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

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Date of decision: 09.10. 2017

+ O.M.P. (COMM) 360/2017 and IA No. 11328/2017 (stay)

NATIONAL AGRICULTURAL COOPERATIVE MARKETING
FEDERATION OF INDIA LTD. Petitioner

Through Mr. A.K.Thakur, Mr.R.K.Mishra and
Mr.Rishi Raj, Advs.

versus

BANACO OVERSEAS Respondent

Through Mr.K.Singhal and Mr.Siddharth
Mittal, Advs.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. This petition is filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) seeking to impugn the Award dated 24.05.2017 passed by the learned Arbitrator.

2. The facts relevant for the disposal of this petition, briefly stated are that the Government of India under an obligation with WTO to import specified quantity of Maize (Popcorn) reduced custom duty on the product from 15% to 0% vide Custom Notification dated 25.01.2007. Only designated State Trading Enterprises (STE) including the petitioner were to act as canalizing agency on behalf of certain importers. Directorate General of Foreign Trade (DGFT) had issued import licenses dated 26.04.2010 in

favour of the petitioner with a stipulation that the same should further be supplied to the actual user named under the license. On the basis of the request letters entered by the respondent with the petitioner, the licenses are said to have been handed over to the respondent. Parties entered into an agreement on 15.10.2010 by which the respondents request to the petitioner to import 8160 MTs of Maize (Pop Corn) was accepted.

3. It is the case of the petitioner that on 14.12.2010, the Director of Revenue Intelligence (DRI) raided the respondent's premises and detained the Maize procured by the respondent and also withheld the clearance of the goods lying at various ports. It is contended by the petitioner that they learned about these facts when the officers of the petitioner were summoned by DRI for investigation. It is further claimed that as the import license was issued in favour of the petitioner and all consequences arising out of the violation of the license were attributable to the petitioner, the petitioner suspended further transactions with the respondent by issuing a letter dated 18.03.2011 to its custom handling agents advising them not to clear any cargo till further instructions. The respondent aggrieved by the acts of DRI is said to have filed a writ petition being WP(C) 898/2011 before this court. The writ petition was disposed of on 24.05.2011 whereby an undertaking was given by the respondent to pay the customs duties, etc. if the same is imposed.

4. Before dealing with the contentions of the learned counsel for the parties, I may look at the statement of claim to complete the full narration of facts which have not been fully elaborated by the respondent in the present petition.

5. As per the respondent, the respondent paid a sum of Rs.1,77,79,679/- to the petitioner as the sale price for 934.12 MTs of Maize to be imported by the petitioner for sale. Out of the said quantity of 934.12 MTs, the petitioner cleared 621.96 MTs valued at Rs.1,23,41,804/- balance 312.16 MTs valuing Rs.60,75,347/- was not got cleared by the respondent. It is the case of the respondent that vide letter dated 27.01.2011, it asked the petitioner to get the consignments cleared as the goods had arrived at the Indian Ports and bill of entry had already been filed. It was also brought to the notice of the petitioner that Pop Corn Maize being an agricultural product is perishable in nature and its shelf life is short and therefore, delay in clearing the same would result in complete loss of goods. Despite various requests, no action was taken by the petitioner.

The respondent filed a writ petition being WP(C) No. 898/2011 before this court for the release of the goods. On 11.02.2011, this court directed the DRI to dispose of the application of the respondent dated 27.01.2011 by 05.03.2011. On 05.03.2011, DRI informed the respondent that they have already forwarded a no objection for allowing the provisional release of the detained goods to the custom authorities. It is urged that the petitioner despite the said no objection given by DRI asked the clearing agents by letter dated 18.03.2011 not to get the goods cleared. The respondent thereafter preferred a second writ petition being WP(C) No.2172/2011 seeking quashing of the letter dated 18.03.2011 and for directions to the petitioner to clear the consignments. This court vide order dated 24.05.2011 issued directions permitting the respondent to clear the consignments subject to giving necessary undertakings. It is urged that in the meantime a huge amount had accumulated towards demurrage, detention and other incidental

charges which the respondent paid and hence, the claim for refund of the same and other damages.

6. Disputes having arisen between the parties, the respondent approached this court for appointment of an arbitrator. This court vide its orders dated 14.03.2013 appointed Hon'ble Mr. Justice K. Ramamoorthy as the sole Arbitrator to adjudicate the disputes between the parties.

7. Learned Arbitrator made the following award in favour of the respondent:-

"I. Directing the respondent to pay to the claimant the sum of Rs.42,62,637/- towards demurrage charges (claim no.1).

II. Directing the respondent to pay to the claimant the sum of Rs.57,50,347.32 towards loss on account of perished consignment (claim no.2).

III. Directing the respondent to pay to the claimant the sum of Rs.58,62,000/- towards payment for shipment in transit which were called back by foreign suppliers (claim no.3).

IV

V. Directing the respondent to pay to the claimant the sum of Rs.9,00,000/- towards loss of profit (claim no.5).

VI. Directing the respondent to return the security deposit of Rs.2 lakhs without interest (claim no.6)

VII. Directing the respondent to pay to the claimant the sum of Rs.2,49,928/- towards closing balance (claim no. 7)

VIII. Directing the respondent to pay to the claimant interest at the rate of 18% p.a. on the sum of Rs.57,50,347.32 from 27.01.2011 till the date of payment, directing the respondent to pay to the claimant interest at the rate of 18% p.a. on the sum of Rs.58,62,000/- from 27.01.2011 till the date of payment and

directing the respondent to pay to the claimant interest at the rate of 18% p.a. on the sum of Rs.42,62,637/- from 18.03.2011 till the date of payment (claim no.8).”

8. I have heard learned counsel for the parties.

9. Learned counsel for the petitioner has sought to challenge the Award on the following grounds:-

(i) On claim No. 1, he relies upon Clause 4 of the Agreement dated 15.10.2010 to contend that demurrage was the liability of the respondent and hence, the award to the extent it grants recovery of Rs.42,62,637/- on account of demurrage is erroneous. He relies upon the judgment of the Supreme Court in the case of *Numaligarh Refinery Ltd. vs. Daelim Industrial Company Ltd., (2007) 8 SCC 466* to contend that where an interpretation of an agreement is wholly contrary to law, then there is no prohibition for the courts to set things right. He hence submits that claim No.1 has been awarded to the respondent contrary to the terms of the contract.

(ii) On claim No.2, he submits that there is no worthwhile evidence led by the respondent for the learned Arbitrator to award a sum of Rs. 57,50,347.32/- for the alleged damage to the goods which were of perishable nature. He points out to the evidence of the experts, namely, Sh. Birmaninder Singh Sagoo/CW-7 and Sh. Vishu Gupta/CW-8 to contend that the evidence led by them do not show any damage to the crop or any loss or damage suffered by the respondent.

(iii) Regarding claim No.3, namely, award of Rs.58,62,000/- for shipment in transit which was called back by the foreign suppliers, it is urged that while part of the goods were in transit, the respondent asked the foreign

suppliers to divert the consignments to other destinations. A sum of Rs.58,62,000/- which had been paid to the foreign suppliers by the petitioner has not been returned back by the foreign suppliers. He submits that the goods were diverted to different destinations on the instructions of the respondent and there can be no reason for any damages being thrust on the petitioner as the loss took place due to the acts of the respondent.

(iv) He further submits that there are no basis for the learned Arbitrator to award Rs.9 lakhs to the respondent on account of loss of profit.

10. I may now deal with the submissions of the learned counsel for the petitioner. The first plea pertains to claim No.1, namely, the award of Rs.42,62,637/- towards demurrage charges. The learned Arbitrator concluded that the liability to pay demurrage arose on account of delay in taking delivery. The Award notes that the petitioner relied heavily on the investigation started by the DRI in some cases. However, the Award notes that the DRI had not taken any action against the respondent. Further what was the scope of action taken by DRI is not at all clear. It further notes that DRI could not have taken any action on the basis of alleged violation of actual user condition. It was the duty of the petitioner who had undertaken the obligation to import huge quantity of Maize to be helpful rather than trying to create unnecessary hurdles. The Award notes that the petitioner was solely responsible for the delay and imposition of demurrage charges by the port authorities and consequently, is liable to pay the same.

11. The petitioner seeks to rely upon Clause 4 of the Agreement dated 15.10.2010 which reads as follows:-

“4. That the purchaser shall keep NAFED fully indemnified against all claims proceedings, demands including demurrage etc.

or any charges of any value whatsoever, of any party in the entire import transaction.”

12. I may note that this plea based on clause 4 of the agreement has not been specifically raised by the petitioner in their defence statement/counter-claim. This fact was pointed out to the learned counsel for the petitioner. The only part of the reply to the statement of claim where a somewhat faint plea was taken to this aspect was pointed out by the learned counsel for the petitioner, the relevant portion of which reads as follows:-

“Claimants were told that they will be solely responsible for any loss relating to quality, demurrage, penalty etc. Instead of complying with communications of respondent, Claimant filed petition before Delhi High Court.”

13. I may note that claim No. 1 has been raised by the respondent in para 25 of the claim petition and in response to para 25 in the statement of defence all that the petitioner has said that is that the claim of the claimant is denied in view of the position already stated above.

14. Clearly no such plea has been raised by the petitioner before the learned Arbitrator. Hence, the Award is completely silent about interpretation of Clause 4 of the Agreement between the parties dated 15.10.2010. The petitioner cannot now be allowed to raise this plea.

15. Even otherwise in my opinion the plea of the petitioner is completely untenable. In the course of argument it was admitted that there was no specific bar from DRI in clearing the consignments of Maize that had been imported by the petitioner. The only apprehension of the petitioner was that in the eventuality of any duty being imposed on the consignments, the liability would fall on the petitioner. It is quite apparent that the

apprehension of the petitioner was misplaced. As rightly pointed out by the learned counsel for the respondent, Clause 3 of the agreement dated 15.10.2010 specifically states that the custom duty is the liability of the respondent. It may also be noted that the petitioner filed a writ petition before this court being WP(C) 898/2011. It was pursuant to the orders of this court that DRI gave a provisional NOC on 05.03.2011. Despite the said clearance, the petitioner still took no steps and on the contrary wrote a communication to the clearing agent on 18.03.2011 not to take delivery of the containers in the absence of any specific instructions from the petitioner. It was at that stage that the respondent was compelled to file a second writ petition before this court being W.P.(C) No. 2172/2011. On 24.05.2011, this court directed that subject to the respondent furnishing an undertaking, the respondent is permitted to clear the consignments irrespective of the communication dated 18.03.2011 of the respondent. It is therefore sometimes in August-September 2011 that the consignments were released. Hence, the findings of fact recorded by the learned Arbitrator that the petitioner is solely responsible for the delay and imposition of demurrage charges by the port authorities is a plausible conclusion based on the facts on record. The liability to pay the demurrage charges arose as a consequence of the inaction and breach of the contract by the petitioner. The Award for refund of the demurrage charges to the respondent is a reasonable conclusion. There are no reasons for this court to interfere in the said conclusions recorded by the learned Arbitrator.

16. The second plea raised by the petitioner relates to claim No.2 where an award has been passed in favour of the respondent for the loss of goods amounting to Rs.57,50,347/-. It is a matter of fact that the goods had reached

the Indian Ports sometimes in November-December 2010 and were released in August-September 2011. It is the case of the respondent that the goods were of perishable nature and on account of the delay and default on the part of the petitioner, the consignments were held up at the port. It is also the case of the respondent that the shelf life of the goods is very small. Despite being brought to the notice of the petitioner that the goods are decaying, no steps were taken by the petitioner.

For seven months the goods were lying at the ports. The respondent pleaded that the goods had perished causing a complete loss to the respondent of Rs.60,75,347/-. It is the case of the respondent that they finally had to sell the goods @ Rs.2 per kg as Chara Dana whereas the market value would be Rs.65 to 70 per kg. Copy of the invoice showing sale of Chara Dana has been placed on record. Learned Arbitrator noted the evidence of RW-1/Sh.Upendra Kumar where he admits that the imported maize was perishable in nature. The Award also concludes that on account of the delay, the items became non-consumable by human beings. It noted that the petitioner had failed to produce any counter evidence. The proximate cause for the decay was the delay caused by the petitioner and hence, in law the petitioner is liable to pay the value of the loss caused. The Award notes that to mitigate the loss, the respondent had disposed of the material but could get only Rs.3.25 lakhs and accordingly an award for Rs.57,50,347/- was passed in favour of the respondent.

17. As the main plea of the petitioner is that there is no cogent evidence on record to prove the loss suffered by the respondent, I may look at some of the evidence on record which was led by the respondent on this claim. Sh. Deepak Thakur-CW-2 in his evidence by way of affidavit has confirmed that

the goods were sold as charadana @ Rs.2/- per kg. In his cross-examination, he has remained firm on the fact that the goods were sold as charadana to 4-5 different parties though he could not name the parties.

18. Similarly, CW-4. Om Prakash Khurana has also filed his evidence by way of affidavit. I may note that despite the contention of the petitioner that adequate evidence in this regard is not on record, a copy of the affidavit by way of evidence of CW-4 has not been placed on record. In my opinion, it was the duty of the petitioner to place on record all the relevant documents, especially keeping in view the fact that it has been submitted by the petitioner that there was no appropriate evidence on record to prove this claim.

19. In his cross-examination CW-4 clearly states that he has bought about 25-26 tons of the perished pop corn and he has paid in cash. He further submits that he owned 35 buffaloes and he required the stock accordingly. Similarly, the evidence of other witnesses who have purchased the goods, namely, CW-5 and CW-6 has also not been placed on record. In contrast, the only evidence which appears to have been led by the petitioner is that of RW-1 Sh. Upendera Kumar who has clearly stated that he is performing clerical job and he was neither the officer concerned to take decision nor to review the decision concerning the transaction which is the subject matter of the dispute.

20. It is clear that based on the evidence of the witnesses of the respondent and the documents placed on record, the learned Arbitrator has recorded a finding of fact that the goods had perished and the proximate cause for the loss of goods is the delay caused by the petitioner in releasing the goods. It is even otherwise common knowledge that pop corn being a perishable item

would not survive being stored in the port for such a long period of seven months. Hence, the plea of the petitioner that the claim No.2 has been awarded without an evidence is untenable.

21. The legal position in this regard is quite clear. The Supreme Court in its judgment in the case of *Associate Builders vs. DDA*, AIR 2015 SC 620 held as follows:-

“31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where-

(i) a finding is based on no evidence, or

(ii) an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or

(iii) ignores vital evidence in arriving at its decision, such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In *H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons*, 1992 Supp (2) SCC 312 at p. 317, it was held:

"7.It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

22. It cannot be said that the findings recorded by the learned Arbitrator is based on no evidence whatsoever. The petitioner has also not been able to

point out any irrelevant facts taken into account or any vital evidence ignored by the learned Arbitrator. Merely because, on the basis of the evidence placed on record by the respondent a different view is possible cannot be a ground to hold the finding of facts recorded by the learned Arbitration as invalid. There is no merit in the said plea of the petitioner.

23. Coming to the third contention of the petitioner, namely, the challenge to claim No. 3 whereby a sum of Rs.58,62,000/- has been awarded in favour of the respondent on account of payment to foreign supplier who had not delivered the goods.

24. The case of the respondent was that apart from the payment of Rs.1,77,79,679/- to the petitioner towards sale price of goods already imported, an advance of Rs.58,62,000/- being 10/20% of the sale price for the purchase of Maize was also paid to the petitioner. As the petitioner was not getting clear the shipment that had already arrived at the port, the respondent had to request the foreign suppliers to call back the shipment in transit as their arrival at India would have caused more loss to the respondent. It is stated that despite clearance by the foreign suppliers, the petitioner did not respond to the foreign suppliers. Accordingly, refund of the said amount is sought.

The Award held that the principle is that the petitioner having received the money for the consignments ought to supply the consignments to the respondent or pay the value thereof to the respondent in case of failure of the supply. Hence, the silence of the petitioner was held to be inexplicable and that does not absolve the petitioner to pay its due.

25. The petitioner has failed to plead with clarity its contentions/objections to the award of the said amount of Rs. 58,62,000/-

awarded by the learned Arbitrator to the respondent. The pleas of the petitioner completely lack clarity. In the statement of defence/reply filed by the petitioner before the learned Arbitrator in response to the said claim raised by the respondent, the plea/defence raised is as follows:-

“Para-19. In reply to this para it is submitted that the entire payment was forwarded to the Foreign Exporter as advance on proforma/ export invoice and payment on CAD (cash against delivery basis) as per the Agreement and against which the Respondent would be entitled only to 1.25 percent of the CIF (cost, Insurance, Freight) value of Goods and on all expenses, i.e., CIF Agents, Freight and Insurance etc.

As admitted by Claimant in their petition, they had themselves requested to foreign suppliers to call back the shipment in transit. No such instructions were given by Nafed, and it was Claimant who was directly interacting with foreign suppliers. Therefore, such action of the claimant has actually and really caused loss to the Respondent on the total value as per agreement @ 1.25% and the respondent is entitled to loss so suffered by admitted action of the Claimant. In fact the payment already made for import from foreign exporter in foreign exchange of Dollars terms has not only been put to waste but also in violation of Foreign Exchange Management Act and Money Laundering Act. The payment of about USD 1, 16,000/- made to foreign exporters is yet to be redeemed.”

In the present petition a somewhat similar ground has been taken by the petitioner in para ‘G’ which reads as follows:-

“F. For that the claim of Rs.58,62,000/- which was allegedly paid by the respondent for shipment in transit which was called back by foreign supplier is totally unwarranted as the petitioner had not given any instructions for call back of the said goods and it was an admitted case of the respondent that such instructions were given only by the Respondent without taking any consent from the petitioner.

The above is the sum and substance of the plea of the petitioner as to why the award has wrongly awarded the aforesaid amount of Rs.58,62,000/- in favour of the respondent for the advance payment paid for shipments which were never received.

It is manifest from the facts that the petitioner has received the aforesaid advance. On the basis of this advance it had booked import of Popcorn Maize from foreign suppliers. It appears that the contract was between the petitioner and the foreign suppliers. If for any reason the foreign suppliers had failed to transfer the goods, it was for the petitioner to have taken steps to recover the dues from the foreign suppliers. Admittedly, the petitioner has received the payment but has not supplied the maize. If the non-supply of the maize was on account of the fault of the respondent, a proper cogent defence was necessary to be put forth. The petitioner has failed to do the same.

As the contract was being entered into by the petitioner and on behalf of the petitioner and payments had been made to the foreign suppliers by the petitioner, it was for the petitioner to have taken steps for recovery of advances paid when the goods were not supplied by the suppliers. The inaction on the part of the petitioner was clearly a gross act of negligence. There is also merit in the contention of the respondent that in the eventuality had the goods reached the Indian Port, they would have met the same fate as the earlier consignments which had been withheld in the port for more than seven months. Other than arguing that the goods were not delivered on account of instructions of the respondent, no other plea has been raised before this court. There is accordingly, no merit in the present plea. There

are no grounds to challenge the findings of fact recorded by the learned Arbitrator in this regard.

26. Regarding the last plea, namely, award of loss of profit of Rs. 9 lakhs, the learned Arbitrator having held against the petitioner with regard to their conduct has calculated the loss of profit at 15% of the value of the goods that was withheld and hence, awarded Rs. 9 lakhs. There are no reasons to differ with the view of the learned Arbitrator.

27. In view of the above, there is no merit in present petition. The same is accordingly dismissed. All pending applications, if any, also stand disposed of.

(JAYANT NATH)
JUDGE

OCTOBER 09, 2017
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