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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% **Reserved on: 15th January, 2018**
Pronounced on: 06th February, 2018

\+ **O.M.P. (COMM) 11/2018 and IA No.532/2018**

METALS & MINERALS TRADING CORPORATION OF INDIA LIMITED (MMTC) & ANR. ..... Petitioners

Through : Mr.Chinmoy Pradip Sharma, Mr.Shailesh Kumar Sinha and Mr.Yadendra Yadav, Advocates.

versus

K.S. OILS LIMITED ..... Respondent

Through : Mr.Varun Mishra, Advocate.

CORAM:
HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This petition is under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred as 'the Act') for setting aside impugned award dated 16.10.2017 passed by the arbitral tribunal. The brief facts of the case are:

a) On 14.09.2007 an agreement was executed between the petitioner and the respondent for trading/procurement /sale of mustard and soya seeds and a Subsequent Agreement dated 10.09.2008 was executed between the petitioner and the respondent also for trading/procurement /sale of mustard and soya seeds. On 04.01.2011 an amendment to the Subsequent Agreement was made for extending the period of the Agreement;

b) On 02.09.2011 the Assistant Commercial Taxe Officer, Anti- Evasion, Rajasthan Ward 3, Jaipur conducted a survey at petitioner's Jaipur branch regarding transactions between the petitioners and the respondent and served a notice dated 11.11.2011 to the petitioner for recovery of VAT tax;

c) On 03.01.2012 the petitioner were constrained to invoke the Bank Guarantee for recovery of outstanding amount and the balance amount of Rs.1.88 Crores was withheld on account of VAT Tax liability imposed upon the Petitioners in relation to transactions between the petitioners and the respondent. The VAT Tax orders issued against the petitioners was assailed by the petitioners before the Deputy Commissioner (Appeals) II, Commercial Taxes, Jaipur and by an order dated 12.06.2012, the Deputy Commissioner (Appeals) held the petitioner (MMTC) had not defaulted in the VAT payments and quashed the illegal tax demand and proceedings against the petitioners;

d) the order dated 12.06.2012 was challenged by the Tax Department before the Rajasthan Tax Board, Ajmer and by order dated 20.03.2015, the Rajasthan Tax Board, Ajmer dismissed the appeal filed by the Tax Department against the Petitioner on the ground the Tax Department failed to establish that there were two transactions and also held the Tax Authority misconstrue the concept of proforma invoices;

e) the respondent issued a legal notice dated 09.02.2016 to the petitioners seeking refund of Rs.2.59 Crores within 15 days along with interest at the rate of 12% per annum. The petitioners on 14.04.2016 issued a reply to the notice dated 09.02.2016 wherein it was categorically stated that the petitioners had rightly withheld a sum of Rs.1.89 Crores on account of erroneous tax liability being foisted upon the petitioner and the tax proceedings were yet to attain finality and that and the respondent was under a strict covenant as per the Agreement to indemnify the petitioners against any liability;

f) on 16.05.2016 the respondent, in view of the Clause 42 of the Agreement for settlement of disputes through arbitration, submitted an application dated 16.05.2016 before the Indian Council of Arbitration for redressal of the dispute;

g) on the other hand the Order dated 20.03.2015 was assailed by the Tax Department before the High Court of Rajasthan in S.B. Sales Tax (VAT) in Revision Petitions No.20/2015 and 21/2015. By Order dated 01.09.2016, High Court of Rajasthan dismissed the aforesaid petitions upholding the order passed by Dy. Commissioner Appeals and the order passed by Rajasthan Tax Board;

h) on 06.04.2017 the arbitral tribunal was constituted and the respondent submitted its statement of claim against the petitioners. The arbitral tribunal by its order dated 06.04.2017 set out the directions to the parties for completion of pleadings and further proceedings. The arbitral tribunal made the impugned award dated 16.10.2017, which is under challenge in this application. Hence this Petition.

2. The basic issue involved in this petition is if the petitioner was justified in holding the amount payable to the respondent after clearing its dues in apprehension of any tax liability that may have any reason against the company.

3. I would like to refer few clauses of the agreement which would throw light on the subject. The relevant clauses are:

> *"**21**. KSOL shall fully indemnify MMTC and keep MMTC fully indemnified and harmless against any losses or damages whatsoever including liabilities arising out of failure to comply with any or all of the conditions/clauses of future trading on NCDEX. KSOL shall also keep MMTC indemnified against all such payment/ liabilities if claimed by any authority/ies, even at a later date against the transaction made under this agreement. Further, without any protest or demur KSOL*

indemnifies MMTC and its branches and shall always keep MMTC fully indemnified and agrees to hold MMTC and its branches harmless against any loss claim, damage, demurrage, costs, penalties, liabilities, legal cases, shortage during transit/storage, quantity/quality/purity, specifications etc, of the material cost of expenses of whatsoever nature caused to MMTC on account of KSOL's acts/omissions/default and/or non-fulfillment of terms and conditions of this agreement. KSOL shall also indemnify MMTC from any/all claims under the contract as well as agro commodities trading in NCDEX.

***27.** Any statutory charges and applicable duties/levies/taxes such as VAT/CST/ST/ Mandi Tax etc. at any point of time for transaction under this agreement shall be to the account of KSOL. Further all expenses like insurance, storage charges, NCDEX charges and other out of pocket expenses, if any, shall be to the account of KSOL.*

***31.** If any litigation arises out of quality/quantity complaint and or failure to deliver the material and/or shortages (quantity) or for any other reason between MMTC and the NCDEX and any other authority/party, KSOL shall be setting the dispute at their own level and shall keep MMTC indemnified in this respect. IF any dispute is arisen, the same will be dealt in consultation with KSOL, at their risk, cost and consequences.*

***33.** Notwithstanding anything contained herein to the contrary, all risk, consequences arising out of the actual transaction(s) taking place between the parties hereto under this agreement and/or* *any modified/amended undertaking will be to the account of KSOL only.*

38. The termination of this Agreement shall not affect any rights or obligations of either party which have accrued prior to the termination or which may arise out of or in connection with trades/transaction entered into or acts done or omitted prior to the termination, but which may result in future dues/obligations payable by KSOL to MMTC and/or the financial institutions/ banks and/or NCDEX and/or any other authority."

4. Admittedly the petitioner invoke the bank guarantee and adjusted its outstanding dues against the petitioner leaving a balance of Rs.1,88,08,233/- which it did not pay to the respondent herein on apprehension of a future tax liability. The arbitral tribunal dealt with this issue as under:

"8. In the meanwhile, the Respondent on 05.01.2012 invoked the bank guarantee of the Claimant and encashed the same to recover its outstanding dues against the Claimant in the running account.

9. The Claimant thereafter vide its various letters dated 06.01.2012, 16.07.2012, 17.08.2012, 31.08.2012, 13.12.2012, 31.01.2013, 21.08.2014, 03.02.2015, 24.03.2015 requested the Respondent to refund the excess amount to the bank account of the Claimant withheld by the Respondent The Claimant even requested the Hon'ble Minister of Commerce, Ministry of Commerce and Industry, to intervene in the said matter for release of excess amount (which as per the Claimant was Rs. 2.59

> *crores) withheld by the Respondent since January 2012."*

5. The learned counsel for the petitioner submits since the respondent was liable indemnify petitioner against any liability under the agreement viz. including a tax liability, hence they withheld the money. Further they submitted though the tax liability was raised by the Sale Tax Authority but it was High Court which put an end to this issue by judgment dated 01.09.2016 of High Court of Adjudicature of Rajasthan at Jaipur in Revision Petition No.2050/2015 and the relevant paras are reproduced as under:

> *"8. The Rajasthan Tax Board as well as the Dy. commissioner (A) has come to a finding that at times this happen because the transactions are though (NCDEX) and there may be a possibility of inadvertent or clerical error and once the assessee was able to show from acceptable evidence than result is obvious and rightly reached by the Dy.Commissioner (A) and the Tax Board respectively.*
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> *9. In my view, it is a finding of fact based on appreciation of evidence on record and no question of law can be said to arise out of the order of the Tax Board, I do not find any i11ega1ity or perversity in the order impugned so as to ca11 for interference of this Court."*

6. Further the cross examination of petitioner's witness namely Mr.Rajesh Shah in an answer to a question had said:

> *"Q. Please explain your averment in your reply to the claim petition that due to typographical error Rajasthan Tax*

Authorities have raised tax demand over MMTC?
Ans. The typographical error is that instead of Indore it was typed as Jaipur."

7. Thus the witness of the respondent had admitted that the tax liability had arisen because of a typographical error of the staff of the respondent in documents relating to the transaction and hence for fault of the respondent, the petitioners have to write various letters to release such amount which was not released and hence the interest on late payment of such dues cannot be denied. Moreso the counsel of the petitioner has not shown me any term of the contract which enable the respondent to retain any amount in anticipation/apprehension of any liability, whatsoever, including tax liability.

8. Thus there is no infirmity in the award of the learned arbitral tribunal in granting an interest on Rs.1,88,08,233/- to the respondent herein. The award is fully justified and petition being devoid of merit is liable to be rejected and hence rejected.

YOGESH KHANNA, J

FEBRUARY 06, 2018
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