Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION NO. 276 OF 2022

Origo Commodities India Pvt. Ltd. .. Petitioner/Appellant
Vs.
Indusind Bank Ltd. .. Respondent

Mr. Vibhav Krishna, Anmol Bartasia a/w. Aabha Dogra. Siddhant Tyagi i/b. Rignaya & Associates LLP for the petitioner/appellant.
Mr. Jaideep Mitra a/w. Jinal Rathi and Samhita Vinod i/b. Rahul Karnik for the respondent.

CORAM : G.S. KULKARNI, J.
DATE : JULY 12, 2022.

ORDER:

1. This is an appeal filed under section 37 of the Arbitration and Conciliation Act, 1996 (for short "the Act") whereby an order dated 10 May, 2022 passed by the learned sole arbitrator on an application filed by the respondent under section 17 of the Act has been assailed. The relevant extract of the impugned order reads thus:

> "1) The petitioner is at liberty to move an appropriate application before the appropriate Court praying for return of the 'Nuts' and the bags containing Husk as may be permissible in law.
>
> 2) Statement made by ld. Counsel, Mr. Dewan for the respondent on 11.04.2022 before this tribunal that if 186 bags of cashew nuts and other bags containing shells of cashew nuts are returned to the respondent by Crime Branch, CID of State of Andhra Pradesh, the respondent shall not dispose of them or not create any third party rights without the order from this tribunal is accepted.
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> 3) The Respondent is directed to furnish a Bank Guarantee of a Nationalized Bank in favour of the petitioner in the sum of Rs.11,00,00,000 (rupees Eleven crores only) initially for a period of one year. The respondent shall renew the said Bank Guarantee from time to time and shall keep the said Bank Guarantee alive till the

> award is made in this arbitral proceeding. The respondent shall furnish such a Bank Guarantee within 45 days from the date of this order.
>
> 4. No order as to costs.”

2. Disputes between the parties have arisen under a Collateral Management Agreement dated 18 October, 2012 under which the appellant was appointed as a Collateral Manager for mitigation of risks in respect of commodities with particular reference to quantity, quality and weight, facilities etc. used to secure the credit facilities to various borrowers across various locations/branches in godown warehouses. The principal grievance of the appellant in assailing the impugned order is to the effect that the impugned order does not take into consideration the correct facts which are on record and more particularly, in making observations in paragraph 52 of the impugned order wherein the learned arbitrator has observed that a prima facie case has been made out by the respondent to show that the appellant was negligent in discharging its duties inasmuch as initially there was an incident where 22250 bags of nuts were lifted and later restored and subsequently, there is a loss of 19,532 bags of nuts in a second incident of theft which had occurred in May, 2020.

3. Insofar as the present proceedings are concerned, the liability of the appellant under the contract in question is specific and is defined under Clause 11, which takes within its ambit the incidence of theft,

burglary etc. The said clause reads thus:

11. Liability of Origo

a) ORIGO shall be liable for any loss, damage, destruction, deterioration or deficiency of the quantity, weight or quality of commodities (hereinafter collectively referred to as "loss") as may be caused on account of negligence, fraud or dishonesty of ORIGO's employees or agents/Franchisees/ Representatives of ORIGO. ORIGO shall at its own Interest, obtain fidelity, Insurance cover where ever possible. The value of the policy shall need to be enhanced at regular intervals passed on growth of Commodities under collateral management agreement with ORIGO. It is clarified that ORIGO shall indemnify and reimburse the loss suffered by the Bank> irrespective of the fact whether insurance is obtained / claim is settled or not, which clarification shall apply only in respect of liability mentioned in this clause (clause 11 a). However the total liability of ORIGO shall be limited to the value of the Commodities at the time of destruction.

(b) ORIGO will indemnify: IndusInd Bank through either of the following two ways whenever a case of presence of sub-standard or spurious commodity is discovered due to margin of errors in sampling:

i. Replacement of sub-standard or spurious stock
ii. Bank recalling the loan and authorizing ORIGO to dispose off the commodity. The deficit, if any, after disposal of commodity to be made good by ORIGO within 30 days from the date of disposal.

c) In respect of losses arising out of the following events for which insurance cover is taken as specified in point A in clause 10 (a) above, ORIGO liability shall be limited to the extent of the insurance claims received from insurance companies as reduced by ORIGO's unpaid warehousing charges and collateral management charges.

(a) fire and allied perils
(b) burglary
(c) earthquake
(d) spontaneous combustion (incase of Cotton)
(e) riots, strikes and malicious damage
(f) any other force majeure event beyond the control of ORIGO.

d) ORIGO shall not be liable for any losses arising out of:
1. a breach of any of warranties by the Bank or by any circumstances by virtue of which the ORIGO is relieved of its contractual obligations as provided herein and
2. occurring after the Commodities have been taken back or removed by the Bank or someone authorized by the Bank in

accordance with the terms of this Agreement.

e) The liability of ORIGO shall not be occurred if the shortage of quantity of products lost or damaged is arisen on account of handling, storage, sampling, repacking, spillage, moisture loss etc. of the original deposited quantity, provided such loss or damage does not exceed the acceptable limit as may be agreed between the parties from time to time.

f) In case of field warehousing services, ORIGO will enter into a lease/ sublease agreement with the borrower and take over the warehouse/godown of the borrower on a nominal lease rental and that rights and liabilities of this parties to this agreement will be same as in the case of warehouse owned/franchisee warehouses of ORIGO."

4. The learned sole arbitrator considering the materials on record has made a clear observation that a prima facie case has been made out of the appellant acting completely in breach of the agreement, as there was an obligation on the part of the appellant to indemnify and/or secure the respondent for the losses which have caused on account of the theft in question in terms of Clause 11(a) of the Agreement. It needs to be noted that the incident of theft/loss was not an isolated incident, as earlier on 19 April, 2019 there was a theft, however, the same, as pointed out by Mr. Mitra, learned counsel for the respondent, is not the subject matter of the proceedings before the arbitral tribunal. The case of the appellant is mainly to attack the findings in paragraph 52 of the impugned order. It will be appropriate to extract paragraph 52 of the impugned order, which reads thus:

52) There is one more aspect which is required to be considered for the purpose of deciding whether prayer in terms of prayer Clause (d) of this Application has to be granted. The Respondent has along with Affidavit in Reply filed a letter dated 24.04.2019 addressed by one partnership firm by name Anusri Cashews' to the Respondent. In the said letter it is specifically mentioned by the author of the letter who was the managing partner of said

> Anusri Cashews that 22,250 bags of Nuts were lifted by them from the aforesaid godown. It also mentions that the aforesaid stocks were pledged to IndusInd Bank (Petitioner), Rajahmundry Branch, A.P. and Origo Commodities (India) Pvt. Ltd. (Respondent) was managing them as collateral manager appointed by the bank. It also mentions that these stocks were lifted by the said firm without any intimation to the IndusInd Bank or Origo. It is the case of the Respondent that the 22,250 bags of Nuts were restored to the Respondent subsequently. The Aforesaid development would prima-facie show that the Respondent has been negligent in discharging its duties. The incident of loss of 19,532 bags of Nuts is a second incident and prima facie shows as to how the Respondent is attending its duties as a bailee. Both these instances show that the Respondent has committed breach of the said Agreement on two occasions. This is against the interest of the Respondent and a factor to be considered against the Respondent while deciding this application."

5. Mr. Krishna, learned counsel for the appellant in assailing the above findings would contend that what has been missed by the learned sole arbitrator in making the observation in paragraph 52 is to the fact that in respect of the earlier incident, the same "Anusri Cashews" has addressed a letter dated 24 April, 2019 whereby they have admitted to removing 22250 bags and the removal of such bags was without notice to the appellant. The respondent was compensated by "Anusri Cashews" by issuing cheques as noted in paragraph 5 of the said letter. It is hence his submission that the claim of the respondent was based on a consolidated claim in respect of both the thefts.

6. Insofar as the above contention of Mr. Krishna is concerned, in my opinion, the same would be required to be stated to be rejected. This for the reason that as clearly seen from the Section 17 application and the record of the proceedings, it is quite clear that the claim of the respondent was only in respect of the second theft which had occurred

in May, 2020 and admittedly in respect of which on 20 May, 2020, the appellant itself had filed a First Information Report with the concerned police station. The said incident, as culled out from the pleadings of the parties was relevant to the incidence of losses in respect of 19532 bags of nuts. This is clear from the application of the respondent under section 17 as set out in paragraph 20 wherein the respondent had specifically pleaded that the stock of bags relevant to the proceedings was 19532 bags . Paragraph 20 of the said application reads thus:

> "20. The Petitioner submits that the Petitioner placed an order with the Respondent for release of stocks to the tune of 50 MT from godown located at Lalitha Godowns, Mukkinada Village, Rajanagaram, Mandal, East Godavari District via emails dated 20th September 2019. The Petitioner submits that the Respondent thereafter released 51.550(MT)&1183 bags from Lalitha godown and delivered the same. The Petitioner submits that thereafter the Respondent further released 1535 bags in favour of the Petitioner on 15th October 2019. The Petitioner submits that the Respondent had released a total of 2718 bags out of balance bags being 22,250 bags in favour of the Petitioner and as per the email dated 25th October 2019 at 2:05 p.m. the Respondent confirmed the number of balance bags in stock with them was 19,973. The petitioner submits that after releasing 2718 bags the balance should have been a total of 19,532 bags but the Respondent confirmed that there are 19,973 balance bags in stock with them. The Petitioner submits that surprisingly there was increase in number of bags by 441, which means there was clear embezzlement of the bags from the Respondent's end and that the Respondent have wilfully replaced commodities without consent and or information to the Petitioner. Hereto marked and annexed as EXHIBIT – H are the emails dated 20th September and 15th October 2019 and marked and annexed as EXHIBIT I 25th October 2019 exchanged between the Respondent and the Petitioner. The Petitioner submits that the commodities as per the pledge agreement and the SR/WR value to the extent of Rs. 14,40,00,000/ hereto marked and annexed as EXHIBIT -I is the copy of the SR/WR."

Thus, the claim of the respondent was clearly only in regard to the second theft and which is in respect of 19532 bags.

7. The next contention of Mr. Krishna is that the Section 17 application ought to have been held to be not maintainable, as the respondent had already initiated criminal proceedings against the appellant and hence there was no reason to seek interim measures by an application filed under section 17 of the Act before the arbitral tribunal. Such contention is also required to be rejected inasmuch as it cannot be said that in the teeth of the contract as entered between the parties and as noted above, the respondents did not have any remedy in law to pursue their civil rights under the contract in question and seek interim measures so as to safeguard and secure the arbitral interest and subject matter of the arbitration, namely, the losses incurred by the respondent. In any event, the criminal proceedings would result in criminal consequences, as the ultimate result would be imposition of a punishment in the event the offence as alleged against the appellant are proved. Insofar as the arbitral proceedings are concerned, the arbitral tribunal would adjudicate civil dispute between the parties in which the respondent is asserting its contractual rights. Thus, the contention of Mr. Krishna that the criminal proceedings would in any manner preclude the respondent from pursuing the arbitral proceedings is wholly without merit.

8. The next contention of Mr. Krishna is in regard to the obligation of insurance company under the contract in question. In this regard, it is

Mr. Krishna's contention that there is an agreement between the parties on insurance, and for such reason, Section 17 application ought not to be maintainable, as it is the insurance company which would indemnify the losses which were caused to the respondent and subject matter of the present proceedings. Mr. Mitra, learned counsel for the respondent has pointed out from the record that on the respondent's own showing, if at all a insurance cover was to be obtained by the appellant, it was of an amount of Rs. 8 crores (policy Page 187) and as clearly seen from the appellant's own email dated 13 June, 2019 addressed to the respondent, the stock at the relevant time in June 2019 was 24000 bags of the value of Rs.41,40,00,000/- (Rs.41.40 crores) and the details of losses qua the 19,532 bags was of a value of Rs. 11,71,00,000/-. Thus, the appellant's contention in this regard needs to fail.

9. Mr. Krishna has referred to the details of the insurance policy as taken out by the appellant with New India Assurance Company Ltd., which are annexed at Annexure "W" at page 194 which sets out that the policy has been taken out by the insurer for a period from 11 July 2019 to 10 July 2020. It is his contention that the policy covers risk in regard to its employee's dishonesty and theft coverage of an amount of Rs.8 crores. He also submits that the claim was lodged by the appellant with the New India Assurance Company Limited on 27 May 2020 as also there was a survey report. As there were some queries, a surveyor was

appointed to investigate the claim which, according to him can be seen from e-mail dated 22 June 2020 sent to the Surveyor. It is also seen that as the premises were locked, an FIR was lodged by the appellant. It appears that the claim could not be processed further. Mr. Krishna would not dispute that till date no compensation has been received by the appellant from the Insurance Company much less offered to the respondent. Mr. Krishna has also drawn Court's attention to the fact that the respondent also has taken out an insurance cover in respect of storage of the material, namely, that of collateral security which can be seen from the receipt annexed at page 101 of the Section 17 application. He submits that it is the appellant's case that it was incumbent on the respondent to point out whether any amount was received. Mr. Krishna, however, fairly conceded that no such case was put up before the arbitral tribunal and hence, the arbitral tribunal has not looked into such issue.

10. The next contention of Mr. Krishna in assailing the impugned order is that the learned arbitrator ought not to have passed such order, as the appellant was in a sound financial condition to suggest that it was futile for the arbitral tribunal to pass impugned order. Such contention of Mr. Krishna cannot be accepted as it is clearly seen from the record and more particularly from the appellant's balance sheet which was on record, on the basis of which the arbitral tribunal has observed that the

appellant was not in a sound financial condition, although it was asserted otherwise. The learned sole arbitrator considering the documents on record has clearly recorded a finding, which Mr. Krishna is not in a position to assail it to be perverse, that the current assets of the appellant barring the inventories are Rs.14618.98 and the current liabilities were to the tune of Rs.21948.98 lakhs and the value of the property, plant and equipments is to the tune of 1394.32 lakhs. It is thus observed by the learned sole arbitrator that the financial position of the appellant is certainly not sound as claimed by it. Such observation can be seen in paragraph nos. 54 and 55 of the impugned order, which reads thus:

> "54) The Respondent in the course of filing Affidavit in Reply placed before the Tribunal the balance-sheet of the Respondent. At the time of arguments, Ld. Counsel for the Respondent filed standalone balance-sheet of the Respondent for the period ended 31 st March 2021. He Submitted that the consolidated balance-sheet filed at the Time of filing Affidavit in Reply need not be considered. As against this, Ld. Counsel for the Petitioner had Submitted that it would be necessary to refer to the Balance-sheet filed by the Respondent at the time of filing Affidavit in Reply and the financial affair of the Respondent cannot be considered solely by relying upon the standalone balance-sheet of the Respondent. I have considered the figures mentioned in the rejoinder filed by The Petitioner. These figures are referred to in the earlier Part of this order. I have considered the figures mentioned In the standalone balance-sheet of the Respondent. The current assets of the Respondent barring inventories is Rs.14,618.99 Lakhs. The current liabilities are to the tune of Rs.21,948.98 Lakhs and the value of the property, plant and equipment is to the tune of Rs.1,394.32 Lakhs.
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> 55) I have considered the consolidated balance-sheet of the Respondent as well as the standalone balance-sheet of the Respondent Considering the said balance sheets in the light of the submission advanced by the Petitioner, it is Found that the financial affairs of the Respondent are not sound. The argument advanced by Ld. Counsel of the Respondent that standalone balance-sheet of the Respondent alone should be considered cannot be accepted. In my view both the balance sheets have to be considered. Even if only the standalone balance-sheet of The Respondent as of 31.03.2021 is considered the Financial affairs of the Respondent are not sound. The Current

liabilities of the Respondent in the standalone Balance-sheet are Rs.21,948.98 Lakhs whereas the current Assets barring the inventories are Rs.14,618.99 Lakhs. The Standalone balance-sheet of the Respondent shows that the Financial affairs of the company are not sound. It may be mentioned that these observations are being made keeping in view the prima-facie case made out by the Petitioner that it has suffered a loss to the extent of Rs.11,71,00,000/-."

11. In fact a clear case in this regard was made out by the respondent in paragraph 5(b) of its rejoinder affidavit to the Section 17 application, which reads thus:

"5(b) The Respondents have admitted that the apprehension of the Applicant/claimant in this Application is justified as the Respondents Audit Report produced by them shows that they are a regular loss making company, which will defeat any final order passed by this Hon'ble Tribunal I further say that the Respondent have annexed a Consolidated Audit Report issued by their Auditors along with audited accounts for the financial year ended on 31st March 2021 annexed at Exhibit A-11 of the Affidavit of Reply. I say that after perusing the Consolidated Profit and Loss account statement at *page* 224 of the Affidavit of Reply, it can be seen that the Respondent is a loss-making company and can be seen from the document annexed by themselves reveals that the Respondent has incurred a loss of Rs. 2,32,40,000/- (Two Crores Thirty-Two Lakhs Forty Thousand) for the financial year ended on 31st March 2021 after applying tax on the operational profit. I further say that the after perusing the consolidatd Balance Sheet at Page 223 of the Affidavit of Reply, it is evident on the face of it that the current liquid asset baring the inventory of the Respondent is only of Rs. 1,96,78,33,000/- (One Hundred Ninety-Six Crores, Seventy-Eight Lakhs and Thirty-Three Thousand) against that the current liability incurred by the Respondent is Rs.2,78,11,60,000/- (Two Hundred Seventy-Eight Crores Eleven Lakhs Sixty Thousand). I say that on above that they have borrowed funds from banks and financial institutes and others to tune of Rs. 64,97,02,000/- (Sixty-Four Crores, ninety-Seven Lakhs, Two Thousand). the I say that the consolidated Audit Report issued by their Auditors along with audited accounts for the financial year ended on 31st march 2021 annexed at Exhibit A-11 of the Affidavit of Reply speaks for itself that the Respondent are not sound enough to even offset their current liability as stated in the consolidated balance sheet. I further say that as per the point 15(b)(a) at page no. 254 of the Affidavit of Reply it reports that the current assets of the Respondent are also offered as a security towards the non-current borrowings (Loans) received from banks and other financial institutions. I say that the concern and apprehension of the Claimant that the Respondent may destroy entire balance stock is justified as the Respondent tried to mislead and misguide the Hon'ble Court and now the Hon'ble Tribunal by lying on oath that the Respondent is a sound company, whereas the Respondent have **ADMITTED** by annexing the said Audit report and audited accounts issued by their Auditors along with audited accounts for the financial year ended on 31st March 2021, which is prima facie apparent that the Respondent is a loss

> making company. I further say that the Respondent have deliberately chosen to *suppress* the provisional account statement for the financial year ended on 31st March 2022. Hence the concern and the apprehension of the Claimant is justified as the Respondent is simply trying to mislead the Hon'ble Tribunal by saying tha they are financially sound, whereby trying to defeat the Claim of the claimant and walk away by washing off their hands and not pay a single penny to the Claimant which they are liable to pay to the Claimant. I say that the loss herein would be of Public Money if the afore-said application under section 17 of the Arbitration and Conciliation act is not made absolute."

12. The learned sole arbitrator has thus opined the respondent's case on the financial condition of the appellant to be correct as ascertained from the documents on record, that also from the audit report produced by the appellant, it was clear that the appellant was a regular loss making company. It is rightly observed that in such situation the appellant is likely to defeat any final order which may be passed by the arbitral tribunal in the respondent's favour. Thus, considering such observations which can be found to be completely based on the documents as placed on record, in my opinion, the submission of Mr. Krishna that the arbitral tribunal ought not to have passed such order cannot be accepted and needs to be rejected.

13. In the circumstances, in my opinion, as there was a clear case of a loss of 19532 bags of cashew nuts which was the collateral security of the respondent bank which was to be maintained by the appellant under the contract in question. Prima facie, on account of the breach of the contractual obligations on the part of the appellant in not maintaining such security, and the same having vanished, which is not disputed by

the appellant, the arbitral tribunal cannot be said to be not correct in coming to the conclusion that this is a case where interim measures in the nature as granted by the arbitral tribunal were necessary to protect the arbitral interest of the respondent. It is well settled that it would be the jurisdiction of the arbitral tribunal to grant such relief when the facts and circumstances of the case so warrant. The law in this regard being well settled (see: **Nimbus Communications Ltd. vs. Board of Control for Cricket in India & Anr., 2012 SCC Online Bom. 287 and Bakes Hughes Singapore PTE cs. Shiv-vani Oil and Gas Exploration Services Ltd., 2014 SCC Online Bom 1663 and a decision of the Delhi High Court in UPPAL Eng. Co. (P) Ltd. vs. Cimmaco Birla Ltd. in OMP No. 382 of 2003 and IA No. 9853/2003 dated 08.07.2005**).

14. Mr. Krishna's contention that the arbitral tribunal ought not to have proceeded to grant interim protection, cannot be sustained inasmuch as the position before the arbitral tribunal was clear that neither any cover under the insurance policy was received by the appellant nor it was the case of the appellant that the respondent had received any amounts thereunder, hence, in my opinion, the respondent was justified in making a grievance of loss of Rs.11,71,00,000/- due to the theft of material in custody of the appellant, which was the collateral security as furnished by the borrower having being lost to the respondent being an apparent breach of the contract by the appellant.

15. In the light of the above discussion, I find no perversity whatsoever to interfere in the impugned order passed by the arbitral tribunal applying the well settled principles of law as discussed by the Division Bench of this Court in **World Crest Advisors LLP vs. Catalyst Trusteeship Ltd. & Ors.**[1] **dated 23 June, 2022** referring to the decisions of the Supreme Court in **Wander Limited & Anr. vs. Antox India Pvt. Ltd.**[2]**, Mohd. Mehtab Khan vs. Khushnuma Ibrahim Khan**[3]**, Monsanto Technology LLC vs. Nuziveedu Seeds Ltd.**[4] and **Shyam Sel & Power Ltd. & Anr. vs. Shyam Steel Industries Ltd.**[5], the principles which can be culled out are that the Court would not interfere in an order granting interim measures when the impugned order is a plausible view, which is not arbitrary, capricious or in the legal understanding of the term 'perverse'. Also the Court cannot substitute an alternative view to one taken by the arbitral tribunal by reappreciating the materials on record. Further when it is clear that the three essential elements in passing of an interim order, namely, of a prima facie case, balance of convenience and a case of a serious prejudice if the relief is denied, are made out by the party seeking an interim relief, then the Court would not interfere in the interim orders as passed on the proceedings. It is also held that it is not enough for a party assailing an interim order to merely demonstrate that

1 Commercial Appeal (L) No, 19252 of 2022 along with Interim Application dated 23.06.2022
2 1990 (Supp) SCC 727
3 (2013) 9 SCC 221
4 (2019) 3SCC 381
5 2022 SCC Online SC 313

a different view is possible but to show that the relief the party seeks is the only possible view and the impugned order is not even remotely plausible. Applying these principles, with certitude, it can be observed that no case whatsoever is made out by the appellant warranting interference in the impugned order passed by the arbitral tribunal. Thus, there is no merit in the appeal, It is accordingly rejected. No costs.

16. The appellants are directed to comply with the order of the arbitral tribunal within two weeks from the date copy of this order is made available to the parties, as the time to comply has already lapsed. There shall not be any further extension.

[G.S. KULKARNI, J.]