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

+ **O.M.P. (COMM) 548/2016**

MAYUR SEEDS & AGRITECH

..... Petitioner

Through: Ms Ranu Purohit, Advocate and
Mr Rishabh Gupta, Advocate

versus

**NATIONAL SEEDS CORPORATION LTD
(NSC)**

.....Respondent

Through: Mr Yashvardhan, Advocate
with Mr Ankit Goyal, Advocate

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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07.03.2018

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an arbitral award dated 05.08.2016 (hereafter 'the impugned award') passed by the Arbitral Tribunal comprising of the sole arbitrator.

2. The impugned award is rendered in the context of two agreements for supply of Soyabean seeds entered into between the parties.

3. Briefly stated, the relevant facts that are necessary to address

the controversy are as under:-

3.1 The respondent (hereafter 'NSC') issued a notice inviting tender (NIT) on 04.06.2011, calling upon the eligible bidders to furnish bids for supply of certified Soyabean seeds for the year 2011-12 (season *Kharif*- 2011). The petitioner submitted its bid pursuant to the said NIT, which was accepted and the parties entered into an agreement dated 16.09.2011 (hereafter 'the First Agreement'). In terms of the First Agreement, the petitioner agreed to supply 27,000 quintals of Soyabean of the specified quality – 10,000 quintals of Soyabean JS-335, 10,000 quintals of Soyabean JS-9305 and 7,000 quintals of Soyabean JS-9560 – at the prices specified in the First Agreement.

3.2 Admittedly, the petitioner could not complete the supplies and the quantity supplied by the petitioner was short by 5,846.10 quintals. In view of the above, NSC imposed a penalty of ₹17,83,061/- in terms of Clause 17 of the First Agreement.

3.3 NSC issued another NIT on 24.04.2012 for Season *Kharif* 2012. The petitioner submitted its tender for the supply of certified Soyabean seeds in terms of the said NIT. The said tender was opened on 16.05.2012. Thereafter, the parties entered into an agreement (hereafter 'the Second Agreement') and, NSC issued a Procurement Order on 28.05.2012. Admittedly, the petitioner was required to supply 20,000 quintals of certified seeds under the Second Agreement.

3.4 There is a controversy regarding the quantity of certified seeds supplied by the petitioner. NSC claims that there was short supply of

seeds of the requisite quality and has imposed a penalty of ₹23,90,201/- in terms of Clause 18 of the Second Agreement for short supply of 6360.30 quintals of Soyabean seeds.

3.5 The petitioner disputed the levy of penalty under the two Agreements and sought appointment of an arbitrator for adjudication of the disputes. This resulted in the Arbitral Tribunal being constituted.

Statement of Claims

4. The petitioner disputed the levy of penalty and also sought to raise a counter claim. It is relevant to refer to the petitioner's stand in the Statement of Claims filed before the Arbitral Tribunal. In the first instance the petitioner disputed that the supplies made by the petitioner in respect of the two agreements were less than the quantities agreed. In respect of the Second Agreement, the petitioner claimed that it had processed 23248.70 quintals of seeds but NSC had accepted delivery of only 11639.70 quintals of seeds. The balance quantity of 11609 quintals of Soyabean seeds was not accepted by NSC and the petitioner returned the same to the agriculturists.

5. The petitioner claims that the said seeds were successfully tested in STL Lab but failed the retest at NSC QCL Lab. It is further claimed by the petitioner that once the seeds had been certified in an STL test, the question of retesting the same was unwarranted. On the basis of the aforesaid stand, the petitioner claimed that it was entitled to the processing charges in respect of 11609 quintals of seeds at the rate of ₹440 per quintal, aggregating a sum of ₹51,07,960/-.

6. The claims made by the petitioner in the Statement of Claims are summarized as under:

- (i) a sum of ₹17,83,061/- on account of wrongful deduction of penalty by NSC in respect of the First Agreement;
- (ii) a sum of ₹23,90.201/- on account of wrongful deduction of penalty by NSC for short supply in respect of the Second Agreement;
- (iii) a sum of ₹51,07,960/- on account of service charge @ ₹440 per quintal for 11609 quintals of seeds that was not accepted by NSC in respect of the Second Agreement; and
- (iv) 18% interest from July, 2013 onwards

7. The Arbitral Tribunal considered the aforesaid claims and rejected the same. The Tribunal found that the penalty levied was in terms of the Agreement; that is, as per Clause 17 of the First Agreement and Clause 18 of the Second Agreement. The Tribunal further held that NSC was also entitled to insist of the seed complying with the QCL tests.

Submissions

8. Ms Ranu Purohit, the learned counsel appearing for the petitioner contended that the impugned award was without application of mind, as the Arbitral Tribunal had failed to consider the relevant facts. She referred to paragraphs 18.2.3 and 18.2.4 of the impugned award which contain the findings of the Arbitral Tribunal with regard to the imposition of liability in respect of the First Agreement. The said paragraphs indicated that the Arbitral Tribunal had proceeded on

the basis that NSC had not taken delivery of seeds in respect of the First Agreement on account of the same failing the QCL Test. She contended that there was no controversy with regard to any of the supplies failing the QCL Test as it was the petitioner's admitted case that it had not supplied 5846.10 quintals of seeds on account of unprecedented rains. She submitted that the issue of seeds being rejected on account of failing QCL Test was a controversy that related supply of seeds under the Second Agreement. She submitted that the impugned award was, thus, liable to be set aside on this ground alone. She also drew the attention of this Court to paragraph 18.2.3 of the impugned award, wherein the Arbitral Tribunal had noted that the STL Test had been conducted in the A.P. State Seed Certification Agency. She stated that this fact was also patently incorrect, as the test was conducted in the State of Madhya Pradesh.

9. She further contended that the principal issue with regard to the Second Agreement was whether petitioner was entitled to service charges. She stated that under the Second Agreement, the petitioner was to process the seeds on behalf of NSC and was only entitled to service charges. Since, the petitioner had performed its services, it was entitled to the service charges which were quantified at ₹51,07,960/-.

Reasons and Conclusion

10. I have heard the learned counsel for the petitioner. Undisputedly, certain errors have crept into the impugned award. It is apparent that one of the principal reasons for the same is also the manner in which the Statement of Claims has been framed. Contrary

to what has been contended before this Court, in the statement of claims, the petitioner had not accepted that there was a short supply of 5846.10 quintals of Soyabean under the First Agreement. On the contrary, the petitioner had asserted that it had supplied the agreed quantity of seeds in respect of both the Agreements. This assertion was followed by the petitioner's explanation with respect to short supply of seeds; it stated that it had supplied the agreed quantity of seeds but according to NSC the supply was short, as NSC had not accepted the seeds that had failed NSC QCL Test.

11. Para 7 & 8 of the Statement of Claims reads as under:-

“7. That, the applicant has supplied the agreed quantity to the respondent Corporation in respect of the above agreements. But, as per the respondent Corporation, the applicant has supplied 5846.10 quintals Soyabean Seed short in respect to the first agreement and 6360.30 quintals of Soyabean Seed short in respect to the Second agreement.

8. That, as per the respondent Corporation, the applicant has supplied 5846.10 quintal of Soyabean seed short in respect of the first agreement and therefore the respondent Corporation is entitled to recover an amount on the said short quantity @ Rs.3,050/- per quintal. Accordingly, the respondent Corporation has deducted a sum of Rs.17,83,061/- from the applicant on account of short supply in the form of penalty.

Similarly, in respect of the second agreement, as per the respondent Corporation, the applicant supplied 6360.30 quintals of Soyabean seed short and as such as per the terms and conditions of the agreement, the

respondent Corporation has deducted an amount of Rs.23,90,201/- from the applicant on account of short supply in form of penalty.”

12. The petitioner had also pleaded that “*the crops of Kharif-2011 and Kharif -2012 was very poor because of heavy rains*”. Thus, the petitioner had also sought to explain the short supply on the ground of heavy rains.

13. It was the petitioner’s case that NSC had failed to take the delivery of 11,609 quintals of seeds in respect of the Second Agreement. It has now been argued on behalf of the petitioner that there was no dispute with regard to the short supply of seeds under the First Agreement. The said seeds could not be supplied due to heavy rains and the only issue which was required to be considered by the Arbitral Tribunal was whether penalty could be imposed on account of short delivery of seeds occasioned by natural factors.

14. The learned counsel for the petitioner had submitted that the disputes in regard to the Second Agreement related to (a) whether the petitioner was entitled to service charges on the quantity of 11,609 quintals of seeds that were prepared by the petitioner but delivery was declined by NSC on account of failing the QCL Test and; (b) whether NSC was entitled to levy any penalty.

15. It is thus apparent from the above that the Statement of Claims filed by the petitioner lacked clarity. The petitioner had sought to raise further contentions but, concededly, the statement of claims was not amended.

16. The petitioner had also contended that it should be treated with parity with Sagar Agro Inputs Pvt Ltd, Ujjain which had also failed to supply the same variety of seeds as the petitioner had agreed to under the First Agreement. It was stated that no penalty had been imposed by NSC on Sagar Agro Inputs Pvt Ltd.

17. In view of the above, the Arbitral Tribunal was required to examine whether the petitioner was entitled to waiver of penalty in respect of the First Agreement (i) on account of unprecedented rains; and (ii) on the ground of parity with Sagar Agro Inputs Pvt Ltd.

18. It is seen that both these questions were considered by the Arbitral Tribunal. The Arbitrator had considered the same in Para 18.2.9 of the impugned award which reads as under:-

“18.2.9 Another issue which requires consideration and determination is regarding the Argument for waiver of the penalty on account of natural calamity. The Claimant has argued that waiver on account of natural calamity has been granted on the ground of natural calamity to another organization namely M/s. Sagar Agro Inputs Pvt. Ltd. for the same season and for the same crop i.e. Soyabean-JS-9305. The Claimant has submitted that during Kharif 2011 season there was a heavy rain in the catchment area of the Soyabean Crop and because of which the quality of Soyabean Seeds suffered damage resulting in below standard production. The natural calamity is widely published in the media and survey was also conducted by the State Government which

established that due to natural calamity of heavy rain the production of the Soyabean Crop has been badly impaired. The Claimant requested the Respondent through its Regional Office for grant of waiver. The Respondent has confirmed vide his written submission dated 15.05.2016 that the request of waiver from the Claimant was received by the Respondent and examined at the level of price committee of Head Office on 11.04.2013 and it was felt by the Committee that the penalty should not be waived. The Claimant agitated the matter again but the waiver was not allowed. Respondent has submitted that the issue of waiver was considered at the higher level and discarded after considering the same on the basis of terms and conditions of the agreement.”

19. Thus, the Arbitral Tribunal has squarely answered the question that the claim for waiver of penalty could not be considered, as there was no provision in the two Agreements for such waiver. Clearly, commercial difficulties are not an excuse for non performance of an agreement. A plain reading of the impugned award indicates that the Arbitral Tribunal had held that the question whether such penalty could be waived was outside the purview of the contract and, thus, was a matter for NSC to consider.

20. It was admitted that NSC had granted waiver of penalty to M/s Sagar Agro Inputs Private Limited which was similarly placed as the petitioner; however, the Arbitral Tribunal did not adjudicate whether the petitioner would be entitled to be treated in the same manner, as the Arbitral Tribunal held that the same was also outside the purview

of the contractual terms. However, the Arbitral Tribunal directed NSC to reconsider the representation of the petitioner.

21. In respect of the petitioner's claims with regard to the Second Agreement, the Arbitral Tribunal was required to address the issue (i) whether NSC was obliged to lift stocks that had not passed the QCL Test; and (ii) whether the petitioner was entitled to processing charges in respect of the quantity of seeds that had not cleared the QCL Test. In this regard, the Arbitral Tribunal returned the finding that NSC was not obliged to accept the delivery of seeds that had failed the QCL Test in view of the express language of Clause 5 of the Second Agreement, which required that the seeds would be processed and packed only after meeting the STL and NSC QCL Seed Test Results. The relevant extract of the impugned award reads as under:

“18.2.3 As regards justification for imposing penalty, it is an admitted fact on the part of the claimant that the Respondent did not take delivery of the said seed the QCL test of the seed conducted at the respondent's lab, seed made available by the claimant was found to be sub-standard and accordingly respondent refused to lift the seed. Issue is whether under these circumstances the respondent Corporation was under any obligation to lift the entire seed, when the seed in question have passed STL test in the A.P. State Seed Certification Agency.

18.2.4 To resolve the above dispute reference to clause 5 and clause 17 of the Terms and Conditions of the

agreement executed between the parties is relevant, which stipulates as under:

Clause 5

The produce from the plots certified by Certification Agency is to be processed and packed only after meeting the STL & NSC QCL seed test results.

Clause 17

Failure to deliver less than 90% of approved quantity by seeds producer, shall entitle NSC to impose penalty @ 10% of the value of the shortfall in the supply at the rate agreed too. The penalty for short supply will remain at 10% of the value of the quantity not supplied against 90% benchmark. For deliberately delayed suppliers penalty of Rs.2/- per day per qtl. may be charged.

18.2.5 In view of the above Respondent is justified in imposing penalty @ Rs. 10% of the value of the shortfall in the supply and as there is no liability on the part of the respondents to lift the seed which have passed the STL test but failed to meet the requirement of QCL test.

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18.3.1 For the Kharif Season 2012 the Claimant has executed an agreement with the Respondent for supply of 2000 qtls. of Soya bean Seeds of different varieties out of which 11639.70 qtls. of the seed passed in both the STL and QCL tests

and the balance amount to the tune of 6360.30 qtls. could not be lifted by the Respondent as the same has not passed the QCL test. As explained in previous paras Clause 5 and Clause 17/18 of the Agreement are relevant which provide that the produce from the plots certified by the Certification Agency is to be processed and packed only after meeting the STL & NSC QCL tests seed test results, since the balance seed made available by the Claimant has not passed in QCL test, there appears to be no obligation on the part of the Respondent to lift the same.

18.3.2 For the reason explained in discussing the previous category (A) Para 18.2.1 to 18.2.7 there appears to be justification for imposing penalty and quantum of penalty imposed appears to be as per Clause 5 and 17/18 of the Agreement.

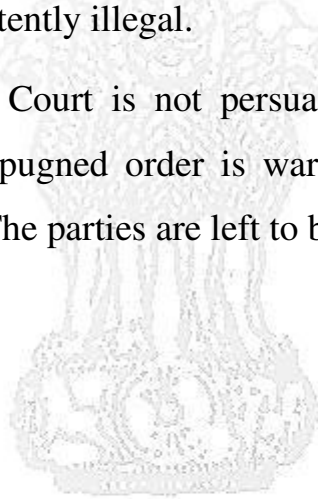
Accordingly the Tribunal do not find any reason to interfere with the penalty of Rs.23,90,201.00 imposed on the Claimant by the Respondent for the short supply of 6360.30 qtls. by the Claimant in Season Kharif 2012. The penalty imposed is as per the terms of Agreement executed between the parties.”

22. As is apparent from the above, the Arbitral Tribunal also held that as far as penalty in respect of the Second Agreement is concerned, there was no ground to interfere, as the same was as per the Agreement executed between the parties.

23. There may be some obvious errors in the impugned award; however, the Arbitral Tribunal has decided the disputes raised by the

petitioner and has answered the controversy involved. It is well settled that the scope of judicial review under Section 34 of the Act is limited. This does not entail re-appreciation of the evidence or re-adjudication of the controversy. The arbitral award can be interfered with only on the ground specified under Section 34 of the Act. In the present case, the petitioner has sought to contest the impugned award on the ground that it is opposed to public policy and is patently illegal. This Court finds it difficult to accept the aforesaid contention; the award can neither be stated to be opposed to the fundamental policy of Indian law nor can be held as patently illegal.

24. In this view, this Court is not persuaded to accept that any interference with the impugned order is warranted. The petition is, accordingly, dismissed. The parties are left to bear their own costs.



VIBHU BAKHRU, J

MARCH 7, 2018

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