$~31

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

\+ O.M.P. (COMM) 217/2024

BULKLOGIX SHIPPING PRIVATE LIMITED ..... Petitioner

Through: Mr.Varun Shankar, Mr.Aryan Panwar and Mr.Anand Bhushan, Advts.

versus

ERIANGO GENERAL TRADING LLC ..... Respondent

Through: Mr.Trideep Pais, Sr.Adv. with Mr.Harisankar Mahapatra, Mr.Devashish godbole, Mr.Vibhav Gadra and Ms.Ritika Vohra, Advts.

CORAM:
HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

<u>O R D E R</u>

% **13.05.2024**

<u>CAV 226/2024</u>

Since the caveator/respondent has put in appearance through counsel, the caveat stands discharged.

<u>I.A. 10801/2024 (exemption)</u>

Exemption is allowed subject to all just exceptions.

Application stands disposed of.

<u>O.M.P. (COMM) 217/2024 & I.A. 10800/2024 (stay)</u>

1. The present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside the arbitral award dated 12.01.2024 whereby the learned arbitrator vide a detailed order passed an award *inter alia* to the effect that the claimant/respondent is entitled for refund of an amount of $367,132.50 (USD) with interest calculated

as per clause 13 of the agreement dated 09.08.2022. The petitioner has challenged the impugned award on the ground that in view of the notification dated 08.09.2022, the petitioner was prohibited from supplying 70% of the agreed material.

2. The facts in brief are that a contract was entered into between the petitioner and the respondent for supply of 300 FCL of Indian White Crystal Sugar on 17.10.2021 and second contract between the petitioner and the respondent was entered into on 11.01.2022 for supply of 13,500 MT's of Indian White Crystal Sugar. Vide notification dated 24.05.2022, the Director General of the Foreign Trade vide notification No. 07/2023 banned the export of Indian White Crystal Sugar. Thereafter the parties entered into a settlement agreement on 09.08.2022. Learned counsel for the petitioner submits that as per clause 5 of the agreement, the petitioner committed to send three shipments of the following description:

Shipment 1:

Product	White Rice 5% 6mm BOPP bags – 26 kg bags shipped in container
Port	Cabinda, Angola
Quantity	20 fcls
Price	$540 per ton; CFR including documents
Total Price	20 fcls x 27 tons x $540 = $291,600

Shipment 2:

Product	White Rice 100%, PP bags 50 kg bags, Shipped in container
Port	Djibouti

Quantity	50 fcls
Price	$410 per ton; CFR including documents
Total Price	50 fcls x 27 tons x $410 = $553,500

Shipment 3 :

Product	Parboiled rice 5%, min 6mm, PP bags 26 kg bags, shipped in container
Port	Djibouti
Quantity	30 fcls
Price	$440 per ton; CFR including documents
Total Price	30 fcls x 27 tons x $440 = $356,400

3. Learned counsel for the petitioner further submits that the timeline of the shipment were that the petitioner was required to send minimum of 25 FCLs on or before 31.08.2022 and remaining 75 FCLs was to be sent on or before 30.09.2024.

4. Learned counsel for the petitioner submits that however clause 10 of the settlement agreement provided that notwithstanding anything contained in clause 9 of the agreement, the date for supply of the agreed upon shipment shall be 30.09.2022. Learned counsel submits that clause 11 further provided that if the petitioner failed to ship all the shipments on or before 30.09.2022, the petitioner shall refund the balance outstanding of $367,132.50 (USD) after deducting the value of whatever cargo shipped in full compliance to the settlement agreement to the respondent within five business days and no later than 05.10.2022 Indian Standard Time. Learned counsel submits that in the interregnum period the government issued a dated 08.09.2022 whereby

the export of broken rice was prohibited. Learned counsel submits that in view of the notification, the petitioner invoked *FORCE MAJEURE* vide communication dated 18.09.2022. Learned counsel for the petitioner submits that in view of the notification, the petitioner could not have supplied 70% of the agreed material and therefore the agreement suspended in nature, the *FORCE MAJEURE* clause was rightly invoked.

5. Learned counsel for the petitioner submits that the learned arbitrator fell into a grave error by passing the award directing the petitioner to refund the complete amount. Learned counsel submits that since the petitioner was barred from shipping the 70% of the agreed material, any supply could have been against the public policy of India. Learned counsel submits that therefore the award is liable to be set aside

6. Mr.Trideep Pais, learned senior counsel has appeared for the respondent on advance notice and submits that there is no error in the award. Learned senior counsel has invited the attention of the court to clause 11 and 18 of the settlement agreement which make it clear that the intentions of the parties were that for any reason if the petitioner fails to send the complete shipment, proportionate amount shall be refunded. Learned senior counsel submits that the learned arbitrator has passed the award after taking into account the jurisdiction under Section 34 of the Arbitration and Conciliation Act.

7. The court's jurisdiction under Section 34 A&C Act is well settled to be limited to the considerations as enumerated within the legislature. The court cannot exercise its jurisdiction to re-appreciate any evidence, re-interpret the terms of contract or go into the merits of the case. At this

stage, the court restricts its scrutiny to checking whether the impugned award is erroneous, patently illegal or in contravention of the provisions of the Act. The Supreme Court in ***Hindustan Construction Co. Ltd. v. National Highways Authority of India***[1], held as under:

> *"**26**. The prevailing view about the standard of scrutiny-not judicial review, of an award, by persons of the disputants' choice being that of their decisions to stand-and not interfered with, [save a small area where it is established that such a view is premised on patent illegality or their interpretation of the facts or terms, perverse, as to qualify for interference, courts have to necessarily chose the path of least interference, except when absolutely necessary]. By training, inclination and experience, judges tend to adopt a corrective lens; usually, commended for appellate review. However, that lens is unavailable when exercising jurisdiction under Section 34 of the Act. Courts cannot, through process of primary contract interpretation, thus, create pathways to the kind of review which is forbidden under Section 34. So viewed, the Division Bench's approach, of appellate review, twice removed, so to say [under Section 37], and conclusions drawn by it, resulted in displacing the majority view of the tribunal, and in many cases, the unanimous view, of other tribunals, and substitution of another view. As long as the view adopted by the majority was plausible-and this court finds no reason to hold otherwise (because concededly the work was completed and the finished embankment was made of composite, compacted matter, comprising both soil and fly ash), such a substitution was impermissible.*
>
> *27. For a long time, it is the settled jurisprudence of the courts in the country that awards which contain reasons, especially when they interpret contractual terms, ought not to be interfered with, lightly."*

(emphasis supplied)

8. At this stage, it is pertinent to examine the award so as to see the reasoning provided by learned arbitrator, which is as below:

***20 .** Keeping in mind the principles of interpretation as stated above, the Tribunal proceeds to deal with the contentions of the parties. The Claimant submitted that the ban on export of rice did not apply to*

[1] 2023 SCC OnLine SC 1063

parboiled rice 5 %. After being informed about the ban on rice by the Government of India, the Claimant by communication dated 22.09.2022 requested the Respondent to supply 30 FCLs of parboiled rice by which the major portion of the advance amount' lying with the Respondent would have been adjusted . There is no dispute that export of parboiled rice 'has not been banned, RW-1 in his cross-examination admitted that export of parboiled rice was not prohibited. However, he stated that there was ·change 1n law pertaining to the export duty.

***21.** The contention of the Respondent that the agreement is indivisible and there is no obligation on the part of the Respondent to comply with a part of the contract is not sustainable. Clause 18 of the agreement dated 09.08.2022 refers to termination of the contract in the event of change in law restricting the export of rice, clearly provides for the deduction of the amount for goods so supplied till that date. It can be deduced from clause 18 that part performance of the contract was contemplated by the parties. The contract refers to three shipments. If there is no ban on export of shipment No.3, the Respondent could not have refused from shipment of parboiled rice.*

***22.** The contention of the Respondent that Clause 9 which imposes time lines for shipment is directory and not mandatory is also bereft of merit. The parties have mutually consented that the agreement is time sensitive, and the parties agreed to strictly · adhere to the updated time frame for the new shipment of rice. The argument of the Respondent that Clause l 0 supersedes Clause 9 in view of the words 'notwithstanding anything contained in Clause 9 is not correct. The non obstante clause in Clause 10 is only with reference to the date of supply of the agreed upon shipments being 30.09.2022. Clause 9 and Clause 10 have to be harmoniously construed . The correct interpretation of the clauses is that the timelines for supply of rice are mandatory subject to conditions that a dispute can be raised only if the shipments are not supplied by 30.09.2022 and not before. A plain reading of clauses 9 and 10 would show that the parties intended the timelines to be strictly followed. Further, a perusal of the other clauses of the agreement makes it clear that parties intended that the supply was to be made by 30.09.2022 .*

***23.** The other contention of the Respondent that Clause 18 has to be read subject to the event of force majeure as dealt with in Clause 17 also lacks merit. Clause 17 permits the parties to suspend the activities*

in case of force majeure. Clause 18 clearly contemplates that any change in law, restricting the export of rice would result in the termination of the contract, one day prior to such a change in law. Force majeure can be invoked in case of war, hostility, military quality, civil commotion, sabotage, , quarantine restrictions, acts of God and acts of Government etc. Restriction of export of rice or any other goods has been specifically dealt with in clause 18 according to which the contract is deemed to have terminated one day prior to such change in law. It is clear from a combined reading of clause 17 and clause 18 that clause 18 is an exception to clause 17 and in case of prohibition of rice or any other goods the contracts deemed to have been terminated one day prior. to the change in law. Thus, the agreement dated 09.08.2022 is deemed to have been terminated on 14.09 .2022, a day prior to the date on which there was. change in law.
***24.** For the foregoing reasons, the Claimant is entitled for refund of an amount of $367,132.50 (USD) with interest calculated as per clause 13 of the agreement dated 09.08.2022. The Claimant has not established its entitlement for other reliefs.*

9. The perusal of the award makes it clear that the learned arbitrator has minutely gone into various clauses of the agreement and has also placed reliance on the settled proposition of the law. The award is well-reasoned and lacks any perversity or illegality. Furthermore, it is evident that the impugned award is very much in consonance with the fundamental public policy of India. It is a no longer *res integra* that this court cannot sit in an appeal over the award of the learned arbitrator even if there could have been another possible opinion on the basis of the constructions of the terms of the contract, the court cannot substitute its own opinion with the opinion of learned arbitrator unless it suffers from any of the grounds as provided under Section 34(2)(b).

10. I do not find that any ground as required under Section 34 has been fulfilled and thereby, the challenge to the impugned award has not been

satisfactorily proven to have any standing.

11. The petition along with the pending application is accordingly dismissed.

DINESH KUMAR SHARMA, J

MAY 13, 2024/rb/aj..