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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 7th August, 2018

+ O.M.P. 444/2015

M/S RAM ABHOSHAN

..... Petitioner

Through: Mr.J.M.Sharma, Sr. Adv. with Mr.Neil
Hildreth, Mr.Rahul Jain, Mr.Ajit Sharma, Advs.

versus

M/S PEC LIMITED

..... Respondent

Through: Mr.Rajesh Kumar, Mr.G.K.Singh, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 challenging the Arbitral Award dated 28th April, 2015 passed by the majority of the members of the Arbitral Tribunal dismissing the claim of the petitioner.
2. The disputes between the parties have arisen out of the Tender No. PEC/Gold Del/20:80/2014-15/Lot-8 dated 12th May, 2014 floated by the respondent with respect to "Net Trading Margin on Sale of Gold by PEC to be imported in 8th Lot of 337 kg. under 20:80 scheme of RBI".
3. The Reserve Bank of India (RBI) vide its Circular dated 14th August, 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 authorised 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. As the import of gold was restricted through only a few Agencies, the respondent being one of them, the respondent floated the tender for Net Trading Margin (NTM) where the bid was invited only for 80% quantity of gold meant for domestic use.

4. The petitioner submitted its bid for import of 200 kg of gold, offering a Net Trading Margin of 6.25%. The bids were opened on 20th May, 2014 and the bid of the petitioner being the highest, was accepted by the respondent. The petitioner deposited the requisite amount as required under different clauses of the bid document and therefore, a contract came into existence between the parties.

5. By a circular dated 21st May, 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. The petitioner claiming that due to such liberalization in the policy, the gold prices and consequently, the profit margins of the petitioner had considerably decreased, claimed Force Majeure by invoking clause 7 of the tender as also under Section 56 of the Indian Contract Act, 1872.

6. The respondent, however, did not agree to such a plea of the petitioner and the petitioner lifted the entire quantity of gold in 10 lots upon making requisite payments to the respondent/customs/supplier.

7. Thereafter, the petitioner filed the 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 on 10th June, 2014 and therefore, the respondent was only entitled to the Net Trading Margin of 0.41 % and it should return the excess Net Trading Margin received by it. The claim has been rejected by the majority of the Members of the Arbitral Tribunal by its Impugned Award.

8. The only question therefore, for consideration is as to whether with the change in the policy as made by the RBI circular dated 21st May, 2014, there is a cause of frustration of contract as contemplated in clause 7 of the tender document and/or Section 56 of the Contract Act. Clause 7 of the tender document is reproduced hereinbelow:

“7. **FORCE MAJEURE:**

Should any of the force majeure circumstances, namely 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 period stipulated for the performance of the Contract shall be extended for as long as these circumstances prevail, provided that, in the event of these circumstances continuing for more than three months, either party shall have the right to refuse to fulfil its contractual obligations without title to indemnification of any losses it may thereby sustain. The party unable to

carry out its contractual obligations shall immediately advise the other party of the commencement and the termination of the circumstances preventing the performance of the contract. A certificate issued by the respective Chamber of Commerce shall be sufficient proof of the existence and duration of such circumstances.”

9. A reading of the above clause would show that the circumstances envisaged therein as cause of Force Majeure are 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.’

10. In the present case, it is not the contention of the petitioner that due to the change in policy of the Government as issued by the RBI Circular dated 21st May, 2014, it was ‘wholly or partially’ prevented from carrying out its contractual obligations. The only plea raised by the petitioner is one of economic loss and un-viability of the contract due to loss in profit margins as a result of change in the policy.

11. Section 56 of the Contract Act is reproduced hereinbelow:

“56. Agreement to do impossible act.—An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful.—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.—Where one person

has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.”

12. Though, it is correct that as laid down by the Supreme Court in ***Satyabrata Ghose vs. Mugneeram Bangur & Co. and Anr.*** AIR 1954 SC 44, the word ‘impossible’ has not been used in the Section in the sense of physical or literal impossibility, at the same time it has been held by the Supreme Court in ***Alopi Parshad & Sons Ltd. vs. UOI***, (1960) 2 SCR 793, a wholly abnormal rise or fall in prices, which is an unexpected obstacle to execution, does not in itself get rid of the bargain parties have made. It is only when a consideration of the terms of the contract, in the light of the circumstances existing when it was made, showed that they never agreed to be bound in a fundamentally different situation which had unexpectedly emerged, that the contract ceases to bind. It was further held that the performance of a contract is never discharged merely because it may become onerous to one of the parties. The relevant paragraphs are reproduced below:-

“21. Section 56 of the Indian Contract Act provides that:

“A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.”

Performance of the contract had not become impossible or unlawful; the contract was in fact, performed by the Agents, and they have received remuneration expressly stipulated to be paid therein. The Indian Contract Act does not enable a party

to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. "The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate — a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet, this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point — not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation. When it is said that in such circumstances the court reaches a conclusion which is 'just and reasonable' (Lord Wright in Constantine case or one 'which justice demands' (Lord Sumner in Hirji Mulji v. Cheong Yue Steamship Co. Ltd.), this result is arrived at by putting a just construction upon the contract in accordance with an 'implication ... from the presumed common intention of the parties'" — speech of Lord Simon in British Movietonews Ltd. v. London and District Cinemas Ltd.

22. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract, merely because on account of an un contemplated turn of events, the performance of the contract may become onerous. That is the law both in India and in England, and there is, in our opinion, no general rule to which recourse may be had, as contended by Mr Chatterjee, relying upon which a party may ignore the express covenants on account of an un contemplated turn of events since the date of the contract. Mr Chatterjee strenuously contended that in England, a rule has in recent years been evolved which did not attach to contracts the same sanctity which the earlier decisions had attached, and in support of his contention, he relied upon the observations made in British

Movietonews Ltd. v. London and District Cinemas Ltd. In that case, Denning, L.J., is reported to have observed:

“.... no matter that a contract is framed in words which taken literally or absolutely, cover what has happened, nevertheless, if the ensuing turn of events was so completely outside the contemplation of the parties that the court is satisfied that the parties, as reasonable people, cannot have intended that the contract should apply to the new situation, then the court will read the words of the contract in a qualified sense; it will restrict them to the circumstances contemplated by the parties; it will not apply them to the un contemplated turn of events, but will do therein what is just and reasonable.”

13. Similarly, in *Naihati Jute Mills Ltd. vs. Khyaliram Jagannath*, 1968(1) SCR 821, it was held that a contract is not frustrated merely because the circumstances in which it was made are altered. The Courts have no general power to absolve a party from the performance of its part of the contract merely because its performance has become onerous on account of an unforeseen turn of events.

14. In *Energy Watchdog vs. Central Electricity Regulatory Commission & Ors.*, 2017 SCC Online SC 378, the Supreme Court again reiterated that a more onerous method of performance by itself would not amount to a frustrating event. Where the fundamental basis of the contract remains unaltered, an unexpected rise in the price will not absolve the party from performing its part of the contract as when they enter into a contract, they take such risk knowingly. Force Majeure clauses are to be narrowly construed and a mere rise in price (in the present case a fall in price) rendering the contract more expensive to perform (in the present case, more onerous to perform)

will not constitute force majeure.

15. In view of the above, I find no merit in the present petition and the same is accordingly dismissed with no order as to costs.

NAVIN CHAWLA, J.

AUGUST 07, 2018
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