
(2022) 01 DEL CK 0040

In the Delhi High Court

Case No : Original Miscellaneous Petition (COMM) No. 164, 190 Of 2020,
Miscellaneous Application No. 2870 Of 2015

Hindustan Petroleum Corporation Ltd

APPELLANT

Vs

M/S Dhampur Sugar Mills Ltd

RESPONDENT

Date of Decision : 06-01-2022

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 23(3), 34
Indian Contract Act, 1872 — Section 73, 74

Citation : (2022) 01 DEL CK 0040

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Naveen Raheja, Aditi Shastri, Prasenjit Keswani

Final Decision : Disposed Of

Judgement

Vibhu Bakhru, J

Introduction

1. The parties have filed these petitions under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter "the A&C Act") impugning an arbitral award dated 23.08.2012 (hereafter "the impugned award") rendered by an arbitral tribunal constituted by a Sole Arbitrator (hereafter "the Arbitral Tribunal").

2. The impugned award was rendered in respect of the disputes that had arisen between the parties in connection with the Agreements (five in number), whereby Dhampur Sugar Mills Limited (hereafter "DSM") had agreed to supply ethanol to Hindustan Petroleum Corporation Limited (hereafter "HPCL").

3. Undisputedly, HPCL was required to bear the sales tax on such supplies of ethanol. However, it was entitled to mitigate the levy by providing

Form-C for the ethanol purchased from DSM. According to DSM, HPCL failed and neglected to furnish the Form-Cs within the time prescribed

resulting in a sales tax assessment being framed on DSM for enhanced sales tax and penalty. DSM claimed that the same constituted a breach of the

agreements in question and accordingly, suspended the supply of ethanol under the four agreements in question until the issue was resolved. HPCL

treated the same as a default on the part of DSM to supply the agreed quantity of ethanol and imposed a penalty under the 'Take or Pay/Supply or

Pay' Clause (clause 3 of the agreements in question)

4. Thereafter, the parties entered into a fresh Agreement (hereafter 'the Fifth Agreement').

5. HPCL sought to recover the penalty imposed under the 'Take or Pay/Supply or Pay' Clauses of the first four agreements from the

consideration payable for the ethanol supplied under the Fifth Agreement. DSM contends that the same was impermissible. It also sought recovery of

the sales tax paid on account of non-furnishing of Form-C. In addition, it also claimed certain sums under the 'Take or Pay/Supply or Pay'

Clause under the agreements in question.

6. The disputes between the parties were referred to arbitration, which culminated in the impugned award.

7. The Arbitral Tribunal awarded HPCL's claim for penalty imposed under the 'Take or Pay/Supply or Pay' Clause and also awarded the

amount claimed by DSM on account of sales tax paid to the Sales Tax Authorities.

Factual Context

8. On 07.02.2007, HPCL and DSM entered into an agreement for supply of ethanol at various locations in Delhi. Thereafter, three similar agreements

were executed between the parties: (i) Agreement dated 28.06.2007 for supply of ethanol to HPCL's locations in the State of Punjab; (ii)

Agreement dated 17.11.2007 for supply of ethanol to HPCL's locations in the State of Haryana; and (iii) Agreement dated 02.01.2008 for supply

of ethanol to various locations in the State of Rajasthan. These agreements are hereafter collectively referred to as 'the Initial Agreements'

9. There is no dispute that initially, DSM complied with its obligation to deliver

ethanol at the specified locations under the Initial Agreements.

However, controversy arose as HPCL did not provide Form-Cs for some of the supplies received by it in a timely manner. DSM claimed that failure

on the part of HPCL resulted in the Trade Tax Department of the State of Uttar Pradesh assessing sales tax at the rate of 32.5% on the value of the

supplies made to HPCL in respect of which Form-Cs had not been furnished.

10. Whilst DSM claims that HPCL was negligent in supplying Form "Cs, even though in some cases, HPCL had received the same from the State

Tax Department; HPCL claims that the delay was on account of reconciliation and/or on the delay on the part of the State Sales Tax Department in

issuing the necessary Form-Cs.

11. In view of non-furnishing/delay in furnishing of the Form-Cs by HPCL and the resulting liability of sales tax, DSM issued a communication dated

05.09.2008 suspending the supplies of ethanol under the Initial Agreements pending resolution of the controversy regarding the timely issuance of

Form-Cs.

12. DSM was provisionally assessed to sales tax. By a letter dated 27.02.2009, DSM called upon HPCL to pay an amount of Rs. 1,48,67,132.48 on

account of the Sales Tax imposed on DSM for non-submission or delayed submission of the Form-Cs in respect of supplies made to HPCL. DSM

claimed that a recovery certificate for the said amount was issued by the Sales Tax Department.

13. A sum of Rs. 35,30,363/- was recovered by the Uttar Pradesh Sales Tax Department from DSM in respect of the sales tax/penalty in respect of

the supplies made by DSM to HPCL on account of non-furnishing of the Form-Cs.

14. DSM took steps to assail the said demands and also preferred a Writ Petition (being W.P. No. 1453 (MB) of 2009 in the High Court of Allahabad)

impugning the sales tax/penalty demand. DSM also pursued with HPCL for an indemnity against any liability and to pay the amount due.

15. Since DSM had suspended the supplies pending resolution of the issue regarding submission of the Form-Cs by HPCL, HPCL considered the

same as a breach of the "Take or Pay/Supply or Pay" Clause and, by a letter dated 18.05.2009, put DSM to notice that it would be liable to pay

penalty of a sum of Rs. 28,85,945/-. Similarly, by a letter dated 17.09.2009, HPCL put DSM to notice regarding levy of penalty of Rs. 55,45,710/-

under the 'Take or Pay/Supply or Pay' Clause. By a subsequent communication dated 20.08.2010, HPCL also claimed an additional amount quantified at Rs. 3,34,755.

16. On 11.10.2010, the parties entered into a new agreement (the Fifth Agreement) for supply of ethanol. The Fifth Agreement also included a 'Take or Pay/Supply or Pay' Clause (Clause no. 5).

17. The disputes between the parties remained unresolved and HPCL commenced deducting penalties in terms of the 'Take or Pay/Supply or Pay' Clause under the Initial Agreements from the payments due to DSM for supplies made under the Fifth Agreement.

18. It is material to note that DSM also claimed an amount of Rs. 8,35,034/- under the 'Take or Pay/Supply or Pay' Clause under the Fifth Agreement alleging that HPCL had failed to indent or accept the minimum agreed quantity of ethanol.

19. In view of the aforesaid disputes, DSM invoked the Arbitration Clause under all the Agreements (the Initial Agreements and the Fifth Agreement) by notices dated 19.07.2011 and 27.08.2011.

20. On 05.09.2011, HPCL appointed HPCL's former Chief Legal Advisor, as the Sole Arbitrator (the Arbitral Tribunal), to adjudicate the disputes between the parties and referred the disputes to arbitration.

21. The Arbitral Tribunal entered upon reference and by the first procedural order, fixed a schedule for completion of the pleadings. DSM filed its

Statement of Claims on 10.10.2011. DSM claimed a sum of Rs. 56,86,050, which according to it was deducted from the invoices raised by it, along

with interest at the rate of 24% compounded annually. DSM also claimed a sum of Rs. 1,40,21,870/- along with interest at the rate of 24% per annum

at annually compounded rates, in terms of HPCL's obligation under the 'Take or Pay/Supply or Pay' Clause under the agreements in

question, as according to DSM, HPCL was responsible for suspension of the supply of ethanol. DSM also claimed Rs. 35,30,363/- on account of Sales

Tax recovered by the Trade Tax Department along with interest at the rate of 24% per annum. In addition, DSM claimed an amount of Rs. 8,45,034/-

on account of HPCL's obligation in terms of the 'Take or Pay/Supply or Pay' Clause under the Fifth Agreement. Further, DSM claimed

costs and expenses.

22. HPCL filed its reply to the Statement of Claims on 02.01.2012 after much delay, disputing the claims made by DSM. DSM filed its rejoinder to the said reply on 22.02.2012. Thereafter, on 20.03.2012, HPCL filed its sur-rejoinder and also included a counter claim, which comprised of a tabular statement indicating calculation of penalty aggregating to Rs. 88,14,785/- under the 'Take or Pay/Supply or Pay' Clause. DSM filed its reply to the Counter Claim on 10.04.2012.

23. On 16.07.2012, after the Arbitral Tribunal had commenced final hearing, HPCL filed an application seeking amendment of its counter claim to enhance it to Rs. 1,09,21,140/-. The Arbitral Tribunal rejected HPCL's application for amendment of the counter claim as it was highly belated.

24. The Arbitral Tribunal delivered the impugned award on 23.08.2012.

25. The concerned Trade Tax Authorities passed the final assessment orders on 28.06.2012 and 01.08.2013 setting aside the Sales Tax demands raised, at the maximum rate on DSM.

Submissions

26. Both the parties have assailed the impugned award. HPCL contends that the award of a sum of Rs. 35,30,363/- awarded in favour of DSM is patently erroneous as no such sales tax liability had crystallized on DSM. DSM was contesting the demands raised by the Uttar Pradesh Sales Tax

Authorities and the Arbitral Tribunal had found that HPCL had provided the necessary Form-C to DSM. Albeit after some delay.

27. HPCL also assails the decision of the Arbitral Tribunal to award further sums to DSM, which included a sum of Rs. 8,45,034/- on account of obligations under the 'Take or Pay/Supply or Pay' Clause of the Fifth Agreement.

28. HPCL is also aggrieved on account of the Arbitral Tribunal rejecting its application to seek amendment of the counter claim to enhance it from Rs.

88,14,785/- (which was awarded by the Arbitral Tribunal) to Rs. 1,09,05,550/- on account of penalty under the 'Take or Pay/Supply or Pay' Clause.

DSM contends that the impugned award is vitiated on that ground as well

29. DSM also assails the impugned award on, essentially, two grounds. It contends that the levy of damages under the 'Take or Pay/Supply or

Pay' Clause [Clause-3 under the Initial Agreements] is patently erroneous for two reasons. First, that DSM had not breached any of its

obligations under the Initial Agreements. It had suspended the supply of ethanol solely because HPCL had breached its obligations to pay the sales tax

or to provide Form-Cs in a timely manner. Resultantly, DSM was exposed to a sales tax liability and it was entitled to suspend the supplies until the

issue was resolved. Since, DSM had not breached the Initial Agreements, it could not be made liable for any damages. Second, it is stated that HPCL

had failed to establish the damages as claimed by it. DSM had raised a defence in this regard and had contended that unless, HPCL established that it

had suffered damages, no amount could be awarded to it. However, the Arbitral Tribunal had rejected it.

30. Mr Keswani, learned counsel appearing for DSM, submitted that DSM had specifically pleaded that HPCL had not established any loss and

therefore, no amount could be awarded to it under the "Take or Pay/Supply or Pay" Clause. He submitted that the said clause was in the nature

of a clause providing for liquidated damages and no such damages were payable without HPCL establishing the loss suffered by it. DSM had referred

to the decisions of the Supreme Court in *Fateh Chand v. Balkishan Dass*: (1964) 1 SCR 515 and *Maula Bux v. Union of India*: 1969 2 SCC 554, in

support of the contention before the Arbitral Tribunal; however, the Tribunal had brushed aside the said submissions by stating that the case laws

referred to on behalf of DSM did not help as "the facts and ratio of the judgments is different".

31. Mr Keswani has also referred to the decision of *Kailash Nath v. Delhi Development Authority & Anr.*: (2015) 4 SCC 136 and submitted that the

said decision was delivered by the Supreme Court after the impugned award was rendered and therefore, could not be placed before the Arbitral

Tribunal. However, the decisions of the Supreme Court in *Maula Bux v. Union of India* (supra) and *Fateh Chand v. Balkishan Dass* (supra), which

were referred to by the Supreme Court in *Kailash Nath Associates v. Delhi Development Authority & Anr.* (supra) were brought to the notice of the

Arbitral Tribunal. He also referred to the decision of a Coordinate Bench of this Court between the same parties in *M/s Dhampur Sugar Mills Ltd. v.*

Hindustan Petroleum Corporation Ltd. : OMP (COMM) 243/2015, decided on 20.02.2019. In the said case, this Court had set aside the arbitral award

on the ground that the Arbitral Tribunal had not addressed the principal dispute between the parties, that is, whether DSM could withhold the supplies

on account of non-supply/delayed supply of Form-C by HPCL. He submitted that in this case also, the said dispute has not been addressed.

32. He submitted that HPCL could either establish that it has suffered a loss or establish that the penalty as provided under the 'Take or Pay/Supply or Pay' Clause was a genuine pre-estimate of the loss, which could not be quantified. But HPCL had done neither. It had not pleaded that it was not possible to establish the loss suffered by it on account of short supply of ethanol. It had also not produced any evidence to establish the loss suffered by it.

33. Mr Keswani, readily conceded that DSM had also failed to produce any evidence to establish that it had suffered any loss on account of shortfall in indenting/ accepting ethanol against which the Arbitral Tribunal had awarded a sum of Rs. 8,45,034/- in its favour.

34. It is also material to note that he also conceded that an award for a sum of Rs. 35,30,363/ to compensate DSM for the amount paid to the Sales Tax Authorities would not survive since DSM had, after the impugned award was rendered, succeeded in its claim that the said amount, which was recovered by the Uttar Pradesh Sales Tax Authorities, was not payable.

35. Mr Naveen Raheja, learned counsel appearing for HPCL, assailed the impugned award on three fronts. First, he submitted that the Arbitral Tribunal had awarded a sum of Rs. 35,30,363/- against a Sales Tax liability that had not finally crystalized and therefore, it was liable to be set aside.

36. Second, he submitted that the decision of the Arbitral Tribunal to reject HPCL's request for amendment of the counter-claims was patently erroneous and contrary to Section 23(3) of the A&C Act. He submitted that by virtue of Section 23(3) of the A&C Act, any party could amend or supplement the claim at any stage. The decision of the Arbitral Tribunal to reject HPCL's request for supplementing its claim was most unreasonable as HPCL had merely sought to amend the quantum of the counter-claims without amending any other pleading.

37. He also countered the submissions made by Mr Keswani. He submitted that the 'Take or Pay/Supply or Pay' Clause (Clause 3 of the Initial Agreements) expressly records that it was a pre-genuine estimate of the loss and therefore, it was not open for DSM to contend to the contrary. He submitted that it was not necessary for HPCL to either plead or prove that it had

suffered any loss. He referred to the decision of the Supreme Court in Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd: (2003) 5 SCC 705, in support of his contention. He also referred to the decision of the Division Bench of this Court in Tower Vision India Pvt. Ltd. v. Procall Private Limited: 2012 SCC OnLine Del 4396.

Reasons and Conclusion

38. As is apparent from the above, the principal controversy to be addressed is whether the impugned award is vitiated by patent illegality as the

Arbitral Tribunal has entered into an award in favour of HPCL for recovery of the amounts of penalty claimed in terms of Clause 3 of the Initial

Agreements (Take or Pay/Supply or Pay Clause) and, in favour of DSM under a similarly worded clause in the Fifth Agreement.

39. Before proceeding further, it would be relevant to refer to the said clause. Clause 3 of the Initial Agreements and Clause 5 of the Fifth Agreement

are similarly worded. Clause 5 of Fifth Agreement for supply of ethanol is set out below:-

5. TAKE OR PAY/SUPPLY OR PAY:

The both parties agree to supply/uplift minimum 90% of the order quantity. In case of failure from either party, this "Take or Pay/Supply or Pay"

clause shall be applicable in addition to the other terms & conditions of the contract. The modalities shall be as under:-

i. The location shall place monthly indents/schedule for supplies of ethanol by the Suppliers.

ii. The Supplier will make the supplies as per the indents/schedule placed by the purchaser. The Supplier shall strictly adhere to the supply schedule. In

case of failure to supply, the committed quantity shall reduce on prorata basis for the period so delayed. For the purpose of calculating prorata quantity,

date of receipt at location shall be taken as date of supply and scheduled date provided by the location shall be considered as requirement date for this

purpose.

iii. The above reconciliation of quantity supplied visa-a-visa indents/schedule and settlement of accounts under this clause shall be done on financial

quarter basis by the indenting locations.

iv. Amount of Rs.2700/- per KL (Rupees Two Thousand Seven Hundred Only per KL) (equivalent to 10% of the basic rate) shall be payable by the

Supplier for the undelivered quantity from minimum quantity of 90% of the indented quantity on financial quarter basis.

v. Amount of Rs.2700/- per KL (Rupees Two Thousand Seven Hundred Only per KL) (equivalent to 10% of the basic rate) shall be payable by the

Purchaser for the un-indented quantity from minimum 90% of the prorated purchase order quantity minus prorated quantity arrived as per clause 5 (II)

above on financial quarter basis.

vi. State Excise controls the movement of ethanol. The delay in issuance of requisite permissions/clearances by State Excise shall affect the

indents/schedule of supplies. The both parties agree that delays and prorated quantity thereof due to non-availability of requisite permissions/clearances

by Statutory Authorities shall be reconciled on case-to-case basis.â??

40. As is apparent from the above, an amount equivalent to 10% of the basic rate would be payable for undelivered quantity, which falls short of the

threshold of 90% of the ordered quantity. DSM was also entitled to receive penalty at the same rate for un-indented quantity that falls short of the said

threshold. The clause also expressly records that it was a true estimate value of damage/loss. It is clear from the plain language of the said clause that

it is in the nature of providing liquidated damages.

41. Undisputedly, DSM would not be liable to pay any amount under the aforesaid clause if it was entitled to suspend the supplies on account of non-

supply/delay in providing the Form-Cs. It is also not disputed that DSM had called upon HPCL to indemnify it for any loss that it may incur on account

of delay or deficiency in providing the Form-Cs but HPCL had failed to provide any such indemnity.

42. Form-C is a form issued by the Sales Tax Department of the purchasing dealer (in this case, HPCL) to enable purchase of goods from a

registered dealer (in this case, DSM) without payment of sales tax to the said dealer. The selling dealer is entitled to produce the Form-C forwarded

by the purchasing dealer to avail exemption from payment of sales tax or to pay sales tax at a reduced rate, as the case may be. Although, DSM

would be assessed for sales tax on the supplies made by it to the HPCL, it was entitled to exemption from payment of sales tax or to pay the same at

a reduced rate by providing the Form-C from HPCL. Sales tax is an indirect tax and DSM was entitled to recover the same from HPCL on the

supplies made by it. It is important to note that the Arbitral Tribunal had also found that DSM was liable to pay sales tax and had awarded an amount of Rs. 35,30,363/- in favour of DSM.

43. In the circumstances, it is undisputed that HPCL was either required to furnish the Form-Cs or to pay the sales tax to DSM on such supplies as a part of the consideration. Failure to pay such sales tax or provide the requisite Form-C would in fact amount to a failure on the part of HPCL to pay full consideration for the supply of ethanol by DSM.

44. DSM's action for suspending the supplies on account of non-supply of Form-C was required to be viewed in the aforesaid perspective. It was necessary for the Arbitral Tribunal to determine whether suspension of the supplies constituted a breach of the Initial Agreements on the part of DSM. It is also relevant to note that the Arbitral Tribunal had framed the following issues for consideration:-

â??(i) Whether claimant failed to deliver supplies against indents placed as per agreement?

(ii) Whether respondent failed to provide Form-C form supplies made (delayed or not at all) and was claimant justified in withhold supplies?

(iii) Whether claimant is entitled to receive his claim as stated in para 14, sub para 1 to 11? If yes, which claim and to what extent?

(iv) Whether respondent is entitled to receive his counter claim made at page No. 17 para 1 to 3? If yes to what extent?

45. In respect of the first issue, the Arbitral Tribunal found that DSM had failed to deliver the supplies against indents placed by HPCL as the supply orders were pending with DSM as on 05.09.2008.

46. Insofar as issue no. (ii) is concerned, the Arbitral Tribunal held as under:-

â??From the above discussion it is clear that supplies of ethanol were suspended on 05.09.2008 and were resumed only after signing new agreements

in year 2010. On 05.09.2008 supply orders placed by respondent under agreement dated 07.02.2007 were pending. There was delay in furnishing

Form-C by respondent but no Form-C is pending for supply received. Respondent can furnish Form-C to the claimant for supplies received only after

the same are released by State Tax Department.â??

47. Although, the Arbitral Tribunal held that there was a delay in furnishing of the Form-C and HPCL was liable to pay the sales tax at the applicable

rates including a higher rate if any, due to late furnishing of the Form-C, yet the Arbitral Tribunal held that DSM was not justified in withholding the supplies as there was no Form-C pending.

48. DSM had submitted that the delay in providing the Form-Cs was about three years in some cases. The Arbitral Tribunal's conclusion that

there was delay in furnishing of the Form-C's did indicate that the Arbitral Tribunal had accepted that HPCL has breached its obligations.

The Arbitral Tribunal's reasoning that even though there were a number of instances of delay in furnishing the Form-Cs by HPCL, but since no

Form-C was pending, the claimant was not justified in withholding the supplies to some extent, fails to address the question. This is because DSM had

suspended the supplies at a time when the Form-Cs was pending, and that issue was not resolved. It remained unresolved for a considerable time.

Therefore, it is difficult to follow as to how furnishing the Form-Cs at a later date would absolve HPCL of its failure to provide the Form C's at

the material time.

49. The next aspect to be addressed is whether it was necessary for HPCL to have established that it had suffered any loss in order to sustain its

counter-claims. In this regard, it is relevant to note that there are hardly any pleadings regarding the counter-claims made by HPCL. HPCL has

merely set out a table providing the calculation of Rs. 88,14,785/- under a Column with the heading "penalty calculation is + to Rs. 2150 per KL

that is, 10% of basic rate (Rs. 2500 per KL) penalty under Take or Pay/Supply or Pay clause (Rs)". However, in its first prayer clause, HPCL had

made certain rudimentary pleadings. The first prayer made by the HPCL is set out below:-

"Based on the above, it is submitted that the Claimant is liable to pay the above sum of Rs.88,14,785/- being the penalty under the "Take or

Pay/supply or pay" clause to the Respondent. It is because the Claimant has failed to supply a total quantity of 4099.9 Kls and the penalty levied being

@ Rs.2150/- per KL being the 10% basic rate of Rs.21,500/- per KL, Rs.2150/- per KL thus amounting to Rs.88,14,785/- liable to be paid by the

Claimant to the Respondent. Accordingly, the Hon'ble Arbitrator may be pleased to pass an award of Rs.88,14,785/- to be payable by the

Claimant to the Respondent.

50. As noticed above, DSM had disputed the above claim on the ground that HPCL had not established the same. The Arbitral Tribunal rejected the aforesaid contention. There are only two reasons discernable from the impugned award for such rejection. First, that DSM had also claimed damages under Clause 3 of the Initial Agreements; and second, that the provisions of Clause 3 of the Initial Agreements could not be ignored. Since DSM had failed to supply the minimum 90% of the un-indented ordered quantity, it was liable to pay damages under Clause 3 of the Initial Agreements.

51. There is merit in Mr Keshwani's contention that HPCL was required to establish the loss suffered by it and if the same could be established with reasonable certainty, HPCL was required to plead, at the very least, that it was not feasible to establish the loss suffered by it and that the liquidated damages as provided under the agreements in question were a genuine estimate of the loss suffered on account of non-supply of ethanol by DSM. However, HPCL had done neither

52. Mr Raheja's contention that HPCL was not required to either plead or prove any loss is difficult to accept. In *Kailash Nath Associates v. Delhi Development Authority and Anr.* (supra), the Supreme Court had referred to Section 74 of the Indian Contract Act, 1872 and had held as under:-

43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:

43.1. 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 as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both 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 penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

43.2. 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.

43.3. 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.

43.4. The section applies whether a person is a plaintiff or a defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. 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 that the liquidated

amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

43.7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and

conditions of a public auction before agreement is reached, Section 74 would have no application.

53. HPCL had neither pleaded that it was not feasible to establish the loss nor had led any material to establish that it had suffered loss on account of

non-supply of ethanol by DSM. There is also no pleading to the effect that ethanol was otherwise not readily available or available at a price higher

than as agreed between DSM and HPCL. DSM's contention that HPCL had failed to establish any loss was contested on an erroneous premise

that HPCL was not required to establish the same.

54. In the given circumstances, this Court is of the view that the award of Rs. 88,14,785/- in favour of HPCL, is not sustainable.

55. It is also material to note that DSM had also made a similar claim under Clause 3 of the Initial Agreements and Clause 5 of the Fifth Agreement.

DSM's claim in respect of the Initial Agreements was rejected as the Arbitral Tribunal had found that DSM had failed to supply ethanol and there

was no failure on the part of HPCL to indent/accept the same. However, DSM's claim under Clause 5 of the Fifth Agreement was allowed. As

conceded, the award of Rs. 8,45,034/- in favour of DSM is also liable to be set aside, as DSM had also failed to establish the loss suffered by it.

56. As conceded by Mr Keswani, the award for an amount of Rs. 35,30,363/- on account of sales tax paid by DSM to the Tax Authorities is also

unsustainable and is set aside.

57. The contention that HPCL was entitled to amend the counter-claim and the Arbitral Tribunal had erred in not permitting the same, is clearly unmerited.

58. Section 23(3) of the A&C Act, which was relied on behalf of HPCL, reads as under:-

â??23 (3) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defense during the course of the arbitral

proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.â??

59. It is clear from the plain language of Section 23(3) of the A&C Act that a party is entitled to amend or supplement its claim unless the Arbitral

Tribunal considers it inappropriate having regard to the delay in making any such amendment. In the present case, there was an inordinate delay on

the part of HPCL in filing its counter claim in the first place.

60. The learned Arbitrator entered upon reference and by the first procedural order dated 09.09.2011, fixed a schedule for completion of the

pleadings. DSM was directed to file a Statement of Claims along with the relevant documents on or before 29.09.2011 and HPCL was directed to file

its reply to the Statement of Claims on or before 20.10.2011. The first hearing was scheduled on 29.10.2011. DSM sought extension of ten daysâ??

time for filing its Statement of Claim and did so on 10.10.2011.

61. HPCL did not file its reply within the stipulated time. It was also not represented before the Arbitral Tribunal at the first hearing, that is, on

29.10.2011. The Arbitral Tribunal directed HPCL to immediately file its reply and DSM was directed to file its rejoinder within a period of fifteen days

from receipt of HPCLâ??s reply.

62. HPCL failed to comply with the said order as well. However, a month later (that is, on 28.11.2011) it sought extension of time for filing its reply

and counter claim. It again sought extension of time for filing a reply on 03.12.2011. The Arbitral Tribunal accepted the request and permitted HPCL

to file its reply by 03.01.2012. And, DSM was granted three weeksâ?? time to file a rejoinder.

63. HPCL filed its reply on 02.01.2012 disputing the claims made by DSM. DSM filed its rejoinder to the said reply on 22.02.2012. Thereafter, on

20.03.2012, HPCL filed its sur-rejoinder and also included a counter claim, which comprised of a tabular statement indicating calculation of penalty

aggregating to Rs. 88,14,785/- under the "Take or Pay/Supply or Pay" Clause. DSM filed its reply to the counter-claim on 10.04.2012.

64. The Arbitral Tribunal listed the matter for hearing on 04.05.2012 and on that date, struck the issues to be decided. After the issues were framed,

both the parties also agreed not to lead any further evidence.

65. Final hearing commenced before the Arbitral Tribunal on 02.07.2012 and DSM's submissions were heard. However, HPCL sought an

adjournment to advance its contentions. The Arbitral Tribunal scheduled the next date of hearing on 16.07.2012. On the next date, that is, on

16.07.2012, HPCL once again sought an adjournment and also filed an application seeking amendment of its counter claims to enhance the amount to

Rs. 1,09,21,140/-. Thereafter, on 24.07.2012, HPCL filed its written submissions but no oral submissions were advanced on its behalf. The Arbitral

Tribunal rejected HPCL's application for amendment of the counter-claim as it was highly belated.

66. Oral submissions on behalf of DSM in the rejoinder were heard by the Arbitral Tribunal on 27.07.2012. DSM also filed its written submissions.

67. It is apparent from the above, that HPCL had delayed in filing its counter claim, which was filed along with its sur-rejoinder after the pleadings

were complete. The application to make an amendment was moved at the stage of final hearing of the claims. Undeniably, the same was at a much

belated stage. Thus, the decision of the Arbitral Tribunal to deny HPCL's request to amend the claim cannot be faulted.

68. In view of the above, the impugned award is set aside.

69. The petitions are disposed of in the aforesaid terms. The pending application is also disposed of.