

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

Reserved on: 05.09.2019
% *Pronounced on: 15.10.2019*

+ **O.M.P. (COMM) 459/2016**

ACME MANUFACTURING COMPANY LTD. Petitioner

Through: Mr. M.S. Ganesh, Sr. Advocate with
Mr. Mohinder J.S. Rupal, Mr.
K.Seshachary, Ms. Enakshi
Mukhopadhyay Siddhanta, Mr. Hardik
Rupal, Mr. Prang Newmai, Mr.
Koushik Ghosh, Mr. Naman Garg and
Ms. Aditi Shastri, Advocates

versus

UNION OF INDIA Respondent

Through: Mr. Ripu Daman Bhardwaj, CGSC
with Mr. T.P. Singh, Advocate

**CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH**

JUDGMENT

JYOTI SINGH, J

O.M.P. (COMM) 459/2016

1. Present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') seeking to set aside the Award passed by the sole Arbitrator on 07.07.2015.

2. The necessary facts to decide the present petition are that a contract

was entered into between the petitioner and the respondent (DGBR) for supply, erection and commissioning of HMPs 30-45 TPH capacity, one at Avantipur under Project Beacon and the other at Silchar under Project Pushpak on 12.10.1993. The total contract value was Rs. 108.87 Lacs. The date of completion as agreed between the parties was 12.01.1994 for both the Plants. According to the terms of the contract, one Plant was to be directly supplied and erected at Silchar (Assam) while the other was to be erected and commissioned at Avantipur (Kashmir), but was to be delivered at the Depot at Pathankot.

3. As per the terms stipulated in Acceptance of Tender (hereinafter referred to as 'AT') dated 12.10.1993, delivery was Pathankot & Silchar respectively, inclusive of Road Transportation Charges, but exclusive of transit insurance. The consignees were OC 1326 Base Depot, c/o 56 APO and OC 510 ESS Coy, c/o 99 APO respectively. Relevant clause of the Contract is reproduced as under:-

“Clause 7 of the Contract- Terms of delivery: FOR Pathankot and Silchar inclusive of Road Transportation charges but exclusive of transit insurance which will be paid extra.”

The terms of payment were mentioned in clause (e) of the AT, which reads as under:

“(e) Terms of payment:- 80% payment for supply of equipment alongwith 100% taxes and duties will be paid on proof of initial inspection at your premises and receipt of machines at site by the Consignee as applicable for delivery by road. Balance 20% will be paid after commissioning, testing and final inspection of machines at consignee's site against production of bank guarantee

for an equivalent amount, valid for one year from the date of commissioning.”

4. The provision for pre-inspection of stores/equipments by the contractor/seller was given in clause (g) of the AT which is as under:

“(g) Pre-inspection of stores/equipments by the contractor/sellers

The contractor/seller should satisfy himself that the stores are in accordance with the terms of the contract and fully conform to the standard specifications by carrying out a thorough pre-inspection of each stores before actually tendering the same for inspection to the inspecting officer nominated under the terms of the contract. Such pre-inspection on the part of the contractor, seller would minimize the chances of rejection in inspection and the consequences thereof. The stores shall be tendered for inspection and the consequences thereof. The stores shall be tendered for inspection sufficiently ahead of stipulated delivery period to avoid delay in spection.”

5. The disputes in the present case relate mainly to the **erection and commissioning** of the Hot Mix Plants and the relevant clause with respect to erection and commissioning is clause (j) which is extracted hereunder:

“(j) Erection and commissioning:- The contractor will depute the service engineers for the purpose of erection and commissioning of the Hot Mix Plant at site on arrival. Intimation of arrival of the equipment shall be given to the contractor/seller immediately to avoid any delay. The service engineer will commission the equipments as per the rates agreed upon and indicated in clause 14 below. Thereafter the service engineer will impart operation and maintenance training to the BRO staff free of cost for a period of 21 days. However, during erection and commissioning of the Hot Mix Plants, all necessary help required by the service engineer shall be

made available by the consignee free of cost. This includes necessary skilled and unskilled workers, consumables like diesel, Kerosine, grease etc and necessary tools and tackles not included in the scope of supply. But, first fill of oils/lubricants required for commissioning of equipment shall be supplied by the contractor/seller free of cost.”

6. The case as set out in the petition is that pursuant to a Tender, a contract was awarded to the petitioner, for Two Auto-Batch type Hot Mix Plants, electrically driven, capable of producing 45 TPH at 2% moisture content and 30 TPH at 6% moisture content. The Senior Quality Assurance Establishment (SQAE), which was the independent Inspection Agency appointed by DGBR, vide letter dated 04.11.1993, laid down the detailed conditions for inspecting the Plant at the premises of the petitioner. A letter dated 02.08.1994 from SQAE duly recorded that both the Plants were inspected and accepted under the Inspection Note dated 21.07.1994. Being cleared on inspection, the Plants were delivered by the petitioner in 1994 at Pathankot and Silchar respectively. It is significant to highlight that in terms of clause (e) of the AT, 80% payment of the basic price and 100% duty was released by DGBR to the petitioner on the basis of this Inspection Note of SQAE.

7. On 04.07.1998, the contract was cancelled by the DGBR on the ground that the petitioner had failed to commission the Plant at Avantipur, while the one commissioned at Silchar did not confirm to the quality of Auto mode and the production capacity of 30/45 tonnes, per hour. In fact, it had many vital defects and could not be run to achieve the Hot Mix Aggregate for the purpose of laying roads in Border areas.

8. Disputes having arisen between the parties, respondent approached this Court for appointment of an Arbitrator, for recovery of Rs. 313.77 Lacs from the petitioner. On 18.07.2001, this Court appointed a Sole Arbitrator to adjudicate the disputes.

9. Respondent herein was the claimant before the Arbitrator and made the following claims in its statement of claim:

“(a) CLAIM NO: 1:

Claim of Rs. 89,02,728.00 on account of amount paid during Nov 94, against advance payment of 80% cost of equipment on arrival at site, plus taxes extra .Since the Department has rejected the equipment as defective, and the contract has been cancelled, respondent may take back his defunct equipment after returning the money paid to them. (with interest as intimated in claim no.2 below).

(b) CLAIM NO: 2:

Claim of Rs. 1,18,85,142.00 as interest at simple interest @ 18% per annum on above amount till 31 March 2002, wef 04 November 94.

(c) CLAIM NO: 3:

Claim of Rs. 1,36,52,496.00 on account of non-utilisation charges of the plants from the date it should have been commissioned till the date of cancellation of contract. Details of calculations are enclosed as annexure-I

(d). CLAIM NO : 4:

Claim of Rs, 3,14,843.00 on account of cost of materials, Bitumen, POL consumed by the Project for trial run of the plant with defective system which could

not be used effectively on jobs due to poor quality. Details of calculations are enclosed as annexure-II.

(e). CLAIM NO: 5:

Claim of Rs. 1,79,072.00 on account of cost of stores issued to firm for fabricating short supplied items. Details of calculations are enclosed as annexure-III.

(f) CLAIM NO : 6:

Claim of Rs. 8,49,670.00 on account of cost of man power provided to firm for erection / commissioning and trial run of the plant. Details of calculations are enclosed as annexure-IV.

(g) CLAIM NO : 7:

Claim of Rs. 5,36,113.00 on account of usage rate of matching resources, wasted for erection l commissioning and trial of the plant. Details of calculations are enclosed as annexure-V.

(h) CLAIM NO: 8:

(i) Cost of litigation occurred in Delhi High Court Arbitration Application case No: AA-178 of 1999, titled U of I Vs M/S ACME Manufacturing Co Ltd to the claimant Rs.4,310.00. Details of calculations are enclosed as annexure- VI.

(ii) Cost of finalisation of case through this Arbitration process to be paid to claimants as per actuals on conclusion of the case.

(i) CLAIM NO: 9 :

Defamation charges on account of loss of reputation due to non accomplishment of targets within a

definite time frame occurred to the claimant. fixed at Rs, 50,00,000.00.”

10. The petitioner herein preferred the following counter claims:

“Claim No.1

Union of India has not paid so far the balance 20% of the consideration amounting Rs.19,84,532.80 against the two plants under the contract. The said amount is therefore liable to paid forthwith.

Claim No.2

Union of India is also liable to account for the illegal deductions made against the 80% of the consideration amount which was to be paid against delivery of the plants. The total amount for which deductions were made illegally by Union of India is Rs.30,18,497.80 (Rs.19,48,817/- - 90% payment of 4 Nos. HMEE Plants + Rs.9,51,548/- L/D. charges for 2 Nos. Hot Mix Plant + 1 Lac erection and commissioning charges + Rs.18,132.80 Short payment).

Claim No.3

Union of India has not paid a sum of Rs4,23,361.50 towards the balance amount outstanding against the supply of Batching and Mixing Plant and therefore the said amount is also liable to be paid by UOI. (Rs.3,99,250/- as - 20% payment + RS.24,111.50 as short payment).

Claim No.4

The Claimants had to station their service engineers at the respective sites. The actual work involved for erection of the said two plants at the sites is only 60 mandays. However; due to failure of UOI to provide; necessary equipments, quality raw material, labour, unsuitable site for erection; failure to notify unsuitable weather

conditions prevailing all the year around at the sites, unilateral shifting of site from Pathankot to Awantipur. which is politically as well as the topographically totally different; non cooperative attitude of officers of UOI resulted into grossly under utilisation of the services of the service engineers who consequently held to remain at site for 1200 mandays in Silchar and 120 mandays in Awantipur. This in turn resulted into unnecessary expenses incurred by the Claimants in terms of transportation, non-productive payment of salaries to their service engineers, managers and other staff, ideal labour etc. The total amount of loss to the Claimants in this regard is Rs.20,00,000/-, which UOI is liable to compensate. (After taking into account standard 60 mandays for completion of erection and commissioning of each plant the net extra mandays spent will be 1320-120 = 1200 mandays. For the additional mandays to cover overheads and other misc. expenses charges which will be Rs.1,500/- per mandays i.e. 1,500 x 1,200 mandays = Rs.18 lacs + 2 lacs appx. for To & Fro railways/airfare etc.- the total gross is Rs.20 lacs).

Claim No.5

Due to illegal deduction made by Union of India against the required payment of 80% of the total consideration and thereafter Withholding the balance 20% of the consideration amount which UOI was liable to pay, resulted into blockage of necessary funds which were to be utilised by the Claimants for other projects in hand as a result of which the said other projects also got delayed and the Claimants suffered heavy losses on this account also. The total losses suffered by the Claimants is quantified at Rs.6,04,00,000/-, which UOI is liable to compensate for (blocking of funds - Rs.54 lacs, loss of production - 1.5 Crores, loss of new orders - 3 crores, other losses - 1 crore).

Claim No.6

The Claimants due to illegal and unjustified deduction and for withholding all the bonafide payments by UOI was prevented from making reasonable profit from this commercial transactions. The loss of profit in this regard is Rs.1.5 Crores, which Union of India is liable to pay as damages.

Claim No.7

Although, the plants were found to be fit and in working condition by the inspection agency and inspection certificate was also issued accordingly, Officers of UOI who were incharge of the project however maintained an adamant stand throughout the period of erection and commissioning. There was no to-operation what so ever from the side of UOI. The officers of UOI were not keen to see the plant in operation and therefore on flimsy grounds refused to issue completion certificate to the Claimants for the Silchar plant and refuse to provide proper site to enable the Claimants to successful erect the plant at Awantipur although they fully realised the unsuitability of the present site. UOI eroded the credibility of Claimants with its Bankers/Customers .Over and above this the Claimants were threatened of black listing them thus resulting into loss of goodwill and reputation in the commercial circle. Damages on account of loss of goodwill and reputation 'of the claimants is assessed at Rs.3 Crores which Union of India is liable to pay.

Claim No.8

Union of India failed to make timely payments and also withheld payments which bonafidely due. UOI is therefore liable to pay interest @18% per annum with effect from 22.11.1994 with quarterly rests till realisation on all the heads of claim raised herein above.

Claim No.9

Union of India unilaterally and wrongfully cancelled the contract, although Claimants were always ready and willing to do their part of obligation under the contract of India and even carried out necessary modifications. Union of India malafidely and deliberately did not want to issue the completion certificate and rather proceeded to initiate frivolous and unwarranted litigation. The cost of litigation is therefore liable to be accounted for by UOI both in the Delhi High Court as well as before this Hon'ble Arbitral Tribunal. The cost of litigation in the Delhi High Court amounts to Rs.62,260/-. Over and above the Claimants pray for actual cost of litigation before this Arbitral Tribunal the figures for which will be provided at the time of culmination of the present Arbitration proceedings.

Claim No.10

Claimants are also entitled to pendentente and future interest on all the above claims preferred till the date of actual realisation of the payments. The Hon'ble Arbitrator may be pleased to award interest @18% per annum with quarterly rest on this account also.

11. The learned Arbitrator allowed the following claims of the respondent herein:

- a. Claim No. 1 for return of Rs.89,02,728/-, paid towards 80% of cost of equipment and taxes etc., was allowed and Rs.60,01,365/- was awarded.
- b. Claim No. 2 of the respondent for Rs.11,88,511/- was for award of interest on the amount claimed under Claim No. 1 @ 18% per annum (simple) with effect from 4.11.1994 till 31.3.2002, the date of payment. This was allowed and simple interest was awarded w.e.f. 04.07.1998 till the date of recovery at the rate of 6% per annum.

- c.** Claim No. 5 on account of cost of stores issued to the petitioner for fabricating short supplied items was allowed.

12. The learned Arbitrator rejected the following claims of the respondent herein:

- a.** Claim No. 3 on account of loss due to non-utilisation of plants was rejected since they could not be put into operation for laying down the roads.
- b.** Claim No. 4 for the cost of material etc. utilised by the Projects for trial run of Silchar Plant, was rejected.
- c.** Claim Nos. 6 and 7, which were towards the money spent on skilled and unskilled labour as well as usage rate of matching resources respectively, were rejected.
- d.** Claim No. 8 for cost of litigation in this Court in appointment of Arbitrator was disallowed.
- e.** Claim No. 9 was for defamation on account of loss of reputation. Respondent also claimed 18% interest on whole amount from date of the Award till recovery and costs. The same was rejected.

13. All the counter claims of the petitioner herein were rejected by the learned Arbitrator.

14. Thus, the learned Arbitrator by the impugned Award finally awarded Rs. 60,01,365/- against claim No. 1 and 1,79,072.80/- against claim No. 5 to the respondent which was to be paid to the respondent within four months from the receipt of the Award. Interest @ 6% per annum was awarded on the amount under Claim No. 1 from 4.7.1998 till the date of Award i.e.

Rs.63,04,008/-. It was further directed that in case the said amount was not paid in the stipulated period, 9% simple interest per annum was to be paid by the petitioner from the date of the Award till the recovery. Costs of Rs. 6,69,250/- were also awarded in favour of the respondent. The learned Arbitrator further directed that on recovery of the amount, the petitioner shall be entitled to return of the two Hot Mix Plants which they had delivered to the respondents herein.

15. The present petition has been filed assailing this award.

16. Mr. M.S. Ganesh, learned senior counsel for the petitioner, has raised the following grievances against the Award:

(a) It is contended that the Award contains decisions on matters beyond the scope of the submission to the Arbitrator within the meaning and intent of Section 34 (2)(a)(iv) of the Act. Learned senior counsel submits that parties never authorised the learned Arbitrator to pass the Award on certain issues and this is violative of Section 28(2) of the Act.

(b) It is next contended that the impugned Award is in conflict with the public policy of India as well as Section 34(2)(b)(ii) read with explanation 1 (ii) & (iii). The Award according to the learned senior counsel, is vitiated by patent illegality appearing on the face of the Award and deserves to be set aside under Section 34(2)(a) of the Act.

Elaborating these submissions, learned senior counsel contended that the contract is a standard form contract of the Union of India and is liable to be construed contra proferentem against the Union of India. It is a contract in two parts. The first deals with supply and the second with erection and

commissioning of the Hot Mix Plants. The first part provides for inspection of the equipment under supply, by the respondent's own Quality Assurance Department, to the satisfaction of the Department and payment thereupon of 80% of the value of the supply, along with 100% taxes and duties. This is so mentioned in clause (7) and clause (e) of the AT. According to the learned senior counsel, this part was duly complied with by the petitioner and once the payment of 80% was made by the respondent, the property in the goods passed on to the respondent.

The warranty/guarantee clause which is clause (f) relates to the second part i.e. erection and commissioning. It comes into play only on the passing of title of the goods to the respondent. The contention is that upto the fulfilment of the first part, the supply of the equipment is of moveables governed by the Sale of Goods Act, 1930, but the moment the Plant is erected at the site, it becomes an immovable and a fixed asset governed by the Transfer of Property Act, 1882. It is thus contended that from the inception of the second part of the contract, the question of return of the 80% payment received on conclusion of the first part does not arise. If at all a claim could lie, it would only be for damages for breach of contract, but which was not even the claim of the respondent.

(c) Learned senior counsel next contends that there is no clause or provision in the AT for refund by the supplier of the purchase money paid. The contract contains clause 15, which is the Liquidated Damage Clause. It stipulates the conditions under which it can be invoked but with a cap on the quantum of damages. The liability under clause 15 is that of liquidated damages and not 'penalty' and the respondent has recovered the full

liquidated damage. Thus, the Tribunal could not have awarded refund of the 80% payment to the respondent.

(d) The next contention of the learned senior counsel is that the Arbitration Agreement in the contract, vide question 4 of the queries to be answered by the tenderers reads:

“Do you agree to sole arbitration by an officer in the Secretary BRDB to be appointed Arbitrator?”

In answer the respondent had written “OK Noted.” Thus the Arbitration Clause according to the learned senior counsel does not confer on the Arbitrator any authority to decide the dispute on equitable principles. There is no separate and express authorisation by the parties to decide *Exx Aequo Et Bono* or as *amiable compositeur* as required by Section 28 (2) of the Act.

The argument is that there was only one substantive claim by the respondent which was claim No. 1. This claim was on account of the amount paid during November 1994 against the advance payment of 80% when the equipment arrived at site. It is submitted that this is a claim in equity. The parties had not authorised the Arbitrator to decide the said dispute. Besides, the claim has no foundation. The cancellation was made on the ground that the petitioner had failed to commission the Plants to the required parameters and was not founded on any allegation that the Plants were not manufactured and supplied.

(e) It is next contended that the Award travels beyond the terms of the contract as well as the grounds on which the DGBR itself cancelled the

contract. The contract does not mention 80% payment as being 'Advance Payment' nor does it stipulate that the payment shall be 'on account'. The sole stipulation is that the payment will be made on proof of initial inspection at the premises of the petitioner and receipt of machines at site.

(f) It is further contended that under clause (h) of the AT, Inspection was made and the Inspection Note was duly accepted by the respondent. It was recorded in the communication dated 02.08.1994 that the Plant meant for each consignee had been inspected and accepted. The Arbitrator has completely ignored this document.

(g) Learned senior counsel further contended that the finding that after recovering the money, the petitioner may take back the Plants is equally untenable. Admittedly, the equipment was supplied in 1994, the contract was cancelled in 1998 and the claim was lodged in 2002. By the time the award was rendered, the plants being embedded in the earth and having suffered adverse weather conditions, have become dysfunctional and are no more than a piece of junk. Thus, this direction of the Arbitrator is meaningless.

(h) Learned senior counsel also laid stress on the point that in fact the petitioner had successfully delivered the Plant in Pathankot, where the same was to be erected and commissioned as per the AT. However, the respondent unilaterally and without informing the petitioner shifted the whole plant to another site at Avantipur. This site was not the site specified in the contract, apart from the fact that it was 500 kilometers North of Pathankot and 30 kilometers away from Srinagar. According to the petitioner the site conditions were far different in Avantipur, in terms of climate and

topography and this largely contributed to the Plant not functioning. The respondent had at no point of time, informed the petitioner about the harsh and abnormal climatic conditions in Avantipur. The Plants can operate only within limited range of atmospheric temperature and abnormal conditions would certainly affect the operation of the Plants. The shifting of the entire Plant over a distance of 500 kilometres could have also damaged the Plant.

(i) Learned senior counsel has relied on the judgments of the Apex Court in the case of *General Assurance Society Ltd. vs. Chandumull Jain (1966) 3 SCR 500*, *Oriental Insurance Co. Ltd vs. Narbheram Power and Steel P Ltd (2018) 6 SCC 534*, *Adani Power (Mundra) Ltd. vs. Gujarat Electricity Regulatory Commission 2019 SCC Online SC 813* on the proposition that once there is no equity clause in the standard form contract, the Arbitrator cannot script a contract for the parties. Reliance is also placed on the judgment of the Apex Court in *Bank of India vs. K. Mohandas (2009) 5 SCC 313* for the proposition that the contract is liable to be construed contra – proferentem against the Union of India. It is thus argued that the Award insofar as it allowed claim No. 1 be set aside.

17. No other claim or counter claim were pressed by the learned senior counsel.

18. *Per contra*, learned counsel for the respondent has argued that right from the beginning of the contract, the petitioner kept on asking for extensions for completing the work. Several letters to this effect were filed before the Arbitrator. Despite several reminders to the petitioner and its assurances to complete the erection and commissioning, the petitioner failed to commission the plant at Silchar with the required rated capacity. There was mismatching of components, faulty alignment, design shortcomings and

deviations in specifications. The Plant could not produce the rated output of 30-45 TPH and gave an average output rate of only 11 TPH on 12.12.1997. On 13.12.1997, the Plant did not operate due to chocking of Bitumen Transfer System and even on 14.12.1997, the output was far too low. This was a clear breach of contract by the petitioner and all the lapses were communicated to the petitioner at the relevant time.

19. It is contended that insofar as the Beacon Plant was concerned at Avantipur, the same was only delivered at Pathankot but was never erected nor commissioned at Avantipur, despite several reminders to the petitioner. Petitioner first postponed the erection on the ground of cold weather. Subsequently excuses of security threats were made. Despite several letters and high level meetings, no steps were taken to erect the plant.

20. It is submitted that once the petitioner failed in erecting and commissioning one Plant and erected the other Plant with defects, the respondent was justified in cancelling the contract and thus became entitled to refund of the 80% payment, given as advance.

21. Counsel for respondent argued that it is wrong to contend that the property in the machinery passed under the Sale of Goods Act, to the respondent. It is contended that in the present contract, supply of Plant was not a severable part of the contract, but was part and parcel of the second part of the contract, which was erection and commissioning. The Arbitrator has rightly taken note of the breach on the part of the petitioner and refunded the amount to the respondent.

22. It is next contended that the contract agreement envisaged two types of inspection: (a) inspection by the seller and (b) final inspection by the

User, at the time of commissioning. At the time of initial inspection, the checks that are generally carried out are completeness check, quality conformity as per AT, specification checks, model number, list of tools, technical literature, markings etc. which are merely visual. It is submitted that the HMP is a huge construction machine and therefore, functionality/serviceability check of the machine is not possible during the initial inspection. It is only during the final inspection when the equipment is commissioned and trial run is carried out that it is tested for functionality. A Load Test is also carried out and it is at this stage that the shortcomings are noticed. Therefore, the advance payment of 80% is required to be returned back to the respondent once the petitioner did not complete its part of the obligations under the contract.

23. I have heard the learned senior counsel for the petitioner and the counsel for the respondent along with an officer from the office of the DGBR, who had been called by the Court for certain clarifications on the technical aspect of the matter.

24. The present case would have to be examined on the touchstone of principles governing contracts between parties keeping in mind that none of the conditions of AT have been challenged by the petitioner, as well as the scope of judicial review under Section 34 of the Act.

25. A reading of the contract and its various clauses, brings out that the contract in question was for supply, erection and commissioning of two Auto-batch type Hot Mix Plants, with a required output capacity of 30-45 TPH. The consignees were also clearly mentioned in clause 9 of the AT and it was clear that the Plants had to be delivered at Silchar and Avantipur,

respectively. The terms of payment were given in clause (e) of the AT which has been extracted above.

26. The petitioner had accepted all the terms and conditions of the AT. Right from the date of start, petitioner had requested for extension of the delivery period. The Plants were delivered at the respective sites in 1994 in dis-assembled condition. As noted above, the Plant at Silchar was erected but it never achieved the required output rate and the Plant at Avantipur was neither erected nor commissioned.

27. Major plank of the arguments addressed by the parties were with respect to claim No. 1, preferred by the respondent herein. The claim was for return of the 80% amount released to the petitioner, on delivery of the two Hot Mix Plants, on initial inspection.

28. The learned Arbitrator in order to decide claim No. 1 has delved into the terms of the contract as well as the technical snags in the commissioning of the Hot Mix Plants.

29. The Arbitrator posed itself some vital questions as under:-

“1. Whether the respondent committed breach in respect their contractual obligation in supplying, erection and commission of the 2 Hot Mix Plants mentioned in the contract dated 12th October, 1993, between the parties as alleged in the claim Petition?

2. Whether the Claimant is entitled to recover from the respondent the amount mentioned in the Claims No.1 to 9 in Schedule of the Statement of Claim or any part thereof?

3. Whether the Claimant is entitled to interest on the amount which they are entitled to recover from the Respondent and if so, at what rate and for what period?

4. *Whether the Claimant committed any breach in their obligation under the aforesaid contract as alleged by the Respondent?*
5. *Whether there are justified reasons for respondent not to fulfil all their obligations or some of them under the contract as alleged?*
6. *Whether the change of site of erection of one Hot Mix Plant from Pathankot to Awantipur amounted to change in terms of contract, if so, its effect?*
7. *Whether Respondent had voluntarily accepted the site of erection from Pathankot to Awantipur?*
8. *Whether the Claimant caused damage to the Hot Mix Plant delivered by the Respondent at Pathankot while transporting the same from Pathankot to Awantipur as alleged?*
9. *Whether it was due to facts beyond control of Respondent or due to natural causes or act of God that Respondent could not comply with the delivery, erection and commission of Plant as required under the Contract?*
10. *Whether the liquidated damages levied by the claimant on the Respondent were justified, if so, whether the claimant is entitled to claim it from the Respondent or vice versa?*
11. *Whether SQAE on inspection gave certificate of fitness of both the Plants, if so, when and what is effect?*
12. *Whether the respondent is entitled to claim balance of price of the two Plants i.e. 20% of the contracted price which was not paid so far?*
13. *Whether the Respondent has 'supplied, erected and commissioned the Hot Mix Plants at Silchar as per the contractual obligation, if so, its effect?*
14. *Whether in the area of Silchar, in respect of plant supplied, erected and commissioned as alleged, its performance was adversely affected due to rains or moisture or natural causes as alleged by the Respondent?*
15. *What is the effect of any admission, if any, between the parties in the Joint Inspection Report?*

16. Whether the Respondent is entitled to recover any money from the claimant, as alleged in counter claim if so, how much?

17. Whether the Respondent is entitled to recover interest, if so, at what rate and for what period?

18.To what relief either of the parties are entitled? ”

SILCHAR PLANT

- i. (Ex.C-42) was heavily relied upon by the Arbitrator. This was the last ‘Joint Report’ which contained results of Joint Load Test in presence of senior officials from both sides. Relevant part of Award noting the defects pointed out in the report is as under:

“This report starts with a recitation that the Last Joint Load Test was conducted on 26th and 27th June, 1997, when this Hot Mix Plant did not perform satisfactorily due to various design inadequacies and performance short comings as brought out in the Joint Report dated 28th June,1997. At that occasion, M/s ACME requested DGBR for three months time to rectify the defects/short comings and carry out complete servicing and modification in the Plant to make it fully reliable and functional to rated capacity and specified performance para-meters. Then there is further recitation that the firm has carried out certain enumerated jobs to improve its reliabilities and performance. These are enumerated seven jobs which have been detailed in Annexure A-3 hereto. However, the leading one is servicing of Heating System to ensure operation of burner in high and low flame in Auto Mode. Another job worth noticing is rectification of Dryer Drum transmission and replacing the damaged fluid coupling plate and also replacement of defective exhaust Blower Impeller. Then this report refers to what happened on the trial run/operation of the Plant on 12th December, 13th December and 14th December and what break downs occurred. Mainly there were repeated choking of Bitumen transfer system from

Bitumen Tank to Pugmil. Bitumen got stuck in pipe and pump due to low temperature and motor was burnt repeatedly. There was found inadequacy in heating capacity of Aggregate Burner. It was not adequate to achieve required temperature of Hot Mix. At item No. 13, this report records that over all performance of the plant is not satisfactory. Out put achieved on all three days was only nominal or nil. During the period, the plant functioned for two or three hours, the out put average ranged between of 11 to 20 Tons per hour on one or other of these days, during the period of 2-1/2 hours after great intermittent efforts at repairs. This out put loses significance (what ever it is worth) as there was so much break down of vital parts whenever its functioning was attempted and most of the time was taken in repairing it on particular days or ensuing days. The expected temperature was never achieved.

As regard Auto Operation of the Plant, report specifically mentioned that the operation of the Plant could not be put on Auto batching operation as it could not be continuously run on manual mode due to choking problem of Bitumen.

The reason of poor performance of Plant are recorded in Para 21 of this report and it mentions choking of Bitumen in transfer system from Bitumen Pump to Pug Mill on all four days and it took 2 to 6 hours to remove this choking and secondly there was inadequate heating capacity of Aggregate Burner. It could not achieve required temperature of 135°C to 140° C throughout. Of Course, it is mentioned that high moisture contents in the aggregate/sand due to rains has also affected the out put and the temperature of the mix.

It is also mentioned in this report that the frequent rains during the test has also interrupted the continuous working of the plant.

Net result is recorded in para No.22 that the performance of Plant is not satisfactory. It could not achieve the rated output and the specified temperature. Final result is recorded in Para 23 that the Plant is not fit in its existing form and it needs a number of listed modification, /additions/repairs for satisfactory running. There is List of 8 such items of modifications/repairs/additions which are needed for its satisfactory functioning. These were : Need for fitting Drier Drum Burner of higher capacity, need for improving Bitumen Transfer System, eliminate chocking of Bitumen in Pump and Pipes, Heavier Power Motor were required to be fitted to overcome minor chocking of Bitumen Transfer System from Bitumen Tank to Pug Mill, Heavier Plate was required to replace couple Plate of Drier Drum, (the thickness of plate used to manufacture drier drum was found much less than prescribed in the N.I.T.), Chain Transmission required to be properly covered to avoid wear from abrasives falling on the chain, electric wiring system from Plant Control Panel to various system was required to be protected from weather condition.”

Arbitrator observed that petitioner undertook to carry out modifications, but did not do so. Arbitrator rejected the contention that contract was impossible to perform or that targets could not be achieved due to rains/adverse weather conditions. There was no plea that contract was *void ab initio* since DGBR had not disclosed the season/climate changes. In fact, trial runs had failed in different months in different years and thus could not be even related to adverse weather conditions or seasonal changes. Communication dated 18.11.1996 (Ex.C-35) brought out 16 deviations from the specifications in the AT. 12 major defects were found in the trial run as under:-

- i. *Slinger conveyer has got torn and perished.*

- ii. *Roller bearing of slinger conveyer broken.*
- iii. *Abnormal sound coming, from motor/reduction gear.*
- iv. *Temperature of the aggregate does not come upto the required level at the desired output of the plant;*
- v. *Hot elevator bottom tensioning shaft loosen out while running of elevator since there is no system to lock the shaft or any collar provided to avoid, the axial movement of the shaft.*
- vi. *Filler screw conveyer unit not yet tried/tested properly.*
- vii. *Material coming out through the mixing shaft of pugmil. This will damage the shaft and bearings.*
- viii. *Pugmil shaft key comes out very frequently.*
- ix. *Railing of platform of pugmil is mounted using single nut and bolt arrangement which is not strong enough.*
- x. *Bitumen pump of boiler gives abnormal sound.*
- xi. *Temperature of Bitumen is not reflected correctly in the control panel.*
- xii. *Hot oil is not circulated smoothly in the circulation pipe and chambers, leading to frequent blockage. Hence, hot oil spills out with high pressure through valve/connection wasting huge quantity of hot oil.*

Second major problem observed was that plant was not working on Auto mode. Arbitrator has significantly noted in para 68 that the defects were admitted by the petitioners. Relevant part is reproduced as under:-

“68. Thus we see that from the very start till the contract was cancelled, so many vital defects Were noticed and pointed out repeatedly by the claimant DGBR to Respondent, and to the various officers of the Respondents. These defects were even admitted by officers of respondent. Thus N.B.Joshi RW-2 of Respondent was confronted with two communications RW-2/X1 dated 6.10.97 and RW-2/X2 dated 14.2.98 signed by Maj. Salil Tandon of 1953 Field Workshop C/o 56 APO which was annexed with a table of defects noted in Awantipur Plant in inspections on 8.2.98, (by Major Salil and Col. Katoch if DGBR and Mr. Doshi of Respondent) and on 11.2.98 by Mr.Sobha Ram AE, and Mr. Doshi and a copy of this communication was sent to Mr. Doshi also. This letter Ex. RW-2/X2 dated 14.2.98 with its Appendix A, was proved by Lt. Col. R.K.Sharma CW-3 also as S2 and a detailed discussion of it is being made at a subsequent stage of this Award(Paras 83 to 89) . It detailed vital defects in Awantipur Plant. Mr. Joshi's only reply was that he did not know about these communications. Then in C-42 dated 15.12.97 and 0-11 which are admitted documents, respondent admitted existence of vital defects in the plants.”

Argument that the plant was inspected by SQAE and certificate of fitness was given and thus any problem in erecting/commissioning and operation of the plants cannot mean there is violation of AT has been dealt with as under by the Arbitrator:

“These arguments of Learned Counsel for respondent conveniently omit the facts that the Contract was not only for supply of the two Plants but also essential requirement was of their erection and commissioning to achieve the contracted output of Hot Mixed aggregate at contracted temperature by respondent themselves at named location/site. The three essential aspects of Respondent's obligation were: supply 'of two plants i.e. all their parts from smallest assemblies to largest and nuts and bolts which were required to make these plants

whole, erecting these plants at their determined site and lastly smooth functioning of the plants for continuous Hot Mix aggregate products with products temperature going to the extent 140°C producing Hot Mix @ 30/45 Tons per hour within moisture variations of 2% to 6% by weight of aggregate temperature variations of 2°C to 6°C. For the purpose of commissioning after erection, the respondent had to carry out trial run of the Plants for their own satisfaction and it was to be shown that when they were satisfied themselves. with trial run, they could call upon the claimant or DGBR to get the Plant inspected jointly by them and by Authorized Officer or representative of the SQAE. Requirement of this joint inspection could arise only after the Respondent themselves were satisfied of the functioning of Plant after erection, and their performance being upto the required parameter in terms of at least production and temperature. This is so provided as essential terms in AT.”

- ii. The Arbitrator has observed that the Plant rarely functioned for one to two hours and that too did not give the required output, due to the choking of the Bitumen Transfer System, on several occasions. The Arbitrator has observed that the Plant had two vital functions; (i) to mix the Bitumen and ensure that it is flowing; and (ii) that there is auto batching of the aggregate and mixing of the loaded aggregate with hot Bitumen, at controlled speed and temperature. He has noticed that the Silchar Plant was only a ‘machine’ which failed again and again and DGBR (user department) had to suffer due to non-use of the Plant for construction of the Road at sensitive areas of the country, despite having paid 80% of the contract value, as advance.
- iii. Learned Arbitrator has rendered a finding that the contract was a “**Composite** agreement” for supply, erection and commissioning and

mere supplying the Plants could not absolve the petitioners of their contractual obligations. Reference has been made to several communications from the Headquarter DGBR wherein it was being repeatedly pointed out that the Plant at Silchar was totally defective. A large part of the Award is dedicated to pointing out in detail, the various problems faced by the DGBR in running the Plant.

AVANTIPUR PLANT

30. The learned Arbitrator has made an in-depth analysis with regard to the Plant which was required to be commissioned at Avantipur. Several letters have been relied on which were admittedly written by the DGBR requiring the petitioner to carry out the commissioning and offering the help of their Engineers. The learned Arbitrator has also dealt with the issue raised by the petitioner about the alleged change of destination and observed that there is no deviation from the AT. The exact location of the place was mentioned as Avantipur. Of course, the delivery point was stated to be Pathankot, but several communications between the parties according to the Arbitrator, mentioned Avantipur as the site of erection. The Arbitrator also significantly noted that the petitioner had sent their Engineer in September 1994 to lay down the foundation of the Plant at Avantipur. When these locations were known and declared and acted upon, it was for the petitioner to find out the base Altitudes or prevalent climatic condition, including the rainfall. The argument of change of destination was rejected by the Arbitrator as merely an afterthought. The Arbitrator also notices the fact that in one letter S-2, it was clarified that the Plant was to be first commissioned at the same location and tested for performance before shifting to the new

location and therefore, and thus the plea of change of destination was a concocted story by the petitioner. In fact, the Arbitrator has also taken note of several defects in the Plant to be installed at Avantipur and has given a detailed list of the said defects at page 102 of the Award. Having detailed the breaches on the part of the petitioner, the Arbitrator has come to a finding that it was the petitioner, who was guilty of committing breach and not the respondent. The relevant portion of the Award relating to the defects is extracted hereunder:

“Lt. Col.R.K.Sharma CW-3, with his Affidavit, has produced letter S-2 dated 14.2.1998 sent by Officer commanding Major Salil of 1053 Field Workshop (GRAF) to HQ 32 BRTF with a copy to Mr. Doshi, Development Engineer, ACME and to HQ Chief Engineer (P) BEACON, apprising that Joint Inspection of Plant at Awantipur on 8.2.1998, was done by two officers of Claimant DGBR namely Col.Katochh and Major Salil in the presence of Mr. J.S.Doshi, of ACME, at site where it was being erected and decided that before shifting to a new location the Plant must be made functional first at its present location and only thereafter it will be decided whether to shift this plant to another site. Again inspection was done on 11.2.1998 by Shri Shobha between them that necessity of the shifting of the Plant can't be ascertained without commissioning of Plant at same location and testing it before shifting to new location. This Appendix A records the defects visually noticed then in the Awantipur Plant. In these inspections they noticed , visually , large number of major and minor defects/omissions/ short comings . in this plant. The list of these defects was annexed to this communication.”

Arbitrator observed that table of defects was signed by officer of the petitioner on all pages and on cross examination Ex.S-2 was proved to be a genuine document. The Arbitrator has observed as under:-

From a close perusal of all the documents placed on record by both sides, as has been discussed hereinabove, it is clear that Hot mix Plant at Awantipur could not be erected by Respondent because there was mis alignment of various assemblies qua each other and qua foundation which were got filled by respondent's Engineer. The difficulties have been noticed in detail in the joint report sent with communications (already discussed). There were so many short comings and omissions showing why this Plant of Awantipur could not be erected.

“95. Assertion of Respondent's counsel that DGBR had requested for shifting of Plant to another site at Awantipur is not acceptable. There was no such request. According to Respondent as recorded by them in 0-21 dated 7.1.98 sent to DGBR on the basis of joint meeting of the parties regarding Beacon Plant it was agreed that detailed work programme will be chalked out for shifting and erecting the plant in consultation with Chief Engineer Beacon, if the Plant is to be shifted and the Respondent will complete the Plant within 3 months from readiness of the foundation laying of which the Respondent was ready to supervise. It was specifically mentioned that if the Plant is to shift, it will be transferred under supervision of Acme. This was the joint decision of shifting the Plant either at the request of DGBR or at the initiation of Respondent. It was only a conditional statement about how ACME would proceed to take action, if the Plant is required to be shifted. However, the plant was not required to be shifted. I have above noticed that in another Joint Report 8-2, with Appendix A proved by Lt. Col. R.K.Sharma, it was specifically mentioned that unless the plant was made functional, at existing site, it would not be ~a tabulated report of those defects, omissions and short comings were also noticed. If plant was required to be shifted, fresh time of three months was to be given to erect and commission the plant at new site after its foundation were freshly laid at new site. Apparently this Plant's assemblies were defective and mis-aligned to each other

and there were omissions of essential parts such that the plant could not be erected as a functional Hot Mix Plant. The respondent has failed to explain why for a period of 3 Y2 years they could not erect the plant. They were initially" harping on the facts of non provision of 30 ton Crane but even that was provided quite in time and all assistance was provided to respondent's Engineer but to no avail. Whatever they supplied at Pathankot was taken to Awantipur, but it could not be erected as Hot Mix Plant by Respondent. Its commissioning would have been next step which, of course, never reached. Thus respondent failed to meet their necessary obligation, which was their duty to perform in this contract."

31. The Arbitrator has, based on several communications before it and the evidence led, has come to a finding of fact that the petitioner had failed to erect and commission the Plants and was in breach of the obligations and in my view, rightly so. This was a composite contract for supply, erection and commissioning of the Hot Mix Plants and only when the plants were commissioned and worked to the required capacity, the obligation of the petitioner could be said to be discharged. The learned Arbitrator with great pains has come to a conclusion that having advanced 80% of the money to the petitioner, the DGBR could not utilise the Plants and the process of road construction suffered.

32. While examining the objections against the Award under Section 34 of the Act, the scope of judicial review is extremely narrow. The Arbitrator is a master of facts and evidence. In the present case, the Arbitrator has gone into depths of the technicalities and come to a finding that the Plants supplied by the petitioner could not be put into operation. This Court cannot substitute its views for the technical findings given by the Arbitrator as neither it is in the domain of this Court to so interfere nor does the Court

possess the expertise to do so, more so when a possible view has been taken by the Arbitrator.

33. The contention of the petitioner that having supplied the machine and having received 80% payment, the goods had passed to the petitioner only deserves to be rejected. When the contract was entered into between the parties, the intent was clearly to purchase Hot Mix Plants, which upon erection and commissioning could be operated for the purpose of laying roads in border areas. Mere supply of the machine cannot absolve the petitioner. On ultimate analysis, I find that petitioner failed miserably in even erecting the Plant at Avantipur. As regards the Plant at Silchar, though it was commissioned, but it was incapable of functioning as per the requirement. It broke down whenever attempt was made to commission it. Even during the intermittent running the required temperature was never achieved. The initial certificate by SQAE was only to release advance payment. Final testing was to be by the User i.e. DGBR. But this stage was never achieved. Thus initial inspection can be of no avail to the petitioner. This Court cannot shut its eyes to the fact that the project involved was laying down roads in the difficult terrains on the borders. These are very crucial and critical projects. Failure on the part of the petitioner to supply the plants, as per specifications, had delayed the project and caused an irreparable damage to the respondent.

34. The 80% payment given by the respondent was only by way of an advance on receipt of the machinery and initial visual inspection. This surely cannot connote that the petitioner would be entitled to the payment even though one plant did not work and the other was not even erected. In

my view, petitioner being guilty of breach cannot be permitted to retain the 80% amount and this is an unjust enrichment of the petitioner. The Arbitrator in my opinion, has taken a plausible view which requires no interference from this Court.

35. The judgments relied upon by the petitioner would not apply to the present case. This was clearly a composite contract. Till the plants were successfully commissioned, the obligation of the petitioner under the contract was not complete. Thus, it cannot be argued that with 80% payment being released, goods passed to the respondent under the Sales of Goods Act.

36. For the reasons stated above, there is no merit in the petition and the same is hereby dismissed.

OCTOBER 15th, 2019
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(JYOTI SINGH)
JUDGE