Pushkar Paint Industries vs Union Of India on 20 August, 2022

In the Court of Shri Sanjiv Jain, District Judge,
(Commercial Court-03), Patiala House Courts New Delhi

OMP (Comm) No. 209/2019

Pushkar Paint Industries
B-92, Sector C,
Badri Prasad Sarraf Bhawan,
Maha Nagar, Lucknow-226006
Uttar Pradesh ..... Petitioner

versus

Union of India
Integrated Headquarters, MoD (Army)
Directorate General of Ordnance Branch,
Master General of Ordnance Branch,
Central Provision Cell, Proc Sec (OS-PI),
"L" Block, DHQ PO, New Delhi-110001 ..... Respondent

Date of institution : 30.11.2019
Date of reserving judgment : 22.07.2022
Date of decision : 20.08.2022

JUDGME NT

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter called the 'Act') challenges the award dated 26.08.2019 passed by the Arbitrator Brig A. K. S. Chandele (Retd.), whereby, he held that the petitioner is not entitled to claim bank guarantee amount of Rs. 10,76,544/- or any interest on it or any other relief. He held that the respondent is not entitled to any amount claimed in the counter claim or OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.1 of 37 any other relief and the amount forfeited by the respondent in the form of Bank Guarantee (PBG) as genuine pre-estimate being reasonable compensation is sufficient for the respondent.

Brief facts:

2. Briefly stated, the facts are that the petitioner manufactures all kinds of paints for the Railways, Defence, Para Military Forces etc. The respondent had invited tender for supply of 54000 ltrs of paints. The petitioner submitted its bid, which the respondent accepted. An order dated 19.01.2015 was placed on the petitioner for supply of the aforesaid quantity at Rs. 199.36 per ltre aggregating to Rs. 1,07,65,440/-. The supply order had an advance sample clause under Part II, Clause 6 as per which, the petitioner was required to submit advance samples for test &

approval by 17.03.2015 and performance bank guarantee of an amount of Rs. 10,76,544.00. Delivery period was nine months or earlier from the effective date of approval of the advance samples by CQA (M), Kanpur. It was stipulated that in case, the advance samples are not submitted by the due date or they fail in the test, the contract will be cancelled at the risk & cost of the supplier.

3. On 11.03.2015, the petitioner submitted the advance samples in required quantity to the respondent, which the respondent received on 16.03.2015. The samples on testing were not found confirming to the specifications and were OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.2 of 37 rejected. The petitioner wrote letters from 05.08.2015 to 16.11.2015 (10 letters) to the respondent challenging the rejection, requesting to resend the advance samples for joint testing and permitting it to manufacture bulk supply at its own risk & cost with improvements sought but the respondent vide letters dated 18.08.2015 & 26.08.2015 did not agree to its request / offer. It vide letter dated 13.11.2015 also refused to entertain the petitioner's request for advance cum bulk production on the ground of delay but stated that the request for submission of advance samples for retesting is under consideration. It vide letter dated 24.11.2015 set up 15.01.2016 as the last date for submitting the fresh samples with a condition that 45 days period would be reduced from the total period in the final bulk supply. The petitioner submitted fresh samples for testing on 11.01.2016 but the samples again failed in the tests conducted in the respondent's lab, which the respondent intimated to the petitioner vide letter dated 24.05.2016 stating that request to issue bulk production clearance cannot be entertained. It vide letter dated 01.08.2016 wrote to the petitioner that the petitioner has committed breach of contract as its samples repeatedly failed in tests; it failed to supply the stores within the stipulated time and it cancelled the supply order. It also invoked the bank guarantee.

4. The petitioner aggrieved by the cancellation of supply order and invocation of bank guarantee sent a notice of request OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.3 of 37 for arbitration vide letter dated 13.10.2016. The respondent referred the matter to arbitration.

5. The petitioner filed its statement of claims claiming that it has been manufacturing and supplying paints to Defence for about four decades, which were accepted by Defence without observing any defect but in this case, respondent demanded the advance samples and rejected the same keeping them for several months, keeping the contract alive, though, the said item did not require advance samples being merely the paint. It had written to the respondent that the advance samples were prepared strictly as per the specifications and in case of any deviation, it was ready to attend joint testing at CQA (M) Lab or respondent may send it to NABL accredited lab. It was stated that it after submission of advance samples was so confident that it furnished the bank guarantee. When the samples were rejected, it requested for retesting / joint testing and after a long time, the respondent decided to take fresh

samples on 11.01.2016, which it again rejected after four months vide letter dated 24.05.2016. It was alleged that though the time was not the essence of contract but the respondent abruptly cancelled the order on 01.08.2016 and illegally encashed the bank guarantee after the expiry of its validity period. It was stated that pre condition to invoke the bank guarantee was against any loss or damage caused to it or suffered by it. Though, the respondent did not suffer any loss and the term of guarantee OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.4 of 37 'suffered loss' or 'likely to suffer loss' did not happen but still the amount was retained. It was stated that risk purchase from the 3rd party was illegal & invalid. Further, the respondent had received the stores at a lower rate in the risk purchase. Reliance was placed on the cases Essban Paints Vs. Union of India (2002) 1 Arb. LR (Delhi), Indian Oil Corporation Vs. Lloyds Steel Industries Ltd, 2008 (1) RAJ 170 (Del), Vishal Engineers & Builders Vs. Indian Oil Corporation Ltd, 2012 (1) Arb. LR 253 (Del) and Kailash Nath Associates VS. Delhi Development Authority & Anr 2015 (1) (SCALE) 230.

6. In the statement of defence, it was submitted by the respondent that since the petitioner could not perform the contract, the bank guarantee was forfeited under the terms & conditions of the contract and as per Section 74 of the Indian Contract Act. The samples sent for testing were found to be not of acceptable quality. It was stated that there was no question of loss or profit. The bank guarantee clause was agreed upon between the parties, which clearly provided that in case of breach by the petitioner, whether or not actual damage or loss is proved, the petitioner shall be liable to pay the amount as per the bank guarantee. It was stated that the present case does not fall in the category of liquidated damages.

7. The Arbitrator after framing the issues as detailed in Para 4.1.2 of the award, taking affidavits of the parties, who were OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.5 of 37 also subjected to cross examination and hearing arguments, gave the issue-wise findings referring relevant clause of PBG, Special Conditions of Supply Order, Clause 1, Part IV and Advance Sample Clause (Clause 6 Part II of the Supply Order). He held that the contention of the petitioner that its samples failed in one parameter only out of 31 parameters and thus rejection by the respondent was wrong, does not hold much water as there is no provision in the contract for such a waiver or exception. He also rejected the contention of the petitioner that the testing equipment of the respondent was faulty. He held that since it was a defence contract, the supplier had to be extra cautious and its stores should be upto the mark as it involved the question of National Security and Defence. He also did not find merits in the contention of the petitioner that the bank guarantee was encashed illegally. He held that since the bank guarantee provided for the performance of contract and the petitioner failed to perform the contract, invocation of bank guarantee was completely valid. He referred the judgments relied upon by the petitioner and the cross examination of the respondent's witness (question no. 66), where, he had stated that defence contract cancellation led to non availability of stores to the field army for a further duration of 6-8 months and the loss occurred due to fault of supplier cannot be calculated in purely financial terms since a life of a soldier cannot be calculated in financial terms. He also considered the contention of the petitioner that merely because a contract contains a OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs.

UOI Page No.6 of 37 clause to forfeit security does not ipso facto entitle the respondent to forfeit the security and claim liquidated damages and that the party must show actual loss and that even if an amount has been stated in a contract or a penalty has been stipulated, such amount or penalty is only to be treated as an upper limit only and that the compensation, which is to be granted to the party claiming a breach has to be reasonable and commensurate to the actual loss / damage suffered by the claiming party. He held that there is an exception to the rule that if the nature of the contract is such that calculation of loss cannot be done easily or it is not possible to calculate the financial loss or damage, then the security can be forfeited and the liquidated damages can be claimed without proving and showing how much loss has been caused as long it becomes clear that some loss or damage has ensued to the claiming party or that the party claiming has suffered legal injury. If the parties have agreed upon a genuine pre-estimate of loss in the contract itself, then the same need not be strictly proved at the time of claiming loss in the event of a breach as long as the compensation contemplated is not by way of penalty or unreasonable referring the case of ONGC Vs. Saw Pipes, (2003) 5 SCC 705. He held that while the goods should have been delivered within nine months of acceptance of samples but due to breach on the part of the petitioner, the supply was delayed much beyond the said time and had to be finally cancelled in August 2016. He held that keeping in mind the OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.7 of 37 facts of the case and the nature of contract, it would not be possible to calculate the loss easily and also the loss suffered by the respondent cannot be calculated strictly in monetary terms referring the case of Ministry of Defence, Govt. of India v/s Cenrex SP Z.O.O & Ors, OMP NO. 408/2007, where it was held as under:

> "14. In the present case, surely subject contract is of a type where how much loss is caused to the petitioner/ Ministry of Defence, Government of India for delay in supply of parachutes cannot be calculated because how the Army of this country would have been affected by non-delivery of the parachutes on time and what would have been the alternative arrangements made due to delayed deliveries and expenses accordingly which had to be incurred on account of non- availability of parachutes on time, is impossible to calculate……."

8. He held that the said para / extract succinctly captures the issue faced with attempts to calculate loss in the present matter due to non performance by the petitioner. He held that in this contract, the loss suffered by the respondent cannot be calculated, however, it is clear that breach was committed by the petitioner and legal injury was suffered by the respondent including the loss, though, not quantifiable in monetary terms. He held that in view of Section 73 & 74 of the Indian Contract Act, in the present case, 10% of the supply order amount qualifies as reasonable compensation and is a genuine pre- estimate of loss. He held that the petitioner, being fully aware that the supply of goods was for use in war equipments, which are directly related to matters of National Security and Defence OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.8 of 37 and having accepted the consequences in the event, could not supply the goods. Now the petitioner cannot be allowed to argue that it was not aware of the consequences of non supply to the defence forces and further argue that defence has not suffered any financial loss so the bank guarantee cannot be forfeited. He held that sufficient time and opportunity were granted to petitioner to provide the goods, however, despite that petitioner's samples failed in tests repeatedly.

Since, goods were not supplied according to the contractual obligation, the respondent became entitled to the bank guarantee amount.

9. As to the issue 'whether the time was the essence of contract', he referred the answer of the respondent's witness on question no. 72, which is reproduced as under:

> "Q. 72. Where was the term for urgency mentioned in the contract?
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> A72. The said contract was concluded for an item which was required by the Defence Forces. The item by its nature and scope is used in Defence equipments for safeguarding the shelf life of costly govt. equipment in absence of which the said equipment may deteriorate. Secondly, the contract itself is a time bound activity in which specific days are mentioned for the supplier to complete the deliveries. Hence, this is enough proof that the item is urgent and required for operational purposes since, the contract was for defence requirements concluded on behalf of the President of India.

10. He also considered the contention of the petitioner that the time was not of the essence of the contract referring the case of Hind Construction Contractors v/s State of Maharashtra, MANU/SC/0031/1979 quoted by the petitioner and held that OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.9 of 37 time was essence of the contract as specific dates were mentioned in the contract for the supplier to complete the work. The contract was issued by the defence for an item which was required for operational use and any delay or non supply of stores could highly prejudice the interests of the Defence Forces. He held that whether or not, time is the essence of a contract, depends on the nature of the contract, which fact is also evident while allowing retesting as the respondent had put a condition that 45 days time shall be deducted from the delivery period, which was not opposed by the petitioner. He held that the time was of the essence of the contract.

11. As regards issue 'whether rejection of petitioner's various offers was justified', the Arbitrator answered this issue in affirmative holding that the samples were lacking in their specifications. The respondent was not obligated to accept any of the offers made by the petitioner especially when the advance samples failed to clear the required test.

12. Ld. Counsel Sh. Ashish Khorana for the petitioner vehemently argued that the award is highly unconscionable and in conflict with the public policy of India, which has been made after ignoring the material documents. The petitioner being MSME Unit, has been manufacturing paints for the Defence Forces for more than 40 years. It had furnished the bank guarantee. It had to commence the supply only after the OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.10 of 37 approval of the advance samples as per clause 6 of the agreement meaning thereby that in case advance samples were not submitted or failed, only remedy with the respondent was to go for risk purchase. The agreement did not have any single term to encash the bank guarantee. If in risk purchase contract, the respondent suffered loss and purchased material at higher price than original tender, then the petitioner could be called to pay the extra / additional amount to the respondent

but in the present case, admittedly, the respondent went for the risk purchase as per the terms of the contract after the petitioner's advance samples failed and purchased the same goods but at a lower rate, which means no loss and therefore, no damages could have been claimed but the respondent forfeited the BG illegally against the terms of the contract. Ld. Counsel stated that the bank guarantee was submitted only for the purpose to cover up the respondent when there was a failure to supply or due to short fall or delay in supply etc, after the commencement of the contract, which could be maximum upto 10%. However, in the present case, supply did not commence because of precondition of approval of advance samples. The only remedy available with the respondent was to go for the risk purchase and after going, it could have claimed only the difference of the amounts spent by it in the risk purchase. Further, risk purchase claim was valid only if risk purchase contract followed certain preconditions like the original contractor is invited for RP contract for the same material with identical terms as that of the OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.11 of 37 original contract etc. Ld. Counsel contended that in the present case, the material was purchased by the respondent at no extra price but at a lesser price and thus not suffered any financial loss. Further, in risk purchase contract, the respondent had asked 5% security instead of 10%, it had written a term that bulk supply from past suppliers is acceptable but when the petitioner's samples failed on only one parameter out of 31 parameters, the respondent refused the petitioner's request to allow it to do bulk supply. Ld. Counsel contended that the Arbitrator being creature of contract has to act within the four corners of the contract and interpret the terms as per the substantive law of India, which clearly stipulated that in case advance sample is not submitted by due date or it fails in the test, the contract will be cancelled at the risk & cost of the supplier.

13. Ld. Counsel contended that Section 74 of the Indian Contract Act provides that even if the contract contains a clause to forfeit the security, it does not ipso facto entitles the party to forfeit the security or claim the liquidated damages. Where loss in terms of money can be determined, the loss is to be proved. Ld. Counsel contended that notice under Section 55 of the Indian Contract was to be given, which was not given in the present case. Further, procurement was made very late in February 2017 at a lesser / low rate. Ld. Counsel contended that the Supreme Court in the Government and Ministry of Defence OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.12 of 37 Contract has observed that when there is no loss, no damages can be claimed. Even if it relates to Armed Forces or just by saying that the material is required for Armed Forces, it does not entitle it to claim damages, if not suffered or make time as the essence, when it itself had extended the delivery period for supply or travelled / acted against its own drafted terms in RFP or contract. Ld. Counsel contended that just by saying that the material was required by the Armed Forces, does not entitle it to act illegally or beyond the agreed terms. In the eyes of law, both the parties are equal.

14. Ld. Counsel contended that it was for the respondent to prove that it had correctly forfeited the security, which it failed to prove, still the Arbitrator allowed the forfeiture and passed the non speaking award. The contract was clear that the bank guarantee could be encashed by the respondent under the circumstances enumerated in Page 43 RW1/3 but the respondent decided else-wise. If the samples failed like it happened in this case, the bank guarantee could not be encashed on that account, rather the purchaser had to go for the procurement from the other sources after termination of the contract by purchasing at the risk & cost of the petitioner. The same

was done as admitted by the respondent. The document relating to the same was placed on record and confronted with the witness, who had admitted that the respondent through risk purchase procured the material at roughly Rs. 17.0 lakhs OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.13 of 37 cheaper than the original contract but the Arbitrator just said that the material was required for Armed Forces. Since, in the eyes of law, both the parties were equal, the Arbitrator should have acted fairly.

15. Ld. Counsel contended that the Arbitrator ignored the facts that the respondent built a false defence against the petitioner by alleging that the petitioner was supposed to be aware about the requirement of the respondent for which purpose this specification was made and petitioner should have imagined the same whereas the specification "Paint RFU fin AD WE Br/Spr Olive Green ISC-294" and in a written contract where terms are specific and clear, the question of inducting / adding by imagination did not arise, which respondent's witness said during his cross examination that the petitioner should have known the extract details of its usage. The Arbitrator despite the petitioner pleaded the same, held in favour of respondent. He acted with a bias mind being Ex. Army Officer. Ld. Counsel contended that the item in question was a paint, which had nothing to do with the National Security and it was only an inventory item.

16. Ld. Counsel contended that the Arbitrator failed to consider the law laid down in the case of Kailash Nath Associates (supra), where case of ONGC Vs. Saw Pipes (supra) was referred. Ld. Counsel stated that in the case of Raman Iron OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.14 of 37 Foundry Vs. Union of India, AIR 1973 SC 1265, it was held that there is no difference between liquidated damages and unliquidated damages and in both the eventualities, financial loss has to be proved and Section 74 of the Indian Contract cannot be applied without there being proof of financial loss. The principle to prove the loss is envisaged in Section 73 of the Indian Contract Act, where no remote / indirect loss can be claimed. It has to be direct loss and in case of failure to receive goods, buy as per law and claim difference. Ld. Counsel contended that meaning of damages in a civil contract is to compensate and the compensation can be in terms of money only, provided there is a loss and not just because there is a term stipulated which in this case is not there.

17. Ld. Counsel further argued that the Arbitrator ignored the material documents and rejected the claim without adopting a judicial approach. He travelled beyond the agreement and passed the award against the substantive law of land and the terms of the contract, which is patently illegal and against the fundamental policy of India.

18. Ld. Counsel Sh. Ashish Sharma for the respondent per contra argued that a senior person retired from the post of Brigadier in Indian Army, who very well understands the nature & scope of such contracts, was appointed as an Arbitrator to resolve the disputes. He had given fullest opportunities to the OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.15 of 37 parties to present their case. He, thereafter, passed the well reasoned and speaking award. Ld. Counsel stated that the petitioner in the present petition under Section 34 of the Act has tried to reappraise the points / issues and raise new points, which were never raised before the Arbitrator, which cannot be allowed. Ld. Counsel contended that the Arbitrator has given his findings supported by facts, law, evidence and the circumstances of the case. He has given his findings in regard to forfeiture of the

bank guarantee. The petitioner itself has admitted that the advance samples submitted by it for testing and retesting failed on few parameters. Since, the stores were meant for defence use, there was no question of any compromise on the quality of the stores to be procured by the respondent. Since, the supply order stipulated the clause of testing & approval of advance samples before delivery, it was incumbent upon the petitioner to provide the samples to meet the requisite specifications laid down for the stores. Since, the stores did not meet the requisite specifications, the respondent rightly cancelled the contract and forfeited the PBG, which action was rightly upheld by the Arbitrator supported with reasons. Ld. Counsel contended that the petitioner has failed to show that there is an error apparent on the face of the award or the award is against the public policy or the terms of the contract. Ld. Counsel stated that the jurisdiction of the Court when called upon to decide the objections raised by a party against an arbitral award is limited, as expressly indicated in the OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.16 of 37 Act. The Court has no jurisdiction to sit and examine the correctness of the award on merits with reference to the material produced before the Arbitrator. It does not sit in appeal over the views of the Arbitrator by re-examining and re- assessing the material, unless, perversity is writ large on the fact of the arbitral award or the award suffers from the vice of jurisdictional error. Ld. Counsel stated that when the reasons given by the Arbitrator are germane, relevant and have rational nexus, the reasonableness of the reasons cannot be challenged. Ld. Counsel stated that there is no illegality / infirmity in the impugned award and the petition deserves to be dismissed with costs.

19. I have given my thoughtful consideration to the rival contentions and gone through the material placed on record and the cases (supra) referred above.

20. Section 34 of the Arbitration and Conciliation Act reads as:

> "34.Application for setting aside arbitral award-
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> (1)Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub- section (3).
> (2)An arbitral award may be set aside by the court only if-
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> (a) the party making the application furnishes proof that-
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> (i) a party was under some incapacity, or
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> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.17 of 37
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> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation- I For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India only if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81."

ii) It is in contravention with the fundamental policy of Indian law;

iii) It is in conflict with the most basic notions of morality or justice.

Explanation-II- For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

[2 (A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the court, if the court finds that the award is vitiated by patent illegality appearing on the face of the award: Provided OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.18 of 37 that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

21. Normally, the general principles are that the decision of the Arbitrator unless there is an error apparent on the face of the award which makes it unsustainable, is not to be set aside even if the court as a court of law would come to a different conclu- sion on the same facts. The court cannot reappraise the evi- dence and it is not open to the court to sit in appeal over the conclusion of the arbitrator. It is not open to the court to set aside a finding of fact arrived at by the arbitrator and only grounds on which the award can be cancelled are those men- tioned in the Arbitration Act. Where the arbitrator assigns co- gent grounds and sufficient reasons and no error of law or mis-

conduct is cited, the award will not call for interference by the court in the exercise of the power vested in it.

22. In the case of Associate Builders v/s Delhi Development Authority, (2015) 3 SCC 49, it was held that interference with an arbitral award is permissible only when the findings of the arbitrator are arbitrary, capricious or perverse or when con- science of the Court is shocked or when illegality is not trivial but goes to the root of the matter. The arbitrator is ultimately a master of the quantity and quality of evidence while drawing OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.19 of 37 the arbitral award. Patent illegality must go to the root of the matter and cannot be of trivial nature.

23. In Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India Ltd. 2019 SCC OnLine SC 677, the Supreme Court has held that under Section 34 of the Act, a decision which is perverse while no longer being a ground for challenge under public policy of India but would certainly amount to a patent illegality appearing on the face of the award. A finding based on the documents taken behind the back of the parties by the arbitrator would also qualify as a de-cision based on no evidence inasmuch as such decision is not based on evidence led by the parties and therefore would also have to be characterized as perverse.

24. There is no quarrel on the legal position that the legislative mandate clearly bars the Court to re-appreciate the evidence for deciding an objection under Section 34 of the Act. The parties are also not allowed to expand the scope of defences raised before the Arbitrator to get fresh adjudication from the Court. However, in order to see whether the Arbitrator has passed the award against the basis notions of justice or it is patently illegal as alleged by the petitioner, I deem it appropriate to consider the real controversy between the parties, which gave rise to the cause of action for filing the claims and OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.20 of 37 the manner in which it were appreciated by the Arbitrator in reference to the terms & conditions of the contract.

25. It is not in dispute that a supply order dated 19.01.2015 was placed on the petitioner for supply of 54000 ltrs of paints. The supply order had an advance sample clause under Part II, Clause VI, which provided that "the firm should submit at least 4x500 ml of the paint store duly labeled and sealed affixed on cap and label, as the advance sample of specified quantity to SQAE (GS)/AHSP, for test and approval within 45 days i.e. 17 th March 2015. In case the advance sample is not submitted by this due date or it fails in the test the contract will be cancelled at its risk & cost".

26. As per the supply order, delivery of stores was to be done by the petitioner before the expiry of nine months from the date of passing of the advance samples. In the present case, the petitioner submitted the advance samples in required quantity to the respondent on 11.03.2015, which were received by the respondent on 16.03.2015. The samples were sent for testing to SQAE (GS) / AHSP but the same were not found as per the specifications and were rejected vide letters dated 07.05.2015 & 05.06.2015, which communication, the petitioner received in August 2015. The petitioner vide letter dated 05.08.2015 informed CQA (M) that the samples were prepared strictly as per specification No. IND / SL / 3286 (C) with amendment no.

OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.21 of 37 1 and it meets all the requirements of the specifications including resistance to humidity under condition of condensation test in its lab, when tested according to relevant contract specifications. If any deviation in the test result is observed in its lab (respondent's lab), it is ready to attend the joint testing at CQA (M) lab to satisfy the testing official or the samples may be sent to NABL accredited 3 rd lab at its expenses. Test like resistance to humidity under condition of condensation may be performed on new panels. This was followed with a letter dated 07.08.2015 addressed to Integrated Headquarters, MoD (Army) with copy to CQA (M) stating that it is confident that its advance samples meet all the requirements of the specification of the supply order, however, it is ready to send fresh advance samples to CQA (M), Kanpur, so that supply order could be materialized. Permission was accordingly sought to submit fresh advance samples to CQA (M). On 20.08.2015, it sent a letter to CQA (M) stating that the advance samples were prepared strictly as per the SO specifications and the same meet more than 30 parameters except one test parameter "resistance to humidity under condition of condensation". It informed that it is ready to improve the quality in bulk supply on this parameter. A request was made to accept advance samples for bulk supply manufacturing including improvement upto the requirement for the said parameter also at its risk & cost. The respondent did not accede to its request vide reply dated 26.08.2015. The petitioner vide letter dated 31.08.2015 again OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.22 of 37 requested CQA (M) for according permission to manufacture bulk quantity production at its risk & cost to enable it to supply the material at a short span without any deviation in quality. It was followed by a letter dated 03.09.2015, where, reference of a meeting dated 01.09.2015 with CQA (M) was made requesting for a joint testing and permitting it to manufacture bulk quantity at its risk & cost. It vide letter dated 21.09.2015 requested the respondent to accord permission to submit fresh advance sample to CQA (M) and issue acceptance letter of PBG for Rs. 10,76,544/- forwarded vide letter dated 24.08.2015 as per the contract. It was followed by the letters dated 03.10.2015, 19.10.2015 & 23.10.2015. The respondent then vide letter dated 13.11.2015 wrote to the petitioner that its request for advance cum bulk production cannot be entertained at this stage. It, however, communicated to the petitioner that its request for additional time for submission of advance samples is under process, which is without prejudice to the terms & conditions of the contract. The petitioner then vide letter dated 16.11.2015 referring its earlier letters reiterated what was stated in the letter dated 23.10.2015. The respondent then vide letter dated 24.11.2015 granted period upto 15.01.2016 to submit the fresh advance samples but reduced 45 days period to execute the contract in final bulk supply reserving its right to levy damages including liquidated damages for the period from 17.03.2015 to 15.01.2016. The petitioner submitted the fresh samples on 11.01.2016 for retesting, which were again rejected OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.23 of 37 vide letter dated 24.05.2016. It was communicated through this letter that the advance sample test even after giving due opportunity failed and therefore, it failed to supply the item against the subject supply order within the stipulated time frame and its request for issue of bulk production clearance cum advance sample cannot be entertained at this belated stage. The respondent then vide letter dated 01.08.2016 communicated to the petitioner that it has committed a breach of contract; Since, the time was essence of the contract, which it failed to adhere to, supply order is cancelled at its risk & cost. The petitioner then vide letter dated 16.08.2016 referring its earlier letter apprised the respondent that since process of re-tendering is very lengthy, it will not be beneficial for the Defence Organization. It requested for one more chance to submit fresh advance

samples to meet the urgent requirements of the Defence Forces for testing by NABL accredited lab but same was not acceded to and the respondent invoked the bank guarantee.

27. The correspondences placed on record show that the advance samples of the petitioner failed in one parameter out of 31 parameters. The samples were sent twice for testing but both the times, they failed in the said parameter. The Arbitrator was right in rejecting the contention of the petitioner that the samples failed in one parameter out of 31 parameters and rejection by the respondent was wrong. He has rightly held that OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.24 of 37 there is no provision in the contract for such a waiver or exception. He also did not find merits in the contention of the petitioner that the testing equipment of the petitioner was faulty. He has rightly held that since it was a defence contract, the supplier had to be extra cautious and its stores should be upto the mark as the supply related to Defence Forces. It may be true that the petitioner is an MSME unit and has been manufacturing paints for Defence Forces for more than 40 years but since the supply order provided for sending the advance samples, which condition was in the knowledge of the petitioner, it was incumbent upon the petitioner to comply that condition. He cannot be allowed to take shelter of its request to allow bulk supply manufacturing at its risk & cost. It was for the respondent to take decision in the interest of the work and the respondent cannot be forced to accede to this request of the petitioner. Further, supply order does not provide any term / condition to take the supply of the stores, if the stores do not meet the parameters / specifications as laid down for the stores.

28. As regards the condition that the time was of the essence of the contract, the documents show that the supply order was placed on 19.01.2015. The petitioner submitted the advance samples as per the terms of the supply order for testing on 11.03.2015. The result was communicated to the petitioner in August 2015 vide results dated 07.05.2015 & 05.06.2015. Though, the petitioner immediately offered for retesting vide OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.25 of 37 letter dated 05.08.2015 but the respondent took decision for retesting after series of correspondences made by the petitioner vide letter dated 24.11.2015. Fresh samples for retesting were sent on 16.01.2016 of which the results were communicated on 24.05.2016. Although, the delivery period fixed as per the supply order was nine months or earlier from the effective date of approval of advance samples by CQA (M), Kanpur but it was not strictly followed by the respondent. Acceding to the request by the respondent for sending fresh samples, amounted to giving time / extending time to supply the stores meaning thereby that the term / condition that time was of essence of the contract was not in strict sense was followed by the respondent. It took many months to take the decision whether or not fresh advance samples were to be sent for retesting. Further, it communicated the result of retesting to the petitioner after about four months of the samples sent for retesting.

29. Admittedly, the said contract was concluded for an item which was required by the Defence Forces and the said item by its nature and scope is used in Defence equipments for safeguarding the self life of costly equipments and in the absence of which the equipment may deteriorate but from the nature of contract and the correspondences, it cannot be concluded that the contract itself was a time bound activity or the contract required mentioning of specific days for the supplier to complete the delivery. In this case, the supplies were OMP (Comm) No. 209/2019 Pushkar Paint Industries

Vs. UOI Page No.26 of 37 taken after about two years, so it cannot be said that the item was urgent or without the procurement of the said item, the operational purpose had affected. It was held in the case of Hind Constructions v/s State of Maharashtra, 1979 AIR 720 SC that whether time is the essence of contract is a question of intention of the parties, to be gathered from the contract and the provision for imposition of penalty and extension of time would militate such an inference. That being the position and in view of the case supra as gathered from the intention of the parties, time was not strictly made as the essence of the contract.

30. In the present case, after the samples failed in retesting, the supply order was cancelled vide letter dated 01.08.2016. Risk purchase was made by the respondent in terms of Part II Clause VI of the supply order. I find force in the contention of Ld. Counsel for the petitioner that risk purchase was valid only if risk purchase contract had followed certain pre-conditions like if the original contractor is invited for the risk purchase contract for the same material with identical terms as that of the original contract. In this case, in the risk purchase contract, the respondent had asked for 5% security instead of 10%. It had incorporated a term that bulk supply from past suppliers is acceptable. Question arises, why this condition was relaxed in the risk purchase tender / contract. It assumes importance because the petitioner repeatedly had requested the respondent to allow manufacturing of bulk stores at its risk & cost to OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.27 of 37 ensure timely supply, which request was not acceded to by the respondent. It shows that the respondent adopted different parameters for the petitioner and different for the 3 rd party, who had participated in the risk purchase tender.

31. It is manifest from the record that in the risk purchase tender, the price was less than the price quoted by the petitioner in the original supply order dated 19.01.2015. The respondent thus through risk purchase procured the stores at roughly Rs. 17.0 lakhs cheaper than the original contract.

32. In the instant case, samples were sent twice for testing and the delivery timelines were extended based on the mutual consent between the parties. When the second samples failed, the respondent cancelled the contract and forfeited the bank guarantee on 24.08.2015.

33. The question now arises whether the respondent rightly forfeited the bank guarantee?

34. As per the bank guarantee, the bank as principal obliger on behalf of the petitioner had undertaken / guaranteed that in the event that the President of India declares to them that the goods have not been supplied according to the contractual obligations under the contract, they will pay the respondent on demand and without demur all and any sum upto a maximum of OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.28 of 37 Rs. 10,76,544/-. It was valid till 23.08.2016.

35. Clause 3 Part II of the supply order contains "Delivery Period", it states that the quantity 54000 ltrs is to be supplied withing nine months or earlier from the effective date of approval of advance sample by CQA (M), Kanpur. The supply order can be cancelled unilaterally by the buyer in case the items are not received within the supply ordered delivery period. Extension of supply ordered delivery period will be at the sole discretion of the buyer, with the applicability of LD clause, RR,

denial clause and other applicable clauses. Clause 6 contains "Advance Sample Clause", which interalia provides that .....in case, the advance sample is not submitted by the due date or it fails in the test, the contract will be cancelled at the risk & cost of the supplier. Clause 8 contains "Liquidated Damages", which interalia provides that in the event of the seller's failure to supply the stores / goods and conduct trials etc as specified in the supply order, the buyer may, at its discretion withhold any payment until the completion of the supply order. Clause 11 Part IV contains "Risk & Expense Clause", which interalia provides that if the stores or any installment thereof are not delivered within the time or time specified in the contract or if defective delivery is made in respect of the stores, the buyer after granting the seller 45 days to cure the breach, shall be at liberty without prejudice to its right to recover liquidated damages as a remedy for breach of contract to OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.29 of 37 declare the contract as cancelled..... In case of material breach, that was not remedied within 45 days, the buyers shall have the right to purchase or procure the stores from any other source at it thinks fit of the same or similar description to make good such default. Any excess of the purchase price, over the contract price, the buyer shall appropriate and recover the balance from the seller which recoveries shall not exceed the 100% of the value of the contract.

36. Admittedly, in the present case, as per clause 6 of the supply order, the advance samples were sent to the laboratory for testing twice and both the times, the samples failed in their specifications, which made the respondent cancel the contract and making risk purchase of the stores at the risk & cost of the petitioner but in the risk purchase, the respondent purchased the stores at a lower rate / price than what was quoted by the petitioner, meaning thereby that it did not suffer any loss or damages. The risk purchase clause i.e. clause 11 also provides for making purchases at the risk & cost of the seller and recover the extra / balance cost from the seller. Since, in the instant case, the respondent did not incur any extra cost in the risk purchase, so there was no question of recovery of extra / balance cost from the seller. There was already a time extension clause in the supply order i.e. clause 3, which clearly provided that the supply ordered delivery period could be extended at the sole discretion of the buyer with the applicability of LD clause OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.30 of 37 and other applicable clauses. The record shows that when the samples failed for the first time, on the request of the petitioner, the respondent took a decision to send fresh samples for retesting, thus extending the delivery period. The contract was cancelled only when the fresh samples sent for retesting failed. Generally, there are two types of contract, one where the actual loss can be calculated and even if there is a clause of liquidated damages, only actual loss should be granted subject to the upper limit as specified in the liquidated damages under clause 74 of the Indian Contract Act and second where loss is caused but cannot be quantified in view of the nature of the contract, then the Court should allow the enforcement of liquidated damages under Section 74 of the Indian Contract Act.

37. It was held in the case of Maula Bax Vs. Union of India, 1970 (1) SCR 928 that where, under the terms / contract, the party in breach has undertaken to pay a sum of money or to forfeit a sum of money, which it has already paid to the party complaining of breach of contract, the undertaking is of the nature of penalty. All stipulations by way of penalty are covered by Section 74 of Indian Contract Act, which says that the agreed party is entitled to receive compensation from the party, who has broken the contract, whether or not actual damages or loss is proved to have been caused

by the breach. It merely dispenses with proof of actual loss or damages. It does not justify the award of compensation, when in consequence of OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.31 of 37 breach, no legal injury has resulted because compensation from breach of contract can be awarded to make good the losses or damages, which naturally arises in the usual course of things.

38. In the case of Kailash Nath Vs. DDA, (2015) 4 SCC 136, the Supreme Court after a conspectus of several decisions laid down the following principles:

> 1. "Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive reasonable compensation such as liquidated amount, only if it is a genuine pre-estimate of damages fixed by both the parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penality, only reasonable compensation can be awarded not exceeding the penality so stated. In both the cases, the liquidated amount or penality is the upper limit beyond which the court cannot grant reasonable compensation.
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> 2. Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.
>
> 3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.
>
> 4. The section applies whether a person is a plaintiff or a defendant in a suit.
>
> 5. The sum spoken of may already be paid or be payable in future.
>
> 6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove, the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.
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> 7. Section 74 will apply to cases of forfeiture of earnest OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.32 of 37 money under a contract. Where forfeiture takes place under the terms and condition of a public auction before agreement is reached, Section 74 would have no application".

39. Clause 11 of the supply order clearly provided that for any breach of contract or non compliance / violation of any of the terms & conditions or for default, the buyer reserves the contractual & legal right to cancel the contract at the risk & cost of the supplier / tenderer and resort to repurchase the defaulted item by way of risk purchase (RP). In such a case, the tenderer / supplier, who was responsible for such breach / default is liable to refund the extra expenditure incurred on such risk purchase.

40. It may be true that in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by it before it can claim a decree and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of the contract but it is only in the case of breach of contract where, it may be impossible for the Court to assess compensation arising from the breach and the sum named by the parties, if regarded as a genuine pre-estimate may be taken as a measure of reasonable compensation but not, if the sum named is in the nature of a penalty.

41. In the instant case, it cannot be said that the loss is an OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.33 of 37 inevitable consequence of the breach of contract since, it could be the case that after terminating the supply order, the petitioner could obtain the stores through risk purchase tender at a price, which was lower than the contracted price of the said quantity. When the respondent could clearly have not suffered any loss, it would not be entitled to any compensation for the breach by the petitioner.

42. Admittedly, the supplies were for the Defence and the respondent had to make risk purchase enquiry but the material shows that the risk purchase was made at the price lower than the price contracted with the petitioner. It is not the case that it was impossible to assess the actual damages nor it was a case of genuine pre-estimate of damages for reasonable compensation.

43. As stated by the respondent's witness that the Defence contract cancellation led to non-availability of stores to the field Army for a further duration of 6 to 8 months and that life of a soldier cannot be calculated in financial term but it cannot be lost sight of the fact that the respondent took about 4 to 6 months in taking decision to send fresh samples for retesting. That being the position, the petitioner cannot be solely blamed for the delay. The case of Ministry of Defence referred by the respondent is distinguishable on facts. In that case, there was no delivery of parachutes on time, which was an essential item and related to the safety of the Defence Personnels but the present OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.34 of 37 contract was for supply of paints, which was not related to the safety / security of the Army Personnels. I failed to understand how any delay or non-supply of the stores prejudiced the interest of the Defence Forces as held by the Arbitrator. Just by saying that the material is required by Armed Forces, it does not ipso facto entitle the respondent to claim damages, even if not suffered or make time as the essence, when it had itself extended the delivery period for the petitioner to supply thereby acting against its own drafted terms in the contract. Just by saying that material was required by armed Forces, the respondent cannot be allowed to act beyond the agreed terms of the contract as in the eyes of law, both the parties are equal.

44. In the case of Raman Iron Foundry Vs. Union of India (supra), it was held that there is no difference between liquidated damages and unliquidated damages and in both the eventualities, financial loss has to be proved and Section 74 of the Indian Contract cannot be applied without there being proof of financial loss. The principle to prove the loss is envisaged in Section 73 of the Indian Contract Act, where no remote / in direct loss can be claimed. It has to be direct loss and in case of failure to receive goods, buy as per law and claim difference.

45. In the instant case, the Arbitrator in Para 6.1.19 & Para 6.1.20 of the award has observed that reading of the judgments and Section 73 & 74 of the Indian Contract Act makes it clear OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.35 of 37 that even if an amount has been stated in a contract or a penalty has been stipulated, such amount or penalty is only to be treated as the upper limit only. The compensation, which is to be granted to the party claiming a breach has to be reasonable and commensurate to the actual loss / damage suffered by the claiming party. Merely because a contract contains a clause to forfeit security does not ipso facto entitle the respondent to forfeit the security or claim liquidated damages and that a party must show actual losses and if the nature of contract is such that the calculation of losses cannot be done easily, then the security can be forfeited or liquidated damages can be claimed without proving how much loss has been caused as long it becomes clear that some loss or damage has ensued to the claiming party or the party claiming has suffered legal injury. However, in Para 6.1.29, the Arbitrator held that in the present case, it would not be possible to calculate the loss easily and also the loss suffered by the respondent in monetary terms due to non-performance by the petitioner. I failed to understand on what basis, he gave this finding. In this case, risk purchase was made and there was no financial or monetary loss to the respondent, so, there was no question of holding by the Arbitrator that 10% of the contract amount qualifies as reasonable compensation or a genuine pre-estimate loss in terms of Section 73 & 74 of Indian Contract Act. He has come to this conclusion which a man of ordinary prudence would not have arrived. That being the position, the award on the face of it is perverse, patently illegal OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.36 of 37 and against the legal prepositions as discussed in the preceding paras and it cannot be said to be in public interest.

46. Section 34 (2) (a) & (b) of the Act provides that an arbitral award may be set aside by the Court, if the party making the application furnishes proof that the award is in contravention with the fundamental policy of India or it is in conflict with the most basic notions of morality or justice or perverse.

47. For the aforesaid reasons, I am of the view that the award deserves to be set aside being perverse, against the basic notions of justice and the fundamental policy of Indian Law. The impugned award is therefore set aside with no orders as to costs.

48. File be consigned to record room.

Announced in open court today i.e. 20.08.2022 (SANJIV JAIN) District Judge (Commercial- 03) Patiala House Courts, New Delhi OMP (Comm) No. 209/2019 Pushkar Paint Industries Vs. UOI Page No.37 of 37