

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

% Judgment reserved on: 15th October 2015
Judgment delivered on: 22nd January 2016

+ **FAO(OS) 256/2015**

M/s MMTC Limited Appellant

versus

M/s Transmmonia AG Zurich (Switzerland) Respondent

Advocates who appeared in this case:

For the Appellant : Mr Neeraj Kishan Kaul, Senior Advocate with Mr Rohit Puri, Mr Bhuvan Mishra and Mr Prateek Khanna, Advocates.
For the Respondent : Mr Sandeep Sethi, Senior Advocate with Mr Umar Ahmad and Mr Kamaljeet Singh, Advocates.

CORAM:-

**HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SANJEEV SACHDEVA**

JUDGMENT

SANJEEV SACHDEVA, J

1. The appellant has filed the present appeal impugning the judgment dated 11.03.2015, whereby the objections filed by the Appellant under section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) to the Arbitral Award dated 27th November 2014 have been dismissed.

2. The disputes between the parties arise out of contract dated 7th October 2011. Under the contract, Respondent Transmmonia AG Zurich (hereinafter referred to as TAG) had agreed to supply and sell to Appellant MMTC, a net quantity of 2,00,000 metric tonnes (“MTs”) of Granular/Prilled bulk Urea (“product”) on CFR basis,. The product was to be loaded in 4/8 lots at the option of TAG. The rate was US Dollars (“USD”) 525 per metric tonne (“PMT”).

3. On 9th November 2011, TAG nominated a vessel (MV Kiran Europe) for transportation of a quantity of 48-50,000 MTs bulk urea to MMTC in terms of the schedule laid down in the contract. The consignment was to be loaded at Constanza, Romania and delivered at Krishnapatnam in India. As per the Appellant-MMTC, the purchase was meant for the Department of Fertilizers (“DoF”), Government of India. MMTC conveyed its acceptance to TAG on 11th November 2011. A Cargo Plan was forwarded on 22nd November 2011 under the instructions of TAG and endorsed by the Master of the said shipping vessel, MV Kiran Europe.

4. In terms of Clause IV (8) of the contract, “the weight (of the consignments loaded on to the ship) was to be determined by conducting draft survey before loading of the cargo and after completion of the loading of the cargo through an independent internationally reputed surveyor at Buyer’s cost. Bill of lading and

invoice will show draft survey weight.” The Surveyor who prepared the draft survey report was SGS Romania SA (“SGS”) and was chosen by MMTC.

5. The consignment of 50,000 MTs which was to be loaded was split up into two consignments of 42,000 MTs and 8,000 MTs by TAG. TAG sent an email dated 30th November 2011 seeking an extension of the deadline for the entire 50,000 MTs to 5th December 2011. On 5th December 2011, TAG issued a shipping advice stating that the entire quantity of 50,000 MTs was on board the vessel but under two separate bills of lading (“B/L”), i.e., one for 42,000 MTs and another for 8,000 MTs and that the ship had set sail only on 3rd December 2011. Discharge from MV Kiran Europe was completed on 9th January 2012 with 42,000 MTs being off-loaded.

6. Meanwhile, the international price of the contracted goods had fallen from the rate of USD 525 PMT to USD 446 PMT. MMTC was, however, bound to pay TAG the contractual price, provided the shipment of the last lot was made on or before 30th November 2011.

7. MMTC received a letter from the DoF on 30th December 2011 stating that the DoF could not accept MV Kiran Europe at the MMTC contract price, but was prepared to pay at the rate of USD 446 PMT. DoF refused to reimburse MMTC as per the value of USD 525 PMT

and instead paid MMTC at the rate of 446 USD PMT for the 42,000 MTs. DoF also declined to accept the balance 8,000 MTs which was loaded on MV Kiran Europe, which had set sail on 3rd December 2011.

8. Accordingly, MMTC took the stand that since TAG had failed to ship the entire 50,000 MTs by 30th November 2011, it was in breach of the contract. MMTC maintained that it stood discharged from its obligation to pay for the goods at the contracted rate of USD 525 PMT. MMTC claimed from TAG USD 3,318,000 as damages at the rate of 79 USD PMT being the differential between the contracted value of USD 525 PMT and USD 446 PMT paid by DoF to MMTC. To the above extent, MMTC encashed the Performance Guarantee Bond (“PGB”).

9. In its statement of claim before the Arbitral Tribunal, TAG sought: (i) Refund of or damages for the sum of USD 3,465,000 for MMTC’s alleged wrongful invocation of the PGB. (ii) Damages for the sum of USD 1,655,000 for MMTC’s breach of an alleged oral agreement to receive and pay for the additional 8,000 MTs. (iii) USD 40,635.42 as demurrage along with interest and costs.

10. MMTC, apart from denying the above claims, preferred the following counter-claims: (a) LD for the amount equivalent to 2% of

the value of the contract for the undelivered part of the product for each month or part of month's delay, together with interest at 18% from 9th January 2012 till the date of payment, being the sum of USD 525,000. (b) to be reimbursed at the rate of USD 79 PMT on 42,000 MTs amounting to USD 3,318,000. (c) USD 18,276.04 by way of "dispatch amount".

11. The three issues that were formulated by the Arbitral Tribunal on TAG's claims were: (a) Refund of or damages for the sum of USD 3,465,000 allegedly wrongfully claimed by MMTC under the PGB. (b) Payment of USD 1,655,000 by way of damages from MMTC for wrongful refusal to accept or pay for 8,000 MTs of the product, (c) USD 40,635.42 for payment of demurrage by MMTC.

12. The Learned single Judge has noticed in the impugned Judgment that on the first issue of refund of USD 3,465,000, the Arbitral Tribunal had concluded that 42,000 MTs was delivered by TAG to MMTC in accordance with the contract. This finding was based on the evidence of the parties. The Arbitral Tribunal further held that there was no provision in the contract giving the right to MMTC to insist upon any upper limit being satisfied, with the option to satisfy the minimum and maximum limit being given only to TAG as the seller. There was no addendum to the contract incorporating such a requirement.

13. With regard to the remaining consignment of 8,000 MTs and whether there was an agreement between the parties to extend the latest shipment date for the same beyond the contractual date of 30th November 2011, the Arbitral Tribunal based on the evidence of the parties on record held in favour of MMTC that it was not liable to TAG in respect of 8000 MTs. On the third issue of demurrage the Arbitral Tribunal held that the Notice of Readiness (“NoR”), after the vessel arrived at the destination port, was tendered on 30th December 2011. However, the discharge commenced only on 5th January 2012. The demurrage period was held to be one day and 17.01 hours, since it began to run 24 hours after the arrival of the vessel. MMTC was held liable to pay USD 8,252.50 to TAG.

14. The counter-claims of MMTC were held to be untenable since there was no breach of contract by TAG.

15. MMTC objected to the Award of the Arbitral Tribunal contending that time was of the essence of the contract and the entire quantity of 50,000 MTs had to be shipped by 30th November 2011. It was also contended that there was nothing to show that a draft survey took place prior to the loading, as required by Clause IV (8) of the contract. It was contended that TAG failed to complete the loading of the entire shipment before 30th November 2011. It sought extension of time till 5th December 2011 and therefore committed default in terms

of Clause II of the contract. No extension of time had been granted to TAG. There was no amendment in writing in terms of Clause II signed by both parties agreeing to any such extension.

16. It was contended that the vessel with the said quantity of 50,000 MTs was shipped only on 5th December 2011. This, it was contended, was in view of the fact that the draft survey report submitted was dated 5th December 2011 and this was in itself an admission that the loading of the consignment was not complete on 30th November 2011, by which time the price of the contracted goods had fallen from 525 PMT to 446 PMT. In terms of Clause XXII, TAG was bound to reimburse MMTC for the short payment by DoF, which was entirely attributable to the failure of TAG to send the entire consignment of 50,000 MTs on or before 30th November 2011.

17. Attention of the learned single judge was drawn to the testimony of various witnesses of TAG and the fact that the Arbitral Tribunal had specifically put questions to TAG's witness on whether the draft survey report was prepared prior to the loading or after the loading on 30th November 2011, however there was no discussion in the Award of that particular issue. It was contended that this was a case of evidence on record being entirely overlooked by the Arbitral Tribunal and no finding rendered on the crucial issue on whether the

vessel was indeed loaded after the draft survey report was prepared by the SGS on 30th November 2011.

18. On behalf of TAG in response to the contentions of MMTC, it was pointed out before the learned Single judge that in its response to TAG's claims before the Arbitral Tribunal, MMTC did not raise any issue as regards the draft survey report. It was only in the written submissions filed before the Arbitral Tribunal that for the first time, such an issue was raised. Further reference was made to the documents including the draft survey report, to show that the Inspector had been on the vessel and conducted the inspection both prior to and after the loading of the consignment. The said draft report although dated 5th December 2011, showed that the inspection took place after the loading on 30th November 2011 which clearly showed that 42,000 MTs of the prilled bulk Urea had already been loaded on that date.

19. The Learned Single Judge found that MMTC had not specifically raised the issue regarding the absence of draft survey report in the pleadings and the said issue was raised for the first time in the written submissions filed before the Arbitral Tribunal.

20. The Learned Single Judge on the perusal of the draft survey report, held that it appeared that SGS did prepare the draft survey

report and the report revealed that the date of inspection was from 19th till 30th November 2011 and it further reflected that the readings on the ship were noted down by the Inspector from the beginning of inspection till its conclusion, i.e., from 19th to 30th November 2011 and at the time of the loading, 42,000 MTs was complete the Inspector of SGS was very much present and he confirmed the reading on 30th November 2011.

21. The learned single judge noticing the above aspects was of the view that by producing the draft survey report, TAG had discharged its burden of showing compliance with the requirement of Clause IV (8) of the contract and if MMTC wanted to doubt the correctness of the report or to further show that it was in fact prepared only on 5th December 2011, it should have produced the agency SGS as a witness which was not done.

22. Learned Single Judge has held that the view taken by the Arbitral Tribunal was a plausible view. On examination of evidence, the learned Single Judge has held that TAG had been able to demonstrate before the Arbitral Tribunal that the consignment of 42,000 MTs had in fact been loaded by 30th November 2011.

23. Learned Single Judge has further held that as far as the consignment of 42,000 MTs was concerned, there was no short-

landing at the discharge port vis-à-vis the separate B/L for that quantity. There was no rejection of the consignment of 42,000 MTs. The said quantity was accepted and was in fact offloaded. There was also no deviation of the specifications as far as the 42,000 MTs was concerned. MMTC could not bring the case within the ambit of Section 37(4) Sale of Goods Act, 1930 and thus held that the decision of the Arbitral Tribunal requiring MMTC to reimburse the amount recovered by encashing the PGB cannot be faulted.

24. With regard to the claim of demurrage, the learned single judge has held that the same is a finding of fact regarding the date of Notice of Readiness and the date on which the delivery was actually taken.

25. The learned single judge thus held that no grounds had been made out, within the limited scope of Section 34 of the Act, for interference with the impugned Award of the AT.

26. There is no gainsaying that the arbitral tribunal is the master of the factual arena and has the right to even go wrong while deciding the factual issues, unless there is something manifest from the face of the award that is so grave as to move the conscience of the court that the error would result in a monumental miscarriage of justice.¹

¹ *Food Corporation of India v. Shanti Cereals Pvt. Ltd., 2010 (3) ARB. LR 296 (Del.) (DB)*

27. Where the Arbitral Tribunal has assessed the material and evidence placed before it in detail, the court while considering the objections under Section 34 of the said Act does not sit as a court of appeal and is not expected to re-appreciate the entire evidence and reassess the case of the parties. The jurisdiction under section 34 is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, another view is possible. The duty of the court in these circumstances is to see whether the view taken by the Arbitrator is a plausible view on the facts, pleadings and evidence before the Arbitrator. Even if on the assessment of material, the court while considering the objections under section 34 is of the view that there are two views possible and the Arbitral Tribunal has taken one of the possible views which could have been taken on the material before it, the court would be reluctant to interfere. The court is not to substitute its view with the view of the Arbitrator if the view taken by the Arbitrator is reasonable and plausible.²

28. We also find that the findings returned by the arbitral Tribunal are purely factual. Even though the learned single judge was not required to re-appreciate the evidence but, we find from the

² *Jhang Cooperative Group Housing Society v. P.T Munshi Ram & Associates Private limited:* 202(2013) DLT 218.

impugned order, that he has examined the evidence led by the parties and confirmed the findings returned by the Arbitral Tribunal. The Arbitral Tribunal has assessed the material and evidence placed before it and has analysed the relevant clauses of the contract and taken a view that is plausible. The learned single judge has also examined the same and found the view taken by the Arbitral Tribunal to be a plausible view not calling for any interference. We find no infirmity in the view taken by the learned single judge. The appeal is accordingly dismissed, leaving the parties to bear their own costs.

SANJEEV SACHDEVA, J

BADAR DURREZ AHMED, J

JANUARY 22, 2016
HJ