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Arb.O.P (Com.Div.) No.572 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.06.2023

CORAM

THE HON'BLE Mr. JUSTICE KRISHNAN RAMASAMY

Arb.O.P (Com.Div.) No.572 of 2022

Samwon Textile Co Ltd.,
#4022 227, Bangbae-ro,
Seocho-gu, Seoul,
Republic of Korea.

... Petitioner

Vs.

Toram Exports Private Limited,
S.F.No.5, No.1(2), Asher Nagar 1st Street,
Alamelu Industrial Complex,
Tirupur 641 603.

... Respondent

Arbitration Original Petition filed under Sections 47 to 49 of the
Arbitration and Conciliation Act, 1996 to:

(a) declare that the award dated 29.01.2021 be deemed
to be a decree of this Hon'ble Court;

(b) pronounce judgement according to the award dated
29.01.2021 and direct the respondent to pay to the petitioner a
sum of USD 53,662 along with interest on the sum of USD
49,461.9 (calculated @ 6% p.a. starting from 22.11.2019) for



each day, the final number of days being terminated at the time of payment by the respondent;

(c) order and direct the respondent to pay the petitioner the costs of this petition;

For Petitioner : Ms.Anita Suresh
For Respondents : Ms.Ananda Gomathy

ORDER

This Arbitration Original Petition has been filed under Sections 47, 48 and 49 of the Arbitration and Conciliation Act, 1996 (hereinafter called as “A and C Act”) to enforce the foreign award with the following prayers:

(a) declare that the award dated 29.01.2021 be deemed to be a decree of this Hon'ble Court;

(b) pronounce judgement according to the award dated 29.01.2021 and direct the respondent to pay to the petitioner a sum of USD 53,662 along with interest on the sum of USD 49,461.9 (calculated @ 6% p.a. starting from 22.11.2019) for each day, the final number of days being terminated at the time of payment by the respondent;

(c) order and direct the respondent to pay the petitioner the costs of this petition;



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2. The learned counsel appearing for the petitioner would submit that in the present case, the arbitration was conducted in terms Korean Commercial Arbitration Board (KCAB) International Arbitration Rules. As per the terms and conditions of the contract, all the claims, which cannot be amicably settled between the seller and buyer, shall be settled by way of arbitration in Seoul in accordance with KCAB International Arbitration Rules, whose award shall be final and binding upon the seller and buyer.

3. The learned counsel for the petitioner would submit that on 30.03.2018 and 20.04.2018, the sale contract was executed between the petitioner and the respondent and as per the sale contract, the respondent has to supply the goods. However, since the respondent had failed to supply the goods, the petitioner had incurred loss and hence, the arbitration proceedings were initiated by the petitioner. On 16.08.2019, the claim statement was filed. On 11.11.2019, the arbitration center had intimated the appointment of Arbitrator to both the parties. On 29.11.2021, the award came to be passed and on 08.02.2022, the petitioner had communicated the award to the respondent.



4. Further, she would submit that the learned Arbitrator had conducted the proceedings in accordance with KCAB International Arbitration Rules and the learned Arbitrator had given number of opportunities to the respondent. However, the respondent had only selectively participated in the proceedings. The learned counsel for the petitioner had also referred to the communication, which was sent by the learned Arbitrator to the respondent with regard to the filing of written statement. However, the respondent had failed to file the same.

5. It was also submitted by the learned counsel for the petitioner that on the other hand, the respondent had sent number of documents by virtue of e-mail communication to the Arbitrator and the learned Arbitrator had also communicated the respondent vide e-mail stating that the Arbitrator will not be in a position to consider the documents sent by them, since the written statement was not filed by them. In spite of all the above, the respondent had failed to file the written statement, which would be treated as that the respondent is not interested to contest the matter. Thereafter,



based on the claim made by the petitioner, the Arbitrator had passed an award.

6. Therefore, the learned counsel for the petitioner would contend that there is no illegality in the award and the learned Arbitrator had conducted the proceedings in accordance with the KCAB International Arbitration Rules and also as per the terms agreed by the parties. She had also referred to the judgment of the Hon'ble Supreme Court in ***M/s.Centrotrade Minerals and Metals Inc., vs. Hindustan Copper Limited*** in ***Civil Appeal No.2562 of 2006*** in support of her submission.

7. On the other hand, the learned counsel appearing for the respondent had mainly opposed on the point that in the present case, the proceedings has not been conducted in fair manner and no opportunities had been provided to the respondent to present his case. Further, she would contend that the respondent had filed numerous documents. However, the same had not been dealt with by the learned Arbitrator. She would also contend that the arbitration proceedings were conducted during the COVID



period and it was also categorically informed to the Arbitrator that due to the COVID Pandemic and closure of office of the respondent, they were not in a position to participate in the arbitration proceedings physically. However, the respondent had participated in the proceedings through the video conference hearing after first week of June, 2021.

8. Further she would contend that due to the COVID spread, the business of the respondent has come to stand still, due to which the respondent got affected mentally and financially, which would attract Section 48(i)(a) of the Act, since the respondent had some incapacity to participate in the arbitration proceedings. She had also advanced her arguments that the respondent was unable to present the case due to the reason of COVID situation and due to the mental and financial disabilities. Therefore, she would contend that the award is not sustainable in law and it cannot be enforced. Since, this award is squarely falls in the purview of Section 48(i)(a) and (b) of the Act, the same cannot be enforced. Hence, she prayed for dismissal of this petition.



9. Heard the learned counsel for the petitioner as well as the respondent and also perused the materials available on records.

10. Upon hearing and perusal of documents, the main issues that are raised for consideration are as follows:

- (i) whether the respondent was unable to present his case?
- (ii) whether the respondent is mentally and financially incapacitated to participated in the proceeding?
- (iii) whether the respondent is incapacitated due to COVID situation?

11. Let me analysis the opportunities provided by the learned Arbitrator and what was happened during the COVID period apart from the requisition made by the respondent. The communications between the respondent and the learned Arbitrator as stated in the award is extracted hereunder:

“24. On 12 December 2019, the Tribunal emailed the Parties so as to invite Respondent to respond to the Preliminary Questions by no later than 16 December 2019 and warned that



the Tribunal would proceed with this Arbitration without further waiting for Respondent's response.

25. On 17 February 2020, the Tribunal emailed the Parties the draft Procedural Order No.1 ("POI") which contained a provisional timetable for this Arbitration and invited the Parties to comment on the draft POI by no later than 21 February 2020.

26. On 21 February 2020, Claimant emailed that it did not raise any objection on the draft POI as well as the provisional timetable. Respondent did not make any response.

27. On 25 February 2020, the Tribunal issued POI via email stating, inter alia, as follows:

27.1. Claimant shall file its First Written Submission by 9 March 2020;

27.2. Respondent shall file its First Written Submission by 30 March 2020;

27.3. Claimant shall file its Second Written Submission by 20 April 2020;

27.4. Respondent shall file its Second Written Submission by 11 May 2020;

27.5. Pre-hearing conference for further direction shall be on 15 June 2020; and

27.6. Evidentiary hearing is scheduled for 22 June 2020.

F. Parties' Submissions and Further Proceedings



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28. *On 9 March 2020, Claimant did not file its First Written Submission.*

29. *On 17 March 2020, the Tribunal emailed the Parties to direct Claimant to file its First Written Submission by no later than 20 March 2020.*

30. *On 20 March 2020, Claimant did not file its First Written Submission.*

31. *On 27 March 2020, Claimant emailed the Tribunal to request that the Tribunal grant an extension and re-schedule Claimant's submission for 3 April 2020.*

32. *On 27 March 2020, the Tribunal emailed the Parties to encourage Respondent to submit its comment on Claimant's request for extension by no later than 31 March 2020. Respondent did not make any comment.*

33. *On 1 April 2020, the Tribunal sent the Parties an email noting that Respondent made no comment and stating that:*

33.1. *Claimant is allowed to submit its written submission by 3 April 2020;*

33.2. *Respondent shall file its written submission by 15 May 2020;*

33.3. *No further submission will be allowed; and*

33.4. *The Tribunal will later determine whether the in person evidentiary hearing will*



be held, and if so, when and where the hearing will take place.

34. On 3 April 2020, Claimant did not file its written submission. Claimant informed the Tribunal that it would file its written submission by 6 April 2020.

35. On 6 April 2020, Claimant filed its written submission together with its factual exhibits C-4-1 through C-11-3, and served them for Respondent via email in accordance with Article 4.1(b) of the KCAB International Rules.

36. On 7 April 2020, the Tribunal emailed the Parties noting that Claimant filed its submission on 6 April 2020 and thus failed to make its submission by the original due date, 3 April 2020. In this regard, the Tribunal decided that Respondent shall be given three more days to prepare its written submission and thus shall file its written submission by 21 May 2020.

37. On 21 May 2020, Respondent did not file its written submission.

38. On 22 May 2020, the Tribunal emailed the Parties that (1) Respondent was invited to make its comment whether it had submitted or intended to submit any written submission by no later than 26 May 2020, and (ii) in the event that Respondent failed to make comment, the Tribunal would consider that Respondent had no intention to submit any written submission in this Arbitration.

39. Respondent did not make any comment until 26 May



2020.

40. On 29 May 2020, the Tribunal emailed the Parties that (i) the Tribunal noted that Respondent had not made any comment or response and thus would be considered having no intention to submit any written submission in this Arbitration; (ii) the Tribunal invited the Parties to make comment on the Tribunal's suggestion that the evidentiary hearing be held via video conference without verbatim transcription by no later than 3 June 2020.

41. On 3 June 2020, Claimant emailed the Tribunal that (i) Claimant preferred in person hearing; and (ii) Claimant requested that the evidentiary hearing be re-scheduled for 23, 24 or 29 June 2020.

42. On the same day, Respondent emailed the Tribunal that due to COVID-19 (i) Respondent's office had been closed until early June 2020; (ii) Respondent would not be allowed to travel outside India; and (iii) it was difficult for Respondent to confirm any specific date for in person evidentiary hearing.

43. On 6 June, the Tribunal emailed that (i) the Tribunal suggests that the evidentiary hearing would be held on 23 June 2020 via telephone conference; and (ii) the Parties are invited to comment on the Tribunal's suggestion by no later than 10 June 2020. Neither Party responded to the Tribunal's email.

44. On 12 June 2020, the Tribunal emailed the Parties that the Parties were encouraged to inform the Tribunal which



option they preferred among: (i) a hearing via telephone conference on 23 June 2020; (ii) a hearing via video conference on 23 June 2020; and (iii) an in person hearing on an unfixed date.

45. On 12 June 2020, Claimant emailed that it wished the evidentiary hearing held via telephone conference, while respondent made no response. On the same day, the Tribunal invited respondent to make comment on the Tribunal's suggestion by no later than 17 June 2020.

46. Until 17 June 2020, Respondent did not make any comment.

47. On 19 June 2020, the Tribunal determined that the evidentiary hearing be held on 23 June 2020 via telephone conference and informed the Parties of its decision vis email.

48. On 21 June 2020, the Tribunal set up a telephone conference and advised the Parties the information necessary to access the conference

49. On 23 June 2020, the evidentiary hearing took place via telephone conference and was attended by counsel for Claimant, Mr. Jong-Man Jeon. The interpreter Mr. Tae-Young Kang was also present to assist Claimant in the proceedings. Respondent was not present at the evidentiary hearing.

50. On 24 June 2020, the Tribunal issued the Procedural Order No.2 stating that (1) Claimant is directed to arrange for the transcription of the evidentiary bearing by 8 July 2020; (ii)



Respondent is invited to raise any procedural objection or make any comment on the transcript of the hearing, if any, within two weeks from the date when Claimant circulates the transcript; and (iii) the Parties are encouraged to file their respective Post-Hearing Briefs by 22 July 2020.

51. On 14 July 2020, Claimant requested that (i) the Tribunal grant an extension of due date for its Post-Hearing Brief until 31 July 2020; and (ii) the Tribunal approve Claimant's increase of the claim amount of damages for mental injury from KRW 20,000,000 to KRW 70,000,000.

52. On the same date, the Tribunal granted Claimant's request for an extension. Accordingly, the Tribunal re-scheduled the submission of the transcript for 31 July 2020, and the Post-Hearing Brief, for 14 August 2020. The Tribunal invited Respondent to make comment on Claimant's request for increase of its claim amount by no later than 17 July 2020. Respondent did not make any comment until 17 July 2020.

53. On 20 July 2020, the Tribunal approved that Claimant increases its claim amount

54. On 30 July 2020, Claimant submitted the transcript of the hearing and its Post-Hearing Brief together with factual exhibits C-12-1 through C-14-2. Claimant confirmed that it would not submit any further document. On the other hand, Respondent did not make any comment on the hearing transcript nor did it file its Post Hearing Brief.



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55. *On 7 August 2020, Respondent requested to grant it more time to present its case in this Arbitration.*

56. *On 8 August 2020, the Tribunal granted Respondent a final chance to present its case and asked by when Respondent would be ready to submit a post-hearing brief and to attend an evidentiary hearing.*

57. *On 10 August 2020, Respondent confirmed that it could attend a hearing via teleconference on 13 August 2020 and would provide its written submission.*

58. *On the same date, the Tribunal emailed the Parties that the Parties were encouraged to inform the Tribunal to which date they are available for a supplementary hearing among 25, 26, 28 and 31 August 2020.*

59. *On 12 August 2020, the Tribunal directed that (i) Respondent file its written submission at least 7 days before the supplementary hearing; (ii) Respondent inform the Tribunal by when it can submit its written submission and documentary evidence by 19 August 2020.*

60. *On the same date, Respondent submitted a list of factual exhibits and a link where the Tribunal can download the documentary evidence. In addition, Respondent informed the Tribunal that it would send its written submission by 21 September 2020.*

61. *On 18 August 2020, the Tribunal made it clear that Respondent was expected to file written submissions. On the*



same date, Respondent emailed that it would submit all documentary evidence before 21 September 2020.

62. On 19 September 2020, Respondent emailed that it sent the original copies of the documentary evidence.

63. On 21 September 2020, the Tribunal stated that Respondent was expected to submit written pleadings with documentary evidence.

64. On 23 September 2020, Tribunal emailed that Respondent's documentary evidence may have no legal effect if Respondent failed to submit its written pleadings

65. On 24 September 2020, Tribunal received hard copies of Respondent's documentary evidence Exhibits R-1 through R-68 with no written pleadings. With respect to the Tribunal's request for written pleadings, Respondent confirmed that all the information necessary to the Tribunal was in the documentary evidence.

66. On 25 September 2020, the Tribunal emailed that it understood Respondent's position and Respondent shall bear the risk incurred by Respondent's failure to submit any written pleadings.”

12. In spite of the above communications by the Arbitral Tribunal, the respondent did not made any response but selectively. The communications sent by the respondent would show that number of opportunities had been



provided by the Arbitral Tribunal to the respondent to file their written statement and to participate in the proceedings through video conference. In spite of those opportunities, they had selectively participated in the proceeding as per their conveniences.

13. The main arguments of the learned counsel for the respondent is that they had filed number of documents and the same had not been considered by the learned Arbitrator. However, as stated above, the Arbitrator had sent a communication that in the event of failure in filing the written statement of the respondent, the documents which are filed by the respondent cannot be considered, since it must be supported with the written statement. All those aspects have been communicated and in spite of all those communications, the respondent had not filed the written statement. Thereafter only the Tribunal had passed this award. Therefore, the question of not providing opportunities to the respondent and due to which they were unable to present his case does not arise.



14. Another issue raised by the respondent is with regard to the mental and financial disability. This ground was not at all raised before the Tribunal and it is raised only before this Court. Therefore, this Court cannot considered this aspect at this point of time. That apart, the respondent had not produce any evidence to substantiate the same. As far as the mental disability is concerned, as per the communication sent by the respondent, after the COVID period, the office of the respondent was opened in the first week of June and thereafter, they had sent number of documents, which would show that the respondent is mentally fit to participate in the proceedings. As far as financial disability is concerned, the Tribunal had not called the respondent for the personal hearing and the respondent had willingly participated in the arbitration proceedings through video conference. Therefore, the question of financial incapacity also cannot be raised.

15. Accordingly, all the three issues are answered above.



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16. In view of the above, this Court does not find any substance in the submission made by the learned counsel for the respondent. Further, this Court is also in agreement with the law laid down by the Hon'ble Apex Court in ***Civil Appeal No.2562 of 2006*** (referred supra).

17. Accordingly, this Court is inclined to hold that the award is enforceable in terms of Sections 47, 48 and 49 of A and C Act. It is made clear that the petitioner is entitled for the relief as prayed for and the respondent is directed to pay the award amount to the petitioner along with interest within the period of four weeks from the date of receipt of copy of this order.

18. With the above direction, this Arbitration Original Petition is allowed.

13.06.2023

Speaking/Non-speaking order

Index : Yes / No

Neutral Citation: Yes / No

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KRISHNAN RAMASAMY.J.,

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