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

Date of decision: 2nd December, 2020

+ ARB.P. 489&490/2020

INDIAN SUGAR EXIM CORPORATION LTD Petitioner
Through Mr.Nakul Dewan, Sr. Adv. with
Mr.Surjendu S. Das, Ms.Annie Mittal,
Ms.Sakshi, Advs.

versus

SAKUMA EXPORTS LIMITED Respondent
Through Mr.Anush Raajan, Adv.

CORAM:
HON'BLE MR. JUSTICE C.HARI SHANKAR

ORDER (ORAL)

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02.12.2020

(Video-Conferencing)

1. This petition under Section 11(6) of the Arbitration & Conciliation Act, 1996, prays for appointment of a sole arbitrator to arbitrate on the disputes between the parties.

2. Without prejudice to the rights of the respondent to contest the allegations levelled by the petitioner, the facts, as contained in paras 5 to 24 of the petition, setting out the dispute between the parties, may be reproduced thus:

“5. The Department of Food and Public Distribution vide Notification No. 1 (14)/2019-SP-I dated 12 September 2019 (“Notification”) issued a Scheme for providing assistance to sugar mills for sugar season 2019-20, wherein the Maximum Admissible Export Quantity ("MAEQ") for Balrampur Chini Mills Limited (" BCML") was determined. The purpose of the said scheme was that the funds to be provided as assistance to

facilitate export was to be used for payment of cane price dues of farmers for the sugar season 2019-20 and cane price arrears of previous sugar seasons.

6. On 30 September 2019, the Petitioner entered into various sugar purchase contracts with BCML for purchase of 60,000 MT (approx.) from the sugar mills.

7. Out of the aforesaid quantity, approximately 31, 000 MT ($\pm 10\%$) was contracted for export. The price was Rs. 19,000 per MT (ex- mill) with applicable GST at 0.1 %. The Government of India allocated MAEQ to various factories. The Petitioner agreed to utilize MAEQ quota of BCML by exporting the above quantity of sugar as per the terms and conditions stipulated by the Government of India, sourced from various sugar mills of BCML. The said MAEQ is deemed to be discharged as per Government Notification on submission of different documents, including "Self-certified copies of Export Proceed Realisation" or BRC.

8. The Respondent undertook to lift the entire quantity of 60,000 MT of sugar from BCML, out of which 29,000 MT ($\pm 5\%$) was sold by the Petitioner to the Respondent at Rs.19,100 PMT (ex-mill) with applicable GST at 5%. The remaining sugar from BCML was to be exported to foreign buyers by the petitioner for which the Respondent agreed to act as a facilitator. The Respondent identified and negotiated with the foreign buyers for export of the said sugar.

9. Accordingly, the Agreement was formally entered into on 7 November 2019, whereas the Respondent, from 1 October 2019, started carrying out different steps involved in the process to undertake the export, including to arrange foreign buyers for the export of sugar by the Petitioner and to negotiate terms with such buyers. The Respondent arranged Sakuma Exim DMCC (UAE), Sakuma Exports PTE Ltd. (Singapore) and Al Malaki Foodstuff Trading LLC (UAE) as the foreign buyers for export of the entire sugar quantity by the Respondent. It is pertinent that the foreign buyers are the subsidiaries and/or related of the Respondent.

10. In the Agreement, the price of sugar was agreed at Rs. 19,100 PMT (ex-mill) (including Rs. 100 margin of

Petitioner) with applicable GST at 0.1 %. All expenses as per the Agreement were to be paid by the Petitioner as per directions of the Respondent. The foreign receipt in USD as negotiated by the Respondent with the foreign buyers, was to be received by the Petitioner. The margin for the Petitioner from the entire export was Rs. 100 PMT after adjusting all expenses including foreign exchange fluctuation. Copy of Facilitation agreement dated 7 November 2019 is annexed herewith and marked as Document-2.

11. The Respondent under Clause 5 of the Agreement undertook to bear all costs and expenses incurred in performing obligations under the Agreement and Clause 8 of the Agreement to complete the loading of sugar within the contractual delivery period.

12. The Respondent further, under Clause 18 of the Agreement was under an obligation to ensure timely acceptance of the export shipment by the foreign buyers and thereafter, timely acceptance of the payment towards the export shipments within 9 (nine) working days. The Respondent thereunder, also agreed to indemnify the Petitioner with full amount and 18% interest in case of failure. It is evident from the said Clause that the Respondent was under an obligation to make timely payments towards the export shipments under the Agreement.

13. Furthermore, the Respondent under Clause 20 of the Agreement undertook to make available all the documents required by the MAEQ holder sugar factory for availing the assistance to the Petitioner within 30 (thirty) calendar days from loading the entire contractual quantity from the sugar factory/MAEQ Mill. Therefore, it is apparent that the Respondent had clearly agreed to submit all the documents including BRC, which is being generated on receipt of payment to the Petitioner, that are to be submitted further to the Source Sugar Factory, i.e. BCML in the instant Agreement so as to comply the requirements under the Notification.

14. It is submitted that the said sugar factory can avail such assistance within 90 (ninety) days from the date of issue of the last bill of lading for which claim is being made as under

Clause 4 (iii) of the Notification and in case of delay and in case of delayed submissions 10% assistance shall be deducted from the total assistance till 180 (One Hundred Eighty) days from the date of issue bill of lading would be allowed. Therefore, the said documents are of immense importance for the Source Sugar Factory to submit them with the Department of Food and Public Distribution in order to avail the benefit under the Scheme.

15. The Respondent lifted the entire contractual quantity of sugar from BCML and facilitated the Petitioner to export the entire quantity to the foreign buyers as agreed in the Agreement. The Respondent was the facilitator and instrumental in every stage of the export to foreign buyers, including but not limited to facilitating transport, insurance, survey from the ex-mill to Free on Board (FOB), appointing Clearing House Agent (CHA), etc.

The disputes under reference for arbitration

16. The disputes arose as the Respondent neglected and failed to comply with the contractual obligations inter alia to arrange payments under the Agreement towards 3,501 MT (approximately) out of the entire quantity of sugar lifted by it from sugar mills of BCML.

17. The Respondent is liable to pay the Petitioner an outstanding amount of USD 10,69,220 (US Dollars Ten Lakhs Sixty-Nine Thousand Two Hundred Twenty only) along with interest under the Agreement towards the sale proceeds. The Respondent failed to ensure from the foreign buyers thereby, violating the terms of the Agreement. The Petitioner is also entitled to duty drawback on outstanding sale proceeds along with interest.

18. The Petitioner availed Packing Credit in Foreign Currency (PCFC) from Axis Bank for purchase of sugar from BCML by submitting Foreign Sale Contract to Bank. The delay and failure of the Respondent to make the payments under the Agreement led to crystallization of the PCFC account of the Petitioner by Axis Bank. The Petitioner informed the Respondent through several emails and followed up for the payment of outstanding amounts in order to avoid

the crystallization of its PCFC. But the Respondent neglected and failed to make the payments under the Agreement. The Bank ultimately crystallized the PCFC account of the Petitioner due to the failure in payments for which the Respondent is wholly and solely responsible. The Respondent is responsible for such loss on account of crystallization and is bound to pay the amount to the Petitioner. The Bank also applied interest on the overdue PCFC due to conversion of loan from USD to INR which the Respondent is bound to indemnify the Petitioner under the Agreement.

19. Not only the pending payments and other losses, because of outstanding payments, the requisite documents are not made available to the Source Sugar Factory, i.e. BCML. Thus, BCML is unable to comply the requirement of notification under the MAEQ Scheme of the Government of India. The Respondent is aware of the same. This has led to creating a knot in the commercial understanding between the Petitioner and BCML and potential disputes apart from loss of profit or revenue, goodwill and reputation to the Petitioner. The Respondent is liable to indemnify the Petitioner towards the same.

20. The Petitioner also incurred expenses under the Agreement which are required to be reimbursed by the Respondent along with interest.

21. The Petitioner has repeatedly requested the Respondent for the payments vide several email correspondences *inter alia* dated 25 February 2020, 13 March 2020, etc. Aggrieved by the inaction of the Respondent to the Petitioner's request, the Petitioner sent a Demand Notice dated 16 May 2020 requesting the Respondent to adhere to the terms of the Agreement and pay the outstanding amount as under the Agreement. Copy of the Demand Notice dated 16 May 2020 is annexed herewith and marked as Document-3.

22. The Respondent simply chose to vaguely deny the claims of the Petitioner under the Agreement which shows their *malafide* and attempts to escape their liability. Copy of the Reply to the Demand Notice dated 27 May 2020 is annexed herewith and marked as Document-4.

23. The Petitioner had engaged with the Respondent in various discussions and deliberations for resolving the issue of payment of the outstanding amounts by the Respondent in good faith. Despite the extraordinary patience shown by the Petitioner and a bona fide effort taken by the Petitioner to resolve issues at hand by providing ample opportunities to fulfil their contractual obligations, the Respondent failed to adhere to the terms of the Agreement.

24. All the efforts of the Petitioner to resolve the disputes through discussions and negotiations with the Respondent in various meetings were without any effect because the Respondent was neither willing to perform nor willing to rectify its breaches under the Agreement. The repeated reminders from the Petitioner requesting for performance, were conveniently ignored by the Respondent with an oblique motive.”

3. Mr.Anush Raajan, learned counsel for the respondent, contests the arbitrability of the dispute, but has no objection to the prayer, of the petitioner, for reference of the dispute to arbitration, keeping the issue of arbitrability of the dispute alive.

4. Mr.Nakul Dewan, learned senior counsel for the petitioner, is also agreeable to this course of action.

5. The arbitration clause, in the agreement between the parties, reads thus:-

“Arbitration

In the event of any dispute between the parties arising out of or related to this Contract, the Parties shall, at first instance endeavour to settle such dispute amicably within thirty (30) days. Failing which, the dispute shall be referred to arbitration to be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and the rules made there under, as amended from time to time, by a sole arbitrator

mutually appointed by the Parties. The arbitration proceedings shall be conducted in English language and the seat of the Arbitration shall be New Delhi. The arbitration award shall be final and binding upon the Parties. [After the submission of any dispute to arbitration, or during continuance of arbitration the Parties shall continue to perform the respective obligations under this Contract.] This clause shall survive the termination or expiry of this agreement."

6. Para 24 of the petition avers that efforts at an amicable resolution of dispute between the parties, did not succeed. While Mr. Raajan disputes this assertion on facts, in the interests of resolution of dispute, he submits that he does not oppose the reference of the issue to arbitration.

7. Notice invoking arbitration was sent by the petitioner to the respondent on 1st August, 2020, in which two names were suggested, for appointment as sole arbitrators to arbitrate on the dispute, one of which is Hon'ble Mr. Justice Pradeep Nandrajog, Former Chief Justice of the High Court of Bombay and a retired Judge of this Court.

8. Mr. Raajan, learned counsel has no objection to Hon'ble Mr Justice Nandrajog being appointed as the sole Arbitrator to arbitrate on the dispute between the parties.

9. In view thereof, without expressing any opinion on the merits of the case of the petitioner, and leaving the issue of arbitrability of the dispute open to be agitated before the learned sole Arbitrator, this petition is disposed of by appointing Hon'ble Mr. Justice Pradeep Nandrajog (Retired), as the sole Arbitrator, to arbitrate on the disputes

between the petitioner and the respondent. All defences of the respondent, to the challenges raised by the petitioner, shall remain open.

10. The parties may contact the learned sole Arbitrator, with the copy of this order, as e-mailed to them by the Registry of this Court, within a period of one week from today.

11. The learned sole Arbitrator shall be entitled to fees in accordance with the Fourth Schedule of the Arbitration & Conciliation Act, 1996.

12. The learned sole Arbitrator would also file the requisite disclosure under Section 12(2) of the Arbitration & Conciliation Act, 1996, within a week of entering on the reference.

13. With the aforesaid directions, this petition stands disposed of.

C.HARI SHANKAR, J

DECEMBER 2, 2020/aa