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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.507 OF 2016

WITH
NOTICE OF MOTIONNO.2483 OF 2016
IN
ARBITRATION PETITION NO.507 OF 2016

M/s.Raghuvir Cotton Ginning & Pressing Pvt. Ltd. ...Petitioner
V/s.
M/s.Vijay Cotton & Fibre Co. ...Respondent

Mr.Shaunak Thacker with Ms.Gunjan Jayakar, Ms.Rinku Valanju and Mr.H. Shah for the Petitioner.

Mr.Simil Purohit i/b M/s.Purohit & Co. for the Respondent.

CORAM : R.D. DHANUKA, J.
DATE : 11TH JANUARY, 2017.

P.C. :-

1. By this petition filed under section 34 of the Arbitration & Conciliation Act, 1996, the petitioner seeks to impugn the arbitral award dated 12th June, 2015 passed by the Appellate Arbitral Tribunal of the Cotton Association of India in Appeal No.1 of 2013-2014, dismissing the appeal filed by the petitioner impugning the arbitral award dated 4th March, 2013 by which the claims made by the respondent were allowed. Notice of Motion No.2483 of 2016 is filed by the petitioner in the arbitration petition *inter-alia* praying for a stay of the impugned award. Some of the relevant facts for the purpose of deciding this petition are as under :

2. It is the case of the petitioner that the petitioner and the respondent had entered into two separate contracts on 27th August, 2010 and 6th October 2010 for supply of 1200 bales and 900 bales respectively to be supplied by the petitioner to the respondent on the terms and conditions referred to in the said contracts. It is the case of the petitioner that the delivery was to be effected by the petitioner in respect of the said two contracts during the month of January, 2011 and December, 2010 respectively.

3. The parties were governed by the bye-laws of the Cotton Association of India. It is the case of the petitioner that though the petitioner had offered delivery of the cotton in terms of the contracts entered into between the parties, the respondent did not take delivery thereof. The Ministry of Commerce & Industry (Department of Commerce,Directorate General of Foreign Trade) had issued a notification dated 29th December, 2010 wherein the quota was granted to each parties for export of cotton bales. Insofar as the respondent is concerned, the limit was fixed of 500 bales.

4. It is the case of the petitioner that by a letter date 15th December, 2010, the petitioner called upon the respondent to deposit the contract amount and to take delivery of the contractual quota. The respondent however, failed and neglected to make payment and also to come forward to take "parakh" and delivery of the said items. The respondent however, thereafter started sending letters alleging that the petitioner had failed to give delivery of the cotton contracted to be delivered in the month of December, 2010. The respondent also threatened that if the petitioner would fail to deliver the cotton, the respondent would invoice back the cotton to the petitioner. The

said letters were addressed by the respondent vide letters dated 8th January, 2011 and 17th February, 2011. By the letter dated 25th March, 2011, the respondent informed the petitioner that it had invoice back the cotton to the petitioner at the rate of Rs.61,000/- per candy and raised debit note of Rs.1,75,73,464/- and Rs.95,20,870/- towards the first and second contracts respectively.

5. The respondent thereafter filed Arbitration Reference bearing No.25 of 2011- 2012 before the Arbitral Tribunal constituted under rules of the Cotton Exchange of India and filed the statement of claim *inter-alia* praying for a sum of Rs.2,52,94,334/- with further interest on the amount of Rs.1,57,73,464/- and Rs.95,20,870/- at the rate of 18% p.a. from 25th March, 2011. The petitioner resisted the said claim by filing the written statement. It is the case of the petitioner that the petitioner placed on record various other invoices executed to oppose the rates claimed by the respondent in the invoice back. The respondent and the petitioner filed rejoinder and sur-rejoinder respectively before the Arbitral Tribunal. No oral evidence was laid by the parties.

6. On 4th March, 2013, the Arbitral Tribunal made an award allowing the claim of the respondent to the extent of Rs.1,14,64,521.75 ps. with interest at the rate of 15% p.a. from the date of award and also awarded the costs quantified at Rs.73,236/-. Being aggrieved by the said award dated 4th March, 2013, the petitioner filed an appeal on 4th March, 2013 before the Appellate Arbitral Bench constituted under the provisions of the Cotton Association of India. On 12th June, 2015, the Appellate Arbitral Tribunal rejected the said appeal filed by the petitioner.

7. Mr.Thacker, learned counsel for the petitioner invited my attention to various documents annexed to the petition, grounds raised in the petition and the findings rendered by the Arbitral Tribunal as well as the Appellate Arbitral Tribunal. It is submitted by the learned counsel that though by a letter dated 15th December, 2010, the petitioner had called upon the respondent to deposit the contract amount after giving cash discount of 15% and to take delivery of the contractual cotton, the respondent failed and neglected to make any payment and to take delivery of such goods. The breach was thus committed by the respondent and not by the petitioner.

8. It is submitted by the learned counsel that the date of delivery originally contemplated under the said two contracts were never extended and thus the respondent could not have insisted for delivery after the due date. He submits that in any event, the export quota of the respondent was limited to 500 bales and thus the respondent could not have exported the cotton bales beyond 500 bales and thus there was no need of the respondent beyond 500 bales.

9. The next submission of the learned counsel is that the respondent had not issued any notice of invoice back. In any event, the Arbitral Tribunal could not have decided the issue of invoice back in view of bye-law 219 of the Cotton Association of India. He submits that the notice for invoice back could be given only after the Arbitral Tribunal would have decided the breach, if any, of the petitioner and such issue of notice back was to be decided by a separate

Committee constituted by the Board under bye-law 204. He submits that if any adverse decision would have taken by the Committee in respect of the issue of invoice back, the petitioner would have a remedy to challenge the said order separately. In view of the Arbitral Tribunal itself deciding the issue of invoice back illegally, the petitioner lost an opportunity to challenge the order of such Committee before appropriate forum.

10. It is submitted by the learned counsel that though the petitioner had proved the delivery of the letter dated 15th December, 2010 to the respondent, the Arbitral Tribunal did not consider the said letter on the ground that the same was not proved by the petitioner.

11. It is submitted by both the Tribunals have not considered various issues raised by the petitioner and have illegally allowed the claims made by the respondent.

12. Mr.Purohit, learned counsel appearing for the respondent on the other hand invited my attention to the findings rendered by both the Tribunals against the petitioner and in favour of the respondent and would submit that such finding being not perverse, cannot be interfered with by this Court in this petition filed under section 34 of the Arbitration & Conciliation Act, 1996.

13. It is submitted by the learned counsel that the so called letter dated 15th December, 2010 alleged to have been addressed by the petitioner to the respondent was never delivered to the respondent. The petitioner had failed to prove the factum of delivery of the said letter to the respondent. Though the petitioner had filed an

affidavit to prove the said letter dated 15th December, 2010, the witness who had filed an affidavit was never produced for cross examination. He submits that the Arbitral Tribunal thus rightly rendered a finding that the petitioner had not proved the delivery of the said letter dated 15th December, 2010.

14. It is submitted that on the contrary, the respondent was admittedly addressing various letters seeking delivery of the cotton bales from time to time which the petitioner failed to deliver. The Arbitral Tribunal thus has rightly rendered a finding that the breach was committed by the petitioner and not by the respondent.

15. Insofar as the submission of the learned counsel for the petitioner that no notice of invoice back was issued by the respondent is concerned, learned counsel invited my attention to the submissions made by the petitioner itself in paragraph 3 (j) of the arbitration petition admitting that the respondent had issued a notice of invoice back to the petitioner. He also invited my attention to the findings rendered by the Arbitral Tribunal insofar as the issue of invoice back is concerned in the impugned award against the petitioner which finding was confirmed by the Appellate Arbitral Tribunal. Reliance is placed on paragraph 8 (xv), the Arbitral Tribunal in which such finding is rendered by the Arbitral Tribunal. He submits that in the said paragraph, the Arbitral Tribunal has also categorically held that there was default on the part of the petitioner in rendering the delivery of the cotton bales to the respondent.

16. Insofar as the submission of the learned counsel for the petitioner that the Arbitral Tribunal could not have decided the issue

of invoice back under bye-law 219 and the same could be decided only by the Committee constituted by the Board under bye-law 204 is concerned, it is submitted by the learned counsel for the respondent that the said bye-law 219 has to be read with bye-law 204. He submits that in this case the contract was not closed invoice back to the Seller. The petitioner had failed to deliver the cotton bales within the time stipulated in the contract. The respondent had thus repeatedly issued notices of invoice back to the petitioner. He submits that it is a matter of record that the petitioner did not raise any such issue before the Arbitral Tribunal but on the contrary produced the other invoices to oppose the the rate claimed by the respondent after demanding invoice back price. No such ground is at all raised in the arbitration petition and thus the petitioner cannot be allowed to raise such ground across the bar.

17. Learned counsel for the respondent invited my attention to bye-law 204 and would submit that the dispute between the parties in this case was about the breaches of contract whether attributed to the petitioner or the respondent and as a result thereof consequence thereof. He submits that the Committee appointed by the Board would not determine the invoice back rate in the facts and circumstances of this case and thus reliance placed on the said provision is totally misplaced. He submits that in any event, the Arbitral Tribunal has rendered a finding of fact which being not perverse, cannot be interfered with by this Court.

18. In rejoinder, Mr.Thacker, learned counsel for the petitioner reiterates his submission that the issue of invoice back could not have been decided by the Arbitral Tribunal and the same could be

decided only by the committee to be appointed by the Board under the bye-laws framed by the Cotton Association of India.

REASONS AND CONCLUSION

19. There is no dispute that the respondent vide contracts dated 27th August, 2010 and 6th October, 2010 purchased from the petitioner 2100 fully pressed bales cotton described in the said contracts. The delivery period under the said two contracts were January 2011 and December 2010 respectively. It is the case of the respondent that since the petitioner did not deliver the bales of contract in terms of the said contracts within the time prescribed, the respondent decided to close out the said contract on 25th March,2011.

20. The dispute before the arbitral tribunal was whether the petitioner had committed any delay in delivery of the pressed cotton or the respondent had requested for extension of the delivery period. The arbitral tribunal appointed under the provisions of the bye-laws of Cotton Association of India rendered an award on 4th March,2013 allowing the claim of the respondent towards the price difference to the extent of Rs.1,14,64,521.75 ps. The Appellate Arbitral Tribunal rendered an award on 12th June, 2015 rejecting the appeal filed by the petitioner after recording various findings.

21. Insofar as the submission of the learned counsel for the petitioner that the petitioner had called upon the respondent to deposit the contract amount after giving cash discount of 15% vide letter dated 15th December,2010 is concerned, a perusal of the findings rendered by the arbitral tribunal clearly indicates that the

petitioner had failed to produce the proof of the delivery of the said alleged letter dated 15th December,2010. On the other hand, the respondent had produced the proof of delivery of several letters addressed by the respondent calling upon the petitioner to deliver the bales cotton within the time prescribed. However, the petitioner failed and neglected to deliver the bales cotton as per the delivery period described in the said two contracts. The arbitral tribunal has rendered a finding to this effect in the impugned award that the petitioner had not proved the delivery of the said letter dated 15th December,2010. Though the petitioner had filed an affidavit of a witness to prove the delivery of the said alleged letter dated 15th December,2010, the said witness was not produced for the purpose of cross examination or even examination in chief.

22. Insofar as submission of the learned counsel for the petitioner that no notice of invoice back was issued by the respondent is concerned, a perusal of the averments made in para 3(j) of the petition filed by the petitioner itself indicates that the petitioner has admitted in the arbitration petition that the respondent had issued a notice of invoice back to the petitioner. The arbitral tribunal also has rendered a clear finding on this issue. The respondent had proved the factum of delivery of such notices of invoice of back issued by the respondent to the petitioner. This finding rendered by the arbitral tribunal is also confirmed by the appellate arbitral tribunal. There is thus no substance in the submission of the petitioner that the respondent had not issued notice of invoice back to the petitioner.

23. Insofar as submission of the learned counsel for the

petitioner that the arbitral tribunal could not have decided the issue of invoice back under bye-law 219 and the same could be decided only by the committee constituted by the board under bye-law 204 is concerned, in my view, Mr.Purohit, learned counsel for the petitioner is right in his submission that the said bye-law 219 has to be read with bye-law 204. In this case, the respondent had issued repeatedly notice to the invoice back to the petitioner. The petitioner did not raise any such issue before the arbitral tribunal and on the contrary produced the other invoice simplicitor to oppose the rates claimed by the respondent in those notices of invoice back. No such ground is also raised by the petitioner in the arbitration petition. Be that as it may, in my view there is no substance in the submission made by the learned counsel for the petitioner and more particularly on interpretation canvassed by the learned counsel in respect of the bye-law nos.219 and 204 insofar as power of committee to decide the rate of invoice back is concerned and the same is accordingly rejected.

24. The arbitral tribunal as well as the appellate arbitral tribunal have rightly considered the invoice back claimed by the respondent and has rightly allowed the claims of the respondent partly.

25. Insofar as submission of the learned counsel for the petitioner that the delivery date was not extended and thus the respondent could not have insisted the delivery after the due date is concerned, there was ample evidence on record to show that the respondent had asked to delivery of the cotton bales within the time prescribed in the contract entered into between the parties.

26. Insofar as the submission of the learned counsel for the petitioner that the export quota of the respondent was limited to 500 bales and thus the respondent could not have exported the cotton bales beyond 500 bales and thus there was no need of the respondent to take delivery beyond 500 bales on the date of such delivery described in the contract is concerned, in my view there is no substance in the submission of the learned counsel for the petitioner. The petitioner did not raise any such issued before the arbitral tribunal. Be that as it may, the obligation of the petitioner to deliver the contracted quantity of cotton bales under the contract was not dispensed with even if the respondent would not have required the entire quantity of cotton bales described in the contract on the due date of delivery.

27. A perusal of the arbitral award rendered by the arbitral tribunal as well as by the appellate tribunal tribunal clearly indicates that both the tribunals have rendered various findings on fact after considering the evidence on record produced by both the parties and on interpretation of the provisions of the contract. The findings rendered by none of the tribunals are perverse and thus cannot be interfered by this court under section 34 of the Arbitration and Conciliation Act, 1996. The interpretation of the contract by both the tribunals being a possible interpretation, cannot be substituted by another interpretation by this court. The petition is devoid of merits.

28. I, therefore, pass the following order :-

(a) Arbitration Petition No.507 of 2016 is dismissed.

(b) In view of the dismissal of the arbitration petition, Notice of Motion No.2483 of 2016 filed by the petitioner *inter alia* praying for stay of the impugned award does not survive and is accordingly dismissed.

(c) No order as to costs.

(R.D. DHANUKA, J.)