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

Reserved on : 1st October, 2018

Date of decision : 28th January, 2019

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O.M.P. 2/2014 & I.A. 671/2017

**THE STATE TRADING CORPORATION OF INDIA
LTD**

..... Petitioner

Through: Mr. Sandeep Sethi, Senior Advocate
with Mr. Ram K. Watal, Advocate
(M-98100316961).

versus

M/S J.K. INTERNATIONAL PTY LTD & ANR Respondents

Through: Mr. Sudhir Nandrajog, Senior
Advocate with Mr. Sanjay Bansal &
Mr. Ajay Chaudhary, Advocates (M-
9811079974).

**CORAM:
JUSTICE PRATHIBA M. SINGH
JUDGMENT**

Prathiba M. Singh, J.

1. O.M.P. 2/2014 is filed by the State Trading Corporation of India Ltd. (*hereinafter*, 'STC') under Section 34 of the Arbitration and Conciliation Act, 1996 (*hereinafter* 'the Act') challenging the award dated 3rd September, 2013 passed by a three-member Arbitral Tribunal by a 2:1 majority. O.M.P.(ENF.)(COMM.) 45/2018 has been filed by M/s J.K. International Pty. Ltd., Australia (*hereinafter*, 'seller') seeking enforcement of the said award.

2. The subject matter of the contract was importation of yellow peas. A tender was floated by STC for purchase/import of yellow peas on 8th July, 2008. Respondent No.1 - M/s. J. K. International Pty. Ltd., Australia (*the*

'Seller') was awarded the tender and a contract was executed on 31st July, 2008 for supply of 1,60,000 MTs of yellow peas +/- 10% (at the option of the seller). The goods were to be supplied in four separate shipments of 40,000 MTs each as per the contract dated 31st July, 2008. Subsequently, however, the said contract was amended vide addendum dated 18th September, 2008, and the requirement of shipping 40,000 MTs in each shipment was done away with. The supplies were to be made in the months of September, October, November and December, 2008.

3. The Seller effected the first two shipments for the months of September and October, 2008, in respect of which there is no dispute. However, disputes arose in respect of the shipment for November, 2008. It is the case of the Seller that it initially nominated MV TARSUS as the vessel for supply of yellow peas for the month of November, 2008. Thereafter, upon the request of STC, the shipment was agreed to be delayed for 10 to 15 days and MV DING XIANG HAI was nominated as the vessel. However, despite nomination, STC failed to open the letter of credit in favour of the Seller, in terms of its contractual obligations. The Seller sent repeated reminders and pursued the matter with STC but did not receive any response from them. The Seller, thereafter, raised a claim for damages against the STC for not having opened the letter of credit and for not having accepted the November and December, 2008 shipments. The Seller claimed that it had incurred huge losses and was left with no option but to sell the yellow peas in the open market at lower prices, which resulted in losses. It was also submitted that STC was in clear breach of the terms of the contract, having not opened the letter of credit, within the stipulated period as per the contract.

4. STC on the other hand took the stand that the Government had taken an in-principle decision to review the availability of imported pulses as also the price situation owing to which Public Sector Units (*hereinafter*, 'PSUs') were not permitted to make any further import of yellow peas. STC did not agree with the claims raised by the Seller, and accordingly, the Seller invoked arbitration under the aegis of Indian Council of Arbitration. The Arbitral Tribunal constituted of Justice V. N. Khare (presiding Arbitrator), Justice A. M. Ahmed (Arbitrator) and Justice D. P. Wadhwa (Arbitrator). The award dated 3rd September, 2013 was rendered by a 2:1 majority, in favour of the Seller, whereby damages were awarded for compensating the losses of the Seller, both for the months of November and December, 2008.

5. The said award dated 3rd September, 2013 is under challenge in OMP 2/2014.

Submissions on behalf of Petitioner –STC

6. Mr. Sandeep Sethi, learned Senior Advocate appearing for the Objector- STC submits that the Arbitral Tribunal has failed to consider various clauses of the contract. According to STC, there was no nomination of a vessel for the month of December, 2008. Even the nomination of the vessel for the month of November, 2008 was not to be treated as a valid nomination, as it was neither accepted nor approved by STC. According to Mr. Sethi, until and unless the nomination is approved by STC, there is no obligation to open the letter of credit in favour of the Seller under the contract. It is further submitted that the decision of the Government to have a relook on the issue of importation of yellow peas was an intervening factor, which constituted Force Majeure and hence STC, being a PSU, was bound by the said decision of the Government not to make any further

imports of yellow peas. This fact was, according to STC, duly communicated to the Seller and hence STC could not be forced to accept the shipment of yellow peas, contrary to the said decision of the Government.

7. Mr. Sethi further argued that the majority award was passed without taking into consideration the minority award, which, in itself, renders the majority award inoperative and invalid. Once there is a dissenting/minority award, the majority award, has to give reasons as to why the majority is differing from the minority.

8. It is further submitted that in view of the errors in the majority award the only option left for this Court is to set aside the award completely. Insofar as the calculation of damages is concerned, it is submitted, that the same is also erroneous as the Tribunal has added additional 10% to the quantity specified in contract without STC having accepted the said quantity or the addition of the 10%.

9. It is further submitted that since the Seller did not nominate any vessel for December, 2008, under Section 38 of the Sale of Goods Act, the contract ought to be treated as having been repudiated as a whole, as the Seller was in clear breach. It is, thus, submitted that since the Seller was itself in breach, the contract ought to be treated as cancelled as a whole, and thus, there was no obligation to open the letter of credit for the months of November and December, 2008. On behalf of STC, the following judgments are relied upon:

- ***N.K.N. Ramier and Bros. v. S.S. Ramuda Ayyar & Anr. AIR 1933 Mad 176;***
- ***M/s Vishnu Sugar Mills Ltd. v. M/s Rameshwar Jute Mills Ltd. AIR 1970 Patna 323;***

- *Nune Sivayya and Anr. v. Maddu Ranganayakulu & Anr. AIR 1935 Privy Council 67;*
- *Juggilal Kamlapat v. Pratapmal Rameshwar (1978) 1 SCC 69;*
- *Union of India v. Niko Resources Ltd. and Anr. 2012 (3) Arb. LR 19 (Delhi);*
- *Associate Builders v. Delhi Development Corporation AIR 2015 SC 620;*
- *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705.*

Submissions on behalf of Seller

10. It is contended by Mr. Sudhir Nandrajog, learned Senior Advocate appearing on behalf of the Seller that STC is in complete breach of the contract because, despite the Seller having nominated the vessel for the month of November, 2008, STC failed to open the letter of credit within the timelines stipulated in the contract. In fact, a perusal of the decision of the Government relied upon by STC shows that though review was to be undertaken of the importation policy, only future imports were to be stopped and not the imports which were already contracted for. It is the further contention of the Seller that STC had no choice, after the vessel was nominated, but to open the letter of credit within the timelines stipulated in the contract. By simply procrastinating, STC was responsible for making the Seller wait unendingly. Repeated follow-ups with STC did not evince any reply which forced the Seller to depute its representative to have a meeting with STC. Mr. Nandrajog submits that it was at the request of STC that the Seller agreed to delay the shipment for November, 2008. In the meantime, the first vessel which was nominated for the November, 2008 shipment i.e.,

MV TARSUS, was changed and another vessel – MV DING XIANG HAI was nominated. This vessel continued to be available even for the month of December, 2008 and hence the contention that there was no nomination for the month of December, 2008 is incorrect.

11. It is further submitted on behalf of the Seller that the alleged embargo of the Government from any future imports of yellow peas was nothing but a bogey. Even as of January, 2009 STC asked for reduction of price of yellow peas to be supplied under the contract. The Seller agreed to reduce the price and despite the said reduction being agreed to, STC failed to honour the terms of the contract and open the letter of credit.

12. It was further argued, on behalf of the Seller, that in order to mitigate its losses the Seller had no option but to sell the goods to a third party. Finally, it is contended that the conduct of STC led to the Seller incurring huge costs on various counts, as also losses. Further it is contended by the Seller that the Force Majeure clause of the contract could have been invoked by STC only in the manner as provided in the contract, which admittedly was not invoked. The Seller further submitted that the stand taken by STC is contradictory, inasmuch as if the contract itself was frustrated by the decision of the Government not to import yellow peas, then no nomination of any vessel was required for December, 2008.

13. Moreover, STC is an autonomous body and does not work directly under the Government. Reliance is also placed on the minutes of the meeting dated 4th November, 2008 to submit that only fresh contracts were not to be entered into. This is reiterated in the minutes of meeting dated 15th December, 2008. Even the policy decision of the Government dated 29th January, 2009 did not impose a mandatory ban on import of yellow peas. In

fact, many other PSUs/companies continued to import yellow peas, which fact is not denied by STC.

14. Mr. Nandrajog further contends that the request for reduction in price defeats both arguments by STC. Firstly, it shows that there was no ban on imports and secondly, it also shows that the contract was not frustrated. Moreover, it is submitted that the fact that a particular transaction is construed as being uneconomical, cannot be a ground for frustration of the contract. It is finally contended that the contract was for total 1,60,000 MTs, and only supplies were to be made in instalments. If STC is in breach, it has to compensate for the entire loss of the remaining supplies. The Seller further relies on the majority award to argue that this award holds that nomination of a vessel was made both for November and December, 2008, and thus, the Seller was not in breach of any of its contractual obligations. The Seller relies upon the following authorities in support of its submissions:

- ***Union of India v. K. H. Rao (1977) 1 SCC 583;***
- ***National Textile Corporation Ltd. v. Nareshkumar Badrikumar Jagad & Ors. AIR 2012 SC 264;***
- ***Travancore Devaswom Board v. Thanath International (2004) 13 SCC 44;***
- ***Alopi Parshad and Sons Ltd. v. Union of India (1960) 2 SCR 793;***
- ***Andard Mount (London) Ltd. England v. Curewell (India) Ltd. AIR 1985 Delhi 45;***
- ***State Trading Corporation of India v. Helm Dungemittel GmbH & Anr. 2018 SCC OnLine Del 9334.***

Relevant Clauses of the Contract

15. Before addressing the rival contentions, the contractual terms need to be set out. The contract dated 31st July, 2008 was for “*import of 1,60,000 metric tonnes yellow peas on C&F Basis*”. Relevant clauses of the said contract are extracted herein below:

“3) **QUANTITY:** 1,60,000 MT (One Lac Sixty Thousand Tonnes) +/- 10% at seller’s option. The Seller to offer in parcel size of 40000 Metric Tonnes.

4)

5) **SHIPMENT SCHEDULE:**

1st Lot - 40,000 MTs +/- 10% (Seller’s option) during Sept’08 - Kolkata Port

2nd Lot - 40,000 MTs +/- 10% (Seller’s option) during Oct’08 - Mumbai Port

IIIrd Lot - 40,000 MTs +/- 10% (Seller’s option) during Nov’08 - Kolkata/Vizag Port (two port)

IV Lot - 40,000 MTs +/- 10% (Seller’s option) during Dec’08 – Kolkata/ Vizag Port (two port)

6) **PRICE:**

S. N.	QTY IN MTs	SHIPMENT PERIOD	Price in USD (C&FFO)
1.	40000 (+/-10%)	September – 2008	524.50
2.	40000 (+/-10%)	October – 2008	526.00
3.	40000 (+/-10%)	November – 2008	526.00
4.	40000 (+/-10%)	December – 2008	526.00

NOTE

Sellers to ensure suitable arrival draft at respective ports at the time of shipment.

7).....8).....

9) **SHIPPING TERMS:**

1. The Seller shall endeavor to ship the Pulses (Yellow Peas) as far as possible in Indian flag vessels.

2. They shall nominate vessels at least 7 days prior to loading, giving all particulars of the vessel including:

- ☐ *Name of the vessel; ex-name(s), if any;*
- ☐ *Classification*
- ☐ *GRT/NRT/DWT*
- ☐ *Holds/hatches*
- ☐ *Type of vessel*
- ☐ *Flag of vessel*
- ☐ *Year & month of built/Age of vessel*
- ☐ *Type, condition and capacity of gear/derricks/cranes*
- ☐ *LOA Beam*
- ☐ *Name of Charterer/Disponent owners with full name & style*
- ☐ *Details of P&I club for owners/charterers for cargo indemnity cover*
- ☐ *Current and validity of planned voyage*
- ☐ *Hull insurance particulars and validity of cover*
- ☐ *Particulars of performance of vessel's previous two voyages in the immediate past under same ownership and operation.*

3. Loading to commence only after nomination has been accepted by Buyer. Only vessels suitable for carrying Pulses (Yellow Peas) in bulk shall be nominated. Vessel(s) should be of such length and beam as to permit their easy entry to East Coast & West Coast of Indian Ports/Docks.

9.4.....9.20.....

9.21. The Seller shall ensure that the goods are shipped on a vessel classed not lower than Lloyds 100 A1 or an equivalent class in the classification of any

other recognized classification society. The nomination of the vessel shall be approved by the Buyer and the certificate of approval of vessel from the Buyer shall form the part of the documents required under the Letter of Credit to be established by the Buyer. The vessel shall not be over 20 years of age. A vessel over 20 years of age but not exceeding 25 years of age would be acceptable provided it has established and maintained a regular pattern of trading on an advertised schedule to load and unload at specified 6 ports. Proof of such advertised schedule should be dated prior to the date of shipment. In the event of vessel being over 20 years, overage insurance premium should be paid by the Seller as per Lloyds of London scale. The vessel on its last voyage prior to ship-breaking will not be acceptable.

9.229.2310)11)

12) PAYMENT:

A. 'At sight' Letter of Credit to be established by the buyer within 10 days from the date the seller provides full vessel nomination details of the buyer. The 'Buyer' shall open an irrevocable Letter of Credit in favour of the seller payable at sight in US Dollars. The L/c shall be negotiable against presentation of the following shipping documents in good order : -

I. Clean on Board Charter Party Bills of Lading marked freight prepaid made out to the order of opening bank and notify party "APPLICANT" showing the name of the consignee, in three (3) signed originals with three (3) non-negotiable copies. Bills of Lading must show that the goods have been shipped on Board and freight prepaid. Bill of Lading to be signed by the Master of the Vessel or by a named agent for an on behalf of the Master or the Owner.

II. 'Seller's signed commercial invoice in three (3) original with three (3) copies on the basis of

shipped weight showing inter-alia Quantity, description and quality of Yellow Peas shipped, price, net invoice value.

III. Certificates from the Govt. nominated official agency in the country of origin/surveyor nominated by the buyer confirming the following with reference to Contract specifications/requirements:

a) Origin, Grade quality, quantity and weight of Yellow shipped. Also certifying that the same is in conformity with the grade & quality requirements under the contract and is fit for human consumption.

b) Detailed quality analysis report of the Pulses (Yellow Peas) shipped with reference to contract requirements and specifications.

c) Yellow Peas shipped is free from live weevils and other insects injurious to stored grains, including Sitophilus Granarius.

d) Yellow Peas is free from levels of radiation stipulated.

e) Yellow Peas does not contain pesticidal residues other than the permissible limits.

f) Phytosanitary certificate in conformity with accepted international convention and phytosanitary regulation of India. Following additional declarations are required to be incorporated in the phytosanitary certificate that the consignment(s) conforms to the plant quarantine (Regulation of import into India) Order 2003 with schedules and subsequent amendments.

g) Copy of telex/fax indicating shipment particulars after completion of each shipment.

Note: *The above requirements shall be appropriately worded in the Letter of Credit. Any other essential documentary requirements can be added in the L/C.*

C. All bank charges in India for the establishment of letter of Credit shall be borne by the Buyer. All bank charges outside India, including negotiation charges and foreign bank's reimbursement commission shall be borne by the Seller. The letter of Credit amendments/extensions charges, if any, shall be borne by the party responsible for occasioning the amendments/extension.

D. In case the seller fails to negotiate shipping documents within 15 days from the date of shipment and seeks extension in the period of negotiation of L/C beyond this period or original documents are not received by the buyer before arrival of the ship at the nominated discharge ports, due to any reasons whatsoever, the seller shall have necessary instructions issued to the ship/ship's agent at the discharge port to deliver the cargo to the Buyer and/or their nominee(s) against a simple letter of indemnity without insisting for original Bill(s) of Lading or Bank Guarantee.

E. Negotiation of documents under reserve is not acceptable.

F. State Bill of Lading and Third Party commercial invoice shall not be acceptable.

G. Phytosanitary Certificate showing consignee name as notifying party and showing description of goods as "Peas" are acceptable.

The above documentary requirements, however, shall be appropriately worded in the letter of credit.

13).....18).....

19) FORCE MAJEURE:

I. If at any time during the continuance of this contract either party is disabled to perform in whole or in part any obligation under this contract because of war, hostility, civil commotion, quarantine restrictions, Military operations, Sabotage Strikes, Lock-Outs, act

of God or act of Government (including but not restricted to prohibition of export or import), fires, floods, explosions, epidemics, strikes, then the date of fulfillment of any engagement shall be postponed during the time when such circumstances are operative.

II. Any waiver/ extension of time in respect of the delivery of any installment or part of the goods shall not be deemed to be waiver / extension of time in respect of remaining deliveries.

III. If operation of such circumstances exceeds one month each party shall have the right to refuse further performance of the contract in which case neither party shall have right to claim eventual damages.

IV. The party, which is unable to fulfill its obligation and under terms of this present contract must immediately inform the party of occurrence of any of the causes mentioned in the clause, give notice to the other party of the existence or termination of the circumstances preventing the performance of the contract, duly endorsed by the Foreign Trade Mission/ Chamber of Commerce in the country of the party giving sufficient proof of the existence of circumstances and the duration. Non-availability of raw material will not be an excuse to the seller for not performing their obligation under this contract.

20).....21).....

22) GENERAL CLAUSE:

It is expressly understood and agreed by and between Seller and Buyer that The State Trading Corporation of India (STC) is entering into this Agreement solely on its own behalf and not on behalf of any other person or entity. In particular, it is expressly understood and agreed that the Government of India is not a party to this agreement and has no liabilities, obligations or rights hereunder. It is expressly understood and agreed

that STC is an independent legal entity with power and authority to enter into agreements solely on its own behalf under the applicable laws of India and general principles of Contract law. Buyers expressly agree, acknowledge and understand that STC is not an agent, representative or delegate of the Government of India. It is further understood and agreed that the Government of India is not and shall not be liable for any acts, omissions, and commissions, breaches or other wrongs arising out of this agreement. Accordingly, Buyer hereby expressly waive, release and forego any and all actions or claims, including cross claims, impleader claims or counter-claims against the Government of India arising out of this Contract and covenants not to sue the Government of India as to in any matter, claim, cause of action or things whatsoever arising out of or under this agreement during the validity of the Contract.

25) This Contract is subject to Indian Government Rules and Regulations with regard to import of yellow Peas No.2 or better from time to time. No claim and / or liability will lie on STC in case there is any change in Government Act/rules and regulations in this regard.”

16. An addendum was entered into, by which clauses 3 & 5 were amended as under:

“1. CLAUSE -3: QUANTITY : The clause to be read as

“1,60,000 MT (One Lac Sixty Thousand Tonnes) +/- 10% at sellers’ option in four lots.” I/O existing.

2. Clause -5: shipment schedule: The clause to be read as

“1st Lot during Sept’08 – Kolkata/Vizag Port (two port)

*IIInd Lot during Oct'08 – Mumbai Port
IIIrd Lot during Nov'08 – Kolkata/Vizag Port (two
port)
IVth Lot during Dec'08 – Kolkata/Vizag Port (two
port)” I/O existing.”*

17. A perusal of the above contract shows that though the total contracted quantity of yellow peas was 1,60,000 MTs, the price was not same for each of the shipments. For the first instalment, the price was USD 524.50 per metric tonne and for the remaining instalments it was 526 USD per metric tonne. Further, as per clause 9.2, the Seller had to nominate the vessel 7 days prior to loading. However, loading was to commence only after the nomination was accepted by the Buyer. Letter of credit was to be opened by STC within 10 days from the date when the Seller provided the full details of the vessel nomination. So far there is no confusion.

18. The issue, however, gets confounded in view of clause 9.21 which requires that nomination of the vessel is to be approved by the Buyer and certificate of approval of the vessel from the Buyer was to form part of the documents required under the letter of credit. The relevant sentence of clause 9.21 reads as under:

“The nomination of the vessel shall be approved by the Buyer and the certificate of approval of vessel from the Buyer shall form the part of the documents required under the Letter of Credit to be established by the Buyer.”

19. This clause forms the bone of contention between the parties as STC argues that until the nomination of the vessel is accepted by it, there is no obligation to open the letter of credit, under the contract. A perusal of this clause, read with clauses 9 & 12 of the contract shows that there are five

stages in this contract:

- (a) Nomination of the vessel;
- (b) Opening of letter of credit by the Buyer;
- (c) Approval of the nomination by the Buyer;
- (d) Loading of the shipment; and
- (e) Presentation of letter of credit for payment.

20. The nomination of the vessel has to take place 7 days prior to loading. Time for opening letter of credit commences immediately when nomination is made. 10 day period is available to STC for establishing the letter of credit. This 10 day period commences from the date on which the nomination is made by the Seller and communicated to STC. An approval of the nomination is, however, required prior to the commencement of loading the goods on the vessel. The approval has to form part of the documents to be presented with the letter of credit. The manner in which the system of letter of credit operates is clear i.e. immediately after loading and departure of the ship, the Seller can seek negotiation of the letter of credit, along with all the original documents, as mentioned in clause 12. The said shipping documents enlisted in clause 12 would be required prior to the Seller negotiating the letter of credit. These documents are required at the time of presentation of the letter of credit. In addition to these documents, as per clause 9.21, the certificate of approval of the nomination from STC would also be required. The extracted portion of Clause 9.21 does not have any bearing on the opening of letter of credit, upon nomination. It is merely connected with the loading of the vessel and negotiation of the letter of credit. The contention of STC that until the nomination is approved, letter of credit need not be opened, is contrary to the terms of contract. The manner

in which a letter of credit is to be negotiated and the original documents have to be sent to STC is also clear from a perusal of the clause 12(III)(D).

21. The words “*documents required under the letter of credit*” clearly mean that the approval is one of the documents to be submitted for the negotiation of the letter of credit. It cannot be construed that the approval is a pre-condition for opening the letter of credit. The words “*letter of credit to be established by the buyer*” is merely a description of the letter of credit and nothing more. Thus, the five distinct stages in this contract cannot be confused. The terms are clear and unequivocal. The nomination of the vessel has to be followed by opening of letter of credit. Parallely, the nomination has to be approved by STC, and upon receiving the approval, the Seller can load the vessel, negotiate the letter of credit by presenting all the original documents including the approval.

Communication between the parties

22. Vide communication dated 7th November, 2008, the Seller nominated MV TARSUS as the “November vessel” and called upon STC to open the letter of credit for November, 2008. Upon not receiving any reply, a reminder was sent on 10th November, 2008. Further reminder was issued on 17th November, 2008. On 17th November, 2008, a meeting was also held between STC and various officials of the Seller, pursuant to which the Seller agreed to delay the shipment of yellow peas for November by 15 to 20 days. This was confirmed vide email dated 19th November, 2008. The subject line of this email reads as under:

*“Subject: Contract No.15736 for 40,000 Mts 10% +/-
to suit the freight Canadian Yellow Peas for November
Shipment”*

23. In this email, the Seller while confirming that the November shipment is being delayed by 15 to 20 days, also nominated a different vessel i.e. MV DING XIANG HAI to carry the said shipment. The Seller sought confirmation of this email again on 20th November, 2008. On 14th January, 2009, the Seller again called upon STC to open the letter of credit for November, 2008 in the following terms.

“Dear Sir,

As per our earlier nomination of MV Ding Xiang Hai carrying Canadian Yellow Peas under our contract No.15736. We urgently request you to provide Letter of Credit within today to complete our documents.

We appreciate your earliest attention to the same and awaiting copy of the same within today.

Best Regards

Sandeep Mohan”

24. Upon not receiving any reply, on 19th January 2009 a detailed notice was issued by the Seller explaining to STC the criticality of the issue as also the storage availability and carrying costs at the loading port in Vancouver, Canada. Thereafter, negotiations were conducted between the parties. Pursuant to a meeting held in January, 2009, on 23rd January, 2009, the Seller made a without prejudice offer to pass on the freight difference of USD 35 per metric tonne, for the balance supplies and also arrange usance for 90 days at 5% per metric tonne at STC’s cost, if required.

25. STC, thereafter, constituted an empowered committee to negotiate the disputes with the Seller, and vide letter dated 17th February, 2009 after discussions, the Seller was informed that a senior official of STC was appointed to facilitate the opening of letter of credit **“for the balance unshipped quantity as per the contractual terms”**. However, a day later, on 18th February, 2009, in a meeting held between STC and the Seller, STC

expressed its inability to import unperformed quantities of yellow peas due to prohibition by the Government. Relevant portion of minutes of the meeting held on 18th February, 2009 read as under:

“3. The Empowered Committee made it explicitly clear that in view of the embargo imposed by the Government on further imports of Yellow Peas, STC will not be able to import unperformed quantities and that this being the prohibition on imports by the Government fell well within the ambit of the Force Majeure clause in the governing contract dated 31.7.2008 as being an act of Government.”

26. However, one day later, on 19th February, 2009, further negotiations for reduction of price were initiated by STC. The letter dated 19th February, 2009, reads as under:

*“M/s J.K. International Pty. Ltd
49 Suscanand Street, Rocklea QLD 4106
GPO Box 1981 Brisbane, QLD 4001
AUSTRALIA*

Sub: Contract No. STC/PUL/IMP/07/2008-09 dated 31.7.2008 for 1,60000 MT (+/- 10% more or less sellers option of Canadian Yellow Peas to STC)

Dear Sir,

We have reference to your letter dated Jan 23, 2009 on the above subject wherein you have offered us to reduce the price of Yellow Peas by US\$ 35 per tonne and agreed for a price of US\$ 490 per tonne for the balance unshipped quantity of Yellow Peas.

In order to enable us to take further action in this regard, kindly confirm the above mentioned price at the earliest.

With regards,

*Yours sincerely,
Sd/-
Khaleel Rahim”*

The Seller, on the same day, agreed to supply yellow peas to STC, at the reduced price of USD 490 for the pending shipment of 70,000 MT +/- 10%, subject to STC establishing a negotiable and workable LC at the contract price of USD 526 per MT.

27. Despite the Seller agreeing for the reduced price demanded by STC, the supplies were not accepted and no letter of credit was opened by STC in favour of the Seller. This led to the issuance of the legal notice dated 8th July, 2008 by the Seller, along with the claim for a sum of Rs.36,354,840/- USD. After a series of negotiations, arbitration was invoked by the Seller under Clause 21 of the contract. The award dated 3rd September, 2013 was passed by a 2:1 majority, by the Ld. Arbitrators. The majority award held as follows:

- a) STC was in breach of contract dated 31st July, 2008 as it failed to open the letter of credit for the remaining two shipments i.e., for November, 2008 and December, 2008,
- b) The Seller also made reduced price offer as asked by STC, which was also not availed by STC. The Seller then shipped the goods to alternate buyers.
- c) The price by which it was sold to the alternate buyer was USD 278 per metric tonne in November, 2008 and USD 250 per metric tonne in December, 2008. Based on the Agri watch prices, the price for January and February was fixed at USD 310 and USD 315 per metric tonne.
- d) Since the sales to third party was made in January and February, hence price was USD 310 and USD 315 per metric tonne.

- e) The decision of the Government did not constitute an embargo on imports or a force majeure situation,
- f) STC has been taking shifting stands.

28. The justification provided by STC for not accepting shipments needs to be examined. It is averred by STC that an embargo on future imports of yellow peas was placed by the Government in a meeting held between the Secretary (CA) and the officials of the PSUs to review availability of imported pulses and price situation of pulses. Relevant extract of minutes of the meeting dated 4th November, 2008 is as under:

- *It was observed that the stock of around 5 lakh Mts of pulses are available with the PSUs for the last two year i.e., 2007-08 (1.28 lakh Mts) and 2008-09 (3.53 lakh Mts). The disposal of the same be arranged gradually.*
- *Out of this yellow peas account for about 4 lakh Mts.*
- *It has also been informed by the PSUs that they are having financial problems as the yellow peas were bought at a much higher price than they are prevailing now. Also on account of rupee's depreciation of about 20%. Price different of purchase and the current market price is very high (more than 30%). In this regard they have requested to Secretary (CA) to release at least ad hoc amount against the provision for reimbursement of 15% losses on imported pulses during 2008-98. PEC will provide the certificate of internal auditor indicating the extent of loss so that case for release of adhoc amount of 15% subsidy can be projected.*

.....

- **It is also observed that the all PSUs has already contracted to import around 7.23 Lakh Mts Yellow Peas against the targeted quantity of 7.5 lakhs MT. Therefore, Secretary (CA) has suggested to the PSUs, not to go for further contract of Yellow Peas."**

29. Thereafter, the Government, through the Ministry of Consumer Affairs Food and Public Distribution, sent letter dated 29th January, 2009 to STC, which reads as under:

“D.O.NO.6(9)-2008-PMC

29th January, 2009

Dear

Secretary (CA) in a meeting with PSUs held on 4.11.2008, to review domestic process and availability of imported pulses, took the following decisions:-

- (i) It was decided that PSUs may not import any further quantities of yellow peas and avoid further increase in inventories.*
- (ii) The losses that would results from any import would not be considered for reimbursement by Government under the scheme of reimbursement of losses upto 15% of the landed cost.*

2. You are therefore, requested to strictly comply with the above said decisions of the meeting and intimate us immediately of the action taken in this regard.

With kind regards,

Yours sincerely,

Sd/-

(Anandi Ravichandran)”

30. A perusal of the above shows that there was no blanket embargo on importation of yellow peas. What was considered was only a review of the imports and execution of future contracts. This is, in fact, admitted by the witness of STC, Mr. N. N. Kalsi himself. Extract of the said evidence reads as under:

<i>Q.21</i>	<i>Shown paragraph 13 of the affidavit. I put it to you that in the alleged Minutes dated</i>
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	<i>04.11.2008 there was no direction/mandate to any PSU to not to honour the commitment already made by means of existing contracts as regard the supply of yellow peas?</i>
A.	<i><u>STC Management interpreted that no further quantities should be brought in and the same was followed by other PSUs in consultation with Ministry of Consumer Affairs in the Review Meeting of Ministry of Consumer Affairs which takes place from time to time. I refer to the direction contained in the letter dated 29.01.2009 at pg. 21 of my affidavit.</u></i>

31. Thus, the argument of STC that a policy decision was taken not to import even the contracted quantities of yellow peas is contrary to a bare reading of the above two documents. The phrase used i.e., not to 'further contract' for import of yellow peas and not to 'further import' yellow peas shows that there was no embargo on importing the already contracted quantities. The stand of STC on this issue is thus liable to be rejected. As of 4th November, 2008, the decision was to not enter into any "fresh contracts". The statement of the witness clearly establishes that it was STC's "interpretation" that no further quantities should be imported.

32. The contention that there was no nomination for the month of December, 2008, is correct, if the contract is interpreted strictly. However, every contract has to be interpreted in the background of the facts and circumstances prevailing at the time. The evidence on record clearly shows that the Seller had two vessels ready i.e., MV TARSUS for November, 2008 and MV DING XIANG HAI for December, 2008. It nominated the November vessel in time. Upon the request of STC it delayed the November shipment and nominated the second vessel, which was set aside for the

December shipment, for the November shipment. The witness on behalf of the Seller Mr. Sandeep Mohan, in his cross examination states as under:

Q.3 Did the claimant nominate any vessel for shipment of December, 2008?

A. Yes. Claimant had nominated a vessel on 7th of November, 2008 and then sent another reminder on 10th November, 2008 and another reminder was sent on 17th November, 2008 at which point the buyers asked to defer shipment for 15 to 20 days which automatically meant that the shipment for November had shifted to December and then the failure of the buyer opening any LC's for November portion despite many reminders meant the vessel which was moved for December was not executed then how can a seller nominate another vessel for December. It meant the shipment for December had moved to January for the same amount of days and the seller requested once again to please open your LC for both the vessel which was now loaded in December and the vessel which would be loaded in January, but the buyer had failed to open any of the LCs.

Q.4 Would you agree that the Claimant had to make two nominations of vessels, one for the shipment of November and another for the shipment of December?

A. Under the contract I agree. However, under the communication that took place the shipment nomination was given for November vessel MV Tarsus on 7th November and the buyers failure to accept nominations and request on 17th November to defer the shipment by 15 to 20 days meant the November portion the contract under Tarsus would have loaded the November cargo and on 19th November for the nomination of MV Ding Xiang Hai would have loaded in

December which in fact did load in December, 2008.

33. Several emails were written by the Seller calling upon STC to open the letter of credit, which was not done by STC. Under such circumstances, the absence of a formal letter nominating the same vessel or any other vessel for the month of December, 2008 is impractical to say the least.

34. Contracts for supply of goods have to be interpreted in the commercial context and not in a theoretical manner. When STC was taking a stand that due to Government's policy it could not make any further imports, it would have been unrealistic to expect the Seller to again nominate the vessel for December, 2008. While the issue relating to the November shipment remained unresolved, it did not appear at any point of time that the Seller did not have the capability or capacity to make the December shipment. The Seller went out of its way to fulfil its obligations under the contract and STC simply did not communicate a firm decision. Even as of February 2009, the Seller made it absolutely clear that it is ready and willing to ship the entire unshipped quantity. Thus, the submission that there was no nomination of a vessel for December 2008 is not to be viewed in a technical manner as it was STC which was responsible for not agreeing to import. The Seller cannot be expected to keep the November vessel in readiness as also another vessel in addition, thereby incurring huge costs, for the month of December 2008, when it is was clear that STC was citing Government embargo as a reason not to import.

35. Adherence to and enforcement of contracts is essential for any commercial ecosystem to thrive. The present is a clear case where one party i.e., the Seller was repeatedly attempting to accommodate the buyer, as also

adhere to the terms. However, the buyer STC failed to show the diligence to honour the terms of the contract by procrastination and indecision.

36. Further, if STC had to invoke the Force Majeure clause, there was a specific procedure prescribed in the contract which, however, was not invoked. Even after the contractual period expired, STC sought a discounted price as of February, 2009, and other favourable terms, which were also agreed to by the Seller. This, itself, demonstrates that the Seller was extremely keen to resolve the issue and to make the supplies as per the contract. STC did not even resort to termination of the contract. The correspondence/minutes in January – February, 2009, clearly show that STC changed its stand almost on a daily basis. Prior to commencement of arbitral proceedings, at no point of time did STC take the stand that no vessel was nominated for the month of December, 2008. Even in February, 2009, STC made an offer for purchase of the entire balance quantity for both pending shipments and not just for quantity for the month of November, 2008. Thus, it is clear that STC is liable for damages for the entire unshipped quantity for the month of November and December, 2008.

37. Mr. Sethi's submission based on Section 38 of The Sale of Goods Act, 1930 is that even if STC had not opened the letter of credit in respect of the November shipment, since the supplies were being made in instalments, the contract was not repudiated as a whole and there was an obligation on the Seller to nominate a vessel for December. First, the nomination of a vessel is not a simple empty formality. For a Seller who is serious in its dealings, it entails huge costs as the Seller has to requisition the vessel, pay the charges for the same, enter into a contract with the ship owner etc., and then nominate the vessel. STC, as is clear from the chronology of events,

was taking a stand that it did not wish to have any further supplies. Hence the nomination did not make any practical sense. Even under Section 38, if the instalment supply is only for the purpose of convenience of parties, and there was sufficient flexibility to the Seller in the quantum of supplies to be made in each shipment, this is not a strict case of 'Instalment deliveries'. Moreover, in February 2009, STC and Seller were negotiating for the sale of the entire unsupplied quantity at a discounted price. Thus, the provisions of Section 38 would not apply.

38. The submission that the majority award is vitiated as it does not deal with the minority award has been considered by a Ld. Division Bench of this Court in ***State Trading Corporation of India Vs. Helm Dungemittel GmbH & Anr (FAO (OS) (Comm) 76 of 2016)***. The Court has held as under:

“29. Mr. Sethi has contended that since the Arbitrators had the benefit of the Minority Award but they failed to give any reasons for not accepting the minority view. He has also relied on the observations made in the case of Union of India v. Niko Resources Limited (supra). We are unable to accept the contention of Mr. Sethi. Reading of para 43 of the aforesaid judgment would show that the observations so made were in the light of the facts of the aforesaid matter. The Court had observed that then Majority Award did not inspire confidence. It was also observed that the majority has dealt with the submissions of the parties but did not deem it appropriate to deal with the findings of the dissenting Award rendered by Justice Wadhwa although the draft Award of Justice Wadhwa was received by them in good time but the Arbitrators did not meet for the reason that there was basic difference in the approach of the Majority Award and the Minority Award and in those circumstances, the Court observed that it was incumbent in such

circumstances for the majority to have discussed the point raised by Justice Wadhwa in the dissenting Award. In the present case, we find that not only the Majority Award inspires confidence but the same has been upheld by the Single Judge and we have also not found any reason to disagree with the same.”

39. Thus, it is broadly when the court feels that the majority award does not inspire confidence that the court has to see whether the majority award considers the minority award. In the present case, the Court holds that the majority award is broadly well-reasoned and has considered all the facts and legal propositions. Thus, the mere reason of not considering the minority award, does not vitiate the majority award.

40. The majority award, however, takes the surplus of 10% quantity of yellow peas, over and above the quantity agreed in the contract. The total contractual quantity was 1,60,000 MTs, out of which first two shipments for a total quantity of 90,660 MTs was made in September 2008 and October 2008. The third and fourth lot would, therefore, have to be treated as 69,340 MTs (1,60,000 MTs – 90,660 MTs) and not 69,340 MTs + 16,000 MTs i.e., 10% of 1,60,000 MTs, as has been done by the Tribunal. The optional quantities are additional in nature and ought not to form the basis for damages. Further the final negotiations conducted in February 2009 showed that the seller was willing to sell for 30% lesser price. The Seller had sold unshipped quantity to third parties and demanded damages on the basis of the revenue it lost from the said transactions. However, instead of the sale price to the third parties, the Agriwatch prices were taken by the Tribunal to be the standard. Thus, the damages ought to be determined by taking into consideration USD 490 as the agreed sale price minus the per MT price as

per Agriwatch for calculating the loss to the seller. The Tribunal has erred in taking the contractual price of USD 526 and subtracting the same by the Agriwatch price of November. The negotiations having continued till February 2009, the prices of November, 2008 could not have been considered. Thus, the damages payable would be as under:

A	Price agreed to by the seller in February 2009	=	USD 490
B	Agriwatch price in February 2009	=	USD 315
C	Difference (between A and B)	=	USD 175
D	Balance quantity of yellow peas to be shipped	=	69340 MT
E	Damages payable USD 175 x 69340 MT	=	12,134,500 USD
F	Exchange rate applicable as per the Tribunal	=	INR 47
G	Amount in Indian Rupees (12134500 x 47)	=	Rs.57,03,21,500/-

41. Considering the globally prevalent interest rates as also the fact that the present OMP has been pending since 2014, the interest payable would be 2% from the date of pronouncement of award. The awarded amount be now paid within three months, failing which interest at the rate of 4% on the sum awarded would be payable upon the expiry of three months till date of payment.

42. OMP is disposed of in the above terms. All pending applications also stand disposed of.

PRATHIBA M. SINGH
JUDGE

JANUARY 28, 2019/dk