IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 348 OF 2015

Al Jabriah Metals Trading Ltd. …Petitioner
vs
ISMT Ltd. & Anr. ...Respondents

Mr.Archit Jayakar I/b. Jayakar & Partners for Petitioner.
Mr.Ashish Kamat with Tejesh Dande and Bharat Gandhvi I/b. Tejesh Dande & Associates for Respondent No.1.

CORAM : S.C.GUPTE, J.

DATE : 14 FEBRUARY 2019

P.C. :

This arbitration petition challenges an order passed by a sole arbitrator in a reference between the parties arising out of a contract for supply of scrap.

2 On 19 February 2008, the Petitioner sent a quote to Respondent No.1 for supply of 'Heavy Metal scrap' ('HM Scrap') of 1000 Metric Tones ('MT') at the rate of USD 440 per MT. Based on this quote, on 23 February 2008, the parties entered into a contract, under which the Petitioner agreed to supply to the Respondent 1000 MT of HM scrap at the rate of USD 440 per MT (“Contract No.1”). Respondent No.1 issued a purchase order for supply of 1000 MT of HM scrap at the rate of USD 440 per MT as per the terms of contract No.1. On 9 March 2008, another quote was supplied to Respondent No.1 for supply of HM scrap for 1000 MT at the rate of USD 506 per MT. On 18 March 2008, the parties entered into a contract by which the Petitioner agreed to supply to Respondent No.1 1000

MT of HM scrap at the rate of USD 506 per MT ("Contract No.2"). Based on this contract, a second purchase order was issued by Respondent No.1 for supply of 1000 MT HM scrap at the rate of 506 per MT as per the terms of contract No.2. Invoices were raised by the Petitioner for both these supplies. In June 2008, goods under both contracts arrived at Nhava Sheva Port and delivered to the Respondent's plant at Jejuri, Pune. It was the complaint of Respondent No.1 that the quality of the stock supplied was not upto the mark; it consisted of 60% mud and 38% HMS (grade I & II) and 2% non-magnetic items such as wooden pieces, cotton waste, tyres, stones, etc. The Respondent, accordingly, claimed refund of the amount paid to the Petitioner corresponding to the deficient quantity. That is how disputes arose between the parties. These disputes were referred to arbitration through International Chamber of Commerce ('ICC'). The learned arbitrator accepted the Respondent's claim towards rejected goods on account of deficient quality to the extent of 825.570 MT of scrap, and awarded the value of the rejected goods in USD and custom/import duty, education cess and taxes on such rejected material as well as container detention/ground rent and damage charges for such material in INR. The learned arbitrator, by his impugned award, accordingly awarded USD 263,250.80 plus a sum of INR 45,83,062.30 under the Respondent's claim for deficient quality of goods. On the amount of claim in US dollars, the Petitioner was directed to pay simple interest at the rate of 8% per annum till the date of the award under Section 31(7)(a) of the Act and post-award interest at the rate of 12% p.a. under Section 31(7)(b). The arbitrator awarded costs of arbitration fixed by ICC at USD 78,000/-.

3 Whilst challenging the impugned award, learned Counsel for

the Petitioner, firstly, submits that the arbitrator lacked jurisdiction to adjudicate upon disputes and differences between the parties. It is submitted that the purchase order submitted by the Respondent to the Petitioner was without its conditions printed overleaf. It is submitted that only the front portion of the purchase order was served on the Petitioner. It is submitted that the Petitioner, after making inquiries, could obtain the back page of the purchase order usually issued by the Respondent to its scrap vendors. It is submitted that the back page containing terms and conditions printed on it makes it clear that the arbitration clause contained in it was different from the one contained in the contract in the present case. It is submitted that instead of an ICC arbitration, the terms and conditions of the purchase order provided for arbitration through Maratha Chamber of Commerce. There is no substance in this contention. Whatever may have been the Respondent's printed purchase order and which may have been submitted to other scrap vendors, it is common ground that in the present case what was served on the Petitioner as a purchase order was only the front page without the so called conditions printed overleaf. If these conditions were not forwarded to the Petitioner, obviously that implies that there was no contract between the parties based on these conditions. It is also not in dispute that the contracts in the present case actually contain an ICC arbitration clause, under which the present arbitration reference was made. There is, accordingly, no merit in this challenge.

4 Learned Counsel, secondly, submits that the arbitrator has passed award of compensation for deficient quality of goods based on no evidence or, in the alternative, contrary to the material placed by the

parties before the arbitrator. Learned Counsel submits that the arbitrator has relied on 'without prejudice' correspondence between the parties to arrive at his conclusion on deficient quality. It is also submitted that the quality of deficient goods considered by the learned arbitrator is not supported by the communications considered in that behalf. The quality of deficient goods is a pure question of fact. The arbitrator has considered the emails exchanged between the parties from 1.9.2008 onwards, concerning the quality of the goods. Based on these emails, the arbitrator determined the actual quantity of material said to be deficient in quality. The emails are referred to in para 31 of the impugned award. None of these mails are marked as 'without prejudice'. The award also discusses minutes of meeting between the parties' representatives, which also show that the parties had agreed to the quantity of deficient goods. Further e-mails exchanged between the parties have been considered in paras 34 and 35 of the impugned award. Based on this material and taking into account the terms and conditions of the contract, the arbitrator deduced that a total quantity of 825.570 MT of Scrap supplied to the Respondent was deficient in quality and that this quantity ought to be compensated for at the rate of 440 USD per MT. Learned Counsel for the Petitioner submits that the cross-examination of the Respondent's witness A.C. Mohan shows that the quantity of 849 MT of scrap, said to be rejected material, could not be termed as unusable. Whether any particular quantity was actually deficient in quality and could be rejected, is a pure question of fact, to be decided on appreciation of evidence placed by the parties. The arbitrator's view in this behalf is clearly a possible view. It is supported by evidence. The award on this claim cannot be said to be based on no evidence or a view, which no fair or judiciously minded person would take or a view that would shock the conscience of the court. Accordingly, the award does not merit any interference under Section 34 of the Arbitration and Conciliation Act, 1996.

5 Learned Counsel for the Petitioner also challenges the award insofar as rejection of the Petitioner's counter-claim is concerned. The Petitioner's counter-claim was terminated by ICC on account of non-payment of fees. It is not in dispute that fees were not paid by the Petitioner and in the premises, under the applicable ICC rules, counter-claim was terminated. The only argument advanced in this behalf is that since the Petitioner had raised an issue of jurisdiction, the arbitrator should have decided it upfront under Section 16 and since that was not done and the Petitioner was made to go through the entire reference and could not pay its fees, its counter-claim ought not to have been terminated. There is no merit in the contention. Anyway, the arbitrator considered the issue of jurisdiction against the Petitioner and there cannot be any grievance that the Petitioner was made to go through the entire reference. If indeed it desired to get the counter-claim adjudicated by the learned arbitrator, the Petitioner had no option but to go through the entire reference and also pay the fees. Non-payment of arbitration fees invites, under the ICC Rules, termination of a claim or counter-claim, as the case may be.

6 Hence, there is no merit in any of the challenges to the impugned award. The arbitration petition is dismissed. No order as to costs.

(S.C. GUPTE, J.)