of reasonable profits arising from a breach of contract. The rule that is applicable can be summarised as follows:

'The defendant is liable only for "natural and proximate consequences of a breach or those consequences which were in the parties' contemplation at the time of contract". The above quoted phrases are words of art and usually represent two ways of expressing a single requirement. Proximate and natural consequences are those that flow directly or closely from the breach in the usual and normal course of events—those which a 'reasonable man' or a person of ordinary prudence would when the bargain is made foresee, as expectable results of later breach. The phrase 'in the parties' contemplation' normally means in the reasonable contemplation of the

defendant. Thus understood, it has got only the same meaning as the companion phrase 'natural and proximate'. Brevity and clarity are better served by abandoning these traditional phrases of legal art and using instead the gist of their meaning. We propose the following statement of the rule. The defendant is liable only for reasonably foreseeable losses—those that a normally prudent person, standing in his place possessing his information when contracting would have had reason to foresee as probable consequences of future breach'. ”

The Supreme Court, in various judgments, including ***Karsandas H. Thacker v. The Saran Engineering Co. Ltd., AIR 1965 SC 1981***, has accepted this well settled position in law and held that compensation is not to be given for any remote and indirect loss or damage sustained by reason of breach.

16. In the present case, there is no breach of the license by NRDC and the damages being sought are indirect. The Court does not find any fundamental error in the arbitration award. The award is well reasoned and considers all the documentary and oral evidence adduced by the parties. The scope of interference under Section 34 of the Arbitration and Conciliation Act, 1996 being limited, this Court is of the opinion that no interference is called for. Under these circumstances, the OMP is dismissed, however, with no order as to costs.

PRATHIBA M. SINGH
JUDGE

JULY 22, 2019
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