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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**ORDINARY ORIGINAL CIVIL JURISDICTION**
**IN ITS COMMERCIAL DIVISION**

**ARBITRATION PETITION NO.543 OF 2017**

JSW Steel Limited ..Petitioner
Vs.
Kences Container Terminal Limited
(Vishrutha Logistics Limited) ..Respondent

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Ms.Daisy Dubhash with Ms.Kinjal Patel i/b. Converse Law LLP for Petitioner.
Ms.Lopa Mumin with Mr.J.B. Navlani for Respondent.

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**CORAM : G.S. KULKARNI, J.**

**DATE : 7th JANUARY, 2019**

**P.C.:**

Heard learned Counsel for the petitioner and the learned Counsel for the respondent.

2. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 (for short, “ACA”) is to the award dated 11 September 2017 passed by the learned sole arbitrator whereby the petitioner's claim for an amount of Rs.98,15,442/- for shortage of 205.559 Metric Ton of TMT Bar, a claim of Rs.26,26,250/- on account of damaged material of TMT Bar of 55 metric ton lying unsold and lastly a claim of Rs.41,86,333/- on account of loss of value of HR coil of 308.53 metric ton and HR Plate of 22.57 metric ton has been rejected.

3. The disputes between the parties had arisen under the agreement dated 4 December 2010 which is basically in the nature of a storage contract. The respondent was required to provide an open area with hard top, leveled with paved blocks and proper drainage facility of 60,000 sq. meters and covered shed of 1000 sq. mtrs. to the petitioner for storage of petitioner's goods with suitable handling equipment. The agreement was for a period commencing from 4 December 2010 to 3 December 2011. In pursuance of the said agreement, a work order dated 5 February 2011 was placed with the the respondent.

4. The case of the petitioner in the arbitral proceedings *inter-alia* was that the respondent did not provide the petitioner with hard top or leveled warehouse with proper drainage facility as agreed that there were several complaints which are received by the petitioner from the customers. All this resulted into damage to the goods as set out in detail in the statement of claim.

5. The petitioner contended that on expiry of the agreement the respondent was obliged to return the petitioner's goods lying at the depot. However, despite repeated letters addressed in that regard, the respondent refused to release the goods. The petitioner was also

required to approach this Court in a petition filed under Section 9 of the ACA (Arbitration Petition (L.) No.1106/12) wherein an order dated 12 September 2012 came to be passed allowing the petitioner to remove the goods/stock lying at the said premises of the respondent in presence of Court Receiver/Commissioner. The goods accordingly were removed in the presence of Court Commissioner and an inventory to that effect was also made by the Court Commissioner. The inventory revealed that there was shortage of their material and the petitioner has accordingly sufferred losses. The petitioner therefore, invoked arbitration and made the above claims.

6. The learned arbitrator although accepted that there was shortage of material, however the learned Arbitrator has come to a conclusion that the petitioner could not prove the quantum of loss, in regard to which the claims were made by the petitioner before the arbitral tribunal. It was observed that there was no evidence to show the quantum of loss in terms of money.

7. Learned Counsel for the petitioner has fairly restricted her arguments only on this issue and would submit that learned arbitrator has erred in not allowing the claims on the shortage of the said material. She would submit that during the course of the argument, the petitioner

had pointed out the circular dated 5 August 2013 issued by the Ministry of Steel, Government of India, which showed the market rate of TMT bars, HR coils etc. in June 2013 at  47540 per metric ton. Her submission is that once this circular was relied during the course of the argument, learned Arbitrator ought to have considered the said circular as an evidence to award the claim as made by the petitioner in regard to the shortage of material, as also the stock which remained unsold. In the alternative, learned Counsel for the petitioner would submit that once the learned arbitrator had held that there was shortage of material, the learned arbitrator ought to have considered the petitioner's claim on the best judgment assessment and/or honest judgment. It is, therefore, her submission that the award is required to be set aside.

8. On the other hand, learned Counsel for the respondent has opposed the above submissions.

9. I have heard learned Counsel for the parties. I have also perused the record as also the compilation of the proceedings before the learned arbitrator as tendered on behalf of the petitioner. It needs to be noted that when the petitioner made a claim of Rs.98,15,442/- being the loss caused to the petitioner on account of shortage of material, the petitioner in the statement of claim has not substantiated as to on what

basis an amount of Rs.98,15,442/- is quantified. This is clear from the reading of paragraph 1 at page 16 of the statement of claim as also paragraph 6 which is summary of statement of claim. Although there was insufficient material or no basis and as set out in the statement of claim to quantify the claim at the amounts as set out in the statement of claim, however, this did not preclude the petitioner to establish/prove the claims as made, by placing appropriate material/evidence which would indicate the correct value of the material of which there was a shortage. However, despite ample opportunity which was available to the petitioner before the arbitral tribunal, no such steps were taken. It is in fact surprising that at the fag end of the proceedings in the rejoinder arguments the petitioner sought to rely on a circular dated 5 August 2013 as noted by the learned arbitrator in paragraph 20(d) of the award, to contend that the value of the material be assessed by applying the said circular, which was obviously not accepted by the learned Arbitrator and in my opinion, rightly. This firstly for the reason that the market values could not have been accepted as any evidence on the basis of which learned arbitrator would proceed to award the quantum of loss in terms of money. The value would depend on the nature and quality of the material and blanket values could never have been fixed.

10. In fact it is interesting to note that when the petitioner's witness no.1 was put a question as to on what basis a claim was made for TMT bar at Rs.47,750/- per metric ton, the witness answered that there was nothing on record, and stated that however, at this price the petitioner would sell the TMT bar at the relevant time.

11. The discussion in regard to the learned arbitrator rejecting the said claim can be seen in paragraph 20(d) of the award which reads thus:-

> "20(d) As regards Defendant's contention that the Claimant has not been able to prove the quantum of loss, there is some substance in this contention. In paragraph 5 of the Statement of Claim, it is contended by the Claimant that because of shortage of TMT Bar of 205.559 MT, it has suffered loss of Rs.98,15,442/- at Rs.47,750/- per MT. In fact, even the Tribunal, posed this question to the learned counsel for the Claimant, i.e. how does the Claimant prove that the market price of the said goods was Rs.47,750/- per MT at the relevant time, during the arguments advanced by Mr.Dogra, the learned counsel for the Claimant, to which the response was that it would be dealt with in the Rejoinder. While arguing in rejoinder, the learned counsel for the Claimant tendered a circular dated 5th August 2013, issued by Ministry of Steel, Government of India, according to which, *inter alia*, the market price of TMT Bar in June 2013 was Rs.47,540 for one MT. When asked by the Tribunal, as to how such a document in the form of evidence could be tendered for the first time at the stage of final arguments, which in effect deprives the other side i.e. the Defendant an opportunity to counter it, the answer was that the said circular was a public document and therefore could be relied upon. Assuming with out admitting that it was a public document, even then it cannot be permitted to be relied at the fag end of the Arbitration. There is therefore, no question of Tribunal taking any cognizance of the said circular, as the law, does not permit it. Even if strict rules of the Evidence Act, do not apply to an Arbitration, it is well

> settled that principles of natural justice do apply which require that the Defendant should be given sufficient opportunity and should be put to notice before the Trial starts about the evidence which the Claimant wants to adduce."

12. In my opinion, no fault can be found to the above reasoning adopted by the learned arbitrator, in rejecting the said claim of the petitioner. There is nothing of any perversity or any ground falling within the parameters of Section 34 of the ACA, so as to interfere with the award in question, on the limited issue as noted and raised by the learned counsel for the petitioner. Accordingly, the petition is rejected. No costs.

**[G.S. KULKARNI, J.]**