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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Date of Decision: 30.07.2012**

% **FAO(OS) 337/2012**

FLORA EXPORTS Appellant
Through: Mr. Dhruv Mehta, Sr. Adv. with Mr.
Jeevesh Nagrath and Mr. Sameer
Abhyankar, Advocates

versus

IMPEX-TRADING GmbH & ANR. Respondents
Through:

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (Oral)

C.M. No. 12818/2012 (Exemption)

Exemption allowed, subject to all just exceptions.

FAO(OS) 337/2012

1. The appellant, in this appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (the Act) assails the judgment dated 13.04.2012 passed by the learned Single Judge in O.M.P. No.559/2010 on 13.04.2012, whereby the appellants objections to the arbitral award dated 16.06.2010 under Section 34 of the Act have been dismissed.

2. The parties entered into Contract No.PJN-1119/06, whereunder the appellant agreed to supply 56,712 pieces of 100% cotton throws in 9,452 boxes from its plant situated at Panipat to the respondent situated in Germany. The date of the start of the contract was 02.02.2006. The dispute arose as, according to the respondent/claimant, the appellant had short supplied the goods which were discovered upon receipt of the goods in Germany. Consequently, the respondent sought refund of the excess amount realized by the appellant for the consignment along with interest.

3. The said dispute was referred to arbitration, registered as Case No.1544. The arbitration was conducted in accordance with the rules of Indian Council of Arbitration in terms of the agreement of the parties. The primary issue of fact which arose for determination by the arbitral tribunal, was as to who was responsible for the shortage of goods. Under the contract, the aforesaid supply was to be made by 30.04.2006 ex-Bombay Port on CFR basis. The goods were to be transported by a sea going vessel from Bombay to Rotterdam through Maersk Line (India) Pvt. Ltd. Further, the goods were to be taken by container trucks from Rotterdam to the warehouse of the respondent at Greven, Germany under the supervision of Vat-Logistic Company, the agent of the respondent.

4. The first consignment of four containers was delivered by the appellant to the respondent without any complaint. The second consignment of four containers, after inspection by the respondent's authorized representative, left the factory premises at Panipat. The appellant claims that after the containers were stuffed, they were sealed by the officers of the excise department by a lead seal piler and a report was prepared on the spot. The blue seal of the shipping line was also put on the containers. The appellant also locked the container with an iron strip and a lock. The container was then sent to Inland Container Depot (ICD) at Tughlakabad in Delhi. While two of the containers left the factory premises of the appellant on 09.05.2006 and reached ICD at Tughlakabad on 11.05.2006, the third left the factory on 12.05.2006 and reached ICD on 15.05.2006. The fourth container left the factory on 13.05.2006 and reached ICD on 15.05.2006.

5. The said containers were further sealed with a white coloured customs seal. The containers were then sent to Bombay Port, where they were inspected, loaded and checked by the customs officers. They were then loaded on to the vessel for onward sailing to Rotterdam. The vessel reached Rotterdam on 12.06.2006 and the containers ultimately reached the warehouse of the respondent of the respondent at Greven, Germany on 22.06.2006. The appellant claims that all the four containers comprising the second consignment with all

seals intact were received by the respondent at its warehouse at Greven, Germany on 22.06.2006.

6. The respondent complained shortage of cartons. It was claimed that in three out of the four containers, as opposed to 3504 cartons, only 1186 cartons were found, and 2318 cartons were missing.

7. In the light of the aforesaid, the primary dispute which arose between the parties was purely a factual dispute, i.e. the determination of the place where the goods had been lost in transit. If the goods had been lost in transit in India, the appellant was responsible, whereas, if the goods had been lost after reaching the port at Rotterdam, the respondent would have been responsible.

8. The learned arbitrator took into account the evidence led before him and arrived at the conclusion that the shortage/theft, if any, had taken place while the goods were in transit in India between Panipat and ICD Tughlakabad. This finding of the learned arbitrator was founded upon, inter alia, the following evidence:

- i) The FIR lodged at police station Kalkaji by the appellant indicated the time of occurrence between 9th and 15th May, 2006. In this complaint made by Atlas Shipping Services Pvt. Ltd. engaged by the appellant, the total quantity stated to be missing in each container was, as indicated by the

respondent in its e-mail to the appellant. The FIR recorded the suspicion of the appellant on the driver of M/s. Ravi Roadways of his having stolen the goods in transit to ICD, Tughlakabad.

- ii) The modus operandi of theft taking place between Panipat and ICD, Tughlakabad was brought on record by the evidence of Sunder Lal, Sub-Inspector. He affirmed the complaint received from Atlas Shipping Services, which named the driver Guddu as the main culprit.
- iii) The Sub-Inspector confirmed that there were complaints of goods being stolen between Panipat and ICD, Delhi.
- iv) The respondent relied upon the news reports of 4th July and 29th August, 2006 to this effect.
- v) The distance between Panipat and Delhi should not have taken three days for the containers to reach ICD Delhi from Panipat.
- vi) The incident of theft of goods regularly taking place between Panipat and Delhi was known to exporters of textiles.
- vii) The modus operandi of committing theft from sealed containers had been disclosed by the police authorities in their press release. The rivet of doors which are fixed to the

container from one side, and are held together by locks and other closing mechanism at centre are removed, and after the goods are removed, the door is then riveted again. In this style of opening of the container doors, the seals affixed on the container doors are not affected at all and gives a false impression that the container doors have not been tampered with.

- viii) The transit time of the container trucks from Rotterdam port to works site of the respondent at Greven was within the normal time of three hours, making it almost impossible to tamper with the container and steal the goods.
- ix) The appellant itself informed the respondent that they had suffered similar loss of goods during container movement in 2005 against different supply orders of some other firms in Panipat.

9. The appellant, for the first time, raised the issue that the goods had been stolen while they were in transit from Rotterdam port to the respondent's facility at Greven, Germany in their objection petition. It was contended that the goods had reached the Rotterdam port on 12.06.2006 and not on 22.06.2006, as assumed by the learned arbitrator. Therefore, according to the appellant, there was sufficient time for the theft to take place while the goods were in transit from

Rotterdam to Greven. It was argued by the appellant that since the tribunal had proceeded on a fundamentally wrong premise that the time of transit was only three hours (whereas it was over ten days), the finding that the goods could not have been lost between Rotterdam and Greven was patently erroneous, thereby rendering the award patently illegal and liable to be set aside.

10. The learned Single Judge has examined this plea of the appellant squarely in the impugned judgment. The learned Single Judge observed that this issue was never raised by the appellant before the arbitral tribunal. It was not the case of the appellant that the theft had taken place while the goods were in transit after reaching Rotterdam port. The submission of the appellant before the learned Single Judge was, and even before us is, that the learned arbitrator should have himself noticed the fact that the consignment in question had reached Rotterdam port on 12.06.2006 and not on 22.06.2006. The contention of the appellant was, and continues to be, that there was sufficient time for the goods to be stolen after they had reached Rotterdam.

11. The learned Single Judge noticed that it was the learned arbitrator who put the question to the surveyor of the respondent on the issue whether the theft could have taken place at Rotterdam. It was not even the appellants case that the goods could have been

stolen at Rotterdam. The learned Single Judge, as aforesaid, has rightly rejected the said submission of the appellant.

12. Before proceeding further, we may notice a patent infirmity in the appellants submission. Though the goods appear to have reached the Rotterdam port on 12.06.2006, as contended by the appellant, it appears that the same were got released from the customs at Rotterdam port by the respondent only on 21.06.2006, as customs duty was paid on that date. Therefore, it is wrong for the appellant to contend that the goods were available with the respondent or its agent from 12.06.2006 itself. The goods were in the custody of customs at Rotterdam upto atleast 21.06.2006. Pertinently, it was not even the appellants case that the goods had been stolen while they were in the custody of the customs department at Rotterdam port.

13. As rightly observed by the learned Single Judge, the learned arbitrator was required to return a finding on a pure question of fact based on the evidence led before him and on the basis of preponderance of probabilities. It is well settled that findings of fact returned by the arbitrator which are founded upon evidence cannot be interfered with by the Court while hearing objections to the award as the Court does not sit in appeal over the arbitral award.

14. The learned Single Judge has set out the reasoning given by the learned arbitrator for arriving at his conclusion on facts that the

theft, in all probability, had taken place while the goods were in transit from Panipat to ICD, Tughlakabad. We consider it appropriate to set out the said reasoning, as the same clearly shows that the learned arbitrator has analysed the evidence before him in a reasonable way and the conclusion drawn by him is plausible and highly probable. The conclusion reached by the learned arbitrator reads as follows:

“• That there was shortfall of cartons after 3 disputed containers were opened is supported by the surveyor appointed by the Claimants in Germany.

• It therefore, clearly needs to be established that if the Respondents have dispatched 9452 cartons (containing 56,712 pieces) and the Claimants have not received all the goods obviously the containers have been tampered and the goods have been removed/stolen.

• Based on sequence of events from the Respondents works site at Panipat till the receipt of goods at the Claimants site at Germany, the probability of containers being tampered with and the missing goods removed is highest between Panipat to ICD, Delhi route. This contention is supported strongly by the fact that 3 disputed containers took 41-42 hrs. to cover the distance which is normally covered in 10-12 hrs.

• In all probabilities, therefore, it is strongly established that the containers when en route to Delhi from Panipat have been tampered with and the missing goods removed i.e. stolen from the containers. This has been obviously done in collusion with freight forwarder and his sub agent M/s. Ravi Road Ways including the drivers of the trucks who were moving the containers.

• That there is occurrence of this possibility is strengthened by the police officials statement that there were occasions when FIRS were lodged indicating the export containers are being tampered with while moving from Panipat to ICD, New Delhi and goods stolen. Further the Respondent upon being

informed by Claimants of shortage of goods also suspected that the goods were stolen between Panipat & Delhi they directed the freight forwarder to lodge FIR for missing goods.

- Police authorities in their press release have confirmed that the rivets of doors which are fixed with the container from one side and are held together by locks and other closing mechanism at centre and gets fully opened when the rivets are removed and after the goods are removed, the door is then riveted again. In this style of opening of the container doors it can be observed that the seals affixed on the container doors are not affected at all i.e. the seals remain intact. This gives false impression that the container doors have not been tampered with. Thus the submission by the Respondents that the seals were intact is not tenable to say that the container doors have not been tampered with.*

- As stated earlier the transit time of the container trucks from Rotterdam port to works site of the Claimants at Greven was within the normal time of 3 hrs. only making its almost 'nil' possible to tamper the container and steal the goods.*

- In view of the above it is well established that if the Respondents have dispatched goods as per purchase order and the claimants have received the short supply of 13,908 pieces it is a strong possibility that the containers were tampered with and the goods have been removed from the containers”.*

- It also seems that the Respondent is either not aware or is aware but has chosen to ignore the fact that the containers on journey from Panipat to ICD, Delhi are being tampered with and goods are stolen. It is also interesting to note that the Claimants did inform the Respondents that they had suffered similar loss of goods during the container movement in 2005 against the different material ordered by the Claimants on some other firm in Panipat. In that case the Panipat Firm established that the goods were stolen in connivance with driver of the truck. The Indian firm then replenished the quantity of missing goods.*

- Based on the evidence provided by the Respondents that the excise official stuffed the containers in their presence and issued examination reports it is clear that no. of cartons as*

per Invoice were stuffed i.e. requisite no. of pieces have been loaded in respective containers at the works site of the Respondents.

• Thus considering various reasons as stated above I conclude that the containers have been tampered with and goods to the extent of 13,908 pieces have been removed/stolen during the journey of containers from Respondent's work site at Panipat to ICD, Delhi. In view of the conclusion that the 13,908 pieces have been removed/stolen during transit from Panipat to ICD, Delhi the Claimants have received short supply of 13,908 pieces at Greven in Germany."

15. Accordingly, we find no merit in this appeal and dismiss the same.

C.M. No. 12817/2012 (Stay)

Since we have dismissed the first appeal, this application does not survive. Application stands disposed of.

VIPIN SANGHI, J.

SANJAY KISHAN KAUL, J.

JULY 30, 2012

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