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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. 281/2015**

Date of Decision : 1st April, 2019

DHAMPUR SUGAR MILLS LTD. Petitioner
Through: Mr.Prasenjit Keswani,
Mr.Raghvendra Pratap Singh, Advs.

versus

BHARAT PETROLEUM CORPORATION LTD.
..... Respondent
Through: Mr.S.S.Ray, Mr.Vaibhav Gulia,
Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 34 of the of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 30.12.2014 passed by the Sole Arbitrator adjudicating the disputes that have arisen between the parties in relation to the 'Agreement for supply of indigenous anhydrous ethanol in State of Haryana' dated 11.10.2010 executed between the parties.

2. The primary dispute between the parties is on the interpretation and effect of Clause 5 of the Agreement, which is reproduced hereinunder:

"5. TAKE OR PAY / SUPPLY OR PAY:

The both parties agree to supply/uplift minimum 90% of the order quantity. In case of failure from either party, this “Take or Pay/Supply or Pay” clause shall be applicable in addition to the other terms & conditions of the contract. The modalities shall be as under.

- i. The Location shall place monthly indents/schedule for supplies of ethanol by the Suppliers.*
- ii. The Supplier will make the supplies as per the indents/schedule placed by the purchaser. The Supplier shall strictly adhere to the supply schedule. In case of failure to supply, the committed quantity shall reduce on prorata basis for the period so delayed. For the purpose of calculating prorata quantity, date of receipt at location shall be taken as date of supply and scheduled date provided by the location shall be considered as requirement date for this purpose.*
- iii. The above reconciliation of quantity supplied vise-a-visa indents/schedule and settlement of accounts under this clause shall be done on financial quarter basis by the Indenting locations.*
- iv. Amount of Rs.2700/- per KL (Rupees Two Thousand Seven Hundred Only per KL) (equivalent to 10% of the basic rate) shall be payable by the Supplier for the undelivered quantity from minimum quantity of 90% of the indented quantity on financial quarter basis.*
- v. Amount of Rs.2700/- per KL (Rupees Two Thousand Seven Hundred Only per KL) (equivalent to 10% of the basic rate) shall be*

payable by the Purchaser for the un-indented quantity from minimum 90% of the prorata purchase order quantity minus prorata quantity arrived as per clause 5(ii) above on financial quarter basis.

- vi. *State Excise controls the movement of ethanol. The delay in issue of requisite permissions/clearances by State Excise shall affect the indents/schedule of supplies. The both parties agree that delays and prorata quantity thereof due to non-availability of requisite permissions/clearances by Statutory Authorities shall be reconciled on case-to-case basis.”*

3. It was the case of the petitioner that in terms of Clause 5 of the Agreement as reproduced hereinabove, the respondent was under an obligation to place the indents/schedule on the petitioner on a pro-rata basis on financial quarter basis. Immediately on execution of the above Agreement, the petitioner had called upon the respondent to obtain necessary permissions from the excise authorities for import of Ethanol so that the supply is not effected. However, the respondent was able to obtain the import permission from the Excise Department at Haryana only on 11.11.2010 and thereafter obtain the export permission from the Excise Department in the State of UP only on 08.12.2010. As both the permissions were obtained within the first quarter, the respondent was obliged to place an indent /schedule on the petitioner for the full quarter supply determined on the above basis. As the respondent failed

to place indent for full supply, it was under an obligation to pay the liquidated damages under Clause 5(v) of the Agreement.

4. Counsel for the petitioner submits that in spite of this admitted default and stipulation for payment of liquidated damages, the Arbitrator has rejected the claim of the petitioner on an incorrect basis that for the delay in grant of permission from the Excise Department, the indents are being put for reconciliation on a case to case basis and as the respondent has tried to make up the shortfall in the subsequent quarters, it would absolve the respondent of its liability to pay damages for the particular quarter in which the shortfall occurred.

5. He further submits that the parties having agreed to pay liquidated damages for each others defaults under Clause 5, no further damages had to be proved by the petitioner to sustain its claim.

6. Counsel for the petitioner further submits that the Arbitrator erred in invoking Clause 5(vi) of the Agreement as the respondent never sought any reconciliation on the account of delay in obtaining Excise permissions.

7. On the other hand, counsel for the respondent submits that the Arbitrator having interpreted the terms of the Agreement and rejected the claim on the basis of lack of evidence led by the petitioner, this Court cannot interfere with the same. He submits that the Arbitrator has concluded that

there was no negligence on the part of the respondent in applying to the Excise Department for obtaining requisite permissions. Though the delay in grant of such permissions may not be a force majeure event, however, equally, the respondent cannot be made liable to pay liquidated damages for such delay which was beyond its control. He further submits that Clause 5(vi) of the Agreement envisages the effect of delay in obtaining the requisite permission from the Excise Department. The Arbitrator has rightly applied the same to reject the claim of the petitioner. He further submits that in any case, the petitioner led no evidence of any damages suffered by it due to the failure of the respondent to place the indents.

8. I have considered the submissions made by the learned counsels for the parties. The Arbitrator, in the Impugned Award has held that the delay in grant of requisite permission from the Excise Department are an exception to take or pay and order to pay obligation. The Arbitrator has further held that the application for import permission was sent by the respondent merely six day after the consent letter and the application for export permission was sent just a day after the import permission was granted. The Arbitrator further holds that the respondent cannot be said to have acted callously in this matter. The Arbitrator further holds that the respondent, in order to make up the shortfall, had placed more than required indents for the subsequent quarters of January to March, 2011 and April to

June 2011. The Arbitrator has further held that the petitioner has not shown any loss incurred by it due to the default of the respondent.

9. Clause 5(vi) of the Agreement has been reproduced by me hereinabove. The parties in the above Clause have clearly contemplated that there can be delay in issuance of requisite permissions/clearances by the State Excise Department. The parties have further agreed that in the event of such delay, pro rata quantity shall be reconciled on case to case basis. In the present case, once the Arbitrator held that the delay in grant of requisite permission was not on account of carelessness or negligence by the respondent, the parties were to reconcile the effect of such delay and it cannot be said that the petitioner can claim damages for the entire quantity calculated on pro rata basis.

10. The effect of the respondent placing more than the pro rata quantity for the subsequent quarters was also a relevant consideration and has been rightly taken into account by the Arbitrator.

11. Equally, though the Agreement provides for liquidated damages, it was for the petitioner to have shown that it suffered any damages due to such alleged default of the respondent. As held by the Supreme Court in *M/s Kailash Nath Associates v. DDA & Anr.* (2015) 4 SCC 136, since Section 74 of the Indian Contract Act, 1872, awards reasonable compensation for

damage or loss caused by a breach of contract, damage or loss caused is a *sine qua non* for the applicability of the Section and where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in case where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded. In the present case it cannot be said that it was difficult or impossible for the petitioner to prove damage or loss suffered by it due to the alleged breach of contract by the respondent.

12. I, therefore, do not find any reason to interfere with the Impugned Award.

13. The next challenge of the petitioner is to the refusal of the Arbitrator to award interest for the delayed payments made by the respondent against the invoices.

14. Counsel for the petitioner submits that in terms of the Purchase Order, the respondent was under an obligation to make payment of the invoices within 21 days from the supply being affected. The respondent, however, made unauthorized deductions from the invoices on account of some alleged payments due from the parent company of the petitioner against some other contracts. The petitioner immediately protested against such deductions and eventually the respondent conceded to such protests and made the payment of the balance deducted amount. He submits that even otherwise there was delay in

making payments by the respondent. The petitioner had therefore, claimed interest on such delayed payment.

15. Counsel for the petitioner further submits that the Arbitrator has rejected this claim only on the ground that eventually the respondent did make the payment of the deducted amount. He submits that the petitioner was entitled to be compensated for the loss suffered by it on account of delayed payments.

16. I have considered the submissions made by the counsel for the petitioner. I would first note that the Agreement between the parties does not provide for payment of any interest on delayed payment. Further, the period of delay in the present case, even as per the chart submitted by the petitioner is from January, 2011 to March, 2011, as far as the deducted amounts are concerned. As admitted, the respondent made such payments immediately on finding merit in the contention of the petitioner that no amount could have been withheld for making recovery of dues owed by the parent company of the petitioner and against other contract. For the other amounts, the delay runs into a few days on each occasion.

17. The Arbitrator having exercised his discretion on question of grant of interest, which cannot be said to be unreasonable or perverse, I do not find this to be a fit case of interference by this Court.

18. In view of the above, I find no merit in the present petition. The same is dismissed with no order as to costs.

NAVIN CHAWLA, J

APRIL 01, 2019

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