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

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Judgment delivered on: 22.08.2017

+ O.M.P.(COMM) 310/2017

M/S RELIABLE AGRO FOODS & OTHERS

..... Petitioners

versus

**M/S AL-NAFEES FROZEN FOOD EXPORTS
PRIVATE LIMITED**

..... Respondent

Advocates who appeared in this case:

For the Petitioners : Mohd Rashid

For the Respondent : Mr Sunil Dalal and Mr Vivek Jain

CORAM:-

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

22.08.2017

SANJEEV SACHDEVA, J. (ORAL)

IA No.9455/2017(exemption)

Allowed, subject to all just exceptions.

O.M.P.(COMM) 310/2017 & IA No.9456/2017(stay)

1. By this petition under section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act), the petitioners impugn award dated 17.05.2017 passed by the Sole Arbitrator, whereby some of the claims of the respondent/claimant

have been allowed.

2. The challenge to the Award is premised on the following grounds:-

- (i) *First of all, it is contended that there was no Arbitration Agreement between the parties and the petitioners had not agreed to any Arbitration Clause in the Agreement.*
- (ii) *Secondly, it is contended that no notice was issued to the petitioners invoking the Arbitration Clause.*
- (iii) *Thirdly, it is contended that there is non-compliance of Section 18 of the Act, which affords equal treatment to both parties. It is contended that the petitioners were not granted an opportunity to either cross-examine the witnesses of the respondent/claimant or to lead its evidence.*
- (iv) *Fourthly, on merits, it is contended that award of claim No.1 is not based on any reasoning but is based on mere conjecture and surmises.*
- (v) *Lastly, it is contended that the Arbitrator has awarded claim No. 4, which was not substantiated. The contention is that the invoices relied upon by the Arbitrator did not pertain to the petitioners but related to third party.*

3. With regard to the first and second objections raised by the petitioners that there is no Arbitration Agreement and no notice invoking the alleged arbitration clause was issued to the petitioners, reference may be had to Judgment dated 19.08.2015 in Arbitration Petition No.695/2015, which was the petition filed by the respondent under Section 11 of the Act seeking appointment of an Arbitrator.

4. The court while passing Judgment dated 19.08.2015 has recorded that when the application under Section 11 (5) of the Act was filed, the petitioners had raised two objections; one was with regard to institution of civil proceedings by the petitioners against the respondent-claimant and the other that there was no Arbitration Agreement between the parties.

5. Negating both the objections raised by the petitioners, the Court, by judgment dated 19.08.2016, held that the Agreement between the parties contained an Arbitration Clause and was signed by one of the partners of the petitioners and was accordingly, binding upon the parties. In view thereof, the Arbitrator was appointed and disputes referred to Arbitration. No plea was taken in those proceedings, by the petitioners that notice invoking the arbitration clause has not been issued.

6. In support of the plea that petitioners have not agreed to any arbitration clause, it is contended by learned counsel for the petitioners, that though the signatures on the Agreement are of one of

the petitioners, he was not aware as to what he was signing on.

7. This contention cannot be accepted. No such plea was raised either in the petition under section 11 of the Act or before the arbitrator. The signatures on the agreement are admitted by the petitioners. The agreement contains an arbitration clause. Once the signatures are admitted, the petitioners cannot be permitted to contend that they were not aware of the contents of the Agreement. Not only such a plea has not been raised earlier, no evidence has been led by the petitioners to substantiate the same. Further, it is seen from the statement of defence filed by the petitioners to the claim petition that such an objection has not been not taken. The contention of the petitioners is accordingly negated.

8. With regard to the plea that no notice was issued by the respondent invoking the Arbitration clause, it is seen that such a plea was not raised at the time when the petition under Section 11 of the Act was filed by the respondent. Even though the petition was contested by the petitioners, no such objection was taken by the petitioners. Accordingly, this contention is also liable to be rejected.

9. Further the plea raised by the petitioners that they have filed a civil suit in the Court of Junior Division at Purna, Maharashtra, has been dealt with by the learned arbitrator, he has opined that as the Agreement between the parties confer exclusive jurisdiction to the Courts at Delhi, the proceedings before the Court of Civil Judge,

Purna, District Parbhani, would be without jurisdiction.

10. Further, it may be noticed that there is no interim order granted by the Court of Civil Judge, District Purna, in the suit filed by the petitioners interdicting the Arbitration proceedings. Further, the jurisdiction of the Civil Court would be ousted.

11. Merely because the petitioners have filed a suit impugning the Arbitration Agreement would not, in any manner, impinge upon the Arbitration Proceedings or nullify the Award passed. There is no merit in this contention raised by the petitioners as well.

12. Coming to the plea raised by the petitioners with regard to the equal treatment in terms of section 18 of the Act. To examine the said plea, it would be expedient to note some of the proceedings of the arbitration.

13. Arbitrator was appointed by order dated 19.08.2016. The Arbitrator entered reference and issued notice to the parties. The parties thereafter entered appearance and filed their pleadings. Issues were framed and the parties were relegated to leading evidence. The respondent/claimant filed the affidavit. Thereafter, the parties were directed to file List of Witnesses and Affidavit of Admission/Denial. The petitioners did not file any List of Witnesses.

14. By order dated 13.12.2016, parties were granted four weeks time to file List of Witnesses and the Evidence by way of Affidavits

of their witnesses within six weeks. Dates of 24.02.2017 and 25.02.2017 were fixed for the purpose of examination and cross-examination of the witnesses of both the parties.

15. The case was not taken up on 24.02.2017 and 25.02.2017 on account of an e-mail sent by the respondent seeking an adjournment on account of indisposition of its witnesses. Medical Certificate of the said witness was enclosed. There was no objection to the adjournment by the petitioners and accordingly, the case was adjourned to 05.04.2017 and 06.04.2017. Learned Arbitrator made it clear to the parties that no adjournment would be granted on the said dates.

16. The stipulated period for making the Award was to expire in August - September 2017. The parties, however, refused to consent to extensions of the period for making the Award. Accordingly, the Arbitrator was obliged to conclude the proceeding within one year of entering into reference.

17. Despite the learned arbitrator's specific communication that no adjournment would be granted on 05.04.2017 and 06.04.2017, the petitioners sought an adjournment on the ground that their witness Mr Mohammed Ali Khan, who was also one of the partners, was indisposed and could not be made available for cross-examination.

18. The request of the petitioners was rejected by the Arbitrator by order dated 03.04.2017 on the ground that the matter was fixed for evidence of the respondent and as such, indisposition of the witness of

the petitioner was no ground for adjourning the matter. The counsel could conduct the cross-examination and since the petitioner is a partnership firm, if one partner was indisposed, the other partner could be present.

19. Learned Arbitrator has also recorded that petitioners had neither filed any list of witnesses nor the evidence Affidavit of Mr Mohammed Ali Khan, on whose ground adjournment was sought. The Arbitrator refused to adjourn the dates for evidence and cross-examination of the witnesses of the respondent.

20. When the matter was taken up on 05.04.2017, neither the counsel nor any representative of the petitioners was present. At the request of the Arbitrator, counsel for the respondent called up the counsel for the petitioners. The Arbitrator has noticed in the order that the counsel for the petitioners declined to appear on the ground that she had no instructions from the petitioners.

21. As there was no appearance on behalf of the petitioners, the evidence of the respondent was recorded and the same was taken as *ex-parte* evidence. The proceeding was adjourned to 20.04.2017 for the purposes of Final Arguments. The order was communicated to the petitioners.

22. The petitioners filed an application seeking modification of the order dated 05.04.2017. The said application was rejected by the Arbitrator on the ground that the petitioners had failed to proceed with

due diligence and were seeking to delay the proceeding through non-appearance either themselves or through counsels. No list of witnesses or evidence affidavit was filed on behalf of the petitioners. There was also no representation on behalf of the petitioners when the case was fixed for the evidence of the respondent.

23. The Arbitrator has noticed that along with the request to set aside the order dated 05.04.2017, the petitioners had not even sought to file its evidence affidavit to show it's *bona fide*.

24. When the proceeding was taken up on 20.04.2017, counsel for the petitioners was present. Learned Arbitrator had asked the counsel appearing for the petitioners as to whether she would like to cross-examine the witness on the said date if an opportunity was granted. Counsel for the petitioners declined on the ground that she has no instructions.

25. The Arbitrator was left with no opportunity but to proceed with the matter. Thereafter, counsel for the petitioners participated in the final arguments and advanced arguments on behalf of the petitioners.

26. After the hearing was concluded and case reserved for making of the award, an application was filed by the petitioners under Section 13 read with Section 12 of the Act.

27. The said application has been rejected by the Arbitrator by a detailed speaking order dated 16.05.2017. The Arbitrator has noticed

the facts, as enumerated above and come to a conclusion that the apprehension expressed by the petitioners was completely unfounded.

28. The petitioners, in this petition, have not impugned order dated 16.05.2017 of the Arbitrator rejecting the application filed under Section 13 read with Section 12 of the Act.

29. The facts enumerated above and reading of order dated 16.05.2017 shows that the Arbitrator has sufficiently complied with the provisions of Section 18 of the Act. Accordingly, the contention raised by the petitioners is not sustainable and is rejected.

30. Coming to the challenge to the award on merits, claim No.1 is impugned on the ground that the same is based on conjecture and surmises.

31. The Arbitrator by the award in respect of claim No. 1 has held as under:-

“23. In respect to this claim, the Claimant has contended that the respondents did not provide adequate storage facilities for storing the slaughtered meat produced at the factory of the respondents due to which the Claimant was forced to transfer the meat immediately from the factory of the respondents to the storage facility located at Taloja, Maharashtra. The Claimant has also contended that in the process, they had suffered loss as they could not store the processed meat at the store house of the respondents as agreed upon and were forced to incur additional cost of transportation of the said process made by refrigerated trucks amounting to

Rs.17,03,623/-. Additionally, the Claimant incurred storage cost amounting to Rs.1,07,47,087/- as it was forced to transfer the meat to the premises of the Claimant at Taloja.

24. The contention of the Respondents in the reply filed is that the officials of the Claimant took away the finished production on a daily basis from the factory based on the reasoning that they urgently required the meat for the purposes of their commercial obligations and therefore, there were no conditions or occasions for the Respondents to provide storage facilities. According to the Respondents, storage facilities were available but the same was not utilized by the Claimant as the same was subject to additional charges which fact may have led the Claimant to take away the product on a daily basis. According to the Respondents, there was no merit in this case, which is erroneous.

25. Relevant clauses of the Agreement having bearing on the facts of the present case have already been extracted. A bare perusal of the said clauses would indicate that the Respondents would be responsible for the payment of electricity/water charges, maintenance of the plant and machinery, payment of maintenance staff, storing facility, watchman and supervisors for the maintenance. There is yet another clause namely (m) which also speaks of that the Respondents have the responsibility and obligation of slaughtering and processing of buffalo meat as also for freezing, loading and unloading. It is thus clear and apparent that an obligation and responsibility was undertaken under the Agreement by the Respondents to provide for storage and freezing facility. The buffalo meat, which was slaughtered and processed, can be preserved only for a very short period and therefore, it requires proper storage facility with all benefits including freezing

facility. As the Respondents could not provide the storage and freezing facility to the processed meat, although specifically agreeing to provide such facility, the claimant had no other alternative but to take it to its own storage facility, which is located far away, on a day-to-day basis. If, however, the facility of storage and freezing was made available to the Claimant by the Respondents, they could have taken the finished product to the port directly and could have got it exported at their convenience.

26. In any case, having considered the facts, I am of the considered opinion that although transportation of processed meat was not the responsibility of the Respondents but of the Claimant, yet the Claimant was deprived of the opportunity to transport the processed meat at its convenience and only at the time when it was to be exported after using the storage and freezing facilities provided by the Respondents, as per the agreed terms referred above. Therefore, there is violation of the terms of Contract by the Respondents. Although the Claimant would have ultimately transported the finished product for the purpose of export, due to the Respondents not providing adequate storage and freezing facility, the same had to be transported at a speedy frequency in respect of which the Claimant had to use refrigerated trucks, which carried the processed meat frequently to the storage facilities arranged by the Claimant at Taloja in Navi Mumbai, which would not have been the case if the Respondents had provided adequate storage facilities to the Claimant. This is also apparent from the dates provided in the said receipts of the transport services companies that consignments of frozen buffalo meat were transported frequently from the Respondent's factory to Claimant's storage facility in Taloja. Due to such circumstances caused by the Respondents' failure to provide storage, Claimant incurred costs that it had not

foreseen while entering into the Agreement with the Respondents. In the light of these observations, it is deemed appropriate to partially allow the Claimant's claimed amount with respect to transportation costs to the extent of 50% of costs incurred by the Claimant, as shown in the receipts. Therefore, an amount of Rs.8,51,812/- is granted to the Claimant in this regard. The said processed and frozen meat was stored in the Claimant's storage facility for which claim is made for payment of an amount of Rs.1,07,47,087/-. With respect to its claim for storage costs, only an unsigned and unverifiable statement has been provided by the Claimant wherein costs of storage of the meat has been provided for the period of 28.08.2015 to 30.09.2016. The Claimant has failed to provide any substantial evidence that would establish that it had incurred the aforesaid quantum of costs with respect to storage and the simple statement provided by it cannot be relied on as reliable and substantial. In these circumstances, the Claimant's claim for the amount of Rs.1,07,47,087/- is partially allowed to the extent of 15% of the claimed amount, which amounts to Rs.16,12,063/-. This amount has been granted considering that the Claimant had to store the processed meat in its storage facility even though it had not envisaged the same while entering the Agreement with the Respondents, and thereby had to forego income that it would have otherwise earned if the said storage facility was used in the Claimant's regular course of business. Therefore, an amount of Rs.16,12,063/- with respect to the Claimant's claim for storage costs is allowed."

32. The Arbitrator has found that though transportation of processed meat was not the responsibility of the petitioners, however, the respondent was deprived of the opportunity to transport the

processed meat at its convenience and only, at the time when it was exported after using the storage and freezing facility provided by the petitioners.

33. The Arbitrator has interpreted the terms of the agreement between the parties and drawn the conclusion that the petitioners have not complied with the terms of Contract and provided adequate storage and freezing facility. The arbitrator has found that the respondent was required to transport the meat at the speedy frequency for which the respondent had used the refrigerated trucks which carried the processed meat frequently to the storage facility arranged by the respondent, which would not have been the case if the petitioner had provided adequate storage facility to the respondent. The respondents have had to incur extra expenditure, which would not have been the case, had the petitioners complied with the terms and conditions of the contract.

34. It may be further noticed that the evidence led by the respondent has gone un-rebutted. The petitioners have neither cross-examined the witness of the respondent nor led any evidence.

35. In view of the uncontroverted evidence of the respondent, which has been relied upon by the learned Arbitrator, no fault can be found with the findings returned by the Arbitrator. The Arbitrator has merely allowed part of the award and awarded only 50% of the claim towards cost for transportation and 15% claim for storage.

36. With regard to the claim No.4, the finding of the Arbitrator is as under:-

“38. The Claimant has raised a claim for delivery of offal and animal bones to the Respondents for which three invoices amounting to Rs.42,23,624/- was raised by the Claimant and on which Value Added Tax(VAT) has already been paid by the Claimant. Therefore, it has made a claim for the stated amount along with additional interest. In its reply to the Claimant, the Respondents simply denied and disputed the said claim. The Respondents advanced no arguments in this regard.

39. The Claimant in support of its contentions has adduced evidence in the form of its ledger account for the period 1st April, 2015 to 31st March, 2016 wherein three invoices are provided, bearing Excise Invoice Numbers ANE/15-16/PB-001 dated 31.08.2015, ANE/15-16/PB-002 dated 30.09.2015 and ANE/15-16/PB-003 dated 31.10.2015 respectively issued. The total value of the three invoices is shown as Rs.42,23,625.00. Additionally, in all three receipts provided by the Claimant, payment of 5% VAT has been recorded.

40. No further deliberation is required in this regard and it is quite clear from the evidence adduced by the Claimant that the amount of Rs.42,23,624/- is liable to be paid to the Claimant for the delivery of the offal and other animal products. The Respondents only rejected the said claim without providing any argument or reasoning. In light of the claim for Rs.42,23,624/- towards the invoices raised, the said amount is hereby granted to the Claimant. The basis of the aforesaid claim is supported by three receipts placed by the Claimant, which also includes a payment of 5% VAT. None of the aforesaid documents have been contested by the Respondents, and they have simply stated their denial of

the said claim. The fact that the offal and other animal products were delivered to the Respondents has also not been denied. In the light of these observations, it is clear and apparent that the Claimant had a legitimate claim for the offal and animal products that were sent to the Respondents, and therefore, the claim to the amount of Rs.42,23,624/- has to be allowed in favour of the Claimant and against the Respondents.”

37. The claim has been raised by the respondent on the ground that the offal and animal bones were supplied to the petitioners by three trade invoices.

38. The contention of the learned counsel for the petitioners is that the invoices are addressed to one M/s Allied Food Products, which is not the petitioner.

39. Learned counsel for the petitioners, however, very candidly admits that M/s. Allied Food Products is a proprietorship concern of one of the partners of the petitioners.

40. In the claim petition, the respondent has very categorically stated as under:-

“(f) The Respondents have received delivery of the offals and animal bones for which claimant has raised three trade invoices on the Respondents for an amount of Rs.42,23,624/- (Rupees Forty Two Lac Twenty Three Thousand Six Hundred Twenty Four Only) on which the Value –Added Tax (VAT) has been paid by the Claimant although not yet paid by the Respondents. The Claimant

is entitled to recover the payment of Rs.42,23,624/- (Rupees Forty Two Lakhs Twenty Three Thousand Six Hundred Twenty Four Only) along with interest from the Respondents.”

41. In response to the said claim, the petitioners, in their statement of defence, have stated as under:-

“In reply to sub-paragraph 12(f) of the claim petition under reply are denied and disputed”

42. It is observed that the petitioners have given a very evasive denial. There is no specific denial to the averment of the respondent/claimant that the petitioners have received delivery of the offal and animal bones and three trade invoices in the sum of Rs.42,23,624/-, on which Value Added Tax (VAT) have been paid, were raised by the respondent and were unpaid.

43. The findings of the Arbitrator read with the specific pleading on the part of the respondent and the evasive denial in the statement of defence, when examined in the light of the fact that witness of the respondent who has affirmed to the same has not been cross-examined and no evidence to the *contra* has been leading by the petitioners, leads to irrefutable conclusion that the respondent has duly proved its claim and accordingly, the award for this claim cannot be faulted.

44. Further, 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

45. 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

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

² ***Jhang Cooperative Group Housing Society v. P.T Munshi Ram &***

46. The arbitrator's decision is generally considered binding between the parties and therefore, the power of the court to set aside the award would be exercised only in cases where the court finds that the arbitral award is on the fact of it erroneous or patently illegal or in contravention of the provisions of the Act. It is a well-settled proposition that the court shall not ordinarily substitute its interpretation for that of the arbitrator. The arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him.³

47. Learned Arbitrator 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. I find no infirmity in the view taken by the Arbitrator calling for any interference. The Petition is accordingly dismissed.

48. There shall be no orders as to costs.

49. Order *Dasti* under signatures of the Court Master.

SANJEEV SACHDEVA, J

AUGUST 22, 2017

'Sn'

Associates Private limited: 202(2013) DLT 218.

³ ***Swan Gold Mining Ltd. v. Hindustan Copper Ltd., (2015) 5 SCC 739***