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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Judgment: 24th November, 2017

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FAO(OS)(COMM)202/2017

M/S RELIABLE AGRO FOODS & ORS.

..... Appellants

Through Mr. Arvind Nayar, Senior
Advocates with Mr. Aruj Dhingra
and Mr. Ashish Anshuman,
Advocates

versus

M/S AL-NAFEES FROZEN FOOD EXPORTS PVT. LTD

..... Respondent

Through Mr. Sunil Dalal, Mr. Vivek and Ms.
Mansi Agarwal, Advocates

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE A.K. CHAWLA

G.S.SISTANI, J. (ORAL)

CM.APPL 42641/2017

1. Exemption allowed, subject to all just exceptions.
2. The application stands disposed of.

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3. This is an appeal filed under Section 13(1) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 read with Section 37 of the Arbitration & Conciliation Act, 1996 (in short 'Arbitration Act') against the order of the learned Single Judge dated 22.08.2017 by which a petition under

Section 34 of the Arbitration Act for setting aside the arbitral Award dated 17.05.2017 stands dismissed.

4. Mr. Nayar, learned Senior Counsel for the appellants submits that the parties did not agree to sign the agreement nor agreed to the terms as set out therein. It is also the case of the appellants that the appellants had not agreed that the dispute between the parties would be resolved through arbitration.
5. Before the submissions of the learned Senior Counsel for the appellants can be considered, some facts may be noted.
6. The appellant no.1 is a partnership firm with appellants no.2 and 3 as its partners. The appellants are running a slaughter house and carrying on the business of manufacturing and processing of frozen boneless buffalo meat. The respondent carries on the business of exports of fresh frozen meat. The respondent approached the appellants for getting buffalos slaughtered at appellant's abattoir and for processing and manufacturing of frozen boneless buffalo meat. The respondent requested the appellant no.2 to slaughter, manufacture and process frozen boneless buffalo meat of the buffalos which would be provided by the respondent. The appellant agreed to provide such facility, subject to payment of all the charges and on the condition that payment would be made by the respondent on weekly basis.
7. In terms of the agreement dated 01.08.2015, the appellant was to slaughter 250 buffalos daily at their slaughter house and thereafter process and manufacture frozen boneless buffalo meat at their factory for the use of the respondent as per qualities standards which were laid down as fully detailed in the agreement dated 01.08.2015 entered into

between the parties. The respondent addressed a communication dated 28.08.2015 to the appellant informing him that government document bearing correct address of the factory which was required for the purpose of sales tax registration for dispatch of produce from factory of the appellant to the respondent was not provided. Appellant was also informed that as a result thereof, the produce was getting piled up and the respondent was unable to dispatch and export. The appellant was cautioned that till the time the documents are not provided and the registration with the sales authorities is not complete, the clause of minimum guarantee payment in the agreement would not apply. No reply was received. Another communication dated 08.09.2015 was addressed to the appellant calling upon the appellant to provide various documents and in the absence thereof, a notice dated 08.09.2015 was issued by the respondent to the appellant. Appellant was informed that Rs.1,50,00,000/- has been paid as a refundable deposit. Appellant was also informed that since 01.08.2015, animals are being slaughtered at the factory of the appellant, but the appellant had failed to provide storage facility, documents were not supplied. The relevant portion of the notice reads as under:

“3. Since 1.8.2015 our Client is regularly getting animals slaughtered from you as per the agreement and the same is being shifted to our Clients storage/warehouse as you did not provide the agreed storage facility at your site.

4. That since 1.8.2015 you have not complied with our following duties under the agreement:

(a) You have not yet provided required documents being intimated to you through various telephonic calls by the Client as well as vide communication dated 28.8.2015 and 8.9.2015 as is required to export the product.

(b) You have not provided the adequate storage for keeping the product of our Client in your storages and chillers in absence of which our Client is forced to immediately take the product from your site to its place thereby causing damages towards transportation @ Rs.4.00 per kilogram.

(c) You also started calling other persons with a proposal to use our slaughter house facilities which created doubt in the minds of our Client as it had already taken advance orders and have to deliver the same to its Clients only depending upon your entering into agreement with us.

5. That our Client had already made commitments with Foreign Buyers for a period of two years which if not fulfilled may lead to suffer damages to our Client and also bad name to our Client and in case you did not comply with your obligations the same shall be recovered from you by our Client.

6. That the product is perishable in nature and has to be dispatched in one month which has not been exported even after expiry of one month and may cause loss or claim for damages from the side of buyer of our Client which will be your liability and our Client shall claim the same from you....”

8. Since no reply was received, the respondent filed a petition under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator. The petition was heard in the presence of both the parties and by an order dated 19.08.2016, a sole Arbitrator was appointed.
9. The learned Arbitrator framed the following issues:

- “I. Whether the entire claim of the Claimant is required to be dismissed on the ground of pendency of a Civil Suit in the court of Civil Judge, Purna, District Parbhani, in the State of Maharashtra on the same subject matter (same agreement) and therefore, the present subject matter is excluded from arbitration clause between the parties?
- II. Whether the Claimant is entitled to claim and receive payment in respect of the claims and if so for which of the claims and for what amount?
- III. If the aforesaid issue is answered in favour of the Claimant, whether the Claimant would also be entitled to claim any interest and if so at what rate and for which period?
- IV. Whether any of the parties is entitled to cost of proceedings and if so which party and for what amount?”
10. The learned Arbitrator by an Award dated 17.05.2017 allowed the claims of the respondent which led to the filing of a petition under Section 34 of the Arbitration and Conciliation Act. The objections were dismissed, which has led to the filing of the present appeal.
11. The first ground urged by Mr. Nayar, learned Senior Counsel for the appellants is that the appellants cannot be made to suffer on account of ill-advice and, in fact, no advice given by the advocates retained by them to raise material objections against the claim made by the claimants in the arbitration proceedings. Mr. Nayar also submits that the appellants were not advised to raise counter claims in the arbitration proceedings. Mr. Nayar has labored hard to urge before this Court that the appellants were even denied access to justice and delivery of justice despite being paid hefty professional fees to their

counsel in the arbitration proceedings. It is contended that the Award is a result of acts of commission and omission by the said earlier counsel. Learned Senior Counsel contends that the Award is against the public policy of India, settled law, terms and conditions of the contract, perverse and patently illegal on the face of it. Learned Senior Counsel contends that the parties did not agree for the terms contained in the agreement dated 01.08.2015, the appellants had not agreed that the dispute would be resolved through arbitration.

12. The only other ground raised by the learned Senior Counsel is that the learned Arbitrator did not act in a fair and just manner as an equal opportunity to defend was not granted. The learned Arbitrator did not give a reasonable opportunity to the appellants to cross-examine the witnesses of the respondents, the learned Arbitrator did not grant a fair opportunity to the appellants to lead evidence and in the absence of fair opportunity to cross-examine the witnesses of the appellants and to lead evidence, the impugned Award was rendered. In the above circumstances, Mr. Nayar contends that the Award was is haste to be set aside.
13. The first submission of Mr. Nayar is that there was no arbitration agreement between the parties. We find this submission of the learned Senior Counsel to be without any force. The learned Single Judge has rightly considered the fact that an Arbitrator was appointed pursuant to a petition filed under Section 11 of the Arbitration & Conciliation Act, 1996. At that stage, neither an objection was raised with respect to the arbitration clause nor any objection was raised with regard to non receipt of a notice under Section 18 of the Act. Additionally, we may

note that the Agreement was entered into on 01.08.2015. Nothing has been produced to show that the appellants had ever objected either to the arbitration clause or that the Agreement was not signed and executed by the appellants.

14. We may also notice that in the order dated 19.08.2015 passed in the petition filed by the respondents under Section 11 of the Arbitration Act, it was noticed that two objections were raised, one with regard to the institution of civil proceedings by the appellants herein and the other that there was no arbitration agreement between the parties. Both the objections were found to be without any force. The Court returned a finding that the agreement between the parties contained an arbitration clause and was signed by one of the partners of the appellants herein and thus binding and pursuant to the order dated 19.08.2015, an Arbitrator was appointed. We find no infirmity in the order of the learned Single Judge in this regard.
15. The second ground urged is that the impugned Award is as a result of ill-advice and no advice given by the earlier counsels appointed by the appellants, substantial fee was paid to them, proper objections to the claims were not drafted, appellants were not advised to file counter claim and thus, the serious prejudice has been caused to the rights of the parties and on this ground alone, the Award and the order of the learned Single Judge should be set aside. The submissions of the learned Senior Counsel cannot be accepted. We were informed during the course of the hearing that the appellants had made a complaint against their earlier lawyer. Ill-advice and no advice having been

granted cannot be a ground either to set aside the Award or the judgment of the learned Single Judge.

16. The last and only other ground urged by Mr. Nayar is that the learned Arbitrator did not act in a fair and just manner, equal opportunity to defend was not granted, the learned Arbitrator acted in a biased manner. To buttress his argument, Mr. Nayar has contended that when the matter was listed on 24.02.2017 and 25.02.2017 for the purpose of examination and cross-examination of witnesses of both the parties, the case was adjourned on both the dates on account of an adjournment sought by the respondents, but similar indulgence was not shown when the appellants sought an adjournment for the hearing fixed on 05.04.2017 and 06.04.2017 on the ground that their witness Mr. Mohd Ali Khan was indisposed. It is contended that the learned Arbitrator refused the adjournment. Learned Senior Counsel further submits that the learned Arbitrator took up the matter on 05.04.2017 in the absence of counsel for the appellants or their representative and subsequently when the appellants filed an application seeking modification of the order dated 05.04.2017, the said application was rejected which shows that the learned Arbitrator was sitting with a complete bias against the appellants. It is also contended that the learned Arbitrator has acted in haste.
17. This submission of the learned Senior Counsel is also without any force. No doubt, when the case was fixed on 24.02.2017 and 25.02.2017, the same was adjourned on account of witness of the respondents being indisposed based on an e-mail along with medical certificates of the said witness the adjournment was sought, which was

not opposed by the appellants herein. However, while adjourning the case to 05.04.2017 and 06.04.2017, the learned Arbitrator made it clear to the parties that no adjournment would be granted. The matter was listed on 05.04.2017 and 06.04.2017 for cross-examination of the witnesses of the respondents. The learned Arbitrator rightly rejected the request of the appellants in the order dated 03.04.2017 on the ground that the matter was fixed for evidence of the claimant and the witness of the appellants being indisposed was not a good ground for adjournment. Moreover, in case one of the partners was indisposed, another partner could have remained present. The learned Arbitrator also noticed that the appellants herein had not filed any list of witnesses nor affidavits by way of evidence. In view of the conduct of the appellants herein noted above, it cannot be said that the learned Arbitrator acted in a biased manner. We may also note that when the matter was taken up for hearing on 05.04.2017 before the learned Arbitrator, neither counsel for the appellants nor any representative of the appellants was present. As noticed by the learned Single Judge, at the request of the learned Arbitrator, counsel for the respondent had called up counsel for the appellants herein and as noticed in the order of the learned Arbitrator, the counsel for the appellants had declined to appear on the ground that she had no instructions from the appellants herein. Resultantly, the evidence of the respondent (claimant before the Arbitrator) was recorded as an ex parte evidence and the matter was adjourned to 20.04.2017 for final hearing, the order was communicated to the appellants herein.

18. Mr. Nayar, the learned Senior Counsel has contended that dismissing of an application seeking modification of the order dated 05.04.2017 would also show that equal opportunity was not granted to the appellants herein is also misplaced, as not only the appellants did not appear on the date fixed, counsel did not appear. Counsel was informed on telephone, but she informed the learned Arbitrator that she had no instructions in the matter. Even when the application for modification was filed, neither any list of witnesses nor evidence was filed. The learned Arbitrator rightly noticed that along with the application seeking modification of the order dated 05.04.2017, the appellants did not file its evidence to show it bona fides on 20.04.2017 when the counsel for the appellant was present. Counsel was offered an opportunity to cross-examine the witnesses of the respondents herein, but the counsel declined to do so as she had no instructions in the matter. In this backdrop, we are of the considered view that the learned Arbitrator did not act in an unjust manner or that a fair opportunity was not granted to the appellants herein to defend the case. Any *inter se* dispute between the appellants and their counsels cannot be a ground to set aside an Award, which is neither perverse nor unreasonable. The learned Single Judge has also considered each and every claim raised by the respondents and the reasoning of the learned Arbitrator and did not find any infirmity in the same.
19. In the case of ***Jhang Co-operative Group Housing Society Ltd. v. Pt. Munshi Ram and Associates Pvt. Ltd.***, reported at 202(2013) DLT 218(DB), in paras 14 and 19, it was held as under:

“14. With respect to the objections filed by the appellant against the final award dated 27.09.2002 we may note that the law laid down by the Hon'ble Supreme Court restricts the supervisory role of the courts while testing the validity of an Arbitration Award. In the case of McDermott International INC. vs. Burn Standard Co. Ltd. and Others MANU/SC/8177/2006 : (2006) 11 SCC 181, the Hon'ble Supreme Court has held as under:-

“The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.”

It is in the parameters as laid down by the Apex Court vis-à-vis the scope of judicial intervention that the present appeal impugning the order dated 24.05.2012 has to be dealt with in respect to the final award published by the sole arbitrator dated 27.09.2002. It is seen that the Arbitrator has elaborately considered the various documents, submissions and evidence led by the parties in respect of each claim which was left to be adjudicated by the interim award. The Arbitrator has extensively gone into the evidence and evaluated the entire material before him and has published a detailed speaking award.

.....

19. The learned Single Judge has examined each claim awarded by the learned Arbitrator in detail and after scrutinizing the same has found the findings and reasoning to be justified and has declined to interfere in the findings arrived at by the learned Arbitrator in respect of each claim. Once the Arbitrator has returned a finding that delay in completion of the work was attributable to the appellant society and that the rescission and termination of the contract was illegal and more so since these findings are not challenged by making a recourse against the interim award, the findings arrived at by the learned Arbitrator in respect of the claims dealt with by the learned Arbitrator in the final award cannot be said to be erroneous and the learned Single Judge has rightly declined to interfere with the same.”

20. In the case of *Union of India(UOI) v. U.P. State Bridge Corporation Ltd.*, reported at (2015) 2 SCC 52, speedy conclusion of arbitral proceedings was emphasized. In para 16, it was held as under:

“16. Speedy conclusion of arbitration proceedings hardly needs to be emphasised. It would be of some interest to note that in England also, Modern Arbitration Law on the lines of UNCITRAL Model Law, came to be enacted in the same year as Indian Law which is known as English Arbitration Act, 1996 and it became effective from 31st January, 1997. It is treated as the most extensive statutory reform of English arbitration law. Commenting upon the structure of this Act, Mustill and Boyd in their "Commercial Arbitration, 2001 companion volume to the second edition, have commented that this Act founded on four pillars. These pillars are described as:

- (a) The First Pillar: Three General Principles.
- (b) The Second Pillar: The General Duty of the Tribunal.
- (c) The Third Pillar: The General Duty of the Parties.

(d) The Fourth Pillar: Mandatory and Semi Mandatory Provisions.

In so far as first pillar is concerned, it contains three general principles on which the entire edifice of the said Act is structured. These principles are mentioned by an English Court in its judgment in the case of Department of Economics Policy and Development of the City of Moscow v. Bankers Trust Co. MANU/UKCM/0009/2003 : (2004) EWCA Civ 314. In that case, Mance, L.J. succinctly summed up the objective of this Act in the following words: 'Parliament has set out, in the Arbitration Act, 1996, to encourage and facilitate a reformed and more independent, as well as private and confidential, system of consensual dispute resolution, with only limited possibilities of court involvement where necessary in the interests of the public and of basic fairness'. Section 1 of the Act sets forth the three main principles of arbitration law viz. - (I) speedy, inexpensive and fair trial by an impartial tribunal; (ii) party autonomy; and (iii) minimum court intervention. This provision has to be applied purposively. In case of doubt as to the meaning of any provision of this Act, regard should be had to these principles."

21. It has been repeatedly held that while considering objections under Section 34 of the Act, the Court does not sit as a Court of appeal, the Court is not expected to re-appreciate the entire evidence. It is not open for the Court to interfere with the Award merely because another view is possible in the opinion of the Court. The Court is to only consider whether the view taken by the Arbitrator is plausible and having regard to the evidence on record. The learned Single Judge has also examined each claim separately and for cogent reasons, rejected the arguments of the petitioner.

22. We find no grounds to entertain this appeal, the same is accordingly dismissed. At this stage, Mr. Nayar submits that he would advise the appellant to file counter claim against the respondents.

CM.APPL 42642/2017(stay)

23. The application is dismissed in view of the order passed in the appeal.

G.S.SISTANI, J.

A.K. CHAWLA, J.

NOVEMBER 24, 2017

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