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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 29.1.2019

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O.M.P. (COMM) 399/2017

NATIONAL SEEDS CORPORATION LIMITED Petitioner

Through: Mr. Akhil Sibal, Senior Advocate
with Mr. Yashvardhan, Ms. Smita
Kant, Mr. Pradeep Chhindra, Mr.
Abhishek Praharaj and Mr. Parinay
Vasandni, Advs

versus

INTERNATIONAL PANACEA LIMITED Respondent

Through: Mr. Sumesh Dhawan with Mr.
Vatsala Kak, Ms. Ankita Bajpai and
Ms. Tulika Bhatnagar, Advs

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J. (ORAL)

1. This is a petition preferred under Section 34 of the Arbitration and Conciliation Act, 1996 (in short "the Act") to assail the Arbitral award dated 11.07.2017.
2. The short issue which arises for consideration in this petition is: as to whether or not the learned Arbitrator's interpretation of Clause (i), which is titled as "Payment Mode", is perverse.
3. The clause in issue reads as follows:-

"(i) Payment Mode: As the business is on back to back basis, NSC would make payment to the registered Co-

supplier within 15 working days from the date of satisfactory execution of order and receipt of payment to NSC, from purchaser. Before that party will not press hard to release the payment. However NSC will retain 5% amount of the payment as performance guarantee for a period of three months or till such time the buyer gives its final clearance of satisfactory performance of product relating to quality. However, the Co-supplier may deposit Bank Guarantee of equal amount in lieu of release of balance 5% payment and get the said payment released ”

4. The learned Arbitrator based on a reading of the aforementioned clause came to the conclusion that while there was some merit in the stand of the petitioner that the contract did not envisage payment of money to the respondent until the petitioner received money from its purchasers, such a bar could not operate beyond the duration of the contract i.e. a period of one year.
5. The learned Arbitrator after recording that the supplies and the invoices qua the supplies were raised in 2012, went on to observe that the period for payment could not be stretched endlessly and that it had to be construed reasonably.
6. The petitioner has assailed the reasoning of learned Arbitrator on the ground that he has ventured outside the plain terms of the contract, and thus, has committed a jurisdictional error.
7. It is the petitioner's case that the Arbitrator being a creature of the

contract, cannot step outside the periphery drawn for him by the contract obtaining between the parties.

8. In support of this contention, Mr. Sibal, learned senior counsel, who, appears for the petitioner, has relied on the judgment of *Sharma & Associates Contractors Private Limited Vs. Progressive Constructions Limited*, (2017) 5 SCC 743.

9. Before I venture further and test the tenability of the arguments raised before me in context of the facts obtaining in the instant case, let me briefly sketch out the broad contours of the case.

9.1. The petitioner, which is, a company owned and controlled by the Government of India and is under the administrative control of Ministry of Agriculture and Farmers Welfare, entered into an agreement dated 24.05.2012 with the respondent (in short “the agreement”)

9.2 By virtue of this agreement, the petitioner appointed the respondent as the Co-Supplier/Co-Producer of quality agri-inputs such as Bio-manure, Bio-Fertilisers, Bio-Pesticides and Micro Nutrients for the Bihar and Jharkhand region.

9.3 The initial tenure of this agreement was one year which could have been extended another maximum of two years. However, the admitted case of both the parties is that there was no renewal of the agreement. As required under the terms of the agreement, the respondent had deposited a sum of Rs.3,00,000/- in the form of one-time security deposit with the petitioner.

9.4 It appears that thereafter, the petitioner issued various orders between

07.12.2012 and 27.12.2012 to the respondent for supply of Bio-Fertiliser products.

9.5 The orders placed by the petitioner were duly executed and Bio-Fertiliser supplies were made to various districts in the State of Bihar between 12.12.2012 and 31.12.2012.

9.6 As a consequence of the supplies made by the respondent, invoices were raised on the petitioner of a cumulative value of Rs. 1,54,78,228/-.

9.7 The respondent, in this behalf, sent several reminders to the petitioner whereupon a sum of Rs.10,99,094/- was released in favour of the respondent.

9.8 Despite reminders, there was no further movement in the matter of payment by the petitioner.

9.9 The petitioner, it appears, after receiving several reminders, sent an e-mail dated 03.07.2015 wherein it, *inter alia*, took the stand that as per the terms of the agreement, it was required to pay moneys to the respondent only after it received payments from the concerned department.

9.10 This propelled the respondent to serve upon the petitioner a legal notice dated 26.12.2015. Via this notice, it called upon the petitioner appoint an independent and impartial sole Arbitrator to adjudicate upon the disputes which had arisen between them.

9.11 It appears that the petitioner continued to take the stand, which it had taken earlier, which is that, it would make payments to the respondent only

when it received payment from the purchasers.

9.12 This stand was communicated by the petitioner on 07.03.2016, which was its reply to the legal notice served upon it by the respondent.

9.13 It is in this background that the sole Arbitrator came to be appointed.

10. Before the learned Arbitrator, the petitioner took the stand that the respondent had entered into the aforementioned agreement with the petitioner knowing fully well that its business with the petitioner was on a back-to-back basis and therefore, it was known to it that it could not press for payment unless moneys were received by the petitioner from the ultimate purchaser i.e. State of Bihar.

11. The petitioner had required the respondent to supply Azotobactor and PSP to various offices of the District Agriculture Officer in the State of Bihar on the condition that payment in respect of the supplies would be made only after moneys were received from the State of Bihar.

12. It was averred that it was not the case of the petitioner that it had received moneys from the State of Bihar.

13. That being the position, no cause of action for recovery of amount from the petitioner had arisen.

14. As noted at the very outset, the learned Arbitrator after considering the contention of both sides came to the conclusion that the claim made by the respondent for receiving moneys against the supplies made was tenable.

15. The reasoning furnished by the learned Arbitrator, to which I have

made a brief reference at the beginning of my narration, is set out in para 5.6 and 5.7 of the award.

15.1 For the sake of convenience, the same is extracted hereafter:-

“5.6 Having considered the respective submissions of both counsel I am of the view that while there may be some merit in the claim of the respondent that the contract does not stipulate payment until the Respondent receives the money from the purchaser such a bar in my view cannot operate beyond the period of the duration of the contract i.e. one year. In the present case the supplies were made in the year 2012 and the invoices also raised simultaneously. This period cannot be stretched endlessly and the contract must be construed reasonably. Significantly the payment clause also uses the phrase satisfactory execution of the order. There is no dispute whatsoever that the contract was executed satisfactorily. The clause also states that the seller/claimant will not press hard for payment till payment is received from the purchaser and the contract satisfactorily executed. The contract has been executed satisfactorily and now the only requirement is that the seller should not press hard for payment. This does not rule out the fact that after a reasonable period of time, the seller cannot claim his dues. Significantly in absence of the privity of contract with the agencies of the State Government, the Claimant cannot sue them and therefore

cannot be left remedy less.

5.7 Strangely enough neither the respondent and naturally not the claimant, have received any payment though the purchaser has enjoyed the goods and sat over the amount which was payable to the claimant through the respondent.”

16. It is in this backdrop that the petitioner has approached this Court via the instant petition.

17. As noted above, Mr. Akhil Sibal, relying on the stand taken before the learned Arbitrator contended that a perusal of the agreement obtaining between the parties would show that while there was no privity of contract between the respondent and the State of Bihar, the business arrangement was such that the supplies received by the petitioner from the respondent were passed on to the ultimate purchaser and for its efforts a certain sum was retained by the petitioner as margin money.

18. In other words, as noticed above, according to the learned counsel, the arrangement between the parties herein was on a back-to-back basis.

19. For this purpose, my attention was drawn to the agreement and various other clauses which used the expression “back to back basis”.

20. Furthermore, Mr. Sibal emphasised the fact that the learned Arbitrator had committed a jurisdictional error in as much as he had imported equity into the contract obtaining between the parties and thus, disregarded the basic philosophy of law which is that the learned Arbitrator being a creature

of the contract, he cannot step outside the boundaries drawn for him by the provisions of the contract.

21. On the other hand, Mr. Dhawan, who, appeared on behalf of the respondent, submitted that there was no grievance with regard to either quantity and quality of supplies made against the purchase orders placed by the petitioner.

22. Since, the respondent did not have privity of contract with the State of Bihar, it could only look to the petitioner for payment of moneys against the supplies made.

23. The petitioner, having failed to make payments despite repeated reminders, the respondent cannot be asked to wait in perpetuity for payments for supplies made, admittedly, in 2012. This is borne out if a sensible meaning is given to the provision in Clause (i) which reads as follows:-

“...before that party will not press hard to release the payment...”

24. According to the learned counsel, if, as contended on behalf of the petitioner that the respondent was not entitled to seek payment of dues against supplies made by it till payments were received by it, then, the clause would have simply said that no payments would be released unless moneys were received by the petitioner and not that the respondent will not press hard for release of payments.

25. In any event, according to the learned counsel, the view taken by the learned Arbitrator was a plausible view and that no interference was called

for.

26. Having heard the learned counsel for the parties and perused the record, as noted at the very beginning, the only aspect which I need to consider is: as to whether there is any perversity in the interpretation which the learned Arbitrator has given to Clause (i) of the Agreement obtaining between the parties.

27. A careful perusal of the Payment Mode clause would show that with regard to the payment aspect, it states the following:-

- (i) That the business between the parties herein is on a back-to-back basis.
- (ii) The petitioner will make payment to the registered co-supplier (in this case, the respondent) within 15 working days from the date of satisfactory execution of the order and receipt of payment from the purchaser.
- (iii) Before the expiry of 15 working days and the receipt of payment by the petitioner from the purchaser, the registered co-supplier i.e. the respondent, will not press hard for release of payments.

28. It is quite evident that the clause is clumsily worded. The word “and” inserted between the expression “date of satisfactory execution of order” and “receipt of payment to NSC from purchaser” should actually read as “or”, as otherwise unless the petitioner in a given case receives the money on the same date when the order is executed, it gives no clue as to the date from which the period of 15 days would kick in.

29. Since it is not disputed on behalf of the petitioner that the respondent has no privity of contract with the State of Bihar, the word “and” would

have to be read as “or” to make the sense of when the period of 15 days would commence in a situation where the date of execution of the order was different from the date of receipt of payment by the petitioner from its purchaser.

30. Besides this, what is clear, at least, to my mind, is that once parties use the expression that “***before that party will not press hard to release the payment***” it was intended not to insist on payment till such time 15 days expired from one of the two determinable dates i.e. the date of satisfactory execution of the order or the receipt of payment by the petitioner from its purchasers.

31. It is clear that the intent was not that the respondent will not ask for payment till such time petitioner was to receive the payment from its purchaser.

32. Therefore, looked at from any angle, one cannot but agree with the learned Arbitrator that the intent of parties was not to reach a situation where if the petitioner was not able to receive any money from its purchasers, the respondent would be left high and dry.

33. To my mind, the view taken by the learned Arbitrator qua the interpretation of the clause in issue is a plausible view and hence, no interference is called for with the impugned award.

34. The judgment relied upon on behalf of the petitioner is distinguishable as that was a case in which the learned Arbitrator had applied the provisions of the contract obtaining between the respondent before the Court and

another entity by the name of HSCL to a dispute between the respondent and appellant before the Court.

35. It is in this context that the Court came to the conclusion that the learned Arbitrator had committed a jurisdictional error in stepping outside the boundaries of the contract.

36. In my opinion, the judgment rendered in the matter of *Sharma & Associates Contractors Private Limited Vs. Progressive Constructions Limited* is clearly distinguishable on facts.

37. Thus for the foregoing reasons, as indicated above, I am not inclined to interfere with the award.

38. Accordingly, the petition is dismissed.

39. Costs will follow the result in the matter.

RAJIV SHAKDHER, J

JANUARY 29, 2019

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