

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 559/2010

Reserved on: 27th March 2012

Decision on: 13th April 2012

FLORA EXPORTS

..... Petitioner

Through: Mr. Jeevesh Nagrath with
Mr. Nitish Sharma, Advocates.

Versus

IMPEX-TRADING GMBH & ANR

..... Respondents

Through: Mr. Sandeep Agarwal with
Mr. K.A. Singh, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

13.04.2012

1. The Petitioner, Flora Exports, challenges an Award dated 16th June 2010 passed by the sole Arbitrator (Respondent No.2) in the disputes between the Petitioner and the Respondent No.1 M/s Impex Trading GmbH, Germany (Impex) arising out of a contract entered into between the parties on 2nd February 2006 for supply of 100% cotton throws by the Petitioner to Impex.

2. Impex is a company registered in Germany and has its office at Gronau, Germany. The Petitioner is a partnership firm based in Panipat engaged in the business of exports of 100% cotton throws. Under the contract in question, the Petitioner was to supply Impex by 30th April 2006 at Ex-Bombay Port on CFR basis, 56,712 pieces of cotton throws in 9452 boxes. 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 No.1 at Greven, Germany under the supervision of Vat-Logistic Company, the agent of Impex.

3. The first consignment of four containers was delivered to Impex without any complaint. The second consignment of four containers, according to the Petitioner, left factory premises at Panipat after inspection by Mr. Tarun Bajaj, the authorized representative of Impex in India. It is stated that six pieces of cotton throws were packed in one carton and each carton was given a separate number for identification. It is stated that in all there were 4568 cartons which were made available for inspection to Mr. Bajaj before being stuffed in the four containers. The approval certificate dated 7th June 2006 signed by Mr. Tarun Bajaj has been relied upon in this regard.

4. According to the Petitioner before the containers were shipped, the process which was adopted was that the shipping line delivered the empty container to the Petitioner which was then inspected by the officers of the Excise Department. Random samples of the pieces, around 2% of the total in a container, were inspected by the excise officers. The cartons were then stuffed into the containers in their presence. After the containers were stuffed, they were sealed by the officers of the excise department by a lead seal plier and a report was prepared on the spot. The blue seal of the shipping line was also put on the containers. The Petitioner as a precautionary measure 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 which left the factory of the Petitioner on 9th May 2006 reached the ICD at Tughlakabad on 11th May 2006, the third one left the factory on 12th May 2006 and reached ICD on 15th May 2006. The fourth container left the factory on 13th May 2006 and reached ICD on 15th May 2006. At the ICD the report of the officers of the Excise Department was verified by the Superintendent of Customs, who then affixed a white coloured customs seal. The containers then were sent to Mumbai 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 under the bill of lading dated 22nd May 2006. The vessel reached Rotterdam on 12th June 2006. The containers ultimately reached the warehouse of Impex at Greven, Germany on 22nd June 2006. The case of the Petitioner is that each of the four containers comprising the second consignment, with all seals intact, were received by Impex at its warehouse at Greven, Germany on 22nd June 2006.

5. On 22nd June 2006 Impex sent an E-mail to the Petitioner acknowledging receipt of the containers. Impex stated that as regards Container No. PONU 801806-4, 326 C cartons and 497 B cartons (an aggregate of 823 cartons) were found missing. The pictures of the container after opening were attached with the e-mail. It was confirmed that the seals of the container were “not broken”. It was surmised that, “this quantity must have been stolen in India”. On 23rd June a further e-mail was sent by Impex confirming that cartons were missing from two other containers as well. As regards Container No. PONU 737648-5, as against 1220 cartons as per bill of lading only 384 cartons were found. As regards Container No. IEAU 412666-5, as against 1064 cartons as per bill of lading only 405 cartons were found. Only one of the containers namely PONU 162203-0 had no shortage of cartons. Therefore, in all as against 3504 cartons in the three containers only 1186 cartons were found and 2318 cartons were missing.

6. A Surveyor was appointed by Impex and thereafter it raised a claim against the Petitioner. The claim by Impex against its insurance company was not entertained. According to insurance company there was no theft since the seals on the containers were not damaged and the goods must have gone missing before they were loaded on the ship. Impex demanded that the Petitioner should refund the amount to it by issuing a credit note. Impex forwarded its surveyor report dated 4th July 2006 to the Petitioner. In its e-mail

dated 27th July 2006, Impex stated that the goods would have been stolen after the container left the Petitioner's factory.

7. The disputes between the parties were referred to a sole Arbitrator appointed by the Indian Council of Arbitration. Impex pressed two claims apart from the claim for interest and costs of the proceedings. The Petitioner did not file any counter claim. Impex filed the evidence of five witnesses who were cross-examined by the Petitioner. The Petitioner filed the evidence of four witnesses who were cross-examined by Impex.

8. Claim No.1 was for an amount of Euros 70,657 (along with net VAT) on account of short supply of 2318 cartons/13,908 pieces of goods. After examining the evidence in detail, the learned Arbitrator concluded that "goods to the extent of 13,908 pieces have been removed/stolen during the journey of containers from the Respondent's work site at Panipat to ICD, Delhi". Consequently, it was directed that the Petitioner should refund to Impex a sum of Euros 61,195.20 at Euros 4.4 per pieces CFR Rotterdam. The learned Arbitrator awarded Impex Euros 3616 being the import duty component which was held to be liable to be reimbursed by the Petitioner. The learned Arbitrator rejected the claim for reimbursement of the payment made by Impex to the Surveyor. The learned Arbitrator awarded Impex interest at 8.5% with effect from 11th September 2006 (the date Impex made reference of the dispute first to the ICA) till the date of the Award. In the event of failure of the Petitioner to pay Impex the awarded amount within 45 days, it was to pay future interest at 9.5% till the date of payment. Each party was directed to bear their own costs.

9. This Court has heard Mr. Jeevesh Nagrath, learned counsel for the Petitioner and Mr. Sandeep Agarwal, learned counsel for the Respondents.

10. At the outset it must be noted that the Petitioner has in Ground LL of its petition challenged the impartiality of the learned Arbitrator. The Petitioner had earlier filed O.M.P. No.162 of 2008 seeking the removal of the learned Arbitrator. While dismissing the said petition on 18th March 2008 this Court permitted the Petitioner to raise the said ground while challenging the Award. However, the Petitioner has not been able to substantiate the challenge to the impartiality of the learned Arbitrator by anything credible or concrete. The challenge on this ground is rejected as such.

11. The principal contention on behalf of the Petitioner was that the impugned Award suffered from patent illegality inasmuch as the learned Arbitrator proceeded on the premise that the goods in question had reached Rotterdam only on 22nd June 2006 whereas the documents placed on record by Impex itself showed that the goods had reached Rotterdam on 12th June 2006. It is contended that the Surveyor engaged by Impex, on totally erroneous premises, rejected the possibility of theft taking place at Rotterdam where the goods were lying for at least 10 days. Counsel for the Petitioner referred to literature which showed that there were frequent instances of theft of goods at Rotterdam port. He submitted that if in fact there were such a large shortfall of goods to the extent of 2318 cartons weighing approximately 6000 kg, it could not have escaped the attention of Mr. Tarun Bajaj in whose presence the containers were stuffed and sealed. He referred to the evidence of each of the witnesses to contend that the conclusion of the learned Arbitrator that the theft must have taken place even before the goods left ICD, Delhi for Mumbai was based purely on surmises and conjectures. He further submitted that it was unusual that where on opening the first container at Greven shortages were detected, Impex proceeded to open the other containers without informing the Petitioner. The First Information Report ('FIR') lodged by Impex referred to 'pallets' whereas the goods were packed in cartons and then on to containers

which were sealed. Reliance was placed on the judgment in ***Balraj Teneja v. Sunil Madan* (1999) 8 SCC 396** to contend that even if the Petitioner herein had not raised specifically a point about the goods having reached Rotterdam on 12th June 2006 itself and of the possibility of the theft taking place there, the learned Arbitrator ought to have taken note of that fact and dealt with it. It was submitted that this single error had vitiated the entire Award which therefore suffered from a patent illegality. Reliance was placed on the decisions in ***National Highways Authority of India v. Som Datt Builders* (2010) 4 RAJ 352 (Delhi)**, ***Union of India v. Kay Bee Alums Pvt. Ltd.* 155 (2008) DLT 131** and ***Bhandari Engineering and Builders Pvt. Ltd. v. You One Maharia* (2012) I AD (Delhi) 109**.

12. On behalf of Impex, it is first contended that the scope of interference by this Court under Section 34 of the Act is limited. It is submitted that the learned Arbitrator had to decide the dispute on the basis of the pleadings and evidence led by the parties. Before the learned Arbitrator no plea was raised by the Petitioner that the theft of the goods could possibly have taken place at Rotterdam. Reliance is placed on the decision in ***National Thermal Power Corporation v. R.S. Avtar Singh & Co.* (2002) 4 RAJ 685 (Delhi)**. It was submitted that the question whether the theft of the goods took place between Panipat and ICD, Tughlakabad, Delhi was a question of fact which involved the appreciation of evidence. With the learned Arbitrator having undertaken that exercise, it was not open to this Court in exercise of its power under Section 34 of the Act to re-appreciate the evidence and come to a different conclusion. Reliance was placed on the decisions in ***Ravindra Kumar Gupta And Company v. Union of India* (2010) 1 SCC 409**, ***M.P. Housing Board v. Progressive Writers & Publishers JT* (2009) 4 SC 219** and ***McDermott International Inc. v. Burn Standard Co. Ltd.* (2006) 11 SCC 181**.

13. The exercise before the learned Arbitrator involved re-constructing the sequence of events in order to determine at which point the theft of the goods might have taken place. The Surveyor report indicated that the Surveyor himself did not inspect the containers but relied on the evidence of Mr. Strickling. A police complaint was filed in Greven on 22nd June 2006 the date the containers were opened after they reached the warehouse of Impex. The customs duty appeared to have been paid on 21st June 2006.

14. The FIR lodged at Police Station-Kalkaji indicates the time of occurrence as between 9th and 15th May 2006. The information was received by the police on 15th July 2006. Interestingly in this complaint made by Atlas Shipping Services Pvt. Ltd. engaged by the Petitioner, the total quantity stated to be missing in each container is as indicated by Impex in its e-mails to the Petitioner. The FIR recorded the contention of the complainant that “further we suspect that the driver of M/s Ravi Road Ways has stolen the same in transit to ICD. We hereby request you to kindly lodge the FIR and kindly look into the matter”. The *modus operandi* of theft taking place between Panipat and ICD, Tughlakabad was brought on record by the evidence of Sunder Lal, Sub-Inspector who affirmed having received a complaint of Atlas Shipping Services Pvt. Ltd. which named driver Guddu to be the main culprit. The Sub-Inspector also confirmed that there were complaints of goods being stolen between Panipat to ICD, Delhi. Counsel for the Respondent also relied upon news reports of 4th July and 29th August 2006 to this effect.

15. The distance between Panipat and Delhi is such that it ought not to have taken three days for the containers to reach ICD, Delhi from Panipat. This ought to have made the Petitioner seek reasons for the delay. The incidents of theft of goods regularly taking place between Panipat to Delhi was known to exporters of textiles. The Petitioner is stated to be among the largest exporters.

Not surprisingly, therefore, on receipt of the information from Impex, the above FIR was lodged in P.S. Kalkaji. This gives a reasonable indication that even according to the Petitioner there was a possibility of the theft taking place between Panipat and ICD, Tughlakabad.

16. Learned counsel for the Respondents is right in his contention that the case of the Petitioner that the theft could have taken place at Rotterdam was raised for the first time in the present petition under Section 34 of the Act. It was not pleaded by the Petitioner before the learned Arbitrator. It was the learned Arbitrator who put questions to the Surveyor and other witnesses of Impex whether the theft could have taken place at Rotterdam. The answer given by the Surveyor during the cross-examination is relevant. It reads as under:

“Q. Kindly see your para 24 of your affidavit. What makes you sure to say that the loss was generated before the container was shipped?

Ans. The containers were itself not damaged, the seals were also not damaged, and further on the ship as the containers are closely packed there is no chance of opening of the container. Therefore, there are only two possibilities either the goods were not loaded or they have been stolen before the seals were applied.”

“Q. You have reached the office of M/s. Impex Trading in German, Germany 5 hours late. What is the guarantee that pilferage did not occur in Germany?

Ans. Theoretically it is possible but it cannot happen practically as it would mean that there has to be conspiracy between three agencies (M/s. Impex, Storage and Transporting Company) which according to him is not possible because many of these people have unblemished record. Further, the documents have to be signed by two people that means more people would be involved in falsifying the documents. The person calling me would also have to be involved in the conspiracy and why would he call me up right at 9 O’ clock. As such, practically it is not possible.

Q. I put it to you that pilferage can take place between Rotterdam and Germany. If not, why not?

Ans. The container had three seals and a lock and the said seals and lock were intact, therefore, I conclude that pilferage could not have happened between Rotterdam and Germany. Further, there were four truck involved and it is not possible that there was conspiracy between three truck drivers and not involving the fourth one.

Q. Rotterdam is a very big port. The pilferage can take place at the port itself. Do you agree or not?

Ans. Theoretically it is possible but practically it is not as the seals were intact.”

17. It appears that despite the above line of questioning by the learned Arbitrator, the Petitioner did not plead before the Arbitrator that the goods had been received at Rotterdam on 12th June 2006 and that therefore there was a possibility of theft taking place there between 12th and 22nd June, 2006. The fact that the above questions were posed by the learned Arbitrator goes to show that he did consider that possibility. The Arbitrator has given detailed reasons for his conclusion that the theft of the goods took place between Panipat and ICD, Tughlakabad. After analyzing the documents and the evidence of the witnesses the learned Arbitrator concluded as under:

- “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

collision 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."

18. The above conclusions of the learned Arbitrator are based on a detailed analysis of the evidence on record. The likely place of theft was a pure question of fact. The view of the learned Arbitrator was a possible one to take in the facts and circumstances of the case. Given the limited scope of the powers of the court under Section 34 of the Act, the Court is not persuaded to interfere with the above finding of fact or to hold that the impugned Award suffers from any patent illegality. The computation of the actual damages and the award of interest by the learned Arbitrator also cannot be faulted.

19. For the aforementioned reasons, the petition is dismissed with costs of Rs.10,000/- which will be paid by the Petitioner to Impex within four weeks from today.

S. MURALIDHAR, J.

APRIL 13, 2012

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