IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. No. 160/2005

Reserved on: December 5, 2011
Decision on: February 7, 2012

PEAK CHEMICAL CORPORATION INC. ..... Petitioner
Through Mr. A.K. Ganguli, Senior Advocate with Ms. Mamta Tiwari , Mr. Shaiwal Srivastava and Mr. Aamir Khan, Advocates.

versus

NATIONAL ALUMINIUM CO. LTD. ..... Respondent
Through Mr. Ciccu Mukhopadhaya, Senior Advocate with Mr. Surjendu Sankar Das, Advocates.

O.M.P. No. 454/2005

NATIONAL ALUMINIUM CO. LTD. ..... Petitioner
Through Mr. Ciccu Mukhopadhaya, Senior Advocate with Mr. Surjendu Sankar Das, Advocates.

versus

PEAK CHEMICAL CORPORATION INC. ..... Respondent
Through Mr. A.K. Ganguli, Senior Advocate with Ms. Mamta Tiwari, Mr. Shaiwal Srivastava and Mr. Aamir Khan, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
07.02.2012

Introduction

1.1 Both these petitions are filed under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') against the Award dated 16th February, 2005 of the learned Sole Arbitrator. By the said Award most of the claims of the Respondent National Aluminum Co. Ltd. ('NALCO'), a

Government of India undertaking engaged inter alia in the mining of bauxite and the manufacture and sale of alumina and aluminium, against the Petitioner Peak Chemical Corporation ('PEAK'), a company incorporated under the laws of Illinois, U.S.A were allowed and the counter-claims of PEAK were rejected. The dispute between the parties concerned the supplies of caustic soda lye by PEAK to NALCO.

1.2 While PEAK has filed O.M.P. No. 160 of 2005 challenging the impugned Award, NALCO has filed O.M.P. No. 454 of 2005 to the extent that the learned Arbitrator has in answering Issue No.7 held that NALCO was obliged to invite PEAK to participate in the risk purchase to mitigate the damage allegedly suffered by NALCO.

NALCO's petition time barred

2. PEAK's O.M.P. No. 160 of 2005 was filed on 9th May 2005, whereas NALCO's O.M.P. No. 454 of 2005 was filed on 16th May 2005. On the first date of hearing of O.M.P. No. 160 of 2005 NALCO was represented when notice was issued. NALCO's petition was, however, returned by the Registry for curing of defects. NALCO cured the objections and re-filed the petition on 28th May, 2005 but some more objections were pointed out by the Registry. In the application filed (I.A. No. 10075 of 2005) seeking condonation of delay in re-filing the petition, it is stated by NALCO that "due to some inadvertent reason, the applicant herein was able to cure the said objections and file the corrected petition in the Registry of this Hon'ble Court only on 9th December, 2005". In the reply to the said application, it is pointed out by PEAK that O.M.P. No. 454 of 2005 was nominally filed on 16th May 2005 but did not meet the requirements of the rules. NALCO had been granted seven days' time to remove the objections, i.e., on or before 24th May 2005. NALCO, however, re-filed the petition on 28th May 2005 without complying with the requirements as per

the rules. NALCO was then asked to remove the defects and re-file the petition within seven days after curing the further defects. However, NALCO filed O.M.P. No. 454 of 2005 ultimately after 195 days. It is pointed out that the delay of more than six months in re-filing of the petition has not been explained by NALCO. In its rejoinder NALCO offers a weak explanation that the delay in re-filing was "due to some inadvertent reason, primarily as a result of long administrative procedure".

3. The above explanation by NALCO for the delay in re-filing its petition is casual and unsatisfactory. A litigant ought not to take for granted that any delay in re-filing of the petition after curing the defects may be condoned. There is a necessity for the litigant to properly explain the delay in re-filing the petition. In the instant case, the delay is more than 190 days for which the explanation offered is wholly insufficient and unconvincing. The Court is, therefore, not inclined to condone the delay in NALCO re-filing its petition. Accordingly, I.A. No. 10075 of 2005 is dismissed. As a result, O.M.P. No. 454 of 2005 filed by NALCO is also dismissed without any order as to costs.

Background facts of PEAK's petition

4. The facts leading to the filing of O.M.P. No. 160 of 2005 by PEAK is that PEAK is engaged in the supply of various chemicals including caustic soda lye to various companies around the world. On 19th November 1993, NALCO floated a global tender for supply of 50,000 Dry Metric Tons ('DMT') of caustic soda lye on 100% NaOH basis for its M&R complex at Damanjodi, Orissa. NALCO reserved its right to procure the part/full quantity either from indigenous or overseas source. The specifications of caustic soda lye to be supplied were set out. Inter alia it was indicated that the total requirement of caustic soda shall have the sodium chloride content of 0.1% max (Alternative A) or 1.05% max (Alternative B). The maximum

quantity acceptable under Alternative B was 20,000 MT on 100% NaOH basis. Clause 1.3 of the tender document sated as under:

> "1.3 Overseas supplier (Price basis)
>
> The tender should quote their price both on FOB as well as C & F Vishakapatnam Port basis. For Alternative-A and Alternative-B of specification separately. Prices should be quoted only in US Dollars. Buyer reserve the right to place the order either on FOB or on C & F basis. The shipment lot shall be 5000 MT on 100% NAOH Basis. The tenderer should submit offer on firm price basis for supply covering period of one year.
>
> In case the price is not firm they should give the necessary price variation formula if any, in the Unpriced bid."

5. For overseas supply, shipments were to be made in lots of 5,000 MT from February 1994 and were to be completed in phased manner in a period of one year. For an indigenous supplier, the supplies were to be made in a phased manner in one year "as per specific monthly clearance of buyer". The terms of the charter party were to be discussed and mutually agreed by the seller (PEAK) and the purchaser (NALCO). There were conditions relating to sample, attestation, certification of quality and quantity that had to be carried out by PEAK at its cost. For the said purpose, a recognized and licensed inspection agency at the port of loading was to be approved by NALCO. PEAK had to open a Performance Bank Guarantee ('PBG') in favour of NALCO in the requisite format within 21 days of issue of letter of intent for an amount equivalent to 10% of the value of the order.

6. PEAK states that in response to the tender, it made an offer to NALCC on 8th December, 1993 through its agent M/s Jiwanram Sheoduttrai. PEAK offered to supply 30,000 to 50,000 DMT of caustic soda lye under Alternative A (Mercury cell grade) and 20,000 DMT under Alternative B (Diaphragm Grade). It is stated that the bids were opened in two stages. On 21st December, 1993, the unpriced bids were opened, wherein PEAK and five other international bidders were found to have the requisite qualifications. Thereafter, on 11th January 1994, NALCO sought certain clarifications from PEAK. In its reply dated 17th January 1994, PEAK clarified that the prices quoted by it shall be firm till December 1994 and not till February-March 1995. A meeting took place between the representatives of NALCO and PEAK on 21st January, 1994 at NALCO's office at Bhubaneshwar. On 17th February 1994, NALCO opened the priced bids. PEAK was found to be the lowest bidder for both grades of the material.

7. According to PEAK, instead of calling upon it to make the supplies, NALCO disclosed its price to other bidders either to meet or beat the price offered by PEAK. It is alleged by PEAK that NALCO made enquiries from suppliers from whom PEAK was sourcing caustic soda lye. NALCO also disclosed to such suppliers PEAK's quoted prices and quantity, as a result of which, those suppliers eventually withdrew their support. It is submitted that NALCO was aware that the said disclosure of the price of PEAK was bound to have disastrous effect on the supplies to be made by PEAK to NALCO under the tender.

8. In a meeting held on March 1994, NALCO suggested that PEAK should consider a reduction in C&F prices. This was declined by PEAK. NALCO had placed on 11th March, 1994 an advance order with PEAK for supply of 10,000 DMT of caustic soda lye. Out of the 10,000 DMT on

100% NaOH, 5000 DMT was to be supplied under Alternative B (Diaphragm Grade) and 5000 DMT under Alternative A (Mercury Cell Grade) with a minimum concentration of NaOH being 47%. For Alternative B (Diaphragm Grade), it was stipulated that price was U.S. $ (USD) 18.50 per DMT if the shipment was FOB, Gulf, U.S.A and C&F at USD 90.50 per DMT if the shipment was C&F, Vishakapatnam, India. Likewise, for Alternative A (Mercury Cell Grade), the price stipulated was USD 30.75 per DMT for FOB and USD 102.75 per DMT for C&F. NALCO was to open an irrevocable Letter of Credit (L/C) for 100% payment on FOB basis and it was to be converted into C&F if PEAK arranged for the ship earlier.

9. PEAK on 16th March, 1994 sent its counter offer, *inter alia*, stating that it was making arrangement for shipment of 10,000 DMT for Alternative A only at C&F basis. According to PEAK, the following terms were agreed to between NALCO and PEAK, pursuant to the order dated 11th March, 1994:-

a) 10,000 DMT of Grade A material was to be shipped.

b) The Petitioner was to arrange for the shipment.

c) The payment was to be made on C& F basis @ USD 102.75/- per DMT.

d) Letter of Credit (L/C) opened on FoB basis, which was to be subsequently changed to C&F basis by the Respondent.

e) Shipment Schedule – this continued to be discussed between the parties for long.

10. On 17th March, 1994, NALCO confirmed the amendment to the original L/C from FOB terms to C&F value. A concluded and binding contract was executed on 18th May, 1994 between the parties when a quantity of 10,945.37 DMT was loaded and shipped to Vizag.

11. On 19th March 1994, NALCO placed a further order on PEAK for supply of 25,000 DMT in addition to 10,000 DMT for which an order had already been placed on 11th March, 1994. The total quantity now stood at 35,000 DMT including 10,000 DMT of Mercury Grade for which order was made on 11th March, 1994. Again the FOB price for Alternative B, was USD 18.50 per DMT and the C&F Vizag price was USD 90.50 per DMT. For Alternative A, the price was USD 30.75 per DMT for FoB and USD 102.75 per DMT for C&F Vizag.

12. According to PEAK, the above order dated 19th March, 1994 was not a concluded contract "as material aspect of the same were to be mutually decided between the Petitioner and the Respondent" which included arrangement of shipments and shipment specifications, terms of charter party, shipment schedule, pricing, payment, inspection agency, opening of L/C, PBG etc.

13. PEAK claimed that by May 1994, the market availability and price of caustic soda underwent drastic change globally. A large number of units manufacturing caustic soda were either shut or had reduced their production because of which there was a world-wide shortage of caustic soda. It is stated that the price of caustic soda soared to 1000% above the normal price, which had a cascading effect on the availability of caustic soda. It is stated that in view of large scale plant shutdowns and explosions in the plants of major manufacturers of caustic soda in June 1994, there was a world-wide shortage of caustic soda.

14. By letters dated 7th June 1994 and 30th June 1994, PEAK informed NALCO that caustic soda was a difficult commodity to be sourced in future and that most producers had resorted to order control. PEAK stated that in view of market conditions it was not possible for it to accept

order/offer dated 19th March, 1994 and give a shipment schedule thereof. However, PEAK by its letters dated 11th July 1994, 25th July 1994 and 5th August 1994 stated that it could arrange to supply caustic soda at prices other than those stated in the order/offer dated 19th March, 1994. On 3rd October 1994, NALCO asserted that they would go ahead with the risk purchase. PEAK claimed that the time to perform the open ended contract could have been extended till February 1995. PEAK states that instead NALCO even before that date recalled the order dated 19th March, 1994 and alleged risk purchase.

Issues framed by the learned Arbitrator

15. It is stated that on 16th January 1996, NALCO pressed certain claims against PEAK without disclosing the basis of such claims. By its reply dated 31st January 1996, PEAK refuted the said claims. NALCO then appointed a former Chief Justice of India to act as the Sole Arbitrator. NALCO in its statement of claim raised the following claims against PEAK:

a. USD 5,990,600/- for alleged failure to deliver 35,000 DMT of Caustic Soda as per order dated 19th March, 1994.

b. USD 27,107/- allegedly as the excess amount paid by it for order dated 11th March, 1994.

c. A sum of US$ 50,000/- as damages on account of administrative costs for making alterative purchases.

d. Arbitration costs

e. Interest @ 18% per annum from the date of filing of the Claim till the date of the Award.

16. PEAK filed a reply, and also its counter-claims for:

(i) loss suffered by it to the extent that NALCO placed the order for 15,000 DMT on Mitsui and Elf Autochem at a price higher than that quoted by PEAK;

(ii) USD 3.5 million for damages and losses suffered by it on account of breach of confidentiality by NALCO;

(iii) USD 616,906.30 as cumulative damages on account of NALCO placing an order for supply of 7346.67 DMT of caustic soda on M/s. Balli Trading Ltd. at USD 376 per DMT when PEAK had stated that it was prepared to supply that quantity at USD 375 per DMT;

(iv) USD 542,853.45 as cumulative damages on account of NALCO placing an order for supply of the balance quantity of 16708.32 DMT of caustic soda by alleged risk purchase from Sabic and Rank Enterprises at USD 324 per DMT without following the conditions for resorting to risk purchase.

(v) Interest on the amounts claims under (iii) and (iv) above at 18% per annum.

17. The learned Arbitrator framed the following issues as arising out of NALCO's statement of claim and PEAK's reply thereto;

> "1. Whether the Claimant proves that there were concluded contracts:
>
> (a) for a supply of 10,000/- DMT of caustic soda vide letter dated 11.3.1994, and
>
> (b) for a further quantity of 35,000 DMT of caustic soda vide letter dated 19.3.1994 as per para 22 of the claim)?
>
> Or
>
> Whether there was one single contract for the supply of 35,000 DMT as contended in para V of the Rejoinder to the claim as filed by the claimant?
>
> 2. Depending on the answer to issue No.1 above, whether the Respondent committed any breach of either of the contracts in question, and or whether any force majeure conditions in terms of the contract were in existence discharging the Respondent from its contractual obligations?
>
> 3. Whether the disputes arising out of the contract are not arbitrable as alleged by the Respondent?

4. Whether the contract, if concluded, was valid, and the price firm, till December 1994 or till February 1995?

5. (a) Whether the claimant's invocation of risk-purchase clause was in accordance with the contract?
(b) If not, whether the claimant is entitled to claim damages under the general law of damages as claimed in the Rejoinder to the Statement of claim?

6. Whether for invoking Risk Purchase as per Clause 14 of the tender, the claimant was duty bound to have invited tenders from the intending suppliers in the same manner and on the same terms and conditions as was in the original tender?

7. Whether the claimant was obliged to invite the Respondent to participate in the risk purchase to mitigate the damages allegedly incurred by the claimant?

8. Whether the claimant is entitled to any of the reliefs prayed from and whether it is entitled to maintain any claim to be paid in US Dollars?"

18. As regards PEAK's counter-claims, the following six issues were framed:-

1. "Whether the counter-claims of the Respondent are arbitrable and maintainable?

2. If arbitrable, whether the counter-claims are barred by limitation?

3. Whether the claimant was in breach of any obligation under the contract and if so, to what relief is the Respondent entitled?

4. Whether the claimant has acted contrary to accepted commercial practices?

5. Whether the tender dated 19th November, 1993 floated by the claimant ceased to be an open tender in view of the subsequent conduct of the claimant.

6. Whether the claimant is guilty of breach of legitimate

expectation?"

19. Mr. P.K. Mohapatra (CW-1) was examined as NALCO's witness and Mr. Jack K. Clinton (RW-1) and Mr. James A. Bryan (RW-2) were examined as PEAK's witnesses.

The impugned Award

20. Issue No.1 was decided by the learned Arbitrator in favour of NALCO. It was held that there was only one contract covered by the tender for the supply of 35,000 DMT Caustic Soda. There was no valid reason for holding that the document dated 19th March, 1994 did not result in a concluded contract. The tender itself contained detailed provisions which entered into the structure of the contract. These related to the specification of caustic soda lye, overseas supplier (price basis), quality, quantity, delivery schedule, sampling and pre-shipment inspection, validity period for acceptance, earnest money deposit, replacement of off-grade material, insurance, PBG, liquidated damages, default, risk purchase, arbitration, payment terms, dispatch arrangement, application of law to the order and execution. All these were required for compliance with the contract in deciding upon the schedule of shipments to be made. A concluded contract, therefore, was already in existence between the parties for supply of 35,000 DMT of caustic soda.

21. As regards Issue No.2, it was held that there was no substance in PEAK's plea that it was not obliged to supply the goods in the absence of an agreed shipment schedule and connected terms. It was not in dispute that after the initial supply of 10,000 DMT, PEAK did not make any further supplies. The learned Arbitrator considered PEAK's plea of *force majeure* under Clause 13 of the Tender Enquiry and held that PEAK cannot take advantage of the said clause unless it established that the

events resulted directly in PEAK being unable to acquire the supplies covered by the contract with NALCO. It was held that PEAK had failed to prove conclusively that the goods which it had sought to purchase for sale to NALCO were to be acquired from identified manufacturers who were affected by the events.

22. The learned Arbitrator then considered whether the order dated 19th March 1994 was defeated by frustration. After referring to Section 56 of the Contract Act, 1872 it was held that despite the abnormal rise of price in labour and materials, the contract could not be said to have suffered frustration. PEAK had depended upon spot supplies for discharging its obligations to NALCO and, therefore, assumed the risk of the market rising steeply. PEAK had, therefore, failed to prove that the rise of prices in the market made it impossible for it to effect supplies required by the contractor. Moreover, the evidence shows that the suppliers continued to supply the commodity notwithstanding the tight market. It was, therefore, consequently held under Issue No. 2 that PEAK had committed a breach of contract and its plea of justification with reference to *force majeure* was not tenable.

23. Issue No. 3 was not pressed by PEAK at the time of final submissions. Issue No. 4 was answered by holding that, within the contemplation of the contract, the price of the contracted goods was to remain firm and unvaried throughout the implementation of the contract.

24. Issue Nos. 5, 6 &7 were in relation to risk purchase and were taken up together. The learned Arbitrator held that the fax message dated 3rd October, 1994 was sent by NALCO to PEAK stating that on PEAK's failure to confirm the shipment dates, it would go ahead with procurement from alternative sources at the risk and cost of PEAK. Consequently, no

formal termination was required. The conduct of the parties showed that they understood that the contract had been terminated. On 24th October 1994 NALCO issued a tender notice for supply of 65,000 DMT of caustic soda lye on 100% NaOH basis. This consisted of 15,000 DMT constituting the balance for the period ending February 1995 and 50,000 DMT for the following year. The tender notice was sent to seventeen international suppliers, including PEAK and 11 indigenous suppliers. Six international suppliers submitted tenders. PEAK's offer was made in its letter dated 28th November 1994. It was found to be one sided and in favour of the supplier. Accordingly, PEAK's tender was disqualified from consideration. Consequent to the negotiations with the other suppliers, NALCO on 30th January 1995 placed an order on Rank Enterprises for the supply of 10,000 DMT C&F Vizag with the first lot of 5000 DMT to be shipped immediately and the balance by end March/April 1995.

25. The learned Arbitrator held that the discretion with NALCO under Clause 14 was not an unlimited one. After the notice of risk purchase, PEAK should have been given an opportunity of making an offer and the tender notice should have been sent to PEAK as well as to all other suppliers. It was found that while PEAK was invited to submit a bid for supply of 65,000 DMT along with other suppliers, it was not invited under the tender enquiry dated 21st October 1994 to make an offer in regard to purchase of 10,000 DMT. Consequently, the learned Arbitrator declined to grant relief to NALCO against PEAK on the basis of risk purchase in relation to the supplies of 10,000 DMT of caustic soda. However, as regards the supplies of 65,000 DMT, he found that NALCO had followed the correct procedure and, therefore, was entitled to reimbursement on the basis of risk purchase, which it had opted for. The finding on Issues 5, 6 & 7 of the learned Arbitrator was as under:

"NALCO's invocation and application of the risk purchase

clause was in accordance with the contract except insofar as it relates to the envisaged supply of 10,000 DMT of caustic soda by the tender enquiry dated 21st October, 1994."

26. As regards Issue No. 8, it was held that NALCO was entitled to USD 3,983,120.78 as damages and USD 27,107 being the excess payment made to PEAK. Interest @ 10% on the aforementioned sums was also allowed.

27. PEAK's counter claims, except counter-claims 4 and 5, were held to be non-arbitrable. Even counter-claims 4 and 5 were held to be barred by limitation.

Delay in pronouncing the Award

28. Mr. A.K. Ganguli, learned Senior counsel appearing for PEAK first submitted that there was an extraordinary delay by the learned Arbitrator in rendering the final award. He submitted that orders were reserved in the arbitral proceedings on 6th August 2000, and the Award was pronounced more than four years later on 16th February 2005. Relying on the decision in ***Harji Engineering Works Pvt. Ltd. v. Bharat Heavy Electricals Ltd. 2008 (4) Arb LR 199 (Del)*** as well as the decisions of the Supreme Court in ***R.C. Sharma v. Union of India (1976) 3 SCC 574*** and ***Kanhaiyalal v. Anupkumar (2003) 1 SCC 430***, it was submitted that the delay in pronouncement of the Award by itself is a sufficient reason for setting aside the impugned Award. Moreover, on account of the delay, certain facts and submissions were not noticed or dealt with in the impugned Award. It was therefore contrary to the public policy of India as well.

29. The question whether the delay in the pronouncement of an Award after final arguments have concluded vitiates the Award will depend on the facts and circumstances of each case. The decisions relied upon by Mr.

Ganguli turned on their peculiar facts. No two cases are the same. Significantly, delay has not been specified as one of the grounds under Section 34 of the Act for setting aside an Award. It would be straining the language of that provision to hold that delay in the pronouncement of an Award would by itself place it in "conflict with the public policy of India" within the meaning of Section 34 (2) (b) (ii) of the Act. As will be discussed hereafter, the impugned Award sets out comprehensively the facts as pleaded by the parties, the evidence, the submissions of counsel, the analysis of the facts and evidence, and the detailed reasons issue-wise. Another factor that requires to be accounted for is that the dispute between the parties has been pending since 1996. It would not be in the interests of justice to set aside the impugned Award only on the ground of delay and remand it for a fresh determination. The learned Arbitrator who passed the impugned Award has since expired. A fresh arbitration before another arbitrator would not be justified considering the time and money already spent in the arbitral proceedings thus far. Therefore, it is not considered expedient to simply set aside the impugned Award on the sole ground of delay in the pronouncement of the Award. This plea is accordingly rejected.

Concluded contract for supply of 25,000DMT of caustic soda lye?

30. The first contention on merits on behalf of PEAK is that the learned Arbitrator erred in holding that there was a concluded contract between the parties for the supply of 35,000 DMT of caustic soda lye. It was urged that the learned Arbitrator failed to deal with the contention that the essential elements of a concluded contract in relation to the supply of the additional quantity of 25,000 DMT caustic soda lye were absent. First, the shipping schedule was not finalized through mutual negotiations as envisaged in the contract. Second, the price for the supply of the additional quantity was not finalized. Thirdly, no L/C was opened by the buyer NALCO.

Consequently, the question of PEAK being in breach of the contract for the supply of 25,000DMT caustic soda lye did not arise. Reliance was placed on the judgments of ***Chatturbhuj Vithaldas Jasani v. Moreshwar Parashram AIR 1954 SC 236***, ***Union of India v. Maddala Thathaiah AIR 1966 SC 1724*** and ***M/s Rickmers Verwaltung Gimb H. v. Indian Oil Corporation Ltd. AIR 1999 SC 504***. Reference was also made to Section 38 (2) of the Sale of Goods Act, 1930.

31. It was pointed out by Mr. Ciccu Mukhopadhyaya, learned Senior Advocate appearing for NALCO that the correspondence between the parties as noticed by the learned Arbitrator showed that PEAK itself understood that there was indeed a concluded contract between the parties for the supply of 35,000 DMT of caustic soda lye.

32. A perusal of the impugned Award reveals that the learned Arbitrator has analysed the evidence on record. As regards the supply of 10,000 DMT there was no issue between the parties that there was a firm contract. PEAK appears to have proceeded initially on the basis that it would supply the balance quantity of 25,000 DMT. Later it began to back out of its commitment. PEAK had specified in its offer dated 20th December 1993 and indicated that the details of the shipment schedule from February 1994 would be as required by the buyer. Later it offered to effect supply during July-August 1994 but was unable to meet that commitment. On 15th July 1994, NALCO gave its final requirement and fixed the schedule for 10,000 DMT to be made by the end of the third quarter of 1994, another shipment of 5000 DMT by the end of December 1994 and two further shipments of 5000 DMT each in January and February 1995. NALCO was keen to get its stocks for keeping its plant fully functional and PEAK too went along by making offers for supply of the further quantity. In its letter dated 22nd March 1994 in response to NALCO's order placed on 19th March 1994,

PEAK by its reply dated 22nd March 1994 acknowledged receipt of NALCO's order "for 35,000 DMT." In a fax dated 23rd March 1994 PEAK said that it considered understood that the said quantity of 25,000 DMT formed part of the contract for supply of 35,000 DMT of caustic soda lye. In a letter dated 14th April 1994 PEAK stated that it had contracts with its major producers. In its reply before the learned Arbitrator PEAK claimed that it had "booked the entire quantity from the manufacturers" but that this was to no avail since there had been shutdowns and outages in the plants.

33. By a fax message dated 18th May 1994 PEAK confirmed the loading on to the vessel of the first shipment of 10,000 DMT with an excess of 945.32 DMT. According to NALCO the first shipment was received at Vizag Port on or around 12th July 1994 and the excess was 85.899 LMT. After 18th May 1994 there was correspondence and discussion between the parties on the shipment schedule for the balance quantity. PEAK sought extension of time for completing the 'July' shipment of 10,000 DMT. The broad terms of the contract were already contained in the initial contract and known to both parties. NALCO had also agreed to open an L/C to cover the entire balance order. As observed by the learned Arbitrator the mutual agreement as to the schedule of shipment was only a step in the performance of the contract. The evidence on record before he learned Arbitrator did show that PEAK understood that the contract was not limited to the first shipment of 10,000 DMT as was later sought to be pleaded by it. The finding of the learned Arbitrator on the first issue concerning the existence of a concluded contract between the parties for the supply of 35,000 DMT of caustic soda lye does not call for interference.

Force majeure and frustration

34. It was next contended by Mr. Ganguli that merely because there was no price variation clause did not mean that PEAK was bound to supply the commodity at the same price as was contracted when there was sufficient evidence to show that there was an astronomical increase in the price of the goods by over 1000%. He reiterated the pleas of force majeure as well as frustration and submitted that the learned Arbitrator erred in rejecting them.

35. For PEAK to avail of the defence of force majeure in terms of Clause 13 it would have to prove that events subsequent to the contract resulted directly in it being unable to make the supplies covered by the contract. Also, for the plea of frustration to succeed, in terms of Section 56 of the Contract Act, the mere fact of increase in prices of the commodity contracted to be supplied may not suffice. As pointed out in ***Alopi Parshad and Sons Ltd. v. Union of India AIR 1960 SC 588***, "a wholly abnormal rise or fall in prices, a sudden depreciation of currency, and a little obstacle to execution or the like" cannot by itself affect the bargain made between the parties. Further it was observed in ***Continental Construction Co Ltd. v. State of Madhya Pradesh (1988) 3 SCC 82***, that a contractor cannot “on some vague plea of equity” claim to make payment of consideration at rates different from the contracted rates. An abnormal increase in the price of labour and materials was not sufficient to plead frustration. In ***Badri Narain v. Kamdeo Prasad AIR 1961 Patna 41*** it was observed "The decrease in the amount of remuneration has the effect of rendering the contract more burdensome. But, to attract the doctrine of frustration, burdensomeness is not the necessary consideration; the impossibility of performance contract is the true criterion."

36. The learned Arbitrator referred to the report of the Chemical Marketing Reporter of 4th July 1994 (P.156) which confirmed that spot prices of caustic soda had indeed risen sharply, this was not an unusual development in the caustic soda market and buyers and sellers were usually prepared for these fluctuations in price. Mr. Jack Clinton, the witness for NALCO, described generally the phenomenon of "Order Control" and its consequences. Interestingly this witness confirmed that during the period of Order Control the contracted customers with Occidental got their contracted amount." There was no evidence led by PEAK to show that its arrangements with its suppliers were affected by such 'Order Control'. The learned Arbitrator, after analysing the law on the subject including the observations of the Supreme Court in ***M/s. China Cotton Exporters v. Beharilal Ramcharan and Cotton Mills Ltd. AIR 1961 SC 1295,*** held that there was no evidence as to what measures PEAK had taken at the time of accepting NALCO's order to ensure that the supplies promised by it were effectively covered by firm contracts with original suppliers. Had such material come on record, it would have been possible to determine the precise reasons for PEAK's failure to honour its obligations under the contract with NALCO. On the other hand there was evidence to show that "the commodity was available in the market notwithstanding that it was available at a higher price." The reasons given by the learned Arbitrator for rejecting the plea of PEAK on the basis of the doctrine of frustration and *force majeure* are based on a correct appreciation of the evidence on record and consistent with the law on the subject.

Risk Purchase

37. PEAK's case is that there was no concluded contract for the supply of 25,000 DMT of caustic soda lye. In any event, since there was no mutually agreed shipment schedule for that balance quantity, the balance quantity could be supplied till February/ March 1995 when the period of the

contract expired. It is accordingly contended that it is NALCO that committed a breach of the contract by purporting to terminate it in October 1994 even before the period expired without following the procedure for such termination. The further contention is that the definite procedure for resorting to risk purchase was not followed by NALCO which should have floated a global tender and not a limited tender. Also, the learned Arbitrator having held that there was a failure on the part of NALCO to follow the risk purchase procedure for 10,000 DMT, could not have compensated NALCO for the purchase in relation to 25,000DMT.

38. The learned Arbitrator examined Issues 5, 6 and 7 together. It was noted that there were three risk purchase tenders floated by NALCO. The first one dated 18 July 1994 for 20,000 DMT did not result in NALCO buying any quantity since the only vendor who responded quoted too high a price. This was followed by NALCO issuing a notice dated 15th September 1994 calling upon PEAK to supply the balance quantity of 25,000 DMT till the end of February 1995, but required it to communicate a firm shipment schedule. It also informed PEAK that if it received no response, NALCO would source the quantity from elsewhere. PEAK failed to respond. This puts paid to the plea now taken by PEAK that NALCO should have waited till February 1995 for PEAK to complete the supply of the contracted quantity. PEAK could have at this stage easily told NALCO that. The next logical step that NALCO would take is what it did by the further fax message of 3rd October 1994 whereby it informed PEAK that it was going ahead with the procurement from alternative sources at the risk and cost of PEAK. This was, as rightly held by the learned Arbitrator, an effective termination of the contract and both parties understood it to be so. Clearly PEAK was not prepared to supply the contacted quantity at the contracted price. The plea that it was NALCO that was in breach of the

contract is one of desperation. By failing to supply the agreed quantity as contracted it was PEAK that was in breach.

39. The learned Arbitrator has correctly concluded that NALCO, in floating the second limited tender on 21st of October 1994 for 10,000 DMT failed to invite PEAK to participate and thereby was in breach of the risk purchase procedure for this tender. The conclusion that "this omission constitutes a serious defect in the procedure adopted by NALCO, and results in invalidating the risk purchase transaction flowing from the tender enquiry dated 21st October 1994" is based on a correct interpretation of Clauses 12 and 14 of the contract. The learned Arbitrator disallowed NALCO's claim for the cost of risk purchase to this extent. He then proceeded to consider the third risk purchase tender floated by NALCO on 24th October 1994 for 65,000 DMT. The notice had been sent to 17 international suppliers including PEAK which submitted an offer but did not agree to the terms and conditions and therefore was disqualified. The purchase of 25,000DMT caustic soda pursuant to this tender was rightly held to qualify for risk purchase relief but less the quantity supplied by Bali Trading Ltd. pursuant to the tender dated 21st October 1994. Ultimately NALCO was held entitled to claim of only USD 3,983, 120. 78. The Court is unable to agree with the submissions of PEAK that in so deciding the learned Arbitrator committed any grave illegality in this regard. The findings on issues 5,6 and 7 are upheld.

40. As regards the award of interest, Section 31 (7) of the Act does permit the Arbitrator to award reasonable interest. The award of 10% interest can hardly be said to be unreasonable.

Conclusion

41. There is no merit in any of the other contentions of PEAK. The rejection of PEAK's counter-claims also do not call for any interference as it is based on a correct appreciation of the facts and the law. There is no illegality, much less a patent one, vitiating the impugned Award.

42. PEAK's O.M.P. No. 160 of 2005 is accordingly dismissed the costs of Rs. 20,000 will be paid by PEAK to NALCO within 4 weeks. NALCO's O.M.P. No. 454 of 2005 is dismissed on the ground of limitation with no order as to costs.

February 7, 2012 **S. MURALIDHAR, J.**
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