

Dispute

February 16, 2012

DELAY IN PRONOUNCEMENT OF AN AWARD: NOT AGAINST PUBLIC POLICY OF INDIA

INTRODUCTION

The Hon'ble Delhi High Court ("DHC") vide its judgment dated February 7, 2012, in the case of Peak Chemical Corporation Inc. vs National Aluminium¹ Co. Ltd has held that delay in pronouncing the Award would, in itself not result in the award being vitiated as being "in conflict with the public policy of India" within the meaning of Section 34 (2) (b) (ii) of the Arbitration and Conciliation Act, 1996 (Act).

FACTS OF THE CASE

Peak Chemical Corporation Inc ("PEAK" and/or "Petitioner") was engaged in the supply of various chemicals including caustic soda lye to various companies around the world. On November 19, 1993, *National Aluminium Co. Ltd* ("NALCO" and/or "Respondent") floated a global tender for supply of 50,000 Dry Metric Tons of caustic soda lye for its M&R complex at Damanjodi, Orissa.

On December 21, 1993, the technical bids were opened and on February 17, 1994, NALCO opened the financial bids. PEAK was found to be the lowest bidder and a contract was executed between PEAK and NALCO for the supply of caustic soda lye.

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 claimed that the price of caustic soda soared to 1000% above the normal price, which had a cascading effect on the availability of caustic soda and 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.

By letters dated June 7, 1994 and June 30, 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 supply to NALCO at prices as agreed to between the parties.

NALCO pressed certain claims against PEAK for failure to fulfill its agreed obligations which PEAK refuted. NALCO then appointed a former Chief Justice of India to act as the Sole Arbitrator to adjudicate upon the disputes which had arisen between NALCO and PEAK.

The Ld. Arbitrator reserved his award in the arbitral proceedings on August 6, 2000 and the Award was pronounced more than four years later on February 16, 2005

While passing the award, the learned Arbitrator considered PEAK's plea of force majeure and held that PEAK cannot take advantage of the force majeure clause (under the agreement) unless it established that the events as claimed by PEAK 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 as contended by PEAK such as world-wide shortage of Caustic Soda.

The Ld. Arbitrator then considered whether the agreement made between the parties was defeated by frustration. After referring to Section 56 of the Indian Contract Act, 1872 it was held by the Ld. Arbitrator 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 led by NALCO showed that the suppliers continued to supply the commodity notwithstanding the tight market. It was, therefore, consequently held that PEAK had committed a breach of contract and its plea of justification with reference to force majeure was not tenable.

ISSUE

- Whether the delay in the pronouncement of an Award after final arguments have concluded vitiates the Award as being contrary to the Public Policy of India?

PEAK'S SUBMISSIONS

Peak, while placing reliance on Section 56 of the Indian Contract Act, 1872, contended that the Ld. Arbitrator had erred in holding that the contract entered into between PEAK and NALCO had not become void. Relying on Harji Engineering Works Pvt. Ltd. v. Bharat Heavy Electricals Ltd.² as well as the decisions of the Supreme Court in R.C.

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Sharma v. Union of India³ and Kanhaiyalal v. Anupkumar⁴ PEAK further claimed that the extra-ordinary delay in pronouncement of Award by itself was a sufficient reason for setting aside the impugned Award. PEAK further claimed that on account of the delay, certain facts and submissions were not noticed or dealt with in the impugned Award and the Award was therefore contrary to the public policy of India.

DECISION AND RATIONALE

While deciding the objections relating to the plea of PEAK under section 56 of the Indian Contract Act, 1956, the DHC held that 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

The DHC followed the ratio laid down in Alopi Parshad and Sons Ltd. v. Union of India⁵ and held that for the plea of frustration to succeed, in terms of Section 56 of the Indian Contract Act, 1872, the mere fact of increase in prices of the commodity contracted to be supplied may not suffice. In its judgment the DHC also referred to the case of Badri Narain v. Kamdeo Prasad⁶ wherein the Court had observed that "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."

To maintain the defense of force majeure, PEAK had to prove that events subsequent to the contract entered into between PEAK and NALCO, directly resulted in PEAK being unable to make the supplies covered by the contract and that the said burden had not been discharged by PEAK.

On the issue whether or not the delay in the pronouncement of an Award after final arguments have concluded would vitiate the Award, the DHC observed that the same would depend on the facts and circumstances of each case. The decisions relied upon by PEAK turned on their peculiar facts and no two cases are the same. The DHC noted that delay has not been specified as one of the grounds under Section 34 of the Act for setting aside an Award and held that 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.

The DHC further held that since:

- 1. 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; and
- 2. 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 and since 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.

CONCLUSION

Principle enshrined in this case is that an in-ordinate delay in rendering the award would by itself not result in the Award being "in conflict with the public policy of India" within the meaning of Section 34 (2) (b) (ii) of the Arbitration and Conciliation Act, 1996.

The factors which the courts would consider while determining the above would inter-alia include as to whether the award is a reasoned and comprehensive award passed after analyzing facts and the evidence led by the Parties, the submissions of Counsel and whether setting aside an award on the grounds of delay would result in further hardships upon the parties in terms of time and money already spent in the Arbitration proceedings.

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You can direct your queries or comments to the authors

¹ O.M.P. No. 160/2005; [http://indiankanoon.org/doc/9109979/ 2]
² 2008 (4) Arb LR 199 (Del)
³ (1976) 3 SCC 574
⁴ (2003) 1 SCC 430
⁵ AIR 1960 SC 588
⁶ AIR 1961 Patna 41

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