IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 29.10.2024

\+ **FAO(OS) (COMM) 313/2019 and CM APPL. 34865/2024**

GAS AUTHORITY OF INDIA LTD ..... Appellant

versus

SAW PIPES LTD ..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr S V Raju, ASG, Ms Purnima Maheshwari, SC, Mr D K Singh and Mr Samrat Goswami, Advocates.

For the Respondent : Mr.Jayant K Mehta, Sr Advocate with Mr Vijay K Singh and Ms Shruti Manchanda, Advocates.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU
HON'BLE MR JUSTICE SACHIN DATTA

JUDGMENT

VIBHU BAKHRU, J

1. The appellant (hereafter *GAIL*), has filed the present intra court appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereafter *the A&C Act*) impugning a judgment dated 26.11.2010 (hereafter *the impugned judgment*) passed by the learned Single Judge of this Court in OMP (COMM) No.264/2003 captioned *M/s GAS Authority of India Ltd. v. M/s SAW Pipes Limited & Ors*.

2. GAIL had filed the aforesaid application under Section 34 of the A&C Act impugning an arbitral award dated 07.12.2002 as amended on

21.03.2003 (hereafter *the impugned award*), rendered by an arbitral tribunal comprising of three members (hereafter *the Arbitral Tribunal*).

3. The impugned award was rendered in the context of disputes that had arisen between the parties in connection with an agreement for supply of pipes (*the Contract*). SPL was awarded the contract pursuant to being successful in a competitive bidding process initiated by GAIL by floating a global tender. GAIL issued a Purchase Order dated 31.10.1994 (hereafter *the PO*) for supply of pipes. Section III of the bid document contains the General Conditions of the Contract (hereafter *GCC*). Article 1.2 of GCC defines the Contract to include the Purchase Order and all attached exhibits and documents thereto.

4. In terms of the impugned award, the Arbitral Tribunal had awarded a sum of USD 7,230,378.23 along with interest at the rate of 6% per annum with effect from 01.04.1997 till the date of the impugned award as well as interest at the rate of 12% per annum on the aforementioned amount converted into Indian Rupees from the date of award till the date of payment. The Arbitral Tribunal further awarded a sum of ₹ 18,00,000/- along with interest at the rate of 12% per annum with effect from 01.04.1997 till its payment in favour of the claimant (respondent in the present appeal hereafter referred to as *SPL*). In addition, the Arbitral Tribunal also awarded a sum of ₹ 50,00,000/- as costs in favour of SPL.

5. The Arbitral Tribunal held that GAIL was responsible for the delay by not taking the delivery of the goods even when large quantities

of finished and coated pipes were available with SPL. Therefore, GAIL was not entitled to reduce the price payable for the pipes, on account of delay on the part of SPL. Accordingly, the Arbitral Tribunal allowed SPL's claim for the amount withheld by GAIL and awarded the said amount along with the interest. Additionally, SPL also awarded costs in favour of SPL.

6. The learned Single Judge rejected GAIL's petition to set aside the impugned award as the Court found that the Arbitral Tribunal's interpretation of the Contract was reasonable and its view was plausible one. The learned Single Judge rejected the contention that the impugned award is vitiated by patent illegality. The learned Single Judge found that the findings of the Arbitral Tribunal were based on appreciation of material and record and therefore, the GAIL's application was unsustainable. Accordingly, the learned Single Judge also awarded the cost quantified at ₹ 50,000/- in favour of SPL.

7. In view of the above, the principal question that arises for consideration before this Court is whether the impugned award is vitiated by patent illegality on the face of the record or is in conflict with the public policy of India.

FACTUAL CONTEXT

8. GAIL is a Central Public Sector Undertaking (PSU) incorporated in August, 1984 under the Ministry of Petroleum & Natural Gas. GAIL is India's leading natural gas company with diversified interests across the natural gas value chain of trading, transmission, LPG production &

transmission, LNG re-gasification, petrochemicals, city gas, E&P, etc. GAIL owns and operates a network of around 16240 km of natural gas pipelines spread across the length and breadth of country. It is also working concurrently on execution of multiple pipeline projects to further enhance the spread.

9. SPL (Saw Pipes Limited) is a leading global manufacturer and supplier of Iron & Steel Pipe products and is also engaged in the supply of equipment for offshore oil exploration and maintenance.

10. GAIL for its 'Gas Rehabilitation & Expansion Project' issued a notice inviting tenders internationally for procurement of line pipes and coating of pipes pertaining to upgradation of the pipeline system from Hazira to Babrala and Jagdishpur. The bidders were required to submit their bids under the two-bid system, that is, a technical bid and a price bid. GAIL appointed Engineers India Limited (hereafter *the Consultant*) as the consultant for ascertaining the production and financial capabilities of the bidders. The Consultant found SPL to be fully capable and technically qualified with respect to the technical bid. SPL's price bid was found to be the lowest and most suitable. Pursuant to the said evaluation, SPL was awarded the Contract on 31.10.1994 for supply of Polyethylene (PE) Coated Line Pipe of 36-inch diameter for the aforementioned project.

11. The procurement of pipes as required in the Contract were bifurcated into three categories having wall thickness 12.5mm, 14.9mm, and 17.7mm. The total length of the pipes to be supplied was for a length of 513.5 kms and the total value of the Contract was USD

155,685,368.20. The Contract also consists of a delivery schedule according to which the total pipes of length 513.5 kms (43,134 pipes) were to be supplied to GAIL as under:

i. For months March and April, 1995 – 70kms of pipes (or 5,880 pipes) for each month;

ii. For months May and September, 1995 – 67kms (or 4628 pipes) for each month;

iii. For month October, 1995 – 38.5kms (or 3234 pipes).

12. The supplies were to be completed in the month of October, 1995. The pipes were to be manufactured and supplied *via* two major routes, that is, 'plate route' and 'mother pipe route'. A total of 339.51 kms of pipes were to be supplied through plate route, which entailed SPL importing plates as raw material and manufacturing the pipes to be supplied after being coated. A total of 173.988 kms of pipes were to be supplied through mother pipe route, whereby SPL was to import manufactured pipes, which after being coated were to be supplied to GAIL. The Contract provided GAIL with the option to call upon SPL to make good for any shortfall in the quantity as mentioned in the delivery schedule for plate route through mother pipe route.

13. The payments under the Contract were to be made in tranches. 10% of the Order Value was to be paid to SPL against unconditional acceptance of the purchase order dated 31.10.1994 (*the PO*); 80% of the Order Value of the goods was to be paid against dispatch documents including material release note/material acceptance certificate issued by GAIL/Consultant; and the remaining 10% of the price was payable on receipt and acceptance of goods at the site.

14. GAIL was obligated under the Contract to lift the finished/coated pipes from the stack yard of SPL and for this purpose GAIL engaged the services of M/s Shiv Hare Roadlines (hereafter *the transporter*). The Contract provided the release of 80% of the amount payable in respect of the goods lifted upon furnishing the lorry receipt issued by the transporter.

15. The Contract was a Free on Trailer (FOT) contract which obligated GAIL to take delivery of the pipes at the factory gate of SPL after the required inspection/tests were conducted by GAIL/Consultant.

16. The disputes arose between the parties as GAIL withheld the payment of amounts due to SPL under the Contract. It is the case of GAIL that the amounts were withheld towards damages for delay in delivery of the pipes attributable to SPL.

17. Article 28 of the GCC contained an arbitration clause, whereby the disputes in relation to the Contract were agreed to be resolved by arbitration under the rules of the Conciliation and Arbitration of International Chamber of Commerce (ICC) by one or more arbitrators. The venue of arbitration proceedings was agreed to be New Delhi.

18. SPL in regard to the applicability of rules of the ICC *vide* letter dated 20.02.1997 requested GAIL to consider a modification in this regard so that a domestic arbitration could take place under the Indian Arbitration Act as both the parties were Indian and the Contract was executed in India. However, upon receiving no response, SPL approached the ICC for commencement of the arbitration proceedings in regard to the disputes/claims of SPL arising out of the Contract.

19. GAIL objected to the said reference. GAIL contended before the ICC that the arbitration clause consisted of two parts. One being applicable if the contract was to be international, that is, if the contract was to be awarded to any party based outside India in which case the arbitration will be governed by the ICC rules. However, second part of the clause would be applicable if the contract was awarded to a domestic bidder. GAIL contended that the ICC does not have the jurisdiction to commence the arbitration proceedings as the contract was awarded to SPL, which is an Indian concern.

20. However, the ICC rejected GAIL's objection and proceeded with the arbitration. An arbitral tribunal comprising of Mr. Justice C.L. Chaudhary (Retd.) (Chairman); Mr. Justice T.D. Sugla (Retd.) and Mr. Justice S.N. Sapra (Retd.) was constituted. The parties filed the pleadings before the said arbitral tribunal. GAIL reiterated the aforementioned jurisdictional objection. Whilst SPL deposited the cost of arbitration with the ICC, GAIL declined to deposit its share of the arbitral cost. The arbitral tribunal rejected GAIL's objection to the jurisdiction of the arbitral tribunal by a detailed order dated 11.02.1998.

21. SPL filed a civil suit before this Court for an injunction restraining GAIL from encashing the performance bank guarantee furnished by SPL in terms of the Contract. An order dated 24.05.1999 passed by a Division Bench of this Court in FAO(OS) 270/1998 records parties' agreement to amend Clause 28.3.2 of the GCC to exclude applicability of the ICC rules. In the said proceedings the parties agreed for the arbitration to be conducted under the A&C Act in place of the

ICC Rules. Further, a new arbitral tribunal (hereafter *the Arbitral Tribunal*) consisting of Justice (Retd) H.L. Anand; Justice (Retd.) P.K. Bahri and Justice (Retd.) Jaspal Singh was constituted for adjudication of the disputes between the parties. This Court further directed that the Arbitral Tribunal shall take up the matter from the stage already reached and that the aforementioned bank guarantee would be kept alive.

22. The Arbitral Tribunal reserved matter for pronouncing the award on 12.10.1999. However, at this stage, one of the arbitrators, Justice (Retd.) H.L. Anand resigned on account of his ill health and Justice (Retd.) S. Ranganathan was appointed as the Presiding Arbitrator.

SPL'S CASE

23. It is the case of SPL that it had made all necessary arrangements and complied with all its obligations as per the Contract. However, the delivery of coated pipes was not completed within the stipulated period, that is, by October, 1995. SPL for reasons attributable to GAIL and on account of *force majeure* events beyond control of the parties, including unprecedented rains, floods, humidity, and onslaught of insects.

24. According to SPL, the total requirement of trailers for lifting the pipes was 60 (sixty) trailers of 25-ton capacity each, per day for the evacuation rate of the pipes to be in consonance with the delivery schedule as per the Contract. However, GAIL did not comply with the said condition. As a result, around 2000 (two thousand) pipes were lying in the stack yard of SPL on account of failure of GAIL to lift the pipes promptly in the months of March, April, and May, 1995.

25. In order to rectify the aforementioned mismatch in taking up the delivery of the pipes, on 03.06.1995, SPL suggested creation of a buffer stack yard near the main mill of SPL. The entire expense of transporting the ready pipes, creating approach road and other facilities to the buffer stack yard was to be borne by SPL. The buffer stack yard could accommodate 6000 to 8000 pipes, which would decongest the main stack yard and facilitate increased production and resolve the financial cash flow problem being faced by SPL.

26. On 29.06.1995, GAIL accepted the said proposal and agreed to pay 80% of the value of the said pipes on being lifted from the main stack yard for the purpose of stacking in the buffer stack yard. SPL claims that the production/coating of the pipes improved significantly after creation of the buffer stack yard and it had transferred 19,000 number of pipes to the buffer stack yard in a period of 4-8 months.

27. By a letter dated 08.09.1995, SPL brought certain facts to the notice of GAIL claiming that the same constituted *force majeure*, and along with that of *force majeure* conditions and requested GAIL to change the delivery period from 35 weeks to 52 weeks, However, SPL did not receive any response from GAIL.

28. GAIL continued taking delivery of the coated pipes even after the stipulated period and making payments. The last delivery of finished pipes from main coating yard was accepted by GAIL on 16.01.1996 and the last delivery from the buffer stack yard, was accepted on 28.02.1997.

29. SPL filed a Statement of Claims making 17 (seventeen) claims before the Arbitral Tribunal, which are reproduced as under:

i. Claim No. 1 (USD 6265535.33) – Payment of 80% invoice value withheld from various invoices raised by SPL

ii. Claim No. 2 (USD 1640995.92) – Interest on the amount withheld by GAIL, a subject matter of Claim No. 1.

iii. Claim No. 3 (USD 246281.50) – Payment of 10% invoice value withheld from various invoices raised by SPL.

iv. Claim No. 4 (USD 674294.64) – Interest on the amount withheld by GAIL, a subject matter of Claim No. 3.

v. Claim No. 5 (USD 311238.00) – Interest on Delayed Payment by GAIL against two Invoices.

vi. Claim No. 6 (USD 68746.54) – Cost of sample pipes supplied to SPL.

vii. Claim No. 7 (USD 24512.00) – Interest on the outstanding amount of price of sample pipes supplied by SPL.

viii. Claim No. 8 (₹ 7612669.70 or USD 211463.94) – Interest/Damages on funds blocked in the finished pipe inventory due to slow lifting of the finished/coated pipes by GAIL.

ix. Claim No. 9 (₹ 31293679.00 or USD 869268.86) – Interest/Damages on funds blocked in the form of Raw material inventory, due to low production output consequential to slow lifting of the finished/coated pipes by GAIL.

x. Claim No. 10 (₹ 8441000.00 or USD 2345583.33) – Warehousing charges incurred by SPL for the finished pipes during the forced extended period of the contract.

xi. Claim No. 11 (₹ 44963565.20 or USD 1248988.00) – Warehousing charges of raw material and consumable incurred by SPL during the forced extended period of contract.

xii. Claim No. 12 (₹ 10800000.00 or USD 300000.00) – Interest/Damages on funds blocked for the raw material inventory procured for another project due to low production output, consequential to slow lifting of the finished/coated pipes by GAIL.

xiii. Claim No. 13 (₹ 11289580.00 or USD 313599.44) – Expenses/demurrage charges on account of demurrage and continuation charges incurred by SPL due to faults of GAIL.

xiv. Claim No. 14 (₹ 139000000.00 or USD 3861000.00) – Loss of profit suffered by SPL due to extra time consumed in production/coating for GAIL's project.

xv. Claim No. 15 (₹ 60162800.00 or USD 1671188.89) – Warehousing charges at the buffer stack yard incurred by SPL for the finished pipes during the period from 16.01.1996 to February, 1997.

xvi. Claim No. 7A (₹ 16298388.00 or USD 452733.00) – Reimbursement of Excise Duty, levied on SPL. The total amount claimed under Claim No. 1 to 15 comes to USD 11273824.56 and the amount claimed under Claim No. 7A to 15 in Indian currency comes down to ₹ 405861681.90.

xvii. Claim No. 16 – Costs for Arbitration amounting to USD 1,95,000 or at present ₹ 20,00,000/-.

xviii. Claim No. 17 – Pendente lite and future interest which is to be ascertained at the appropriate stage.

GAIL'S CASE

30. GAIL controverted the allegations raised by SPL. GAIL contended that SPL was not able to meet the production targets on

account of its own defaults. GAIL contended that there is no stipulated schedule for lifting of pipes and it had no obligation to lift pipes to match SPL's production schedule.

31. GAIL denied SPL's claims and raised the following four counter claims against SPL:

i. GAIL suffered losses on account of variation in the exchange rate due to late delivery of finished/coated pipes by SPL. GAIL claimed a sum of ₹ 20,52,88,582/- along with an interest at the rate of 18% per annum for the extra payment incurred.

ii. A sum of USD 16,200 and ₹ 216,00,000 along with an interest at the rate of 18% per annum is claimed against the extra expenditure borne by GAIL on account of over stay of the its representatives and consultants in Italy due to delay in manufacturing and supply of pipes which resultant in delayed inspection.

iii. A sum of ₹ 1,26,00,000/- along with an interest at the rate of 18% per annum is claimed against the extra expenditure incurred by GAIL in monitoring the project due to delay in supply of pipes by SPL.

iv. A sum of USD $10,00,000 along with an interest of 18% per annum on account of defective pipes being supplied by SPL which was detrimental to the estimated project deadline in laying down the pipeline under the bed of Chambal river.

32. GAIL claimed that its decision to apply the price reduction formula under Article 24.1 of the GCC is not arbitrable. GAIL also contended that SPL has waived its right to raise such claims as it had not raised any claim during the currency of the Contract.

33. GAIL made a reference to the provisions of the Contract which prescribed varied tests and inspections to be certified by the consultant

before the pipes could be ready for the delivery. It claims that the coating plant of SPL was ready only on 10.03.1995 and the Cathodic Disbondment Test could not be commenced as it required a minimum of 30 days to reach to its findings.

34. GAIL further referred to the letters dated 25.02.1995 and 02.03.1995 and fax dated 11.03.1995 of SPL pointing out that only five pipes were coated till 11.03.1995 when the tests were commenced. GAIL claims that it acceded to the request of SPL for dispatching the pipes without carrying out a particular test as SPL agreed that it would bear the risk and cost if the pipes were found detective after dispatch. GAIL also referred to its fax dated 15.03.1995, wherein GAIL specifically stated that the delay in delivery of coated pipes beyond the contractual date, shall be viewed in terms of the Contract.

35. GAIL denied the existence of any *force majeure* circumstances, which hindered the production of the pipes. It stated that the contract does not envisage absolving SPL of its obligations on account of conditions like rains, humidity and insect infestation. Thus, SPL could not take the benefit of the *force majeure* clause. It claims that the terms of the Contract made it obligatory for SPL to establish adequate infrastructure to prevent any hindrance caused by such events.

36. GAIL asserted that it had rightly declined SPL's request to grant extension of contractual period from 35 weeks to 52 weeks, as SPL was solely responsible for the delay in performing its contractual obligation.

37. GAIL also claimed that some of the pipes, specifically pipes of 17.7 mm, were defective and SPL agreed to rectify the defects, which continued much after 16.01.1996.

THE IMPUGNED AWARD

38. The Arbitral Tribunal reframed the issues based on the draft agreed terms of reference, which were drawn by the previous arbitral tribunal in accordance with the rules of the ICC. And, framed the following thirty-three issues:

i. Whether the Rules of Conciliation, and Arbitration of the International Chamber of Commerce (ICC), Paris, has any applicability to the Arbitration Agreement between the claimant and respondent and if not, whether this Arbitral Tribunal has jurisdiction to enter upon the reference of disputes between the parties as alleged by the respondent in the preliminary objections.

ii. In case ICC rules apply, whether the constitution of this Arbitral Tribunal is not in accordance with the ICC Rules?

iii. Whether the contract provides any specific rate of lifting/picking up of coated pipes by the respondent?

iv. Whether the contract provides any specific rate of production of bare/coated pipes by the claimant? If so to what effect?

v. Whether the claims for alleged withholding of payments as also other claims are not arbitrable for the reasons stated by respondent in its reply?

vi. (deleted)

vii. Whether delay in the delivery schedule occurred on account of omission and commission on the part of the respondent or the claimant? If so to what effect?

viii. Whether any conditions of alleged "force majeure" as stated in the Statement of Claim, existed and if so do they constitute "force majeure" under the contract and if so did the claimant notify the condition in accordance with the contract and if so, to what effect?

ix. Whether the respondent waived the delivery schedule period and acquiesced in the time extension of the delivery schedule by their acts and conduct particularly by taking delivery of the pipes and making payments therefore even after the expiry of the original period stipulated in the contract and slow rate of lifting of the goods by the respondent's transporter from the buffer stack yard till 28.02.1997?

x. Whether the respondent is liable for the payment of a sum of US dollars 6265535.33 to the claimant as per details given in Claim No.1 of the statement of facts and claims filed by the claimant?

xi. Whether the respondent is liable for the payment of a sum of US dollars 1640995.92 to the claimant as per details given in Claim No. 2 of the statement of facts and claims filed by the claimant?

xii. Whether the respondent is liable for the payment of a sum of US dollars 246281.50 to the claimant as per details given in Claim No. 3 of the statement of facts and claims filed by the claimant?

xiii. Whether the respondent is liable for the payment of a sum of US dollars 674294.64 to the claimant as per details given in Claim No. 4 of the statement of facts and claims filed by the claimant?

xiv. Whether the respondent is liable for the payment of a sum of US dollars 311238.00 to the claimant as per details given in Claim No. 5 of the statement of facts and claims filed by the claimant?

xv. Whether the respondent is liable for the payment of a sum of US dollars 68746.54 to the claimant as per details given in Claim No. 6 of the statement of facts and claims filed by the claimant?

xvi. Whether the respondent is liable for the payment of a sum of US dollars 24512.05 to the claimant as per details given in Claim No. 7 of the statement of facts and claims filed by the claimant?

xvii. Whether the respondent is liable for the payment, of a sum of US dollars 211463.04 to the claimant as per details given in Claim No. 8 of the statement of facts and claims filed by the claimant?

xviii. Whether the respondent is liable for the payment of a sum of US dollars 869268.86 to the claimant as per details given in Claim No. 9 of the statement of facts and claims filed by the claimant?

xix. Whether the respondent is liable for the payment of a sum of ₹ 844,41,30/- to the claimant as per details given in Claim No.10 of the statement of facts and claims filed by the claimant?

xx. Whether the respondent is liable for the payment of a sum of ₹ 449,63,565.20/- to the claimant as per details given in Claim No.11 of the statement of facts and claims filed by the claimant?

xxi. Whether the respondent is liable for the payment of a sum of ₹ 1,08,00,000.00 to the claimant as per details given in Claim No. 12 of the statement of facts and claims filed by the claimant?

xxii. Whether the respondent is liable for the payment of a sum of ₹ 1,12,89,580.00 to the claimant as per details given in Claim No. 13 of the statement of facts and claims filed by the claimant?

xxiii. Whether the respondent is liable for the payment of a sum of ₹ 13.9 crores to the claimant as per details

given in Claim No. 14 of the statement of facts and claims filed by the claimant?

xxiv. Whether the respondent is liable for the payment of a sum of ₹ 60162800.00 to the claimant as per details given in Claim No. 15 of the statement of facts and claims filed by the claimant?

xxv. Whether the respondent is liable for the payment of the costs for the present arbitration as claimed by the claimant?

xxvi. Whether the parties are liable for payment of *pendente lite* and future interest of each other?

xxvii. Whether the respondent is entitled to raise or make counter claims in the present proceedings under the ICC Rules of Conciliation and Arbitration?

xxviii. Whether the claimant is liable for the payment of a sum of ₹ 205,288,582.00 to the respondent as per details given in Claim No. 1 of the statement of counter claims filed by the respondent?

xxix. Whether the claimant is liable for the payment of a sum of US dollars 54,26,767.70 to the respondent as per details given in Claim No. 2 of the statement of counter claims filed by the respondent?

xxx. Whether the claimant is liable for the payment of a sum of US dollars 162000 and ₹ 21600000.00 to the respondent as per details given in Claim No. 3 of the statement of counter claims filed by the respondent?

xxxi. Whether the claimant is liable for the payment of a sum of ₹ 126,00,00.00 to the respondent as per details given in Claim No. 4 of the statement of counter claims filed by the respondent?

xxxii. Whether the claimant is liable for the payment of a sum of US dollars 10,00,000 to the respondent as per details given in Claim No. 5 of the statement of counter claims filed by the respondent?

xxxiii. To what other reliefs, if any, is the claimant entitled to against the respondent and to what other relief is the respondent entitled to, if any, against the claimant?

39. The Arbitral Tribunal examined the relevant Clauses of the Contract. The Arbitral Tribunal observed that the scope of work under the Contract comprised of three parts including import of material, manufacturing of the pipes, and coating the pipes. The Contract was for a fixed price of USD 155,685,368.20 as specifically stated in Annexure II to the PO. It was agreed that the said price would remain fixed till completion of the Contract. The delivery schedule was specified in Annexure III to the PO.

40. The Arbitral Tribunal also noted that M/s Socotherm, Italy was a collaborator for technical know-how for coating of pipes. The Arbitral Tribunal, amongst other clauses, noted Clause 6.0 and Clause 24 of the GCC, which provided for price reduction schedule for delayed delivery. The Arbitral Tribunal also referred to Section 1 of the bid documents that set out the project profile and the mode of dispatch of the goods for domestic bidders, and Article 1.5 of the GCC, which stipulated that delivery would be deemed to have been made in case of supplies within India, on the date of railway receipt/loading receipt.

41. The Arbitral Tribunal found that the Issue nos.1, 2 and 27 – which related to the question whether ICC Rules were applicable to the arbitration between the parties – were no longer relevant as the parties had agreed to an *ad hoc* arbitration under the provisions of the A&C Act.

42. The Arbitral Tribunal noted that the tender floated by GAIL was a global tender and therefore, the monthly delivery schedule was intended to facilitate supply of goods from abroad by a foreign contractor through shipping vessels with the corresponding duty of GAIL to take delivery of the said goods in one go. However, since the Contract was awarded to a domestic manufacturer (SPL) and the deliveries were to be accepted ex-factory, GAIL was required to lift the supplies on much shorter intervals.

43. The Arbitral Tribunal accepted SPL's contention that although the Contract specified a monthly schedule for deliveries, the same did not mean that specified quantities of pipes produced in a month were required to be lifted in one go at monthly intervals. The Arbitral Tribunal held that both the parties had mutual and reciprocal duties to produce and lift the pipes in coordination.

44. The Arbitral Tribunal rejected GAIL's contention that it was not obliged to lift pipes commensurate with SPL's production. The Arbitral Tribunal held that the contractual provisions for supply and delivery of pipes was required to be understood in the factual background of the Contract and the same could only mean that SPL was required to produce sufficient number of pipes so as to not fall behind GAIL's capacity to lift the finished/coated pipes.

45. The Arbitral Tribunal found in favour of SPL that it was entitled to the value of the goods supplied. And, in the given facts, GAIL was not entitled to withhold payments on account of delay in supply of

pipes. The Arbitral Tribunal found that there was an initial delay on the part of SPL during the months of March and April 1995. However, GAIL had accepted lower delivery during this period without any protest or reservation. Even during the said period, GAIL was responsible for certain delays including delay attributable to its consultant on account of applying an incorrect procedure for certain tests. The Arbitral Tribunal held that the delay in delivery of pipes after May 1995 was attributable to GAIL as the transporter engaged by GAIL could not lift pipes equivalent to SPL's daily production.

46. The Arbitral Tribunal accepted SPL's contention that it was constrained not to produce pipes to its full capacity per day as there was delay on the part of GAIL's transporter to lift pipes, which had created a bottleneck on account of storage capacity at the coating yard being full to its capacity.

47. In the aforesaid context, SPL had suggested creation of a buffer stack yard to augment the storage facility and GAIL had accepted the same. Accordingly, SPL had created a buffer stack yard at its own cost. In the aforesaid context, the Arbitral Tribunal rejected GAIL's contention that it had agreed to creation of a buffer stack yard only on the request of SPL and had no reciprocal obligation to lift pipes from the said yard. The Arbitral Tribunal observed that the need for buffer stack yard had arisen on account of GAIL's inability to lift adequate number of pipes from the coating yard in a timely manner.

48. The Arbitral Tribunal rejected SPL's claim that it was absolved of any delay in supply of pipes on account of *force majeure* events as contemplated under Article 27 of the GCC. According to SPL, there were excessive rains and insect infestation among other events, which constituted a *force majeure* condition under Article 27 of the GCC. However, the Arbitral Tribunal rejected the said contention.

49. The Arbitral Tribunal noted that SPL had requested for extension of the delivery period from 35 weeks to 52 weeks by a letter dated 08.09.1995 and had also sent a reminder dated 27.11.1995. Although GAIL did not respond to the said letter, it continued accepting deliveries of pipes even beyond the stipulated period without raising any protest. The Arbitral Tribunal found that GAIL had not informed SPL that it intended to reduce the price in terms of the price reduction formula under Article 24 of GCC on account of delayed deliveries. SPL had completed the production of coated pipes by January 1996. However, GAIL continued to take deliveries from the main coating stack yard till 16.01.1996 and from the buffer stack yard till 28.02.1997. In the given facts, the Arbitral Tribunal held that GAIL had waived the delivery schedule and was, thus, not entitled to invoke the price reduction formula.

50. The Arbitral Tribunal held that the provision for price reduction was akin to a provision for liquidated damages. However, GAIL had not suffered any loss on account of delay in delivery of pipes as GAIL was also facing problems of stacking pipes at its site. Further, GAIL

had also completed the works for which pipes were required, without any cost overrun.

51. In the aforesaid view, the Arbitral Tribunal allowed SPL's claim for the amount withheld by GAIL. The Arbitral Tribunal also found that SPL was entitled to interest on the amounts withheld.

52. GAIL had made certain adjustments against the amounts payable to SPL on various counts. The Arbitral Tribunal found that GAIL was not entitled to any adjustment as claimed except an amount of USD 99,294.60. In the aforesaid view, SPL's Claim no.3 for an amount of USD 246,281.50 was allowed to the extent of USD 146,986.90. That is, after reducing the amount of USD 99,294.60 from the claimed amount, which the Arbitral Tribunal held was due to GAIL.

53. As far as Claim No. 1 is concerned, SPL had claimed an amount of USD 6,265,535.33 as the balance amount due in respect of the balance price for the pipes supplied in the months of October and November 1995. GAIL claimed that the said amount was adjusted against its claim of reduction in price for the delayed delivery of the pipes. The Arbitral Tribunal held GAIL liable to pay the aforesaid amount to SPL and that reduction in price was not justified even for the late deliveries of March and April 1995 for which SPL was solely responsible.

54. SPL had claimed interest at the rate of 19.25% per annum on amounts claimed under Claim No. 1 and Claim no.3. The Arbitral Tribunal was of the view that it was unfair to apply the same rate of

interest on the amounts in US dollar currency and amounts awarded in Indian rupees. Thus, the Arbitral Tribunal held SPL to be entitled to interest at the rate of 6% per annum on Claim Nos. 1 and 3 and accordingly, restricted the Claim Nos. 2 & 4 to USD 5,115 and 2,10,169 respectively.

55. There is no dispute that the amount of USD 2,46,281.50 as claimed under Claim No. 3 was payable to SPL. However, GAIL claimed that certain amounts were to be adjusted against the Claim No. 3. The Arbitral Tribunal accepted that one of adjustments as claimed by GAIL was justified. The Arbitral Tribunal held that SPL had benefitted in supplying 4,585.99 tons of pipes through plate route in excess of the quantity as agreed. This additional benefit was computed at ₹32,01,193/- or USD 99,294.60. Thus, the said amount was liable to be adjusted by GAIL against Claim No. 3 of SPL. Accordingly, the Arbitral Tribunal awarded an amount of USD 146,986.90 (USD 246,281.50 minus USD 99,294.60) in respect of claim no. 3

56. In respect of SPL's claim for interest on amounts claimed under Claim No. 3 being Claim No.4, the Arbitral Tribunal allowed interest at the rate of 6% per annum on amounts awarded under Claim No. 3 computed at USD 210,169 up to 31.03.1997.

57. SPL had claimed interest of USD 311,238 at the rate of 19.25% per annum on the amount of USD 1,51,09,850.13 in respect of the two invoices dated 11.11.1995 and 18.11.1995 for which the payment was released only on 20.12.1996. The Arbitral Tribunal awarded interest of

an amount USD 242,584.32 at the rate of 6% per annum on USD 1,51,09,850.13, against the said claim (Claim No.5).

58. The issues under Claim No. 6 and 7 pertaining to price of sample pipes supplied to GAIL by SPL were mutually resolved. By a letter dated 01.01.2001, GAIL agreed to pay ₹18,00,000/- in regard to these claims, which were accepted by SPL by its letter dated 23.01.2001.

59. The Arbitral Tribunal rejected SPL's Claim No. 8 for an amount of USD 211,463. SPL had claimed the said amount as interest/damages on the funds amounting to USD 7,612,669 blocked in the finished pipes inventory remaining in the coating stack yard without being lifted promptly. The Arbitral Tribunal also rejected SPL's Claim No. 9, which was of similar nature as the amount claimed under Claim No. 8.

60. SPL claimed a sum of ₹ 8,44,41,000/- under Claim No. 10 as additional expenses incurred for maintaining the buffer stack yard for prolonged period of the Contract from October 1995 till April 1996. The Arbitral Tribunal rejected the said claim as SPL had not put GAIL to any notice that it would be charging any maintenance expenses at any point of time during the performance of the Contract. For the same reason, the Arbitral Tribunal rejected the amount claimed under Claim No. 11.

61. SPL claimed an amount of ₹ 1,08,00,000/- under Claim No. 12, which was rejected by the Arbitral Tribunal as such damages even if incurred, did not flow naturally from any breach of the terms of the Contract.

62. SPL's claim for recovery of ₹ 1,12,89,580/- (Claim No. 13) for expenses incurred by SPL on account of GAIL not releasing the dues of SPL in time, was also rejected by the Arbitral Tribunal.

63. SPL's claim for loss of profits (Claim no.14) and claim of ₹ 6,01,62,800/- for expenses incurred for maintaining the buffer stack yard for the period 16.01.1996 to February 1997 (Claim no.15), were also rejected by the Arbitral Tribunal.

64. The Arbitral Tribunal rejected GAIL's counter claims, except counter claim no. 5, which was partially allowed.

65. GAIL's counter-claim no.5 was for recovery of USD 5,426,767.70 for not making up the shortfall in production of pipes using the mother pipe route. The Arbitral Tribunal allowed the said counter claim to the extent of USD 99,294.60. However, no separate award was made in this regard as the same has been accounted for by reducing the amount awarded against SPL's Claim No. 2.

66. Insofar as costs is concerned, the Arbitral Tribunal held that the total arbitration costs of ₹ 1,01,66,567/- were borne by the parties during the proceedings. The Arbitral Tribunal thus awarded an amount of ₹ 50,00,000/- as costs in favour of SPL and against GAIL considering the partial success of SPL.

67. Lastly, in the context of the claim for *pendente lite* and future interest, the Arbitral Tribunal referred to the decision of the Supreme Court in ***Forsal v. ONGC: AIR 1984 SC 241,*** and noted that the date of the decree/award would be the material date for determining the

exchange rate for converting the amount of award in foreign currency into Indian rupees. The Arbitral Tribunal thus awarded 6% per annum pendente lite interest up to the date of the impugned award on the amount awarded in US dollars. For the amount awarded in Indian rupees, the Arbitral Tribunal awarded interest at the rate of 12% per annum till the date of payment. The Arbitral Tribunal also held that the amount in US dollars when converted into Indian rupees as per law, would carry future interest at the rate of 12% per annum from the date of decree/award till payment.

68. The Arbitral Tribunal rendered the impugned award on 17.12.2002. Thereafter**,** the parties filed applications under Section 33 of the A&C Act seeking amendment in the impugned award on the ground of certain typographical and computation errors. The Arbitral Tribunal formulated a revised tabular statement summarizing its conclusion regarding various issues raised before it. The said tabular statement is reproduced under:

Claim No.	**Issue No.**	**Amount awarded to the claimant in**	
		USD	₹
1.	10	6,265,535.33	
2.	11	511,500	
3.	12	146,986.90 (A)	
4.	13	210,169	
5.	14	96,187	

6, 7	15, 16		18,00,000
8 to 15	17 to 24	Nil	
16	25		50,00,000 (B)
17	26	(C)	
		7,230,378.23	68,00,000

69. The Arbitral Tribunal's conclusions as recorded in paragraph 181 of the impugned award, as amended on 21.03.2003, is reproduced as under:

> "In view of the findings arrived at above, the following award is made:-
>
> (i) That the respondent shall pay to the claimant a sum of US Dollars 7,230,378.23 (Seven Mil1ion Two hundred Thirty thousand Three hundred Seventy Eight US Dollars and Twenty Three Cents.)
>
> (ii) That the respondent shall pay the claimant a sum of ₹ 18,00,000/- (Rupees Eighteen Lakh).
>
> (iii) That the respondent shall pay interest at the rate of 6% per annum on the amount awarded at S. No. (i) from 01.04.1997 till date of decree.
>
> (iv) That the respondent shall pay interest at the rate of 12% on the amount converted into Indian Rupees at S. no. (i) and (iii) from the date of decree till payment.
>
> (v) That the respondent shall pay to the claimant interest at the rate of 12% per annum on the amount awarded at S. no. (ii) with effect from 01.04.1997 till payment.
>
> (vi) That the respondent shall pay ₹ 50,00,000/- (Rupees Fifty Lakh) as costs to the claimant.

(vii) That all other claims and counter claims stand rejected.

(viii) That the Bank guarantee furnished by the claimant shall stand discharged."

IMPUGNED JUDGEMENT

70. GAIL assailed the impugned award under Section 34 of the A&C Act. GAIL contended that in terms of Article 13 of GCC, GAIL and its Consultant were required to inspect and test the pipes before taking the delivery of the pipes. SPL was required to give a thirty days notice under Article 13.10 of the GCC for inspection specifying the goods and quantities ready for testing. SPL was thus obligated to have sufficient storage capacity at least to the extent of pipes manufactured continuously for a period of thirty days. However, SPL's capacity to store pipes was limited to eight days' production.

71. GAIL contended that merely because GAIL/transporter may have delayed the receipt of the pipes did not vest SPL with a right to slow down the production of pipes. According to GAIL, the Contract vested sufficient flexibility to lift the pipes as and when they were needed.

72. GAIL assailed the finding of the Arbitral Tribunal that the number of pipes to be produced by SPL per month as stipulated in Annexure 3 to the PO is not rigid figure of monthly production but only a projection of its distribution over the entire period of the Contract. GAIL also impugned the finding that GAIL had not suffered any damages on account of the delay in production of pipes by SPL.

73. Insofar as the award of costs to the tune of ₹ 50,00,000/- is concerned, it was urged on behalf of GAIL that the same was excessive. GAIL claims the grant of interest at the rate of 6% per annum and 12% per annum on the dollar amount and the rupee amount respectively was also excessive.

74. The learned Single Judge found no merit in GAIL's application under section 34 of the A&C Act for setting aside the impugned award. The learned Single Judge referred to correspondence exchanged between SPL and GAIL/transporter and noted that about 60 trailers per day were required to be arranged for transporting the finished pipes. The transportation of the pipes commenced on 30.03.1995 and only twelve pipes were lifted on 31.03.1995.

75. Insofar as the award of cost of ₹ 50,00,000/- is concerned, the learned Single Judge found the said decision of the Arbitral Tribunal to be well founded. SPL had deposited around ₹ 40,76,313/- with the ICC towards fee for invoking arbitration. Since the impugned award was in favour of SPL, it was entitled to the refund of the costs. The learned Single Judge observed that the awarded cost is less than 50% of the costs claimed by SPL.

76. The learned Single Judge found no merit in GAIL's submission that the grant of interest by the Arbitral Tribunal, was excessive. The learned Single Judge observed that the Arbitral Tribunal had considered the variation in exchange rates, while awarding interest on the amount awarded in US dollars and in the Indian rupees.

REASONS & CONCLUSIONS

77. GAIL has assailed the impugned award principally on the ground that it is contrary to the terms of the Contract. GAIL's principal grievance relates to the decision of the Arbitral Tribunal to reject its claim of price reduction as per the formula as set out in Article 24 of GCC.

78. As noted hereinbefore, SPL had raised several claims in the nature of damages suffered on account of breach of the terms of the Contract on the part of GAIL. These claims were rejected by the Arbitral Tribunal. Essentially, the Arbitral Tribunal had allowed SPL's claims in regard to the balance consideration for the goods supplied, interest thereon, and costs.

79. There is no dispute as to the amount payable by GAIL for the pipes supplied by SPL. However, GAIL had withheld an amount of USD 6,265,535.33, which it claimed was on account of reduction in price of the supplies in terms of Article 24 of GCC. In addition, GAIL also claimed that it is entitled to make adjustments on account of, (i) benefit of USD 5,426,767.70 derived by SPL by making supplies through mother pipe route instead of the plate route; (ii) USD 142,432.25 as expenses incurred for rectification of defects in pipes supplied at the site; and (iii) excess supply of mother pipes. The claim for adjustment of USD 5,42,767.70 was also raised as counter-claim no.1.

80. The Arbitral Tribunal did not accept that GAIL was entitled to make the adjustments as claimed except to the extent of USD 99,294.60. The Arbitral Tribunal found that SPL had used 104,585.99 tons of

material through the plate route. The Arbitral Tribunal referred to Clause 3 of the PO, which specified that a benefit of ₹7 crores was provided by SPL to GAIL based on consumption of 100,000 metric tons and if the consumption was in excess of the said quantity, GAIL would be entitled to additional benefit on proportionate basis. In view of the said clause, the Arbitral Tribunal held that GAIL was entitled to ₹ 32,01,193/- (or USD 99,294.60) on account of the excess use of 4,585.99 tons of material. Accordingly, the Arbitral Tribunal allowed adjustment of the aforesaid amount from the amounts payable to the SPL. However, the Arbitral Tribunal did not accept that any other adjustment could be made.

81. It is material to note that GAIL's claim for the adjustment of USD 54,26,767.70 for making good the shortfall in production of pipes through plate route by mother pipe route, was also raised as a counter claim (being Counter Claim No.1). Accordingly, the said counter claim was allowed only to the extent of USD 99,294.60 but the same was not awarded. This was because SPL's claim in regard to the amount of USD 246,281.50, which was withheld by GAIL (Counter Claim No.3) was allowed to the extent of USD 146,986.90 after deducting the amount of USD 99,294.60, which was found due to GAIL.

82. As noted above, SPL had raised a claim of USD 6,265,535.33 (claim no.1) for the payment of 80% of the invoice value, which was withheld by GAIL from various invoices raised by SPL and a claim of USD 246,281.50 (claim no.3) being the amount of 10% of the invoice value withheld from various invoices raised by SPL. The Arbitral

Tribunal allowed claim no.1 for the entire amount, however, allowed claim no.3 only to the extent of USD 146,986.90 after reducing USD 99,294.60 found payable to GAIL.

83. The Arbitral Tribunal rejected GAIL's claim for adjustment on account of expenses for rectifying the defects (adjustment of USD 142,432.25). The Arbitral Tribunal found that the documents and material placed on record indicated that SPL had carried out the work of removing the defects in respect of some of the pipes. And, GAIL had made no claim on account of GAIL's contractor (M/s Dodsal) rectifying the defects, at the material time. No details of any such claim were furnished to SPL at the material time and GAIL had not produced any correspondence in this regard.

84. GAIL's adjustment on account of excess use of mother pipes to the extent of USD 4567.73 was also rejected on the ground that SPL had denied that it had supplied excess quantity as claimed by the GAIL. The Arbitral Tribunal did not find sufficient material that established GAIL's claim. Additionally, GAIL had not raised any such claim or demanded any such amount from SPL prior to filing the pleadings in the arbitral proceedings.

85. There is material on record indicating that there were certain defects in the pipes supplied and SPL had agreed to rectify the same. There is also material on record to establish that SPL had rectified certain defects. However, there is little material on record to indicate that SPL had defaulted in doing so. The Arbitral Tribunal's finding that there is no correspondence informing SPL about the rectification work

being contracted to one M/s Dodsal and the details thereof, was not effectively controverted. The Arbitral Tribunal's decision in regard to rejection of these adjustments is based on appreciation of evidence and cannot be said to be vitiated by patent illegality on the face of the record. Thus, no interference with the decision of the Arbitral Tribunal to reject such adjustments is warranted, in these proceedings under Section 37 of the A&C Act.

86. The learned ASG appearing for the GAIL had focused his submissions, essentially, on the decision of the Arbitral Tribunal to reject GAIL's claim for applying the price reduction formula. He submitted that the impugned award was vitiated by patent illegality as it was contrary to the express terms of the Contract. His submissions to the said effect were founded on two grounds. First, that the delay in supply of pipes was admitted. The Arbitral Tribunal had also concluded that there was delay in supply of pipes and SPL's production did not match the delivery schedule under the PO. And second, that the terms of the Contract expressly provided for a price reduction formula in case of delay in supply of pipes. He also referred to the decision of a Coordinate Bench of this Court in ***GAIL (India) Limited v. Punj Lloyd Limited***[1] in support of his contention that it was not necessary for GAIL to prove that it had suffered actual loss claiming reduction in price.

87. He submitted that SPL had applied for extension of time for delivery of pipes on account of *force majeure* and had requested that the delivery schedule be extended from 32 weeks to 52 weeks. This

[1] Neutral Citation No.: 2017:DHC:2458-DB

established that there was a delay in supply of pipes. The Arbitral Tribunal had rejected SPL's claim that it was absolved of supplying the goods as per schedule on account of *force majeure* conditions. He submitted that having rejected SPL's contention that it could not be held responsible for delay on account of force majeure, the Arbitral Tribunal could not deny GAIL's right to seek variation in price in terms of the Contract. Second, he submitted that there could be no dispute that SPL was liable for the delay as admittedly, its storage capacity was barely equivalent to eight days' production capacity, which was less than the time required to complete the requisite pre-delivery tests. He contended that Article 13.10 of the GCC expressly provided that all tests and trials in general would be witnessed by an Inspector and SPL would confirm to the consultant the exact date of inspection by a thirty days' prior notice. He submitted that it was obvious that SPL was required to make arrangements for storage equivalent to production capacity of at least thirty days. Since the storage facilities available with SPL were only equivalent of eight days production, it was evident that the bottleneck resulting in the delay in supplies was for reasons attributable to SPL. He also submitted that certain tests would require to be conducted over a period of time and SPL had requested for waiver of the requirement of conducting those tests prior to delivery. This also established that the delay was on the part of SPL.

88. Next, he contended that the Arbitral Tribunal had erred in proceeding on the basis that GAIL had a corresponding obligation to lift SPL's production on a daily basis. He submitted that although there

is no cavil that GAIL was required to take deliveries, however, the Contract did not stipulate any time period within which GAIL was obliged to take delivery. It also followed that SPL was required to arrange for storage of pipes for a reasonable period till GAIL lifted the stocks.

89. The question as to who was responsible for the delay in delivery of pipes was one of the principal issues considered by the Arbitral Tribunal. The Arbitral Tribunal held that the initial delay was attributable to SPL. The Contract required SPL to take all requisite steps for importing and erecting the coating plant, importing mother pipes, plates and arrange for raw material. The Purchase Order dated 25.07.1994 expressly provided that the delivery would commence from the fourth month from the date of the said Purchase Order and was required to be completed within a period of nine months from the date of the purchase order. Thus, the entire delivery was to be completed within a period of five months commencing from the expiry of the initial period of four months. The Arbitral Tribunal held that SPL was required to make all preparatory arrangements for execution of the Contract within the period of four months preceding commencement of delivery of pipes. In terms of the Contract, SPL was also required to submit a time schedule and bar charts reflecting the timelines for taking various steps for performance of the Contract. The Arbitral Tribunal noted that SPL was required to submit samples for testing and it started coating the sample pipe on 10.03.1995. The pipes were subjected to stagewise testing including Cathodic Disbondment Test, the result of

which would be available after a minimum period of thirty days. This test commenced on 20.03.1995. In terms of Clause 7.3.3 of the 'Specification for 3-Layer Polyethylene Coating', SPL could commence production only after the written approval of GAIL's Consultant. Additionally, the Arbitral Tribunal noted that Annexure-II to the 'Specification for longitudinally welded saw line pipes (onshore)' provided that the production test on two samples of the base pipes selected at random would be subjected to production test on the first day. The regular production could commence only thereafter. These pipes were offered for tests on 24.03.1995 and the test report was submitted by SPL on 17.04.1995. In view of the above, the Arbitral Tribunal found that SPL was responsible for the initial delay for the months of March and April 1995.

90. However, GAIL was faulted for the delays thereafter as the transporter engaged by GAIL had failed to lift adequate number of coated pipes, which were ready for delivery in the months of May and June 1995. The Arbitral Tribunal found that GAIL was obligated to make arrangement for lifting of 210 (two hundred and ten) pipes daily but at no point of time, GAIL was in a position to do so. In addition, the Arbitral Tribunal also found that the production in the month of March 1995 was hampered due to a wrong procedure suggested by GAIL's Consultant for conducting certain tests. The Arbitral Tribunal observed that tensile test failed because the test was conducted on pipes with adhesive layer including polyphone material. The Consultant was demobilised from coating plant on 15.03.1995 and thereafter, Engineers

India Limited (which was engaged by GAIL) had recognised its mistake and carried out that tensile test after excluding the adhesive layer. The test carried out was reported as successful on 20.03.1995 and the same was accepted by Engineers India Limited on 22.03.1995. The Arbitral Tribunal held that GAIL's consultant was responsible for the said delay of six/seven days.

91. Further, there was also a change in the specifications, which required 750 (seven hundred and fifty) number of pipes to be re-worked. This also resulted in a delay of eight days in normal production. The relevant extract of the impugned award setting out the Arbitral Tribunal's reasons for attributing certain delays to GAIL, is set out below:

> "94. It is thus held that initially for months of March and April, 1995 the claimant is responsible for delay in producing the coated pipes in as much as the claimant keeping in view the varied tests required to be carried out was not ready to produce adequate quantities of tested pipes ready for delivery for the months of March and April, 1995. Thereafter, there was delay imputable to the respondent as its transporter failed to lift the adequate number of coated pipes ready for delivery for the months of May and June, 1995. Thus the targets of monthly quantity for delivery for the months of May and June, 1995. Thus the targets of monthly quantity for delivery of the coated pipes envisaged in the contract were not achieved for the months of March to June, 1995.
>
> 95. The transporter engaged by the respondent was in terms of its contract with the respondent was obligated to make arrangement for lifting of 210

pipes daily. At no point of time throughout the execution of the contract did the transporter achieve this target. Such lapses and delays being caused by the transporter were regularly brought to the notice of the respondent and its transporter (Ex. C-7 to 19 in Volume V, C-97, 99, 105, 107, 109, 113, 114, 116, 117, 119, 120, 121 in Volume VI).

96. The transporter was to lift the pipes from the stack yard and buffer stack yard of the claimant and transport hem to various earmarked dump yards near the sites where the pipes were ultimately to be laid. There was problem of not enough space available in those places as well. There were available plenty of ready pipes at the Buffer Stock Yard throughout the period the contract was being executed after creation of Buffer Stock Yard but they were being lifted in slow motion and this lifting of pipes continued evert long after all the pipes had been made ready by the claimant

xxx xxx xxx

99. The production of pipes in the month of March, 1995 was somewhat hampered due to wrong procedure suggested by M/s Engineers India Limited. The Tensile test had failed as the test on pipes was carried out on adhesive layer with polyphone material included. The consultant on 15.03.1995 demobilized from the coating plant. Later EIL recognized its mistake and tensile test carried out after excluding adhesive layer proved successful on 20.03.1995 (C-180) and was accepted by EIL on 22.03.1995 (C- 59). This delay of six or seven days is imputable to the respondent's consultant. There was some delay attributable again to the respondent for low production in the month of March, 1995 as a total number of 750 pipes had to be reworked due to change in specifications requiring a taper angle of 30

> degree at both ends of the pipes. As per clause 9.8 of the contractual specification the coating of pipes was to terminate at 280 + 15 mm from the pipe end with smooth termination on both ends free from polythene and adhesive. It resulted in eight days delay in normal production (C-63 and C-64 vide letter dated 24.03.1995 (C-61) EIL had given instructions for changes to be made in the final ultrasonic testing procedure to be conducted on the pipes manufactured from the plate routes by the claimant. The documents C-58 to C-69 and C-129 and C-130 show that the claimant had got carried out successfully at the earliest the tests regarding elongation, cathodic disbondment, indentation, coating thickness, holiday and impact."

92. It is apparent from the above that the Arbitral Tribunal's decision is based on the material placed on record. Clearly, the reasoning of the Arbitral Tribunal is a plausible one and cannot be stated to be one that no reasonable person could possibly accept.

93. At this stage, it is also necessary to bear in mind that in proceedings under Section 34 of the A&C Act, the Court is not required to re-adjudicate the disputes. If the view of the Arbitral Tribunal is a plausible one, no interference with the same is permissible in proceedings under Section 34 of the A&C Act[2].

94. The Arbitral Tribunal also held that GAIL had a matching obligation to lift the stocks produced by SPL. The Arbitral Tribunal held that GAIL was required to make arrangements for lifting the coated

[2] National Highways Authority of India v. C.P. Rama Rao ; State of U.P. v. Allied Constructions (2003) 7 SCC 396

pipes, "*which ought to have been almost matching with the production of the coated pipes*".

95. It was earnestly contended on behalf of GAIL that there is no clause in the Contract, which obligated GAIL to make arrangements for lifting of pipes in a manner so as to match with SPL's production. It was also contended that the finding of the Arbitral Tribunal to the aforesaid effect, was not supported by the contractual terms and was, thus, patently illegal. However, we find no merit in this contention. The agreement between the parties has to be read as a whole. It is well settled principle of interpretation of commercial contracts that the same must be interpreted in the manner as to give "*business efficacy"* to the transaction. In ***Nabha Power Limited (NPL) v. Punjab State Power Corporation Limited (PSPCL) and Another***[3], The Supreme Court had taken note of number of decisions, where the courts had applied the test of business efficacy for interpreting commercial transactions and had observed as under:

> "49. We now proceed to apply the aforesaid principles which have evolved for interpreting the terms of a commercial contract in question. Parties indulging in commerce act in a commercial sense. It is this ground rule which is the basis of *The Moorcock [The Moorcock, (1889) LR 14 PD 64 (CA)]* test of giving "business efficacy" to the transaction, as must have been intended at all events by both business parties. The development of law saw the "five condition test" for an implied condition to be read into the contract including the "business efficacy" test. It also sought to incorporate "the Officious

[3] (2018) 11 SCC 508

> Bystander Test" [*Shirlaw v. Southern Foundries (1926) Ltd., (1939) 2 KB 206 : (1939) 2 All ER 113 (CA)*]]. This test has been set out in *B.P. Refinery (Westernport) Proprietary Ltd. v. Shire of Hastings, 1977 UKPC 13 : (1977) 180 CLR 266 (Aus)* requiring the requisite conditions to be satisfied: (1) reasonable and equitable; (2) necessary to give business efficacy to the contract; (3) it goes without saying i.e. the Officious Bystander Test; (4) capable of clear expression; and (5) must not contradict any express term of the contract. The same penta-principles find reference also in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society, (1998) 1 WLR 896 : (1998) 1 All ER 98 (HL)* and *Attorney General of Belize v. Belize Telecom Ltd., (2009) 1 WLR 1988 (PC)* Needless to say that the application of these principles would not be to substitute this Court's own view of the presumed understanding of commercial terms by the parties if the terms are explicit in their expression. The explicit terms of a contract are always the final word with regard to the intention of the parties. The multi-clause contract inter se the parties has, thus, to be understood and interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract."

96. The Arbitral Tribunal reasoned that GAIL was fully aware of the production as well as SPL's storage capacity; therefore, it was not open for GAIL to contend that it did not have any obligation to take deliveries so as to match SPL's production.

97. We find no infirmity with the reasoning of the Arbitral Tribunal. A commercial transaction must be viewed in a reasonable manner and with a perspective that makes commercial sense. The Contract provided for SPL to make deliveries as scheduled, it must follow that GAIL also had the obligation to take delivery of the material in a reasonable

manner. What is reasonable must be viewed in the overall context of the Contract including the production and storage capacity of SPL, which was indisputably known to GAIL prior to issuance of the Purchase Order (PO) in question. It is not disputed that GAIL had prior to placing the PO, inspected SPL's premises and was aware of the storage facility at the coating plant.

98. We also consider it apposite to refer to the following extract of the impugned award which reflects the Arbitral Tribunal's reasoning in this regard:

> "101. The respondent has been responsible for not lifting adequate number of finished pipes throughout the period the contract was being executed. There is no merit in the plea of the respondent that as the respondent had agreed to the creation of a buffer stack yard on the request of the claimant, the respondent was free to lift the pipes from the buffer stack yard at its convenience. It is urged on behalf of the respondent that there was no time limitation for the respondent to lift the pipes from the buffer stack yard. The respondent forgets that the buffer stack yard was created no doubt at the request of the claimant and also at the cost of the claimant but the need for the same arose on account of the inability of the respondent to lift adequate number of pipes from the coating yard. The coating yard had limited storage capacity. Once that storage capacity was reached, obviously the crowding of pipes hampered the coating of more pipes in the coating plant. Creation of the buffer stack yard only solved this problem but the respondent's obligation to lift the pipes within a reasonable period from the buffer stack yard did

> not come to an end. There was nothing wrong on part of the claimant to also insist on the respondent to continue to lift coated pipes from the main coating stack yard in terms of contract also. Even the letters C-18 and C-21 exchanged between the parties provided that only those pipes which cannot be lifted from the coating stack yard would be shifted to the Buffer Stack Yard."

99. GAIL's contention that SPL's storage capacity was limited to eight days production is also unpersuasive. The issue was regarding SPL's storage available at its coating yard. Since the same was creating a bottleneck, SPL had suggested creation of a buffer stack yard where pipes could be stacked and to free up the space in the coating yard. GAIL had consented to the said arrangement. It is also material to note that SPL had sent several communications calling upon GAIL to continue lifting material from the coating yard and not confine the same to buffer stack yard.

100. Clause 3 of Appendix – 1 to the Contract expressly provided that "*finished pipes to be stored for a significant period of time at the mill shall be stored in a manner to prevent corrosion.*" GAIL had argued that this indicated that SPL was required to store coated pipes for a "significant period" of time.

101. The Arbitral Tribunal did not accept the said contention. The Arbitral Tribunal held that the expression "significant period of time" was in the context of the manner in which pipes were to be stored, if required. The Arbitral Tribunal also held that the said clause only indicated that SPL could not insist on the pipes being taken delivery of

as and when they were ready and GAIL had a margin of discretion in lifting of the pipes. However, that does not mean that SPL's production of pipes was required to meet the monthly target, notwithstanding that the GAIL's transporters were neither ready nor had the capacity to take delivery. The relevant extract of the impugned award is set out below:

> "73. After considering the submissions on both sides and the correspondence between the parties, we may summarize the position thus. It is clearly indicated in the contract that this contract was a FOT contract. The respondent was to arrange transporter for lifting the pipes from the stack yard of the claimant. The contract has in-built mutual obligations to be performed. The respondent was not merely to receive the supply. From the stage of procurement of raw material, the manufacture and production of coated pipes and varied tests required to be carried out, the respondent was actively involved at all stages. The contract did specifically provide for monthly delivery schedules. This monthly schedule of delivery could not possible mean only that the claimant should produce the requisite monthly quantity of pipes and keep them stored and the respondent could use its discretion or pleasure to lift those pipes. It could not mean that the respondent was obliged to take the delivery of the pipes as soon as the same were ready for delivery and could defer it indefinitely. It is self evident that the respondent could not have lifted the monthly quota of pipes in a day or even in a week or two weeks. The lifting of pipes had to synchronize with the production of the pipes.
>
> 74. This is how the parties in fact tried to work out the contract. The respondent had engaged the services of a transporter who was to lift about 210 pipes per day by providing around 60 trailers per day. The pipes so

lifted were to be dumped at different sites of the respondent for being used in the project. Mutual obligations under the contract envisaged that the claimant was to produce such quantity of coated pipes so that the monthly quota mentioned in the contract was achieved but the respondent was required to have made adequate transport arrangements so that such monthly quota of pipes could be lifted spread out on daily basis.

75. It is only in this way the contract could have worked. The parties also proceeded towards performance of the contract on that basis. The contract had not provided that the claimant shall have any particular storage capacity for storing the coated pipes. The stack yard at the coating plant of the claimant could store about 1700 coated pipes. The capacity of the plant of the claimant was to produce about 220 coated pipes per day.

76. Clause 3.0 of Appendix I (pages 173 Vo.4) relate to the manner in which the finished pipes were to be kept. The words "significant period" do not mean that storing capacity of a month's production was required. This expression has been used in connection with the manner in which the pipes were to be stored, if required, so that they did not get damaged or rusted. They only indicated that the claimant could not insist on all pipes being taken delivery of, as and when they were ready thus giving the respondent a margin of discretion in lifting and not that the production of pipes should touch the monthly target irrespective of the transporters readiness or capacity to take delivery.

77. It is also on the other hand not correct on the part of the claimant to assert that till the respondent gave any notice for taking delivery there was no obligation on the part of the claimant to produce the pipes for offering delivery. At any rate the respondent had

> engaged the transporter and the correspondence referred to earlier shows that mutual arrangements between the transporter and the claimant were worked out for lifting of the pipes. The claimant had no doubt started pressing the respondent for arranging the transporter even before the claimant had been in a position to supply the pipes as per terms of the contract. It is quite clear however that the claimant started its turnout of coated pipes only on 11-3-1995 and that, having regard to the nature and duration of the tests prevalent then, the number of pipes it got ready for the months of March and April 1995 was far below the expected quantity and only the claimant was responsible for this delay. The respondent could not be blamed for not arranging adequate transport in those months."

102. We are unable to accept that the Arbitral Tribunal's view is not a plausible one. It is apparent that the Arbitral Tribunal has considered and interpreted the terms of the Contract, in the overall context of the transaction. The Arbitral Tribunal has interpreted the Contract in a reasonable manner as men of commerce would have intended. It is well settled that the jurisdiction to interpret a contract rests with the Arbitral Tribunal[4]. Thus, unless the court finds that the Arbitral Tribunal's interpretation is wholly perverse and not a possible view, no interference with the exercise of jurisdiction would be called for in proceedings under Section 34 of the A&C Act. We find that the Arbitral Tribunal's understanding of the Contract is neither contrary to the express terms of the Contract nor can be termed as perverse or

[4] MSK Projects India (JV) Ltd. v. State of Rajashtan (2011) 10 SCC 573

unreasonable. On the contrary, the Arbitral Tribunal has interpreted the Contract in a reasonable manner.

103. The contention that SPL was liable for delay in execution of the Contract was partly accepted by the Arbitral Tribunal. Undeniably, the contention that SPL was responsible for the delay is evident from the fact that that it had sought extension of the Contract on account of *force majeure*, is undeniably persuasive. However, that does not mean that GAIL was not responsible for any delay. As noted above, the Arbitral Tribunal had accepted that SPL was partially responsible for the delay in the initial period. However, it had also faulted GAIL in not lifting the quantities in a reasonable timeframe.

104. It is also evident that even after the entire quantities had been produced, GAIL had taken a considerable period of time to lift the same.

105. In addition to the above, the Arbitral Tribunal also faulted GAIL for withholding substantial amounts due to SPL without informing SPL any reason for the same. Accordingly, the Arbitral Tribunal concluded the issue as to which party was responsible for delay as under:

> "105. Thus it has to be held that even after creation of the buffer stack yard the respondent has been responsible for delay in completion of the contract as it failed to lift the coated pipes in reasonable period and as it withheld substantial amounts due to the claimant without adducing any reasons therefore. This issue is decided accordingly."

106. As stated earlier, we find no grounds to interfere with the Arbitral Tribunal's finding that GAIL was responsible for the delay in lifting the

stocks in a timely manner. Admittedly, GAIL had also withheld amounts due to SPL without providing any reasons for the same at the material time. Clearly, if GAIL was responsible for the delay, its claim for reduction in the consideration payable to SPL on account of delay in delivery of pipes, would be unsustainable.

107. In addition to the above, the Arbitral Tribunal also held that GAIL had accepted the delivery beyond the stipulated period without any demur or protest. Admittedly, GAIL had lifted the pipes from the main coating yard for the last time on 16.01.1996. It had continued to lift pipes from the buffer stack yard till 28.02.1997, which was after a considerable time had expired after the said pipes had been manufactured and stored. As noted above, the Arbitral Tribunal did not accept that GAIL could delay taking delivery of the pipes at its will and had no obligation to take delivery in a timely manner. As discussed earlier, this view cannot be faulted as an unreasonable or a perverse view.

108. Given the aforesaid view, it follows that the Arbitral Tribunal's decision that GAIL had waived the delivery schedule and had acquiesced in extension of delivery schedule by its conduct, warrants no interference in these proceedings. It is also material to note that the Arbitral Tribunal had found that GAIL's decision to apply the price reduction formula was an afterthought.

109. The Arbitral Tribunal held that GAIL's conduct demonstrated that it had taken deliveries commensurate with its needs and had prolonged the same for more than a year beyond February 1996.

110. In view of the Arbitral Tribunal's finding that GAIL was responsible for the delay, the question of applying the price reduction formula does not arise.

111. Insofar as the initial delay attributable to SPL is concerned, the Arbitral Tribunal held that price reduction was not justified as both the parties had, in fact, re-scheduled the deliveries. The relevant extract of the impugned award, which sets out the aforesaid conclusion, is reproduced below:

> "123. The import of Art. 22 making time the essence of the contract has been discussed earlier Art. 24 come in from application only where there is a failure on the part of the supplier in effecting deliveries in time. The interpretation of the schedule to the contract has been discussed at some length earlier and it has been pointed out that no failure to adhere to the terms of delivery can be attributed to the claimant expect perhaps in respect of the deliveries which were to be made in March and April, 1995 before the production-delivery gap was sorted out between the parties. But Art. 24 is only in the nature of a provision for liquidated damages for certain defaults and, as discussed earlier cannot be enforced unless the respondent can be shown to have been prejudiced and to have incurred some damage in consequence of the delay. That is not the position in this case. Its conduct all through demonstrates this beyond doubt. Indeed the respondent took deliveries commensurate with its needs and prolonged the process for more than a year beyond Feb. 96. In view of this position in law, no price reduction can be justified even for the late deliveries of March and April, 1995 supplies for which the claimant was to a considerable extent responsible since all said and done both parties had knowingly and willingly agreed to a rescheduling of the deliveries.

> Thus it is held that the respondent is liable to pay the amount of this claim to the claimant. This issue is therefore decided in favour of the claimant."

112. The contention that GAIL was not required to establish the quantum of actual loss to avail the benefits of the PRF, is merited. Thus, in respect of any delay in deliveries during the initial period of March and April 1995, GAIL may have been entitled to reduce the price of material supplied without actually proving the quantum of loss suffered by it. However, in this case, the Arbitral Tribunal has rejected GAIL's claim even in respect of deliveries made in March and April 1995 on, essentially, three grounds. First, that GAIL had by its conduct agreed to re-scheduling of delivery. Second, that whilst SPL was responsible for delay during this period to a considerable extent, GAIL was also responsible for the same. And third, the Arbitral Tribunal had faulted GAIL for delays on account of wrong testing method applied by the Consultant and for change in specifications during the said period.

113. The Arbitral Tribunal's decision that GAIL had consented to re-schedule the delivery without insisting on reduction of price cannot be stated to be an implausible or an unreasonable view. It is not disputed that after the issuance of the PO, GAIL was kept fully abreast of the state of preparation of SPL, the steps taken by it in this regard, as well as the proposed timelines for delivery of pipes. GAIL was also a participant in some of the steps (through Consultant), particularly, in relation to testing as well as for altering the specifications of the pipes. Thus, GAIL was also aware of the delivery timelines during the initial period. Admittedly, GAIL had not placed any condition or indicated its

intention to pay reduced price for the pipes at the material time. At that stage, GAIL had also not made necessary arrangement for taking of delivery of the goods. Further, as noted above, the Arbitral Tribunal also found that GAIL was responsible for part of the delay during the initial period as well. In view of the said finding, the Arbitral Tribunal's conclusion that GAIL had willingly and knowingly accepted deliveries as re-scheduled without demur or protest, cannot be stated to be a view, that is, perverse or implausible.

114. In the aforesaid circumstances, the Arbitral Tribunal's decision that SPL is entitled to the agreed consideration for delivery of the goods in question without any reduction in price or imposition of liquidated damages, cannot be interfered with in these proceedings. We concur with the decision of the learned Single Judge as articulated in the impugned order.

115. The appeal is unmerited and, accordingly, dismissed. The pending application is also disposed of.

116. The parties are left to bear their own costs.

VIBHU BAKHRU, J

SACHIN DATTA, J

OCTOBER 29, 2024
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