

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

+ **O.M.P. (COMM) 228/2017 & I.A.No.10190/2018**

Reserved on: 12.04.2019
Date of Decision : 30.07.2019

MECAMIDI S.A

..... Petitioner

Through: Ms.Ramni Taneja, Adv.

versus

FLOVEL MG HOLDINGS PRIVATE LIMITED & ANR.

..... Respondents

**Through: Mr.H.L.Tiku, Sr.Adv. with
Ms.Yashmeet Kaur, Adv.**

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Arbitral Award dated 22nd December 2016 passed by the Arbitral Tribunal (hereinafter referred to as the 'Impugned Award').

2. The Impugned Award, holding the petitioner liable for breach of the Joint Venture Shareholders Agreement executed between the parties as well as the Articles of Association of the respondent no. 2 Company, has awarded damages of Rs.1,50,00,000/- to the respondents alongwith interest @ 12% p.a. The Award further dismissed the counter claims filed by the petitioner.

3. The disputes between the parties arose out of the alleged non-compliance of the terms of the Joint Venture and Shareholders Agreement and the Addendum thereto dated 22.03.2007 (hereinafter referred to as 'JVSA') and the Supplementary Agreement dated 28.05.2007 by the petitioner and the alleged non-compliance of four further Agreements dated 22.09.2007 by the respondents. Some facts relevant to understand the disputes between the parties are given as under.

4. The respondent no.2 was incorporated on 14.11.2006 by one Mr. Maharaj Kar and his son Mr. Gautam Kar under the name of 'Flovel Energy Private Limited', with issued share capital of 10,000 equity shares of Rs.10/- each, totaling Rs.1,00,000/-, held equally by Mr. Maharaj Kar and Mr. Gautam Kar. Thereafter, on incorporation of respondent no. 1 company on 16.03.2007, the shares held by Mr. Maharaj Kar and Mr. Gautam Kar in Flovel Energy Private Limited/respondent no.2 were transferred to 'Flovel MG Holdings Private Limited'/respondent no. 1.

5. On 22.03.2007, the respondents entered into the JVSA with the petitioner, a global supplier for Electro-Mechanical equipment for small and average Hydro Power Plants, so as to enable the respondent no. 2, as a Joint Venture Company, to market, design, manufacture, install and service hydropower equipment. The parties further incorporated the terms of the JVSA (as amended) into the Articles of Association of the respondent no.2 company. The JVSA envisaged equity participation in respondent no. 2 by the petitioner and respondent no. 1 in the ratio of

50% each. The JVSA also provided for change of respondent no. 2's name to 'Flovel Mecamidi Energy Private Limited' upon subscription of requisite number of shares by the petitioner in the respondent no. 2 Company, which was eventually so changed on 16.07.2007.

6. As per the JVSA, the parties agreed for fixing the authorized and paid-up capital of the respondent no. 2 Company at Rs.5,00,00,000/-. The JVSA further, in Clause 2 provided for the mechanism for and stages of amounts of subscription of shares by the petitioner and the respondent no. 1 to attain the final ratio of 50:50 shareholding. The said Clause is reproduced hereinunder:

"2. Share Subscription

2.1 Post subscription under this clause by Mecamidi and MG, the paid-up capital of the JV Company shall be Rs.44,000,000/- (Indian Rupees forty four million only) divided into 4,400,000 (four million four hundred thousand) equity shares of Rs.10/- each of the JV Company to be shared between the Mecamidi and MG in the following ratio:

2.1.1 Mecamidi: Subject to Clause 27 below, Mecamidi shall, within 15 [fifteen] working days from the date of the execution of this Agreement remit Rs.11,000,000/- (Indian Rupees eleven million only) towards subscription of 1,100,000 (one million one hundred thousand) equity shares of the JV Company, equal to 25.00% of the paid-up capital of the JV Company;

2.1.2 MG: Subject to Clause 2.7 below, MG shall within 15 (fifteen) working days from the date of the execution of this Agreement remit Rs.33,000,000/- (Indian Rupees thirty three million only), [which amount includes the amount of Rs.100,000/- already subscribed as capital and the amount according to the balance of the Company to be agreed by Mecamidi, incurred by MG together with their nominees prior to the execution of this Agreement]

towards subscription of 3,300,000 equity shares of the JV Company, equal to 75.00% of the paid-up capital of the JV Company.

2.2 Each of the parties shall remit the requisite amounts as set out in clauses 2.1.1 and 2.1.2 towards subscription of equity shares of the JV Company within the time frame stipulated above, in the bank account of the JV Company with Citi Bank N.A. New Delhi. The funds shall be utilized towards meeting the business plan of the JV Company. The capital contribution, if any and for an amount according to the balance of the Company to be agreed by Mecamidi, made by MG together with their nominees prior to the execution of this Agreement shall be reduced from the amount of Rs.33,000,000/- (Indian Rupees thirty three million only).

2.3 The Parties agree that the authorized and paid-up capital of the JV Company shall be fixed at Rs.50,000,000/- (Indian Rupees fifty million only) divided into 5,000,000 (five million) equity shares of Rs.10/- each within a period of 180 (one hundred eighty) days from the date of execution of this Agreement.

2.4 Mecamidi shall within a period of 180 (one hundred eighty) days from the date of execution of this Agreement, subscribe and purchase, in addition to shares subscribed by it in terms of clause 2.1.1 hereof, additional 1,400,000 (one million four hundred thousand) equity shares of Rs.10/- each of the JV Company, to be issued for an aggregate consideration of Rs.14,000,000/- (Indian Rupees fourteen million only), which together with the shares subscribed under Clause 2.1.1 hereof shall constitute 50.00% of the paid-up capital of the JV Company in the following manner:

2.4.1 Direct issue by the JV Company: 600,000 (six hundred thousand) equity shares of Rs.10/- each, to be issued for an aggregate consideration of Rs.6,000,000/- (Indian Rupees six million only);

2.4.2 Purchase of 800,000 (eight hundred thousand) equity shares of Rs.10/- each, at an aggregate consideration of Rs.8,000,000/- (Indian Rupees eight

million only), from MG by way of share transfer. The sum of Rs.8,000,000/- (Indian Rupees eight million only) shall be remitted by Mecamidi to the specified bank account of MG on execution of the necessary documents and approval of the transfer by the Board of the JV Company.

2.5 In order to exercise its rights stated in clause 2.4.1 above, Mecamidi shall remit Rs.6,000,000/- (Indian Rupees six million only) to the specified bank account of JV Company, to subscribe and purchase the equity shares of JV Company as detailed in clause 2.4.1 above.

2.6 Consequent upon the exercise of the rights by Mecamidi under clause 2.4 read with clause 2.5, each of the Mecamidi and MG (hereinafter Mecamidi and MG collectively referred to as 'Shareholders' and individually as 'Shareholder') shall hold the share, of the JV Company in the proportion 50:50.

2.7 The allotment of equity shares to each of the parties shall be of the same value and in accordance with law.

2.8 In the event of failure of Mecamidi to exercise its rights under 2.4 above, this will result into automatic relinquishment/ dilution of its rights under Clauses 7, 8, 12 and 13 of this Agreement.

2.9 It is clearly understood by all the parties, i.e. the JV Company, MG and Mecamidi that the acquisition of equity shares by Mecamidi in the aforesaid manner is subject to the applicable provisions of Foreign Exchange Management Act 1999 and the Regulations of Reserve Bank of India in force which may be amended from time to time.

2.10 The JV Company shall allot the shares of the same value and in accordance with law, to the Shareholders forthwith upon credit of the remittance as specified in clauses 2.1.1, 2.1.2 and 2.4 and shall comply with the necessary legal formalities including those specified under the Companies Act, 1956 and Foreign Exchange Management Act 1999."

7. As per the said Clause, while the petitioner was required to bring in Rs. 1,10,00,000/- to subscribe to 11,00,000 shares in respondent no. 2 within 15 days from execution of the JVSA, taking its shareholding to

25% therein, the respondent no. 1 was required to remit Rs. 3,30,00,000/- (including Rs. 1,00,000/- already remitted by the respondent no. 1) to subscribe to 33,00,000 equity shares in the respondent no. 2 Company, increasing the respondent no. 1's share to 75% of the paid-up capital of the Company, within the said period of 15 days.

8. This was to be succeeded by purchase of another 14,00,000 equity shares by the petitioner in the respondent no. 2 Company within 180 days from date of the JVSA, to be made in the manner outlined in Clause 2.4.1 and 2.4.2 of the JVSA, that is, 6,00,000 equity shares were to be issued to the petitioner upon remittance of consideration of Rs. 60,00,000/- to respondent no. 2 and the balance amount of 8,00,000 shares were to be transferred by the respondent no. 1 to the petitioner upon payment of Rs. 80,00,000/- to the respondent no. 1.

9. Clause 2.8 of the JVSA gave the effect of failure of the petitioner to exercise its rights under Clause 2.4. The same was relinquishment of its rights under Clause 7 (representation in Board of Directors Meeting), Clause 8 (its nominee as Chairman of the Board), Clause 12 (representation in General and Extraordinary General Meeting) and Clause 13 (power to veto 'Reserved Matters').

10. Clause 17 of the JVSA gave the exit route to the petitioner from the JVSA and is reproduced hereinbelow:-

"17. Exit Routes

17.1. MG or a party nominated by it shall, during the first 180 days from the date of execution of the present Agreement, and upon the written request of Mecamidi, unconditionally and

irrevocably purchase the shares of Mecamidi in the JV Company at a consideration of Rs.11,000,000/- (Indian Rupees eleven million only), for transfer of 1,100,000 (one million one hundred thousand) equity shares of the JV Company subject to applicable provisions of Foreign Exchange Management Act, within 90 days of the first request. In the event of there being a breach by MG in this regard, Mecamidi shall be entitled within 60 days thereafter, to purchase the shares of the MG at a consideration of Rs.33,000,000/- (Indian Rupees thirty three million only) for transfer of 3,300,000 (three million three hundred thousand) equity shares of the JV Company. Failure of Mecamidi to comply with its obligations under this Clause will result into automatic relinquishment/dilution of its rights under Clauses 7, 8, 12 and 13 of this Agreement.

17.2. After the first 180 days from the date of execution of the present Agreement MG shall, upon the written request of Mecamidi, irrevocably and unconditionally purchase the shares of Mecamidi on the basis of the fair value as determined by a Chartered Accountant appointed with the mutual consent of the Shareholders or failing which, the statutory auditors of the JV Company subject to applicable provisions of Foreign Exchange Management Act within 120 days of the first request. In the event of there being a breach by the MG in this regard, Mecamidi shall be entitled within 60 days thereafter to purchase the shares of MG on the basis of the value as determined before. Failure of Mecamidi to comply with its obligations under this Clause will result into automatic relinquishment/dilution of its rights under Clauses 7, 8, 12 and 13 of this Agreement.”

11. Clause 22 of the JVSA gave the consequence of breach of Agreement by either party, while Clause 23 of the JVSA gave the consequence of termination of the Agreement, *inter alia* by mutual consent of parties.

12. The parties thereafter revised the timelines for such allotment and transfer of shares by way of a Supplementary Agreement dated

28.05.2007 executed on 12.06.2007. The first stage of remittance of Rs. 1,10,00,000/- by the petitioner and Rs. 3,30,00,000/- by the respondent no. 1 was now to be completed within 15 days of execution of the Supplementary Agreement, that is on or before 27.06.2007. This stage was duly complied with by both parties, though with delay, with the respondent no. 1 having remitted its share of payment in two instalments on 28.04.2007 and 04.05.2007, and the petitioner having remitted its share of payment on 03.07.2007 and 11.07.2007. This transaction led to the petitioner having been issued 25% of the paid up capital in the respondent no. 2 Company. The delay of the petitioner in making payment of this first instalment was, therefore, of no consequence and relevance to the dispute.

13. Thereafter, in accordance with the terms of the Agreements between the parties, the parties then executed four further Agreements on 22.09.2007, namely, (i) Name Protection Agreement – Mecamidi; (ii) Name Protection Agreement – Flovel ; (iii) Technical Know-How License Agreement ; and (iv) Trademarks Licensed User Agreement.

14. The disputes however arose between the parties with the non payment of consideration for the purchase of 14,00,000 shares by the petitioner within the stipulated time, that is, on or before 11.12.2007. Instead, the petitioner sent Euro 94,968.60 to the respondent no. 2 on 18.08.2008, which sum was not accepted and was ultimately returned by the respondent no. 2 to the petitioner on 13.02.2009.

15. During the interregnum, the petitioner claims to have been attempting re-negotiations to re-schedule terms of balance payments with

the respondents and in this regard, claims to have exchanged draft amendment Agreements with the respondents, however, no definitive Agreement was admittedly reached between the parties pursuant to such negotiations.

16. It is also the case of the petitioner that the respondent no. 2 sought to convene a Board Meeting on 30.03.2009 with an Agenda Item B1 amongst others, to increase the paid up share capital of the company from Rs. 4.40 crores to Rs. 5 crores, wherein the respondent no. 1 and the petitioner were to be allotted shares in proportion to shares held in the JV Company on said date. The petitioner however, claiming to be unable to attend, protested against holding of such meeting in India and filed a Company Petition, being CP No. 20(ND)/2009, before the Company Law Board, New Delhi Bench ("CLB"). The CLB on 27.03.2009 passed an *ex-parte* stay to the effect that the concerned agenda item B1, if approved by the Board, shall not be given effect to without the leave of the CLB. This order was modified by the CLB on 04.05.2009 when the CLB allowed the respondent no. 2 Company to allot shares for Rs. 45 lakhs to the respondent no. 1, however, directed that the said shares shall not grant the respondent no. 1 any voting rights, and that Rs. 15 lakh worth shares be kept unallotted.

17. On 22.08.2009, however, the petitioner terminated the JVSA and all related transaction documents between the parties, citing reasons such as that of the respondents seeking exorbitant prices for the additional 25% shares that were to be allotted to the petitioner; attempting to dilute the petitioner's shareholding; not holding Board Meetings outside India;

returning the share application money on the pretext of compliance with the law; conducting business outside the territory; and breaching the terms of the Articles of Association of the JV Company.

18. This termination was not accepted by the respondent no. 1, who, vide reply dated 18.09.2009, denied the allegations contained in the termination letter. The respondents, on 21.06.2010, also invoked the Arbitration Agreement contained in Clause 25A of the JVSA.

19. In the meanwhile, the disputes between the parties before the CLB continued and on 05.07.2010, the CLB passed an order recording that the petitioner was willing to exit from the company on fair valuation of their shares in accordance with law on a date to be agreed upon between the parties and that the respondents agree to facilitate the exit of the petitioner from the respondent no. 2 Company on fair valuation.

20. The Company Petition was finally disposed off on 05.09.2011 in the following terms:

“53. In view of the foregoing, CA. No.704/2010 is hereby dismissed being not maintainable, CA No.703/2010 is hereby allowed. The Petitioner is hereby directed to file the terms of settlement within three weeks from the date of receipt of this order. The Respondents are hereby required to pay the Petitioner fair value @ Rs.15.52 per equity share as determined by M/s. S.Rawla and Associates, Chartered Accountants, in their Valuation Report dated 26.07.2010 for 11,00,000 equity shares of the Petitioner which the Petitioner is directed to transfer to the R-2 on receipt of fair valuation. The payment to the Petitioner be made within four weeks of receipt of the terms of settlement. Further, in view of the foregoing, C.P. No. 20(ND) of 2009 also stands disposed of. All Company

Applications stand disposed of. All interim orders stand vacated. No order as to cost.”

21. The petitioner challenged this order before this Court and such challenge was dismissed on 03.10.2011. A Special Leave Petition filed against such dismissal was also dismissed on 03.01.2012.

22. The respondent no. 2 company had been renamed ‘Flovel Energy Pvt Ltd’ on 11.11.2010 and the petitioner finally exited from the respondent no. 2 Company, selling its shareholding to the respondent no.1 on 20.04.2012.

23. The Arbitration clause having been invoked by the respondents on 21.06.2010, the exit of the petitioner was effected during the pendency of the arbitration proceedings.

24. At the outset, I may only note that the Arbitral Tribunal has given contradictory conclusions towards findings, in respect of certain claims recorded, in the earlier portion of the Award. However, I am proceeding based on the reasoning and the findings clearly recorded in the earlier portion of the Award, rather than the conclusions, which are clearly erroneous and in contradiction to the findings.

25. The Arbitral Tribunal while dealing with claim no. 1 of the respondents, which was for failure of the petitioner to make timely remittances in terms of the JVSA and the Supplementary Agreement, has held that as far as the first instalment is concerned, though the petitioner had brought the same belatedly, as the same had been accepted by the respondents and even the second instalment was demanded by the

respondents from the petitioner, such delay was condoned and the respondents were estopped by their conduct from seeking declaration to the contrary. However, as far as the second instalment is concerned, the Arbitral Tribunal held that there was delay on part of the petitioner to make the said payment within the time agreed and such delay and resultant breach of the JVSA as amended by the Supplementary Agreement, was not condoned by the respondents. As far as the various e-mails exchanged between the parties subsequent to 11.12.2007, which was the last date of making the payment of the second instalment by the petitioner, the Arbitral Tribunal has held that these pertained to proposed new terms, which admittedly did not culminate into a new concluded contract between the parties. The Arbitral Tribunal held that the petitioner had therefore, breached its obligations stipulated in terms of Clause 2.4 of the JVSA.

26. The learned counsel for the petitioner submits that this finding of the Arbitral Tribunal is incorrect. Making reference to various e-mails exchanged between the parties and most specifically, the e-mails dated 08.08.2008 and 13.02.2009 from the respondents to the petitioner, she submits that the respondents had infact condoned the delay of the petitioner in making payment of the second instalment as well. She further submits that the respondents sought to expose the petitioner to a financial risk by imposing unilateral financial commitments which were onerous, unfair, unwarranted and prejudicial to the interest of the petitioner. She submits that therefore, the finding of the Arbitral Tribunal

that the petitioner was in breach of the Clause 2.4 of the JVSA cannot be sustained.

27. I have considered the submissions made by the learned counsel for the petitioner. At the outset it must be noted that the present is a case of “International Commercial Arbitration” as defined in Section 2(f) of the Act. In ***Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India (NHAI)***, 2019 SCC OnLine SC 677, the Supreme Court on scope of power of a Court under Section 34 of the Act, has held as under:-

“35. What is clear, therefore, is that the expression “public policy of India”, whether contained in Section 34 or in Section 48, would now mean the “fundamental policy of Indian law” as explained in paragraphs 18 and 27 of Associate Builders (supra), i.e., the fundamental policy of Indian law would be relegated to the “Renusagar” understanding of this expression. This would necessarily mean that the Western Geco (supra) expansion has been done away with. In short, Western Geco (supra), as explained in paragraphs 28 and 29 of Associate Builders (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court’s intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of Associate Builders (supra).

36. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the

“most basic notions of morality or justice”. This again would be in line with paragraphs 36 to 39 of Associate Builders (supra), as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

37. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of Associate Builders (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco (supra), as understood in Associate Builders (supra), and paragraphs 28 and 29 in particular, is now done away with.

38. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

39. Secondly, it is also made clear that re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

40. To elucidate, paragraph 42.1 of Associate Builders (supra), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Paragraph 42.2 of Associate Builders (supra), however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that

would certainly amount to a patent illegality on the face of the award.

41. The change made in Section 28(3) by the Amendment Act really follows what is stated in paragraphs 42.3 to 45 in Associate Builders (supra), namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2A)."

28. This Court is therefore specifically forbidden from reviewing the Award on the re-appreciation of evidence. In any case and as noted hereinabove, merely because the parties entered into negotiations post the stipulated date for payment of the second instalment, as the said negotiations did not result in any contract, the same can have no effect on the breach of the Agreement already committed by the petitioner in not making the payment of the second instalment by the stipulated date. It is also of relevance to note that apart from the breach of the petitioner in this regard, the Arbitral Tribunal has also found the petitioner in breach of the JVSA insofar as its obligations under Clause 19 of the JVSA are concerned.

29. The learned counsel for the petitioner further submits that the Arbitral Tribunal having itself held that the respondents had failed to produce any evidence of financial gains if the petitioner had performed its part of the contract and of the extent of loss suffered by the respondents, has arbitrarily awarded a sum of Rs. 1.50 crores in favour of

the respondents alongwith interest thereon. She submits that in absence of any relief claimed upon termination of JVSA, the finding of the Arbitral Tribunal is liable to be set aside.

30. I am in agreement with the submission made by the learned counsel for the petitioner. Before proceeding further, I may herein quote the relevant finding of the Arbitral Tribunal in this regard.

“47. Flovel has calculated and claimed damages in the sum of Rupees 4,11,85,334.36 as detailed in paragraph 40 above which includes amounts, that in terms of the contract between the parties, were payable by the Respondent Mecamidi by way of interest for the loans or charges for securing a bank guarantee etc. Flovel carried on business with Mecamidi as an equity shareholder of only 25% instead of 50% of the share capital. The profit of the business was allotted accordingly. Flovel was therefore required to show what was the loss suffered by it on accounts of the breach of contract by Mecamidi. Flovel was required to prove it by producing evidence to show what would have been the financial gains for Flovel if Mecamidi had performed its part of the contract. Unfortunately, Flovel has failed to do so as it has not produced any evidence to show the gains that Flovel would have made in the eventuality of the contract being performed. Further Flovel was also under a positive duty to mitigate and/or reduce its losses which is not shown to have been done. Though it cannot be denied that on account of the breaches committed by Mecamidi, the Claimant must have suffered losses, in the absence of the substantive evidence to assess the extent of such loss, the Tribunal can only award damages which in its opinion appear to be reasonable. Having regard to the facts and circumstances of this case and the evidence produced by the parties, this Tribunal is of the view that it would be sufficient and reasonable to award a sum of Rs.1,50,00,000.00 (Rs. 1 Crore and 50 Lakhs only) by way of damages. On the amount awarded by way of damages, the respondent shall pay interest

at the rate of 12% per annum from the date of the award to the date of payment.”

(Emphasis Supplied)

31. Under Section 73 of the Indian Contract Act, 1872, the party who suffers from a breach of the Agreement is entitled to receive from party in breach, compensation for “any loss or damage” caused to him thereby. This Court in ***Ahluwalia Contract (India) Limited v. The Union of India*** 2017 SCC OnLine Del 11042 clarified that damages claimed cannot be granted as a matter of course, some material evidence is necessary. I may only quote paragraphs 9 and 10 of the said judgment:

“9. Bharat Coking (supra) and Brijpaul (supra), no doubt, are authorities for the proposition that the court even in arbitration cases should be conscious of and ordinarily should not refuse claims toward loss of profits. At the same time, the reference to Section 73 – which finds express mention in Brijpaul (supra) clarifies that damages claimed cannot be granted as a matter of course; some material evidence is necessary. In this case, the extensions led to claims for payments on various accounts and heads during the extended period. The cumulative effect of the award and the impugned judgment is such that the majority of such heads of claim for extra expenditure, increased salary and other overheads for the additional period have been granted. They are based upon certain formulae under the contract. However, in the case of the claim of general loss of profits, having nexus with the value of the contract, the Court finds that there is no worthwhile evidence – apart from the line of questioning adopted by the claimants.

10. That in arbitration proceedings, just as in civil cases, an injured party can claim damages, does not necessarily translate into an award for damages towards loss of profits unless some diligence is exercised by the party (in the present

case, Ahluwalia claiming it). In other words, a claim for damages (general or special) in the proceedings, cannot as a matter of course, result in an award, without proof of having suffered injury. The tribunal – as well as the learned Single Judge in this case appreciated the conspectus of circumstances. The former had the benefit of consideration of record as the primary adjudicatory body. The Tribunal was unable to discern any substantial material to justify the claim for damages towards loss of profits. Having regard to these facts, this Court is of the opinion that the rejection of claim nos. 12-13 was dealt with correctly and reasonably by the learned Single Judge in the impugned judgment, which does not warrant interference.”

32. For the above proposition, one may also refer to ***GTM Builders & Promoters Pvt. Ltd. vs. Sneh Developers Pvt. Ltd.*** 2018 SCC OnLine Del 9653.

33. In the present case, the respondents had pleaded the basis of their claim of damages as recorded in paragraph 40 of the Impugned Award. The Arbitral Tribunal itself noted that it was for the respondents to have shown the loss suffered by them on account of breach of Contract by the petitioner. It further records that the respondents have failed to produce any evidence in this regard. Having observed so, the Arbitral Tribunal has awarded a sum of Rs. 1.50 crores in favour of the respondents, without disclosing any basis for the same.

34. The learned senior counsel for the respondents submits that even in absence of proof of loss, the Arbitral Tribunal can award damages, on the basis of guess work. In this regard, he places reliance on the Judgment of the Supreme Court in ***Dwaraka Das vs. State of M.P. and Another***, (1999) 3 SCC 500. Relying upon the Judgment of this Court in ***Highway***

Engineering Pvt. Ltd. vs. Union of India & Anr., 63 (1996) DLT 833, he submits that in absence of proof of actual loss, the Arbitral Tribunal is entitled to award token damages, which it has done in the present case. He further places reliance on the judgment of the Supreme Court in *M/s. Construction & Design Services vs. Delhi Development Authority*, 2015(2) SCALE 48.

35. I have considered the submissions made by the learned senior counsel for the respondents, however, in the facts of the present case, find no merit in the same.

36. In *Dwaraka Das* (Supra), the Supreme Court was considering a case of breach of a Work Contract for construction of a hostel. The Court held that grant of 10% of the contract price as damages being reasonable and permissible loss of profit, required no interference. The present case does not involve a Works Contract but a Joint Venture Agreement. Therefore, the yardstick of application of percentage of loss of profit to the contract value could not be applied by the Arbitral Tribunal. In any case, as noted hereinabove, the Arbitral Tribunal in the Impugned Award does not disclose any basis for arriving at the figure of Rs. 1.50 crores as damages. It is not for this Court to therefore guess the basis for such an Award.

37. Equally, the sum of Rs. 1.50 crores cannot be said to be mere “token damages” or “nominal damages”. In the present case, the petitioner was to invest a total sum of Rs. 2.50 crores in the respondent no. 2. Admittedly it made the payment of Rs. 1.10 crores as the first instalment, with respect to which, the petitioner, though in delay, was not

found to be in breach of the Agreement. For the second instalment, Rs. 60 lakhs was to be paid by the petitioner to the respondent no. 2 and Rs. 80 lakhs was to be paid by the petitioner to respondent no. 1 by 11.12.2007. Though in delay, this amount was paid by the petitioner on 18.08.2008 but the respondents refused to accept the same. For this delay, an amount of Rs. 1.50 crores cannot be said to be “token” or “nominal” damages. Therefore, the Judgment in *Highway Engineering Pvt. Ltd.* (supra) can also be of no avail to the respondents.

38. In fact, the respondents had kept Euro 94, 968.60 transmitted by the petitioner on 18.08.2008 till 13.02.2009, when it was finally returned by the respondents. This should also have been factored in by the Arbitral Tribunal while awarding damages, however, the Impugned Award does not show if this aspect has been considered by the Arbitral Tribunal.

39. As far as the Judgment in *M/s. Construction & Design Services* (supra) is concerned, the Supreme Court having noted that there was no specific evidence of loss suffered by the respondent therein, held that the party complaining of breach can be allowed reasonable compensation out of the sum fixed as liquidated damages, especially because the project in question was of public utility and the delay itself was taken as having resulted in loss in the form of environmental degradation. This judgment can have no application to the facts of the present case inasmuch as neither were liquidated damages prescribed in the JVSA or the Supplementary Agreement nor a case of any public interest was set up by the respondents.

40. In view of the above, the Impugned Award inasmuch as it awards a sum of Rs. 1.50 crores alongwith interest in favour of the respondents, cannot be sustained.

41. The learned counsel for the petitioner further challenges the rejection of the counter claims No. 1, 2 and 4 raised by the petitioner before the Arbitral Tribunal. These counter claims were premised on the failure of the respondents to cease use of the word “MECAMIDI” even after the termination of the JVSA and the Name Protection Agreement and the Trademarks Licensed User Agreement as also misrepresentation to the customers of respondent no. 2 with regard to continued association of the petitioner with the Joint Venture. The learned counsel for the petitioner submits that the Arbitral Tribunal has erred in holding that the petitioner had failed to place any evidence on record in support of this claim. She submits that as the respondent no. 2 had bid for various projects using the name of the petitioner, the petitioner was entitled to a claim of profits on such projects. The learned counsel for the petitioner further submits that the petitioner had also relied upon the e-mail dated 11.05.2010 addressed by Chirchind Hydro Power Limited to the petitioner; the correspondence exchanged between the petitioner and the Jammu & Kashmir State Power Development Corporation as also the fact that the date of opening of the bid incase of Dikleri Hydro Power Project was 02.12.2010, wherein again the respondent no. 2 had submitted its bid using the name of the petitioner. She further submits that the Arbitral Tribunal has further erred in disallowing these counter claims on the premise that the petitioner had not acted upon the termination notice

dated 22.08.2009 till 05.07.2010. She submits that the termination notice became effective from its date.

42. I have considered the submissions made by the learned counsel for the petitioner, however, find no merit in the same. The findings of the Arbitral Tribunal on the above counter claims are reproduced hereunder:-

“73. In our view for enforcing the specific clauses of JVSA and related 3 agreements upon termination, Mecamidi ought to have acted under clause 17 of JVSA by offering to sell its shareholding to Flovel MG and resigning from the Board of Directors. Mecamidi terminated the JVSA by its letter dated 22.8.2009 but did not take any steps to exit from the JV Company. We agree with the submissions made by Flovel, that though Mecamidi terminated JVSA and 3 related agreements on 22.8.2009, but showed no intention to actually exit from JV company before 5.7.2010. Prior to that it was fighting litigation for equal participation in JV Company. Further, though Mecamidi may not have been aware of the procedure of change of name of JV company in India before but once it engaged lawyers on 27.3.2009, it could have got apprised itself of the same and could have called for board meeting and general meeting for change of name of JV Company. Further, it has been established on record that Mecamidi was not participating in General Meetings of JV Company for which Flovel cannot be blamed. Thus, we hold that there is no breach on the part of Flovel in not taking immediate steps for changing the name of JV Company.

74. The next question is as to whether Mecamidi suffered any loss of goodwill and harm to its reputation on account of use of its name as a part of corporate name of JV Company. Mecamidi has claimed Rupees 65 million towards the loss and damage. However, Mecamidi has not placed any evidence on record in support of its claim to establish the quantum or calculations of loss or that loss was actually suffered by Mecamidi as a

consequence of the continuance of use of its name as part of Corporate name of JV Company. Mr. Marcy in his cross examination in ques no. 71 admitted that there was no letter received from any company/entity complaining that the work done by Flovel Energy was defective or not upto mark which caused loss of reputation to Mecamidi. There is neither any basis in regard to loss/damage nor there is any proof of loss/damage suffered by Mecamidi. We have already held that there was no breach by Flovel as it was taking steps for change of name of JV Company. This claim is liable to be rejected.”

43. It is to be noted that the petitioner, infact, exited from the respondent no. 2 Company by selling its shares only on 20.04.2012. As noted by the Arbitral Tribunal, till 05.07.2010, the petitioner not only did not show any intention to actually exit from the Joint Venture Company, but even thereafter, was not participating in the General Meeting of the Joint Venture Company. The alleged basis of making this claim being 10% profit of the project awarded to the respondent no. 2, in the facts of the present case, is a mere conjecture and surmise and therefore, the Arbitral Tribunal has rightly rejected this counter claim.

44. The next challenge of the petitioner is to the rejection of the counter claim no. 3 by the Arbitral Tribunal. By way of counter claim no. 3, the petitioner had claimed damages for loss of goodwill caused to the petitioner and breach of Technical Know-How License Agreement by the respondents. The learned counsel for the petitioner submits that this counter claim has been wrongly rejected by the Arbitral Tribunal as with the termination of the Technical Know-How License Agreement, the respondents were obligated to have stopped the use of the documents, the Technical Information, Reference List/Equipments Supplied List for the

purposes of qualification/pre-qualification for the projects of Hydro Power Plants. She submits that in spite of such prohibition, the respondents continued to use the proprietary information of the petitioner while submitting their bids for various projects, the details whereof were also filed before the Arbitral Tribunal. In this regard, she makes specific reference to the correspondence exchanged between the petitioner and Jammu & Kashmir State Power Development Corporation.

45. I have considered the submissions made by the learned counsel for the petitioner, however, find no merit in the same. The relevant finding of the Arbitral Tribunal on this counter claim is as under:-

“78. So far as submitting the bid is concerned by Flovel Energy with Mecamidi as part of its Corporate name is concerned, we have already answered the same in favour of Flovel. So far as use of reference list is concerned, Mecamidi has failed to show that in all these projects (except chirchind) reference list of Mecamidi was used. In respect of Chirchind, it appears that the bid was called for on 14.2.2008 (Annexure C 13 and 18.4.2008 Annexure C 48) and negotiations continued thereafter. Neither Mecamidi nor Flovel has placed on record any document to give the date when the reference list of Mecamidi was submitted by Flovel Energy. In the absence of positive evidence, it is difficult to hold that Flovel Energy continued to use the reference list of Mecamidi after termination of JVSA and 3 related agreements by Mecamidi. Mr. Marcy in answer to Questions no. 74 to 78 during his cross examination admitted that it was Mecamidi's belief that Flove Mecamidi Energy might have used the reference list of Mecamidi but they did not possess documentary evidence nor did they possess any document to show that Mecamidi supplied the design and engineering for said 5 projects. Mecamidi has failed to provide source of its knowledge that its reference list was used by Flovel Mecamidi Energy for the named 5 projects.

Mr. Marcy has admitted in his cross examination at Ques No. 83, 84, 85, 126 and 127 that there is no loss of goodwill nor there is any evaluation report for assessment of damages and damages have been claimed on basis of projected figures only.

79. There is another reason for declining this claim, as Mecamidi inspite of contending that there was breach of Technical Know Agreement and Flovel could not have used the reference list of Mecamidi after termination of JVSA yet, it has claimed damages on sharing basis by saying that it is entitled to 50% share of the Joint Venture Company, i.e. Flovel Mecamidi Energy Private Limited. It has contended that Earning of JV company before taxes was Indian Rupees 95 million. Mecamidi has multiplied Rs. 95 million 8 times (contending it to be the current rate of the valuation of the industrial activity) and then divided by 50% being the share of Mecamidi. By this method it has claimed Indian Rupees 380 million. In effect Mecamidi is claiming its share of profit rather than loss of good will and reputation. We do not find any merit in the claim for the reason that Mecamidi has failed to show that any bid was awarded to Flovel solely by the use of name of Mecamidi or its reference list. It has also failed to show any loss was caused to its good will and reputation by either use of name of Mecamidi or its reference list. The calculation of loss is as per projected profits and share of Mecamidi. The figures are imaginary as well as presumptive.”

46. As noted hereinabove, this Court cannot sit as a Court of appeal to re-judge the evidence and to arrive at its own conclusion on the same. In any case, even after having perused the documents referred by the learned counsel for the petitioner, I find no reason to disagree with the finding of the Arbitral Tribunal on this counter claim.

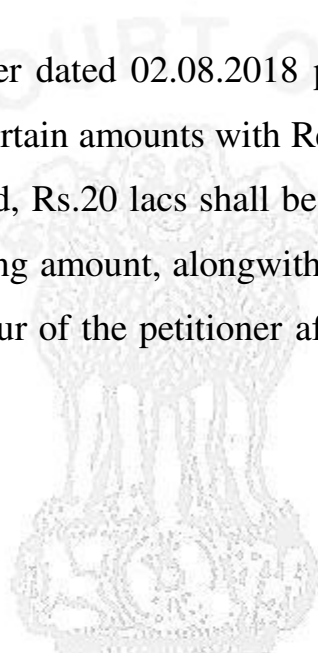
47. Though not argued, the petitioner has also challenged the imposition of cost of Rs. 20 lakhs in the Impugned Award. As the petitioner has been held in breach of the JVSA and its counter claims

have also been rejected and as the costs awarded by the Arbitral Tribunal is found to be reasonable, I find no merit in this challenge.

48. No other challenge to the Impugned Award has been made by the learned counsel for the petitioner.

49. In view of the above, the petition partly succeeds. The parties shall bear their own costs.

50. Pursuant to the order dated 02.08.2018 passed by this Court, the petitioner had deposited certain amounts with Registry of this Court. Out of the amount so deposited, Rs.20 lacs shall be released in favour of the respondents. The remaining amount, alongwith interest accrued thereon, if any, be released in favour of the petitioner after a period of six weeks from today.



NAVIN CHAWLA, J

JULY 30, 2019/rv

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