



2024:DHC:7819



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

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Reserved on: 08th January, 2024
Pronounced on: 30th September, 2024

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CS(COMM) 225/2019 & I.A. 6248/2019

ABBOTT HEALTHCARE PRIVATE LIMITED

A Company incorporated under the Companies Act, 1956,
having its registered Office at 3, Corporate Park,
Sion-Trombay Road, Mumbai-400071,
Maharashtra

..... Plaintiff

Through: Mr. Vivek Sharma, Ms. Mamta
Gautam, Mr. Aditya Jain, Mr. Mihir
Baisla & Mr. Vineet Sawhney,
Advocates.

versus

1. **UNION OF INDIA**

Through the Secretary (H&FW)
Ministry of Health and Family Welfare,
Government of India,
Room No. 156-A, Nirman Bhawan,
New Delhi-110011

..... Defendant No. 1

2. **BITES LTD.**

A Government of India Enterprise
having its registered Office at BITES Bhawan,
Scope Minar, Laxmi Nagar, Delhi-110092

..... Defendant No. 2

Through: Ms. Manisha Agrawal, Mr. R.P.
Agrawal & Mr. Sirish Gupta,
Advocates for D-1 & 2.

CORAM:

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

JUDGMENT



NEENA BANSAL KRISHNA, J.

1. The present Suit for Damages in the sum of Rs. 4,78,84,696/- from the defendant No. 1/Ministry of Health and Family Welfare (*hereinafter referred to as “MoH&FW”*) and Rs. 20,41,545/- from the defendant No. 2/RITES Ltd. along with *pendente lite* and future interest has been filed on behalf of the plaintiff.
2. The ***facts in brief*** are that the *plaintiff-Company* incorporated under the *Indian Companies Act, 1956* is in the business of manufacturing and marketing of pharmaceuticals, nutritional and diagnostic products and medical devices. The plaintiff in India is an affiliate of Abbott Laboratories, Chicago, United States of America, which is one of the largest and most reputed international Companies in the world of specialising in various areas related to nutrition, pharmaceuticals and medical devices.
3. The *defendant No. 2/RITES Ltd.* is a *Public Limited Company* under the *Indian Companies Act, 1956* which functions as a Multiple-disciplinary Organisation in the field of Transport, Infrastructure and related Technologies and undertakes function of procurement for and on behalf of various entities, including the MoH&FW.
4. The *defendant No. 1/MoH&FW* is the principal of which the defendant No. 2/RITES Ltd. is the agent.
5. The plaintiff entered into the Contract bearing NOA No. RITES/MSM/EPW/RCH/01/2010/388 for RCH Kit A dated 31.03.2011.
6. The disputes arose under the Contract and the plaintiff invoked the Arbitration Clause in terms of the Contract dated 31.03.2011 against the defendant No. 2/RITES Ltd., since it alone was the signatory to the



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Contract, on 22.09.2016, pursuant to which the three-Member Arbitral Tribunal was constituted. The plaintiff filed the Statement of Claim dated 24.02.2017 before the Arbitral Tribunal which passed the Award dated 14.06.2018 whereby the Claims against the defendant No. 2/RITES Ltd. was rejected as not maintainable as it was an agent for a disclosed principal i.e., the Union of India, which was not made a Party. The Award further decided that the remedy of the Claimant would lie against the Principal i.e., the Union of India and gave the liberty to the plaintiff to take appropriate recourse under the law. Hence, the present Suit for Damages has been filed. A Statutory Notice dated 29.08.2018 under Section 80 of the Code of Civil Procedure, 1908 (*hereinafter referred to as "CPC, 1908"*) was served upon the defendant No. 1/MoH&FW/Union of India.

7. According to the plaintiff, it had regular dealings with the defendant No. 1/MoH&FW through the defendant No. 2/RITES Ltd. In August, 2010, a Tender Invitation was floated by the defendant No. 2/RITES Ltd. for the supply of RCH Kit A, in response to which a bid was submitted by M/s Piramal Healthcare Limited ("*Piramal*" *hereinafter*) on 06.09.2010 against the Bid No. RITES/MSM/EPW/RCH/01/2010. At the time of submission of the bid, Piramal was in the process of selling its Domestic Formulations Business to the plaintiff and this fact was duly conveyed to defendant No. 2/RITES Ltd. by Piramal. The *Business Transfer Agreement* was executed between Piramal and the plaintiff on 08.09.2010, pursuant to which the domestic formulations and mass market business of Piramal was transferred to the plaintiff. With the transfer of the complete pharmaceutical business of domestic formulations of Piramal to the plaintiff, the capacities and the capabilities of the plaintiff to execute and oversee manufacturing of such



pharmaceutical formulations and to successfully execute the Contract for large supplies of related products was further complemented, enhanced and augmented.

8. In the meanwhile, the bid was opened by the defendant No. 2/RITES Ltd. on 17.09.2010 and the bid Tender was eventually awarded to Piramal by the defendant No. 2/RITES Ltd. on 31.03.2011 for a total consideration of Rs. 73.76 crores in terms of the bid.

9. The Award of Contract to Piramal was notified by the defendant No. 2/RITES Ltd. *vide* '**Notification of Award**' (NOA) **dated 31.03.2011** and along with NOA, Annexure-A to D giving particulars of goods and services to be provided was annexed. The quality details and the printing text for the booklet to be inserted into each kit were also annexed. The goods were to be delivered as provided in Annexure-C, according to which, *50% of the quantity had to be delivered within 90 days from the date of NOA and the balance 50% within 150 days from the date of NOA*. The period of delivery in respect of one half of the goods was to originally expire on 29.06.2011 and for the full delivery, it was to expire on 28.08.2011.

10. The Piramal *vide* Letter dated 06.04.2011 informed the defendant No. 2/RITES Ltd. that it had sold its domestic pharmaceutical formulations business to the plaintiff and suggested entering into a *Tripartite Agreement* between defendant No. 2/RITES Ltd., the plaintiff and Piramal for making of the supplies under NOA as awarded to Piramal.

11. The defendant No. 2/RITES Ltd., however, did not enter into the Tripartite Agreement as it was open to defendant No. 2/RITES Ltd. to reject Piramal's bid and to award the Contract to the second lowest bidder or to float a fresh tender, but defendant No. 2/RITES Ltd. for its own reasons and



convenience failed to do so.

12. Finally, the defendant No. 2/RITES Ltd. on the request of the plaintiff, decided to substitute the plaintiff as the contracting party in place of Piramal in the Contract. Several months had already lapsed in the process. While agreeing for such substitution, the plaintiff had reasonable expectation that other terms and conditions of the Contract, especially the timeframes for the delivery of goods would be suitably amended. As the events unfolded, it transpired that the defendant No. 2/RITES Ltd. did not give sufficient extension in the delivery period. Rather, the defendant No. 2/RITES Ltd. not only blamed the plaintiff for the delay in the execution of contract and the delivery of goods thereunder, but also wrongfully penalised the plaintiff for the same.

13. It is asserted that the *Amendment-I* dated 10.06.2011 was issued by the defendant No. 2/RITES Ltd. to NOA dated 31.03.2011, whereby the name of the Supplier was changed from Piramal Healthcare Limited to Abbott Healthcare Private Limited i.e., the plaintiff herein. All the other terms and conditions of NOA remained unaltered.

14. Pursuant to the Amendment of 10.06.2011, a formal Contract dated 14.06.2011 was executed between the defendant No. 2/RITES Ltd. and the plaintiff for the supply of RCH Kit A for the total consideration of Rs. 73,76,17,570/-. The defendant No. 2/RITES Ltd. in the subject Contract described itself as a procurement Agent on behalf of MoH&FW and signed the Contract purportedly for and on behalf of the purchaser, which was defined to mean and refer to the MoH&FW, Government of India.

15. The plaintiff was unable to complete the supply of subject goods under the Contract within the time period prescribed due to the reasons



attributable to defendant No. 2/RITES Ltd. which failed to give suitable extension of the delivery period but penalised the plaintiff for the alleged delay by wrongfully and unilaterally deducting liquidated damages from the sum payable and paid to the plaintiff for the supplies already made.

16. The plaintiff has asserted that upon NOA being executed, its approved Sub-Contractors commenced the manufacturing of the subject goods, followed by the testing of samples by the designated Testing Laboratory viz., Shriram Laboratories. During the course of testing, it became evident that the defendant No. 2/RITES Ltd. in the beginning itself prescribed certain incorrect specifications and tests which were not applicable *per se* to the respective products/drugs. It is asserted that it is because of these wrong specifications, there was mass failure of samples leading to delay in making of supplies under the Contract.

17. The plaintiff has asserted that an individual RCH Kit A consisted of 8 different components and failure of even a single component resulted in the stoppage of kit production. The plaintiff wrote a *Letter dated 08.08.2011* to the defendant No. 2/RITES Ltd. for failure of samples of iron and folic acid ('IFA' *hereinafter*) syrup on account of higher Folic Acid content, wherein it was impressed that the relevant parameter for Folic Acid content in IFA syrup, is that it should not be less than 90% in content and that the upper limit is not applicable in such cases. The legally prescribed position which emanates as per '*Schedule V*' of the *Drugs and Cosmetic Rules, 1945* cannot be varied by parties by contractual terms to the contrary. The concerns of the plaintiff were, however, not addressed and went unresponded. The failure of samples had a cascading effect on the entire supply chain.



18. The *other parameter* on which the mass failure of samples manufactured by the plaintiff happened was failure to meet the ‘*Uniformity of Content*’ (‘*UOC*’ *hereinafter*) test in the case of IFA tablets. This test is claimed to have been wrongly prescribed in the first place by the defendant No. 2/RITES Ltd. because it does not apply to Multivitamin preparations and IFA tablets are film coated multivitamin tablets. The Plaintiff wrote the two E-mails both dated 25.08.2011 and thereafter followed up repeatedly, though the defendant No. 2/RITES Ltd. failed to respond.

19. On 07.09.2011, the Drugs Control Laboratory, Mumbai in response to the request for opinion from Bharat Parenterals Limited, Baroda, one of the main Sub-Contractors and suppliers of the plaintiff under the subject Contract, gave its opinion that Iron and Folic Acid Tablets are patent and proprietary medicine and therefore, the UOC is not applicable to such tablets. By that time, the cut-off date for making 100% deliveries viz. 28.08.2011 had already passed.

20. The plaintiff exercised its option to challenge the negative reports of the Testing Laboratory i.e. Shriram Laboratories and requested defendant No. 2/RITES Ltd. for the appointment of a Government approved Umpire Laboratory, *vide* E-mail dated 22.08.2011. Vimta Laboratories was appointed on 12.12.2011 as the Umpire Testing Laboratory by the defendant No. 2/RITES Ltd. after several months thus adding to further delay.

21. The plaintiff has claimed that wrong Testing parameter and Technical specifications for the subject drugs was the single largest factor which was responsible for the delay in making of supplies under the subject contract to the defendant No. 2/RITES Ltd. The additional factors because of which the Contract could not be carried out within the prescribed time limit are as



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under: -

- (i) Delay in issuing Amendment-I dated 10.06.2011;
- (ii) Delay in issuing Excise Exemption Certificates ('EEC' *hereinafter*) to the plaintiff, the signed copies were issued by the defendant No. 2/RITES Ltd. as the scanned copies *via* E-mail dated 02.08.2011.
- (iii) Delay in the issuing of Project Authority Certificate ('PAC' *hereinafter*)
- (iv) Delay in appointment of an Umpire Laboratory on 12.12.2011, even though the request was made by the plaintiff on 22.08.2011.

22. The plaintiff has further asserted that on 27.03.2012, the defendant No. 2/RITES Ltd. unilaterally issued the *Amendment-II* to the Contract, whereby it substituted the original *Consignee list* of Maharashtra with a new list with names, addresses and contact numbers. The original list of Consignees under the subject Contract to whom the deliveries were to be made by the plaintiff, was frozen as the part of the Contract itself when the Award was notified in favour of Piramal on 31.03.2011. If the defendant No. 2/RITES Ltd. had to amend it unilaterally for its own reasons, the benefit of such delay of 362 days is on account of risk and responsibility of the defendant No. 2/RITES Ltd. However, no additional accommodation or extension of delivery period was made by the defendant No. 2/RITES Ltd. on this score.

23. On 21.05.2012, without any prior intimation, the defendant No. 2/RITES Ltd. abruptly decided that there would be no further Inspection and Testing of any samples of RCH Kit A without conveying its decision to the



plaintiff in writing. Further, no opportunity was given to the plaintiff before taking such a decision, to stop further testing. There was a complete failure of natural justice. Substantial inventory was lying in finished and semi-finished condition at various points in the production pipelines of various Suppliers of the plaintiff and its warehouse. The entire production planning as well as financial planning of the plaintiff as well as of the suppliers, was jeopardised. The packing materials used for packing the finished goods were specifically marked as ‘*RCH Supply, Not for Sale*’ and, therefore, were not capable of being used in any other commercial production of the same item or delivered to any other purchaser.

24. The defendant No. 2/RITES Ltd. thereafter issued the *Amendment-III* dated 30.01.2013 to the subject Contract, whereby the terms of Delivery were changed from 50% within 90 days from the date of NOA to 50% within 167 days from the date of NOA. It provided that all other terms and conditions shall remain unaltered. This meant that an additional time of merely 77 days was given to the plaintiff to complete 50% of the deliveries. In view of no change having been made in respect of 100% delivery by any of these three amendments, the extended date of delivery of 50% supplies had already expired on 14.09.2011, whereas the date for delivery of 100% supplies, including the first half which expired even earlier on 28.08.2011.

25. It is claimed that such retrospective Amendment is not sanctified by law and is merely notional or fictitious. The plaintiff has submitted that while waiting for further extension of the delivery by the defendant No. 2/RITES Ltd., it was constrained to stop accepting deliveries of further supplies from its own Vendors and Suppliers, including Bharat Parenterals Limited, Baroda. Under these circumstances, the Bharat Parenterals Limited



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served the *Legal Notice dated 13.12.2013* seeking recovery of a sum of Rs. 20,78,729.00/- being the price in respect of finished inventory of goods manufactured pursuant to Purchase Orders by the plaintiff. Subsequently, a settlement was arrived at between the plaintiff and the Bharat Parenterals Limited under which an amount of Rs. 19.80 lakhs was paid by the plaintiff to Bharat Parenterals Limited *vide* Demand Draft dated 21.08.2015. The plaintiff has claimed that it is entitled to the recovery of Rs. 19.80 lakhs which it had paid to Bharat Parenterals Limited, from defendant No. 2/RITES Ltd.

26. The plaintiff, therefore, had invoked Arbitration on 22.09.2016 to seek recovery of this amount from the defendant No. 2/RITES Ltd.

27. The plaintiff had further asserted that it had set up a *dedicated kitting Unit at Palghar, Maharashtra* for manufacturing of kits for supply to the defendant No. 2/RITES Ltd. under the Contract. In that process, it incurred a capital expenditure of Rs. 14,47,414/-. However, the defendant No. 2/RITES Ltd. prevented the plaintiff from making full supply of 67,700 RCH Kits agreed under the Contract between the parties and thereby causing substantial loss to the plaintiff. The said site had to be closed down once the defendant No. 2/RITES Ltd. stopped accepting the supplies. Aside from capital expenditure, the plaintiff had also incurred substantial revenue expenditure on the abortive Project which the plaintiff is entitled to recover from the defendant No. 2/RITES Ltd., though it does not press the same for the sake of expediency. *The plaintiff has claimed damages i.e., capital expenditure of Rs. 14,47,414/- for setting up of Palghar Unit.*

28. The plaintiff has also claimed that notwithstanding the revised timelines, the defendant No. 2/RITES Ltd. kept accepting and making



payments to the plaintiff under the Contract through 2014, 2015 and 2016. The defendant No. 2/RITES Ltd. from time to time, withheld various sums from the money payable to the plaintiff without revealing any reason but for various reasons, including but not limited to *unilateral levy of liquidated damages*.

29. The plaintiff has submitted that on or about 17.05.2016, the defendant No. 2/RITES Ltd. made the last part payment of Rs. 13,73,698.00/- to the plaintiff aggregating to a total net payment of Rs. 36,10,40,375.00/- Upon reconciliation of the running account, the plaintiff has found that the defendant No. 2/RITES Ltd. has levied liquidated damages to the tune of Rs. 3,25,76,118.00/- upon the plaintiff by unilaterally making assessment on sustained losses which is not equivalent to the liquidated damages reserved under the Contract and thereby carried out an assessment of losses on its own. Further, it decided itself that there was a breach on the part of the plaintiff and compensated itself with liquidated damages.

30. It is further asserted that *despite there being Arbitration Clause*, the defendant No. 2/RITES Ltd. acting in a high-handed manner not only bypassed the process of law and decided the issue of breach of Contract and default and compensation and it acted as a judge of its own cause.

31. The plaintiff has asserted that it is entitled to damages of Rs. 3,25,76,118.00/- from the defendant No. 2/RITES Ltd. being the amount deducted by the defendant No. 2/RITES Ltd. towards the liquidated damages.

32. The plaintiff has thus sought recovery of damages and compensation as under: -

(i) Damages to the tune of Rs. 19,80,000.00/- from the defendant



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No. 1 against the equivalent sum paid by the plaintiff to Bharat Parenterals Limited along with the interest @ 18% per annum 24.02.2017, while the Statement of Claim by the Arbitral Tribunal till 23.12.2018 amount to Rs. 6,53,400.00/-.

(ii) Damages to tune of Rs. 3,25,76,118.00/- which had been apportioned by the defendant No. 2 towards liquidated damages along with interest @ 18% amounting to Rs. 1,07,50,118.00/- from 24.02.2017 till 23.12.2018.

(iii) Damages to the tune of Rs. 14,47,414.00/- on account of capital expenditure incurred on setting up of Palghar Unit along with 10% interest per annum amounting to Rs. 4,77,646/- from 24.02.2017 to 23.12.2018.

(iv) Rs. 20,41,545/- as the actual cost of arbitration proceedings under the two broad heads of Arbitrators' fees and counsels' fees alone.

33. The plaintiff has also sought interest at the pre-suit interest in the sum of Rs. 1,18,81,164/- and also *pendente lite* and future interest @ 18% per annum.

34. **The defendant No. 1/MoH&FW and the defendant No. 2/RITES Ltd. in their Written Statement** took the *preliminary objection* that the plaintiff has suppressed the correct facts and has filed the present Suit on the basis of incorrect and distorted facts.

35. It is asserted that M/s Piramal to whom the Contract was awarded, not only concealed the vital facts of having transferred its business to the plaintiff but also chose to extend the validity of bid in its own name despite the fact that the bidder no longer owned the assets on the basis of which the



bid was submitted. This suppression of the facts was illegal and unethical.

36. It is further asserted that the plaintiff itself is responsible for several wrongs inasmuch as improper submission of bid, lethargic rate of production of drugs by component suppliers, failure to meet the technical specifications, lack of quality control, failure to meet the delivery period requirements and a general disregard to agreed terms and conditions of the Contract.

37. The defendants have explained that the Tender was issued by the defendant No. 2/RITES Ltd. with the last date of submission being 17.09.2010. One of the bidders i.e., M/s Piramal was in the final stages of transferring its business to the plaintiff and it was completed on 08.09.2010 i.e., after one day of submission of bid by M/s Piramal in its own name on 17.09.2010, i.e. 10 days before the last date of submission of bids, it transferred its business to the plaintiff on 08.09.2010, but it did not wait for this one day to complete the business transfer in favour of the plaintiff, so that the bid could be submitted in the name of plaintiff instead of M/s Piramal, thereby avoiding the entire problem of change of name and its related issues.

38. It is further asserted that M/s Piramal not only concealed this vital fact of business transfer to the plaintiff, but also chose to extend the validity of the bid in its own name despite having ceased to be owner of the assets.

39. Furthermore, this fact was brought to the notice of the defendant No. 2/RITES Ltd. after six months of the execution of the Business Transfer Agreement. The plaintiff, instead of accepting its lapse, has made a claim that the defendant No. 2/RITES Ltd. should have acted on its own, based on wide publicity given by it in the media. It is submitted that the bids can be evaluated on the basis of submitted documents alone and not on media



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information.

40. The defendants have asserted that in the first place, M/s Piramal should have waited for one day and bids should have been made by the plaintiff in its own name to avoid any confusion which occurred in the present case. Alternatively, M/s Piramal should have itself withdrawn the bid and the plaintiff should have submitted its fresh bid in its own name, since M/s Piramal ceased to be the owner of the assets on the basis of which the bid was submitted. It was appropriate for it to have withdrawn its Bid before opening of the tender without forfeiting its bid security for which it had adequate time and let the new owner bid for the same.

41. It is further asserted that the request for change of name was received from the plaintiff on 07.04.2011 i.e., six months after execution of the Business Transfer Agreement dated 08.09.2010, by M/s Piramal to the plaintiff. The defendant No. 2/RITES Ltd. *vide* its Letter dated 11.04.2011 called upon Piramal to furnish requisite documents in compliance thereof. The plaintiff provided the requisite documents and information on 18.05.2011 i.e., after five weeks. The change of the name of supplier after bid had been accepted and NOA issued was an unusual event which resulted in wastage of time and avoidable delay. The process of changing the name involved capacity and capability assessment of the plaintiff proposing the change of name to the World Bank and after getting its *No Objection*, to submit it for consideration before MoH&FW i.e. defendant No. 1. Since the value of the Contract was substantial, MoH&FW too took some time. The request for change of the Supplier led to many downstream disruptions. The documents like the Project Authority Certificates, Excise Exemption Certificates, Road Permits which carry the name of the supplier, could not



be prepared earlier as it could be prepared only after the amendment for change of name was issued. The selection of the Inspection Agency to whom the addresses of the manufacturing and kitting facilities is given, also got delayed in the process.

42. The defendants have submitted that after the change of name was approved by MoH&FW, the Contract was signed by the plaintiff and the defendant No. 2/RITES Ltd. on behalf of the defendant No. 1 on 14.06.2011. At the late stage, the plaintiff has raised the fictitious arguments that since the Contract got novated, the delivery should have been re-fixed. This argument is incorrect as the Contract had been accepted and signed by the plaintiff without any changes considering it doable. If the plaintiff felt that the delivery schedule or other stipulations of the Contract were not justified, it should have been signed only after the Clauses were amended. When the parties sign the Contract, it signifies that all the terms and conditions stipulated in the Contract have been understood and accepted by the party.

43. *In respect of the allegation that the specifications of the drugs in the Tender documents were incorrect*, it is submitted that deficiencies in specifications were required to be pointed out by the Suppliers before opening of the Tender and at the time of pre-bid Meeting, where opportunity was given to all the Suppliers to raise their issues regarding Tender specifications and other terms and conditions. M/s Piramal did not raise any issue before the opening of the Tender. However, in case the plaintiff thought that the specifications were faulty, it had ample time for almost eight months from 08.09.2010 till 14.06.2011 to protest and ask for correction of specifications. Once it signed the Contract, it was duty bound



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to supply material strictly as per the Contract which it miserably failed to do.

44. The assertion of the plaintiff that the Iron and Folic Acid Syrup batches were wrongly rejected by the Testing Laboratory, is incorrect in terms of the clear and unambiguous specifications provided in the Contract itself. The Bidder had wrongly offered the medicines with higher Folic Acid content than what was prescribed in the Contract and thus, the supplies had to be rejected. It is asserted that the plaintiff has tried to mislead by referring to reports from one *Invochem Laboratory* issued to *M/s Piramal* which shows that the IFA syrup sample which was tested complied with Folic Acid requirement, even though it contained higher than specified content of Folic Acid. The plaintiff has missed to note that the *Invochem Laboratory* also stated in its report that '*Limit NLT 90%*' (Limit not less than 90%). This means that in those particular cases, the required specifications prescribed a limit on the lower side and there was no limit on the higher side. It is claimed that the specifications for IFA syrup stated that the content of Folic Acid should be 90% to 115% of the stated amount i.e., 0.5 mg.

45. The plaintiff was duty bound to supply the material strictly according to the specifications which it has failed to do. *M/s Piramal Healthcare* had also given a Letter dated 28.10.2010 to defendant No. 2/RITES Ltd. confirming that there is no deviation from its side and from all supporting manufacturers in respect of Technical Specifications, commercial terms and conditions of the Tender documents. The plaintiff is estopped from alleging that the Tender Specifications with regard to the drugs, were not proper.

46. The plaintiff's contention that *UOC test was not required for the supplies as they were film coated* is incorrect and misleading as nowhere in



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the Contract, the supplies were required to be film coated. The specification of IFA tablets clearly mentioned two aspects, namely, (i) tablets are coated and (ii) UOC test must be performed on the tablets. The defendant No. 1 had issued a clarification *vide* Letters dated 24.10.2011 and 01.12.2011 to defendant No. 2/RITES Ltd. in this regard which is self-explanatory. The opinion of Drugs Control Laboratory, Mumbai, in response to the request for opinion from Bharat Parenterals Limited, Baroda is not relevant as the Contract has been confirmed as per the offer of the bidder.

47. The *third objection is in regard to the issue of Umpire Analysis*. It is submitted that the issue of referring the supplies for Umpire Testing would have arisen only if the supplies were found to be of sub-standard quality. The selection of Umpire Agency had to be done after following the due process which involved taking approval by the defendant No. 2/RITES Ltd. of World Bank as well as of the defendant No. 1.

48. From the record, it is evident that total 179 batches (12% of supplied batches 1489) were given for Umpire Analysis and out of them, 101 batches were rejected. It means that only 5% of batches were affected due to Umpire Analysis. The result of Umpire Testing was received on 01.02.2012. According to the Testing report, 78 batches were passed and 101 batches were failed by the Umpire Lab. This proves that not only the plaintiff was supplying material with a lot of delay but also drugs supplied were defective in quality. The issue of Umpire Testing, therefore, would not have arisen and the delay could have been avoided if the plaintiff had supplied the material of requisite quality.

49. The defendants in respect of *Project Authority Certificates* (in short “PAC”) have explained that it was to be issued to the manufacturer by the



defendant No. 1 to enable the manufacturer to import the raw material without payment of excise duty. The PAC is issued in deemed export cases which is what the present World Bank funded Project was. The claim of the plaintiff that the supplies were delayed due to delay in issue of PAC is incorrect, as it had to itself have manufactured components before issue of PAC which had been issued by the answering defendant as per the due procedure.

50. It is explained that out of the eight components that were to be supplied in the kit, only one component (Vitamin-A) had raw material which had to be imported. The said Vitamin-A component was to be manufactured by M/s Piramal. The PAC dated 15.06.2011 was issued in the name of M/s Piramal Healthcare Limited. The major quantity of Vitamin-A syrup was manufactured in the month of May, 2011 by M/s Piramal Healthcare Limited, which is prior to the date of issue of PAC. Therefore, lack of PAC was not a reason for delaying the manufacturing process. Further, the plaintiff has failed to clarify whether the said PAC was utilised by M/s Piramal Healthcare Limited or not and has failed to produce any record regarding the utilisation of PAC. Therefore, the plaintiff as well as Piramal Healthcare Limited should be held liable for mis-utilisation of PAC.

51. The defendants have further asserted that the *issuance of Excise Exemption Certificates (in short "EECs")* by defendant No. 2/RITES Ltd. was done on 29.06.2011 to the sub-contractors and on 08.08.2011 to the plaintiff, as admitted by them.

52. The plaintiff has not explained, nor filed any evidence to show as to how the issue of EEC on 29.06.2011 as detailed herein caused any delay in execution of the Contract. The Inspecting Agency was called for sampling



for the first time on 11.07.2011. The goods could have been dispatched only after receiving the Inspection Reports. Since EECs were available at the time of Inspection, they were never a bottleneck for dispatch of drugs, either for the component manufacturers or to the plaintiff. The alleged delay in issuing EECs is not a factor responsible for delay in supply of goods, simply because the goods were not ready for dispatch when the EECs were received. Further, the list of manufacturers engaged by the plaintiff to manufacture and supply various required drugs along with the details of batch numbers, date of manufacturing date of expiry, etc. was already available. The said list shows that the different sub-contractors had started manufacturing of drugs on 01.05.2011 or on 01.06.2011 which is much before the issuance of EECs. Therefore, the delay in making late supplies cannot be attributed to the issue of EECs.

53. The defendants have further explained *that the addresses of consignees* had been provided by defendant No. 1 to the defendant No. 2/RITES Ltd. along with their Indent on the basis of which the Tender documents were prepared by defendant No. 2/RITES Ltd.

54. It is denied that the addresses of the consignees had been modified in any way, except that in case of some of the consignees of Maharashtra, the address stated 'Civil Surgeon' in place of 'District Health Officer'.

55. On 17.02.2012, on the representation submitted by the plaintiff to the defendant No. 2/RITES Ltd. that the consignees were not accepting the goods on this ground, the amended list of consignees with the correct addresses was sent by the defendant No. 2/RITES Ltd. on 27.03.2012.

56. The Contract required the plaintiff to give an advance intimation of seven days to the consignees before the delivery of the products. Had the



intimation been given, the plaintiff would have known that the addresses needed correction well in time.

57. Furthermore, it has emerged from the Bills submitted by the plaintiff that out of 31 consignees in Maharashtra, the plaintiff had completed deliveries to 17 consignees by 17.02.2012 i.e., before the submission of representation for correction of names/addresses of Maharashtra consignees and to 28 consignees by 27.03.2012. Only three consignees remained to be delivered after the issue of Amendment. Essentially, the amendment was not required for delivery as has been asserted by the plaintiff.

58. The *other ground taken by the plaintiff for delay in commencement of production* is not supported by any evidence. There is no explanation given as to why there was a delay by the various manufacturers of 2-3 months in starting the manufacturing of the drugs. It is on this account of not starting production of kit components in April, that the plaintiff lost valuable time which was because of its own negligence.

59. Moreover, there is no link between substitution of name of plaintiff and starting of manufacturing of drugs by its Sub-Contractors. From the Letter dated 13.12.2012 of the plaintiff itself, it is evident that it had started making the kits in full swing and was able to dispatch more than 25,705 kits between January, 2012 to 20.05.2012, even though it was required to supply 67,700 kits in 5 months, as per the Contract. It is the plaintiff which was lethargic in production rate and lacked available production capacity with its Sub-Contractors. It did not demonstrate higher production rate during the Contract period at any stage.

60. It is evident that the plaintiff, having realised its lack of production capacity quite early in the Contract, tried to cover this major shortfall by



raising various contentions to divert the attention from the core issue of slow rate of production.

61. **In respect of defendant No. 2/RITES Ltd.**, it is asserted that the claim amount against the defendant No. 2/RITES Ltd. being less than Rs. 2,00,00,000/-, this Court has not the pecuniary jurisdiction to entertain the present Suit. It is also bad for misjoinder of cause of action as all the claims have been made against the defendant No. 1 on the basis of the Contract Agreement dated 14.06.2011. The plaintiff against the defendant No. 2/RITES Ltd. has claimed Rs. 20,41,545/- towards cost of the Arbitration proceedings, but the remedy of the plaintiff lies against the defendant No. 1 and not against the defendant No. 2/RITES Ltd. which was merely acting as an agent of defendant No. 1.

62. Furthermore, the plaintiff has based its claim against the defendant No. 1 and the defendant No. 2 independently on different and distinct causes of action because of which the Suit is bad for misjoinder of cause of action.

63. Furthermore the Defendant asserts that it is the plaintiff who had wrongly initiated Arbitration proceedings against defendant No. 1 and cannot seek re-compensation for arbitration expenses from the defendant No. 2. It is further asserted that when the costs/expenses had not been allowed by the Arbitrators while passing the Award dated 14.06.2018, a separate Suit was not maintainable to claim such expenses allegedly incurred by the plaintiff in Arbitration proceedings. By not allowing the costs in favour of the plaintiff, it is deemed to have been disallowed by the Arbitrators. In case the plaintiff was aggrieved, it should have filed its Objections under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as the "Act, 1996"*) but it cannot seek



reimbursement by way of present Suit. The Award dated 14.06.2018 has become final and binding on the plaintiff.

64. Furthermore, the Award dated 14.06.2018 has given remedy to the plaintiff only against the defendant No. 1 and, therefore, the defendant No. 2/RITES Ltd. has been wrongly impleaded in the present Suit.

65. Moreover, the claim against the defendant No. 2 is not based on a commercial transaction and the present Suit vis-a-vis., the defendant No. 2/RITES Ltd. is not maintainable.

66. **On merits**, it is denied that the defendant No. 2/RITES Ltd. is liable to pay any amount as claimed by the plaintiff.

67. **The plaintiff in its Replication** has reaffirmed its assertions as made in the Plaint.

68. ***Issues on the pleadings were framed on 19.04.2022 as under: -***

“(i) Whether the present suit is bad for misjoinder of causes of action? OPD-1 & 2

(ii) Whether there is no cause of action for filing the present suit? OPD-1 & 2

(iii) Whether the defendant No.2 was entitled to levy, deduct and appropriate, liquidated damages (Rs.3,25,76,118/-) against the plaintiff, without invoking the arbitration clause? OPD-1 & 2

(iv) Whether the plaintiff is entitled to receive and the defendant No.1 is liable to pay damages to the tune of Rs.3,25,76,118/- to the plaintiff on account of wrongful appropriation of liquidated damages? OPP

(v) Whether the plaintiff is entitled to receive and the defendant No.1 is liable to pay a sum of Rs.14,47,414/- on account of capital expenditure incurred by the plaintiff in the setting up of the Palghar kitting unit? OPP

(vi) Whether the defendants have resorted to improper



contractual mechanism in their standard form contract to make the arbitration clause meaningless, if so, its effect and consequence? OPP

(vii) Whether the plaintiff is entitled to receive and the defendant No.2 is liable to pay a sum of Rs.20,41,545/- towards actual costs of arbitration? OPP

(viii) Whether the plaintiff is entitled to receive and the defendant No.1 is liable to pay, a sum of Rs.19,80,000/- against an equivalent sum paid by the plaintiff to Bharat Parenterals Limited? OPP

(ix) Whether the plaintiff is entitled to receive and the defendant No.1 is liable to pay pre-suit interest? OPP

(x) Whether the plaintiff is entitled to receive pendente lite and future interest on the decretal amount from the date of decree to the date of actual realization, if so, from which defendant and at what rate? OPP

(xi) Relief.”

69. The plaintiff in support of its case, examined *PW1/Santan Panigrahy, Legal Head*, who tendered his affidavit of evidence, Ex.PW1/A, Power of Attorney dated 19.12.2017, Ex.PW1/1 and the Affidavit dated 19.07.2017 along with the copy of the Cross-examination dated 05.08.2017 submitted before the Arbitral Tribunal, are Ex.PW/D1-D2.

70. *PW2/Milind Madhukar Kale, Newten Division, New Tender Team, Chief Manager, Institutional Business* tendered his affidavit of evidence, Ex.PW2/A. The other documents have been exhibited as PW2/1 to PW2/4. The Demand Draft dated 21.08.2015 in the sum of Rs.19,80,000/- Ex.PW2/5. The Settlement Agreement dated 27.08.2015 executed between the plaintiff and the Bharat Parenterals Ltd. (Supplier/Sub-contractor) is Ex.PW2/6.

71. *PW3/Dr. Vaijayanti P. Dikshit, former employee of the plaintiff, who*



was the *Quality Head*, tendered her affidavit of evidence, Ex.PW3/A.

72. PW4/Santosh Tupe, Manager Finance, tendered his affidavit of evidence, Ex.PW4/A and various other documents, Ex.PW4/1 to PW4/2.

73. The defendants in support of their case examined DW1/Nitin Jain, an employee of the defendant No. 2/RITES, who tendered his affidavit of evidence, Ex.DW1/A and proved various documents which are Ex.DW1/1 to DW1/7. DW1/3 is the last of data compiled from the Test Reports. DW1/4 is the PAC. DW1/5 is an E-mail dated 16.02.2011 seeking Shelf Life data as of 31.12.2011 given by the plaintiff to the defendant No. 2/RITES.

74. *Learned counsel on behalf of the plaintiff has argued* that though there was some delay in supply of goods but the same was attributable solely to the defendants. Admittedly, initially the Tender Bid was submitted by M/s Piramal Healthcare Limited on 07.09.2010 and the Business Transfer Agreement executed between M/s Piramal Healthcare Limited and the plaintiff on 08.09.2010. The Notification of Award, Ex. P-1, under the Tender was awarded to M/s Piramal Healthcare Limited on 31.03.2011. M/s Piramal Healthcare Limited informed the defendant No. 2/RITES vide its Letter dated 06.04.2011 **Ex. P-2**, about the sale of its domestic formulation business to the plaintiff and then sought execution of the Tripartite Agreement between M/s Piramal Healthcare Limited, plaintiff and the defendant No. 2/RITES which was eventually executed on 10.06.2011 and the *Amendment-I dated 10.06.2011, Ex. P-6*, and the *Amendment-II dated 27.03.2012, Ex. P-43*, were issued by the defendant No. 2/RITES Ltd. to NOA dated 31.03.2011 substituting the plaintiff in place of M/s Piramal Healthcare Limited.

75. It is argued on behalf of the plaintiff that under the Contract, the



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delivery was to be made of 50% of goods within 90 days and the entire delivery of goods was to be done in 150 days. The delay in supply of goods occurred on account of delay in issuing the Amendment-I dated 10.06.2011 and the Amendment-II dated 27.03.2012 by the defendant No. 2/RITES Ltd. to NOA dated 31.03.2011, which cannot be attributed to the plaintiff.

76. It is further argued on behalf of the plaintiff that the defendant No. 2/RITES Ltd. had claimed mass failure of the specifications of the goods as per the Contract '*Schedule V*' of the *Drugs and Cosmetic Rules, 1945*. It is asserted that the goods were according to the specifications given under the *Drugs and Cosmetic Rules, 1945* in which the upper limit of Folic Acid in the drugs has not been prescribed. Therefore, the presence of a higher amount of Folic Acid was not relevant. The UOC test has been wrongly applied as it is not applicable to the film coated tablets. The plaintiff had written two emails to defendant No. 2/RITES Ltd. which failed to respond.

77. It is also argued on behalf of the plaintiff that the Testing Agency i.e., Shriram Laboratories in its Report dated 07.12.2011, agreed that UOC Test was not applicable to film coated tablets. The request of the plaintiff to appoint the Umpire Laboratory was also delayed, leading to further delay in supply of the consignments.

78. Furthermore, the defendant No. 2/RITES Ltd. issued the *Amendment-II* to the NOA dated 31.03.2011 in respect of the supply of consignments in Maharashtra and directed that instead of '*District Health Officer*' the consignments be delivered to the '*Civil Surgeons*'. The list of consignees was substituted which attributed to a delay of 362 days.

79. The defendant No. 2/RITES Ltd. stopped the inspection and testing on 21.05.2012 without any notice. The plaintiff had approved the



Sub-Contractor i.e., Bharat Parenterals Limited for production of the goods which had produced substantial quantities but because of the inaction of the defendant No. 2/RITES Ltd., it stopped taking the goods from the Sub-Contractor. The Bharat Parenterals Limited issued the Legal Notice dated 13.12.2013 to the plaintiff seeking recovery of a sum of Rs. 20,78,729.00/- being the price in respect of finished Inventory of goods manufactured pursuant to the Purchase Order by the plaintiff. Subsequently, a settlement was arrived at between the plaintiff and the Bharat Parenterals Limited under which an amount of Rs. 19.80 lakhs was paid by the plaintiff to Bharat Parenterals Limited *vide* Demand Draft dated 21.08.2015. It is claimed that the plaintiff had to incur the said amount only on account of the acts of the defendant No. 2/RITES Ltd. and it is entitled to recovery of the said amount.

80. Learned counsel for the plaintiff has argued that the plaintiff had to set up a dedicated kitting unit at Palghar, Maharashtra for manufacturing of kits for supply to the defendant No. 2/RITES Ltd. under the Contract and in that process, it incurred a capital expenditure of Rs. 14,47,414/- which is also payable by the defendant No. 2/RITES Ltd.

81. It is further argued on behalf of the plaintiff that the defendant No. 2/RITES Ltd. *has levied liquidated damages* to the tune of Rs. 3,25,76,118.00/- without any basis or evidence. The Contract provided for limited liquidated damages upto 10% of the Contract price but that was subject to proof of actual damages suffered by the defendant No. 2/RITES Ltd. However, the defendant No. 2/RITES Ltd. has unilaterally deducted this amount towards damages without any evidence and this amount is liable to be paid to the plaintiff.



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82. In the end, learned counsel for the plaintiff has argued that the plaintiff had undertaken the Arbitral proceedings against the defendant No. 2/RITES Ltd. pursuant to their *inter se* Contract but the same got defeated on account of non-impleadment of Union of India i.e., the defendant No. 1/MoH&FW for which the defendant No. 2/RITES Ltd. is liable to pay the arbitration costs to the plaintiff, which according to the plaintiff it had incurred on account of acts of the defendant No. 2/RITES Ltd.

83. *Learned counsel on behalf of the defendant Nos. 1 and 2* has countered all the arguments and has taken a preliminary Objection that the present Suit is barred by limitation. The period for which the Arbitration was undertaken i.e., from 22.09.2016 to 14.06.2018 is not liable to be excluded under *Section 14* of the *Limitation Act, 1963* as defendant No. 1/MoH&FW was not a party to the arbitration proceedings.

84. It is further argued on behalf of the defendant Nos. 1 and 2 that the Agreement, in fact, was between the plaintiff and the Union of India and it had been signed by the defendant No. 2/RITES Ltd. as an Agent of Union of India i.e., the defendant No. 1/MoH&FW. The defendant No. 1/MoH&FW, being the principal, should have been made a party in arbitration proceedings but the plaintiff failed to act with due diligence and is responsible for the expenditure so incurred on the arbitration proceedings for which the plaintiff cannot make the defendant No. 2/RITES Ltd. liable.

85. Learned counsel for the defendants has argued that while dismissing the Claim, the Arbitrator did not award any costs to the plaintiff. The remedy with the plaintiff was to have sought the clarification of the Award or should have filed Objections under *Section 34* of the *Arbitration and Conciliation Act, 1996* against the said Award. The plaintiff has failed to



follow the appropriate remedy and it cannot seek recovery of costs of arbitration by way of present Suit.

86. It is also argued on behalf of the defendant Nos. 1 and 2 that the plaintiff itself was at default in not being able to meet the standard or quality, and to make supplies within time and the drugs supplied were not in accordance with the specifications.

87. It is further argued that it was M/s Piramal Healthcare Limited which had submitted its bid initially despite having sold its domestic formulation business to the plaintiff within two days, failed to inform the defendants at the time of NOA. Pertinently, if the domestic formulation business was to be sold within two days, it is the plaintiff which should have submitted the Bid in its own name rather than seek transfer of NOA in its name after M/s Piramal Healthcare Limited was declared successful. The Tripartite Agreement has been duly signed by the defendant No.2/RITES Ltd., plaintiff and M/s Piramal Healthcare Limited and therefore, the defendants cannot be blamed for the subsequent execution of a Tripartite Agreement which got necessitated solely and purely because of the conduct of plaintiff or of M/s Piramal Healthcare Limited. The plaintiff having purchased the domestic formulation business from M/s Piramal Healthcare Limited should have been prompt in acting under the Business Transfer Agreement but it is the plaintiff which has failed to act promptly taking six months in informing the defendants about the Business Transfer. This time taken in execution of the Tripartite Agreement could have been saved if the plaintiff had acted with promptitude.

88. It is also argued on behalf of the defendant Nos. 1 and 2 that as per the terms of NOA, the content of medicines had to be uniform and the



medicines were required to be coated and were subject to UOC test. The medicines produced by the plaintiff were not in accordance with the specifications. The quoting could be of various kinds as has been explained by the defendants and, therefore, some batches of medicines were not cleared.

89. The Umpire Laboratory was constituted for 179 batches but only 78 batches were cleared. The EEC/PAC for import of vitamin crystals which cost about Rs. 1.74 crores, but the same was not accounted or utilised by the plaintiff.

90. It is further argued on behalf of the defendants that the change in the list of consignees for Maharashtra was only to the extent that the supply was to be made available to the Civil Surgeons instead of District Health Officer and this cannot be claimed to be a ground for delay. The sub-contractors themselves have started manufacturing belatedly and any loss caused to the plaintiff because of its dealings with the Sub-Contractors and the same cannot be attributed to the defendants nor can the plaintiff seek its recovery from the defendants.

91. In the end, it is argued on behalf of the defendants that the liquidated damages have been imposed in terms of Clause 22.1 of NOA and the plaintiff cannot make any grievance in respect of liquidated damages which have been imposed on account of delay and the breaches committed by the plaintiff.

92. It is, therefore, submitted that the Suit of the plaintiff is liable to be dismissed.

93. Submissions heard and the Written Submissions of the parties along with the Judgements as well as the evidence have been perused.



94. My issue-wise findings are as follows:

ISSUE No. 1: Whether the present suit is bad for misjoinder of causes of action? OPD-1 & 2

95. A preliminary objection has been taken on behalf of the defendants that there is misjoinder of cause of action. It is asserted that the Claims of the plaintiff arise under the Contract Agreement 14.06.2011, **Ex. P-58**, with the defendant No. 1/MoH&FW. However, the arbitral proceedings had been initiated by the plaintiff against the defendant No. 2/RITES Ltd. The Arbitrator had dismissed the Claim of the plaintiff *vide Award dated 14.06.2018* by observing that the remedy of the plaintiff would lie against the principal i.e., the defendant No. 1/MoH&FW which was not made a party in the arbitration proceedings and not against the defendant No. 2/RITES Ltd.

96. The Claims in the present Suit are against the defendant No. 1/MoH&FW while the claim for refund of costs of arbitration is against the defendant No. 2/RITES Ltd. and, therefore, there is a misjoinder of cause of action. This argument is completely misplaced as the defendant No. 1/MoH&FW is the principal and the defendant No. 2/RITES Ltd. is only an agent of the defendant No. 1/MoH&FW and the defendant No. 1/MoH&FW has been acting and entering into the Contract through defendant No. 2/RITES Ltd. The documents of Contract may be signed by the defendant No. 2/RITES Ltd. but not in its independent right and title but for and on behalf of the defendant No. 1/MoH&FW.

97. The plaintiff may have wrongly pursued its arbitral proceedings against the defendant No. 2/RITES Ltd. but the defendant No. 2/RITES Ltd. is an agent of defendant No. 1/MoH&FW and all the disputes have arisen



under the one Contract. Therefore, the plea taken that there is misjoinder of cause of action is completely misplaced.

98. *Accordingly, Issue No. 1 is decided against the defendants.*

ISSUE No. 2: Whether there is no cause of action for filing the present suit? OPD-1 & 2

99. The plaintiff has made specific averments of there being wrongful levy of liquidated damages and also that it had to incur various expenditure in performance of the Contract, which is liable to be recovered from the defendants. The liquated damages as imposed by the defendants are also claimed to have been wrongly levied and the recovery of the alleged liquidated damages is also sought by the plaintiff.

100. There are various cause of actions as already detailed above, disclosed by the plaintiff and it cannot be said that the Plaint is bereft of cause of action.

101. *The Issue No. 2 is decided against the defendants accordingly.*

ISSUE NO. 6: Whether the defendants have resorted to improper contractual mechanism in their standard form contract to make the arbitration clause meaningless, if so, its effect and consequence? OPP

ISSUE NO. 7: Whether the plaintiff is entitled to receive and the defendant No.2 is liable to pay a sum of Rs.20,41,545/- towards actual costs of arbitration? OPP

102. The plaintiff aggrieved by the acts of the defendants in respect of the Contract dated 14.06.2011 **Ex. P-58**, had initiated arbitration proceedings on 22.09.2016 against the defendant No. 2/RITES Ltd. and the claim was rejected by the Arbitrator *vide* Award dated 14.06.2018 **Ex. P-65**, by observing that the arbitration proceedings were not maintainable against the



agent i.e., defendant No. 2/RITES Ltd., even though the name of the principal i.e., the defendant No. 1/MoH&FW was disclosed. The arbitration initiated by the plaintiff failed on the Technical ground of non-impleadment of the principal i.e., the defendant No. 1/MoH&FW. The plaintiff suffered an adverse award purely because of its own mistake of not impleading the correct parties in the arbitration proceedings initiated by it before the Arbitrator and, therefore, cannot seek the cost of arbitration in the sum of Rs.20,41,545/- from the defendant No. 2/RITES Ltd. As has been already discussed above, the defendant No. 1/MoH&FW is the principal which entered into the Contract with the plaintiff through its agent i.e., defendant No. 2/RITES Ltd. and it was for the plaintiff to have invoked its remedies against the right parties. Therefore, the plaintiff is not entitled to the sum of Rs. 20,41,545/- towards the cost of arbitration.

103. *The Issue Nos. 6 and 7 are decided against the plaintiff, accordingly.*

ISSUE No.3: Whether the defendant No.2 was entitled to levy, deduct and appropriate, liquidated damages (Rs.3,25,76,118/-) against the plaintiff, without invoking the arbitration clause? OPD-1 & 2

104. Though it is claimed that the liquidated damages have been levied by the plaintiff against the defendant No. 2/RITES Ltd. without invoking the Arbitration clause, but the liquidated damages have been imposed and deducted by the defendant No. 2/RITES Ltd. under the terms of the Contract and the defendant No. 2/RITES Ltd. was not necessarily required to invoke Arbitration for determination of liquidated damages. The act of unilateral deduction of liquidated damages according to the defendant No. 2/RITES Ltd., was in terms of the Contract. Therefore, the liquidated damages were



not required to get adjudicated through arbitration, rather the plaintiff has a remedy to get such deductions made by the defendant No. 2/RITES Ltd. set aside by seeking appropriate remedy by way of arbitration/litigation which has been done.

105. Since, the defendant No. 2/RITES Ltd. has claimed to act under the terms of the Contract in levying and deducting the liquidated damages, it cannot be said that such determination for liquidated damages could have been done only through arbitration and not by the defendant No. 2/RITES Ltd. itself.

106. *The Issue No. 3 is, therefore, decided against the plaintiff accordingly.*

ISSUE No. 4: Whether the plaintiff is entitled to receive and the defendant No.1 is liable to pay damages to the tune of Rs.3,25,76,118/- to the plaintiff on account of wrongful appropriation of liquidated damages? OPP

107. The defendant No. 1/MoH&FW has deducted a sum of Rs. 3,25,76,118/- towards the liquidated damages. There are two aspects viz., (I) whether there existed the circumstances which justified imposition of liquidated damages, and (II) if it is found that the plaintiff was liable to pay damages, were they to be calculated in terms of *Clause 22.1* of GCC or that their quantification had to be proved by the defendant No. 1/MoH&FW, before its levy.

108. The liquidated damages have been imposed upon the plaintiff in terms of the *Clause 22.1 of GCC* which reads as under: -

“Clause 22 Liquidated Damages —

22.1 Subject to GCC Clause 24, if the Supplier fails to deliver any or all of the Goods or to perform the Services within the



period(s) specified in the Contract, the Purchaser shall, without prejudice to its other remedies under the Contract, deduct from the Contract Price, as liquidated damages, a sum of equivalent to the percentage specified in the SCC of the delivered price of the delayed Goods or unperformed Services for each week or part thereof of delay until actual delivery or performance, up to a maximum deduction of the percentage specified in the SCC. Once the maximum is reached, the Purchaser may consider termination of the Contract pursuant to GCC Clause 23.”

109. As per the aforementioned Clause, the plaintiff was liable to pay damages in case of delay and failure to deliver any goods or to perform services within the period specified in the Contract. The plaintiff has not denied that there was delay in supply of goods to the defendants. *The question for determination is whether this delay was attributable to the plaintiff.*

110. *The delay has been claimed to be on the following grounds :-*

- i) *Change of Tender in the name of the Plaintiff;*
- ii) *Issue of PAC and EEC;*
- iii) *Specifications of the drugs in the Tender document were incorrect;*
- iv) *Issue of umpire analysis;*
- v) *Delay in commencement of production of drugs by sub-contractor of the plaintiff; and*
- vi) *Error in addresses of consignees.*

(i) **Change in the name of the Plaintiff:**

111. The plaintiff has claimed that there was a change in the name of the successful contractor from M/s Piramal to the name of the plaintiff, which resulted in delay of supply of medicines to the defendants. It is not in dispute



that M/s Piramal, submitted its bid with the defendants on 06.09.2010 and immediately thereafter, on the next day, entered into a *Business Transfer Agreement* with the plaintiff on 08.09.2010. The last date of submission of Tender bid was 17.09.2010, which implies that there was sufficient time for the present plaintiff, to have filed the Bid in its own name but neither was the bid withdrawn by M/s Piramal nor a fresh Bid was filed by the plaintiff, despite there being sufficient time. Pertinently, once the business had been transferred by Piramal to the plaintiff, it was left with no business interest to continue with its bid.

112. Despite having transferred the business to the plaintiff on 08.09.2010, the Piramal Health Care continued in its endeavour to get the Tender. Interestingly, the Tender was granted in favour of Piramal on 31.03.2011. The initial validity of the Tender was 17.12.2010 but was extended till 21.01.2011. Ultimately, the Award was given to M/s Piramal Healthcare Ltd. on 31.03.2011.

113. M/s Piramal informed the defendants about the business transfer in favour of the plaintiff on 06.04.2011 and the *First Amendment* in the Notification of the Award in favour of the plaintiff was made on 10.06.2011; the name of the plaintiff was substituted in place of the M/s Piramal Healthcare Ltd. The intimation about Transfer of business was given on 06.04.2011. In all, 70 days were taken from the date of intimation till the First Amendment and transfer of the Award in the name of the plaintiff.

114. While the plaintiff has claimed that there was inordinate delay in the transfer of the tender Award in its name, it cannot be overlooked and ignored that this intimation of business transfer, should have been given immediately, once it was effected on 08.09.2010. Pertinently, instead of



intimating the defendants about the business transfer at the stage of inviting the Tender itself, M/s Piramal Healthcare Ltd. took the advantage of continuing with the Tender and it was eventually awarded in its name on 31.03.2011. When the Award was given to Piramal at that stage also, it did not inform the defendants about having Transfer of Business to the plaintiff. After having successfully got the Tender in its name, the M/s Piramal Healthcare Ltd. then informed the defendants about the Business Transfer Agreement and the requisite Notification took about 70 days to transfer the Notification of Award, **Ex. P-1**, in the name of the plaintiff.

115. The defendants in their evidence have explained that it is the plaintiff which took almost five weeks in furnishing the requisite documents for the transfer of the Tender in their name. Furthermore, a request was made by the plaintiff for change of Suppliers, after the bid had been accepted and a Notification of Award issued, which was an unusual event, which resulted in wastage of time and avoidable delay. Furthermore, the processing of the request for change of name involved doing a capacity and capability assessment of the plaintiff, getting all the required documents from them, proposing the change of name to the World Bank and after getting the no objection from the World Bank, submitting the documents to the Ministry of Health and Family Welfare i.e. the answering defendants. Since the value of the Contract was substantial, in the Ministry too, the decision took some time. Furthermore, the request for change of supplier led to many downstream disruptions too. The documents like the Project Authority Certificates, Excise Exemption Certificates, Road Permits, which carry the name of the supplier, could not be prepared. They could be prepared only after the Amendment for change of name was issued. The defendants have



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further explained that after the change of name of supplier i.e. the name of the plaintiff was approved by the Ministry, the Contract was signed by the plaintiff i.e. the supplier and defendant No. 1 on 14.06.2011.

116. It is a Government Agency and approvals are required at various levels, which took 70 days. There was no delay per say that can be attributed to the defendants in taking out the amended Notification; rather it is the conduct of the plaintiff which has resulted in delay of the amended Notification being issued in the name of the plaintiff.

117. It is pertinent to observe that the Business Transfer had taken place on 08.09.2010, which implies that all the business obligations had been taken over by the plaintiff; while doing so it was aware of the obligations which would fall upon it in case the Tender was granted to the M/s Piramal Healthcare Ltd. The plaintiff being well aware of all its obligations arising out of Business Transfer and also about the bid having been made by M/s Piramal Healthcare Ltd., it cannot be subsequently claimed that its obligations under the Tender would commence only after the amendment was carried out in its name. The plaintiff having already taken over the obligations of M/s Piramal Healthcare Ltd., it cannot deny or avoid on a specious ground of a formal Amendment of the Notification in its name. There was nothing which prevented it from the manufacture or procurement of the medicines under the Tender.

118. As per the Tender, 50% supply of medicines was to be made in 90 days and the remaining 50% was to be supplied in the following 90 days. The delivery of the medicines, therefore, had to be completed in 180 days. The name change may have taken 70 days but it was well within the knowledge of the plaintiff since the date of Award of Tender about its



obligations of supplying 50% of medicines within 90 days of the Award of tender. There was no reason for it, to have not prepared the medicines. *70 days' time taken for Amendment of the Notification and change of the name of Supplier, cannot be taken as a factum contributing towards the delay in supply of medicines.*

(ii) Issuance of Excise Exemption Certificate, PAC and Road Permits.

The second ground on which the plaintiff has attributed the delay to the defendant, is in issuance of Excise Exemption Certificate, PAC and Road Permits.

119. This has already been explained by the defendant that the delay was purely on account of the amendment in the Notification to change it in the name of the plaintiff. Such delay, therefore, cannot be attributed to the defendant.

120. PW-2, Milind Madhukar Kale on the delay in supply of Excise Exemption Certificates had admitted that they were not required for starting the manufacture of goods but only at the time of dispatching the goods. The sub-contractors started dispatching the manufactured goods to the Plaintiff from July, 2011 onwards and the first batch of the kit was manufactured and dispatched by the Plaintiff in August, 2011. The defendant has suggested that the Excise Exemption Certificates and Project Authority Certificates had been provided to the Plaintiff on 29.06.2011, while the first batch of the kit was dispatched by the Plaintiff in August, 2011.

121. PW-2 Milind Madhukar Kale further deposed that even though the Certificates were made available in June, 2011, the dispatch requires a long process of inspection of individual drugs/components, drawing of samples by the Inspection Agency appointed by Defendant No.2 for those drugs and



sending the said samples to the Testing Laboratory appointed by the Defendant No.2, receipt of the report of the Testing Lab in respect of the said samples, preparation of kits by the Plaintiff, calling of the Inspection Agency for inspection of kits and issuance of Dispatch Clearance Certificate by the said Inspecting Agency. All this took time and that is why the first dispatch could be commenced only in August, 2011.

122. PW-2 further stated that the Excise Exemption Certificates were required for the process of inspection and also by the sub-contractors for the dispatch of drugs by them to the Plaintiff. The defendant gave the suggestion that the Excise Exemption Certificates and Project Authority Certificates had been provided to the Plaintiff on 29.06.2011 i.e. the Certificates had already been made available while the Inspection was sought on 09.07.2011. In no way, can the delay in issue of the requisite Certificates can be attributed as a ground for delay in supply of medicines.

123. PW-2 was further questioned by the defendant as to whether the Project Authority Certificate that was issued, was utilised by the plaintiff to which the witness answered that he was not aware if the said Certificates were ever utilized. He also clarified that this was one of the reasons and not the only reason for delay.

124. It can thus, be concluded that the issue of EEC places no restrictions on manufacturing of drugs by the sub-contractor as is evident from the list of Sub-Contractors engaged by the plaintiff to manufacture and supply the various drugs and to get along with it, the batch numbers, date of manufacturing, date of expiry etc. The sub-contractors had started manufacturing of drugs on 01.05.2011 or on 01.06.2011. ***There is, therefore, no delay attributable to the issuance of EEC and PAC.***



(iii) Specifications of the drugs in the Tender Document were incorrect:

125. The plaintiff has further stated that the wrong testing parameters and technical specifications for the subject drugs by the defendant No. 2, is the single largest factor, which is responsible for the delay in making of the supplies under the subject Contract by the plaintiff.

126. The plaintiff has asserted that individual RCH Kit-A consists of 8 different components and failure of even a single component would result in stoppage of Kit production. There was failure of samples of Iron and Folic Acid (hereinafter 'IFA') on account of higher Folic Acid content. However, this specification in the Tender document was incorrect as the only relevant parameter for Folic Acid content in IFA Syrup, is that it should not be less than 90% in content and that upper limit is not applicable or is to be made applicable in such cases. That being the legally prescribed position, which emanates from 'Schedule V' of the *Drugs and Cosmetic Rules, 1945*, it cannot be varied by the parties by contractual terms to the contrary. Though the concerns had been raised by the plaintiff, they remained unaddressed. The failure of samples thus, had a cascading effect on the entire supply chain.

127. The defendant has explained that any deficiency in the specifications, were required to be pointed out by the supplier before opening of the Tender and at the time of pre-bid meeting, where opportunity is given to all the suppliers, to raise their concern regarding Tender specifications and other terms and conditions. M/s Piramal did not raise any such issue before the Tender opening. Likewise, the plaintiff had ample time of almost eight months i.e. from 08.09.2010 till 14.06.2011, to protest and to get the specifications corrected. Once they had signed the Contract, they were duty



bound to supply the material strictly according to the specifications provided in the Contract, which they have failed to do.

(iv) Issue of Umpire Analysis:

128. The plaintiff has claimed that the other parameter for mass failure of samples manufactured by the plaintiff, was the failure to meet the “Uniformity of Content” (*hereinafter referred to UOC*) test in the case of IFA Tablets. The plaintiff has asserted that this test was wrongly prescribed in the first place by the defendant No. 2 because it does not apply to multi-vitamin preparations and IFA Tablets are film coated multi-vitamin Tablets.

129. The issue was first raised by the plaintiff *vide* two e-mails both dated 25.08.2011 **Ex. P-23** and thereafter repeatedly, though, it failed to receive any response from the defendant No. 2.

130. On 07.09.2011, the *Drugs Control Laboratory, Mumbai Ex. PW 2/3*, in response to the request for opinion from Bharat Parenterals Limited, Baroda, one of the main Sub-Contractors and suppliers of the plaintiff under the subject contract, gave its opinion that Iron and Folic Acid tablets have patent and proprietary medicine and therefore, UOC test was not applicable to such tablets. The cut-off date for marking 100% deliveries i.e. 28.08.2011, in the interim, expired.

131. Shriram Laboratories was appointed by the Defendant No. 2 as the Testing Laboratory as per the Contract and NOA dated 31.03.2011. As per the Report dated 02.08.2012, Shriram Laboratories concluded that the Iron and Folic Acid Syrup batches supplied by the Plaintiff were ‘*not of Standard quality*’ as they did not comply with the prescribed specifications and had a higher Folic Acid content than that prescribed in the NOA.

132. The plaintiff has asserted that the *Shriram Laboratories* should not



have performed *Uniformity of Content* Test for Iron and IFA Tablets (small and large) and IFA should not have been rejected on account of excess Folic Acid content. It was asserted that there is only a lower limit of folic acid content which is prescribed and not the higher content.

133. Further, *Shri Ram Testing Laboratories* on 07.12.2011, conceded that the UOC Test, which had been originally prescribed by the defendant No. 2 in the manufacturing specifications and Protocol, was not applicable to Iron and Folic Acid tablets, which was one of the key constituents of Kit A. The total number of 251 days (counted from the date of Notification of Award i.e. 31.03.2011), were wasted simply on account of wrong specifications and testing methodology. This delay was overlapping the delay already explained.

134. The defendants on the other hand, have denied the averments of the plaintiff that UOC Test was not required for the supplies, is incorrect and misleading. Nowhere in the Contract was it mentioned that the supplies had to be Film coated. The UOC Test has been prescribed for IFA tablets (large and small). It clearly mentions two aspects i.e. (i) *Tablets are coated; and* (ii) *UOC Test must be performed on the tablets*. When these two conditions were laid down in the Contract, the manufacturer should have chosen a product type, which conformed to both the conditions. The choice of manufacturing 'Film Coated' tablets by the plaintiff, was not appropriate to the contract specifications. Some other type of coating should have been chosen, say Sugar coating or enteric coating, where UOC Test was applicable. Such a tablet would have satisfied both the conditions of being coated and being amenable to UOC Test.

135. The defendant No. 1 issued a clarification *vide* its Letter dated



24.10.2011/01.12.2011 **Ex. DW 1/2**, to the defendant No. 2. The defendants have further stated that the opinion of Drugs Control Laboratory, Mumbai, in response to the request for opinion from Bharat Parenterals Limited, Baroda, is not relevant in this case as the Contract had been placed, as per the offer of the Bidder.

136. ***Folic Acid test***

137. *PW-3 Dr. Vaijayanti P. Dikshit* in her cross-examination had deposed that as per the technical specifications of Iron and Folic Acid tablets, they should comply with the requirements of IP (Indian Pharmacopeia) given under tablets. For the Folic Acid content as per the Regulatory regime comprising the *Drugs and Cosmetic Rules, 1945 (Rule 124-B)*, only the lower limit of not less than 90% of Folic Acid is applicable and there is no higher limit prescribed. However, in the present case, the batches failed on account of higher content of folic acid. Furthermore, monograph of Iron Folic Acid tablets and Iron Folic Acid syrup do not form part of IP 2007 and IP 2010. Therefore, it is a proprietary medicine and the Plaintiff had to use the manufacturer's specifications where the only limit which is prescribed is a lower limit and no higher limit has been prescribed. In case of vitamins, one has to add overages to comply with the label claim throughout the shelf life of the drugs/ products so as to compensate for the losses on account of different climatic conditions.

138. The plaintiff thus, exercised its option to challenge the negative reports of *Shri Ram Testing Laboratory* and requested defendant No. 2 for the appointment of a Government approved Umpire Laboratory *vide* e-mail dated 22.08.2011, **Ex. P-21**. Vimta Laboratories were appointed as the Umpire Laboratory by the defendant No. 2, several months later, on



12.12.2011, **Ex. P-35** i.e. after much delay.

139. The defendant, on the aspect of Umpire Analysis, has explained in their written statement and also by DW-1, Sh. Nitin Jain in his affidavit of Evidence, Exhibit DW-1/A that issue of referring the supplies for Umpire Testing, arises only when the supplies are found to be of sub-standard quality. The selection of the Umpire Agency had to be done, after following due process, which involved taking approval by the defendant No. 2 of the World Bank as well as of the defendant.

140. Further, Defendant No. 2 appointed Vimta Laboratories as Umpire Laboratory on 12.12.2011 which was 111 days after the request was made by the plaintiff. DW-1 in his cross examination has explained that Umpire Analysis was not a regular process for the appointment of which approval of the Ministry of Health and Family Welfare had to be taken.

141. Moreover, it is a matter of record that total 179 batches (i.e. 12% of the supplied batches i.e. 1489), were given for Umpire Analysis, out of which 101 batches were rejected that means only 5% of the total batches, were affected due to Umpire Analysis. The result of Umpire Testing was received on 01.02.2012, according to which 101 batches failed while 78 batches were passed by the Umpire Lab. It clearly proves that the drugs that were being supplied by the plaintiff were of defective quality. Had the plaintiff supplied material of requisite quality, the very issue of Umpire Testing, would not have arisen and the delay could have been avoided.

142. CW-1 in his cross examination admitted that only 80 batches failed out of 1489 batches on the ground of uniformity of content tests. The plaintiff, however, asserted that there was no requirement of UOC which was insisted by the defendant on account of which these samples failed.



143. The plaintiff in answer to the specific question of his claim that UOC test was not required for the medicines referred to *the Indian Pharmacopoeia 2014* but had admitted that *IP 2014* is given in *Schedule V of Drugs and Cosmetic Act*. The contract between the parties was of 2010 while the Regulation on which reliance has been placed by the plaintiff is admittedly of 2014.

144. Therefore, the plaintiff cannot be held to be justified or correct in asserting that there was no requirement of a UOC test. Moreover, it cannot be overlooked and ignored that only 80 batches had failed. The very fact that remaining 1409 batches conformed, clearly reflects that the plaintiff was well aware of the requirement which it had to meet and had in fact adhered to for majority of the batches. The plaintiff cannot place the burden of rejection of 80 batches on account of UOC testing, on defendant No.2. In fact, the Umpire Testing Report has confirmed that it is the plaintiff who had failed to conform to the specifications as mentioned in the Tender document and was well within the knowledge of the plaintiff.

(v) Delay in commencement of production of drugs by Sub-Contractors of the plaintiff:

145. It is explained by the defendant that NOA has been issued by defendant No.2 on 30.03.2011 while the same has been issued by RITES Ltd. on 31.03.2011. There is almost a delay of 2-3 months in the start of production by the Sub-Contractors for which there is no explanation forthcoming. In fact, there was no production in the month of April. It is the plaintiff, who is responsible and negligent in not commencing the production of the kit component till April, 2011.

146. Furthermore, the process of manufacturing of Drugs was not affected



by the substitution of name of Piramal Healthcare Limited by that of plaintiff, M/s. Abbot. The manufacturing of drugs had already commenced on 01.05.2011 by four Sub-Contractors and on 01.06.2011 by three Sub-Contractors, while the amendment to the change of name was issued on 10.06.2011. It is evident that there is no link between substitution of the name of the plaintiff and the date of start of manufacturing of drugs by the Sub-Contractors.

147. The plaintiff in his own letter dated 13.12.2012 **Ex. PW1/36** addressed to defendant No.1, stated that they have started making the kits in full swing and would be able to dispatch more than 25,705 kits between January, 2012 to 20.05.2012 i.e. in five months, whereas they were required to supply 67,700 kits in five months as per the Contract. The total number of kits delivered was 34,331 kits between August, 2011 to May, 2012. The data shows the lethargic rate of production and utter lack of available production capacity on the part of the plaintiff for meeting the needs of the contract. The plaintiff did not demonstrate achieving a higher production rate during the contract period at any stage. The plaintiff, after taking over the business, did not ensure its capacity to meet its commitment under the Contract. ***The plaintiff itself failed to meet its obligations by its slow production and inability to meet the production supply of the kits as per the Tender requirements and cannot put the blame for any delay on the defendants.***

148. It may thus be concluded that none of the grounds agitated by the plaintiff, could establish the dereliction by defendant or can be held responsible for the delay in supply.

(vi) Error in addresses of consignees:

149. The next ground agitated by the plaintiff, to explain the delay is



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unilateral amendment to the original consignee list of Maharashtra.

150. It is asserted that the defendant No. 2 issued an amended list on 27.09.2012, **Ex. D-1**, with the new names, addresses and contact numbers of the consignee, even though the original list of consignees, giving the names of the person to whom the medicines were to be delivered, had been frozen at the time of the contract, when notified in favour of Piramal on 31.03.2011. If the defendant No. 2 had to amend it unilaterally for its own reasons, the benefit of such delay i.e. 362 days must be given in favour of the plaintiff and to the risk and responsibility of the defendant No. 2. However, no additional accommodation or extension in the delivery period was made by the defendant No. 2 on this score.

151. The plaintiff has claimed that the defendant No.2 had unilaterally issued *Amendment II* dated 27.03.2012 thereby substituting the original consignee list of Maharashtra with a new list of names, addresses and contact numbers which entitled it to a benefit of 362 day (i.e. the period from date of NOA 30.03.2011 upto 27.03.2012). It is claimed by the plaintiff that the delivery date must be re-fixed from the date of this material modification.

152. The defendant Nos.1 & 2 have explained that the addresses of the consignees had been provided by the defendants along with their indent as per the Tender documents. It was denied that the addresses of the consignees had been amended subsequently. It has been explained that in case of some of the consignees of Maharashtra, the address stated was "*Civil Surgeon*" in place of "*District Health Officer*". On 17.02.12 the Plaintiff submitted a representation to Defendant No.2 that the consignees were not accepting the goods on this ground. This representation was considered and after getting



the corrected addresses from the answering Defendant, the amended list of consignees was forwarded to the Plaintiff, on 27.03.2012.

153. The Contract required the Plaintiff to give an advance intimation of seven days to the Consignees before delivery of the product. Had the intimation been given, the Plaintiff would have known that the addresses needed correction well in time.

154. DW-1 in his cross-examination has explained that the request from the plaintiff about the non-acceptance of drugs by consignee was received on 17.02.2012. The matter was checked and it came out that only the designation of the consignee had to be changed and not the address. DW-1 further stated that till the *Amendment-II* was issued, maximum number of drugs had been supplied by the Plaintiff to the consignees.

155. Furthermore, out of 31 consignees in Maharashtra, the Plaintiff had completed deliveries to 17 consignees by 17.02.2012 (i.e. before submission of representation by the Plaintiff for correction in the names/addresses of Maharashtra consignees). The delivery to 28 remaining consignees was made by 27.03.2012. Only 03 consignees remained to be delivered after the issuance of Second Amendment. Essentially, the Amendment was not needed for delivery.

156. From the testimony of the witnesses, it thus emerges that the addresses were not changed but only the designation of the consignee was changed and this would obviously not impact the delivery of the consignments. It emerges that some of the consignees on account of the designation refused to accept the consignments about which the plaintiff informed the defendant only on 17.02.2012 and not on 30.03.2011 as has been claimed by the plaintiff.



157. Furthermore, there is no rebuttal that most of the consignments till then, stood delivered.

158. The plaintiff has not rebutted the testimony of DW-1 in any manner. ***The claim of the plaintiff that there was a delay of 362 days on account of change of list of consignees is, therefore, not tenable.***

159. ***Conclusion:***

160. From the aforesaid discussion, it can be concluded that the delay was not attributable, for any act of the defendants.

II. Termination of Contract without Notice:

161. Having concluded that the delay in supply and completion of the delivery of Kits cannot be attributed to the defendants, the most pertinent question which arises is whether the defendant was justified in terminating the Contract on 21.05.2012 when defendant No. 2/RITES Ltd. abruptly decided that there would be no further inspection and testing of any samples of RCH Kit A and instructed the Testing Agency to act accordingly.

162. **The plaintiff has contended that** this decision of defendant No. 2 to stop Inspection and Testing was never conveyed to the plaintiff in writing. Moreover, no opportunity was given to the plaintiff to explain before taking such a decision. There was a complete failure of principles of natural justice. The substantial Inventory lying in finished and semi-finished condition at various points in the production pipelines of various suppliers of the plaintiff and in the plaintiff's warehouse, was jeopardised and the financial planning of the plaintiff as well as, of its suppliers, suffered. According to the plaintiff, the packing materials used for packing the finished goods, was specifically marked as "*RCH Supply, Not for Sale*" and therefore, were incapable of being used in any other commercial production of the same



items or delivered to any other purchaser.

163. The defendants have explained that the Contract had been issued on 31.03.2011 while the decision to stop the inspection was taken on 21.05.2012 i.e after 14 months. The plaintiff during this period, had not completed the supply of even the first lot, whereas the same was to be completed in 90 days as per the Agreement. For the reasons not attributable to the plaintiff, like issues of EEC, PAC, inspection and testing agencies etc, the extension of delivery date of 1st lot was given to the purchaser. There were negligible supplies in the 2nd lot and the supplies of 2nd lot were made without completing the supply of 1st lot. The Lot wise supply position is as under:-

Lot	Ordered quantity	Supplied quantity
I	33,889	27,538
II	33,811	6,787
Total	67,700	34,325

164. The defendants have explained that the delivery period for the 1st lot was given by the defendant No. 2 because of the delay, which was not attributable to the plaintiff, as is evident from the Letter dated 30.09.2011 **Ex. D-7**, written by the defendant No. 2 to the Ministry.

165. However, the extension of delivery date, did not absolve the plaintiff for its slow production rate, mismanagement of contract and delays caused by rejections of their supplies. The Sub-Contractors of the plaintiff, did not manufacture the drugs in sufficient quantity and of requisite quality well ahead of the delivery period. Till date, as per the Notification of above, supply was to be made of 50% within 90 days of the date of NOA and balance 50% within 150 days from the date of NOA.



166. The defendants have explained that the delivery date of 1st lot, was extended to 14.09.2011, for the reasons explained above; rather there was no justification for the request of the plaintiff, to grant extension in respect of 1st Lot of 50% upto 31.03.2012.

167. The defendants have further explained that the plaintiff *vide* Letter dated 01.02.2013 **Ex. P-47**, had written to the Joint Secretary, EPW, seeking further amendment of the Contract, to grant extension upto 31.03.2012 for the 1st Lot of supplies. This Letter essentially raised the points, which have already been considered and since the plaintiff's demand was not reasonable or justified, the same was not accepted.

168. The defendants have further claimed that the delivery period of the Contract, could not have been extended indefinitely for which reason, the Inspection was frozen by MoH&FW/defendant No. 1 as the extended delivery period had expired on 14.09.2011 and only about one half of the ordered quantity was supplied by the plaintiff till May, 2012. The defendants have explained that it was a World Bank funded Contract and the World Bank initiated its decision, to stop funding from 31.03.2012 onwards, consequent to which, defendant No. 1 decided to stop accepting any new batches for inspection. In this regard, the defendant No. 2 sent an e-mail dated 28.02.2012, to the World Bank.

169. The defendants have further explained that whatever material had been offered for inspection, was accepted by the defendant No. 2 and there was no question of seeking confirmation from the plaintiff as there was already inordinate delay on the part of the plaintiff, in supplying the drugs. Rather RCH program of the Ministry suffered due to non-supply of drugs by the plaintiff, within time.



170. The plaintiff has asserted that the defendant No. 2 thereafter, issued Amendment-III dated 30.01.2013 **Ex. P-46**, whereby the terms of delivery, were changed from “50% within 90 days from the date of notification of award” to “50% within 167 days from the date of notification of award” or this meant that additional time of merely 77 days, was given to the plaintiff, to complete 50% of the deliveries. This extended period for delivery of 50% supplies, had already expired on 14.09.2011, whereas the date for delivery of 100% supplies including the first half, had expired even earlier on 28.08.2011. The retrospective Amendment is not sanctified by law and is merely notional or fictitious.

171. The question which thus, arises is whether the Contract automatically came to an end after the expiry of stipulated time, which hinges on the finding whether time was the essence of the Contract.

172. The Apex Court in its decision in Hind Contractors v. State of Maharashtra, (1979) 2 SCC 70, held that whether the time is the essence of the Contract would essentially be a question of the intention of the parties to be gathered from the terms of the Contract. Even when the parties have expressly provided that Time is the essence of the Contract, such stipulation would have be read along with the other provisions of the Contract and on construction and interpretation of the terms of the Contract, inference that completion of the work by a particular date was intended to be fundamental, may be excluded. For instance, if the Contract includes Clauses providing extension of time in certain contingencies or for payment of fine or penalty for every day or week, the work undertaken remains unfinished on the expiry of the time provided in the contract, such clauses would be



construed as rendering ineffective the express provision relating to the time being the essence of the Contract.

173. Further, in Welspun Specialty Solutions Limited v Oil and Natural Gas Corporation Ltd (2022) 2 SCC 382 the Apex Court held that having an explicit clause alone may not be enough to make time the essence of the contract; the entire contract and surrounding circumstances must be considered to determine if time is of the essence, it was also observed that the circumstances of the case are more important than the contract's provisions when claiming liquidated damages.

174. In light of the aforesaid law, it may be significant to refer to the terms of the contract, according to which the supply of 50 percent was to be made in the first 90 days and the balance was to be paid in 150 days from the date of notification of the Award i.e 30.03.2011 and the time for execution of the Agreement was till 28.08.2011. Though the Defendants have stated that the grace of the delivery of the first 90 days was extended to 167 i.e. extended by 77 days but the final date of delivery continued to be 150 days. However, it is not in dispute that even though the 150 days had expired on 28.08.2011 but admittedly the Defendant continued to accept the delivery of the medicines upto May, 2012 without any protest.

175. It is evident that though the time of delivery was stipulated as 150 days, the deliveries after that were also made, thereby reflecting that time was not of the essence of the contract. This is further reaffirmed by the nature of the Contract wherein under the World Bank, Ministry of Health and Family Welfare had undertaken to distribute these medicines in all the Health sectors to be distributed to small children and pregnant women.

176. The conduct of the parties and the nature of the contract thus, leads to



an irresistible conclusion that time was not the essence of the contract.

177. ***Having concluded*** that time was not the essence of the contract and the medicines were being accepted by the Defendant till May, 2012, the question arises how the Contract to be concluded was. For this, it is pertinent to refer to the ***Clause 23*** of the GCC, which provides for termination. It reads as under:

Clause 23: The Purchaser, without prejudice to any other remedy for breach of Contract by writing notice of default sent to the supplier, may terminate this Contract in whole or in part:

- 1. If the supplier fails to deliver any or all of the Goods within the period(s) specified in the contract or within any extension thereof granted by the Purchaser pursuant to GCC Clause 21; or*
- 2. If the Goods do not meet the Technical Specifications stated in the Contract; or*
- 3. If the Supplier fails to provide any registration or other certificates in respect of the Goods within the time specified in the Special Conditions.*
- 4. If the Purchaser determines that the Supplier has engaged in corrupt, fraudulent, collusive, coercive or obstructive practices in competing for or in executing the Contract then the Purchaser may, after giving 14 days notice to the Supplier, terminate the Supplier's employment under the Contract and cancel the contract, and the provisions of Clause 23 shall apply as if such expulsion had been made under Sub-Clause 23.1*



[...]

23.2 In the event the Purchaser terminates the Contract in whole or in part pursuant to GCC Clause 23.1, the purchaser may procure upon such terms and in such manner as it deems appropriate, Goods or Services similar to those undelivered and the Supplier shall be liable to the Purchaser for any excess costs for such similar Goods or Services. However, the Supplier shall continue performance of the Contract to the extent not terminated.

178. While the Defendants had continued to accept the medicines till May, 2012, but without any demur, Notice or intimation of any kind to the Plaintiff, it suddenly stopped accepting the supply of evidence. The conduct of the Defendant was in complete contravention of the **Clause 23 GCC**.

179. *The claim of the Defendants that the medicines were not meeting the specifications or that there was default in the supply of the quantities of the goods as agreed by the parties entitled it to terminate the Agreement, but it could not have unilaterally without any prior written Notice to the Plaintiff stopped accepting the medicines abruptly.*

180. Further, it was specifically provided in Clause 23.2 GCC that in case the purchaser terminates the Contract, it may procure the goods or services similar to those undelivered and the supplier shall be liable to pay the excess cost for such goods and services. *Clause 23.2* thus, imposed an obligation on the Defendant to purchase the undelivered medicines from the market and recover the price differential from the Plaintiff.

181. From the conjoint reading of the aforementioned two clauses it is evident that the liquidated damages for the unperformed services or delayed



goods for each week or part thereof could be calculated at the applicable rates not exceeding 0.5% per week and the maximum shall not exceed 10% of the Contract.

182. The Defendant has done none of this. It has neither procured any medicines nor has it disclosed the rate at which the similar medicines could have been purchased from the market. Even if the contention of the Defendant that they were entitled to claim liquidated damages in terms of SCC but even then there is not an iota of evidence to state what was the period of default and what was the loss suffered, if any. This leads to only one conclusion that there was no loss of any kind suffered by the Defendant.

The second aspect is the imposition of liquidated damages.

183. While no Notice as mandated by Clause 23.1 GCC was given, it may still be considered as to whether the defendants were entitled to deduct the liquidated damages in the sum of Rs.3,25,76,118/-, calculated at 10%. . The special conditions of the Contract in regard to the ***Clause 22.1*** reads as under:

“22.1. Liquidated Damages

Subject to GCC Clause 24, if the Supplier fails to deliver any or all of the Goods or to perform the Services within the period(s) specified in the Contract, the purchaser shall without prejudice to its other remedies under the Contract, deduct from the Contract Price, as liquidated damages, a sum equivalent to the percentage specified in the SCC of the delivered price of the delayed Goods or unperformed Services for each week or part thereof of delay until the actual delivery or performance up to a maximum deduction of the percentage specified in the SCC. Once the maximum is reached, the Purchaser may consider termination of the Contract pursuant to GCC Clause 23.”



184. It specifies that the liquidated damages could be calculated at a rate of 0.5% for every week of delay up to a maximum of 10%. How the liquidated damages in the sum of Rs. 3,25,76,118/- has been calculated by the Defendant has not been explained or disclosed. What emerges is that the total value of the contract was 73,76,71,570/- and since the supply was about 50% of the agreed quantity, the simpliciter formula for calculating damages of 10% of the Contract amount has been adopted by the Defendant. This is not only contrary to the specific *Clause 23.2* of the GCC but is also against the tenets of the Contract law.

185. It is asserted that these damages could not have been unilaterally deducted by the defendants. Their Contract contained an Arbitration Clause which was the agreed mechanism for resolution of disputes, which included within its ambit, the question of damages suffered by one party on account of default by the other party. The defendant No. 2 if aggrieved, could have invoked the Arbitration Clause but it could not have acted in a high-handed manner and unilaterally deduct the amounts by passing the process of law. It cannot be a Judge of its own course.

186. It is further asserted that the defendant No. 2 has consumed every last dose of medicines supplied, which was made by the plaintiff, under the Contract and as such, no loss has been suffered by the defendant No. 2. It is, therefore, not entitled to damages either liquidated or unliquidated.

187. The simpliciter answer of the defendant is that *Clause 22.1* GCC **Ex. P-58** read with relevant Clauses of GCC explicitly provided that if the supplier failed to deliver any or all the goods or perform the services within the period specified in the Contract, the defendants shall be entitled to deduct from the Contract price, the liquidated damages, which is a sum



equivalent to a percentage specified in the SCC (0.5% per week) for each week or part thereof of delay until actual delivery of performance upto a maximum of 10%. The period of delay in the present case, has been worked out to 45 weeks whereas the liquidated damages have been deducted only for 20 weeks (maximum) as per the Contract.

188. It is evident that in case the Defendant felt that the default was on the part of the Plaintiff and was not being able to deliver the medicines on time and within the time frame that was envisaged under the Delivery schedule, then it was bound to send a Notice in writing for termination of the Agreement. Also, in terms of Clause 23.2 it was required to procure the Medicines from the market and recover the differential. The obligation was on the defendant to mitigate the losses.

189. Reference may also be made to Sections 73 and 74 of the *Indian Contract Act, 1872* which provide for calculation of damages and for their mitigation. Sections 73 and 74 of the Indian Contract Act, 1872 read as under:

“Section 73: Compensation for loss or damage caused by breach of contract.—When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.”

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

[...]

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience



caused by the non-performance of the contract must be taken into account.

Section 74:— *Compensation for breach of contract where penalty stipulated for:—*

[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, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or 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 or, as the case may be, the penalty stipulated for.

.....”

190. In *Fateh Chand v. Balkishan Das*, AIR 1963 SC 1405, the law relating to the damages had been propounded which reads as under:

“Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award in case of breach of contract is unqualified except as to maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles.



The jurisdiction of the court is not determined by the accidental circumstance of the party in default being a Plaintiff or a Defendant in a suit. Use of the expression “to receive from the party who has broken the contract” does not predicate that he jurisdiction of the Court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract....”

191. Likewise, it has been held in the Case of Maula Bux vs. Union of India(1969) 2 SCC 554., and Kailash Nath Associates vs. Delhi Development Authority, (2015) 4 SCC 136 that proof of loss or damage arising out of breach of contract is a sine qua non for payment of compensation.

192. On a conspectus of the above authorities, the law on compensation for breach of contract Under Section 74 can be stated to be that where a sum is named in a contract as a liquidated amount payable by way of damages or in the nature of penalty, the party complaining of a breach can receive as reasonable compensation such liquidated amount or as penalty only if it is a genuine pre-estimate of damages/penalty fixed by both parties and found to be such by the Court. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

193. It is thus settled that even if the liquidated damages were envisaged in the Contract, the loss had to be proved. The defendants could not have deducted these liquidated damages to the tune of Rs. 3,25,76,118/-, without proving any loss, from the amount that was due and payable to the Plaintiff.

194. Therefore, the plaintiff is held entitled to recovery of the amount of Rs. 3,25,76,118/- so deducted towards liquidated damages.



195. Issue No. 4 is accordingly decided against the defendant.

ISSUE NO. 8: *Whether the plaintiff is entitled to receive and the defendant No. 1 is liable to pay, a sum of Rs.19,80,000/- against an equivalent sum paid by the plaintiff to Bharat Parenterals Limited? OPP*

196. It is submitted on behalf of the Plaintiff that while awaiting extension of the delivery period by the defendant No. 2, the plaintiff was constrained to stop accepting the deliveries of further supplies from its own vendors and suppliers including Bharat Parenterals Limited of Vadodara. Consequently, Bharat Parenterals Limited served a Legal Notice dated 13.12.2013, seeking recovery of a sum of Rs. 20,78,729.00 being the price in respect of finished inventory of goods manufactured pursuant to Purchase Orders, issued by the plaintiff to Bharat Parenterals Limited. Subsequently, the parties arrived at a settlement under which an amount of Rs.19.80 Lacs was paid by the plaintiff to the Bharat Parenterals Ltd., by Demand Draft dated 21.08.2015.

197. The arbitration was invoked by the plaintiff a year hence, on 22.09.2016, for recovery of the said amount from the defendant No. 2. The plaintiff was entitled to compensation for the amount equivalent to what he had to pay to the subcontractor on account of act of stoppage by the defendant No. 2.

198. The defendants have countered this contention and claim of the plaintiff, by asserting that it was not liable in any manner for the amount for which Legal Notice was issued to the plaintiff by Bharat Parenterals Limited and if any amount had been paid by the plaintiff to it, the defendants had nothing to do with this alleged Settlement *inter se* the plaintiff and Bharat Parenterals. The defendants cannot be made liable for payment of



19,80,000/-, which the plaintiff had paid to its sub-contractor.

199. It would be relevant to refer to the Settlement between the Plaintiff and Bharat Parenterals Ltd. **Ex. PW2/6** wherein Bharat Parenterals Ltd. had made a claim of Rs. 75,60,313/-, however they arrived at a Settlement for Rs. 19,80,000/-. There had been various disputes which had arisen between the Plaintiff and Bharat Parenterals Ltd. on account of the supply of various kits constituent to the purchase Order and all past, present or future claims, demands, obligations, costs and expenses on account of contractual arrangement between parties.

200. In this regard, reference may be made to Paragraph 25 of the Plaint wherein it has been stated by the Plaintiff itself that Bharat Parenterals Ltd. had served a *Legal Notice dated 13.12.2013* seeking recovery of a sum of Rs. 20,78,729/- being the price in respect of finished inventories of goods manufactured pursuant to purchase Orders issued by the Plaintiff which were lying with Bharat Parenterals Ltd. While the Settlement Agreement **Ex. 2/6** reflects that the entire dispute had been settled for Rs. 19,80,000/- but the claims were in the sum of Rs. 75,60,313/-. The plaintiff had asserted that the unfinished goods were in the sum of Rs. 20 lakhs. Even if it is accepted that the plaintiff had accepted the delivery of unfinished medicines which were worth Rs. 19,80,000/-, no evidence whatsoever has been led on behalf of the plaintiff whether it was able to mitigate the losses by selling the medicines in the market.

201. A plea has been taken by the Plaintiff that the medicines could not be sold because the packaging had the label of *Not for Sale*. However, it was only the labels or the packaging that could have easily been changed. The Plaintiff could have sought the cost of packaging and not of the medicines.



202. The Plaintiff has failed to prove or even depose that the unfinished medicines with Bharat Parenterals Ltd. were taken by it or were sold or what was the cost of those medicines or the packaging. For want of evidence, the Plaintiff cannot be held entitled to recovery of Rs. 19,80,000/- which it had paid to Bharat Parenterals Ltd.

203. **Therefore, Issue No. 8 is decided against the Plaintiff.**

ISSUE NO. 5: Whether the plaintiff is entitled to receive and the defendant No. 1 is liable to pay a sum of Rs.14,47,414/- on account of capital expenditure incurred by the plaintiff in the setting up of the Palghar kitting unit? OPP

204. The plaintiff has asserted that it had set up a dedicated Kitting unit at Palghar (the "Palghar Unit") for the manufacture of kits for supply to the consignees of the defendant No. 2, under the subject contract, and in the process, had incurred a capital expenditure of Rs.14,47,414/-. However, defendant No. 2 through its conduct prevented the plaintiff from making full supply of 67,700 RCH Kits under the contract, which led to substantial loss to the plaintiff. Therefore, the plaintiff has claimed the capital expenditure of Rs.14,47,414/-, made by it in setting up the Palghar Unit.

205. The defendants have denied their liability to pay the capital expenditure incurred by the plaintiff. It is asserted that the defendants had nothing to do with the setting up of the Unit and no extra demand can be sought by the plaintiff, for commissioning in a dedicated kitting facility.

206. There was no provision in the contract, which required a setting up of a kitting facility. The kitting cost was covered in the Contract and has been paid in full to the plaintiff against the supply of full Kits (about 51% of the ordered quantity). The cost of kitting had already been defined as Rs.272/-,



per kit and had already been paid to the plaintiff. As per the plaintiff's letter dated 10.02.2015, they had delivered 34,331 kits and he has already been paid Rs.93.38 Lakhs (Rs.272 x 3433), towards kitting charges.

207. The defendants have rightly claimed that it was not their responsibility for the plaintiff to create the Kitting facility. It was the plaintiff, who had participated in the Contract on the basis of its own capacity to provide a kitting unit, for which a rate of Rs.272 per kit, had been included in the Contract price.

208. The plaintiff cannot claim any reimbursement of the capital investment made by him for the purpose of discharging its obligations under the Contract. The claim of the plaintiff for setting-up the knitting unit is, therefore, without any merit.

209. **Issue No. 5 is decided against the plaintiff.**

ISSUE NO. 9: *Whether the plaintiff is entitled to receive and the defendant No.1 is liable to pay pre-suit interest?*

OPP

210. Because it is the damages which have been awarded to the plaintiff and also considering that it was the plaintiff who erred in not making Defendant No.1 as a party to the Arbitration proceedings, it is held that the plaintiff is not entitled to pre-suit interest.

211. **Issue No. 9 is decided against the Petitioner.**

ISSUE NO. 10: *Whether the plaintiff is entitled to receive pendente lite and future interest on the decretal amount from the date of decree to the date of actual realization, if so, from which defendant and at what rate? OPP*

212. Considering the entire circumstances, the plaintiff is held entitled to



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Interest at the rate of 7% per annum from the date of institution till the date of realisation.

213. Issue No. 10 is decided accordingly.

Relief:

214. In light of the findings of the aforesaid issues, the Plaintiff is held entitled to recovery of Rs. 3,25,76,118/- which had been deducted by the Defendant as liquidated damages. The Plaintiff is also granted interest at the rate of 7% p.a. from the date of institution of Suit till the date of payment. The parties shall bear their own costs.

215. The Decree Sheet be made accordingly.

**(NEENA BANSAL KRISHNA)
JUDGE**

SEPTEMBER 30, 2024

S.S/RS