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

Reserved on: 22.01.2020

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Pronounced on: 27.05.2020

+ O.M.P. (COMM) 365/2017

JUPITER RUBBER PVT. LTD. Petitioner

Through Mr. Ramesh Singh & Mr. Pankaj
Jain, Advocates

versus

UNION OF INDIA Respondent

Through Mr. Dev P. Bhardwaj, CGSC with
Ms. Aakanksha Kaul, Advocate

+ O.M.P. (COMM) 54/2019

UNION OF INDIA Petitioner

Through Mr. Dev P. Bhardwaj, CGSC with
Ms. Aakanksha Kaul, Advocate

versus

JUPITER RUBBER PVT. LTD. Respondent

Through Mr. Ramesh Singh & Mr. Pankaj
Jain, Advocates

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

J U D G E M E N T

1. Both these petitions have been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act')

challenging the Award dated 26.05.2017 passed by the Arbitral Tribunal. O.M.P. (COMM) 365/2017 has been filed by Jupiter Rubber Private Limited challenging part of the Award wherein imposition of Liquidated Damages has been upheld by the Arbitrator though with reduction from 10% to 3% as also challenging the rejection of the Claim of interest on delayed payments.

2. OMP(COMM) No. 54/2019 has been filed by the Union of India challenging the Award to the extent it has reduced Liquidated Damages (hereinafter referred to as 'LD') from a sum of Rs. 70,79,581/- to Rs. 23,12,875/-. Since both petitions lay a challenge to the same Award and common questions of fact and law arise, they are being disposed of by a common judgment. For the sake of convenience, Jupiter Rubber Private Limited is being referred to as Petitioner in both the petitions and Union of India is being referred to as Respondent.

3. Brief facts shorn of unnecessary details are that Respondent floated a tender on 25.10.2012 for purchase of 1,41,309 Light Weight Ground Sheets. Petitioner is a Registered Small Scale Industry in the business of manufacture of Light Weight Ground Sheets (hereinafter referred to as 'Sheets'), out of special fabric, outsourced from the market. Petitioner made an offer on 26.11.2012 to supply @ Rs. 501/- per piece, aggregating to Rs. 7,07,95,809/-. On 13.12.2013, Respondent accepted the offer of the Petitioner, however, at the rates prevailing in 2012, and the Petitioner provided a Bank Guarantee in the sum of Rs. 70,79,581/-, which was initially valid upto 30.06.2015, but subsequently extended, at the instance of the Respondent upto 31.12.2016.

4. Acceptance of Tender also provided for approval of the Sheets through 16 Nos. of advanced sample representing the entire bulk supply, out of which one number each had to be submitted to the Inspecting Officer, Indentor for each of the 14 consignees and 2 Nos. for testing with the DIG (Prov), Director General, CRPF, within 15 days of the receipt of the order for approval of the Sheets by the purchaser.

Case of the Petitioner

5. Petitioner submitted the advance sample of Sheets, which was duly approved by the Competent Authority on 10.03.2014 and information in this regard was received by Petitioner on 17.03.2014. Delivery period of the Sheets under the Acceptance of Tender (hereinafter referred to as 'AT') was 4 months or earlier, from the date of approval of advance samples for the entire quantity. The delivery period was thereafter refixed w.e.f. 10.03.2014 to 09.07.2014 or earlier.

6. AT provided for Pre-Dispatch Inspection (hereinafter referred to as 'PDI') after approval of advance sample. It was not possible to manufacture and offer the entire quantity of 1,41,300 pieces of the Sheets at a time and thus the Petitioner split the delivery into lots and offered them for PDI.

7. Under the agreed terms, once pre-dispatch intimation of a particular lot was given to the Respondent, the Respondent through its Board of Officers would draw random samples, out of the said lot, and send to a NABL approved Laboratory for testing. Simultaneously, Respondent would seal the remaining Sheets of that lot and keep them in a Bond Room and retain the keys. After receiving confirmation from the Laboratory that the samples tested, met the Tender specifications, the

entire lot was forwarded to the Provisional Directorate (Delhi), for giving specific recommendation for acceptance of the lots by the Competent Authority and only thereafter the keys of the room used to be handed over to the Petitioner, for supply. In case of non-confirmation of the samples, the keys and the samples were retained for about a month.

8. Initially, the Petitioner could not offer the Sheets for PDI due to non-availability of the officers of the Respondent to conduct the same as they were involved in Election Duty in 2014. The first lot of 20,447 pieces was offered for PDI on 08.05.2014. Clearance by the Board was given on 30.05.2014, after 22 days. 90% of the payment covered by the Challan was received between 09.07.2014 and 01.10.2014, much after the period for making payment, mentioned under Clause 19 of the AT.

9. Second lot comprising of 32,612 pieces, with aggregate value of Rs.1,63,38,612/- was offered for PDI on 20.06.2014. Goods were cleared only on 03.09.2014 i.e. after 75 days. Bond Room keys were handed over on 15.09.2014 i.e. after 87 days and only thereafter the supply of second lot could be effected. On 25.07.2014, the delivery period was extended by four months i.e. upto 01.12.2014 with Denial Clause and LD.

10. Third lot of 32,358 pieces was offered on 17.09.2014 for PDI and clearance was received on 17.11.2014 i.e. after 60 days. Fourth lot of 35,600 Sheets was offered for PDI on 17.11.2014, clearance whereof was received on 27.01.2015 i.e. 87 days thereafter. Final lot of 20,327 Sheets was offered for PDI on 29.01.2015 and was cleared on 31.03.2015 i.e. after 61 days. On 30.12.2014, the delivery period was extended from 02.12.2014 to 11.03.2015. Last consignment admittedly was received by the consignee at Bilashpur on 25.05.2015.

11. Petitioner received 90% payment in respect of Sheets supplied under the first Four lots, but while making 90% payment towards the Fifth lot, Respondent deducted Rs. 70,79,581/- towards Liquidated Damages (LD). Respondent also deprived the Petitioner of the interest on delayed payments under the provisions of Interest on Delayed Payment to Small Scale and Ancillary Industrial Undertakings Act, 1993, which it was entitled being an SSI Unit.

12. Aggrieved by the action of the Respondent, Petitioner took recourse to arbitration and made the following claims before the Tribunal:

“(a) An award for Rs.86,14,596/- against Respondent and in favour of Claimant, as pleaded in paragraph 23 hereof;

(b) A declaration that the Respondent is not entitled to impose Liquidated Damages of Rs. 70,79,581/- or any part thereof as against the Claimant;

(c) Interest; interest pendente lite and interest upon award at the rate of 21.075% per annum.”

13. Respondent filed its Statement of Defence. Finally, the Tribunal passed the impugned Award. Claim of the petitioner for interest on delayed payments was rejected. Imposition of LD was upheld, but the quantum was reduced from 10% to 3% of the contract value, with directions of refund of the balance amount to the Petitioner within three months from the date of the Award, failing which, it would carry simple interest @ 6% per annum post Award till realization.

Case of the Respondent

14. Petitioner offered first lot for PDI on 20.05.2014 i.e. after expiry of more than two and a half months from the date of re-fixation of delivery period, against the stipulated period of four months. PDI was carried out on 29.05.2014 and the Board of Officers (BOO) after drawing 80 Nos. of Sheets as samples found them to be in conformity with the specifications and requested the Petitioner to supply the lot to the consignees.

15. Petitioner on 09.07.2014, intimated dispatch of 20,477 Nos. and further offered second lot of 32,612 Nos. for PDI, also requesting for delivery period extension by four months with LD Clause. Accordingly, Respondent extended the delivery period upto 01.12.2014 with LD charges, vide letter dated 25.07.2014.

16. BOO carried out PDI of the Second lot on 28.06.2014 and randomly selected the samples and dispatched them to NABL Laboratory on 03.07.2014. Test Report was made on 08.08.2014 and the BOO again carried out inspection on 10.08.2014, after receipt of the Report. Report of PDI was accepted by the Competent Authority and the same was conveyed to the Petitioner on 28.08.2014.

17. Petitioner offered the Third lot on 17.09.2014 and PDI was conducted on 19.09.2014. It was again inspected on 24.10.2014, after the Laboratory report and Petitioner was intimated to commence the supply on 17.11.2014.

18. On request of the Petitioner vide letter dated 02.12.2014, delivery period was extended upto 11.03.2015, with LD Clause. Petitioner offered Fourth lot on 17.11.2014, whereupon PDI was conducted on 27.11.2014 and post Laboratory Report Inspection was done on 15.12.2014. Petitioner was intimated to commence supply on 19.12.2014. Likewise,

Fifth lot was offered on 29.01.2015 and was inspected on 09.02.2015. On 10.03.2015 Post Lab Inspection was done and petitioner was asked to commence supply on 17.03.2015.

19. Last consignment was received by the Consignee on 25.05.2015 i.e. after lapse of more than One year and Five months from the date of placement of supply order. Acting in accordance with Clause 22 of Schedule to the AT read with para 14 (7)(i) of DGS&D – 68 (Revised), Respondent imposed LD to the tune of Rs.70,79,581/- on account of delayed supplies and the same were recovered from the pending bills of the Petitioner.

20. Learned counsel for the Petitioner argued that LD could have been imposed only if the Petitioner was solely or partly responsible for the entire delay in performance of the contract and secondly if the Respondent had actually suffered any monetary loss or damage. However, in the present case, though the petitioner was ready with its supplies, Respondent delayed the inspection, testing and clearing the said supply in lots. It is submitted that a chart to this effect was placed before the Tribunal. The dates in the Chart would show that on the very day when the earlier challans/lots were cleared, Petitioner would offer the next lot. Respondent took 320 days in clearing the Five lots, as against total 100 days under the Contract. Documents to this effect were placed before the Tribunal, but have not even been dealt with. In addition, the Respondent neglected in Inspecting the Sheets on time and retained the keys of the Bond Room, for unreasonably long periods, which each time delayed the offer of the next lot, despite the Sheets being ready. On a complaint made by the petitioner, in this regard, internal Memos were

also issued to the concerned officers, in-charge of Inspection. Petitioner could not be blamed for the keys not being handed over on time and major part of the delay was on account of this. It was argued that the Arbitrator cannot ignore vital evidence placed before it and this is settled law as held by this Court in ***Sunil Kukreja vs. North West Sales and Marketing Ltd. in OMP (Comm) 456/2017, decided on 24.04.2018*** and ***Govt. of NCT of Delhi vs. Hurryson Enterprises in OMP 608/2008, decided on 18.12.2018*** as well as by the Supreme Court in ***Associate Builders vs. DDA [2015 (3) SCC 49]***.

21. It is argued that the sole ground on which the Arbitrator has blamed the petitioner for the delay is that there was no condition in the Contract for supplying the Sheets in multiple lots. This finding is in the teeth of the contractual provisions as there was no provision prohibiting supply in multiple lots and the only requirement was supply to be completed within the delivery period of four months. Respondent took almost seven and a half months more, than the period which was actually required, to fulfil its obligations of inspecting, testing and clearing the lots. Respondent was bound by its reciprocal obligations under the law of contracts, more particularly, Sections 50 to 54 of the Indian Contract Act, 1872.

22. It was further argued that it is wrong for the Respondent to contend that the Petitioner had agreed for imposition of LD by seeking extension, inasmuch as the language of the letter indicates that the extension was sought 'as per the LD Clause' and there was no agreement towards imposition of LD. This Court in ***Bharat Sanchar Nigam Limited vs.***

BWL Ltd., 2011(2) Arb.LR 131 (Delhi) (DB) has rejected a similar contention.

23. It is next contended that the imposition of LD, even otherwise is contrary to law as the respondent neither pleaded nor proved any monetary loss or damage, on account of the alleged delay, in execution of the contract. In the case of ***Ghanshyam Das Gupta vs. Makhan Lal, MANU/DE/0235/2012***, it has been held by the Court that in the absence of pleading or proof, such a deduction is illegal. It is settled law that even in case of LD, governed by Section 74 of the Indian Contract Act, the party is required to prove loss. Reliance is placed on the judgment of the Supreme Court in ***Kailash Nath Associates vs. Delhi Development Authority, 2015 (4) SCC 136***. Even though a party need not prove damage or loss upto the threshold as required under Section 73, however, it if incurs no loss at all, Section 74 cannot come into play. Reliance is placed on ***BSNL (supra)*** and ***Tower Vision India Pvt. Ltd. vs. Procall P. Ltd, 2014 (183) Comp Cas 364 (Delhi)***.

24. It is further contended that assuming but not conceding that the deduction of 3% is justified towards LD, then also the amount deducted is *ex-facie* illegal as this has been done on the entire contract amount whereas should have been only on supplies made beyond the original delivery period i.e. w.e.f. 09.07.2014. Admittedly, the First and the Second lots had been offered for inspection and testing upto 20.06.2014 and thus the value of supply made post 09.07.2014, was worth only Rs. 4.46 Crores and the LD should have been 3% of Rs. 4.46 Crores.

25. The next contention of the learned Counsel for the Petitioner is with respect to the Claim of interest on the delayed payments made by the

Respondent. It is argued that even though the Arbitrator held that there was delay in payment, it declined the interest on broadly two grounds: (a) failure to deliver goods on time and (b) no provision in the contract for levy of interest on delayed payments and that the Arbitrator cannot travel beyond the contractual terms. It is argued that the Claim for interest had nothing to do with the alleged delayed supply of the Sheets and consequential deductions, but was a Claim in respect of amounts actually paid, but belatedly. Section 31(7)(a) of the Act permits the Arbitrator to grant interest in all cases, except where there is contract to the contrary, between the parties. Section 3 of the Interest Act, 1978 also enables the Arbitrator to grant interest on delayed payments. Reliance is placed on the judgment of the Supreme Court in *Assam State Electricity Board & Ors. vs. Buildworth Pvt. Ltd.* 2017 (8) SCC 146 and *State of Orissa vs. B.N. Agarwalla & Ors.* [1997 (2) SCC 469]. Hence the Award to this extent deserves to be set aside.

26. *Per contra* learned counsels for the Respondent at the outset argued that this Court has a limited jurisdiction under Section 34 of the Act and ought not to interfere in the Award. Arbitrator has declined to award interest on the payments made to the Petitioner and also found recovery on account of LD to be justified, though at a reduced percentage, and this was clearly in the domain of the Arbitrator. Supreme Court in the case of *Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India (NHAI)*, [(2019) 15 SCC 131], has held that there must be patent illegality appearing on the face of the Award which goes to the root of the matter, but is not a mere erroneous application of law.

27. On merits, it is argued that the Arbitrator, on appreciation of evidence, on record, found that there was no material which supported the Claim of delayed payment. It is urged that having failed to prove that the payments were delayed, no interest can be sought by the Petitioner. The Arbitrator as a matter of fact found that the Petitioner failed to deliver goods within the contractual delivery period and cannot blame the Respondent and seek interest. The Arbitrator observed that payment of Bills runs after delivery of goods. The other reason for rejection of the Claim was that there was no provision in the AT providing for levy of interest. It is argued that this Court in ***C.L. Gupta v. Delhi Development Authority***, [2006 (88) DRJ 300] has held that it is not necessary that in every case, the Arbitrator should award interest *pendente lite* and it is a matter within the Arbitrator's domain and discretion, to be exercised in the facts of each case. This is evident even from a bare reading of the language of Section 31(7) of the Act.

28. As far as the LD is concerned, the Arbitrator found that the Petitioner failed in supplying the Sheets on time to the Respondent and that there was no condition in the contract which permitted the supply of the Sheets in multiple lots. Petitioner, for his own convenience supplied the Sheets in multiple lots, which delayed the pre-inspection on each occasion. Had the Sheets been supplied in one or two lots only, there would have been no delay in inspections. Extension of time was granted subject to the LD Clause and at each stage, Petitioner had agreed to pay Liquidated Damages.

29. It is further submitted that the Arbitrator relied on a judgment in the case of ***Ministry of Defence, GOI vs. CENREX, Sp. Z.O.O. & Ors.***,

OMP 408/2007, in which the issue was of supply of parachutes to the Ministry of Defence and this Court held that in cases of supply to the Soldiers, it was impossible to calculate the loss, but surely the delay in supplies resulted in huge logistic problems. The finding of the Arbitrator cannot be termed as ‘patently illegal’ in view of the Law enunciated in the judgments in ***Construction & Design Services vs. Delhi Development Authority, Civil Appeal Nos. 1440-1441 of 2015, decided on 04.02.2015, ONGC vs. Saw Pipes Ltd., [(2003) 5 SCC 705], Belco Enterprises v. DTC [OMP Nos. 498, 502, 508 and 511/07] and Kailash Nath Associates v DDA & Anr. [(2015) 4 SCC 136]***.

30. It is further argued that the Law laid down in these judgments clearly is that where damage or loss is difficult or impossible to prove, Liquidated amount mentioned in the Contract, if a genuine pre-estimate of damage or loss, can be awarded.

31. It is next contended that Petitioner failed to offer 3 out of 5 lots, prior to the expiry of original delivery period and this is an undisputed fact. Petitioner was not required to wait for approval from the Respondent for one lot before offering the next lot and had it followed this pattern there would not have been any delay in supplies. Attention is drawn to a letter dated 09.07.2014, whereby extension of delivery period was sought and the Petitioner had admitted that it was unable to complete the supply of entire quantity, within the stipulated period, due to difficulty in procurement of the Yarn, required to manufacture the Fabric. This clearly shows that delay was not attributable to the respondent.

32. Arguing in support of the challenge to the Award by Union of India in OMP (Comm) No. 54/2019, learned counsels for the respondent

submit that the Arbitrator has not given any reason for reducing the LD from 10% to 3% and this is clearly contrary to provisions of Section 31(3) of the Act and a Patent Illegality. Reliance is placed on the judgment of the Supreme Court in ***Union of India vs. Mecano Export Import S.A., 2014 SCC Online Del 40.***

33. Learned counsel for the petitioner in reply submits that the judgment in ***C.L. Gupta (supra)*** is clearly distinguishable as firstly the judgment has been given under 1940 Act and not under the 1996 Regime. Secondly, the reasoning of the Arbitrator to deny interest is palpably unsustainable and an erroneous understanding that in the absence of a specific provision in a contract permitting grant of interest, no interest can be awarded by an Arbitrator. It is submitted that this Court in ***Mahalaxmi Light House vs. Chief Electoral Officei & Anr., in FAO(OS) COMM. 152/2017, decided on 20.09.2017,*** has interfered with the discretion of the Arbitrator where he declined to grant interest.

34. With respect to the Claim of LD, Petitioner reiterates that Respondent has neither pleaded nor proved any loss by the alleged delay in supplying the Sheets. In such a situation, even the Award of 3% of LD in favour of the Respondent is patently illegal and has resulted in unjust enrichment of the Respondent. In the case of ***Construction & Design (supra)*** relied upon by the Respondent, the Court declined to grant the upper limit as provided in the LD Clause and only upheld the Award of reasonable amount.

35. I have heard the learned counsels for the parties and examined their contentions.

36. The first issue that arises is with respect to the Liquidated Damages under Clause 22 of the Agreement. While the Petitioner is aggrieved by the imposition of reduced percentage of Liquidated Damages, Respondent is aggrieved by the reduction from 10% to 3%. The Arbitrator has given a chronology of the dates on which different lots of the sheets were supplied by the Petitioner to the Respondent and which have not been disputed by the Parties. Having noted the dates of supply, the Arbitrator observed that there was no condition in the Contract permitting supplies of the goods in multiple lots and a delivery period was stipulated to complete the supply. Petitioner for its own convenience supplied the goods in multiple lots, which delayed the pre-inspection of the goods. Had the Petitioner supplied the goods in one or two lots only, there would not have a delay. The Arbitrator observed that parties had expressly agreed for recovery of damages, from the contractor, for failure to provide goods, within fixed delivery period, as a pre-estimated sum in the nature of Liquidated Damages. The Arbitrator also observed that the Petitioner in para 17 of the Statement of Claim had admitted that when extension of time was sought, Respondent extended the time, subject to Denial Clause and LD charges. On the aspect of proof of loss, the Arbitrator relied on a judgment of this Court in **Ministry of Defence, GOI vs. CENREX (supra)** where the Court has held that the loss caused to the Army on account of non-delivery of berets on time and in making alternative arrangement was impossible to calculate and upheld the claim of LD by the Government. The Arbitrator notes that the original delivery period was four months from the date of placement of the Supply Order and the supplies were made well beyond the stipulated period. Parties are

bound by the enforceable obligations they enter into and terms of Contract are sacrosanct. Noting the delay in supplies, the Arbitrator concluded that Respondent rightly levied LD on the Petitioner. Relevant part of the Award is as under:-

“The Respondent vide letter dated 10.03.2014 communicated to the Claimant about the re-fixation of the delivery period w.e.f. 10.03.2014 to 09.07.2014 or earlier after which claimant started manufacturing of the goods. It is admitted by the both the parties that the stipulated date of the delivery of the store was 9.7.2014, which was re-fixed by both the parties after the approval of the advance samples. It is shown that the parties of the Contract are consented regarding the delivery schedule and other terms of the Contract. Therefore, the parties to the Contract are abiding by the terms of the contract, which are settled after the mutual consent of the parties itself. Accordingly, the Claimant and Respondent are bound by the terms of the Contract and claimant was bound to supply the 1,41,309 Nos. of Goods @ Rs.501.- to the Respondent within stipulated time fixed by the parties in impugned contract.

The facts and circumstances of the case, reveals that the Claimant had offered 1st Lot of goods of 20,477, Nos. of light Weight Ground Sheet for Pre-dispatch inspection on 20.05.2014 i.e. after an expiry of more than two and a half months from the date of re-fixation of delivery period. The Claimant offered the 2nd lot of said goods of 32, 612 nos. on 20.06.2014 for predispatch inspection i.e. after an expiry of one month from the date of submissions of 1st lot of store. The Claimant had offered 3rd lot of store of 32,358 Nos. on 17.09.2014, Pre-dispatch inspection conducted by the detailed CRPF B.O.Os on 19.09.2014 & 24.10.2014 (After lab test). Acceptance of PDI report and intimation to execute the supply was conveyed to the firm on 17.11.2014. The Claimant had offered 4th Lot of 35,600 Nos. 17.11.2014, PDI conducted by the BOO on 27.11.2014 &

15.12.2014 (after lab test). Acceptance of PDI report and intimation to execute the supply was conveyed to the firm on 19.12.2014. The Claimant had offered 5th and final lot of 20.327 Nos. of 29.01.2015, PDI conducted on 09.02.2015 & 10.03.2015 (after lab test). The last consignment was received by GC CRPF Bilaspur [Chhattisgarh] on 25.05.2015 i.e. after lapse of more than one year and five months from the date of placement of supply order [A.T.] against the stipulated delivery period of four months. Delivery period for supply of the store was re-fixed w.e.f 10.03.2014 to 09.07.2014 whereas the Claimant supplied the full quantity of goods by 25.05.2015. The grounds agitated by the Claimant through its SoC are not justifiable and has not been proved by the Claimant as well. It is cleared that the Claimant was failed to supply the goods to the Respondent on time. After perusal of the case and annexed documents, it reveals that there is no condition in the contract to supply the goods in multiple lots. It is only mentioned that the goods should be supplied within stipulated time (re-fixed) by the parties. The Claimant for his own convenience supplied the goods in multiple lots due to which the pre inspection was delayed. If the Claimant supplied the goods in one or two lot only, the delay would not be caused. So, the consequences of that should be bear by the claimant only. As the goods supplied by the Claimant was in pieces by which the inconvenience caused to the Respondent.

When parties have expressly agreed that, recovery of damages from the contractor for breach of the contract or failure to provide Goods within fixed DP, is pre-estimated genuine, liquidated damages duly agreed by the parties, there was on justifiable reason for the Arbitrator to arrive at conclusion that still the purchaser should prove loss suffered by its because of delay in supply of goods.

Further, in para 17 of SoC, it was admitted by the Claimant that at the time when Claimant sought extension of time for

supply of goods, time was extended by the Respondent for completing the delivery upto 01.12.2014 and thereafter till 11.03.2015 the RR and Denial Clause with LD charges. Despite this, claimant had supplied the goods which would indicate that even at that stage, Claimant was agreeable to pay liquidated damages.

The Hon'ble High Court in para 13 in the case of Ministry of Defence, GOI vs. CENREX Sp. Z.O.O & ors. (O.M.P. No.408.2007), which dealt with the supply of parachutes to the Ministry of defence held that,

"loss cannot be calculated for delay in supply of berets by the Claimant to the Union of India (Ministry of Defence) because how the Army of this country would be affected by non-delivery of the berets on time and what would have been the alternative arrangement made due to delayed deliveries and expenses accordingly which has to be incurred on account of non-availability of berets on time, is impossible to calculate." Hence, invocation of Clause 9 of the A. T. towards liquidated damages is valid and can be enforced.

From the foregoing observation, the act of the Respondent regarding the recovery of LD from the Claimant is legally sustainable. It is clearly mentioned in the Accepted Contract that the stores should be delivered within 4 months after placement of AT and approval of advance samples (to be re-fixed) i.e. 10.03.2014 to 09.07.2014 or earlier, which was accurately given by the Claimant to the Respondent and accepted by the Respondent also.

It is the settled position of law that, an agreement between two entities, creating an enforceable obligation to do, or to refrain from doing, a particular thing, enforceable by law is termed as 'Contract'. Parties to a contract are bound by the terms to which they have agreed. The binding force of a contract is based on the fact that it evinces a meeting of

minds of two parties in good faith. A contract, once formed, does not contemplate a right of a party to reject it. Contracts that were mutually entered into between parties with the capacity to contract are binding obligations and may not be set aside due to the caprice of one party or the other unless a statute provides to the contrary.

From the foregoing observation, it is determined that it was the Claimant who actually delayed the supplies of stores to the Respondent within stipulated time i.e. 10.03.2014 to 09.07.2014 or earlier. Consequently, the amount which was recovered by the Respondent from the Claimant was not by way of any wrong representation but it was legally and justifiably recovered from the Claimant, which is according to the terms of the contract.

Therefore, I have no hesitation to come to the conclusion that the Claimant is liable for the levy of LD for the delay of supply of 1,41,309, Nos. Light Weight Ground Sheet to the Respondent within re-fixed period of delivery i.e. 10.3.2014 to 9.7.2014 or earlier.”

37. Chapter 16 of Indian Contract Act, 1872 provides for consequences of Breach of Contract. Section 73 provides that the party who suffers by breach of a contract is entitled to receive from defaulting party, compensation for any loss or damage caused, arising in usual course of things, meaning thereby that mere breach of contract is not sufficient, and the party suffering the damage, on account of such breach must prove the loss. On the other hand, Section 74 entitles a party to claim reasonable compensation from the defaulting party, which is a pre-determined compensation, stipulated in the Contract entered into between the parties. This sum called the ‘Liquidated Damages’ is a genuine pre-estimate of damages and does not require the threshold of proof of actual loss as

required under Section 73. Only when the amount is 'penal' in nature, it is unenforceable. Various Courts have however held that the Claimant would have to prove at least the 'legal injury' from the breach. In the case of **ONGC v. Saw Pipes 2003 (5) SCC 705** the Court held as under:-

"Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This Section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia [relevant for the present case] provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach."

38. In the case of ***Tower Vision (supra)*** the Court held as under:-

“24. What follows from the above is that even if there is a clause of liquidated damages, in a given case, it is for the Court to determine as to whether it represents genuine pre-estimate of damages. In that eventuality, this provision only dispenses with the proof of "actual loss or damage". However, the person claiming the liquidated damages is still to prove that the legal injury resulted because of breach and he suffered some loss. In the process, he may also be called upon to show that he took all reasonable steps to mitigate the loss. It is only after proper enquiry into these aspects that the Court in a given case would rule as to whether liquidated damages as prescribed in the contract are to be awarded or not. Even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him and what is stipulated in the contract is the outer limit beyond which he cannot claim. Unless this kind of determination is done by the Court, it does not result into "debt".”

39. It is thus settled that when a party claims Liquidated Damages, the claim will only be justified if there is a legal injury. It is equally settled that under Section 74 once the parties agree on a particular sum, towards LD, payable when damage is suffered, then, unless it is proved that the LD was not a genuine pre-estimate of damage, but in the nature of penalty, LD can be awarded by a Court or a Tribunal.

40. The questions, however, that arise in this case are whether the loss alleged to have been suffered by the Respondent has to be proved on the threshold of Section 73 and whether in every case the loss can actually be proved. Insofar as the first question is concerned, the same has been

answered in various judgments some of which are referred to above. Degree of proof under Sections 73 and 74 of the Contract are of different levels. Under Section 74 party suffering damage need not lead evidence but would have to show legal injury.

41. Insofar as the second question is concerned, the Courts have held that there may be cases where there is a legal injury, but loss cannot be proved and in such cases damage can be automatically awarded to the aggrieved party. In ***Belco Enterprises (supra)*** the Court held as under:-

“10. The law with regard to the imposition of and a claim towards liquidated damages is now well settled. Liquidated damages are a genuine pre-estimate of the damages under Section 74 of the Contract Act, 1872. Once the parties agree that a particular amount towards liquidated damages is payable, then, unless and until it is alleged and proved that the liquidated damages are in fact not a genuine pre-estimate of damages, but are in fact in the nature of penalty, such liquidated damages can be claimed. When in certain contracts, losses caused can be proved, then, in such cases, in spite of a clause of liquidated damages, a person who is aggrieved, has also to prove the loss/ damages and the figure of liquidated damages would only be the upper limit of damages which can be awarded for breach of the contract. In these latter cases, what are damages to be awarded is to be calculated on the basis that loss suffered has to be proved. However, there are other cases of certain contracts where loss/damages cannot be proved. One example is where damages cannot be calculated on account of breach of contract is when a contractor is given a contract for the construction of a road, which is delayed and on which road toll had to be collected, and consequently it cannot be known how many vehicles would have actually passed on the road and therefore what would be the loss of the toll also cannot be known.

Similarly, another example is with respect to construction of an oil rig. If OMP 498/07, 502/07, 508/07 & 511/07 Page 7 there is delay in the construction of the oil rig, what would be the amount of the oil rig would have produced if it was made on time cannot be known. Therefore, in both these cases of construction of road as well as oil rig, there is no requirement of an aggrieved party to prove damages as are contemplated in the clause for liquidated damages and such damages are **automatically awarded** to the aggrieved party. Both the aforesaid examples were considered by the Supreme Court in the judgment of ONGC Vs. Saw Pipes 2003 (5)SCC 705, and the relevant paragraphs of this judgment dealing with this issue are paragraphs 46, 66 and 67 of the judgment which read as under:

"46. From the aforesaid sections, it can be held that when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss which naturally arises in the usual course of things from such breach. These sections further contemplate that if parties knew when they made the contract that a particular loss is likely to result from such breach, they can agree for payment of such compensation. In such a case, there may not be any necessity of leading evidence for proving damages, unless the court arrives at the conclusion that no loss is likely to occur because of such breach. Further, in case where the court arrives at the conclusion that the term contemplating damages is by way of penalty, the court may grant reasonable compensation not exceeding the amount so named in the contract on proof of damages. However, when the terms of the contract are clear and unambiguous then its meaning is to be gathered only from the words used therein. In a case where agreement is executed by experts in the field, it would be difficult to hold that the intention of the parties was different from the language used therein. In such

a case, it is for the party who contends that stipulated amount is not reasonable compensation, to prove the same.”

42. In the present case the Arbitrator found that the loss was incapable of proof. The delay in Supplies had adversely effected the logistics of CRPF and functioning of troops and following the judgment in **CENREX (supra)**, the Arbitrator upheld the levy of LD.

43. On a careful analysis this Court finds that the facts of the present case are similar to those in **CENREX (supra)** inasmuch as the present Contract also dealt with goods which were to be supplied to the CRPF and its timely supply was extremely crucial to the Force. As rightly held in **CENREX (supra)** non-delivery of items required for Forces causes a loss/damage which is impossible to compute in terms of money. This Court does not find any infirmity in the finding of the Arbitrator that the Respondent was entitled to levy LD. Thus the challenge by the Petitioner to imposition of LD must fail.

44. At this stage, I would deal with the objection of the Respondent, with respect to reduction in the percentage of the LD by the Arbitrator from 10% to 3%. The Arbitrator was of the view that the LD @10% was on the higher side and came under the “umbrella of penalty and not as LD”. The loss suffered by the Respondent was not so huge so as to justify LD of 10% and therefore reduced it to 3%. In **ONGC (supra)**, Supreme Court has clearly held that under Section 74 of the Act, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. The Arbitrator

correctly applied the law and reduced the percentage of LD from 10% to 3% as in his wisdom the imposition of LD at 10% was a penalty, being on a higher side. This Court cannot substitute the wisdom or the plausible view of the Arbitrator. The judgment relied upon by the Respondent in the case of *Union of India vs. Mecano Export Import S.A. (supra)* lays down a proposition that can hardly be disputed. Under Section 31 (3) of the Act, the Arbitrator is required to give reasons for the Award and reason is a ground or a motive for a belief or course of action. The Arbitrator looking into the facts and circumstances of the case rendered a finding that the loss suffered by the Respondent, which though could not be computed in terms of money, was not enough to justify LD @ 10% and with this reasoning reduced the amount claimed. Thus, it cannot be argued that the Award is bereft of reasons. No ground is made out to interfere with this part of the Award.

45. Insofar as the contention of the Petitioner that LD should be levied on delayed supplies only, is concerned, suffice would it be to notice that the Contract does not contemplate any bifurcation. Petitioner has itself complicated the matter by supplying in lots. This contention only merits rejection.

46. The next issue that arises is with respect to the claim of the Petitioner for interest on delayed payments. The Arbitrator has rejected the claim on two grounds, that there was no provision in the Contract for grant of interest on delayed payments and there was failure to deliver goods in time. A perusal of the several documents filed by the Petitioner before the Arbitrator and the categorical stand taken in the Statement of Claim and the rejoinder indicates that the Petitioner had throughout

claimed that the Bills were cleared belatedly. The Arbitrator has himself noticed in page 16 of the Award that the Petitioner had annexed documents to justify the claim, but does not even deal with them. In the later part of the Award, the Arbitrator contradicts himself by observing that the Petitioner failed to put on record any copy of the payment to show that the payment was delayed. Petitioner delivered Two lots out of five within the original delivery period and was entitled to payment as per the terms of AT. The Arbitrator has confused the Claim of Interest on delayed payments with the ultimate completion of supply of all the five lots. No doubt the scope of interference under Section 34 of the Act is limited, but it is equally settled that if the Arbitrator ignores vital evidence, the Award can be interfered with. In **Sunil Kukreja (supra)**, this Court has held as under:-

“12. A bare reading of the above finding of the Arbitrator would clearly show that there is no mention about the admission by the respondent recorded in the MOU regarding the receipt of Rs.5 crores from the petitioner. Equally, there is no discussion on the oral testimony of the witness of the petitioner and the lack of cross-examination by the respondent and its effect. There is also no discussion on the effect of the answer to question no. 5 given by the witness produced by the respondent in support of its claim. In my view, this is a case of total absence of consideration of evidence led before the Arbitrator. It is not a case where an inference is to be drawn on the evidence led before the Arbitrator because in that case, the Court, in exercise of its powers under Section 34 of the Act, would not act as a Court of Appeal to re-appreciate such evidence. The present is the case of total lack of consideration of the evidence by the Arbitrator.

13. In *Associate Builders vs. Delhi Development Authority* (2015) 3 SCC 49, Supreme Court has held that where the Arbitrator based his finding on no evidence or ignores vital evidence in arriving at his decision, the said decision would necessarily be perverse and is foul of the fundamental policy of Indian Law. Paragraph 31 of the judgment is instructive in this regard and is reproduced hereinbelow:-

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

- (i) a finding is based on no evidence, or
- (ii) an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or
- (iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.”

14. In *Hindustan Lever Ltd. v. Shiv Khullar and Anr.*, 2008 SCC OnLine Del 424, this Court had underlined the difference between reappreciating the evidence and considering where material evidence has been ignored. It was emphasized that whereas the former would be an activity prohibited while considering the objections under Section 34 of the Act, the latter would be an activity to find out whether the learned Arbitrator has acted within his mandate for the reason the mandate of the Arbitrator is to decide on facts after considering all the relevant facts and not ignoring the same. Paragraphs 17 and 20 of the judgment are important and are reproduced hereinbelow:-

“17. A commonly held belief that while considering objections under Section 34 of the Act the Court cannot look into the evidence before the arbitrator also needs to be clarified. There is a difference in re-appreciating evidence and

considering whether material evidence has been ignored. Whereas the former would be an activity prohibited while considering objections under Section 34 of the Act for the reason an arbitrator is a chosen forum by the parties to conclude rival issues of fact between the parties, the latter would be an activity to find out whether learned arbitrator has acted within his mandate for the reason the mandate of the arbitrator is to decide on facts after considering all the relevant facts and not ignoring the same.

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20. Even in the realm of evidence, no doubt the provisions of the Evidence Act, 1872 are not strictly applicable before an arbitral forum, but underlying principles thereof would certainly apply. For example, Section 21 of the Evidence Act, 1872 mandates that an admission made by a party is a relevant fact. The said section underlines a fundamental policy of the law that the best evidence of a party is the admission of the opponent. Suppose an arbitrator ignores an admission made by a party which has not been explained. Would not such an award be liable to be challenged on the plea that by ignoring a material evidence, a fundamental policy of law relating to evidence being violated by the arbitrator, the award is liable to be challenged? Surely, such an award would suffer from the mandate of the arbitrator being violated as also on the ground that the conclusions are perverse.”

47. The second reason for rejecting the claim in my view is against the well-settled law on the discretion of the Arbitrator to grant interest. In the perception of the Arbitrator, the law on interest is that the Arbitrator will have the power to Award interest only when the Contract between the

parties so provides. This observation is in the teeth of Section 31 (7) (a) of the Act which clearly stipulates that the Arbitral Tribunal has the power to grant interest on a claim for payment of money, at such rate as it deems reasonable for the whole or any part of the period between the date on which cause of action arose and the date on which the Award is made, unless otherwise agreed by the parties. Thus, when the contract between the parties stipulates a specific bar on the grant of interest, the Arbitrator cannot grant interest. Supreme Court recently in case of ***Jaiprakash Associates Ltd. (Jal) v. Tehri Hydro Development Corporation India Ltd., 2019 SCC OnLine SC 143*** has held as under:-

“13. Insofar as power of the arbitral tribunal in granting pre-reference and/or pendente lite interest is concerned, the principles which can be deduced from the various judgments are summed up below:

(a) A Constitution Bench judgment of this Court in the case of Secretary, Irrigation Department, Government of Orissa v. G.C. Roy⁵ exhaustively dealt with this very issue, namely, power of the arbitral tribunal to grant pre-reference and pendente lite interest. The Constitution Bench, of course, construed the provisions of the 1940 Act which Act was in vogue at that time. At the same time, the Constitution Bench also considered the principle for grant of interest applying the common law principles. It held that under the general law, the arbitrator is empowered to award interest for the pre-reference, pendente lite or post award period. This proposition was culled out with the following reasoning:

“43. The question still remains whether arbitrator has the power to award interest pendente lite, and if so on what principle. We must reiterate that we are dealing with the situation where the agreement does not provide for grant of such interest nor does it

prohibit such grant. In other words, we are dealing with a case where the agreement is silent as to award of interest. On a conspectus of aforementioned decisions, the following principles emerge:

- (i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, Civil Procedure Code and there is no reason or principle to hold otherwise in the case of arbitrator.*
- (ii) An arbitrator is an alternative forum (sic forum) for resolution of disputes arising between the parties. If so, he must have the power to decide all the disputes or differences arising between the parties. If the arbitrator has no power to award interest pendente lite, the party claiming it would have to approach the court for that purpose, even though he may have obtained satisfaction in respect of other claims from the arbitrator. This would lead to multiplicity of proceedings.*
- (iii) An arbitrator is the creature of an agreement. It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow, as they think fit, so long as they are not opposed to law. (The proviso to Section 41 and Section 3 of Arbitration Act illustrate this point). All the same, the agreement must be in conformity with law. The arbitrator must also act and make his award in accordance with the general law of the land and the agreement.*

(iv) *Over the years, the English and Indian courts have acted on the assumption that where the agreement does not prohibit and a party to the reference makes a claim for interest, the arbitrator must have the power to award interest pendente lite. Thawardas [Seth Thawardas Pherumal v. Union of India, (1955) 2 SCR 48 : AIR 1955 SC 468] has not been followed in the later decisions of this Court. It has been explained and distinguished on the basis that in that case there was no claim for interest but only a claim for unliquidated damages. It has been said repeatedly that observations in the said judgment were not intended to lay down any such absolute or universal rule as they appear to, on first impression. Until Jena case [(1988) 1 SCC 418 : (1988) 1 SCR 253] almost all the courts in the country had upheld the power of the arbitrator to award interest pendente lite. Continuity and certainty is a highly desirable feature of law.*

(v) *Interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference (pre-reference period). For doing complete justice between the parties, such power has always been inferred.”*

It is clear from the above that the Court decided to fall back on general principle that a person who is deprived of the use of money to which he is legitimately entitled to, has a right to be compensated for the deprivation and, therefore, such compensation may be called interest compensation or damages.

(b) *As a sequitur, the arbitrator would be within his jurisdiction to award pre-reference or pendente lite interest even if agreement between the parties was silent as to whether interest is to be awarded or not.*

(c) *Conversely, if the agreement between the parties specifically prohibits grant of interest, the arbitrator cannot award pendente lite interest in such cases. This proposition is predicated on the principle that an arbitrator is the creature of an agreement and he is supposed to act and make his award in accordance with the general law of the land and the agreement. This position was made amply clear in G.C. Roy case in the discussion that ensued thereafter:*

“44. Having regard to the above consideration, we think that the following is the correct principle which should be followed in this behalf:

Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred to the arbitrator, he shall have the power to award interest pendente lite. This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and therefore when the parties refer all their disputes — or refer the dispute as to interest as such — to the arbitrator, he shall have the power to award interest. This does not mean that in every case the arbitrator should necessarily award interest pendente lite. It is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view.”

(d) *Insofar as 1940 Act is concerned, it was silent about the jurisdiction of the arbitrator in awarding pendente lite interest. However, there is a significant departure on this aspect insofar as 1996 Act is concerned. This distinction has been spelt out in Sayeed Ahmed case in the following manner:*

“Re: Interest from the date of cause of action to date of award

7. The issue regarding interest as noticed above revolves around Clause G1.09 of the Technical Provisions forming part of the contract extracted below:

“G. 1.09. No claim for interest or damages will be entertained by the Government with respect to any money or balance which may be lying with the Government or any become due owing to any dispute, difference or misunderstanding between the Engineer-in-Charge on the one hand and the contractor on the other hand or with respect to any delay on the part of the Engineer-in-Charge in making periodical or final payment or any other respect whatsoever.”

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14. The decisions of this Court with reference to the awards under the old Arbitration Act making a distinction between the pre-reference period and pendente lite period and the observation therein that the arbitrator has the discretion to award interest during pendente lite period in spite of any bar against interest contained in the contract between the parties are not applicable to arbitrations governed by the Arbitration and Conciliation Act, 1996.””

48. Therefore, in my view, this part of the Award, declining the relief of interest suffers from patent illegality, and deserves to be set aside.

49. It is settled law that while setting aside whole or part of the Award under Section 34 of the Act, Court cannot modify the Award. In view of

this, the Petitioner is at liberty to initiate appropriate legal proceedings for redressal of its claim for interest.

50. Accordingly, OMP (Comm) No. 365/2017 is partly allowed and OMP (Comm) No. 54/2019 is dismissed. No order as to costs.

JYOTI SINGH, J

MAY 27th, 2020
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