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

R-393

\+ **OMP 727/2010**

PRIYANKA OVERSEAS LTD & ANR ..... Petitioners
Through: Mr. Kuljeet Rawal, Advocate.

versus

MMTC LTD. ..... Respondent
Through: Mr. Manish Sharma, Advocate.

CORAM: JUSTICE S. MURALIDHAR

O R D E R

% **15.02.2017**

1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to an impugned award dated 30th July 2010 passed by the learned sole Arbitrator in the disputes between the Petitioner, Priyanka Overseas Limited, ('Priyanka') and the Respondent, MMTC Ltd. (MMTC), arising out of the Memorandum of Understanding ('MoU') dated 30th April 2002.

2. In terms of the MoU, Priyanka was to locate the foreign buyers for purchase of rice. Pursuant thereto contracts would be entered into between the foreign buyers and MMTC. It is stated that in reality the Respondent was the financier and all benefits of the said export as permissible in law were to be to the account of the Respondent. MMTC was entitled to interest, service charges for providing finance and executing the contract for export. It is further stated that rice could be procured only from the Food Corporation of India ('FCI') and that MMTC was bound to make timely payment for

release of rice by FCI on the request of Priyanka. In turn it was made available to the foreign buyer of the rice.

3. Priyanka's case was that despite complying with all its obligations under the MoU and the contracts, MMTC had not performed its part as a result of which Priyanka had to pay huge demurrage. Priyanka states that the insurance cover was taken by it in the name of MMTC as beneficiary and the requisite premium was also paid by Priyanka. The insurance claim realised was, however, not passed on to Priyanka.

4. Before the learned Arbitrator Priyanka claimed from MMTC *inter alia* Rs. 50,25,605 along with interest @ 15% per annum with costs. MMTC filed its defence statement and counter-claim. MMTC maintained that it had accounted for the monies received from the MMTC and also adjusted the amount released by the invocation by the bank guarantee (BG) furnished by Priyanka. MMTC filed a statement of account filed before the learned Arbitrator, showing that inclusive of interest upto 31st January 2004, the sum owed to it by Priyanka was Rs. 2,43,45,389.

5. On the basis of the pleadings, the learned Arbitrator framed the following issues for determination:

> (i) Whether the Claimants, M/s. Priyanka Overseas is entitled to a sum of Rs. 50,25,605 or any other amount for the reasons stated in the Statement of Claim?
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> (ii) Whether the Claimant is entitled to interest? If so, at what rate and for which period?
>
> (iii) Whether the Respondent, MMTC Limited is entitled to a sum of

Rs. 2,43,45,389 or any other amount for the reasons as stated in the counter-claim?

(iv) Whether the Respondent is entitled to interest? If so, at what rate and for which period?

(v) Relief."

6. Apart from the documentary evidence, the affidavit of Mr. R.K. Jain on behalf of Priyanka and Mr. M.R.C. Menon on behalf of the MMTC were filed. In the impugned Award the learned Arbitrator held as follows:

(i) Priyanka was entitled to adjustment of Rs. 34,07,758 for transit loss on goods covered under insurance policies.

(ii) Priyanka was entitled for adjustment of Rs. 31,71,844 towards transit loss on goods for which no insurance policy was taken.

(iii) Priyanka was entitled to adjustment of Rs. 19,30,875 towards physical loss of cargo on the basis of a certificate dated 28th October 2002 issued by the Surveyors.

(iv) Priyanka was entitled to have the above sums awarded in its favour adjusted against the 'principal amount'.

7. However, the learned Arbitrator appears to have adjusted the above amounts as against the interest of Rs. 1,17,19,914.60 calculated by MMTC upto 31st January 2004. According to the learned Arbitrator this reduced the interest to Rs. 18,35,114. The counter-claim filed by MMTC was partly allowed to the extent of Rs. 1,40,00,000 as against the claim of Rs. 2,43,45,389. Simple interest @ 8% has been granted to MMTC on the aforementioned amount. It was further held that in the event the awarded amount was not paid within three months, MMTC was entitled to a further

simple interest @ 9% per annum from the date of the Award till its realization.

8. Mr. Kuljit Rawal, learned counsel appearing for Priyanka, assailed the impugned Award on the following grounds:

(a) Although Priyanka had claimed amounts received by MMTC by way of adjustment and refund from FCI in the sum of Rs. 30,25,770 plus Rs. 14,88,836, the learned Arbitrator had not dealt with that aspect of the matter except noting that MMTC in its counter-claims showed the amounts which have been received as refund from FCI. The learned Arbitrator observed: "therefore, these items needs no comment."

(b) After holding that Priyanka was entitled to a sum of Rs. 85,80,175 on account of insurance claims, cargo loss and transit loss of goods, and after holding that this requires to be adjusted against the 'principal amount', the learned Arbitrator deducted the said amount from the interest amount of Rs. 1,17,19,914.60. This was an obvious error.

(c) On the basis of the certificate dated 28th October 2002 issued by the Surveyors, the learned Arbitrator allowed the physical loss of cargo. However, the learned Arbitrator erroneously rejected the loss claimed due to rain damage which was based on the same certificate.

(d) The claim by TDI of a sum of Rs. 77,30,976 towards demurrage charges was unfairly rejected on the basis of the observations of this

Court in the an order passed in a petition by Priyanka under Section 9 of the Act although this Court had clarified that it was only a *prima facie* view. It is submitted that the learned Arbitrator ought to have gone by the debit notes raised by Priyanka in this regard.

(e) Lastly, there was no justification for the learned Arbitrator to have denied Priyanka interest on its claims.

9. Mr. Manish Sharma, learned counsel appearing for the Respondent, MMTC, sought to defend the Award by pointing out as far as the refund and adjustment received from the FCI it was duly accounted for in the accounts filed by MMTC as part of its statement of account which was placed before the learned Arbitrator. As regards the adjustment against the principal amount, Mr Sharma sought to contend that the sum of Rs.2,43,45,389 claimed by MMTC in its counter-claim was in fact the principal amount. According to him if the sums awarded to Priyanka along with interest @ 15% was calculated it might work out to Rs.1.03 crores. If this was adjusted against the principal amount claimed by MMTC, The balance worked out to Rs.1.40 crores which is what has been awarded in favour of MMTC. As regards Priyanka's claim for demurrage, Mr Sharma submitted that no credible evidence was produced by Priyanka in support thereof.

10. As regards the Award not accounting for the receipts of sums received by MMTC from FCI as refund, the Court finds on a comparison of the statement of account submitted by Priyanka (which is at internal page 11 of the Award) with the statement of account submitted by MMTC (which is at internal page 18 of the Award) that MMTC has in fact accounted for the

refund received from FCI. If those sums shown therein as refunds from FCI are totalled, they correspond more or less to what was claimed by Priyanka on this score. Therefore, as far as the said claim is concerned, the impugned Award does not call for any interference.

11. As regards the adjustment against the 'principal' amount, the explanation offered by Mr Sharma does not stand to logic for the simple reason that the counter claim filled by MMTC sets out in a chart annexed thereto the calculation of the interest in the sum of Rs. 1,17,19,914.60. This is shown the interest "on payments released to FCI on account of rice export through Priyanka Overseas." This is not interest on any amount due from Priyanka to MMTC. It cannot therefore straightway be presumed that whatever amount was paid as interest by MMTC to FCI could be recovered from Priyanka without there being a proper explanation for such claim against Priyanka. The impugned Award is totally silent on this aspect. No calculation is set out to explain how the interest amount has got reduced to Rs. 18,35,114 or even how the sum of Rs. 1.40 crores found due to MMTC was arrived at. The arithmetic as suggested by Mr Sharma does not work out to the above sums. In any event, the Court finds that MMTC's counter claim is exactly in two paragraphs without any explanation for the overall claim of Rs.2,43,45,389. The statement of account filed by MMTC only confounds the problem rather than lend clarity. Even if the sum of Rs.85,10,275 were adjusted against the aforementioned amount the balance does not work out to Rs.18,35,114 or Rs. 1.40 crores. This part of the Award is plainly unsustainable in law as it contains no reasons and does not appear to based on any provisions of the agreement between the parties.

12. Now turning to the claim towards loss on account of rain damage, the learned Arbitrator rejected it on the ground that there was no documentary evidence to support it. However, the learned Arbitrator noted that Priyanka had placed on record a certificate dated 28th October 2002 issued by the Surveyor. In fact, the learned Arbitrator has relied on that very certificate to allow the claim as regards physical loss of cargo.

13. A perusal of the said certificate which has been placed on record reveals that it certifies both physical loss of cargo as well as loss on account of rain damage. Mr Rawal is right in his submission that if the same certificate was sufficient documentary evidence for the physical loss of cargo there was no reason why it should have been discarded as proof of loss due to rain damage.

14. Mr Sharma sought to suggest that while allowing the claim for physical loss of cargo, the learned Arbitrator did not rely on the above certificate but on some other 'documentary evidence'. However, the following paras in the impugned Award belie this submission:

> "The Claimant has claimed an adjustment of Rs.19,30,875 on account of physical loss of cargo i.e. 203.250 MT barge loss of cargo in stream at the rate of 9500 Per MT. In support of this, claimant has filed a certificate dated 28.10.2002 of the Surveyors. The Respondent has denied this claim.
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> I am of the view that the physical loss as alleged is covered under the Agreement and the Claimant has proved his loss by documentary evidence. The Claimant is entitled to adjustment of Rs.19,30,875."

15. When both the above two paragraphs are read together, it is plain that the only documentary evidence which was placed by Priyanka in support of the claim was the certificate dated 28th October 2002. In fact it is not even Priyanka's case that there is any other documentary evidence in support of its claim. Consequently, the Court finds merit in the contention of Mr. Rawal, learned counsel for the Petitioner that the certificate dated 28th October 2002 of the Surveyor was sufficient proof of loss due to rain damage as well and that the said claim in the sum of Rs.49,68,500 ought to have been allowed.

16. As far as the demurrage is concerned, the learned Arbitrator has set out the observations in this Court's order dated 9th December 2004 in OMP No. 225 of 2004. The said order was obviously only a *prima facie* determination and could not have formed the basis for rejection of the claim. Nevertheless, it was incumbent on Priyanka to have placed on record the challans showing payment of demurrage. What has been placed on record are only the debit notes raised by Priyanka itself without any other supporting document. This cannot constitute sufficient proof of the claim of demurrage. Therefore, the Court is not persuaded to interfere with the impugned Award insofar as it rejects Priyanka's claim for demurrage.

17. Finally as regards the claim for interest, the Court finds no discussion in the impugned Award for rejection of the Priyanka' claim for interest on the amounts due from it. While the learned Arbitrator has awarded MMTC interest @ 8% on its counter claim, and future interest @ 9%, nothing has been awarded towards interest in favour of Priyanka. There appears to be no

justification for this.

18. In sum, the Court holds as under:

(i) The rejection of the Priyanka's claim in the sum of Rs.49,68,500 for loss on account of rain damage is unsustainable in law. The said claim ought to have been allowed by the learned Arbitrator.

(ii) The amounts awarded in favour of Priyanka ought to have been adjusted against the principal amount claimed by MMTC. With there being no clarity on what is the principal amount claimed by MMTC is, the sum worked out by the learned Arbitrator i.e. reducing the interest to Rs.18,35,114 after adjustment and determining Rs. 1.40 crores as due to MMTC is not based on any calculation which could be justified from the documents placed on record. To that extent the impugned Award is unsustainable and is hereby set aside. The award of corresponding interest on the said sum to MMTC is also set aside.

(iii) The denial of simple interest @ 8% and future interest @ 9% simple interest to Priyanka on the amounts found due to it is not justified and the Award to that extent is again held unsustainable in law.

19. It will be open to the parties to go in for a fresh arbitration on the above aspects in accordance with law.

20. The petition is disposed of but in the circumstances with no order as to costs.

S.MURALIDHAR, J

FEBRUARY 15, 2017/*Rm/dn*