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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: July 13, 2018

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FAO(OS)(COMM) 205/2017

NORDIC INTERTRADE AS (NORWAY)

..... Appellant

Through: Mr. Aman Ahluwalia, Mr. Sumeet Lall, Ms. Marisha Shukla & Mr. Sidhant Kapoor, Advs.

versus

STEEL AUTHORITY OF INDIA LIMITED (INDIA)

..... Respondent

Through: Mr. Akhil Sibal, Sr. Adv. with Mr. Pradeep Chindra, Mr. Ashish Kumar, Mr. Sushil Kumar Singh & Ms. Surabhi Diwan, Advs.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

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S. RAVINDRA BHAT, J.

1. Nordic Intertrade AS (hereafter “Nordic”) – a Norway based company appeals the rejection of its objections under Section 34 of the Arbitration and Conciliation Act 1996 (hereafter “the Act”), to an arbitral award dated 23.01.2012 (hereafter “impugned award”) of a sole arbitrator.

2. The dispute referred to the tribunal arose between the parties in respect of a contract dated 01.02.2008 (hereafter “the Agreement”) whereby

the respondent ("SAIL") agreed to sell 5000 MT of Prime Mild Steel, Hot Rolled Plates (Non- Alloy) to Nordic. The dispute was whether Nordic was liable to pay duties imposed on export of the contracted goods. Nordic disclaimed the liability to pay any export duties. SAIL, however, insisted that Nordic- the buyer had to pay, saying that Nordic's failure to indicate a vessel during the agreed "laycan" before expiration of the agreement term, led it to invoke clause 9 (the Red Clause) of the Agreement and that its effect was that the title of the goods passed (from SAIL) to Nordic. SAIL argued that since the duties were notified *after* title to the goods passed Nordic had to pay the duties. SAIL had refused to load the cargo without securing receipt of the export duty; Nordic therefore opened the letter of credit (L/C) for the amount of export duties under protest, which SAIL encashed. Nordic claimed the export duty amount and other costs and damages incurred before the tribunal. SAIL counter claimed costs incurred by it in respect of litigation instituted by Nordic. The tribunal considered the claims and counterclaims and rejected them by the impugned award.

3. The terms spelt out in the "General Terms and Conditions of Export Contract (FOB)" were an integral part of the Agreement. In terms of the Agreement, Nordic opened a L/C on 06.02.2008 for payment of the goods in question. On 09.04.2008, SAIL issued a notice of readiness (NOR) of cargo and also called upon Nordic to nominate a suitable vessel within laycan period of 25.04.2008 to 29.04.2008. Nordic's agent, by an email dated 15.04.2008, advised the availability of a vessel MV "Rickmers, Chennai" with laycan of 07.05.2008 to 15.05.2008. SAIL responded to the email on 17.04.2008. The controversy as to whether SAIL agreed to revised laycan,

as suggested on behalf of Nordic, was a subject matter of dispute before the arbitral tribunal. On 06.05.2008, SAIL invoked clause 9 (the Red Clause) of the General Terms and Conditions of Export Contract (FOB) and negotiated the documents under the L/C opened by Nordic. Later, on 10.05.2008, SAIL submitted an NOR. The same day, the Central Government, by Notification No.66/ 2008 - Customs imposed export duty of 15% *ad valorem* on the goods in question. The nominated vessel, MV "Rickmers, Chennai" arrived at Vizag Port on 12.05.2008. SAIL, however, did not load the cargo but sent a letter dated 12.05.2008 requesting the agent to hold the berthing of the vessel till further advice from SAIL in view of "*some commercial settlements due from receiver of the cargo*". It also asked Nordic pay the export duty imposed by notification-dated 10.05.2008. The ensuing correspondence saw parties hardening their position; finally, Nordic opened the L/C for the amount of export duties payable on the goods on 28.05.2008 and sent a letter dated 29.05.2008 placing on record that it had paid the export duty under protest. The total amount of export duty paid by Nordic under protest was ₹2,88,21,737/- (equivalent to € 460,779.18). It also claimed to have paid detention charges @ US\$ 242,414 (equivalent to € 179,565 (to the shipper)). On receipt of the L/C, SAIL loaded the goods onto the vessel.

4. Nordic sought the payment of € 724237 (equivalent to ₹4,98,99,929/-, calculated at the exchange rate of Euro 1 equal to ₹68.90) from SAIL, which responded to the legal notice by its letter dated 21.11.2009 refuting that claim. Nordic demanded a reference to arbitration by writing to the Indian

Council of Arbitration (ICA). These arbitration proceedings culminated in the impugned award.

5. Before the learned single judge, the invocation of the laycan was contested as contrary to the record; secondly it was contended under the Agreement, SAIL was liable to pay all custom duties, having regard to clause 9.3 of the Agreement as it provided that the seller (SAIL) was obliged to deliver the goods FOB (SLSD) at its cost. In terms of clause 1.1 of the Agreement, all commercial terms and abbreviations used in the Agreement were to be interpreted by applying the rules of the 'ICC INCOTERMS 2000'. SAIL referred to the meaning of FOB under the ICC INCOTERMS 2000 (hereafter 'the INCOTERMS') and submitted that payment of all duties on export was SAIL's liability and the arbitral tribunal had grossly erred in denying Nordic's claim for reimbursement of detention charges, bank charges and legal expenses. The last ground was deliberate delay by SAIL in loading the goods onto the vessel with the view to economically coerce Nordic into furnishing an L/C for the amount of export duty. All these contentions were rejected.

6. The learned single judge reasoned, on the arguments concerning applicability of INCOTERMS conditions, that the tribunal's findings could not be faulted:

“25. Admittedly, SAIL was liable to pay customs duty relating to the goods till such time as they passed the ship's rail. However, the question is not of customs duty, which were otherwise in contemplation of the parties, but the additional export duty levied for the first time after the title of the goods

passed to Nordic and after SAIL had realised the entire consideration. The export duty of 15% was imposed by virtue of a notification issued by the Government of India on 10.05.2008 and, admittedly, the process of clearing the goods had commenced on 08.05.2006, after SAIL had invoked the Red Clause and received the consideration for the same. The arbitral tribunal thus considered that such duties which altered the cost structure after the title of the goods had passed were payable by Nordic. In effect, the arbitral tribunal held that such duties formed a part of additional costs incurred after the title and risk had passed to Nordic and which would also include additional costs incurred on account of any supervening event. The expression 'FOB' as used in clause 9.3 of the Agreement, must be understood in the context of the Red Clause.

26. The FOB shipment as explained under INCOTERMS is to be applied under normal circumstances and not in cases where any breach of contract is alleged. In the introduction to INCOTERMS, it is expressly stated as under:-

".... Although Incoterms are extremely important for the implementation of the contract of sale, a great number of problems which may occur in such a contract are not dealt with at all, like transfer of ownership and other property rights, breaches of contract and the consequences following from such breaches as well as exemptions from liability in certain situations. It should be stressed that Incoterms are not intended to replace such contract terms that are needed for a complete contract of sale either by the incorporation of standard terms or by individually negotiated terms. Generally, Incoterms do not deal with the consequences of breach of contract and any exemptions from liability owing to various impediments. These questions must be resolved

by other stipulations in the contract of sale and the applicable law."

27. It stands to reason that in the context of the Agreement between the parties, the expression 'FOB' as used in clause 9.3 cannot be understood in the manner as canvassed on behalf of Nordic. The definition of FOB as provided under the INCOTERMS and as quoted above, clearly indicates that the risk of loss or damages to the goods after the goods have passed the ship's rails, are with the buyer. Thus implying that risk prior to that point are with the seller. However, concededly, the risk of loss or damage to the goods would stand transferred to Nordic once SAIL had invoked the Red Clause. Thus, in the context of the Red Clause, the expression 'FOB' would only imply that, notwithstanding the invocation of the Red Clause, SAIL would be liable to deliver the goods onto the vessel but it does not mean that the risk of loss or damage remained with SAIL even after the title of the goods had passed to Nordic. It also stands to reason that payment for additional costs resulting from imposition of additional levy after the transfer of title of goods would also be Nordic's liability.

28. In view of the above, this Court is unable to accept that the decision of the arbitral tribunal suffers from any patent illegality or is perverse."

7. Mr. Aman Ahluwalia, Nordic's counsel argued that under the Customs Act 1962, SAIL is the exporter and is liable to make payment of export duty. Counsel relies on relevant provisions of the Customs Act, 1962 such as Sections 2(15), 2(19), 2(20) and 51. Learned counsel submitted that Clause 9.3 of the Agreement fourth paragraph (Annexure C-19- at page 67) provides as follows:

"If the seller has to provide a contract of carriage which involves payment of duties, taxes and other charges, such costs will, of course, fall upon the seller to the extent that they are for his account under that contract. This is now explicitly set forth in the A6 clause of all "C"- terms."

8. Mr. Ahluwalia also relied on Condition A6 (FOB Terms) of Incoterms which read as follows:

"Division of costs

The seller must, subject to the provisions of B6, pay all costs relating to the goods until such time as they have passed the ship's rail at the named port of shipment; and where applicable the costs of customs formalities necessary for export as well as all duties, taxes and other charges payable upon export."

9. Condition B6, which is referred to in A6 (above) reads as follows:

"Division of costs

The buyer must pay all costs relating to the goods from the time they have passed the ship's rail at the named port of shipment; and any additional costs incurred, either because the vessel nominated by him fails to arrive on time, ; and where applicable, all duties, taxes and other charges as well as the costs of carrying out customs formalities payable upon import of the goods and for their transit through any country."

10. It is argued that Clauses A6 and B6 are both subject to Clause 14 of Incoterms which provide that customs export duty is to be paid by the exporter. It is submitted that a plain reading of Clauses A6 and B6, that the second part of Clause A6 (which relates to customs formalities and export duty) is not and cannot be subject to any portion of Clause B6; since, no part

of Clause B6 deals with customs *export* duty. The third part of Clause B6 only deals with customs formalities and *import* duty.

11. Learned counsel submitted that these conditions are to be in any case, read with Paragraph/Clause 14 of Introduction to Incoterms which clarifies what is “customs clearance” as

“an obligation of the seller or the buyer to undertake obligations in connection with passing the goods through customs of the country of export or import it is now made clear that this obligation does not only include the payment of duty and other charges but also the performance and payment of whatever administrative matters are connected with the passing of the goods through customs and the information to the authorities in this connection. Further, it has although quite wrongfully - been considered in some quarters inappropriate to use terms dealing with the obligation to clear the goods through customs when, as in intra-European Union trade or other free trade areas, there is no longer any obligation to pay duty and no restrictions relating to import or export. In order to clarify the situation, the words 'where applicable' have been added in A2 and B2, A6 and B6 clauses of the relevant Incoterms in order for them to be used without any ambiguity where no customs procedures are required. It is normally desirable that customs clearance is arranged by the party domiciled in the country where such clearance should take place or at least by somebody acting there on his behalf Thus, the exporter should normally clear the goods for export, while the importer should clear the goods for import.”.

12. It was submitted that there was no basis for any distinction, as drawn by the learned single judge, upon the levy of duty after passing of title (under the contract) and that such finding is contrary to the contract. It was

argued that the contract is on FOB terms, and under Incoterms 2000, it is the duty of the seller to pay the necessary export duties. The parties do not have any specific customs duty in contemplation at the time of making of the contract. Rather, the risk of customs duty, if any, is simply allocated to the seller. The point at which it can be ascertained whether there is any duty to be paid is the point at which the goods cleared for export and cross the customs barrier, which is the taxable event in terms of the Customs Act, 1962. Therefore, the contractual obligation of the seller to pay the duty at the point of the taxable event, when the goods become subject to tax levy. At the point at which the goods were to clear the customs barrier in the present case, export duty had been levied, and the seller ought, therefore, to have discharged its contractual obligation to pay such duty. The seller's duty to pay export duty arose because, in an F.O.B. contract, the contract price is inclusive of export duty. This seller is not absolved of this duty merely because the 'Red Clause' is invoked. Even after invoking the Red Clause, the seller is obliged to deliver the goods F.O.B., i.e. inclusive of export duty, if any. Having correctly held that the payment of export duty was the responsibility of the seller, both the Arbitrator and the learned single judge erred in holding that this duty shifts to the buyer upon invocation of the Red Clause.

13. It is stated that the tribunal- and the learned single judge erred in overlooking the fundamental fact that in an F.O.B. contract, the contract price is inclusive of export duty. Thus, by shifting the burden of export duty from the seller to the buyer merely because the 'Red Clause' was invoked, the tribunal and learned single judge, in effect, held that this altered the contract price, which is an essential element of the contract. It is plain from

the terms of the contract that it was never the intention of the parties that the Red Clause would affect any modification in the contract price. The Award is, therefore, unreasonable and contrary to the fundamental policy of Indian law, and as calls for interference. It was emphasized that passing of title to the goods to NORDIC did not alter SAIL's liability to make Customs Export Duty; it continued to lie with SAIL. It is submitted that the invocation of Red Clause only meant that the seller was entitled to and, therefore, received the payment for the goods sold. However, it did not shift or alter the liabilities and responsibility of the parties in terms of the contract.

14. Learned counsel relied on *Asia Pacific Commodities Ltd Vs Assistant Commissioner of Customs, Kakinada* 2012(280) ELT 481(A.P.) to say that conditions in INCOTERMS especially, the following observations:

“As per the above clause all export duties, taxes, levies etc., on cargo present or future in India shall be for seller's account and all import duties, taxes, levies etc., present or future in the country of destination shall be for buyer's account. Further all taxes/duties on freight and vessel is to vessel owner's account. Buyer's obligations are found in Part B of FOB contract. As per point B2 read with B6 the buyer must obtain any import license where applicable and pay all customs formalities for the import of goods and where necessary for their transit through any country. From a perusal of the FOB contract terms in Incoterms, there cannot be any doubt that it is always the duty and obligation of the seller to bear the costs of customs formalities as well as the duties, taxes and charges payable upon export.”

15. It was also argued that the decision in *Pacific Minerals (P) Ltd v State of Madhya Pradesh* AIR 1965 SC 428 is authority for the proposition that

FOB sales price includes export duty. Learned counsel relied on the following observation:

“5. In F. O. B. sales, the price is inclusive of the export duty. The appellant was required to pay the duty before shipment under Section 137 of the Sea Customs Act, 1878. In terms of the sales, the appellant was required to place the goods on board the ship, and it could do this only on payment of the export duty. In other words, the delivery to the buyer in terms of the F. O. B. sale could not be made without paying the export duty. Nevertheless, the export duty is not, like transport and freight charges, an expense incurred in conveying and causing delivery of the ore to the buyer.”

16. Mr. Akhil Sibal, learned senior counsel for SAIL, urged that this court should desist from interfering with the impugned judgment as it had affirmed the tribunal's findings. Pointing out that in the absence of a patent error of law or manifestly unreasonable findings, the courts cannot invoke Section 34 of the Act, learned senior counsel submitted that the interpretation preferred by the award was one plausible view. It could not be characterized a view contrary to the terms of the contract. Counsel relied on *Associate Builders v Delhi Development Authority* (2015) 3 SCC 49 and *Steel Authority of India Ltd v Gupta Brother Steel Tubes Ltd* (2009) 10 SCC 63) in this regard.

17. Counsel also submitted that clause 9.2 of the Red clause stated that the title to the goods passed to the buyer on negotiating the documents and realizing 100% payment. After this the goods were to be held in the custody of the seller at the risk and responsibility of the buyer. SAIL realized 100%

value of the goods on 7/5/2008 and held them at their stockyard entirely at the risk of the buyer and any subsequent development affecting the cost structure of the contract was, accordingly, to the account of Pacific. In the present case, the export duty was imposed by 10 May 2008, and therefore Nordic was liable to bear it.

Analysis and Conclusions

18. SAIL had invoked clause 9 of the Agreement (the Red Clause), which reads as follows:

"9.0 Red Clause 9.1 In the event of:

(a) The failure of the Buyer to nominate a suitable vessel within the specified laydays, as mentioned in the Seller's Notice of Readiness (NOR) Or

(b) The vessel nominated by the Buyer and accepted by the Seller failing to arrive at the designated load port within the agreed laycan for reasons other than Force Majeure, as defined under Clause 10 herein below:

Or

(c) The vessel (nominated by the Buyer and accepted by the Seller) being found unsuitable after its arrival at the designated loadport, as certified by independent marine surveyor(s), the seller shall be entitled to negotiate their Commercial Invoice against the L/C opened by the Buyer and realise 100% of the value of the materials ready for shipment on the basis of certificate issued by the Pre-shipment Inspection agency certifying that the contracted materials and quantity are ready for shipment and also that the materials are in good condition. Remarks such as "materials partly rust stained/rusty edges/wet before shipment/rust stained/ some rusty edges' and/ or "stored in open area prior to loading" and/or "unprotected cargo"

appearing in the Pre-Shipment Inspection Certificate are acceptable.

9.2 The title having already passed on to the buyer, the materials will thereafter be held in custody by the seller at the risk and responsibility of the buyer at the storage yard of the seller. The materials will be covered by tarpaulin at the buyer's request and cost at the storage yard of the seller.

The cost of holding materials shall be as follows till the date of acceptance of vessel's NOR, when the vessel finally calls at the loadport :

US \$ PMT [i] For the first 15 days from the date of expiry of NOR Nil

ii] For any subsequent week(s) Buyer to ensure that payment towards Ground Rent and/or Tarpaulin cost is remitted and remittance Instruction duly forwarded by SWIFT message, before actual shipment, against the debit invoice.

9.3 The Buyer shall however nominate [another] suitable vessel within reasonable time from the date of realisation of payment, as mentioned above, for taking delivery of the cargo and subject to such vessel arriving at the designated loadport, the seller shall at his cost deliver the materials FOB [SLSD] in terms of Contract.

9.4 The Letter of Credit established by the buyer in favour of the seller shall make specific and unconditional provision to the above [9.1 to 9.3] effect. L/C to be opened with First Class International Bank having Correspondent relationship with State Bank of India, Name of the Banks can be obtained by the buyer from SAIL."

19. Nordic failed to nominate a suitable vessel, within the agreed laydays (25.04.2008 to 29.04.2008 of SAIL's NOR); consequently SAIL invoked the Red clause, having regard to clause 9.1(a) of the Agreement. In the circumstances, the Red clause was invoked, in the opinion of this court,

quite correctly. On account of clause 9.2 of the Agreement, the attendant risk and responsibility for the materials stood transferred to Nordic. There was no dispute that the responsibility for risks in relation to the goods in question rested with Nordic- even in proceedings under Section 34. The surviving question was whether despite the transfer of title, responsibility and risks in relation to the goods to Nordic, the responsibility to pay the export duties levied for the first time, after the title in the goods had passed, would have to be borne by SAIL. That SAIL had to pay custom duties in vogue prior to the invocation of the Red clause is undisputed. However, it was SAIL's case that it was not responsible for imposition of any cost resulting from any subsequent supervening event, including levy of export duties that were imposed after SAIL had invoked the Red clause. The arbitral tribunal considered the issue and rejected Nordic's contention that notwithstanding the transfer of risk and responsibility relating to the goods, the liability to pay the export duty imposed for the first time after Nordic had acquired the title of the goods, would continue to be that of SAIL.

20. The entire effort before this court, by Mr. Ahluwalia, was to establish that the liability to pay export duty levied before the event of departure (of the goods) whether existing or newly imposed is on the exporter and not the buyer. Nordic's interpretation of the contract was textual, and in the context, its contention was that the passing of title to the goods, and even risk did not mean that any other supervening event, such as levy of duty, impacted the buyer; it was an obligation that the seller had to and continued to bear and had to discharge. 'FOB' is defined under the INCOTERMS 2000 as follows:-

"FOB Free on board (... named port of shipment) "Free on Board" means that the seller delivers when the goods pass the ship's rail at the named port of shipment. This means that the buyer has to bear all costs and risks of loss of or damage to the goods from that point. The FOB terms requires the seller to clear the goods for export. This term can be used only for sea or inland waterway transport. If the parties do not intend to deliver the goods across the ship's rail, the FCA term should be used."

Clause A6 (of INCOTERMS) relates to FOB terms; it provides that all costs relating to the goods were payable by the seller. Clauses A6 and B6 which are inter-related are reproduced below:

"A6 Division of costs The seller must, subject to the provisions of B6, pay

- all costs relating to the goods until such time as they have passed the ship's rail at the named port of shipment; and*
- where applicable, the costs of customs formalities necessary for export as well as all duties, taxes and other charges payable upon export.*

B6 Division of costs The buyer must pay

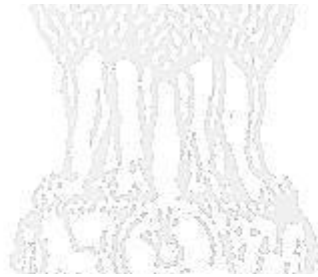
- all costs relating to the goods from the time they have passed the ship's rail at the named port of shipment; and*
- any additional costs incurred, either because the vessel nominated by him fails to arrive on time or is unable to take the goods, or closes for cargo earlier than the time notified in accordance with B7, or because the buyer has failed to give appropriate notice in accordance with B7, provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods; and*
- where applicable, all duties, taxes and other charges as well as the costs of carrying out customs formalities payable upon import of the goods and for their transit through any country."*

21. The terms of the agreement are clear; they state that (Clause 9.2) *“The title having already passed on to the buyer, the materials will thereafter be held in custody by the seller at the risk and responsibility of the buyer at the storage yard of the seller”*. Nordic emphasizes that Clause 9.3 prevails in this case, because it stipulates that after passing of title *“the seller shall at his cost deliver the materials FOB [SLSD] in terms of Contract.”* Concededly, the contract is silent with respect to payment of export duty imposed subsequently. Again, there is no dispute that the contract incorporates the terms of INCOTERMS 2000. Clause A6 and B6 (applicable to FOB) contracts, provide that the seller should, *subject to Clause B6*, pay all *“costs of customs”*. B6, however, stipulates that the buyer must pay *“where applicable, all duties, taxes and other charges as well as the costs of carrying out customs formalities payable upon import of the goods and for their transit through any country.”* In view of these express stipulations, the tribunal’s decision that freshly imposed export duty had to be borne by the buyer (Nordic) cannot be characterized as contrary to contract. Nordic’s attempt – to persuade the court that in view of these express stipulations, the tribunal’s decision that freshly imposed export duty had to be borne by the buyer (Nordic) cannot be characterized as contrary to contract. Nordic’s attempt – to persuade the court that *“costs”* do not include export duties, in this court is unconvincing. *“Costs”* – according to A6- include *“costs of customs”*. Therefore, there was no infirmity on the tribunal’s part in construing that such costs included export duty.

22. It is too late in the day to argue that a mere erroneous interpretation of a term of contract can be an error of law. The jurisprudence which has

evolved over a decade and a half as regards what are “patent errors” of law indicate that the findings *should be manifestly contrary to law*. A plausible view, which even a civil court can adopt, is hardly one, which warrants appellate review. In arbitration disputes, the “hands off” approach which the law cautions applies with all vigor to proceedings under Section 34; in appeals against decisions under that provision, the scope for review is even narrower; only *egregious findings disclosing a manifest error or manifest approaches to a dispute*, can call for interference.

23. In view of the previous findings and observations, this court holds that there is no merit in the appeal; it is consequently dismissed without order on costs.



S. RAVINDRA BHAT, J

A. K. CHAWLA, J

JULY 13, 2018

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