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

Date of decision: 16th February, 2023

+ O.M.P. (COMM) 412/2016

EMMSON GULF DMCC

..... Petitioner

Through: Mr.Ashish Khorana, Adv.

versus

NATIONAL COOPERATIVE CONSUMER FEDERATION OF
INDIA LTD. Respondent

Through: Ms.Anju Bhattacharia and
Ms.Suriti, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)

1. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') challenging the Award dated 13.05.2016 passed by the learned Sole Arbitrator to the limited extent that while awarding the amount of Rs.51,43,248/- to the petitioner towards the Performance Bank Guarantee, the learned Sole Arbitrator has awarded interest only with effect from the date of the Award, i.e., 13.05.2016 till the date of the payment.

2. It is the case of the petitioner that the petitioner had claimed interest on the above amount from the date of the encashment of the Performance Bank Guarantee, i.e. 04.03.2010, till the invocation of the arbitration, i.e. 15.04.2013 as also the *pendente-lite* and future post-

Award interest.

3. The learned counsel for the petitioner contends that leave alone giving any reason for not allowing the above claim, the above claim appears to have completely missed the consideration of the learned Sole Arbitrator.

4. On the other hand, the learned counsel for the respondent submits that the respondent had also challenged the Impugned Award by way of a petition under Section 34 of the Act. The same was dismissed by this Court; appeal there against has also been dismissed. She submits that, therefore, the Award has attained finality and the present petition is not maintainable.

5. She further submits that in the Impugned Award, the learned Arbitrator found that the petitioner had sold the Yellow Peas to a third party and, therefore, was in breach of the Agreement between the parties. The learned Sole Arbitrator has, however, awarded refund of the Performance Bank Guarantee only on account of the fact that the respondent was unable to show any loss suffered by the respondent due to such breach of the contract by the petitioner. She submits that the learned Sole Arbitrator has, therefore, refused to award interest in favour of the petitioner. She submits that this finding is rendered by the learned Sole Arbitrator in paragraph 8.5 (iv) of the Impugned Award.

6. I have considered the submissions made by the learned counsels for the parties.

7. The petitioner had raised the following claims before the learned Sole Arbitrator:

“(i) Rs.1,59,97,995/- due to sale on lesser rate of

6283.580 MTs with 18% interest from 16.04.2013 till actual realization;

(ii) Sum of Rs.51,43,248/- towards the so-called illegal encashment of bank guarantee by the respondent with 18% interest from 16.04.2013 till actual realization;

(iii) Sum of Rs.9,33,138/- towards storage charges with 18% interest from 16.04.2013 till actual realization;

(iv) Rs.50 lakhs towards business loss with 18% interest from 16.04.2013 till actual realization;

(v) Interest of Rs.62,52,805/- @14% per annum on the aforesaid sum of Rs.1,59,97,995/- from 01.07.2010 to 15.04.2013;

(vi) Interest of Rs.22,44,993/- from 04.03.2010 till 15.04.2013 @ 14% on Rs.51,43,248;

(vii) Interest of Rs.3,70,443/- from 15.06.2010 till 15.04.2013 on storage charges @ 14%.”

(Emphasis supplied)

8. On pleadings of the parties, the learned Sole Arbitrator framed the following issues:

“8.3 On the basis of the pleadings of both the parties and discussions with them on 03.12.2013, the following issues were framed:-

(i) Whether the claimant is entitled to a sum of Rs.51,43,248/- on account of encashment of bank guarantee by the respondent?

(ii) Whether the claimant is entitled to any damages, storage charges, loss and mesne profit? If so, at what rate and on what amount?

(ii) Whether the claimant is entitled to loss on total sale of Rs. 1,59,97,995/- on the sale of 6283.580 MTs of Yellow Peas and business loss amounting to Rs.50,00,000/- (Rupees Fifty Lakhs)

(iii) Whether the claimant is entitled to any interest? If so, on what amount, at what rate and from which date?

(v) Cost.”

(Emphasis supplied)

9. Therefore, not only did the petitioner claim interest from the date of encashment of the Performance Bank Guarantee, but also one of the issues before the learned Sole Arbitrator was whether the claimant is entitled to any interest on the amount claimed and, if so, on what amount, at what rate, and from what date.

10. The learned Sole Arbitrator allowed only the claim of the refund of the amount received by the respondent on the encashment of the Performance Bank Guarantee, observing as under:

“8.5 Now, I come to examine the claims of the claimant & deal the issues as follows:-

(i) Claim of the claimant for a sum of Rs.51,43,248/- for the encashment of bank guarantee by the respondent. Although, it appears to be in consonance with the procedural practice and the norms but the claimant has suffered the loss because of encashment of bank guarantee by the respondent. From the records and the pleadings, it can be inferred that the respondent has not been put to any loss or damages since the respondent has already made contract, on the pretext of the breach by the claimant in this case, with another party and goods supplied to Government of Rajasthan in time. Therefore, the claim for refund of amount of Performance Bank Guarantee is permissible/justified.

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It can be concluded that both of them could not reach to any understanding and doubtful situation seemed to be unnecessary created. However, in view of no loss caused to the respondent, neither mentioned in the contract nor otherwise, it will be in the interest of justice that the respondent should refund the claim of performance bank

guarantee stated to the tune of Rs.51,43,248/-. To this extent only, the case goes in favour of the claimant and against the NCCF. The claimant is not entitled to any other charges on sales, damages, loss, mesne profit etc. mentioned in the issues or otherwise. Respondent, therefore, is ordered to pay Rs.51,43,248/- i.e. the amount of Performance Bank Guarantee, to the claimant."

11. The other monitory claims of the petitioner were rejected by the learned Sole Arbitrator.

12. On the issue of the interest, the learned Sole Arbitrator held as under:

"As regards the interest is concerned, the interest mentioned by the claimant seems to be very high. In the light of the present situation and considering all aspects, as discussed hereinbefore, simple interest @ 10% per annum is ordered to be paid by the respondent to the claimant - M/s. Emmsons Gulf DMCC on the amount of Rs.51,43,248/- only i.e. the amount of Performance Bank Guarantee with effect from the date of Award i.e. 13.05.2016 till the date of payment."

(Emphasis supplied)

13. A reading of the above finding on the issue of interest would show that the learned Sole Arbitrator has awarded interest only with effect from the date of the Award, however, there is no discussion in the impugned Award on the pre-reference or *pendente-lite* interest claimed by the petitioner, leave alone any reason given for rejecting the same.

14. Reliance of the learned counsel for the respondent on paragraph 8.5 (iv) of the Award to contend that the same contains reasons for disallowing the interest claim of the petitioner is ill-founded. Paragraph

8.5 (iv) of the Impugned Award is reproduced herein below:

“(iv) In view of the foregoing, the claimant since delivered the material immediately on arrival of the goods, for home consumption to a Indian Company, name not mentioned, does not seem to be realistic & proper. The question of storage did not arise since disposed off the goods & not being in the name of NCCF. The payment of any interest is out of question. Hence, no interest payment is allowed.”

(Emphasis supplied)

15. Clearly, the above paragraph was dealing with the claim of the petitioner towards interest of storage charges. The learned Arbitrator held that once the storage charges are not payable, there is no question of any interest being allowed thereon. The said paragraph has no relevance to the claim of interest on the amount of Performance Bank Guarantee directed to be refunded by the respondent to the petitioner under the impugned Award.

16. Section 31(7) of the Act reads as under:

“(7) (a) Unless otherwise agreed by the parties, where and insofar as an arbitral award is for the payment of money, the arbitral Tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment.

Explanation: The expression “current rate of interest” shall have the same meaning as assigned to it under clause (b) of the Section 2 of the Interest Act, 1978 (14 of 1978).”

17. It is, therefore, in the power of the Arbitral Tribunal to award interest for the period between the date on which the cause of action arose and the date on which the Award is made and thereafter. Section 31 (3) of the Act casts an obligation on the Arbitral Tribunal to state the reasons upon which the Award is based, unless the parties have agreed that no reasons are to be given or the Award is an Arbitral Award on agreed terms under Section 30 of the Act.

18. In the present case, the exceptions to the giving of reasons by the Arbitral Tribunal were not attracted. The Arbitral Tribunal was, therefore, under an obligation to give reasons for rejecting the claim of grant of interest for the period from the date of the cause of action till the date of the Award, if at all it intended to reject such claim. As noted hereinabove, in fact, the Award is silent on the said issue.

19. The submission of the learned counsel for the respondent that the petition filed by the respondent under Section 34 of the Act being dismissed, the present petition would not be maintainable, is also ill-founded. The Court under Section 34 of the Act does not exercise the power of the Appellate Court. The dismissal of the petition under Section 34 of the Act, therefore, does not amount to a merger of the Award into the order passed by the Court under Section 34 of the Act. The jurisdiction under Section 34 of the Act is highly limited and it is only within the limited sphere that the petition of the respondent was considered and rejected. The same can, therefore, have no bearing on the separate claim and challenge of the petitioner to the same Arbitral Award.

20. In view of the above, as the learned Sole Arbitrator has not given any finding on the claim of the petitioner to the award of interest from the date of the cause of action till the date of the Award, leave alone given any reasons for rejecting the same, if at all, the Arbitral Award to that limited extent cannot be sustained and is set aside.

21. The petition is allowed in the above terms. There is no order as to cost.

FEBRUARY 16, 2023/Arya

NAVIN CHAWLA, J

