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IN THE HIGH COURT OF DELHI AT NEW DELHI*Date of decision: 02.08.2023*

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O.M.P. (COMM) 408/2016

UNION OF INDIA & ANR.

..... Petitioners

Through: Mr.Satya Ranjan & Mr.Kautilya
Birat, Advts.

versus

INDIAN AGRO MARKETING CO-OPERATIVE LTD.

..... Respondent

Through: Mr.Vijay Kasana, Mr.Rajiv
Ambawata, Mr.Abhijeet Vikramjit, Mr.Kshitij
Chhabra & Mr.Chirag Verma, Advts.**CORAM:****HON'BLE MS. JUSTICE REKHA PALLI****REKHA PALLI, J (ORAL)**

1. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (the Act), seeks to assail the award dated 22.04.2016 passed by the learned Arbitrator. Under the impugned award, the learned Arbitrator has, while rejecting the counter claims of the petitioners (the respondents before the learned Arbitrator) directed them to pay to the respondent, a sum of Rs. 40,96,800/- alongwith interest @6% p.a. from the date of encashment of the bank guarantee till the date of actual payment.
2. Before dealing with the rival submissions of the parties, the brief factual matrix as is necessary for the adjudication of the present petition may be noted.
3. Upon the petitioners floating a tender enquiry on 22.02.2012, the parties entered into a contract on 03.04.2012, whereby the respondent was to



supply 800 M/T “*Arhar Dal*” to the petitioners during the period between 01.06.2012 and 15.06.2012. The per quintal cost of the “*Arhar Dal*” to be supplied was agreed to be Rs.5,121/- and accordingly, the value of the contract was fixed at Rs. 4,09,68,000/-. In terms of the agreement, the respondent on 03.05.2012 furnished a bank guarantee to the petitioners for a sum of Rs. 40,96,800/-.

4. On account of the respondent’s failure to make the supply of “*Arhar Dal*” within the prescribed period, the petitioners issued a performance notice dated 19.06.2012 to the respondent. As the supplies were still not made, the petitioners issued a cancellation notice dated 17.08.2012 and thereafter on 30.08.2012 proceeded to encash the bank guarantee furnished by the respondent.

5. Being aggrieved, the respondent approached this Court by way of a petition being ARB P. 118/2014, seeking appointment of an arbitrator. Vide order dated 28.05.2014, this Court appointed a sole arbitrator for adjudication of disputes which had arisen between the parties in relation to the contract dated 03.04.2012.

6. Before the learned arbitrator, the sole claim of the respondent was that not only was the cancellation of the contract illegal and contrary to the terms of the agreement entered into between the parties but even otherwise, the petitioners having not made any risk purchase of the *Arhar Dal*, had not suffered any losses and were therefore, not entitled to claim any damages. It was therefore contended that the action of the petitioners in encashing the bank guarantee was illegal.

7. The petitioners sought to defend their action of encashing the bank guarantee by urging that once the respondent had violated the terms of the



contract, the petitioners were justified in encashing the bank guarantee as per Clause 10(F) of the Special Terms and Conditions of Contract for supply of pulses/dried items/animal ration.

8. After considering the rival submissions of learned counsel for the parties, the learned Arbitrator came to the conclusion that the termination order, having been issued by the petitioners without granting the mandatory 30 days performance period to the respondent, was bad in law. The learned Arbitrator further held that the petitioners, having failed to prove any loss whatsoever suffered by them on account of the breach of contract by the respondent, could not have straightway forfeited the amount covered by the bank guarantee.

9. In the light of these findings, the learned Arbitrator allowed the respondent's claim for recovery of a sum of Rs.40,96,800/- with interest @ 6% p.a. from the petitioner. The interest was directed to be paid from the date of encashment of the bank guarantee till the date of actual payment.

10. In support of the petition, learned counsel for the petitioners submits that the learned Arbitrator failed to appreciate that once the respondent had failed to supply the agreed goods in accordance with the terms of contract entered into between the parties, the petitioners were justified in terminating the contract and encashing the bank guarantee. He submits that the very purpose of obtaining the Bank Guarantee from the respondent at the time of entering into contract was to ensure that in case, the respondent fails to make the supplies in terms of the contract, the petitioners would be entitled to encash the bank guarantee by way of damages. He, therefore, prays that the petition be allowed and the impugned award be set aside.

11. On the other hand, learned counsel for the respondent defends the



impugned award by contending that the learned Arbitrator had rightly appreciated the fact that compensation can be given only for actual damages or loss suffered. He submits that admittedly, the petitioners had not even pleaded before the learned Arbitrator that they had resorted to any risk purchase of the goods and therefore, they cannot claim that any loss had been suffered by them. Once the petitioners did not lead any evidence that they had suffered any loss or damages on account of non-supply of *Arhar Dal* by the respondent, the learned Arbitrator was justified in holding that no material was placed on record by the petitioners to show that they had to procure the *Arhar Dal* from any other source at a higher value. In support of his plea that in such circumstances, the petitioners were not entitled to claim any damages or encash the bank guarantee, learned counsel for the respondent seeks to place reliance on a recent decision of a Division Bench of this Court in *FAO(COMM)1/2023* titled *Union of India vs. M./s Indian Agro Marketing Cooperative Limited*. He, therefore, prays that the petition be dismissed.

12. From the rival submissions of the parties, what emerges is that it is the petitioners' plea that once there was a clause in the contract providing for encashment of bank guarantee in case, of the respondent being in breach of the contract, there was no requirement to prove actual loss or damages suffered by the petitioners. Since this is the sole ground which has been urged before this Court, it would be apposite to refer to the findings of the learned Arbitrator in this regard as contained in para 60 of the impugned award. The same reads as under:

60. In the case at hand Respondent has not placed any material nor led -any evidence to demonstrate risk purchase



or actual loss suffered by it on account of the breach by the Claimant for failure to supply Dal Arhar as per the terms of the contract. It is not even the case of the Respondents that they were entitled to encash the bank guarantee in terms of the contract without suffering any actual loss on account of such breach. The Respondents admittedly did not go for any risk purchase/ general damages or suffered any actual damage on account of such breach. In the facts and circumstances of this case as no legal injury has resulted in consequence of the breach, any award of compensation in the form of liquidated damages to the Respondent is not justified and will amount to 'unjust enrichment'. 'Accordingly, the fourth issue is decided in favour of the Claimant.

13. From the aforesaid findings of the learned Arbitrator, it is evident that the petitioners did not lead any evidence before him to show that it had or was compelled to purchase the same *Arhar Dal* from any other source at a higher price. In fact, even during arguments, learned counsel for the petitioners has not been able to dispute the position that no material to prove any actual loss suffered was placed before the learned Arbitrator and has only sought to urge that once there was a clause in the contract for encashment of the bank guarantee in case of a breach thereof, the petitioners were justified in encashing the Bank Guarantee and withholding the amount.

14. Having given my thoughtful consideration to this submission of the petitioner, I am unable to accept the same. It has been consistently held not only by this Court but even by the Apex Court that compensation can be given only for actual damages or loss suffered. Proof of actual damages or loss is a *sine qua non* for grant of damages under Section 74 of the Indian Contract Act unless it is pleaded that the damages are unquantifiable. In the



present case, the petitioners have neither led any evidence to show any loss suffered by them nor have they taken a plea that the damages or loss suffered by them could not be calculated. In these circumstances, if the petitioners themselves chose not to lead any evidence to demonstrate any losses suffered on account of the respondent's failure to supply the agreed goods within the agreed time frame, they have themselves to blame. I, therefore, do not find any reason to differ with the conclusion arrived at by the learned Arbitrator that the petitioners having failed to produce any material to demonstrate risk purchase or the actual loss suffered by them, they could not be allowed to unduly enrich themselves by retaining the amount appropriated by them by encashing the bank guarantee.

15. Before I conclude, I may note that the parameters for examining an award under Section 34 of the Act are very limited as the Court does not sit in appeal over an arbitral award by re-assessing or re-appreciating the evidence. The only ground urged by the petitioners infact falls within the realm of interpretation of the clauses of the contract and appreciation of evidence and would therefore not fall within the ambit of interference by this Court under Section 34 of the Act. Despite this position, I have, on the insistence of learned counsel for the petitioners, examined the award in some depth but as observed hereinabove, find no reason to differ with the conclusions arrived at by the learned Arbitrator. In my view, there is neither any patent illegality nor any perversity in the impugned award. On the other hand, I am of the considered opinion that the findings of the learned Arbitrator are in consonance with the settled legal position and therefore warrant no interference by this Court.

16. For the aforesaid reasons, I do not find any merit in the petition,



which is, accordingly, dismissed.

17. As the petitioner had already deposited the awarded amount with the Registrar General of this Court, the Registry is directed to forthwith release the said amount alongwith accrued interest thereon in favour of the respondent.

(REKHA PALLI)
JUDGE

AUGUST 2, 2023
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