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

% *Date of Decision: 24.08.2022*

+ **FAO (COMM) 87/2021 & CM APPL. 13955/2021**

UNION OF INDIA & ANR.

..... Appellants

Through: Mr. Kirtiman Singh, CGSC with
Ms. Manmeet Kaur Sareen, Mr.
Madhav Bajaj & Ms. Kunjala
Bhardwaj, Advs.

versus

M/S AJANTA RAAJ PROTEINS LIMITED Respondent

Through: Ms. Shobhana Takiar, Adv.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J. (ORAL)

1. The appellants have filed the present appeal under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (hereafter '**the A&C Act**') impugning a judgment dated 27.10.2020 (hereafter '**the impugned judgment**') passed by the learned Commercial Court, whereby the appellant's application under Section 34 of the A&C Act, seeking to set aside an arbitral award dated 20.08.2019 (hereafter '**the impugned award**'), was rejected.

Factual Context

2. Appellant no. 2 (hereafter '**DMS**') and the respondent (hereafter '**Ajanta**') entered into an agreement dated 18.01.2012 (hereafter '**the**



Agreement') for the supply of milk. In terms of the Agreement, Ajanta agreed to supply to DMS pure, unadulterated, raw chilled/pasteurised milk, and milk conforming to the specifications and conditions, as contained in the Agreement. The contracted quantity of milk was 25,000 kgs. of milk per day for the period 18.01.2012 till 31.12.2012. Ajanta had also deposited a sum of ₹14,25,000 as a security deposit, in favour of DMS. The said security was refundable on completion of the Agreement.

3. The milk was supplied regularly till the month of April, 2012. However, on 11.04.2012, DMS rejected the supply of milk made by Ajanta on the ground that the same was of inferior/poor quality.

Aggrieved by the same, Ajanta, by way of a representation dated 16.04.2012, *inter alia*, stated that it procures good quality VLC milk and there were no quality problems with the supply of milk from other dairies. It, *inter alia*, claimed that the milk from the tankers that was rejected on the ground of presence of detergent was tested in its laboratory and "*found o.k.*". Ajanta further proposed that the supply of milk be stopped with immediate effect till the period DMS was in actual need of milk.

4. DMS responded to the said letter by a communication dated 18.04.2012. DMS claimed that the quality of milk supplied by Ajanta was of poor quality. The said letter indicates that DMS also forwarded a copy of the report of the Manager (Quality Control), which stated that the "*Quality of milk sent by Ajanta Raaj did not meet laid down DMS Specifications as per the agreement. Milk found unfit for human*



consumption. DMS follows standards analytical procedures and does not rely on the data /statements/observations/experiences of other receiving dairies.”

5. On 20.04.2012, DMS sent a letter stating that “*We are regularly monitoring the performance of our milk suppliers and if we feel that we are being put to inconvenience without any genuine reason, we may blacklist such firms, so that they may not be able to supply milk to Delhi Milk Scheme in future*”

6. Thereafter, on 08.05.2012, DMS sent a letter referring to Ajanta’s letter dated 16.04.2012 and cancelled the Agreement.

7. In view of the disputes between the parties, on 28.05.2013, Ajanta invoked arbitration in terms of Clause 18 of the Agreement and requested the Secretary, Ministry of Agriculture, Department of Animal Husbandry and Fisheries to appoint a Sole Arbitrator within a period of thirty days of the receipt of notice. DMS, by a communication dated 24.06.2013, rejected/refuted the claims preferred by Ajanta.

8. Thereafter, Ajanta, by way of a petition under Section 11 of the A&C Act (being Arb. P. 498/2013), approached this Court to appoint a Sole Arbitrator. This Court, by an order dated 19.02.2014 appointed the learned Sole Arbitrator (the Arbitral Tribunal).

Arbitration

9. Before the Arbitral Tribunal, Ajanta raised the following claims:



Claim no. 1	Collateral Security (refundable) deposited with DMS	₹14,25,000
Claim no. 2	Interest on the said amount	₹5,55,750/-
Claim no. 3	Cash advance paid to milk vendors	₹20,00,000
Claim no. 4	Cost of milk	₹1,97,902
Claim no. 5	Expenses incurred on transportation for carriage of milk through tankers to and fro	₹1,54,000
Claim no. 6	Damages on account of loss suffered due to breach of contract, loss of business, reputation and goodwill, hardship and mental agony and other incidental pecuniary loss.	₹5,00,000
Claim no. 7	Cost of Litigation	₹1,00,000
Claim no. 8	Any other or further claim with respect to the said contract	
TOTAL		₹49,32,652/-

10. Ajanta contended that cancellation of the Agreement by DMS was illegal and unjustified and the rejection of milk tankers had caused a heavy financial loss. Ajanta further contended that the Agreement



was cancelled in an arbitrary and unjustified manner, without assigning any valid reason and further, no notice or intimation for cancellation was served upon Ajanta.

11. DMS also filed counter claims aggregating Rs 65.53 lakhs. However, the counter claims preferred by DMS were not considered by the Arbitral Tribunal on account non-payment of fee.

12. DMS contended that Ajanta had deliberately supplied milk of inferior quality, which had tested positive for detergent, pH level was high as 6.94, and maltose, sugar and ammonium were present. Thus, the milk had abnormal taste and bad odour and was unfit for human consumption. DMS further contended that Clauses 4(b), 6.2, 6.3, 5.6 and 5.7, disentitled Ajanta from claiming refund of security deposit with interest as the said clauses entitled DMS to forfeit the entire security deposit of ₹14,25,000/-.

13. The Arbitral Tribunal considered the rival contentions. It referred to Clause 5 of the Agreement and held that the milk supplied by Ajanta was not tested in the manner as envisaged in the Agreement and thus, it rejected the report of the Manager (Quality Control) relied upon by DMS. The Arbitral Tribunal further held that DMS could have penalised Ajanta in terms of Clause 7 of the Agreement due to non-supply of the milk, however, it could not forfeit the security amount of ₹14,25,000/-. The Arbitral Tribunal rejected claim nos. 3, 4, 5 and 6 on the ground that Ajanta had failed to prove or produce any documents to prove the same.



14. By the impugned award, the Arbitral Tribunal awarded a sum of ₹14,25,000/-, in favour of Ajanta along with interest at the rate of 10% on the aforesaid amount from 08.05.2012 till 28.03.2014 (the date of filing of the claim).

Section 34 of the A&C Act

15. The appellant challenged the impugned award by filing an application under Section 34 of the A&C Act [being OMP (COMM) No. 51/2019 captioned *Union of India and Anr. v M/s Ajanta Raaj Proteins Ltd. and Anr.*]. The appellant assailed the impugned award on the ground that the Arbitral Tribunal had failed to consider that DMS had cancelled the Agreement on the ground that Ajanta had supplied inferior/poor quality milk and forfeited the security amount as the agreed quantity of supply of milk, that is, 25,000 kgs was not supplied by Ajanta. DMS also contended that the Arbitral Tribunal had erroneously granted interest on the security amount as there was no provision in the Agreement stipulating the same.

16. The learned Commercial Court examined the contentions advanced on behalf of DMS and found the same to be unmerited. The learned Commercial Court found that the Arbitral Tribunal had rightly observed that the report of the Manager (Quality Control) of DMS could not be relied on as the milk was not tested in the manner as prescribed under the provisions of the Agreement.

17. The learned Commercial Court further rejected the contention advanced on behalf of the appellant that there was short supply in milk



as DMS did not issue any notice or raise any allegation in this regard in any of its communications. The learned Commercial Court further held that since DMS had failed to prove any cause of action on the ground of non-supply of milk, it could not forfeit the security amount. The learned Commercial Court further found that DMS had not raised any contention that the rate of interest granted by the Arbitral Tribunal was unreasonable or on the higher side. Further, in view of the commercial nature of the transaction, interest at the rate of 10% per annum could not be held to be unjustified.

18. The learned Commercial Court also found that the decision of the Arbitral Tribunal to reject the counter claims preferred by DMS, in terms of the order dated 26.02.2018, was not challenged by DMS and since no objections were filed, DMS had accepted the said order.

19. Aggrieved by the impugned judgment, DMS has filed the present appeal.

Submissions

20. Ms. Manmeet Kaur, learned counsel appearing for the appellants, assailed the impugned judgment and the impugned award, on three fronts. First, she contended that the Arbitral Tribunal had no jurisdiction to adjudicate the disputes regarding forfeiture of the security deposit as, in terms of internal Clause 4(b) of the Agreement, the parties had agreed that the decision of the General Manager, DMS would be binding. She stated that in terms of the Arbitration Clause (Clause 18 of the Agreement), all matters, other than those in respect of



which the parties had agreed that the decision of the General Manager, DMS would be final and binding, could be referred to arbitration. She stated that forfeiture of the security deposit was therefore, an ‘excepted matter’ and beyond the jurisdiction of the Arbitral Tribunal.

21. Second, she submitted that the Arbitral Tribunal had erred in finding that the procedures for testing under Clauses 5.6 and 5.7 of the Agreement were not followed. She stated that since Ajanta had not disputed the results of DMS’s Quality Control Laboratory, it was not necessary to preserve the samples for a period of twenty-four hours.

22. Lastly, she contended that the Arbitral Tribunal had grossly erred in holding that Ajanta could be penalised under Clause 7 of the Agreement but forfeiture of the security deposit was not permissible. She contended that the penalty could be levied in case of short supply of milk but the present case was not a case of short supply of milk but of failure to make any supplies.

Reasons and Conclusion

23. The first and foremost question to be considered is whether any interference with the impugned judgment or impugned award is warranted on the ground of lack of jurisdiction.

24. Concededly, DMS had not raised any objection regarding the jurisdiction of the Arbitral Tribunal during the arbitral proceedings or prior thereto. As noticed above, Ajanta had filed a petition under Section 11 of the A&C Act [ARB. P. 498/2013]. In the said



proceedings, DMS did not raise any objection to the effect that any of the claims raised by Ajanta fell within the scope of excepted matters. DMS also did not raise any such ground in the arbitral proceedings. It neither filed any application under Section 16 of the A&C Act nor raised any such plea in its Statement of Defence. On the contrary, DMS sought to raise a counter-claim – which was not pursued – for the loss suffered on account of non-supply of the agreed quantity of milk. DMS challenged the impugned award under Section 34 of the A&C Act. However, even in those proceedings, DMS did not press any challenge to the impugned award on the ground of lack of jurisdiction.

25. It fairly stated that although a ground regarding jurisdiction of the Arbitral Tribunal was mentioned in the application, however, the same was not pressed. Axiomatically, the learned Commercial Court did not consider any such challenge, obviously for the apparent reason that no such ground was urged.

26. It is apparent from the above that the appellants had waived their objection, if any, to the jurisdiction of the Arbitral Tribunal to decide Ajanta's claim for refund of the security deposit. As noticed above, DMS had also preferred a counter-claim for the loss suffered by it.

27. In terms of Clause 4(b) of the Agreement, the General Manager, DMS could, without prejudice to any action, terminate the Agreement and forfeit the security deposit, if there was a failure to supply the milk for three consecutive days without any valid or acceptable reason. A plain reading of Clause 4(b) of the Agreement indicates that the decision



of the General Manager, DMS to forfeit the security deposit or to terminate the Agreement may be considered as final and binding. However, it may be open for Ajanta to contend that the decision of the General Manager regarding the question whether there was a failure to supply milk for three consecutive days without reason, DMS was not final and binding.

28. The question whether the claim made by Ajanta fell within the scope of excepted matters may have been a contentious issue, which is required to be examined by the Arbitral Tribunal in the first instance. It would not be apposite for this Court to speculate as to the counter assertions that may have been raised by Ajanta to contest any assertion that its claims were beyond the jurisdiction of the Arbitral Tribunal. Suffice it to state that no such ground was taken and therefore, DMS is now precluded from raising the same.

29. In terms of Section 34(2)(b)(i) of the A&C Act, an arbitral award would be liable to be set aside if a court finds that the subject matter of dispute is not capable of settlement by arbitration under the law for the time being in force. In ***MSP Infrastructure Ltd. v. M.P. Road Development Corporation Ltd.***: (2015) 13 SCC 713, the Supreme Court had, *inter alia*, observed as under:

“The scheme of the Act is thus clear. All objections to jurisdiction of whatever nature must be taken at the stage of the submission of the statement of defence, and must be dealt with under Section 16 of the Arbitration Act, 1996. However, if one of the parties seeks to contend



that the subject matter of the dispute is such as cannot be dealt with by arbitration, it may be dealt under Section 34 by the Court.”

30. However, it appears that the said observations, which are part of paragraph 16 of the decision, were overruled by the Supreme Court in ***Lion Engineering Consultants v. State of Madhya Pradesh & Ors.:*** (2018) 16 SCC 758. The Supreme Court, in the said decision, observed that “*both the stages are independent*”. The reference to the two stages being, stage under Section 16 of the A&C Act and Section 34 of the A&C Act. Thus, it may have been open for DMS to urge the ground regarding lack of jurisdiction even at the stage of Section 34 of the A&C Act. But concededly, no such ground was urged.

31. In view of the above, this Court is unable to accept that the impugned award can be faulted on this ground.

32. Insofar as DMS’s challenge to the finding of the Arbitral Tribunal to the effect that DMS had not followed the testing procedure as specified in Clauses 5.6 and 5.7 of the Agreement is concerned, the said finding is a finding of fact. It is trite law that an arbitrator is the final adjudicator of questions of fact. Unless it is established that such findings are patently erroneous that goes to the root of the dispute, it would be impermissible to interfere with the arbitral award.

33. Clause 5.6 of the Agreement provides that DMS would arrange to analyse and test the milk supplied at the Quality Control Laboratory for acceptance. In the event of any variation in the testing done by DMS and Ajanta, then the sample would be preserved for twenty-four hours



for the same to be tested in the presence of the representatives of the concerned parties. In case of further dispute, a third party, as mutually agreed, would be appointed to test the sample.

34. Ajanta's letter dated 16.04.2012 indicates that Ajanta had not accepted that there was any problem of quality in the milk supplied by them. It was expressly stated in the said letter that Ajanta had tested the milk from the tankers that were rejected by DMS and had found the same to be okay. DMS contested the said claim and forwarded the report of the Manager (Quality Control) along with letter dated 18.04.2012, which was more than two days after DMS had rejected the tankers. The Arbitral Tribunal observed that DMS had not preserved the milk sample for twenty-four hours or had called upon Ajanta's representative to get the same tested in the presence of its representative. The said findings of the Arbitral Tribunal are not amenable to challenge. It is not permissible for this Court to reappreciate the evidence and re-adjudicate the disputes.

35. The learned Commercial Court had also examined the contentions advanced on behalf of DMS and observed as under:

“30. Record would reveal that report dt. 18.4.2012 pertains to rejection of tankers of milk in April 2012. Manager (Q.C). This document depicts test reports dated 11.4.2012; 12.4.2012 and 14.4.2012. As per this report, quality of milk sent by the claimant did not meet the specifications laid down by DMS as per agreement and milk was found unfit for human consumption. But record does not reveal if DMS ever apprised the Claimant-supplier of milk in time of the



reports dated 11.4.2012; 12.4.2012 and 14.4.2012 and that the milk was being preserved for 24 hours for test in presence of the representative of the claimant, as prescribed in clause 5.6 of the agreement. In this situation, the claimant had no opportunity for test of the milk in presence of its representative or for raising any objection thereto within the stipulated period. Furthermore, the claimant could not get opportunity to get the same tested from third agency.

31. Undisputedly, the sample was not got tested from third agency. In this situation, Learned Arbitrator rightly observed that report of Manager (Quality Control) of the Objector could not be relied on, the reason being that the milk was not tested in the manner prescribed in clauses 5.6 and 5.7 of the agreement.”

36. As noted above, review of the factual finding of the Arbitral Tribunal is neither permissible nor warranted. This Court is unable to accept that the impugned award is vitiated on the ground of patent illegality on the face of the record. The Court also finds no ground to fault the impugned judgment.

37. The observation made by the Arbitral Tribunal that DMS could impose a penalty, in the event of short supply, was founded on interpretation of the relevant clauses of the Agreement as well as various communications between the parties. According to DMS, it was entitled to forfeit the security deposit on account of non-supply of milk. Admittedly, Ajanta had sent certain tankers for supply of milk on 11.04.2012, 12.04.2012, and 14.04.2012. The said tankers were not accepted by DMS, as is apparent from Ajanta's letter dated 16.04.2012. Ajanta had also requested, by its letter dated 16.04.2012, that it be



permitted to stop the supply of milk till “DMS is in actual need of milk”. DMS’s letter dated 08.05.2012 cancelling the Agreement indicates that it was in reference to Ajanta’s letter dated 16.04.2012. The contents of the said letter are relevant and reproduced below:

“Dated the 8th May 2012

To

M/a Ajanta Raj Proteins Limited.
Agra Bah Road
Manikpura Distt. Agra. U.P.

Subject: Cancellation of Agreement for milk supply.

Sir,

This has reference to your letter No. Nil dated 16th April 2012 regarding milk supply to DMS. The General Manager is pleased to cancel your agreement for milk supply w.e.f. 08.05.2012.

Thanking you,

Yours Faithfully,
Sd/-

(Bimla Bhandari)
AAO(GM Office)”

38. According to DMS, prior to the said letter, it had sent a letter dated 03.05.2012 pointing out that there was a short supply of milk in the month of April, 2012 and supply of milk was stopped after 15.04.2012. It is apparent that there was a dispute whether Ajanta had stopped the supply of milk or was otherwise prevented from doing so. According to Ajanta, it had made payments to milk suppliers and had



suffered damages on account of abrupt cancellation of the Agreement. It is in the context of the said disputes that the Arbitral Tribunal had observed that even if there was any loss suffered for non-supply of milk, Ajanta could be penalized in terms of Clause 7 of the Agreement. Admittedly, no such penalty was levied and DMS had also not pursued its claim for loss on account of short supply or non-supply of milk. In view of the above, the Arbitral Tribunal found that DMS could not forfeit the security deposit furnished by Ajanta and the said amount had been wrongly withheld by DMS. The observations made by the Arbitral Tribunal cannot be read in isolation and must be considered in the context of the entire dispute.

39. Accordingly, this Court finds no merit in the present appeal and the same is, accordingly, dismissed. The pending application(s) is/are also dismissed.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

AUGUST 24, 2022

‘gsr’