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

\+ FAO(OS) (COMM) 120/2016

NATIONAL CO-OPERATIVE CONSUMERS ..... Appellant

Represented by: Mr.Anju Bhattacharya, Advocate with Mr.Elgin John, Advocate

versus

EMMSONS GULF DMCC ..... Respondent

Represented by: None

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE YOGESH KHANNA

<u>O R D E R</u>

% 15.11.2016

<u>CM No.42227/2016</u>

Allowed subject to just exceptions.

<u>CM Nos.42228-29/2016</u>

For the reasons stated in the two applications one day delay in filing and eighteen days delay in re-filing the appeal are condoned.

The applications are disposed of.

<u>FAO (OS) Comm.120/2016</u>

1. Having heard learned counsel for the appellant we find no merit in the instant appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 laying a challenge to the order dated July 28, 2016 passed by the learned Single Judge dismissing objections filed by the appellant under Section 34 of the Arbitration and Conciliation Act, 1996 which laid a

challenge to an award dated May 13, 2016 passed by the learned Sole Arbitrator.

2. Succinctly stated, as per contract which was signed on January 28, 2010, the shipment of the goods to be imported : 6000 M.T. Yellow Peas had to be between the months of December 2009 and January 2010, as recorded in para 2.4 of the award. With a correct remark by the learned Arbitrator as to on what basis parties contemplated the import to be by the end of January 2010. We only add the comment. It is a case where the appellant did not bother to amend the terms of the contract and apparently the dates in contemplation when negotiations were going on have been blindly recorded in the contract.

3. Further relevant fact based on evidence noted by the learned Arbitrator is that admittedly as per the contract, upon the respondent furnishing a bank guarantee within two days of the agreement the appellant had to open a letter of credit within seven days thereof. The bank guarantee was submitted by the respondent a little late i.e. by two days. But there was a huge delay in the appellant opening the letter of credit. These are factual aspects which the learned Arbitrator has arrived at on the basis of the evidence.

4. As per the award, the claim for loss/damages caused to the respondent due to alleged breach by the appellant has been negated. The amount recovered by the appellant under the performance guarantee has been directed to be returned on the reasoning that the appellant failed to establish a loss. The respondent has accepted the award to the extent its claim for damages has been negated.

5. It has been opined by the learned Single Judge that the learned

Arbitrator has correctly applied the law relating to damages in case of breach of a contract. Where, in a contract; the contract being of a kind such as a public utility i.e. a bridge, where damages cannot be quantified by means of leading evidence a sum stipulated by way of damages in the contract if not penal would be treated as a reasonable pre-estimate of the agreed damages and the same would be awarded. But, where a liquidated damages is recorded in a contract but the damages is of a kind which can be established by leading evidence then the liquidated damages agreed to becomes the upper limit of the agreed loss to be compensated, requiring proof of the actual loss caused.

6. The decisions referred to by the learned Single Judge in paragraph 16 and 18 of the impugned order are certainly attracted in the facts of the instant case and we find that the learned Single Judge has appreciated the award within the parameters of Section 34 of the Arbitration and Conciliation Act, 1996. Concededly the appellant has not led any evidence of loss caused to him on account of non supply of the Yellow Peas.

7. The appeal is dismissed in limine.

8. No costs.

PRADEEP NANDRAJOG, J

YOGESH KHANNA, J

NOVEMBER 15, 2016
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