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

ARBITRATION PETITION NO.945 OF 2016

M/s Sarr Freight Corporation ... Petitioner
Versus
M/s Bharat Heavy Electricals Ltd ... Respondent

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Mr. Dharam Jumani a/w Ms. Debashree Mandpe I/b Ganesh & Co. for the Petitioner.
Vaishali Sanghvi I/b M/s Solicis Lex for the Respondent.

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CORAM : S.C. GUPTE, J.

DATE : 30 JANUARY 2019

P. C. :

. Heard learned Counsel for the parties.

2 This petition challenges an award passed by a Sole Arbitrator in a reference between the parties arising out of a work order for ocean freighting of project cargo from Mumbai Port to Elefsina Port, Greece. The work order was placed by the Respondent on the Petitioner in pursuance of a notice inviting tenders. The Petitioner's tender was accepted and the contract for arranging transportation of cargo was awarded to it. It was the Respondent's case that the Petitioner could not arrange for sea transportation and failed to perform the contract. It was, on the other hand, the Petitioner's case that it was the Respondent who failed to deliver at the load port the subject cargo, which, under the contract, was required to be delivered under the hook of the ship by a stipulated date or within a

permissible time. It was submitted that the contract date of delivery was 20 December 2013. The Petitioner had undertaken the contract work on an understanding that a ship was available on 22 December 2013 for transport of goods from Mumbai to Elefsina, which was an underserved route. It was submitted that the cargo was instead delivered under the hook of the ship on 24 January 2014. It was submitted that as a result, the Petitioner could not arrange sea transportation and suffered damages. The Petitioner was the claimant before the arbitral tribunal, whereas the Respondent had filed its counter-claims claiming various charges including demurrage, risk purchase differential cost, liquidated damages and interest. The arbitrator rejected the Petitioner's claim, whilst allowing the Respondent's counter-claims for demurrage and risk purchase differential cost. The Respondent's counter-claims of liquidated charges and interest were rejected on the ground that no material was produced by the Respondent in support of those claims. The rejection of its claims and award of the Respondent's counter-claims are challenged by the Petitioner.

3 The main contention of the Petitioner for challenging rejection of its claims is that the arbitrator construed the relevant delivery clauses under the contract of ocean freighting unreasonably. The contract provided for the delivery date of 20 December 2013 only as an expected date for delivery of cargo. It was said to be a tentative date. Learned Counsel for the Petitioner relies on clauses 4.1 and 20 of general terms and conditions forming part of the contract. These clauses *inter alia* require the tenderer to commence the work within the period provided under the LoI/Contract and in case LoI/Contract is silent in this regard, within fifteen days after award of contract. These clauses do not suggest that delivery was to be

either on 20 December 2013 as a firm date or within fifteen days of award of contract. The term could only mean that the contractor would have been bound to arrange for sea transportation of cargo within fifteen days of its delivery. That is how the contractual terms have been interpreted by the learned arbitrator. There is no infirmity to be found in such interpretation within the meaning of Section 34 of the Arbitration and Conciliation Act, 1996. It demonstrates a reasonable construction of the contract and a possible view.

4 When one comes to the counter-claims of demurrage and risk purchase cost awarded by the arbitrator, it is noticed that the award is based on no evidence. In the first place, the counter-claims themselves were formulated as one line claims. The statement of counter-claims simply alleged that the Respondent had incurred storage/demurrage charges at Mumbai Port – Rs.10,85,535 and extra freight incurred – Rs.1,75,241. This was specifically denied by the Petitioner in its reply to the counter-claims. In the face of these pleadings, the only evidence to be found in support of the counter-claims is the repetition of the same line in the oral evidence of the Respondent's witness. There are neither particulars nor supporting material produced to justify the claims of either storage/demurrage charges or extra freight incurred for transporting of goods. At least, the award does not show that the arbitrator has considered any particulars or material.

5 Learned Counsel for the Respondent submits that LoI for ocean freighting contract given to another contractor after invoking risk purchase clause was produced in evidence and it shows that the alternative contract was awarded for Euros 54,850. In the first place, the award does not show

that the arbitrator has considered this LoI to work the difference between the risk purchase LoI and the contract LoI. In any event, on the face of it, the Petitioner's offer for arranging freight transport was for Euros 53,800. Even if one were to consider the difference between the two contracts, it works out to Euros 1,050. It is not known how this difference could translate to Rs.1,75,241 in rupee terms. The rates of exchange for the relevant period do not justify this conversion. In any event, it is not permissible to the court to speculate how the arbitrator actually worked out the risk purchase damages.

6 As far as demurrage charges are concerned, there is absolutely no evidence. Learned Counsel for the Respondent could not show even a semblance of evidence to support the award.

7 In **Associate Builders Vs. Delhi Development Authority**[1], the Supreme Court has made it clear that it is an important juristic principle that a finding of fact must be based on some evidence; and this juristic principle is part of the fundamental policy of Indian law. If the finding is based on no evidence, such decision would necessarily to be perverse, and any award which is perverse is required to be set aside under Section 34 of the Act as being contrary to the fundamental policy of Indian Law. In the present case, as we have noticed above, the award of the Respondent's counter-claims on demurrage and risk purchase cost is not supported by any evidence, and is accordingly liable to be set aside.

8 Accordingly, the Arbitration Petition is allowed by setting aside the

1 (2015) 3 Supreme Court Cases 49

impugned award dated 4 April 2016 to the extent it relates to the Respondent's counter-claims on demurrage and risk purchase cost.

9 No order as to costs.

10 In view of the order passed today, the security furnished by the Petitioner for stay of the execution of the impugned award shall be returned to the Petitioner.

(S.C. GUPTE, J.)