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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **W.P.(C) 3722/2019 & CM APPL. 17092/2019**

M/S GLOBAL TRANSNATIONAL TRADING FZE ..... Petitioner

Through Mr Abhinav Vashistha, Senior Advocate with Mr Sriram Krishna, Mr Siddhanth Singh, Advocates.

versus

UNION OF INDIA AND ORS. ..... Respondents

Through Mr Tarkeshwar Nath, Mr Mahavir Rawat, Advocates for R3/STC.
Mr Manish Mohan, CGSC with Mr Abhishek Kr Chaudhary, Ms Manisha Sarola, Advocates for UOI/R1 and R2.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

% **10.04.2019**

CM APPL. 17093/2019

1. Allowed subject to all just exceptions.

2. The application is disposed of.

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3. The petitioner has filed the present petition, *inter alia*, praying that directions be issued to the respondents to allow the test of a third sample of urea supplied by the petitioner, by any accredited neutral laboratory. Further, the petitioner also impugns the action of respondent no.3 (State Trading Corporation of India Ltd.-hereafter 'STC') invoking the bank guarantee, and

accordingly prays that the amount recovered by the encashment of the bank guarantee be refunded, along with interest. In addition to the above, the petitioner also claims that STC has recovered an amount in excess of the penalty levied by it by encashment of the bank guarantee, and therefore the excess amount ought to be refunded to the petitioner.

4. The controversy in the present petition stems from the contract entered into between the petitioner and STC for the supply of urea. On 12.06.2016, STC had issued a notice inviting Global Tender (NIT) for the supply of fertilizer. The said procurement was being done by respondent no.3 on behalf of the Department of Fertilizers, Government of India (hereafter DoF). Pursuant to the said NIT, the petitioner submitted its bid, which was accepted. On 23.06.2015, the petitioner was awarded the contract for supply of 105,000 (+/- 5% tolerance) MTs Bulk Granual Urea vide the agreement dated 23.06.2015 bearing Contract No. STC/UREA/2/2015-16/GLOBAL/29.

5. In terms of the said contract, the petitioner furnished a bank guarantee in the amount of USD 10,49,636. The said bank guarantee covered the shipment of the contracted quantity in two lots.

6. Accordingly, granular urea of a total quantity of around 62,900.866 Mts of fertilizer was shipped through M/V Delruba and the same was cleared under a Bill of Lading dated 13.07.2015. The remaining quantity of around 42,870 Mts of urea was sent by a subsequent shipment (through M/V Artavand) and cleared under the Bill of Lading dated 27.07.2015.

7. In terms of the contract, M/s Geo Chem (agency appointed by STC) drew samples from the fertilizer shipped by the petitioner. This Court is informed that the said samples were separated into three parts. The first part

was analysed on 29.07.2015. The analysis report of the first part was submitted by M/s Geo Chem on 29.07.2015. The said report indicated that the product in question substantially conformed to the specification as mentioned under the contract. However, the particle size less than 2 mm, constituted 7.82% of the sample, which was above the prescribed limit of 5%. A tabular statement indicating the analysis report is set out below:-

FCO Specification			Compositi on as per Analysis	Variation	Permissible Tolerance Limit	Remarks
	Chemical Composition-					
(i)	Moisture per cent by weight maximum	0.5	0.34			
(ii)	Total Nitrogen per cent by weight (on dry basis) Minimum	46.0	46.20			Standard
(iii)	Biuret per cent by weight, maximum	1.5	0.87			
(iv)	Particle Size – 4.0 mm to +2.0 mm – 90% min + 4.0 mm - 2.0 mm - 5.0% maximum		90.34 1.84 7.82	 (+) 2.82	 3.0 Unit	

8. The petitioner claims that the copy of the said report was provided to the petitioner on 12.01.2016. The petitioner did not accept the same, and by a letter dated 18.01.2016 requested that the samples be also analysed by another party – "Umpire Analysis" – in terms of clause 10 of the contract between the parties. In terms of the said request, the umpire analysis was conducted by the Fertilizer Control Laboratory, Trichy. The results of the said analysis indicated that the consignment of urea did not conform to the stipulated specifications, inasmuch as the percentage of particle size of above 2mm and less than 4 mm, was determined at 74.10% instead of

90.34%, as ascertained under the prior analysis. The relevant analysis report of the said sample is set out below:-

"Chemical analysis of fertilizer (on fresh weight basis except in the case of urea on dry weight basis.)

S. No.	Details	Specification as per F.C.O.	Composition as per analysis	Variation	Permissible tolerance limit(units)
1	Moisture (Maximum)	1.0%	0.31%		0.3
2.	Total N. (Minimum)	46.0%	46.24%		0.5
3.	NH4N (Minimum)				
4.	Biuret % by Weight (Maximum)	1.5%	0.93%		
5	Total P2O5 (Minimum)				
6	Natural Ammonium Chrate Soluble P2O3 (Minimum)				
7	Circle Acid soluble P2O5				
8	Water Soluble P2O5 (Minimum)				
9	Sulphur(asS)% by weight (Minimum)				
10	Particle Size				
	% of the Material Pass through 4.0 mm	90.00	74.10%	-15.90	

	IS since and retained on 2.0 mm IS sieve(no.1less than)				
	% of the material pass through and below 2.0 mm IS Sieve (not more than)	5.00	25.90	+20.90	3.0

9. In view of the above report, STC issued a notice of claim dated 29.09.2016 seeking the refund of the landed cost of the cargo. The petitioner contested the same by contending that the result of the Umpire Analysis was abnormal and untenable. At the material time, STC did not accept the same and by a letter dated 24.10.2016, called upon the petitioner to remit the amount raised by way of a Debit Note and/or enhance the value of the Bank Guarantee.

10. In view of the above dispute, the petitioner filed a petition before this Court, under Section 9 of the Arbitration and Conciliation Act, 1996, *inter alia*, seeking interim relief staying the operation and effect of the Notice of Claim dated 29.09.2016. The petitioner further sought an order restraining STC from encashing the bank guarantee. The petitioner's claim for restraining STC from invoking the bank guarantee was not accepted, and STC proceeded to encash the bank guarantee in the sum of USD 10,49,636 on 25.12.2016.

11. It is relevant to note that by the order dated 27.10.2016 passed by this Court in the aforesaid application, this Court had also directed that the STC

would preserve the goods which were still in control and in possession of STC.

12. Thereafter, on 06.01.2017 STC issued another notice, *inter alia*, stating that the sum of USD 16,147,051.19 was payable by the petitioner towards the refund of the landed cost of the cargo, after adjustment of the Bank Guarantee. This was again reiterated by STC by the notices dated 03.04.2017 and 28.04.2017. The petitioner responded to the aforesaid notices, and contested the same by reiterating that the bank guarantee was incorrectly encashed.

13. On 26.03.2018, STC informed the petitioner that the Department of Fertilizers had directed STC to pay a penalty amount of ₹5,82,47,937/-, calculated on the basis of the Umpire Analysis report. It is the petitioner's case that the earlier demand for a sum of USD 16,147,051.19 (after adjustment of the bank guarantee) was accordingly withdrawn. In the aforesaid view, the petitioner contends that STC's claim is now limited to ₹5,82,47,937/- as the said contract was for supplies to the Department of Fertilizers, which had limited its claim to the said penalty. In this view, the petitioner claims that excess amount recovered by encashment of bank guarantee over and above the claim of ₹5,82,47,937/-, is required to be refunded to the petitioner. The petitioner has computed the said excess amount at ₹1,28,93,767, on the basis of the STC's letter dated 26.03.2018.

14. Since the aforesaid amount has not been released to the petitioner, it has filed the present petition.

15. At the outset, it is relevant to note that the disputes are essentially contractual disputes stemming from the contract dated 23.06.2015 entered into between the petitioner and STC. The said contract includes an

arbitration clause which is set out below:-

> "**20. ARBITRATION**:
>
> In the event of any dispute arising between the Parties in relation to or under this Agreement/EOI , the same shall be settled by arbitration conducted in accordance with the Rules of Arbitration of the Indian Council of Arbitration, New Delhi, The decision of the arbitration tribunal shall be final and binding. The venue of the arbitration shall be New Delhi, India. The language of arbitration shall be English. The governing laws shall be laws of India. The arbitral award shall be enforced in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any of its amendments thereof."

16. In this view, the disputes between the parties are required to be adjudicated/resolved by arbitration, and it would not be apposite to consider the same in this petition. It is also noticed that the petitioner had sought to agitate his grievance regarding the Umpire Analysis being untenable by way of an earlier petition, under Section 9 of the Arbitration and Conciliation Act, captioned ***Global Transnational Trading FZE v. The State Trading Corporation of India Ltd & Anr.*** : ***O.M.P. (I) (COMM) 427/2016,*** which was disposed of by the order dated 27.10.2016.

17. In view of the above, the present petition is dismissed, leaving it open for the petitioner to avail of its remedies as available in law.

18. Insofar as the petitioner's request for refund of excess amount recovered by STC is concerned, the STC shall examine the same, and if it is found that it has recovered a sum in excess of its claims and there is no dispute regarding such excess recovery, STC shall take the necessary steps for refunding the same.

19. Given the circumstances of this case, whether the petitioner has already sought to avail all remedies under Section 9 of the Arbitration and Conciliation Act, 1996, this Court is also of the view that the present petition be dismissed with imposition of costs. However, this Court is refraining from doing so, in view of the fact that it appears from the letter dated 26.03.2018 that certain undisputed amounts may be payable to the petitioner, the directions for which has been passed above.

20. It is clarified that nothing stated in this order should be construed as a final determination of the question whether any amount is admittedly payable by STC to the petitioner. The import of the present order is limited to directing STC to pay the undisputed amount, if any, within a period of eight weeks, from today.

21. All contentions of the parties are reserved.

22. The petition is disposed of. The pending application is disposed of.

VIBHU BAKHRU, J

APRIL 10, 2019

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