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

+ **O.M.P. (COMM) 342/2016**

NATIONAL CO-OPERATIVE CONSUMERS

FEDERATION OF INDIA LTD.

..... Petitioner

Through: Ms Anju Bhattacharya and Mr Elgin
Matt John, Advocates.

versus

EMMSONS GULF DMCC

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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28.07.2016

VIBHU BAKHRU, J (ORAL)

IA No.8849/2016

For the reasons stated in the application, the delay of 24 days in re-filing the petition is condoned.

The application stands disposed of.

IA No.8848/2016

Allowed, subject to all just exceptions.

O.M.P. (COMM) 342/2016

1. National Cooperative Consumers Federation of India Ltd. (hereafter 'NCCFI') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') for partially setting aside the award dated 13.05.2016 (hereafter 'the impugned award') passed by the Sole Arbitrator, Dr. Y.K. Aggarwal. The impugned award was made in respect of

the disputes raised by Emmsons Gulf DMCC (hereafter 'EGD') - a company incorporated in United Arab Emirates - in relation to the agreement dated 28.01.2010 (hereafter 'the Contract') entered into between the parties for sale and purchase of 6000 metric tonnes of Yellow Peas.

2. NCCFI is an open body of consumer cooperatives in the country and is deemed to be a Multi State Cooperative Society under the Provisions of the Multi State Cooperative Societies Act, 2002. On 03.12.2009, NCCFI invited a Global Tender for import of 6000 Metric Tons of Yellow Peas for supply to the Government of Rajasthan. The said tender was opened on 08.12.2009 and EGD's bid was accepted as it was the lowest. NCCFI confirmed the same by a facsimile message dated 24.12.2009. Subsequently, on 28.01.2010, a Contract was signed between the parties. In terms of the Contract, EGD was obliged to furnish a Performance Bank Guarantee (hereafter 'PBG') within two working days in the prescribed form. NCCFI was obliged to issue a letter of credit (hereafter 'L/C') within seven days after submission of the PBG.

3. EGD submitted the PBG (BG no. 115/FLG/15//10) in the sum of US\$ 1,12,200/- issued by the Indian Overseas Bank. On 01.02.2010, EGD obtained an import permit from Government of India in the name of NCCFI.

Thereafter, on 13.02.2010, NCCFI furnished a L/C dated 12.02.2010 to EGD. Prior to the submission of the aforesaid L/C, EGD sent a letter dated 09.02.2010, *inter alia*, stating that if a L/C was not submitted, it would be difficult for EGD to execute the Contract. This was followed by another communication dated 12.02.2010 whereby EGD stated that if a L/C was not established, it would have the right to cancel the Contract/re-negotiate the terms of the Contract. After receiving the L/C, EGD sent another communication on 16.02.2010 calling upon NCCFI to amend certain terms and conditions in the L/C and to provide the same from a Prime Bank. In terms of the L/C, the supplies were to be made by 15.02.2010 at Nhava Sheva Port. According to EGD, the aforesaid terms required to be amended to enable shipment within 30 days and the delivery at Nhava Sheva/ Mumbai. In addition, EGD also required modification of certain other terms.

4. Thereafter, on 23.02.2010 NCCFI cancelled the Contract. It invoked the PBG on 26.02.2010. NCCFI procured the subject goods from another supplier and supplied the goods to the Government of Rajasthan within time.

5. EGD issued a letter dated 10.12.2011 invoking the arbitration clause and claiming a sum of Rs. 2,48,45,069/-. EGD also reiterated this claim in its notice dated 10.11.2012. Before the Arbitrator, EGD filed a Statement of

Claim claiming an aggregate amount of Rs.3,59,42,621/- as under:-

- “(i) Rs.1,59,97,995/- due to sale on lesser rate of 6283.580 MTs with 18% interest from 16.04.2013 till actual realization;
- (ii) Sum of Rs.51,43,248/- towards the so-called illegal encashment of bank guarantee by the respondent with 18% interest from 16.04.2013 till actual realization;
- (iii) Sum of Rs.9,33,138/- towards storage charges with 18% interest from 16.04.2013 till actual realization;
- (iv) Rs.50 lakhs towards business loss with 18% interest from 16.04.2013 till actual realization;
- (v) Interest of Rs.62,52,805/- @14% per annum on the aforesaid sum of Rs.1,59,97,995/- from 01.07.2010 to 15.04.2013;
- (vi) Interest of Rs.22,44,993/- from 04.03.2010 till 15.04.2013 @ 14% on Rs.51,43,248;
- (vii) Interest of Rs.3,70,443/- from 15.06.2010 till 15.04.2013 on storage charges @ 14%.”

6. It is EGD's case that NCCFI had breached the terms of the Contract and had not provided the L/C within the agreed time. EGD claimed that it was ready with the supplies within a few days of signing the Contract; but could not make the supplies as NCCFI had not issued the L/C within the time agreed, that is, by 08.02.2010. EGD further stated that although it was not required to perform the Contract since NCCFI had failed to issue the L/C by 08.02.2010 it, nonetheless, sent an e-mail on 12.02.2010 but received no response thereto on that date. EGD claimed that it had arranged for the

consignment to be put on a vessel (MV Sea Honest) which was expected to reach Mumbai on 12.02.2010. However, since NCCFI did not issue the L/C, the said goods could not be cleared for supply to NCCFI and EDG was compelled to file the Bill of Entry for home consumption. EDG claims that once this was done, the said consignment could not be cleared for NCCFI. EDG contended that NCCFI submitted the L/C only on 13.02.2010 for delivery on or before 15.02.2010 and, the subject goods having been cleared for home consumption, EDG was not in a position to arrange for fresh supplies within a period of 72 hours.

7. NCCFI contested the claims made by EDG. It stated that the EDG had breached the terms of the Contract and had failed and neglected to deliver the goods as agreed thereunder. It further stated that the L/C was submitted within the extended time as agreed between the parties. NCCFI alleged that EDG had diverted the goods meant for supply to NCCFI to another entity for profit.

8. In view of the rival stands, the Arbitrator framed the following issues:-

“(i) Whether the claimant is entitled to a sum of Rs.51 ,43,248/- on account of encashment of bank guarantee by the respondent?

(ii) Whether the claimant is entitled to any damages, storage charges, loss and mesne profit? If so, at what rate and on what

amount?

(iii) Whether the claimant is entitled to loss on total sale of Rs.1,59,97,995/- on the sale of 6283.580 MTs of Yellow Peas and business loss amounting to Rs.50,00,000/- (Rupees Fifty Lakhs)

(iv) Whether the claimant is entitled to any interest? If so, on what amount, at what rate and from which date?

(v) Cost.”

9. After examining the relevant facts and circumstances and after considering the rival contentions the Arbitrator rejected the claims made by EGD on account of damages, storage charges, loss and mesne profits. He found that the goods in question had been delivered to an Indian Company which, according to him, indicated that EGD had not suffered any loss or damage as claimed by it. EDG's claim for difference in the price of goods as per the Contract and the price at which EGD claimed that the goods were sold, was also rejected; the Arbitrator found that the same did “not seem to be reasonable and justifiable”. EGD’s claim for storage charges was also rejected on the ground that since the goods had been disposed of to an Indian purchaser immediately on arrival of the goods, the question of demurrage and storage did not arise. However, in so far as encashment of the PBG is concerned, the Arbitrator held in favour of EGD and directed

refund of the amount received by NCCFI on encashment of PBG along with interest *inter alia* on the ground that NCCFI had not suffered any loss.

10. The learned counsel for NCCFI submitted that the impugned award to the extent that it directed refund of the amount received by encashment of PBG along with interest, was liable to be set aside. According to her, the Arbitrator erred in proceeding on the basis that NCCFI was obliged to establish a loss in order to claim forfeiture of PBG. She contended that the Arbitrator had found that the EGD had not imported the goods in the name of NCCFI as was required under the Contract and having found that EGD had breached the term of the Contract, the Arbitrator could not have directed refund of the PBG. She referred to clause 13 of the contract which reads as under:-

“13: FORFEITURE OF PERFORMANCE GUARANTEE

1. The Buyer reserves the right to forfeit 1110 the Performance Guarantee if if the Seller -

- a- Fails to supply the goods within the specified period.
- b- Commits any breach of Contract or fails to fulfill any term(s) or condition(s) of the Contract.”

2. The Performance Guarantee will be released to the Seller on successful and satisfactory execution of the Contract. No claim shall be admissible against the Buyer in respect of interest on Performance Guarantee regardless of the time of the release.”

On the strength of the aforesaid clause, she contended that NCCFI was well within its right to encash the PBG and forfeit the amount as EGD had failed to supply the goods within the specified period and had committed breach of the Contract. She contended that the PBG could only be released on successful and satisfactory execution of the Contract which, admittedly, was not done. She also relied on the decision of the Supreme Court in **A.S. Motors Pvt. Ltd. v. Union of India and Ors.:** 2013 10 SCC 114 and drew the attention of this court to paragraph 27 of the said decision in support of her contention that NCCFI was entitled to forfeit the PBG and the provisions of Section 74 of the Contract Act, 1872 did not forbid the same. She contended that it was not necessary for NCCFI to prove any actual damage for forfeiture of the PBG since such forfeiture in the eventuality of failure on the part of EGD to perform the Contract was an agreed term of the Contract.

11. She further referred to the decision of the Supreme Court in **Oil & Natural Gas corporation Ltd. v Saw Pipes Ltd.:** 2003 5 SCC 705 and on the strength of the said authority contended that an award which was contrary to the terms of the contract was liable to be set aside as being in conflict with the public policy in India.

12. I have heard the learned counsel for the Petitioner at length.

13. A plain reading of the arbitral award indicates that the Arbitrator had come to a conclusion that both NCCFI and EGD had not adhered to the terms of the Contract. Whilst the Arbitrator had found that EGD had failed to supply the goods or confirm to the schedule, he also held that NCCFI had not submitted the L/C within seven banking days after EDG submitted the PBG. He further held that although EGD had claimed that NCCFI had breached the Contract but it appeared that EGD had created uncertainty and doubt with regard to supply of 6000 MTs of Yellow Peas by its communications dated 09.02.2010, 12.02.2010 and 16.02.2010 and it is in these circumstances the NCCFI had arranged for supply of Yellow Peas from an alternative source. EGD was also faulted for not importing Yellow Peas in the name of NCCFI as required under the Contract. The Arbitrator further noted that in terms of the Contract, the shipment period was specified as December, 2009 – January, 2010 and observed that both the parties had varied certain terms of the Contract on the basis of their mutual understanding. After noting the relevant facts in the award, he observed as under:

“From the above, the various facts of the case right from the very beginning, may be crystal clear. It may be observed that from the start, lack of trust and false allegations on the part of, both the parties appear to be prevailing throughout the

period. Apparently, deception on the part of both the parties seems to have played key role in spoiling the whole dealings at large.”

The Arbitrator was thus of the view that both, EGD and NCCFI were responsible for the failure of the Contract. It is in this perspective that the Arbitrator examined the claims made by EGD.

14. Thus, whilst, the Arbitrator rejected EGD’s claim on account of loss, storage and demurrages, however, he allowed the claim for refund of the amount received by NCCFI by invoking the PBG. The relevant portion of the Award reads as under:-

“(i) Claim of the claimant for a sum of Rs.51,43,248/- for the encashment of bank guarantee by the respondent. Although, it appears to be in consonance with the procedural practice and the norms but the claimant has suffered the loss because of encashment of bank guarantee by the respondent. From the records and the pleadings, it can be inferred that the respondent has not been put to any loss or damages since the respondent has already made contract, on the pretext of the breach by the claimant in this case, with another party and goods supplied to Government of Rajasthan in time. Therefore, the claim for refund of amount of Performance Bank Guarantee is permissible/justified.”

15. It is plainly apparent from the above that the Arbitrator, having arrived at a finding that no loss was suffered by NCCFI, was of the view that

NCCFI could not retain the amount recovered as bank guarantee “*on the pretext of the breach by the claimant*”. I find no infirmity with this view, particularly, when the Arbitrator had concluded that both the parties had not adhered to the Contract.

16. The decision of the Supreme Court in *A S Motors Pvt Ltd (supra)* does also not assist the Petitioner. In that case, the Supreme Court had held as under:-

“.... the Court has, subject to the outer limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to the circumstances of the case. This would essentially be a mixed question of law and fact that a writ court would not possible decide. The appellant could and indeed ought to have sought its remedies in a proper civil action if it questioned the reasonableness of the amount; recoverable by the appellant in terms of the contractual stipulations.”

17. In the present case, it can be inferred from the tenor of the award that the Arbitrator’s substratal rationale for awarding the refund of the Bank Guarantee is a view that the amounts sought to be recovered by NCCFI were not reasonable given that NCCFI had not suffered any loss.

18. The scope of the interference in arbitral award is highly restricted and the same can be set aside only on the grounds as set out in Section 34 of the Act. The learned counsel appearing on behalf of NCCFI has sought to

contend that the Arbitrator has erred in law in directing the refund of the amount received on encashment of the PBG. Even if it is assumed – although there is no reason to do so – that the Arbitrator has erred in law, the same cannot be a ground for setting aside the award. The parties once having been agreed that the decision of the Arbitral Tribunal is binding on them must be held bound by the Arbitral award. The Court while exercising the jurisdiction under Section 34 of the Act, does not sit in appeal over the decision of the Arbitrator. In **Tarapore and Company v Cochin Shipping Yard Ltd :1984 2 SCC 80** and **U P Hotels v U P State Electricity Board: 1989 1 SCC 359**, the Supreme Court had held that an Arbitrator's decision on a question of law would also be binding, even if the same was erroneous. Although, these decisions were delivered in the context of the Arbitration Act, 1940, the same would continue to be instructive as the scope of the interference under the Act is narrower than that under the 1940 Act.

19. The Petition, is accordingly dismissed.

VIBHU BAKHRU, J

JULY 28, 2016

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