

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 10.04.2017

+ **O.M.P. (COMM) 274/2016**

TRAXPO ENTERPRISES PRIVATE LIMITED

..... Petitioner

Versus

PEC LIMITED

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Kuljeet Rawal.

For the Respondent : Mr Arvind Chaudhary and Ms Asha Chaudhary.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

O.M.P. (COMM) 274/2016 and 6347/2016

1. M/s Traxpo Enterprises Pvt. Ltd. (hereafter referred to as 'TEPL') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') *inter alia* praying that the arbitral award dated 20.10.2015 (hereafter 'the impugned award') passed by the sole arbitrator, be set aside.

2. The impugned award was rendered in the context of the disputes raised by the respondent, P.E.C. Limited (hereafter 'PECL'), in connection with the agreements dated 05.03.2007, 23.10.2007 and 24.12.2007.

3. TEPL claims that it had received the impugned award on 02.11.2015 and thereafter, filed the present petition on 02.02.2016; that is, on the last day of the period of limitation, as specified in Section 34(3) of the Act.

However, the said petition was defective and TEPL took a considerable time to cure the defects. The petition was finally re-filed on 17.05.2016, which is approximately three and a half months after the petition was initially filed and about six and a half months after TEPL had received a copy of the impugned award. The time taken to re-file the petition alone exceeds the time available under Section 34(3) of the Act to file a petition to set aside the award.

4. TEPL has sought to explain the delay by citing various reasons. First, it is stated that the Director, who was to sign the petition, was based in Kolkata and, therefore, it took some time to comply with the objections raised by the Registry. Second, it is stated that the signed copy of the petition was left with the peon in the chamber of the advocate during court hours. It is stated that at the material time, the peon was alone in the office and the petition was mixed up with other court records and was misplaced. This was discovered only in the first week of March, 2016, which was almost after a month after the initial petition was filed. Third, it is stated that the petition which was filed on 03.03.2016, was also defective and the same was sent by email but since the size of the softcopy sent by the email was large, the same could not be opened and a fresh hardcopy was sent for signatures of Mr Shashi Kant Tapuria, the Director of TEPL. Fourth, it is stated that Mr Tapuria was not well in the months of March, April and May, 2016 and, therefore, could not do the needful.

5. In view of this Court, none of the explanations appear to be credible. A period of three months has been specified under Section 34(3) of the Act for filing the petition under Section 34 of the Act. If the petitioner is able to show sufficient cause, which prevented him from filing the petition within

the said time, the Court can condone the delay for a maximum period of thirty days and not thereafter. Plainly, the legislative intent clearly is not to permit any delay in approaching this Court. In **Delhi Development Authority v. Durga Construction Co.:** 2013 (139) DRJ 133, this Court had held that notwithstanding the language of Section 34(3) of the Act, the Court could condone the delay in re-filing. However, the discretion to do so would have to be exercised keeping in view the legislative intent of Section 34(3) of the Act. A liberal approach would not be warranted and the petitioner would have to show sufficient cause, which prevented the petitioner from re-filing the petition, within the time prescribed.

6. A bare reading of the impugned award also indicates that TEPL had deliberately adopted dilatory tactics and had left no stone unturned in its endeavour to delay the proceedings. This is chronicled in detail in the impugned award. Therefore, at the outset, it was put to Mr Rawal whether he had anything to say as to TEPL's conduct as recorded in the impugned award. He, fairly, did not controvert any of the facts pertaining to the conduct of TEPL as recorded in the impugned award.

7. Thus, in the facts of the present case, this Court is not inclined to condone the delay in re-filing and the petition must be dismissed on this ground alone.

8. However, notwithstanding the above, this Court has considered the present petition on merits as well.

9. Briefly stated, the relevant facts necessary to address the controversy are as under:-

9.1 PECL is a government company engaged in the business of facilitating export and import of various commodities and guaranteeing payments of exporters from India and granting financial facilities to importers in India. TEPL and PECL entered into agreements captioned as “Associateship Agreement” dated 05.03.2007(2 in number), 23.10.2007 and 24.12.2007 for import of Methanol from various foreign sellers. In terms of the aforesaid Associateship Agreements, the quantity of Methanol imported against each of the said agreement was to be sold to PECL on High Seas Sale (HSS) basis. The parties also entered into 4 separate High Seas Sale Agreements on 19.02.2007(2 in number), 22.08.2007 and 09.11.2007, whereby the quantity of Methanol imported was agreed to be sold to TEPL on High Seas Sale Basis.

9.2 It was claimed by PECL that it opened Usance Letter of Credit in favour of foreign sellers under the Associateship Agreement dated 24.12.2007 and 05.03.2007 (for import of 3000 MT of Methanol) and imported the goods for and on behalf of TEPL. It was also claimed that it accepted Documents against Payments under the Associateship Agreement dated 05.03.2007 (for import of 1500 MT of Methanol) and 23.10.2007. The parties had also entered into Deeds of Pledge dated 01.03.2007 (two in number), 05.09.2007 and 26.11.2007, whereby TEPL charged and pledged the goods stored at Kandla by way of first charge in favour of PECL and it was further agreed between the parties that TEPL shall not, without written consent of PECL, take delivery, sale or dispose off in any manner, the pledged goods or any part thereof. Before the arbitrator, the disputes pertained only in respect of Associateship Agreements dated 05.03.2007(for import of 1500 MT of Methanol), 23.10.2007 and 24.12.2007(hereafter collectively also referred to as ‘the Agreements’).

9.3 In terms of the aforementioned Associateship Agreements, TEPL issued 3 post dated cheques aggregating to ₹8,08,00,000/- towards the cost of the consignments along with 3 legal undertakings dated 08.04.2009, undertaking *“to pay the balance amount in respect of the above import, on the first demand without demur and protest”*.

9.4 PECL claimed that it had made the full payment to the foreign suppliers; but, TEPL failed to make the entire payment to PECL in terms of the Agreements, despite various assurances made by it under the letters dated 04.04.2009 and 24.04.2009.

9.5 Thereafter, PECL deposited the said three cheques but the same were dishonoured on presentation; and the same returned under the cover of the return memos dated 26.05.2009. Subsequently, PECL filed a complaint under Section 138 of the Negotiable Instruments Act, 1881, which is stated to be pending before the Patiala House Courts, New Delhi.

9.6 In view of the disputes that had arisen between the parties, PECL invoked the arbitration clause as per the Agreements and sent a notice on 18.04.2013. Thereafter, on 22.08.2013, the sole arbitrator was appointed by Indian Council of Arbitration (ICA).

9.7 TEPL filed a writ petition (W.P. (C) 7918/2013) before this Court challenging the appointment of the sole arbitrator by ICA. The said writ petition was dismissed by an order dated 17.12.2013 holding that there was no illegality in the procedure adopted by ICA in appointing the arbitrator. As TEPL failed to deposit the charges in respect of its counter claims, the arbitrator by an order dated 27.11.2014, terminated the proceedings with respect to counter-claims of TEPL.

9.8 Before the arbitrator, TEPL claimed that subsequent to import of the goods, price of Methanol in Indian Market was less than the price prevailing in the International market and therefore, it was agreed between the parties that the goods would be re-exported to the foreign buyers. Thereafter, negotiations were held with M/s Kolmar Group A.G. and the said firm agreed to import Methanol at the rate of USD 255 per MT and subsequently at the rate of USD 350 per MT. TEPL claimed that the goods were exported and a letter of credit was issued in favour of PECL, however due to some discrepancy, letter of credit could not be honoured for 6-8 weeks. TEPL claimed that during the said time, prices in the international market rose further and it approached PECL stating that a buyer, M/s G-Steel Met Pte Ltd, was willing to lift the stock at the rate of USD 700 per MT. According to TEPL, PECL after giving the assurance to take up the matter with the new buyer, took no steps and therefore, caused a loss of USD 27,09,673.95 to it.

9.9 The books of accounts maintained by PECL reflected the amounts which were due and payable by TEPL. Accordingly, PECL claimed a sum of ₹13,22,55,637/- from TEPL, which included interest at the rate of 14% p.a. PECL further claimed *pendente lite* interest and future interest.

9.10 TEPL claimed that PECL exported the entire quantity to M/s Kolmar Group A.G. and appropriated an amount of ₹3,67,93,430/-. TEPL raised counter claims aggregating to ₹24,24,46,912.64/- along with interest.

9.11 The arbitrator after going through the evidence on record, passed the impugned award allowing the claims of PECL and awarded a sum of ₹8,31,04,993.49/- along with interest at the rate of 14% from the 19.04.2010 till the date of award and further interest at the rate of 14%

from the date of award till payment, along with payment of costs paid by PECL on behalf of TEPL, which were quantified at ₹14,45,490/-. It was also held that if the awarded amount along with interest is remitted to PECL within 3 months of the passing of the award, future interest shall not be payable.

10. Mr Rawal addressed arguments to assail the award on two fronts. First of all, he submitted that the claim filed by PECL was not maintainable as there was no authorisation to file the said claim. He referred to the General Power of Attorney issued by the Chairman-cum-Managing Director of PECL in favour of several persons including Mr Jitender Singh Punia, Deputy Finance Manager of PECL. He submitted that Chairman-cum-Managing Director of PECL did not have any authority to sub-delegate his powers to a Deputy Finance Manager. He referred to the extract of the minutes of the Board Meeting of PECL held on 30.11.1981 and submitted that in terms of the resolution passed by the Board of Directors, the Chairman could sub-delegate his powers to the Heads of division and other managers and not to the officer below the designation of a manager.

11. Second, he submitted that the arbitrator had grossly erred in not appreciating that PECL continued to be the owner of the goods in question and, therefore, TEPL was not liable for the storage and/or custom charges for the goods in question.

12. This Court does not find any merit in the aforesaid submissions. The claim before the arbitrator was duly instituted by Mr Punia, who was duly authorised to act on behalf of PECL, in pursuing the claims against TEPL. PECL had produced the duly executed Power of Attorney in favour

of Mr Punia *inter alia* authorising him for the said purpose. The power of attorney was executed by the Chairman-cum-Managing Director of PECL on behalf of PECL. The objection that the Chairman-cum-Managing Director of PECL had no power to sub-delegate his authority to institute the proceedings is, also unpersuasive. PECL had produced the certified extract from the minutes of the 88th meeting held by the Board of Directors on 30.11.1981, which expressly empowered the Chairman of PECL to sub-delegate powers conferred upon him to Head of the Divisions and "*other Managers under him from time to time*".

13. The expression "*other Managers*" cannot be given a restrictive meaning and is not restricted to only those persons having the designation of managers alone. It is relevant to note that the managers functioning under the Chairman and Managing Director include managerial personnel designated as Chief General Managers, General Managers, Joint General Managers, Managers, Deputy Managers, etc. The designation of managerial personnel also indicates the functional verticals being managed by them such as marketing, finance, etc.

14. Mr Punia was undoubtedly a manager and merely because his designation in PECL was Deputy Finance Manager, does not detract from his role as a manager in PECL.

15. More importantly, the question of authority is a matter of indoor management and TEPL cannot make any grievance of the same. Clearly, if TEPL was to succeed in its counter claims, PECL could not avoid its liability on the ground that Mr Punia had no authority. The arbitrator had also considered the aforesaid contentions and had found that the power of attorney was genuine and authentic. He had also noted that the questions

were put to the PECL's witnesses during the cross-examination but nothing could be brought on record to dispute the authenticity and genuineness of the power of attorney. The arbitrator also found the objection to be baseless. This Court finds no infirmity with the aforesaid view.

16. The next question to be considered is whether the finding of the arbitrator that TEPL was the owner of the goods in question and, therefore, liable for the custom/storage charges, is perverse or patently illegal.

17. Admittedly, the goods in question were sold on High Seas Sale basis. Indisputably, the bills of lading and the tanker bills of lading were endorsed by PECL in favour of TEPL. As per the Associateship Agreement entered into between the parties, TEPL had agreed to issue post dated cheques for 92% of the contractual price and further agreed to bear all custom duties, transit insurance and other expenses. TEPL had also agreed to indemnify PECL against all expenses and losses.

18. In terms of its obligations, TEPL had handed over three post dated cheques dated 08.04.2009 aggregating a sum of ₹8.08 crores (Cheque No.111037 for ₹2.34 crores; Cheque No.111034 for ₹1.50 Crores and Cheque No.111035 for ₹4.24 crores). It is further seen that TEPL had also acknowledged its liability in several of its communications.

19. This Court, thus, finds no infirmity with the impugned award holding that the property and the goods in question vested with TEPL; although the TEPL had to discharge its liability to pay for the same, before it could be released to it.

20. Before concluding, it is also relevant to note that TEPL's conduct before the arbitrator was less than fair. It had sought to delay the

proceedings on myriad of grounds. TEPL had sought several adjournments on various grounds including for marriage of daughter of one of its Directors, for not been able to brief its counsel properly, due elections in the state of Maharashtra and on account of one of its Directors suffering from slip disc, etc.. The present petition was first listed on 19.05.2016 and was adjourned on the request of TEPL seeking time to file an additional affidavit. The petition was also adjourned at the instance of TEPL on successive three occasions thereafter.

21. Accordingly, the petition and the pending applications are dismissed with costs quantified at ₹50,000/-.

APRIL 10, 2017
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VIBHU BAKHRU, J

