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

Reserved on: January 19, 2017
Date of Decision: March 7, 2017

+ **O.M.P. 1409/2014**

HEALTH FOOD PRODUCTS PRIVATE LIMITED Petitioner
Through: Mr. Pawan Upadhyay, Mr. Rajesh Chhetri,
Ms. Meenakshi Rawat & Mr. Utsav Vaid,
Advocates.

versus

SIDDHI VINAYAK INDUSTRIES PRIVATE LIMITED Respondent
Through: Proceeded *ex parte* vide order dated 3rd
October, 2016.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

% **07.03.2017**

1. The challenge in this petition under Section 34 of the Arbitration & Conciliation Act, 1996 ('Act') by Health Foods Products Private Limited to an Award dated 14th July, 2014 passed by the sole Arbitrator in the disputes between the Petitioner and the Respondent/Siddhi Vinayak Industries Private Limited arising out of a Pre-Sale Contract dated 12th April, 2007 in terms of which the Respondent agreed to purchase from the Petitioner 300 MT of vegetable oil.

2. The background facts are that a Free Trade Agreement ('FTA') was executed between the Government of India and the Government of Sri

Lanka on 28th December, 1998 with a view to promoting economic and business relations. In the said FTA, a provision was made for free import of Vanaspati and Bakery Shortening at 0% duty from Sri Lanka to India. The FTA also provided for an 80% tariff concession on import of Vanaspati oil and related products from Sri Lanka to India. It is stated that this induced various manufacturing units to be set up in Sri Lanka to produce Vanaspati and Bakery Shortening.

3. With a view to protecting the domestic market, the import of Vanaspati from Sri Lanka was decided to be channelised through Government agencies. Among the safeguard measures, a cap system was introduced at 2.50 lakh MT per annum. Out of this total cap limit, the Respondent was allocated a quota of 20233 MT per annum for Vanaspati and 5939 MT for Bakery Shortening for 2007-2008. The quota was to be exported by the Respondent from Sri Lanka in four equal consignments.

4. A notification was issued by the Government of India on 21st November, 2006 authorising the import of Vanaspati (hydrogenated vegetable oil) by private parties so long as they possessed a valid import licence issued by the Director General of Foreign Trade ('DGFT'), Government of India. On that basis, many interested parties in India approached manufacturers in Sri Lanka to enter into a Pre-Sale Contract, which was a pre-requisite for obtaining the import license.

5. Accordingly, on 12th April, 2007, a Pre-Sale Contract was executed between the Petitioner and the Respondent for the quarter of April, 2007 – June, 2007. The payment conditions included opening an irrevocable letter

of credit ('L/C') or telegraphic transfer ('TT') 15 days prior to the shipment and the quantity and quality to be final at the load port. It is stated that the Respondent accepted the terms and conditions vide e-mail dated 14th April, 2007. However, according to the Petitioner, the Respondent failed to furnish it with the copy of the import licence. It also did not secure the payment in terms of the Pre-Sale Contract. An e-mail was sent by the Petitioner to the Respondent on 14th May, 2007 requesting compliance. Reminders were sent on 19th and 25th May, 2007. Another e-mail of the same date stated that if there was any delay in the Respondent opening L/C, it would result in cancellation of the contracted quantity.

6. On 26th May, 2007, the Respondent sent a reply stating that it had nominated its Shipping Agent in Sri Lanka. It claimed to have already opened the L/C and requested the Petitioner to dispatch the material at the earliest. The Petitioner, however, points out that the L/C was opened only on 29th May, 2007 and that too in respect of only 15 containers. The Petitioner informed the Respondent on 28th May, 2007 that the vessel would sail out on 5th June, 2007. In response thereto an LC for 15 containers was opened and an intimation was received by the Petitioner in that regard on 30th May, 2007. The LC was defective as instead of Vanaspati it mentioned 'Vanaspati Ghee'. The Petitioner then sought an amendment of the L/C, which was carried out on 31st May, 2007.

7. At the instance of the Respondent, the Petitioner shipped the first consignment on 7th June, 2007. The Petitioner states that the first consignment of 15 containers reached India on 14th June, 2007. The

Petitioner's case is that despite there being no discrepancy in the LC, and the banker of the Petitioner forwarding the negotiation advice to the banker of the Respondent, no payment was made to the Petitioner by the banker of the Respondent. The Petitioner states that it also sent a copy of the export documents by e-mail and courier on 8th June, 2007. On the basis of the said original documents, the Respondent filed a bill of entry ('B/E') for home consumption before the Indian Customs and even got the sampling for custom clearance done.

8. As regards the second consignment, when no L/C was received in respect of the balance 30 containers, the Petitioner sent a reminder to the Respondent by the e-mail on 2nd June, 2007. It is stated that the Respondent provided another L/C but again only for 15 containers. The discrepancy pointed out by the Petitioner led to the Respondent to amend the LC. Later, the Respondent further amended the said L/C in connivance with the bank. This was protested by the banker of the Petitioner by swift message dated 11th July, 2007. The Petitioner states that despite the second consignment of 15 containers reaching India on 11th July, 2007, payment under the second L/C was withheld on account of the alleged discrepancy.

9. As regards the third consignment, it is pointed out that with no L/C having been provided to the Petitioner, an e-mail reminder dated 13th June, 2007 followed by reminders dated 22nd and 25th June, 2007 were sent to the Respondent. Thereafter, the Respondent opened an L/C in respect of 7 containers only and even this had discrepancies. It is stated that the discrepant L/C was provided on 27th June, 2007 and by then the Respondent

had received 37 containers under three consignments. The Petitioner did not receive payments for any of them. It is pointed out that the banker of the Petitioner never received any discrepancy note from the bank that issued the L/C nor any payment despite a substantial lapse of time from the date of shipment. The case of the Petitioner is that the Respondent managed to persuade its banker to stop the L/C from being honoured.

10. The Petitioner states that it received on 10th July, 2007 a letter dated 25th June, 2007 of the Respondent alleging that it had not received the shipment documents and report on the quality of the goods. The Petitioner questions how the Respondent could manage to file a B/E and remove samples without the money being released. Further, according to the Petitioner, if there was any discrepancy in the L/C, it was not possible to remove the goods without the knowledge of the banker of the Respondent. In response to the swift message of the Petitioner's banker dated 19th July, 2007 requesting release of payment, the banker of the Respondent sent a reply on 26th July, 2007 stating that the Customs Department in India found the goods to not be fit for import in India.

11. The Petitioner states that it was trapped by that time as it neither received the payment for the consignments nor got a No Objection Certificate ('NOC') from the Respondent for re-exporting the consignments. The Respondent forwarded a draft MOU requiring the Petitioner to provide a discount of US\$ 1,07,500 in total for all the three consignments. Despite the Respondent agreeing, it backed out subsequently and started seeking modification of the MOU by its mail dated 31st July, 2007. The Petitioner

states that the Respondent wanted to take advantage of the situation and compel the Petitioner to succumb to the Respondent's demand. The Petitioner further states that on the assurance of the Respondent that the entire payment would be made by 30th September, 2007, the Petitioner signed another MOU dated 6th August, 2007. It is stated that after obtaining the above signatures, the Respondent released US\$ 2,50,000 relating to the second consignment. The Petitioner then converted the L/C of the first consignment into DA terms payable by 30th September, 2007.

12. Thereafter, there was again a failure by the Respondent to make payment. On 5th December, 2007, the Petitioner sent a notice cancelling all concessions and demanding payment for the consignment. In its reply dated 1st January, 2008, the Respondent claimed that the second and third consignment of goods were short. By its reply dated 3rd January, 2008, the Petitioner denied the allegation.

13. On 12th May, 2008, the Respondent sent a demand letter claiming dues payable in the sum of US\$ 6,66,207. Subsequently, it filed a suit on 9th July, 2008. In the meanwhile, the Supreme Court at the request of the parties appointed Dr. A.S. Anand, former Chief Justice of India, as the sole Arbitrator.

14. The case of the Respondent, which was the Claimant/Petitioner before the learned Arbitrator, was that the goods supplied by the Petitioner did not conform to the description and additionally, the goods were also short in quantity. The Respondent also alleged that there was discrepancy in the LC. The Petitioner filed an application before the learned Arbitrator for direction

to the Respondent to produce documents relating to the bills of entry of the invoices, custom gate passes etc. By the order dated 20th March, 2010, the learned Arbitrator restricted the request of the Petitioner to the invoices dated 6th June, 2007, 18th June, 2007 and 27th June, 2007.

15. The Petitioner filed a statement of defence as well as a counter-claim. It also placed on record the material and relevant documents in support thereof.

16. By the order dated 20th May, 2010, the following issues were framed by the learned Arbitrator for determination:

- “1. Whether the goods supplied by the Petitioner (the Claimant) under its invoice no. HFP/SV/1/07-08/-7 conformed to the description and the terms stipulated in the contract dated 12.4.2007, if not, what is its consequence?
2. Whether the goods supplied by the Petitioner under its invoice no. HFP/SV/1/07-08/09 conformed to the description and the terms stipulated in the contract dated 12.4.07, if not, what is its consequence?
3. Whether the goods supplied by the Petitioner under its invoice no. HFP/SV/I/07-08/20 conformed with the description and the terms stipulated in the contract dated 12.4.2007, if not, what is its consequence?”

17. In support of its case, the Respondent examined five witnesses and the Petitioner examined three witnesses.

18. By the impugned Award dated 14th July, 2014, the learned Arbitrator allowed the claims of the Respondent and rejected the counter-claims of the Petitioner.

19. As regards the first consignment, the learned Arbitrator found that the parties had an oral agreement that the goods cleared by the Customs could be sold at the best available price in the Indian market since the cost of re-exporting the goods to Sri Lanka would have been enormous. It was held that the Petitioner's case that no such permission had been given to the Respondent did not bear scrutiny as in such case there would be no occasion to execute the MOU dated 29th July, 2007. It was concluded that the Respondent herein (Claimant) had taken the necessary steps to mitigate the losses by selling the goods as an industrial lubricant. The Arbitrator held that the Respondent was entitled to its claim of Rs.28,14,239.80.

20. The learned Arbitrator also specifically dealt with the counter-claim of the Petitioner in the sum of US\$3,33,398. It was found that the Petitioner herein did not give the Respondent any notice regarding dishonour of the B/E and, therefore, the counter-claim was not tenable. Consequently, in respect of the first consignment, the learned Arbitrator held that the Respondent was entitled to Rs.28,14,239.80 being the difference between the amount paid by the Respondent to the Petitioner for the said consignment and Rs.42,41,360 being the amount at which the goods were sold to M/s. Chanchal Enterprises.

21. The claim of the Respondent in respect of the second consignment was Rs.65,70,950 towards short delivery and Rs.51,03,000 on account of discounts given to the buyers because of the less quantity of oil in each tin. The learned Arbitrator analysed the evidence of Mr. Raghav Banka, CW-4 on behalf of the Respondent. It showed that a complaint had been lodged

with the Petitioner that the tins which had been supplied in respect of second consignment were underweight. Further, despite Mr. Manohar, a representative of the Petitioner, having visited the godown to verify the shortage in tins, he was not produced as a witness. The learned Arbitrator held that the Petitioner had shied away from stating the whole truth and the best evidence had been withheld. The evidence of Mr. Aditya Kedia (RW-1) was held to be hearsay. Even the evidence of RW-3 was held not to help the Respondent because it did not furnish any proof of the average weight of the tins supplied by the Petitioner herein to the Claimant (Respondent herein). “No weighment was done in the presence of the witness and the goods had remained at the factory premises after weighment.”

22. The learned Arbitrator further found that merely because no notice for conducting survey was given by Mr. Dahiya (CW-5) to the Petitioner, it could not be said that his evidence was unreliable. The learned Arbitrator noted that the witnesses of the Claimant (Respondent herein) were not effectively cross-examined on this aspect. It was found factually that the Claimant had made the entire payment on the second consignment and taken delivery of the tins of oil which were found to be underweight. As a result, the prospective purchasers refused to take delivery and the Claimant had to re-negotiate the price. It suffered the loss of Rs. 51,03,000. The value of the underweight cargo was US\$ 1,68,486 equivalent to Rs. 65,70,950. The learned Arbitrator found that the claimant was entitled to refund of the said amount. However, the claim for losses of Rs. 51,03,000 was rejected as no satisfactory evidence had been produced by the Claimant in respect thereof.

23. As regards third consignment of the goods, the Respondent claimed Rs. 24,28,500 towards short delivery of goods and Rs. 23,81,400 towards loss of profit. The learned Arbitrator held that the Claimant was unable to substantiate the above claim and, therefore, rejected it.

24. As regards issue No. 5, which concerned the claim in the sum of Rs. 20,40,524 towards loss suffered by the Respondent, the learned Arbitrator held that the Petitioner herein was justified in its stand of pulling back eight containers. At the same time, the Claimant was unable to produce evidence to show how much profit it would have earned had the consignment been delivered and the contents sold. The learned Arbitrator held that “under the circumstances, one can only apply some guesswork.” The Arbitrator considered it to be just and reasonable to award the claimant Rs. 10 lakh for the loss suffered by it.

25. Issue Nos. 7 and 9 concerned five contracts which were admittedly not carried out by the Petitioner herein. There was claim for loss of profit and compensation. The licence fee paid to DGFT was held recoverable by the Respondent/claimant. This amounted to Rs. 1,56,474 + Rs. 32,260 aggregating to Rs.1,88,734.

26. Issue Nos. 6, 8 and 11 arose out of the Petitioner's counter-claims. The Petitioner claimed amounts towards losses suffered by it on account of the quota loss. Reliance was placed by the Petitioner on the evidence of Mr. Aditya Kedia (RW-1). The learned Arbitrator, however, found that “no evidence, much less satisfactory evidence, has been produced by the Respondent (Petitioner herein) in support of the allegation revolving around

quota loss.” Mr. Aditya Kedia (RW-1) was found to have given evasive answers. The learned Arbitrator recorded that “faced with the evidence of RW-1, the Respondent’s learned counsel gave up the claim under those issues during the course of arguments and conceded that the Respondent had not led any evidence in support thereof.”

27. Both the Respondent and the Petitioner had claimed compensation on account of loss of goodwill and this formed subject matter of issue No. 10. However, neither party produced any evidence in this regard. Consequently, the claims were rejected.

28. As regards issue No. 12 concerning the allegation of the claimant that the Petitioner herein had modified the terms of payment, the learned Arbitrator found that nothing had turned on it in view of the findings on issue Nos. 1 to 11. None of the counter-claims of the Petitioner were found tenable. The following amounts were accordingly awarded by the learned Arbitrator in favour of the Respondent:

1	In respect of the claim relating to first consignment	Rs.28,14,239.80
2	In respect of the claim arising out of second consignment	Rs.65,70,950.00
3	For the unshipped quantity of vegetable oil (8 containers)	Rs.10,00,000.00
4.	For the License Fee paid by the Claimant for importing the oil which was not shipped by the Respondent to the Claimant	Rs.1,88,734.00
	Total	Rs.1,05,73,923.80

29. This Court has heard the submissions of Mr. Pawan Upadhyay, learned

counsel appearing for the Petitioner. The Respondent was set *ex parte* by the order dated 3rd October, 2016.

30. A caveat had been filed in the present matter. However, when the petition was first listed on 17th November, 2014, notice was issued on the caveat returnable on 16th January, 2015 since none had appeared for the caveator. Even on the subsequent date i.e., 16th January, 2015, none appeared for the caveator and the caveat was, therefore, closed. Accordingly, notice was issued to the Respondent in the petition returnable before the Joint Registrar ('JR') on 20th April, 2015. On 20th April, 2015 before the JR, one Mr. Shambo Nandy, Advocate appeared for the Respondent and stated that he would be filing his *vakalatnama* during the course of the day and a reply within two weeks. However, on the immediate next date i.e., 11th May, 2015, none appeared for the Respondent. No reply had also been filed. The JR ordered that if no reply was filed within one week, the Respondent would deposit costs of Rs.15,000 with the Prime Minister National Relief Fund and thereafter the Registry would accept the reply along with the receipt of deposit of costs. On 2nd July, 2015, the JR found that no reply had been filed by the Respondent. Even the costs had not been deposited. On the other hand, the counsel who appeared for the Respondent sought some more time. The JR ordered that the Respondent should file its reply positively by the next date of hearing i.e., 9th July, 2015 and also deposit costs within one week. On 9th July, 2015, the costs had not been deposited but reply was stated to have been filed under diary No. 327599. Pleadings were ultimately completed as noted in the order dated 17th March, 2016. However, an application, being IA No .9065/2016 was

filed by the counsel for the Respondent seeking discharge, which ultimately came to be allowed on 3rd October, 2016.

31. In the circumstances, although none appeared for the Respondent thereafter, the Court considered the reply filed by the Respondent to which a rejoinder was also filed by the Petitioner.

32. The arbitration proceedings concerned Pre-Sale Contracts dated 12th April, 2007 and 16th April, 2007 allotted to the Petitioner by the Board of Investment of Sri Lanka for the first quarter of 2007-2008 and four contracts dated 28th May, 2017, 29th May, 2007, and two contracts dated 10th June, 2007 for the second quarter of 2007-2008. Issue Nos. 1 to 4 before the Arbitrator dealt with three consignments of the first contract. The shipment of the first consignment was expected between April and June, 2007. The oil was expected to be packed in 15 kg/ 15 litres tins/jars/cartons and 1 litre/500 ml pouches. The payment was to be made through irrevocable L/C / TT 15 days prior to the shipment. The L/C was received by the Petitioner on 29th May, 2007. The discrepancy in it was that instead of Vanaspati, the L/C mentioned 'Vanaspati Ghee'. An amendment was accordingly carried out to the L/C on 31st May, 2007.

33. The first shipment under invoice dated 6th June, 2007 arrived in India on 12th June, 2007. The Customs Department, however, refused to grant clearance on the ground that the Central Food Laboratory ('CFL') by its report dated 26th June, 2007 found the goods not conforming to the quality specifications laid down in item No. A19 of Appendix B of the Indian Prevention of Food Adulteration Rules, 1955 ('IPFA Rules'). When the

Petitioner was informed, it assured the Respondent by an e-mail dated 10th July, 2007 that the goods conformed to the IPFA Rules. On this basis, the Respondent filed a writ petition in this Court to seek release of the goods after re-testing. By an order dated 9th August, 2007, the High Court directed re-testing of samples at CFL and the CFL did the re-testing on 7th September, 2007 and found the consignment to be in accordance with the IPFA Rules. Ultimately, the consignment was cleared on 2nd October, 2007.

34. Since the timelines had been long crossed, the parties in the meanwhile entered into a fresh MOU dated 29th July, 2007. In terms of the MOU, the major change was that the payment terms of the L/C were changed to Delivery Against Acceptance ('D/A') terms upon Custom clearance of the goods for human consumption. Under this MOU, it was agreed that if the goods failed to get Customs clearance by 30th September, 2007, the Respondent would re-export the consignment to Sri Lanka at the cost of the Petitioner. In that event, the Petitioner would pay 70% of the actual cost of the re-export. Since the goods were cleared by Customs on 2nd October, 2007, the Petitioner requested the Respondent to sell the goods in the Indian market at the best available price as a natural lubricant. In this process, the Respondent incurred a loss of Rs. 28,14,239.80.

35. It is, however, sought to be contended that the MOU dated 29th July, 2007 was never agreed to by the Petitioner. A new case is sought to be made out that since the goods were released by 7th September, 2007, the Respondent was liable to make payment. There was no reference made at all to the issue concerning the grant of customs clearance. The impugned

Award of the Arbitrator refers to the affidavit of evidence of Mr. Nawal Kishore Banka, who was examined as CW-3 and in particular to paras 14 to 17 where the fact of the above MOU had been adverted to. The sale by the Respondent of the consignment to M/s. Chanchal Enterprises for Rs. 42,41,360 has been proved before the learned Arbitrator. The total charges and expenses paid by the Respondent to the Petitioner for the first consignment was Rs.70,55,599.80.

36. The learned Arbitrator has also referred to the cross-examination of Mr. Raghav Banka (CW-4) on the figure of Rs. 42,41,360 claimed. CW-4 explained that the amount had been calculated by taking the amount of the two invoices excluding VAT charges but including Rs. 625, which was received by the Respondent from the Lorry Driver. The learned Arbitrator has also referred to the cross-examination of Mr. Nawal Kishore Banka on the goods being sold as natural lubricant for industrial purposes since they were not fit for human consumption. It is on the basis of the above evidence that the learned Arbitrator came to the conclusion that the Respondent had taken all necessary steps to mitigate the losses. It was held that the Respondent was under no obligation to have the Vanaspati re-processed notwithstanding that Mr. Dwijendra Mathur (RW-2), the witness of the Petitioner, made a statement to that effect.

37. The counter-claim by the Petitioner seeking to recover US\$ 3,33,396 was resisted by the Respondent on the ground that the Petitioner never presented the B/E for payment. In particular, it was pointed out that the Petitioner did not give any notice of dishonour of B/E to the Respondent.

The learned Arbitrator has adverted to the cross-examination of RW-1 examined on behalf of the Petitioner. It is on that basis that the learned Arbitrator concluded that the Petitioner failed to establish its entitlement to the above counter-claim.

38. In the petition, no attempt has been made to demonstrate how the above finding of the Arbitrator, which is based on the evidence on record, could be said to be perverse. It is simply stated that the issue of the first consignment was not dealt with by the learned Arbitrator correctly “as he missed the various admitted documents on record.” Strangely the Petitioner does not refer to any of the documents that the learned Arbitrator has discussed and which form part of the record. The said documents were put to the witnesses who have given clear answers. This Court is not expected to re-appreciate the evidence and interfere with the Award only because a different conclusion is possible. In any event, nothing has been brought on record by the Petitioner to counter the factual position that the Customs Department in India did not clear the goods in the first instance and that the goods could ultimately be cleared only on 2nd October, 2007.

39. Turning now to the second consignment of the goods of the first contract, 340.20 MT was received in India on 11th July, 2007. It was denied Customs clearance on the same ground that it did not conform to the standards laid down in item No. A19 of Appendix B of the IPFA Rules as the “melting point” was above the maximum prescribed limit. The goods were ultimately cleared after fresh samples were drawn and tested under the orders of this Court. However, after taking the delivery, the tins were found

to be underweight i.e., less than 15 kg per tin. As a result, the Respondent had to give discount to its buyers. Taking into account the import duty that had to be paid and the ground rent and liner detention charges for prolonged storage of the oil containers, the price of the short delivery cargo worked out to US\$ 1,68,486 equivalent to Rs. 65,70,950. This was claimed by the Respondent from the Petitioner. On its part, the Petitioner offered to pay only US\$ 83,396 towards container detention and ground rent for prolonged storage. There were two items of claims as far as consignment of goods were concerned – Rs.65,70,950 towards short delivery and Rs.51,03,000 towards discount.

40. As already noticed, the second item of claim was rejected by the learned Arbitrator on the ground of lack of evidence. However, as regards first claim, it was allowed in its entirety after a very thorough examination of the deposition of the witnesses as well as the documents presented before the learned Arbitrator. In particular, the learned Arbitrator discussed the answers given by Mr. Aditya Kediya (RW-1) during his cross-examination and concluded that the Petitioner had “shied away from stating the whole truth.” The case of the Petitioner that the information regarding short supply was received by the Petitioner only after notice dated 5th December, 2007 was issued by it was not believed by the learned Arbitrator. There was an admission by Mr. Kediya that Mr. Manohar, the representative of the Petitioner, did visit the godown of the Respondent to verify the short weight of the tins. However, Mr. Manohar was not examined as a witness.

41. The Petitioner has relied upon the statement of Mrs. Niranjali

Weerassekera (RW-3), who was examined through video conferencing. Her evidence was discussed in detail by the learned Arbitrator in para 51 of the impugned Award and it was concluded that her evidence did not really help the Petitioner “because it does not furnish any proof concerning the average weight of the tins supplied ... in the second consignment.” It was further noted by the learned Arbitrator that the weighment was as per the Petitioner’s endorsement on the relevant documents. Moreover, “no weighment was done in the presence of the witness and the goods had remained at the factory premises after weighment.” The learned Arbitrator also discussed extensively the evidence of CW-5, the Surveyor who had been jointly appointed by the parties, who had inspected the goods lying in the godown and had submitted a report.

42. The learned Arbitrator has referred to the fact that the cross-examination of Mr. Dahiya (CW-5) by the Petitioner on the tins delivered in the second consignment being underweight was not effective. In particular, the Arbitrator adverts to the Petitioner admitting to the visit of its representative to the godown of the Respondent to verify the claim that the tins were underweight. The learned Arbitrator was careful not to award the loss of profit as claimed since there was no satisfactory evidence in that regard. However, the shortage of weight led to the inference that the Respondent had already made excess payment which worked out to Rs. 65,70,950 and this is what was awarded.

43. The Petitioner has been unable to assail the above conclusion of the learned Arbitrator with reference to the evidence of CW-5. In any event,

nothing has been shown to the Court to come to the conclusion that the learned Arbitrator has taken a view which was not possible to be taken on the evidence before him.

44. The dispute in respect of the third consignment in which 7 containers were shipped under invoice dated 1st July, 2007 was similar to the claim in respect of the second consignment. However, here the Arbitrator found that the Respondent was unable to produce satisfactory evidence to show that there were wholesalers who complained about the shortage of weight leading to recall of the goods. The Respondent, in fact, failed to examine a single wholesaler or other purchaser. Consequently, the entire claim in respect of the third consignment was rejected by the learned Arbitrator.

45. The non-shipment of the balance 8 containers under the third consignment formed the subject matter of issue No .5. The excuse given by the Petitioner was that the Respondent had not opened the L/C and nominated the vessel for the said 8 containers and, therefore, the cargo could not be loaded. The Arbitrator noted the practice that L/Cs would be opened after the detail of the vessels in which the cargo would be shipped were intimated. Consequently, the explanation offered by the Petitioner for not nominating the vessel for the 8 containers did not stand to reason. As regards loss of profit suffered by the Respondent, the learned Arbitrator referred to the evidence of Mr. Raghav Banka (CW-4). He noticed that the said evidence of CW-4 had gone un rebutted. “He was not at all cross-examined on that aspect.” The Arbitrator held that no justifiable reason was given by the Petitioner for the non-supply of the 8 containers. However, it

was also noted that the Respondent had not been able to establish that it suffered a loss of more than Rs. 20 lakh. It is in these circumstances that the learned Arbitrator considered the Award of Rs. 10 lakh towards loss of profit for non-dispatch of the remaining 8 containers in the third consignment to be appropriate.

46. Here, again, the Petitioner has not been able to point out why the conclusion reached by the Arbitrator in respect of issue No. 5 could not have been arrived at. Apart from making bald allegations about the Award being opposed to public policy and contrary to the relevant documents and the provisions of law, the Petitioner fails to point out in what manner the Award could be said to be unsustainable in law.

47. As regards issue Nos. 7 & 9 which dealt with five contracts that were not carried out by the Petitioner, it was held that the Respondent would be entitled to recover the licence fee paid by it to the DGFT to the extent of Rs.1,56,474 + Rs.32,260. Detailed and cogent reasons have been given by the learned Arbitrator for arriving at the above conclusion. There is also a discussion of the evidence, in particular, of Mr. Ashok Kumar Jhajharia (CW-2) and Mr. Vikky Gupta (CW-1). Here, again, the learned Arbitrator observed that the Respondent was not at all challenged in the cross-examination in respect of the said four contracts. It was held that the Respondent would be entitled to recover the charges of licence fee in the aforementioned sum.

48. As regards the plea of the Petitioner regarding alleged quota loss, the learned Arbitrator observed that “no evidence, much less, satisfactory

evidence, has been produced by the Respondent (Petitioner herein) in support of the allegation revolving around quota loss.” The evidence of Mr. Aditya Kedia (RW-1) was extensively discussed. In fact, during the course of arguments before the learned Arbitrator, the Petitioner’s counsel gave up the claims arising out of issues 6, 8 & 11 as is noticed in para 85 of the Award.

49. On the question of loss of goodwill, the learned Arbitrator found under issue No. 10 that the claim had not been substantiated.

50. None of the other claims were entertained and the sums were awarded together with interest at 18% per annum from the date of the Award till the date of payment.

51. The scope of interference by the Court with a reasoned Award under Section 34 of the Act is extremely narrow. The Court is not expected to sit in appeal over the evidence of the Arbitrator. Even the conclusions of the Arbitrator as regards interpretation of the clauses of the contract would normally be final unless they are so perverse to suffer from a patent illegality or attract any of the grounds under Section 34 of the Act. The impugned Award certainly does not fall in the category of those Awards that are liable to be interfered with under Section 34 of the Act.

52. The petition is, accordingly, dismissed but in the circumstances, with no orders as to costs.

S. MURALIDHAR, J.

MARCH 7, 2017/b'nesh