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

+ **FAO(OS) (COMM) 218/2018 and CM No. 39478-39480/2018**

Date of decision: 25th September, 2018

NATIONAL AGRICULTURAL CO OPERATIVE MARKETING FEDERATION OF INDIA LTD (NAFED) ..... Appellant

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

versus

M/S BANACO OVERSEAS ..... Respondent

Through None

**CORAM:**
**HON'BLE MR. JUSTICE SANJIV KHANNA**
**HON'BLE MR. JUSTICE CHANDER SHEKHAR**

**SANJIV KHANNA, J. (ORAL):**

This appeal by National Agricultural Cooperative Marketing Federation of India Limited (the Appellant, for short) under Section 37, Arbitration and Conciliation Act, 1996 (for short 'A&C Act') read with Section 13 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 impugns the order dated 09.10.2017 dismissing OMP (Comm.) No. 360/2017 filed by them challenging the award dated 24.05.2017.

2. The appeal is belated and delayed by 270 days and hence, an application seeking condonation of delay has been filed. However,

before issuing notice on this application we have deemed it appropriate to examine the appeal on merits.

3. The Government of India pursuant to international obligation had permitted import of Maize (Popcorn) by designated canalizing agencies including the appellant at Nil duty instead of 15% duty, vide Custom Notification dated 25.01.2007. Accordingly, the Directorate General of Foreign Trade had permitted and issued import license dated 26.04.2010 to the appellant with the stipulation that the Maize (Popcorn) imported would be supplied/sold by the appellant to actual users. The appellant had thereupon entered into an agreement dated 15.10.2010 with M/s Banaco Overseas (the Respondent, for short) for import and supply of 8160 Metric Tons (MTs) of Maize (Popcorn). As per terms settled, the respondent had paid Rs.1,77,79,679/- to the appellant as price for 934.12 MTs of Maize(Popcorn). 621.96 MTs of Maize (Popcorn) valued at Rs.1,23,41,804/- was supplied and the balance 312.16 MTs of Maize (Popcorn) valued at Rs.60,75,347/-, for which the respondent had made the payment, was never supplied by the appellant. The reason was that the Directorate of Revenue Intelligence on 14.12.2010 had raided and conducted search in the respondent's premises at Delhi and Mumbai and detained the Maize (Popcorn) procured by the respondent. Directions were issued to withhold clearance of Maize (Popcorn) lying at the ports.

4. The respondent had filed a W.P.(C) No. 898/2011 in this Court which was disposed of vide order dated 11.02.2011 requiring the Directorate of Revenue Intelligence to dispose of application of the respondent for release of the goods and lifting of embargo.

5. The Directorate of Revenue Intelligence had thereafter issued a No Objection Certificate (NOC) for provisional clearance of Maize (Popcorn). In spite of the NOC, the appellant vide letter dated 18.03.2011 did not permit clearance and supply balance 312.16 MTs of Maize (Popcorn). Even the Maize (Popcorn) consignment lying at the ports was not supplied. In these circumstances, the respondent had filed W.P.(C) No. 2172/2011 for quashing the letter dated 18.03.2011 and for directions to the appellant to clear the consignments etc. By order dated 24.05.2011 the High Court had partly allowed the writ petition and had issued direction permitting the respondent to clear the consignments subject to furnishing necessary undertakings.

6. It is an accepted and admitted case that the Directorate of Revenue Intelligence/Customs Authorities have not passed any adverse order against the respondent. The Arbitration award specifically records that the Directorate of Revenue Intelligence has not given any adverse finding or taken any action against the respondent. This factual position is accepted.

7. Learned Arbitrator in the impugned award dated 24.05.2017 has referred to impractical and rather imprudent stand taken by the appellant in the given factual situation, knowing that imported Maize (Popcorn) was a perishable commodity. The Award records that notwithstanding the NOC issued by the Directorate of Revenue Intelligence the appellant did not release the imported Maize (Popcorn). Consequently, the respondent had filed Writ Petition and after considerable length of time the consignments at the ports were released. However due to delay occasioned, the imported Maize

(Popcorn) lying at the ports had become unfit for human consumption. Demurrage charges of Rs.42,62,637/- had to be paid by the respondent for the release of the consignments at the ports. Further, the respondent in view of the aforesaid attitude had to request the appellant to ask the foreign supplier not to export the Maize (Popcorn) to India as the appellant was not ready and willing to clear the supplies to the respondent. The foreign supplier was accordingly told by the appellant to divert/sell the consignments to third parties. Rs.58,62,000/- was paid by the respondent to the appellant to be further paid to the foreign supplier as shipment charges etc.

8. The Arbitrator vide the award dated 24.05.2017 has directed the appellant to reimburse and to pay demurrage charges of Rs.42,62,637/- and also refund of Rs.58,62,000/- to the supplier. In addition, the appellant had also been directed to reimburse Rs.57,50,347.32/- i.e. the loss suffered on the sale of Maize (Popcorn) which could be only sold for Rs.3,25,000/-. The Arbitration award also directs the appellant to refund security deposit of Rs.2 lakhs without interest and pay Rs.2,49,928/- towards the closing balance, differential amount. The damages on account of loss of profit of Rs.9 lakhs have been awarded.

9. Before the Single Judge, the appellant had relied on clause 4 of the Agreement dated 15.10.2010 which stipulates that the respondent would indemnify the appellant against all claims proceedings and demands including demurrage etc. or any charges of any value whatsoever. The impugned judgment records that this contention and plea relying on clause 4 was not raised before the Arbitrator. This

position was accepted and admitted by the counsel for the appellant. The Single Judge in the impugned judgment has rightly recorded that the appellant cannot be allowed to raise a new contention and plea. The appellant cannot urge and argue that the Award passed was erroneous and illegal in view of the clause, which was never cited and relied upon. This plea and contention relying on clause 4 should have been raised and urged before the Arbitrator, who would have then considered and interpreted the clause, its scope and ambit.

10. The appellant had submitted that there was no evidence to prove and establish loss of Rs.57,50,347.32/- on account of sale of Maize (Popcorn). As noted above, the respondent has paid Rs.60,75,347/- to the appellant. Due to the lapse and default of the appellant full quantity of Maize (Popcorn) was not supplied inspite of issue of NOC by the Directorate of Revenue Intelligence. The appellant was bound and should have refunded money paid by the respondent in advance for supplies that were never made. Further, due to delay on the part of the appellant the imported Maize (Popcorn) lying at the ports had become unfit for human consumption. The Arbitrator after referring to the evidence adduced has held that the respondent were forced to sell the imported Maize (Popcorn) for Rs.2 per kg as "*CHARA DANA*" for the cattle etc. The impugned order refers to the evidence on record and statements of witnesses, and observes that the Maize (Popcorn) was perishable in nature and further on account of delay caused by the appellant in releasing the consignment, the Maize (Popcorn) had become unfit for the human consumption. The aforesaid findings are primarily finding of facts. The reasons elucidated and given in the

Award and accepted by the learned Single Judge are cogent and appeal to common sense.

11. The appellant does not dispute that demurrage charges of Rs.42,62,637/- were paid by the respondent for the release of the consignment of Maize (Popcorn) from the Customs. Payment of Rs.58,62,000/- to the third party exporter for the consignment in transit is accepted. This payment was in fact made by the appellant to the foreign supplier after similar amount was paid to them by the respondent.

12. In view of the aforesaid factual position and findings of the Arbitrator and the limited scope and jurisdiction which this Court exercises under Section 37 read with Section 34 of the A&C Act, we do not find any good ground to interfere with the impugned judgment and the Award. In these circumstances, we are not issuing notice in the application for condonation of delay, being CM No. 39479/2018, and the application along with the appeal would be treated as dismissed. CM No. 39478/2018 and 39480/2018 are also disposed as infructuous.



**SANJIV KHANNA, J**

**CHANDER SHEKHAR, J**

**SEPTEMBER 25, 2018**
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