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

\+ O.M.P. (COMM) 424/2019 & IA Nos. 14173/2019 and 14174/2019

M/S PREM KRISHNA ASSOCIATES & ANR. ..... Petitioners
Through: Mr. G. Sivabalamurugan, Adv.

versus

SINOCHEM INDIA COMPANY PVT. LTD. ..... Respondent
Through: Mr. Dibya Nishant, Adv.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

<u>O R D E R</u>

% **14.10.2019**

<u>IA 14174/2019 (for exemption)</u>

Exemption allowed subject to all just exceptions.

The application stands disposed of.

<u>O.M.P. (COMM) 424/2019 & IA No. 14173/2019 (for stay)</u>

1. The challenge in this petition filed under Section 34 of the Arbitration & Conciliation Act, 1996, is to an Award dated June 19, 2019 passed by the learned Sole Arbitrator whereby the learned Arbitrator has awarded a sum of ₹2,25,14,240/- with interest @ 9% p.a. with effect from March 05, 2018 in favour of the respondent herein.

2. The brief facts, as noted from the record are that the respondent herein was the claimant before the learned Arbitrator and is engaged in the business of manufacturing, marketing, sale and distribution of agro chemicals. In the year 2011, the respondent appointed the petitioner no.1, through its G.P.A. holder namely Mr. G. Mohankrishnan as its Carrying & Forwarding Agent

(C&F Agent) at Coimbatore, inter alia, to receive the products sent by the respondent, store them in the warehouse and dispatch/deliver the same to the distributors in Tamil Nadu and Kerala as per the directions of the Head Office of the Company. The last renewal was vide agreement dated June 08, 2017, effective for the period from April 01, 2017 to March 31, 2018. On September 29, 2017, the respondent sent notice of termination of the agreement in terms of clause 34(a)(vi) under which either party can terminate the agreement without assigning any reason by giving 30 days' written notice to the other party. The termination was to be effective from October 30, 2017 and the petitioner was accordingly asked to submit the bills for reimbursements.

3. Accordingly, transfer of materials to the warehouse of new C&F Agent from the petitioner’s warehouse started towards the end of October, 2017 and was completed by November 15, 2017. The details of the stock received by the new C&F Agent were cross-checked with the company's record and mismatch was noticed. While the respondent’s representatives were verifying the status of the missing goods/stock, one of its customers/distributors M/S A. Natrajan informed the respondent vide email dated November 14, 2017 that it had not received the goods with respect to certain invoices raised against them. As per the detail of bills, they did not receive goods worth ₹1,07,79,374/-. A similar email dated November 20, 2017 was received from another customer M/S WeeareCrop Science to the effect that they too had not received the goods, details whereof were furnished. It is under these circumstances, the respondent made enquiries from all its customers, took confirmation with respect to the non-receipt of the goods, and shared the details with the petitioner. After exchange of

emails amongst the concerned parties, and verification, goods/stock worth ₹2,06,92,273/- were found unaccounted/missing and in the circumstances, vide email January 30, 2018, the respondent asked the petitioner to make payment. Attempts to settle the dispute amicably having failed, the respondent took recourse to the arbitration clause, which resulted in the impugned award.

4. It is noted that the learned Arbitrator noted the defence of the petitioner to be that in terms of the agreement, the petitioner had no discretion in the matter of dispatch of the materials to any third party. It had no authority to appoint any distributor of its choice. The entire process of appointment of distributors and dispatch of goods was to be done strictly on the directions of the respondent company. The petitioner's case was also that the Regional Business Manager of the respondent company one Sasikumar, made some offers and discounts for promotion of the agro-chemical business of the company, and dispatched goods without knowledge of the petitioner. He also took back expired, damaged and leaky materials from the listed distributors, complained of, stored them separately in rented houses elsewhere and compensated the distributors for the goods received back from them by supplying fresh stocks from the petitioner's warehouse without raising invoices and without knowledge of the petitioner. According to the petitioner, the missing of stocks, if any, was the handiwork of Sasikumar who acted in collusion with the Territorial Managers and employees of the warehouse and the petitioner cannot be blamed for the same. In substance, the petitioner denied the respondent's case of 'missing' stocks.

5. The other defence of the petitioner was that the agreement was valid

for a particular period, commencing from 1st April of the year to 31st March of the next year, and in the absence of any 'carry-forward' clause, the past liabilities/transactions of the previous year cannot be clubbed and taken into account while working out the liabilities particularly when it is not pleaded by the respondent that any exercise was undertaken to close the account every year and tally the stock and transactions as per the SAP accounting system being followed in the company and similarly, the liability could not be extended to transactions subsequent to the effective period of the agreement. It is the case of the petitioner that certain invoices of the period both prior to April 01, 2017 and subsequent to October 30, 2017 beyond the effective period of agreement consequent to pre-mature termination of agreement effective from October 31, 2017, have been taken into account, which is not tenable. The petitioner had also claimed set-off of an amount of ₹5,74,788/- by way of counter-claim. The claims of the respondent were the following:-

1. Loss due to missing of materials -	₹2,14,18,769/-
2. Loss of profit due to loss of business-	₹16,82,710/
3. Loss of reputation and goodwill -	₹10,00,000/-
4. Expenses on account of travel and lodging-	₹ 2,04,411/-

6. The oral submissions were advanced by the learned counsel for the parties. On behalf of petitioner, it was stated that in terms of sub-section (3) of section 28 of the Arbitration and Conciliation Act, substituted by amendment with effect from October 23, 2015, the Arbitral Tribunal is required to take into account trade usages, besides the terms of the contract, while deciding and making the Award. The persons involved in the process of distribution of the goods particularly the distributors, namely, A. Natrajan

and others were not examined. The Regional Business Manager Sasikumar was also not examined. They are the persons familiar with the actual trade practices and usages and their evidence would have thrown light on the point of trade usages. The respondent's witness CW 1 Deepak Ranjan examined as the principal witness, had joined the company only nine days ago. Therefore, he had no personal knowledge of the transactions. Thus, the Tribunal was deprived of the evidence on the point of trade usages. It was also contended that the accounts maintained as per the SAP system of accounting which contains details relating to each and every transaction has also not been produced. The claim is simply based on invoices, unsubstantiated by the relevant record. It was stated that Sasikumar taking advantage of his position as Regional Business Manager, bringing the other staff in his collusion, accepted the returned (damaged, expired, leaky) goods from distributors and replaced them with fresh goods on his own without raising invoices and informing the petitioner. For any missing goods/stock, he is the person responsible. According to the petitioner, the respondent company sent termination notice on September 29, 2017 whereas 48 invoices/bills in question are of dates subsequent to September 29, 2017. Only 18 invoices pertain to the period between April 01, 2017 and September 29, 2017, and they only can be subject matter of claim and adjudication. Further, 5 invoices included in the list of impugned invoices marked Ex. C/85 pertain to the period prior to April 01, 2017. In the absence of any carry forward clause, transactions prior to April 01, 2017 cannot be included within the ambit of claim. It was stated that the petitioner can at most be held liable for those irregularities. It was stated that the respondent had lodged a burglary claim with the insurance company which was rejected. Having failed there, they took recourse to arbitration; their intention therefore, does not appear to be clean. In any view, case of burglary and missing stocks cannot stand together.

7. The learned Arbitrator, in his conclusion was of the view that the appointment of petitioner as C&F Agent was to entrust the work of handling i.e. receipt, storage and transmission of the respondent's product at and from the designated godown/warehouse which in the instant case was at Coimbatore and it was the duty and obligation of the petitioner to provide the infrastructure including office space, godown, working staff etc. necessary for storage and transportation of the respondent's products. The petitioner was not only responsible for all damages/losses due to shortage (among other things) of the respondent's product but it also bound itself to "indemnify the company ...... for all such losses and damages", and the company was entitled to adjust the same from the bills. This is in accordance with Clauses 5 and 21(a). The learned Arbitrator was of the view that company's products at the warehouse in question is not in dispute nor it is in dispute that the impugned 71 invoices catalogued in Ex. C/85, which is an admitted document vide the petitioner's affidavit of admission and denial. He was of the view that as per the agreed arrangement, on receipt of the products, the C&F Agent i.e. the petitioner was supposed to make necessary entries in the record after verification of the quantity, batch, number etc. generate the invoices and arrange transportation to· the customers i.e. the distributors. Having thus, received the goods from the company, the petitioner cannot escape the liability for any shortage or missing of the goods.

8. As regards the role of Sasikumar, the Regional Branch Manager, or

other employees, the learned Arbitrator was of the view that there is no evidence to substantiate the petitioner's case of Sasikumar or others accepting the returned goods, generating invoices with respect to fresh products as replacements, on their own without knowledge of the petitioner. The employees were under the control of petitioner and for any act of omission or commission of the employees, they are liable under the agreement, to indemnify the company for the loss.

9. Insofar as the plea that no verification was made with the distributors, is concerned, the learned Arbitrator was of the view that the agreement of the company was with the petitioner and not with the distributors. Even though, reference was made by the learned counsel for the petitioner to the bipartite agreement between the company and the distributors, but the same was not on record. He was of the view that this plea was taken for the first time in the course of oral arguments and cannot be accepted.

10. Insofar as the non-production of the accounts as per the SAP accounting system is concerned, the learned Arbitrator found the plea as without any merit. Moreso, when the claim is based on invoices vide Ex. C/85, which is an admitted document, and therefore, the petitioner cannot complain of any prejudice on account of non-production of SAP records. The claim is based on, amongst other things, emails received contemporaneously from the distributors, and the statements of accounts, and the Tribunal found no reason to disbelieve them.

11. As regards the damaged/leaky materials, and the company's alleged refusal to accept materials, as per clause 12 (f) and (e), it was the duty of the petitioner to store the returned goods separately with relevant documentation, and submit return of such goods along with credit notes and

debit notes to the company, and claim settlement and adjustment. Apparently this was not done, and the petitioner cannot shirk its liability on account of shortage of goods under the pretext of return of goods for being damaged, leaky etc.

12. Insofar as the plea that the claim including the invoices prior to April 01, 2017 and subsequent to October 30, 2017, the learned Arbitrator has accepted the plea on behalf of the petitioner and observed that the petitioner is thus, entitled to deduction of an amount of ₹17,91,650.00 (₹19,85,753/- minus ₹1,94,103/- GST) being the net value of the invoices in question minus GST, from the claim amount, as they pertain to the period beyond the effective period of agreement. The learned Arbitrator accordingly, granted an amount of ₹2,25,14,240/- against claim No.1. With regard to claim Nos. 2, 3 & 4, which is for loss of profit due to loss of business, loss of reputation & goodwill and expenses on account of travel & lodging, the learned Arbitrator held that foundational facts have not been pleaded nor any argument was made in the course of oral submissions, and accordingly rejected the same.

13. It is the submission of the learned counsel for the petitioners that the learned Arbitrator has failed to note and consider that the respondent is estopped from instituting claim petition against the petitioners for the reason that the respondent had raised insurance claim for the claim amount in question under 'Burglary Floater' Policy, but the respondent failed in their attempt resulting in the claim petition filed by the respondent. In other words, the claim was an afterthought. In this regard, he has drawn my attention to the statement as recorded of CW-2 Mr. Deepak Ranjan to contend that on the face of it, the respondent has accepted that against the

claim amount, the respondent had lodged a burglary claim with the insurance company and the same was rejected, andhaving failed there, the respondent took recourse to Arbitration.

14. He has also made the submission with regard to the termination of the agreement by the respondent in violation of principle of natural justice and with mala fide intention. That apart, it is his submission that the sole Arbitrator has failed to note and appreciate that the petitioners had filed criminal complaint against Sasi Kumar / Regional Manger and Madan Kumar which resulted in the termination of Sasi Kumar from the Company.

15. It is his submission that registering of the FIR for omission and commissions of Sasi Kumar and Madan Kumar, who had conspired together to cheat the company because of which company had suffered loss which was subject matter of the claim and such a liability could not be thrusted upon the petitioners herein.

16. I am not impressed by the three submissions made by the learned counsel for the petitioners for the reason that lodging of a claim under 'Burglary Floater' Policy in which the respondent did not succeed, only suggest that the claim under 'Burglar Floater' was not maintainable as no burglary had taken place. The petitioners cannot absolve of its liability for unauthorizedly taking away of material by Sasikumar / Madan Kumar from the warehouse of the petitioners as the responsibility of such material lies with the petitioners.

17. Insofar as the second submission that, the respondent terminated the agreement in violation of principle of natural justice is concerned, the contract clearly stipulates that either of the parties can terminate the contract. It is not the case of the petitioners that contract contemplates

before terminating the contract a show cause notice has to be issued to the petitioners.

18. Even the third submission about the filing of the FIR by the petitioners against Sasi Kumar and Madan Kumar would denote that they have unauthorisedly dealt with the materials which were stored in the warehouse of the petitioners. In any case, it is not the case of the petitioners that the petitioners had brought to the notice of the respondent about the omission and commissions of Sasi Kumar and Madan Kumar against which no action has been taken by the respondent being their employer. The petitioners would be responsible to the respondent for any loss suffered. In any case, I note that the learned Arbitrator has in para 7.7 held as under:

> *"7.7 As regards the alleged role of Sasikumar, the Regional Branch Manager, or other employees, there is no evidence to substantiate the respondents' case of their (Sasikumar or others) accepting the returned goods, generating invoices with respect to fresh products as replacements, on their own without knowledge of the respondents. The employees were under the control of respondents and for any act of omission or commission of the employees, they are liable under the agreement, to indemnify the company for the loss."*

19. The position of law with regard to the scope of judicial review against the award passed by the learned Arbitrator being well settled in terms of the judgment of the Supreme Court in the case of ***Associate Builders v. Delhi Development Authority (2015) 3 SCC 4,*** this Court is of the view that the impugned award does not require any interference. The petition is dismissed.

V. KAMESWAR RAO, J

OCTOBER 14, 2019/*jg*