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

Date of decision: 17th July, 2018

\+ **O.M.P. 198/2010**

M/S HERANBA INDUSTRIES LIMITED ..... Petitioner
Through: Mr. K.N. Bhargavan, Advocates. (M-9810237244)

versus

M/S HINDUSTAN INSECTICIDES LIMITED ..... Respondent
Through: Mr. Arunav Patnaik, Ms. Kanika Singh and Mr. Karun Pahwa, Advocates. (M-9818501344)

CORAM:
JUSTICE PRATHIBA M. SINGH

<u>Prathiba M. Singh, J.</u> (Oral)

1. These objections have been filed under Section 34 of the Arbitration & Conciliation Act, 1996 (*hereinafter, 'the Act'*) challenging the award dated 13th January, 2010 passed by the learned sole Arbitrator.

2. In brief, the Petitioner i.e, M/s Herbanda Industries Ltd. (*hereinafter, 'Petitioner'*) is a manufacturer of various new generation pesticides and it entered into a marketing arrangement dated 11th February, 2004 with the Respondent i.e., M/s Hindustan Insecticides Limited (HIL) (*hereinafter, 'Respondent'*). By the said Agreement, it was agreed that the Respondent would market the products of the Petitioner for use of public health purposes in various State Governments and Central Government, local bodies etc. The Agreement was valid for a period of five years w.e.f. 11th February, 2004. This was an exclusive marketing arrangement by which the Petitioner had agreed to appoint the Respondent as a sole and exclusive marketing

agent.

3. Subsequent to the said Agreement being entered into, a tender was called by M/s Rail India Technical Economic Service i.e, M/s RITES (*hereinafter, 'RITES'*) for supply of health insecticides. In order to support the Respondent's bid in the RITES tender, letter dated 9th February, 2004 was issued by the Petitioner that it would supply technical grade pesticides to the Respondents. Extract of the said letter is set out herein below: -

"*HERANBA INDUSTRIES LIMITED*
101/102 Kanchanganga, Factory Lane, Boriwali (W),
Mumbai-400 092, India
Tel.: 0091 22 2898 7914; Fax: 0091 22 2899 3948
e-mail:heranba@vsnl.com website: www.herbanda.com

February 9, 2004

TO WHOMSOEVER IT MAY CONCERN

We hereby declare that we are basic manufacturers of Deltamethrin Technical & Alpha Cypermethin Technical.

We hereby undertake to supply the Technical Grade pesticides to Hindustan Insecticides Limited for the manufacturing of public health insecticides viz. Deltamethrin 2.5% WP & Aloha Cypermethrin 5% WP.

For HERANBA INDUSTRIES LIIMITED

Sd/-
Neeraj Chaturvedi
Authorised Signatory"

4. It is the case of the Petitioner that after being successful in the RITES tendering process, the Respondent did not place the orders on the Petitioner and instead started sourcing the final manufactured formulation from a third

party. This resulted in losses to the Petitioner which had invested in raw materials and other products with the hope of receiving orders from the Respondent. The Petitioner, thus invoked the arbitration clause contained in the Agreement dated 11th February, 2004 and the matter was referred to arbitration by a learned Single Judge of the Delhi High Court vide order dated 29th September, 2005.

5. The claim of the Petitioner was that since the Respondent purchased the products from its competitor, it suffered losses in respect of capital expenses and purchase of raw material. The Petitioner made a total claim of (i) loss of profit of 15% of the RITES contract (ii) claim towards raw material and capital expenses of Rs.1,60,79,000/- (iii) miscellaneous expenses towards another tender which the parties had jointly bid for in Maharashtra.

6. The Respondent filed a counter claim and sought refund of the security deposit which was made on behalf of the Petitioner by the Respondent for the Maharashtra tender.

7. The learned sole Arbitrator after looking into the contract, firstly held that the said contract which was a marketing arrangement did not have any concern with the RITES tender. The learned sole Arbitrator also notes that the RITES contracts itself was cancelled in view of the findings given by the High Powered Committee constituted by the Punjab & Haryana High Court which had come to the conclusion that the RITES contract could not have been outsourced in the manner it had been done by the Respondent. Thus, the RITES contract was itself cancelled. Under these circumstances, the Arbitrator came to the conclusion that no claim in respect of the RITES contract was maintainable, even by the Petitioner.

8. Insofar as the counter claim of the Respondent is concerned, the Ld. Arbitrator held that since the money had been paid by the Respondent as security deposit for a different tender with the Government of Maharashtra and the same was not refunded by the Petitioner on the ground that it was liable to be adjusted towards the claim qua the RITES contract, the same is liable to the refunded.

9. The learned counsel appearing for the Petitioner submits that the Respondent was under an obligation to place the order under the RITES contract upon it, inasmuch as it had succeeded in the said contract on the basis of the letter dated 9th February, 2004 issued by the Petitioner. He relies on the following paragraphs of the High Powered Committee which according to him supports his case: -

> " *The High Powered Committee then considered the Report submitted by Sub-committee which visited the Bhatinda Works of M/s HIL. The High Powered Committee observed that M/s HIL had valid CIB Registration for supply of Alphacypermethrin 3% and Deltamethrin 2.5% wdp on the date of opening Bids. CIB has also confirmed that M/s HIL are permitted to supply the formulation in the packing given in the bid document and accordingly contract*
>
> *The High Powered Committee members, however, noted that M/s Procured formulation from M/S B. R. Agrotech on payment of cos including excise duty, packed it at their Bhatinda premises, labelled it and effected inspection at their Bhatinda premises itself. As per the terms of their tender the HIL had indicated that they would be procuring Alphacypermethrin/Deltamethrin (Technical) from M/s Hernaba and would be formulating Alphacypermethrin WP/Deltamethrin 2.5% WP at their works at Rasayani. Subsequently, _______ proposed to manufacture*

> *Alphacypermethrin 5% at Bhatinda works, when accordingly allowed in the contract.*
>
> *The High Powered Committee members were of the view that M/s Hindustan gone against the sprit of their tender conditions as they have not formulating final product at their works.*"

10. He submits that the High Powered Committee recommended cancellation of the RITES contract as the Respondent had procured the final products from one M/s B.R. Agrotech. The distinction the learned counsel for the Petitioner tries to draw is that whereas the M/s B.R. Agrotech supplied readymade formulation to the Respondent, the Petitioner would have supplied the raw material and the formulation would have been manufactured by the Respondent. Therefore, it is his argument that if the Respondent had procured the product from the Petitioner, the RITES contract would not have been cancelled and the Petitioner would also have not suffered any losses. The difference he seeks to draw is that the term `Technical' connotes a raw material and not the finished product, which the Petitioner was to supply whereas what the Respondent obtained from M/s. B.R. Agrotech was the finished product. Due to this difference, the Respondent would not have been in breach of the RITES contract. He submits that having obtained the tender on the strength of the letter of the Petitioner, the Respondent could not have obtained the products from some other entity.

11. The distinction between the `Technical grade' and the final product obtained from B.R. Agrotech may be correct. However, the agreement between the Petitioner and the Respondent did not envisage that the Respondent will ONLY source the products from the Petitioner. The

exclusivity did not apply to the Respondent. It applied only to the Petitioner, that the Petitioner would exclusively market its products through the Respondent. There was no obligation on behalf of the Respondent only from the Petitioner. Moreover, the RITES tender was not in contemplation at the time of execution of the Agreement dated 11th February, 2004.

12. The letter dated 9th February, 2004 may have supported the Respondent's bid with RITES. But the said letter does not create a `*compulsion*' for the Respondent to source the products from the Petitioner and neither is the said letter to be treated as a `*promise*'. It is at best a representation of the commercial capability to supply if the Respondent chooses to place the order on the Petitioner. The said letter is not a part of the arrangement envisaged in the Agreement dated 11th February 2004. Since the RITES contract itself has been cancelled, no claims in respect thereof could have been maintained. For these reasons, no fault can be found in the Arbitrator's reasoning.

13. Insofar as the counter claim is concerned, the learned Arbitrator has merely ordered refund of the security deposit which the Respondent had given to the Petitioner as the same was wrongly adjusted by the Petitioner. The Petitioner does not doubt that the said amount was paid by the Respondent to it. The claims of the Respondent for Rs.9,59,400/- is accordingly rightly allowed. The same is liable to be refunded along with the interest as directed by the Arbitrator within a period of eight weeks.

14. Petition is accordingly dismissed.

PRATHIBA M. SINGH, J.

JULY 17, 2018/*Rekha*