

\$~16 (original side)

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

Decided on: 1st December, 2020

+ O.M.P. (I) (COMM.) 255/2020 & I.A. 8935/2020

AST ENTERPRISES INC. Petitioner

Through: Ms. Anushree Kapadia, Adv.
with Mr. Sharvil Pathak, Adv.

versus

MEWA MISHRI ENTERPRISES PVT. LTD. ...Respondent

Through: Mr. Ashutosh Lohia, Mr.
Aditya Rathee and Mr. Rohan Dewan, Adv.

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (O R A L)

%

01.12.2020

(Video-Conferencing)

1. This is a petition under section 9 of the Arbitration and Conciliation Act, (hereinafter referred as the “1996 Act”), whereby the petitioner has sought certain pre-arbitral interim reliefs.

Facts

2. On 8th January 2020, a Sales Contract was executed between the petitioner and respondent, for the supply of 185 metric tonnes raw cashew nuts by the former to the latter. The goods were to be divided

in eight containers of 40” FCL (Full Container Load). An advance invoice was raised, by the petitioner, for 10% of the total price of the goods. The goods were priced at the rate of US\$ 1535/MT, working out to a total of US\$ 283,975/-. The goods were to be shipped in two lots, of 100 MT and 85 MT respectively, which would, for the sake of convenience, hereinafter, be referred to as ‘Lot A’ and ‘Lot B’ respectively.

3. The Sales Contract, dated 8th January 2020, between the petitioner and respondent, required the “Outturn” of the cashews to be “48 lbs min” and the “Nut Count” to be “190 Nos. max”. Clauses 6 and 12 of the Conditions of Contract read thus:

“6. Landed Weight & Quality_ as per Certificate issued by Independent Surveyor - final and binding as per results at discharge port

12. This Contract is subject to arbitration. Arbitration shall be carried out in accordance with GAFTA No.125 and the relevant GAFTA Contract as applicable GAFTA 125 is incorporated in this contract as if set out herein, entirely. The terms and conditions of GAFTA 125 and the applicable GAFTA Contract shall apply to the extent not contradictory to the terms and conditions herein.”

4. The Sales Contract also contained certain “Specifications On Penalty”, Clauses 1 to 4 thereunder read thus:

“Specification On Penalty:

1. Variance of 0.5% plus or minus in weight at destination on weight report is not accountable but beyond this could be charged at prorate 1:1.
2. Outturn Discount based on RBS/CeoChem Lab report. Lower Outturn is charged at prorate 1: 1 basis, till 46 Lbs
3. Exemption is provided up to an excess of three counts and beyond this is chargeable @ 0.5 USD for every excess count up to index 200 NC
4. Buyer has to submit RBS/GEoChem survey reports for Quality and Port / CFS issued Weight Receipts for Quantity and any other supporting documents within 30 days of arrival of the vessel, to be eligible for raising a claim.”
5. As is apparent from Clause 12 of the “Other Conditions” in the Sales Contract, disputes arising thereunder were to be resolved by arbitration to be carried out in accordance with Rule 125 of the GAFTA (the Grain and Feed Trade Association). Learned counsel are *ad idem* that the GAFTA 125 contains a detailed arbitral protocol, and that the seat of arbitration, as per the said protocol, is at London.
6. On 15th January 2020, 10% advance of the total contract price, of US\$ 28,372.50/- was paid by the respondent to the petitioner. Thereafter on 3rd February 2020, the consignment was loaded from Dar Es Salaam, Tanzania to Mundra, India. The goods were loaded in 8 20/40” FCL containers as required by the Sales Contract.
7. The Sales Contract, as noted hereinabove, contemplated the dispatch of the goods in two lots. Accordingly, two commercial invoices both dated 3rd February 2020, were issued by the petitioner,

the first (Lot A) for 1221 bags weighing a total of 96.459 MT, priced at US\$ 148,064.56, and the second (Lot B) for 1109 bags weighing a total of 87.511 MT, priced at US\$ 134,329.38. The goods arrived at Mundra on 16th February 2020.

8. As required by the contract, a quality and quantity control test was conducted of the goods, by M/s RBS Maritime Services (hereinafter referred to as “RBS”) which issued a certificate dated 3rd March 2020, which may be reproduced thus:

“RBS Maritime Services Licence : SLA 49540
92/U, First Floor, Tel. Tuticorin:0461-2321023, 4002461
Devarpuram Road, Tel. Kollam: 0474-2761004, 2762892
Tutocorin-628 003, E-mail:rbstuticorin@rbsmaritime.com
Marine Surveyors-Cargo rbskollam@rbsmaritime.com
Superintendents

Survey Report No. RBS/MLR/18049A 3rd March, 2020

CERTIFICATE OF QUALITY

APPLICANT / CONSIGNEE	M/s. MEWA MISHRI ENTERPRISES PVT. LTD., HARYANA
SHIPPER	M/s. AST ENTERPRISES INC., U.A.E.
NATURE OF SURVEY	QUALITY INSPECTION

CARGO PARTICULARS:

(As per documents provided to us)

CARGO	RAW CASHEW NUTS IN SHELL
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BILL OF LADING NUMBER	EPIRTZDSTL200144 dt. 03.02.2020
B/L QUANTITY	4x40' CTRS 1109 BAGS 87.511 N.M/T
LOAD PORT / ORIGIN	DAR ES SALAAM / TANZANIA
DISCHARGE PORT	MUNDRA

QUALITY ANALYSIS:
SAMPLING

SAMPLES WERE
DRAWN AT RANDOM
FROM 10% OF THE
BAGS AND
SUBJECTED TO
CUTTING TEST

DATE OF SAMPLING ON 21.02.2020 &
23.02.2020

PLACE OF SAMPLING TRANSWORLD CFS,
MUNDRA

DATE OF CUTTING
TEST ON 24.02.2020

PLACE OF CUTTING
TEST MUNDRA

CUTTING TEST RESULTS:

COUNT per kg: 166

FULL DAMAGE VOID
NUTS gm: 153.000

IMMATURED/SPOTTED
PARTLY SOUND NUTS gm: 68.000

SOUND KERNELS gm: 244.960

PARTLY SOUND KERNELS	gm:	20.420
50% OF THE ABOVE	gm:	10.210
TOTAL YIELD	gm:	255.170
OUTTURN	:	45.00 LBS PER BAG OF 80 KG NETT

ISSUED WITHOUT PREJUDICE

For RBS Maritime Services
Sd./-
Surveyor"

9. It is not in dispute that the respondent made full payment for Lot B, and took delivery of the said lot which was consequently, released from the port and dispatched to the premises of the respondent.

10. According to the recitals in the petition, after Lot B had reached the premises of the respondent, the petitioner was informed by the respondent that the quantity of the said cashew nuts was less than that reflected in the Bill of Lading, whereunder they were dispatched from Dar Es Salaam. According to the Petition, the petitioner requested the respondent to issue a debit note for the difference in the quantity, which was never raised.

11. Thereafter, the respondent, apparently, forwarded to the petitioner, photographs of cashew nuts purported to be from Lot B, indicating that they were defective and damaged. Needless to say, the petitioner disputes the said allegation.

12. The dispute, in the present petition, centers essentially around Lot A and not Lot B. According to the averments in the petition, the respondent rejected Lot A, even while it was at the port, though there was no adverse test report regarding the said lot. As demurrage, on Lot A was increasing on a daily basis, the writ petition avers that the petitioner was left with no option but to refund, to the respondent, the 10% advance paid by the respondent against Lot B, against the alleged shortage in the said lot, on 5th March 2020. Qua Lot A, as the Bill of Entry had been filed in the name of the respondent, clearance of the said lot of cashew nuts in favour of any other party was not possible.

13. The petitioner alleges, further in the petition, that, being thus driven to the wall, and faced with escalating demurrage charges, the petitioner requested the shipper, vide instructions dated 17th March 2020, to release Lot A to the respondent without any payment. The said communication may be reproduced thus:

“##PAGE##

49902

YESBINBBDEL

:20: TRANSACTION REFERENCE NUMBER DATE:

17,MARCH,2020

123131898652-DC

:21 : RELATED REF

NONREF

:79: NARRATIVE

TO: YES BANK LIMITED 48 NYAYA MARG CHANAYA
PURI

NEW DELHI 110021 INDIA

OUR REF : 123131898652-DC

YOUR REF : NOREF

DRAWER: AST ENTERPRISES INC. PO BOX 309049
UNIT
NO 909 THE PALLADIUM PLOTNO JLT-PH1-C3A
JUMEIRAH
LAKESTOWERS, DUBAI UAE
DRAWEE : MEWA MISHRI ENTERPRISES PVT LTD
NH-1 ,40TH
MILE STONE, NEAR BAHALGAR CHOWK
VILLAGE, ASAWARPUR, SONIPAT HARYANA, INDIA
AMOUNT : USD 133,878.31
PLEASE RELAY THE SUBJECT SWIFT TO BELOW
BRANCH
ADDRESS.
YES BANK LTD
FOUNTAIN CHOWK, CHANDNI CHOWK
110006, DELHI
INDIA
.

WE REFER TO OUR COVER SCHEDULE DATED 17-
FEB-2020

KINDLY NOTE AS PER DRAWER INSTRUCTIONS
PLEASE RELEASE THE DOCUMENTS TO DRAWEE
AGAINST FREE OF PAYMENT AND ALSO CLOSE THE
FILE AT YOUR END.

REGARDS
TRADE SERVICES”

14. On 15th April 2020, Lot A was shifted to a private warehouse engaged by the respondent. Efforts, it is claimed, were made by the petitioner to secure the release of the goods from the said warehouse but the warehouse authorities refused to release the goods to anyone other than the respondent.

15. The respondent, according to the assertions in the petition, went on to reject Lot A as well, despite the absence of any adverse report

regarding the said lot. No payment, ultimately, was made by the respondent to the petitioner, for the cashew nuts in Lot A.

16. It may be noted, even at this stage, that the respondent has admitted, in its affidavit filed in response to this petition, that Lot A was finally disposed of partly by sale to third parties and partly by consumption. As such contends the respondent, the said Lot is no longer available, for any orders to be passed in respect thereof.

17. It is in these circumstances that the petitioner has approached this Court with the present proceedings, under Section 9 of the 1996 Arbitration Act. The prayer clause, in the petition, reads as under:

“In view of what is stated hereinabove, it is prayed

a. That the Hon’ble Court may be pleased to direct the Respondent to provide to the Petitioner a complete / detailed chain of transit of the Lot A from the port (Mundra, India), details of location, details of the condition in which it was transported/ stored since it was released from the port with supporting documents;

b. That the Hon’ble Court may be pleased to direct that the Respondent and its employees, agents, representatives, Directors etc. be restrained from assuming interest in any manner in Lot A or part thereof, and disposing of or dealing with Lot A or any part thereof in any manner until the disputes between the parties are finally adjudicated;

c. That the Respondent be directed to give requisite NOC to the Petitioner to obtain the possession of Lot A / any part thereof from the location, where it is presently situated;

d. That, if the Respondent has disposed of Lot A or any part thereof, the Hon'ble Court may be pleased to direct the Respondent to provide details of the trade with all supporting documents evidencing such trade;

e. That the Hon'ble Court may be pleased to direct the Respondent to furnish solvent security for the amount payable under Commercial Invoice bearing no. AST/151/2020 dated 03.02.2020 (*Annexure 5*), i.e. for the value of USD 133,878.31;

f. That pending admission, hearing and final disposal of the present petition, the Hon'ble Court may be pleased to grant *ex-parte ad-interim* relief in terms of para 'a', 'b', 'c', 'd' and 'e' hereinabove;

g. That the Hon'ble Court may be pleased to grant such other and further relief/s as may be deemed fit and proper in the facts and circumstances of the present case.”

18. As a result of the disposal of Lot A by the respondent, prayers (a) to (d) in the petition do not survive for consideration.

Rival Stands and Analysis thereof

19. I have heard Ms. Anushree Kapadia, learned Counsel for the petitioner, and Mr. Ashutosh Lohia, learned Counsel for the respondent, at length. Detailed written submissions have also been filed by both parties.

20. Though, initially, this petition was heard on prayer (f), which seeks *ad interim* reliefs, learned counsel for the parties agreed, on 21st

October, 2020, that as detailed arguments were being heard, the petition could be disposed of at this stage. As such, without entering into the issue of *ad interim* relief, the petition has been heard and is being decided with respect to prayer (e), which seeks issuance of a direction to the respondent to furnish solvent security for the amount of US\$ 133,878.31, being the amount allegedly due by the respondent to the petitioner, against Lot A, covered by the Commercial Invoice bearing No. AST/151/2020 dated 3rd February, 2020.

21. A reply, to the petition, has been filed by the respondent in which, *inter alia*, the following submissions have been advanced, apart from a preliminary objection as to territorial jurisdiction:

(i) On 24th February, 2020, RBS sent certain WhatsApp messages to the respondent, stating that the cashew nuts covered by Lot B, which had been cleared from the port and had reached the premises of the respondent, were damaged. The respondent also placed reliance, in this context, to an alleged admission, by the petitioner, that the average out-turn of the stock of cashew nuts, covered by Lot B was 48 lbs, which, Mr. Lohia points out, is less than the minimum out-turn as per the Sales Contract, which was 52 lbs. My attention was sought to be invited, in this context, to certain WhatsApp exchanges between the petitioner and the respondent.

(ii) The fact that the petitioner refunded 10% of the advance paid by the respondent against Lot B, indicated that the petitioner had acknowledged the inferior quality of the said Lot.

(iii) In view of the inferior quality of the cashew nuts covered by Lot B, it was “subsequently mutually agreed upon” that, as Lot B would fetch only ₹57.33 lakhs in the market, Lot A could be released to the respondent free of cost. According to the averments in the counter affidavit filed in response to the petition, the direction to the Bank, by the petitioner, to release the documents relating to Lot A to the respondent, free of cost, was pursuant to this understanding.

(iv) As such, no claim could lie, of the petitioner, for any payment, against Lot A. It is further alleged, in the affidavit in reply to the petition that, in May, 2020, the petitioner contacted the respondent, stating that the petitioner had been able to arrange for a buyer, for Lot A in Haryana. The petitioner, however, is alleged to have quoted an exorbitant amount for the said Lot, which resulted in the respondent insisting that his account be settled, to avoid any further confusion.

(v) It was on this understanding, according to the affidavit of the respondent, that the respondent took possession, and proceeded to dispose of Lot A, without making any payment to the petitioner thereagainst. For ready reference, paras 7 to 9 of

the affidavit in reply of the respondent, which contain these averments, may be reproduced thus:

“7. The Petitioner categorically agreed over the telephone to release Lot A as a means of compensation / security for the price paid by the Respondent for Lot B, which has been duly consumed on the instructions of the Petitioner herein. What came to the fore was that the Respondent had already paid a sum of Rs.1,27,48,132.88 (including GST) (and certain additional charges to be incurred) towards the purported value of Lot B. However, *it was subsequently agreed upon* mutually that the value of Lot B was able to fetch in the open market a sum of no more than Rs.57,33,000/- odd (that too after spending money on sorting and repackaging the lots to segregate them and make them marketable). Accordingly, the Petitioner conveyed instructions to its bank for release of documents pertaining to Lot A against free of payment thereby agreeing to compensate for the value of Lot B paid extra against the actual value thereof. The Petitioner also categorically requested the Respondent to refund and/or reimburse any further amounts that the Respondent may be able to fetch extra over and above the estimated value of Lot A after being sold in the open market. *It was thus agreed* that the cumulative value of Lot A as well as Lot B would fall in the region of Rs.1,27,48,132.88 (including GST), the total amount already paid by the Respondent to the Petitioner at the time of release of Lot B. The relevant documents pertaining to the amounts paid are annexed hereto as document No.3 (Colly.).

8. Subsequently, in the month of May 2020, the Petitioner through his representative once again contacted the Respondent and conveyed a story that they were able to arrange for a buyer in Haryana for the goods lying in Lot A and quoted an exorbitant amount as the value of the said goods. *They even informed the Petitioner that they would be lifting the goods lying in Lot A in separate quantities and offered to compensate the Respondent at a later date for the value of the goods of Lot B.* However, by this time, the

Respondent had lost faith and trust in the intentions of the Petitioner and was not willing to take any further risks without finalizing or agreeing upon a particular amount being fixed for the value of the goods in Lot B. In other words, *the Respondent requested the petitioner* to bring clarity with regard to the value of goods lying with them at their factory (on the instructions of the Petitioner) and the amount of compensation/ refund they would expect from the Petitioner. It may be relevant to mention here that the Respondent was already reeling under the shock of receiving goods much inferior in quality and value of the goods contracted / agreed upon to be delivered to them and the inordinate delay thereafter over a period of three (3) months and the flip-flop stand of the Petitioner regarding compensation for the amount of goods already paid for. What added to the insecurities and the mistrust of the Respondent was that the Petitioner was quoting an exorbitant sum for the value of goods in Lot A, while his sales representative, who was supposed to liquidate the stocks in Lot A was quoting a completely different figure as the value of the same goods. It was in this background, that the Respondent insisted that his account be settled to avoid any further confusion and to clarify the detention charges as well as other amounts paid by the Respondent on the instructions of the Petitioner thus far.

9. The email dated 15.05.2020 further goes to underscore the contentions of the Respondent that the petitioner was duly informed regarding the value of the goods lying with them and the Petitioner deliberately chose to not respond to the said e-mail communication sent by the Respondent. Per contra, the representative of the Petitioner chose to spin a different tale of disbelief which led to the Respondent suspecting the true and real motive of the Respondent. The suspicion and doubts of the Respondent were further emboldened by the huge variation in the narrative spun by the Petitioner and the documents supplied by his representative regarding the quality and quantity of the goods exported by the Petitioner in Lots A and B.”

(Emphasis supplied)

22. I proceed, now, to deal with the submissions advanced by learned Counsel.

Re. territorial jurisdiction

23. A preliminary objection, to the maintainability of the present petitioner before this Court, was advanced by the respondent, on the ground that, under the GAFTA Rules, the seat of arbitration was at London. Relying, *inter alia*, on the judgment of the Supreme Court in **BGS SGS SOMA JV v. NHPC Ltd.¹**, it was sought to be contended that, once the seat of arbitration was contractually fixed, Section 9 jurisdiction would vest only with the courts within whose territorial jurisdiction such seat was situate.

24. In view of this preliminary objection, advanced by the respondent, submissions were, initially, addressed by Ms. Anushree Kapadia. On this aspect, Ms. Anushree Kapadia sought to place reliance on the proviso to Section 2(2) of the 1996 Arbitration Act, which was substituted by Section 2(2) of the Arbitration and Conciliation (Amendment) Act, 2019. Section 2(2) of the 1996 Arbitration Act, reads thus:

“2. Definitions. —

(2) This Part shall apply where the place of arbitration is in India.

¹(2020) 4 SCC 234

Provided that subject to an agreement to the contrary, the provisions of section 9, 27 and clause (b) of sub-section (1) and sub-section (3) of section 37 shall apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act.”

25. It is clear from a reading of the proviso to Section 2(2) of the 1996 Arbitration Act, that, in the case of International Commercial Arbitration, Part II of the 1996 Arbitration Act, which includes Section 9, would continue to apply, even if the seat of arbitration is outside India. *BGS SGS SOMA JV*¹, on which Mr. Lohia sought to place reliance, did not involve a situation in which the proviso to Section 2(2) of the 1996 Arbitration Act was applicable. This Court, in its recent judgment in *Big Charter Private Limited v. Ezen Aviation Pty. Ltd.*², examined, *inter alia*, the judgments in *BGS SGS SOMA JV*¹ and *Mankastu Impex Private Limited v. Airvisual Limited*³, and held that, even where the agreement contained a separate exclusive jurisdiction clause, vesting jurisdiction in a foreign court, a Section 9 petition would continue to be maintainable before the Courts in India, in view of the proviso to Section 2(2) of the 1996 Arbitration Act.

26. The petitioner has invoked the jurisdiction of this Court on the ground that the registered office of the respondent is in Delhi. There is no exclusive jurisdiction clause, in the present agreement, conferring exclusive jurisdiction on any court other than this Court, to

² MANU/DE/1916/2020

³ (2020) 5 SCC 399

entertain a petition under Section 9 of the 1996 Arbitration Act. Inasmuch as the fixing of the seat of arbitration as London does not divest Courts in India of jurisdiction in this matter, I am of the opinion that the present petition cannot be thrown out on the ground of want of territorial jurisdiction.

27. The preliminary objection, regarding territorial jurisdiction, as advanced by the respondent is, therefore, rejected.

On merits

28. The petitioner has filed a rejoinder to the counter-affidavit of the respondent. All allegations, regarding any defect in quality, either *qua* Lot A or Lot B, have been denied. *Qua* the allegations of the respondent that the out-turn of the cashew nuts was only 45 lbs, as against a minimum stipulated out-turn of 48 lbs, the petitioner, while pointing out that this difference is only 3 lbs, emphasises the fact that the nut count of the cashew nuts was 166 per kg. as against 190 per kg., which was the maximum nut count as per the Sales Contract. In fact, therefore, submits the petitioner, the cashew nuts were superior, rather than inferior in quality to those contracted. In any event, the petitioner submits that this would be a purely factual controversy, which would have to be determined by the contractually contemplated arbitral process. Insofar as the withholding of payment, by the respondent, against the cashew nut in Lot A is concerned, it is underscored in the rejoinder, that there is no contractual stipulation whereunder the respondent could withhold payments against Lot A,

merely because, according to the respondent, the cashew nuts in Lot B were not up to the mark. It is pointed out that, after the cashew nuts in Lot B were duly tested, the respondent with its eyes open, cleared the cashew nuts, for which due payment had been made. The subsequent allegation, of the respondent, that the cashew nuts in Lot B were defective, has been denied by the petitioner.

29. It is further asserted, in the rejoinder of the petitioner, that no test report, regarding Lot A, was ever shared by the respondent, as required by the Sales Contract. Neither was any claim, regarding Lot A, ever raised by the respondent. Essentially, therefore, submits the petitioner, the rejection of Lot A is on the premise that the cashew nuts in Lot B, for which payment had already been made, were defective. As such, the respondent is seeking to set off the payment made towards Lot B, against the cashew nuts in Lot A, which according to the petitioner, is impermissible, contractually and otherwise.

30. In these circumstances, Ms. Kapadia submits that at the very least, the respondent should be directed to secure the money payable to the petitioner against Lot A.

31. The petitioner, in its written submissions dated 7th October, 2020, has averred that the alleged shortfall, in Lot B, was also within the permissible range of 10%, as per the Sales Contract. Moreover, the rejection, by the respondent, of Lot A, was completely unjustified, according to the petitioner, as no independent test report, *qua* the said

Lot, had been obtained by the respondent. Till date, points out the petitioner, no claim of defect in quality in respect of Lot A, has been raised by the respondent. The respondent had, in fact, sought to take undue advantage of the uncomfortable situation in which the petitioner was placed, especially in view of the rising demurrage with respect to Lot A, to coerce the petitioner to refund 10% of the advance paid by the respondent towards Lot B, without the respondent issuing any debit note in respect thereof. The petitioner has emphasised that the following facts were admitted:

- “a) The respondent has received delivery of the entire quantity in two Lots being Lot A and Lot B.
- b) The respondent has only made a payment for Lot B although the agreed terms require making of payment, before taking delivery.
- c) The respondent has received Lot A, has not provided any report of RBS/Geo Chem, has not raised any dispute with respect to the quality of Lot A and has not made any payment towards Lot A.
- d) The respondent has not shown existence of any defect whatsoever by way of any supporting documents either for Lot A or Lot B. The specific agreement between the parties required raising of such disputes along with supporting documents within 30 days of having received the goods.
- e) The respondent has consumed the entire cargo contained in Lot A and Lot B.”

32. A subsequent written note was filed by the petitioner on 13th October, 2020, in which it is pointed out that it was for the first time, in its reply filed in response to the present petition, that the respondent adopted a stand that all cashew nuts in Lot A also stood

consumed/sold by it. It is asserted that the petitioner was never put on notice prior to such consumption/sale. Moreover, no test report or other detail, to the effect that any defect was found in the cashew nuts in Lot A, was ever communicated to the petitioner. The petitioner has re-emphasised the fact that the respondent had no right to dispose of the cashew nuts in Lot A without making any payment to the petitioner, in respect of the said goods. Reliance has been placed, by the petitioner, on the judgment of a Division Bench of this Court in *Ajay Singh v. Kal Airways Pvt. Ltd.*⁴ as well as on the recent decision of this Court in *Dinesh Gupta v. Anand Gupta*⁵, to submit that in such circumstances, security of the price payable to the petitioner against the cashew nuts in Lot A, deserves to be directed.

33. The respondent, *per contra*, relies, in its written submissions, on the judgment of this Court in *Goodwill Non-Woven (P) Ltd. v. Xcoal Energy & Resources LLC*⁶, to contend that a direction to furnish security, for the amount involved in the arbitration, is an extreme step which, before being issued, would have to satisfy the pre-requisites of Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 (CPC). The respondent has again emphasised, in the said written submissions, the fact that the out-turn of the cashew nuts supplied by the petitioner was above the permissible limit as per the Sales Contract, pointing out that the certificate issued by RBS also confirmed this fact. Discomfiture has also been expressed by the respondent, in its written submissions, regarding the petitioner having moved this Court under

⁴ MANU/DE/1820/2017

⁵ MANU/DE/1727/2020

⁶ MANU/DE/1165/2020

Section 9 of the 1996 Act, seeking urgent interim relief, for a dispute which arose in February, 2020, as late as in August, 2020, without taking any steps to initiate arbitral proceedings prior thereto.

34. Apropos the submission of Ms. Kapadia that the contractual relationship between the petitioner and the respondent did not allow the respondent to offset, against Lot A, the perceived overpayment made against Lot B, para 11 of the written submissions of the respondent seeks to aver that this was done with the agreement of the petitioner. On this aspect, Ms. Kapadia submitted that the parties had been corresponding for achieving an amicable settlement to the controversy since February, 2020 and that the Sales Contract did not permit recourse to arbitration without exploring this possibility at the first instance. Moreover, Ms. Kapadia points out that it was only in May, 2020 that the respondent informed the petitioner that it was not in a position to sell the goods covered by Lot A. As such, it is submitted, the petitioner cannot be said to be guilty of any delay in approaching this Court.

35. This Court, while exercising jurisdiction under Section 9 of the 1996 Act, is essentially required to determine whether interim protection, by any of the modes recognised by the said provision, deserves to be granted, or not. The Court is not expected, while doing so, to embark on a detailed factual analysis of the dispute between the parties, even *prima facie*, as that would be an exercise which would appropriately have to be undertaken by the Arbitral Tribunal. The 1996 Act, it has to be remembered at all times, is an Act which is

intended at fostering arbitration, and not adjudication of disputes by courts. The jurisdiction, vested in courts by various provisions of the 1996 Act, has to be understood in the backdrop of this avowed purpose and objective of this statute, and has to be so exercised as to promote and further the arbitral process, to achieve a successful conclusion.

36. While exercising Section 9 jurisdiction, therefore, it is not for this Court to examine, in detail, the disputes between the petitioner and the respondent regarding the alleged shortfall in quality or quantity of the cashew nuts. The issue is highly debatable. The respondent contends that the imported cashew nuts were sub-standard, as their out-turn was less than the minimum prescribed out-turn of 48 lbs. The petitioner contends, *per contra*, that the difference in the out-turn was minimal i.e. merely 3 lbs whereas, on the other hand, the nut count of the imported cashew nuts was much lower than the maximum prescribed 190 Nos. per kg, which indicated that the cashew nuts were superior, rather than inferior, in quality. This is a dispute which this Court, in exercise of its Section 9 jurisdiction, cannot possibly adjudicate. It would have to be examined by the learned Arbitral Tribunal, duly constituted in accordance with the contract between the parties.

37. This Court is mindful of the fact that any opinion, on the factual aspects of the controversy between the parties, even *prima facie*, has the propensity to prejudice the arbitral process. Save and except to the

extent absolutely necessary, therefore, such findings, by a Section 9 court, are, in my opinion, to be avoided.

38. Both the sides have relied on certain WhatsApp communications. I am not inclined to take stock of such WhatsApp communications, as a basis to arrive at a conclusion regarding the merits of the case, even *prima facie*. In my opinion, rights and liabilities can arise only out of communications in writing, whether electronic or physical, and not by WhatsApp communications between the parties. I do not intend, therefore, to take stock of the WhatsApp communications, on which reliance has been placed.

39. As the petitioner has correctly pointed out in its written submissions, certain facts are undisputed. The cashew nuts came in two lots. I may note, here that Mr. Lohia had sought to emphasize the fact that both the lots were essentially one consignment of cashew nuts and that the division of the cashew nuts into two lots was merely for ease of transportation. *Why* the cashew nuts were despatched in two lots, in my view, is not of particular significance. The fact remains that they *were* so dispatched, and that this mode of dispatch was contemplated even by the Sales Contract. Not only did the cashew nuts arrive in two lots, the release of the cashew nuts, and payment thereagainst, was also separate. The respondent had taken delivery of Lot B after making payment against the said Lot and after the said Lot had been tested. Lot A continued to remain in the custody of the customs authorities even after Lot B had reached the respondent's premises.

40. No test report, *qua* Lot A, was forthcoming, except for a report dated 22nd June, 2020, which has been filed by the respondent along with its reply to the written note, on 14th October, 2020. This was much after the said Lot was rejected by the respondent and, as Ms. Kapadia points out, can have no real significance to the controversy in issue, as it cannot possibly constitute either the basis, or justification, for rejecting Lot A.

41. I am not, therefore, persuaded to accept the submissions of Mr. Lohia that the cashew nuts have to be treated as one homogeneous lot, for the purpose of adjudication of the present petition. Admittedly, till 22nd June, 2020, there is no test report relating to Lot A. No payment has been made, by the respondent to the petitioner, against the cashew nuts covered by Lot A. To a specific query, as to whether there was any contractual stipulation which would permit the respondent to withhold payment against Lot A, on the ground that the cashew nuts in Lot B were defective, Mr. Lohia sought to respond by referring to the following email communication, dated 16th May, 2020, from the petitioner to the respondent:

“From: Saravjeet Talwar
Sent: Saturday, May 16, 2020 12:03 PM
To: Healthy Bites; Roland Dsouza
Cc: Ashjeet Talwar
Subject: Re: Regarding Tanzanian RCN

Abhishek,

I am completely surprised by our phone call. Sad that you did not want to settle even though you have goods in your name as security. I expected better because whatever is your claim, it can at best be 300-400 dollars per ton, not more. Additionally you have paid detention and rents which can be used 20000 which comes to around usd 200 per ton. Total claim say can be usd 500, 600 or even 700 per ton. That is why I said keep 50% of the cargo and allow for loading only two trucks. That also you refused. Remember that honesty pays always.

Regards/S Talwar

AST Enterprises Inc,
909 Palladium Tower,
Cluster 'C', Jumeirah Lakes Towers,
Dubai, U.A.E.
Tel +971 4 4495300
Fax +97 1 44495338”

According to Mr. Lohia, a proper reading of the afore-extracted email from the petitioner to the respondent, would indicate that the petitioner had acquiesced to the disposal, by the respondent, of the cashew nuts in Lot A, against the defects in the cashew nuts in Lot B, and the alleged excess payment made by the respondent towards the cashew nuts in Lot B.

42. A reading of paras 7 to 9 of the affidavit filed by the respondent in response to this petition as extracted in para 21 *supra*, reveals that there are no written instructions, from the petitioner to the respondent, permitting the respondent to appropriate, by sale or disposal of Lot A of the cashew nuts, the alleged overpayment, stated to have been made against Lot B. I am not prepared to countenance the submissions of

Mr. Lohia that the e-mail communication dated 16th May, 2020 (*supra*) from the petitioner to the respondent, authorised the respondent to dispose of Lot A and appropriate the proceeds thereagainst, towards the alleged overpayment made in respect of the Lot B. It remains an undisputed fact that no payment has been made by the respondent to the petitioner against Lot A, and that no adverse test report, *qua* Lot A was ever communicated by the respondent to the petitioner.

43. Mr. Lohia has also emphasized the fact that the petitioner had itself directed the bank, to release the cashew nuts in Lot A to the respondent “free of payment”. According to the petitioner, this was done because the respondent was unwilling to release the said lot, and the petitioner was having to incur daily mounting demurrage thereupon. The averment of the respondent, in response to this submission, as contained in para 7 of the affidavit of the respondent, is that, as it had been “*subsequently agreed upon mutually* that the value of Lot B was able to fetch in the open market a sum of no more than Rs.57,33,000/- ... accordingly, the Petitioner conveyed instructions to its bank for release of documents, pertaining to Lot A against free of payment thereby agreeing to compensate for the value of Lot B paid extra against the actual value thereof.” This “subsequent mutual agreement”, according to Mr. Lohia was telephonic in nature, and there is no written communication vouchsafing any such agreement. *Prima facie*, therefore, it is difficult to accept the submission of Mr. Lohia that, by directing the bank to release the cashew nuts in Lot A free of payment, the petitioner agreed to forgo its right to any payment

against the said cashew nuts, and also accepted the allegations of the respondent that the cashew nuts in Lot B were defective.

44. The facts also seem to indicate that the disposal, of the cashew nuts in Lot B, whether by sale to a third party or by way of consumption, was effected by the respondent without the courtesy of even a communication to the petitioner in that regard, prior thereto. In other words, the respondent took possession of Lot A of the cashew nuts, did not make any payment to the petitioner thereagainst and went on to dispose of the entire Lot A of cashew nuts without either seeking the permission of the petitioner, prior thereto, or even, for that matter, informing the petitioner, after disposing of the cashew nuts, that it had done so. Ms. Kapadia is correct in her submissions that it is for the first time, in its response to the present petition, that the respondent informed the petitioner that it had disposed of the cashew nuts in Lot A.

45. Clearly, therefore, a *prima facie*, case is made out, in favour of the petitioner, as regards the alleged illegality, on the part of the respondent, in failing to make any payment, to the petitioner, for Lot A and in disposing of the entire Lot, without even informing the petitioner.

46. Which brings us to the question of the relief to be granted.

47. Ms. Kapadia has pressed prayer (e), which is for a direction to the respondent to furnish a solvent security for the amount payable

against Lot A, which is US\$ 133,878.31. Mr. Lohia has, on the other hand, relied on the judgment of the Division Bench of this Court in *Ajay Singh v. Kal Airways Pvt. Ltd.*⁴ as well as the recent decision of this Court in *Dinesh Gupta v. Anand Gupta*⁵, to contend that furnishing of security, for the amount involved in the arbitration, can only be directed, where the facts indicate that, were such security not directed to be furnished, there is a danger of the arbitral proceedings being frustrated.

48. Ordinarily, no doubt, this proposition, as advanced by Mr. Lohia, is correct. Where there is a disputed claim, interim protection, by way of securing the amount in dispute, at a pre-arbitral stage, would be justified only where there is a danger of the arbitral proceedings, being frustrated, were such deposit not directed. There are, however, no absolutes in law, and the Court is, on occasion, required to tailor the relief to the facts which appear before it. In my *prima facie* view, the facts in the present case are glaring. Mr. Lohia has not been able to show me any provision, in the Sales Contract between the petitioner and the respondent, which entitled the respondent to withhold the payment against the cashew nuts covered by Lot A. *Prima facie*, I am constrained to observe that the respondent appears to have treated itself as the self-professed arbiter of the law, so far as the payment *qua* the said Lot of cashew nuts was concerned. Not only did the respondent take possession of the cashew nuts without making any payment, it has chosen not to make any payment to the petitioner for the said Lot of cashew nuts till date, and went on to dispose of the cashew nuts, without ever communicating, to the

petitioner, any adverse test report in respect thereof, or even informing the petitioner to the fact that it was intending to dispose of the cashew nuts.

49. *Prima facie*, the submission of Ms. Kapadia, to the effect that the respondent has effectively held the cashew nuts covered by Lot A ransom against the amounts, which, according to the respondent, were paid in excess in respect of Lot B, appears to be correct.

50. Even apropos Lot B, RBS had tested the said Lot prior to their being cleared from the customs area and it was after having seen the said test report and having made payment against the said Lot, that the respondent chose to clear the goods from the customs area and remove the cashew nuts to its godown. No doubt, the respondent sought to aver, thereafter, that the cashew nuts were found to be defective. The petitioner has, on the other hand, disputed this allegation and has also submitted that there was nothing to indicate that the cashew nuts, the photograph of which was forwarded by the respondent to the petitioner, actually belonged to Lot B. This, in any case, would be a matter to be examined, on the basis of evidence in the arbitral proceedings and I cannot venture any opinion thereon in exercise of my jurisdiction under Section 9 of the 1996 Arbitration Act. Even if, it were to be assumed, *arguendo*, that Lot B was defective, I am unable, *prima facie*, to see how the respondent could have appropriated, to itself, the cashew nuts in Lot A, without any adverse report *qua* the said Lot and with no other reasonable justification whatsoever.

51. Given the extreme nature of the circumstances in the present case, and the *prima facie*, unconscionable manner in which the respondent had acted, *qua* Lot A of the cashew nuts imported by it, I am of the opinion that the prayer of the petitioner for a direction to the respondent, to secure the amount payable to the petitioner against the said Lot, is merited. The manner in which the respondent has chosen to take possession of Lot A of the cashew nuts, without making any payment to the petitioner, and has chosen to dispose of the cashew nuts, without communicating the said fact to the petitioner, informing the petitioner of such disposal even after it was made, and reserving disclosure in that regard till the filing of a response to the present petition, casts serious doubt on its conduct. It cannot be said, therefore, that if the petitioner seeks securing of the amount due to it against Lot A, the apprehension of the petitioner in that regard is unfounded.

52. In these peculiar circumstances, I am of the opinion that prayer (e) in the petition deserves to be allowed.

53. Accordingly, the present petition is allowed in terms of prayer (e) thereof. The respondent is directed to deposit, with the Registrar General of this Court, an amount, in Indian rupees, equivalent to US\$ 133,878.31, by way of a cross cheque/demand draft, within a period of eight weeks from today. Such deposit, as and when made, shall be retained by the Registry in an interest bearing fixed deposit, and shall

be subject to further orders to be passed either by this Court or by the Arbitral Tribunal to be constituted in accordance with this judgment.

54. The petitioner is also directed to take necessary steps, towards the initiation of arbitral proceedings in accordance with Clause 12 of the terms and conditions contained in the Sales Contract dated 8th January, 2020, within a period of six weeks from today. Failure, on the part of the petitioner, to take steps to initiate the arbitral process, within the said period, as per the protocol contained in the GAFTA Rules, would entitle the respondent, *ipso facto*, to the release of the deposited amount, forthwith, in its favour after, however, applying to this Court therefor.

55. This petition stands allowed to the aforesaid extent, with no orders as to costs.

I.A. 8935/2020

In view of the order passed in the petition, this application is disposed of.

C. HARI SHANKAR, J.

DECEMBER 1, 2020

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