

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

% Date of decision: 14th November, 2018

+ FAO(OS) 154/2018 & CM. No. 43148/2018

M/S RAM ABHOSHAN

..... Appellant

Through: Mr. Tarun Gulati, Mr. Neil Hildreth
and Mr. Rahul Jain, Advs.

versus

M/S PEC LTD

..... Respondent

Through: Mr. Rajesh Kumar Gautam and
Mr. Aakash Sehrawat, Advs.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

CM No. 43148/2018 (for exemption)

Exemption allowed subject to all just exceptions.

Application stands disposed of.

FAO(OS) 154/2018

1. This Intra-Court appeal has been filed by the appellant challenging the order dated August 07, 2018 passed by the learned Single Judge in OMP No.444/2015 whereby the learned Single Judge has dismissed the petition under Section 34 of the Arbitration

& Conciliation Act, 1996 (for short “Arbitration Act, 1996”) filed by the appellant challenging the award of the Arbitral Tribunal dated April 28, 2015.

2. The appellant is a proprietorship concern engaged in trading of gold and bullion. The respondent is one of the eight agencies, as notified by the Director General of Foreign Trade for import of gold in India. A Tender dated May 12, 2014 was issued by the respondent with respect to “*Net Trading Margin of Sale of Gold by PEC to be imported in 8th lot of 337 kg. under 20:80 scheme of the RBI*”. It is a matter of record that the Reserve Bank of India (RBI) vide its circular dated August 14, 2013 had clarified its instructions with respect to import of gold by nominated banks / agencies / entities whereunder the Nominated Banks / Nominated Agencies and other Entities were to make available gold for domestic use only to the entities engaged in jewellery business / bullion dealers and to banks authorized to administer the Gold Deposit Scheme (GDS) against full upfront payment on certain conditions. Under 20:80 Scheme of RBI, 20% of the quantity of imported gold was earmarked for export purpose only and the remaining 80% quantity of imported gold was meant for sale in domestic market. It is noted

from the impugned order that the respondent had floated the tender only for 80% quantity of gold meant for domestic use.

3. The appellant submitted its bid for import of 200 kg of gold, offering a Net Trading Margin of 6.25%. Pursuant thereto, a contract came into existence between the parties.

4. By a circular dated May 21, 2014, RBI liberalized the policy with respect to import of gold by permitting import of gold by Star Trading Houses / Premier Trading Houses which were registered as nominated agencies by the Director General of Foreign Trade (DGFT) under 20:80 Scheme.

5. The appellant claims that due to such liberalization in the policy, the gold prices and consequently, the profit margins of the petitioner had considerably decreased, and had therefore claimed *Force Majeure* by invoking Clause 7 of the Tender, as also Section 56 of the Indian Contract Act, 1872. The respondent did not agree with such a plea and as a result, the appellant lifted the entire quantity of gold in 10 lots upon making requisite payments to the respondent / customs / supplier.

6. Thereafter, the appellant raised a claim for recovery of the alleged excess Net Trading Margin paid by it to the respondent claiming that due to the change in policy of the Government, the

Net Trading Margin had fallen to 0.40% as was evident from the subsequent tender floated by the respondent. In other words, the respondent is only entitled to Net Trading Margin of 0.40% and not 6.25% and it should return the excess Net Trading Margin received by it.

7. The case of the appellant before the learned Arbitral Tribunal was also relying upon Clause 7 stipulating *Force Majeure* and Section 56 of the Indian Contract Act. The majority members of the Arbitral Tribunal rejected the plea advanced on behalf of the appellant upon consideration of the judgment of the Supreme Court in the case of *Satyabrata Ghose vs. Mugneeram Bangur & Co., AIR 1954 SC 44* and ultimately holding that the judgment has no applicability to the facts of the case. The Tribunal was of the view that the Supreme Court held, if the changed circumstances made the performance of the Contract impossible, the parties are absolved from further performance as they did not promise to perform an impossibility.

8. The Tribunal also rejected the plea of the appellant that due to change in import policy by RBI, the appellant had been wholly prevented from carrying its contractual obligation. The Tribunal held that because of the very fact that the appellant had performed

the contract, it cannot allege impossibility or frustration. The Tribunal in its conclusion held as under:

“Irrespective of the above, we otherwise also do not find any applicability of clause 7 to the facts of the instant case. This is so since the word ‘preventing’ has to be given an appropriate meaning to understand the context of clause 7. The claimant has, by its own conduct, established that there was no prevention from performing the contract by reason of change in import policy by RBI. For the case to be covered under clause 7, the situation and circumstances should be such which completely prevent the bidder from performing its obligations. For example, if the change in policy was such that there was absolutely no way in which the contract could have been performed, this would have been covered under the ambit of the word ‘preventing’. Further, this was a commercial transaction and it is well known, in business circles that profit is not inbuilt in every contract. Sometimes, there may be supervising circumstances which might lead to suffering of losses as well. On the other hand, there may be certain situations where the supervening circumstances may increase the profit margin. These are risks which are inbuilt in any commercial transaction, but to brand each circumstances which leads to reduction in profit or incurring losses as Force Majeure would militate against the very essentials of a commercial transaction. The best possible case that can be urged by the claimant is suffering of losses due to

change in import policy, but not Force Majeure. As discussed above, suffering of losses in any commercial transaction is a routine incident, which cannot be given a different hue. In this connection, we would profitably refer to Halsbury's Laws of England, 4th Ed. particularly Paras 902, 904 and 906. In Para 902, various causes of frustration have been enumerated, viz:

- (i) Physical destruction of subject-matter of contract;*
- (ii) Cancellation of an expected event;*
- (iii) Delay not attributable to any party;*
- (iv) Subsequent changes in law;*
- (v) Acts of State rendering the performance legally impossible;*
- (vi) Subsequent changes of foreign law;*
- (vii) Death of incapacity.*

The case of the appellant does not fall under any of these heads. Merely because of change in policy, and not change in law, if there is any loss, the same cannot be stated to be covered under Force Majeure.”

9. The Tribunal has also relied upon the judgment of the Supreme Court in the case of ***Rajasthan State Industrial Development & Investment Corporation vs. Diamond and Gem Development Corporation Ltd.*** (2013) 5 SCC 470.

10. The learned Single Judge in the impugned order has concurred with the majority view of the Arbitral Tribunal while dismissing the objections under Section 34 of the Arbitration Act, 1996. Even before us, it is the case of the appellant through its counsel that the word “*preventing*” as used in Clause 7 cannot be read to mean physical impossibility. It includes within its ambit, cases where it is practically impossible for the party to perform or discharge the contract. In the present case, as a result of the change in the policy formulated by the RBI, restrictions on import of gold in India effectively terminated the monopoly enjoyed by the nominating agencies such as the respondent. On account of change in RBI policy, there was no occasion for the appellant to quote Net Trading Margin for 6.25% particularly when in the subsequent tenders floated by the respondent NTM of 0.40 to 0.60 was quoted by other bidders to the tender.

11. In substance, it is the submission of the learned counsel for the appellant that the learned Single Judge has erred in observing that the contract between the appellant and the respondent was not frustrated. He would rely upon the following judgments in support of his contention:-

- (i) ***Satyabrata Ghose vs. Mugneeram Bangur & Co., AIR 1954 SC 44***
- (ii) ***Delhi Development Authority vs. Kenneth Builders and Developers Private Limited and Others, (2016) 13 SCC 561;***
- (iii) ***Smt. Sushila Devi and Another vs. Hari Singh and Others, 1971 (2) SCC 288 and***
- (iv) ***Tarapore and Company vs. Cochin Shipyard Ltd., Cochin and Another, (1984) 2 SCC 680.***

12. Having heard the learned counsel for the appellant, at the outset we may state that the policy dated May 21, 2014 was not issued by the respondent but by a third party i.e. the RBI. The contract between the appellant and the respondent was executed before such a policy was issued by the RBI, that too on the basis of a bid submitted by the appellant with open eyes, wherein it offered a Net Trading Margin of 6.25%. So, the respondent had no role to play in issuance of a policy by the RBI. Such a policy cannot be a ground for the appellant to invoke the *Force Majeure* clause in a contract with the respondent.

13. The case of the appellant as noted by the learned Single Judge, and also advanced before us, is that because of liberalization in the policy, the gold prices and consequently, the profit margins of

the appellant, had considerably decreased and such a scenario is contemplated in *Force Majeure* clause as the same has been defined to mean an act of God, natural calamity, fire, Government of India / RBI / DGFT Policy restrictions, war, military operations of any nature and blockades preventing the seller / buyer from wholly or partially carrying out his contractual obligations. The learned Single Judge has held that because of change in policy, the appellant had not been wholly or partially prevented from carrying its contractual obligations. In other words, in terms of the policy no restrictions have been put on the appellant to carry out its contractual obligations. Rather, the appellant had continued with the contract and discharge the same by lifting the gold so imported.

14. So, it is rightly held that the *Force Majeure* clause is not applicable in the facts of this case. Reliance placed by the learned counsel for the appellant on the judgments of the Supreme Court in *Satyabrata Ghose, Delhi Development Authority, Smt. Sushila Devi and Another* and *Tarapore and Company (supra)* have no applicability in the facts of this case.

15. We also concur with the learned Single Judge, who had placed the reliance on the judgments of the Supreme Court in *Naihati Jute Mills Ltd. vs. Khyaliram Jagannath 1968(1) SCR 821*

and *Energy Watchdog vs. Central Electricity Regulatory Commission & Ors.*, 2017 SCC Online SC 378. That apart, the present appeal being under Section 37(1)(c) of the Arbitration Act, 1996 and the fact that no submissions have been made by the learned counsel for the appellant that the learned Single Judge has failed to exercise jurisdiction in terms of Section 34 of the Arbitration Act, 1996 and in view of the law laid down by the Supreme Court in *Associate Builders vs. DDA* 2014 (4) ARBLR 307 (SC), we do not see any merit in the appeal, the same is dismissed.

V. KAMESWAR RAO, J

CHIEF JUSTICE

NOVEMBER 14, 2018/aky