

\$~30

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

+ **O.M.P. (COMM) 71/2017**

FRESH & HEALTHY ENTERPRISES LTD. Petitioner

Through: Mr M.M. Kalra and Ms Sonali
Kumar, Advocates.

versus

FIRST CHOICE INTERNATIONAL Respondent

Through: Mr P.V. Yogeswaran and Mr Shikhar
Garg, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% **17.02.2017**

VIBHU BAKHRU, J

IA No.2118/2017

1. Allowed, subject to all just exceptions.
2. The application stands disposed of.

O.M.P. (COMM) 71/2017 and IA No.2117/2017

3. M/s Fresh & Healthy Enterprises Limited, a Government Company, has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an arbitral award dated 09.01.2017 (hereafter 'the impugned award') made and published by the sole arbitrator.

4. The impugned award was rendered in reference to the disputes that had arisen between the parties in relation to an agreement dated 30.01.2015 (hereafter 'the agreement') whereby the respondent had agreed to procure 2500 metric tons of apples from the petitioner. Admittedly, the respondent

had procured more than 2500 MT of apples, from the petitioner, nonetheless, the petitioner claims that the respondent was in breach of the agreement as the apples lifted by the respondent also included apples of grades “A” and “AC”, which were expressly excluded. Accordingly, it was claimed that the respondent had not lifted the quantities of apples as committed by it in terms of the agreement. The arbitrator, on an interpretation of the agreement, rejected the aforesaid contention and consequently passed an award in favour of the respondent. The petitioner claims the impugned award to be contrary to the express terms of the agreement and, therefore, liable to be set aside.

5. Briefly stated the necessary facts to address the controversy are as under:-

5.1 The petitioner is a wholly owned subsidiary of Container Corporation of India Limited and is, *inter alia*, engaged in the business of cold chain supply management, procurement, storage and sale of fruits and vegetables. The parties entered into the agreement in terms of which the respondent agreed to purchase and procure 2500 MT (2000 MT Kinnaur & 500 MT Shimla) apples from the petitioner.

5.2 In terms of the agreement, the respondent furnished two bank guarantees: (i) Performance Bank Guarantee in the sum of ₹1.25 crores for securing due performance of the contract; and (ii) Bank Guarantee of ₹2 crores to secure the petitioner against the price of material of the goods delivered.

5.3 The term of the agreement was till 31.05.2015 but was extended. The

petitioner states that the respondent lifted only 1333.36 MT of apples of grades Supreme, AAA and AA and thus had breached the terms of the agreement. Before the petitioner could encash the performance bank guarantee, the respondent approached this court by way of a petition under Section 9 of the Act (OMP (I) 490/2015), *inter alia*, praying that the petitioner be restrained from invoking/encashing the bank guarantees. This court restrained the petitioner from invoking the performance bank guarantee but did not pass any orders interdicting the encashment of the bank guarantee in the sum of ₹ 2 crores.

5.4 The sole arbitrator was appointed in terms of the arbitration clause and the disputes were referred to the arbitrator. Before the arbitrator, the respondent initially raised claims for return of the bank guarantees and also raised the claims aggregating ₹ 2,09,63,782/- . The respondent prayed that the petitioner be directed to pay this amount of ₹2,09,63,782/- after setting off an amount of ₹74,09,795/- and after giving a volume discount. Subsequently, the respondent also raised an additional claim for the charges for extension of bank guarantee and interest. The petitioner also raised counter claims of ₹6,65,25,603.50/- for recovery of losses alleged to have suffered by the petitioner on account of the alleged breach of the agreement.

5.5 The arbitrator considered the claims and counter-claims and passed the impugned award directing the return of the performance bank guarantee in the sum of ₹1.25 crores; actual bank charges borne by the respondent for extension of the bank guarantee of ₹1.25 crores beyond the initial term; grant of volume discount at the rate of 5%; and interest at the rate of 8% p.a. from 04.08.2015 on the difference in volume discount awarded and granted

by the petitioner.

Submissions

6. Mr Kalra, learned counsel appearing for the petitioner earnestly contended that the arbitrator had grossly erred in misinterpreting the agreement. He submitted that the agreement specifically provided that the respondent would *"lift apples all counts and grades (except A & AC grades)"*. He submitted that admittedly, the respondent had not lifted 2500 MT of apples if apples of Grade A and AC were excluded; thus, the arbitrator had erred in holding that there was no breach on the part of the respondent. He submitted that arbitrator had interpreted the agreement to mean that the quantity of 2500 MT would include apples of A and AC grades and therefore had grossly misinterpreted the agreement. Secondly, he submitted that the arbitrator had grossly erred in entertaining the claim for bank guarantee charges. He submitted that this claim was not made by the respondent in its initial Statement of Claims and had been raised subsequently. Thirdly, he submitted that the arbitrator had grossly erred in allowing the volume discount at the rate of 5% as the respondent had not lifted the requisite quantities. Lastly, he submitted that the arbitrator had grossly erred in rejecting the counter claims-raised by the petitioner.

7. It is apparent that the principal controversy between the parties was whether the apples of grade "A" and "AC" lifted by the respondent, were to be included in computing the quantity of apples lifted by the respondent under the agreement.

8. Before proceeding further, it would be necessary to refer to the

relevant terms of the contract, which are reproduced below:-

“ARTICLE 3: Supply and Delivery:

The PARTY OF THE 1st PART will supply Apples ex Rai, Sonipat and same will be loaded from their CA store situated at HSIIDC Industrial Estate Rai, Distt. Sonapat Haryana and same shall be transported from FHEL’s CA Store solely by the party of the 2nd part by vehicles arranged by them.

The PARTY OF THE 2nd PART shall take delivery of the duly packed Apples loaded in truck from the CA store of the party of the 1st PART situated at Rai, Sonapat Haryana on as is where is basis after due checking of Quality.

ARTICLE 4: Quantity, Sale and Delivery

Quantity:

Under the agreement the parties have agreed to deal in 2,500 MT (2,000 MT Kinnaur & 500 MT Shimla) of Apple. The agreed quantities are to be lifted by party of the second part by 31.5.2015 from date of signing of this agreement.

Sizes and Grades to be supplied:

Party of the Second Part will lift all counts and grades (except A & AC grades) stored in a chamber after resorting-grading-packing by FHEL. The material shall be delivered as per the availability of apples in the open chamber. Broadly for Shimla & Kinnaur the quantity of Royal is 70-80% and balance is either Red or Richared quality apples.

Further the ratio of counts i.e. LMS is 40-50%, Extra

Small 20-30%, Extra Extra Small 20-30% and balance being Pittoo. The above percentages are indicative only and there can be a variation of 10% on either side.

Quality Specifications:

Quality Specifications as annexed in annexure - I are agreed by both parties and a tolerance of 5% intermixing of grades will be acceptable by the party of second part on account of human error in sorting grading at the time of re-packing, inspector's bias and variation in sampling methods. The quality inspection to take place before despatch at the CA Store, Rai, Sonipat and the decision of quality manager FHEL will be binding on both the parties.

Sample Inspection:

Representatives of the Party of second part shall not be allowed to influence sorting grading in process. However, party of the first part will offer samples to the representatives of the party of the second part from the lots to be loaded before loading Samples will be checked according to the quality specifications and tolerance agreed mutually.

Sale Price:

The prices of the sizes, grades, packs of apples to be sold by party of the first part will be as per the price list of FHEL issued from time to time and accordingly payment will be made by the party of the second part to party of first part.

Volume Discount:

Volume discount / target discount @ 5% as may be applicable on total billing i.e. for the quantities lifted

from the date of signing of this agreement to be credited by Party of 1st part of Party of 2nd part immediately post completion of the season and on completion of the contract condition with respect to the volume of purchase. However, on completion of each 500 MT, the volume discount applicable to other parties can be used for credit limit purposes concurrently with the Rs.2 crores BG.

It is clearly agreed that volume discount of 5% will be given if full quantity of 2500 MT is lifted. If quantities lifted are less volume discount will be lower as offered to others for corresponding quantities.

Dispatch:

FHEL will pack the various counts and grades from one side and whatever size and grades are packed on day to day basis will be lifted by the second party. The party of the second part is to provide well in advance the delivery schedule of the quantity required so that the 1st Part may make appropriate arrangements for dispatch of the applies. Any delay in providing the delivery schedule as well as the quantity required for a particular shipment may result in losses to either party and the party of 1st part shall not be liable for such losses. Further as the delivery of the apples will be given from the opened chamber there can be an adjustment of the ratios of various grades and sizes on case to case basis which the party of the 2nd PART will agree. While the party of 1st PART will try to maintain the loading schedule given by the party of the 2nd PART no compensation will be payable by party of the first part for delays due to act of GOD or conditions beyond the control of party of the first part. However, FHEL will be assisting in finding the transport by rail/road on the request of the 2nd party.

Delivery and Transport:

It shall be the responsibility of the Party of the 2nd PART

to make appropriate arrangements for lifting and transportation of the apples as per agreed schedule. Any delay in taking delivery or transit resulting into loss of quality of the apples discovered after the container's reach their destination station shall be on account of the PARTY OF THE 2nd PART and the party of 1st part shall not be held accountable for the same. Since vehicles transporting the Apples shall be arranged by the party of the second part any deviations in temperatures maintained in reefer trucks/containers resulting in to loss of quality of Apples shall be the responsibility of the party of the second part. Transport charge shall be paid by the party to the second part and the liability of the party to the first part cease the moment the articles are loaded in the transportation.

ARTICLE 5: Obligation of the Parties:

The PARTY OF THE 1st PART is under an obligation to give delivery of the contracted quantity and quality of apples as per the delivery schedule provided by the party of 2nd part from the sources station.

Insurance:

The transit/marine insurance of the apples shall be taken by the party of the second part, claims if any to be insurance company shall be filed by the party of the second part for any accidental damage to the Apples on route.

Verification:

The PARTY OF THE 2nd PART shall depute its representative to verify the quality and quantity of apples at the time of the loading into the container/truck/reefer at FHEL Rai. The verification of the quality and quantity of apples by the representative of the 2nd party shall be

sufficient discharge of the party of 1st part for its obligation to supply the order to quality and quantity of apples. After the verification the party in the 1st PART cannot be held responsible for any damaged boxes or fruits supplied to the party in the 2nd PART.”

9. The arbitrator had considered the aforesaid clauses and had concluded that the reference to A and AC grades in Article 4 of the agreement was only to enable the respondent to refuse delivery of apples of those grades.

10. The apples are stored in a chamber and respondent was bound to accept the delivery of the apples once the chamber was opened. The arbitrator reasoned that the clause in question entitled the respondent to reject inferior grades of apple if such grades were also found in the chamber that was opened. The relevant extract of the impugned award indicting the said reasoning reads as under:-

“6.5 The material was to be delivered as per the availability of apples in the “Opened Chamber.” Since, after a chamber was opened, the Claimant was bound to accept the delivery from the open chamber, a right was given to the Claimant to reject the most inferior grades viz. A & AC, if such grades were also available in the open chamber. The words “except A & AC” contained under Article 4, were therefore a proviso to the general provision contained in the agreement that the second party cannot refuse any grade of apple supplied to them against their demand, which is available in the Open Chamber. The plaintiff was bound to accept the remaining sizes and grades as supplied to him from the Opened Chamber. However, Annexure 1, “Quality Specifications” under Article 4, implies that Grades A and AC were also made part of the Agreement and were to be operated upon in case the Second Party accepted

the supplies of such apples at its option. The primary emphasis of the Agreement, as appears from Article 4, was to purchase apples of Kinnaur & Shimla origin. The line "Party on the Second Part will lift all counts and grades (except A & AC) stored in a chamber after resorting-grading-packing by FHEL, appears to be an in-built protection for the Second Party so that they may not be forced to pick up the worst quality apples viz A & AC. However, going strictly by the agreement, this description was meant only for Shimla and not Kinnaur origin apples."

11. It is relevant to note that the stipulation as to the quantity to be lifted is specified in the first sub-paragraph of Article 4 of the agreement, which does not make any distinction between the various grades of apple to be lifted by the respondent. The reference to grades A and AC is found in the second sub paragraph of Article 4, which provides for obligation of the respondent to lift all counts and grades of apples. The exclusion of A and AC grades of apples must be read in the context of the second sub paragraph of Article 4 of the Agreement; it, plainly, serves to qualify the respondent's obligation to lift all counts and grades of apples as provided in the said sub paragraph. The import of the clause is that while respondent was obliged to lift all grades of apples stored in the chamber, it was not obliged to lift apples of "A & AC grades".

12. The arbitrator had also considered the emails dated 21.04.2015 and 14.05.2015 sent by the petitioner. The said emails read as under:-

Mail dated Tue April 21, 2015 at 2: 14 PM:

"We would like to draw your attention towards the despatch schedule as per the agreement. As per the schedule the despatch on monthly basis should have been as under:

S. No.	Month	Scheduled despatch as per the agreement	Actual despatch
1	February	400 MT	415 MT
2	March	600 MT	
3	April	1000 MT	
4	May	500 MT	

You are clearly lagging behind from the schedule. Hence, you are requested to expedite the lifting so as to catch on with the schedule mentioned in the agreement.

With regards,
Deepak Nijhawan
DGM Mktg.
FHEL
9873420726”

Mail dated Thur May 14, 2015 at 12: 14 PM:

“We would like to draw your attention towards the despatch schedule as per the agreement. As per the schedule the despatch on monthly basis should have been as under:

Sr. No.	Month	Scheduled despatch as per the agreement	Actual despatch
1	February	400 MT	1085 MT
2	March	600 MT	
3	April	1000 MT	
4	May	500 MT	

You are clearly lagging behind from the schedule. Hence, you are requested to expedite the lifting so as to catch on with the schedule mentioned in the agreement.

With Regards,
Deepak Nijhawan

DGM Mktg.
FHEL
9873420726”

13. Admittedly, the quantities of actual despatch as indicated in the above mails included apples of grade A and AC. Thus, it can be inferred that even the petitioner had understood that the quantities agreed to be lifted under the agreement would include apples of all grades. The arbitrator found that apples of grade A & AC were also supplied against the bank guarantees furnished by the respondent in terms of the agreement.

14. It is apparent from the above that the view expressed by the arbitrator is certainly a plausible view and the arbitrator's interpretation of the agreement cannot be termed as perverse or patently illegal. It is well settled that this court does not act as a court of appeal and cannot supplant its view over that of the arbitrator. Therefore, even if the interpretation of the agreement is accepted as erroneous - which this court does not - this court cannot interfere with the impugned award. Unless it is concluded that the arbitrator's interpretation is perverse and patently illegal so as to fall foul of the public policy test under Section 34 (2) (b) (ii) of the Act, no interference with the impugned award would be warranted.

15. The question as to interpretation of an agreement between the parties is clearly within the jurisdiction of the arbitrator. In **Mcdermott International Inc. v. Burn Standard Co. Ltd and Others.**: (2006) 11 SCC 181, the Supreme Court held as under:-

“112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also

be a relevant factor in the matter of construction of a contract. The construction of the contract agreement, is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot, be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See *Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission*: AIR2003SC4519 and *D.D. Sharma v. Union of India* : (2004)5SCC325].

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.”

16. In *Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd.*: (2009) 10 SCC 63, the Supreme Court held as under :-

“(vi) If the conclusion of the arbitrator is based on a possible view of the matter, the court should not interfere with the award.

(vii) It is not permissible to a court to examine the correctness of the findings of the arbitrator, as if it were sitting in appeal over his findings.”

In that case, the arbitrator had taken a view that refusal on the part of Steel Authority of India to supply material did not fall within the ambit of the relevant terms in the compensation clause (7.2). In that context the Supreme Court observed that:

“27...Whether this is or is not a totally correct view is really immaterial but such view is a possible view that flows from reasonable construction of Clause 7.2....

28...Once the arbitrator has construed Clause 7.2 in a particular manner, and such construction is not absurd and appears to be plausible, it is not open to the courts to interfere with the award of the arbitrator...”

17. A similar view was expressed by the Supreme Court in **Sumitomo Heavy Industries Limited v. Oil and Natural Gas Commission of India:** (2010) 11 SCC 296. In that case the Supreme Court held as under:-

“.....The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in *Kwality Mfg. Corpn. v. Central Warehousing Corpn.* the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding.”

18. Although, the aforesaid judgments were in context of the Arbitration Act, 1940, the same would continue to be applicable as the scope of interference with an award has been considerably narrowed down in the Act.
19. It is not in dispute that if the apples grade A and AC are taken into

account, the respondent had lifted the quantities as contracted and was not in breach of the agreement. Thus, the impugned award rejecting the counter-claims cannot be faulted. This court also does find any infirmity with the decision of the arbitrator to award the actual cost incurred by the respondent for extending the bank guarantee beyond its original term. Concededly, the respondent would also be entitled to volume discount of 5% if it is accepted that the respondent had lifted the requisite quantities of apples. Thus, the arbitrator's decision to award the same cannot be faulted once it is accepted that the respondent had lifted more than 2500 MT of apples.

20. This court also does not find any infirmity with the interest awarded by the arbitrator.

21. In view of the above, no interference with the impugned award is warranted. Consequently, the petition and the application are dismissed.

FEBRUARY 17, 2017
pkv

VIBHU BAKHRU, J