



2024:DHC:5645



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI***Decided on: 01.08.2024*+ **O.M.P.(COMM) 515/2022**

RK WIND LIMITED

..... Petitioner

Through: Mr. Sanjoy Ghose, Senior
Advocate with Mr. Akshay Goel,
Mr. Paras Arora & Ms. Vishali
Nahar, Advocates.

versus

JEENA AND CO.

..... Respondent

Through: Mr. Saurabh Prakash & Mr. Utsav
Jain, Advocates.**CORAM:****HON'BLE MR. JUSTICE PRATEEK JALAN****J U D G M E N T****O.M.P.(COMM) 515/2022 & I.A. 22223/2022 (for stay), I.A.
4023/2024 (for directions to deposit the awarded amount with interest)**

1. By way of this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ["the Act"], the petitioner assails an arbitral award dated 04.08.2022, by which a learned sole Arbitrator has adjudicated disputes between the parties under an agreement dated 23.04.2013. The learned Arbitrator made an award of Rs.1.37 crores in favour of the respondent on account of unpaid invoices, along with interest and costs, and rejected the petitioner's counterclaim for liquidated damages.

A. Facts:

2. The parties entered into a Transportation Agreement dated 23.04.2013 ["the Agreement"], whereby the respondent was to provide

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services to the petitioner for carriage by sea, of a “Break Bulk Consignment”, comprising of a windmill. Various parts of the consignment were enumerated in Annexure A of the Agreement. The shipment was to originate ex-works in Germany at locations specified in Annexure C of the Agreement, and the destination was specified as Mumbai Port, India.

3. The petitioner opened a Letter of Credit [“LC”] on 20.05.2013, which was subsequently amended on 28.05.2013. The goods were ultimately transported by the respondent on a ship which sailed on 05.10.2013, and arrived in Mumbai Port on 28.10.2013.

4. The petitioner, alleging delay on the part of the respondent, failed to make full payment of the consideration due under the Agreement, leading to claims being lodged by the respondent before the learned Arbitrator. The total amount of the claims was Rs.2,59,92,537/- under the following heads¹:

<i>“Claim No.</i>	<i>Particulars</i>	<i>Amount (INR)</i>
<i>(a)</i>	<i>On account of balance due against Contract value;</i>	<i>1,33,00,000/-</i>
<i>(b)</i>	<i>On account of the balance due towards the contract value that would have been entered into if the respondent had known that there would be no repeat of large business from the Respondent;</i>	<i>37,80,000/- (USD 550,000 – USD 490,000 = USD 60,000)</i>
<i>(c)</i>	<i>On account of Foreign Exchange variation between the</i>	<i>12,20,100/-</i>

¹ Reproduced as mentioned in paragraph 6.1 of the impugned award.



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	<i>anticipated sailing on the date of contract and anticipated date of sailing (August end) as on June 27th;</i>	
(d)	<i>On account of increased freight rates between 23rd April and 5th October due to delay in project;</i>	26,38,138/-
(e)	<i>On account of Foreign Exchange loss due to further delay between end August and 5th October in final execution of project (sailing of shipment leading to still higher exchange rate applicable;</i>	20,76,600/-
(f)	<i>Post storage due to delay in arranging of ship after missing the Planned vessel;</i>	17,60,707/-
(g)	<i>Towards customs clearance services;</i>	150 lakhs
(h)	<i>On account of Saddle fixing done by claimant which was not part of the claimant's work;</i>	
<i>These amounts total to Rs. 2,59,92,537/-."</i>		

5. The petitioner, on the other hand, made counterclaims of Rs. 4,04,50,732 along with interest @ 18 % per annum tabulated under the following heads:

Counterclaim No.	Particulars	Amount in Rs.
1.	Liquidated damages	27,00,000/-
2.	Difference in Freight	17,28,795/-
3.	Demurrage	5,82,333/-
4.	Lorry Detention charges	12,03,000/-
5.	Damage to goods	36,00,000/-

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6.	Loss of profit	3,06,36,604/-
7.	Cost of Arbitration and interest @ 18 % per annum.	

6. The learned Arbitrator came to the conclusion that the respondent herein was not liable for delay, and therefore awarded the respondent's claims to the extent of Rs.1.37 crores under Claim A and Rs.26,38,138/- under Claim D. Interest on Claim D was awarded @ 18 % per annum. The petitioner's counterclaims were rejected and costs were also awarded against it, to the extent of Rs.25,00,000/-. The petitioner was also directed to pay a sum of Rs.13,61,643/- towards bank charges incurred by the respondent for furnishing of bank guarantees.

B. Submissions of the parties:

7. Mr. Sanjoy Ghose, learned Senior Counsel for the petitioner, assailed the impugned award to the following extent:

- Award of Rs.1.37 crores to the respondent under Claim A as against a claim of Rs.1.33 crores;
- Award of interest @ 18% per annum on Claim D;
- Award of costs;
- Denial of the petitioner's counterclaim for liquidated damages despite admitted delay in shipment.

8. Mr. Ghose submitted that it was the admitted position that the petitioner had issued a revised LC on 28.05.2013 in the format suggested by the respondent, and that the goods were available at the port of Bremerhaven, Germany on 14.08.2013. Despite this, the respondent was not able to ship the goods until 05.10.2013, and the goods reached Mumbai only on 28.10.2013. He submitted that, at least for the period



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after 14.08.2013, the responsibility of identifying and engaging a vessel for the shipment was that of the respondent. He submitted that the learned Arbitrator's reading of the correspondence between the parties, particularly a communication dated 02.07.2013, was entirely perverse and contrary to the record. According to Mr. Ghose, the said communication recorded an understanding that the petitioner would be entitled to levy of liquidated damages for any delay in shipment beyond 01.08.2013.

9. As far as interest and costs are concerned, Mr. Ghose submitted that the quantification on both accounts is a devoid of reasons.

10. Mr. Saurabh Prakash, learned counsel for the respondent, on the other hand, submitted that the impugned award does not suffer from any infirmity or illegality, so as to justify interference under Section 34 of the Act. He pointed out that the learned Arbitrator has come to a factual conclusion that the respondent was not liable for any part of the delay in shipment and was, therefore, entitled to the amount payable in terms of the Agreement. The petitioner did not open the LC within the time stipulated in the Agreement, and the goods were also not ready for collection as represented prior to entering upon the Agreement. Mr. Prakash submitted that the delay in availability of the goods required the respondent to re-negotiate for engaging a vessel, particularly as the Agreement was for Break Bulk Consignment of the entire windmill as "one unit of Break Bulk" cargo², and not in parts.

11. Mr. Prakash submitted that the conclusions of the learned Arbitrator are based upon a consideration of the evidence, of which the Arbitrator is the best judge. He submitted that the petitioner's



communication dated 02.07.2013 was partially controverted by the respondent's representative, and the learned Arbitrator has correctly considered the correspondence as a whole in coming to the conclusion that the delay in shipment was not attributable to the respondent.

C. Contractual Provisions:

12. The relevant clauses of the Agreement are set out below³:

"2. APPOINTMENT:

Subject to the provisions of this Agreement, PWL hereby appoints JEENA for the purpose of carriage of Break bulk Consignment from Origin to Destination.

JEENA shall ensure, or cause to ensure, safe and expeditious delivery of the Consignment and undertakes to do all such acts, deeds and things, which are necessary and incidental for safe and expeditious delivery of the Consignment.

JEENA shall deliver, or cause to be delivered, to the best of its ability, but subject however, to reasons of force majeure, the Consignment, to the Destination, without any loss or damage in any manner.

JEENA shall also be responsible for the following:

a. Collection Ex-works of the cargo from Germany as per the instructions of PWL provided at Annexure-C.

b. Sea Worthy Packaging of cargo to ensure the safety of the product and avoid damages to the consignment.

c. Loading of cargo at the shipper's end.

d. Arrange transportation upto the Port of Loading i.e. any suitable port in Germany.

e. Arrange carriage of consignment by sea worthy vessel from any port in Germany to Mumbai.

f. Jeena shall custom clear the consignment at Mumbai Port and hand over 'out of charges' (Gate pass) to PWL.

g. The PWL shall promptly arrange custom duty payment and resolve any issue raised by customs at the time of clearance to avoid any demurrage.

Jeena shall be responsible for

² Clause 1(d) of the Agreement.

³ In the Agreement, the petitioner herein is referred to as "Powerwind Ltd.", which was its name at that time, or "PWL". The respondent is referred to as "Jeena".



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- a. All risk transport insurance
- b. Export documentation at Load Port.

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4. PLANNED SHIPMENT SCHEDULE:

JEENA shall make all the arrangements including but not limited to obtain necessary approvals, escorts availability, packaging, pickup to make the consignment ready for movement within 5 weeks of opening of Letter of Credit and shall ensure inland movement within 1 week thereafter.

If JEENA failed to Ship the Consignment from Germany within 6 weeks of opening of Letter of Credit then PWL shall be entitled for liquidated damages. The amount of liquidated damages is at a rate of 1 per cent of the agreed price as provided under clause 5 for each and every week commencing from the day of delay. The liquidated damages shall not exceed 10 per cent of the of the agreed price as provided under clause 5 without affecting PWL's right of taking other recourses provided in law to recover its damages.

5. CONSIDERATION:

In consideration of effecting safe and expeditious delivery as herein stated and in accordance with the terms of appointment as contained in Clause 2 aforesaid **JEENA shall be entitled to an all-inclusive Ocean Freight sum of Rs. 270 lakhs (Rs. two hundred Seventy lacs only).**

In addition to the consideration mentioned above, JEENA shall also be entitled for Custom Clearance Charges as per Annexure "B" and be reimbursed for secured BL charges as per actual expenses incurred on submission of invoice/bill for the same.

In view of the mutual covenants and reciprocal promises contained herein, both parties record and confirm their specific agreement that the aforesaid consideration is fair and adequate.

JEENA acknowledges that the above consideration contains the whole service of the transportation for the project, permissions hire of transport equipments, escorts surcharges, loading at ports at supplier's end, courier cost, taking a pictures at loadings, document handlings at ports etc.

6. PAYMENT:

40% of the consideration as provided under clause 5 shall be payable after the receiving of Bill of lading.

40% of the consideration as provided under clause 5 shall be payable after the receiving of delivery order.

20% of the consideration as provided under clause 5 shall be payable after the receiving out of charges.

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All the above payments shall be against the Confirmed & irrevocable letter of credit to be opened by PWL.

The validity of Letter of Credit shall 5 months from the date of Opening of LC (Letter of Credit).

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13. TERMINATION:

This agreement will come into force on the day of execution of this agreement and shall expire when the consignment is delivered at the port of discharge to PWL after receiving gate pass from JEENA. In case PWL terminate the contract after its signing, PWL shall be liable to pay full consideration amount as dead freight.

In case JEENA terminates the contract before fulfilling its obligations under the Contract, it shall be liable to pay the termination fees of an amount in Indian rupees equivalent to USD 4,90,000 (Four Lacs Ninety Thousand Dollars).

PWL may, after giving 7 days notice in writing to the JEENA, terminate the contract without paying termination fees rather JEENA shall be liable to pay termination fees where JEENA

*a) has abandoned the Contract for an unreasonable period of time or
b) Without reasonable excuse has failed to provide the services under the contract; or*

c) Failed to ship the consignment from Germany within 6 weeks of opening of LC, provided if cargo is made available to JEENA for packing/pick-up within 5 days of opening of LC.

d) Is in material breach of this Contract or is persistently or flagrantly neglecting to carry out its obligations under the Contract;

During the notice period if JEENA performs the contract or is able to give reasonable excuse of above causes, the termination notice may be withdrawn at the discretion of PWL.

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17. APPLICABILITY OF LAW & SETTLEMENT OF DISPUTES:

This Agreement shall be governed by the Indian laws and place of jurisdiction shall be courts of Delhi only.

Both Parties will attempt to settle any dispute in an amicable and business-like manner.

In the event that a dispute cannot be settled between the Parties, in spite of best intentions, by both, then the Parties shall agree to Arbitration as per Arbitration Clause below.

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19. ARBITRATION:

All disputes, claims or differences which may arise between the parties hereof, out of, or in relation to, or in connection with, this Agreement shall be negotiated and amicably settled. In case of failure of negotiations and settlement, such disputes shall be referred to arbitration under the Arbitration & Conciliation Act, 1996 in accordance with rules framed there under. Such arbitration shall be held in Delhi. The decision of the arbitrator(s) shall be final and binding upon the parties.

All proceedings whether written or oral shall be in English.

20. MISCELLANEOUS:

If and to the extent that this Agreement inadvertently contains any provision which is invalid or unenforceable under any applicable law, then the other provisions of this Agreement will not be affected thereby, and the Parties shall, upon becoming aware thereof, forthwith convene and negotiate the amendment of such provision in such manner that it becomes valid and enforceable without affecting the original intent or the economic purpose and effect of such provision.

No failure to exercise nor any delay in exercising any right, power, privilege or remedy under this Agreement shall in any way impair or affect the exercise thereof or operate as a waiver thereof in whole or in part.

No single or partial exercise of any right, power, privilege or remedy under this Agreement shall prevent any further or other exercise thereof or the exercise of any other right, power, privilege or remedy.”⁴

D. Analysis:

13. The principal question to be considered, is whether the petitioner has rightly been found to be in breach of the terms of the Agreement. This would be relevant both with regard to the petitioner’s counterclaims, and Claim A of the respondent.

14. The learned Arbitrator has based his finding in this regard on the following reasoning:

⁴ Emphasis Supplied.



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- a. By a communication dated 11.03.2013, the proposed scope of work was laid down, and it was stated that “*the cargo is ready for pickup*”⁵. The respondent gave its commercial offer on 09.03.2013, quoting a consolidated sum of USD 5,50,000/- for supply of the cargo, packaged in 19 units measuring 132.64 tonnes in weight and 4266.76 CBM in dimension. The estimate noted that a vessel was expected to arrive at the loading port on 11.04.2013, and that if the planned vessel was missed, the rate would be changed.
- b. The respondent’s obligations under the Agreement included collection of the cargo from three suppliers of the petitioner, packaging, loading and transportation to the load port, as well as carriage of the consignment from Germany to Mumbai and customs clearance.
- c. Although the Agreement did not specifically mention the schedule for collection of the cargo from the petitioner’s vendors, the respondent was expected to make arrangements to enable shipment within five weeks of opening of the LC and to ensure inland movement within one week thereafter. Clause 4 provided for liquidated damages to be paid to the petitioner, in the event the ship failed to sail within six weeks of opening of the LC. Liquidated damages were quantified at 1% of the agreed price per week, subject to a maximum of 10%. The consideration was fixed at Rs. 270 lakhs.
- d. The LC for Rs.2.7 crores was issued by the petitioner’s bankers on 20.05.2013. Taking the date of opening of the LC as 28.05.2013,

⁵ Paragraph 2.1 of the impugned award.



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when certain amendments were carried out, the respondent was to ship the goods by 08.07.2013.

- e. With regard to availability of the shipment from the three suppliers of the petitioner, two of the suppliers originally declined to release the cargo on the ground that their payments had not been cleared by the petitioner. On the basis of the correspondence placed before the learned Arbitrator, he has recorded the following finding:

“5.43. It is obvious from the above that while the cargo from M/s Sinoi was cleared for pickup on 13.06.2013, the windmill towers which were to be picked up from M/s Ambau were not cleared for pickup by M/s Ambau. Therefore, in spite of the cargo of M/s BLG and M/s Sinoi being ready, the claimant could not initiate the process of pickup since the windmill towers being the largest component of the single unit of the breakbulk cargo, were not cleared for pickup due to the respondent’s failure to make payment to the liquidator & prolong the LC in favour of Ambau.”

- f. The respondent, in fact, issued a notice of non-readiness of the cargo on 04.06.2013, to which there was no response.
- g. The learned Arbitrator has therefore arrived at the following conclusion:

“5.59. On 30.06.2013, the period of 6 weeks contemplated under the Agreement, from the date of the issuance of LC, for completion of packing, movement and commencement of shipment was over. Thus I have no hesitation to hold that the respondent was guilty of breach of the terms of the agreement.”

- h. It has been specifically noted that the respondent did not agree to the petitioner’s assertion that the period for shipment would be reckoned from 15.06.2013 and the petitioner would be entitled for liquidated damages from 01.08.2013. Mr. Ghosh relied upon a communication of the petitioner dated 02.07.2013, by which the



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timelines and obligations under the Agreement were sought to be recast. The learned Arbitrator has disagreed with this submission, on the basis of the respondent's reply dated 08.07.2013, expressing only partial agreement with the content of the communication dated 02.07.2013.

15. I do not find any infirmity in the analysis of the learned Arbitrator on the question of liability, so as to invite interference with the award under Section 34 of the Act. The finding of the learned Arbitrator that the readiness of the cargo for pickup by the respondent was "*the core of the agreement*"⁶, is supported by the petitioner's proposal dated 11.03.2013, which was placed before him. Similarly, it is clear from the respondent's letter dated 08.07.2013 that it stuck to the position that the period of six weeks for shipment, contemplated under the contract, would commence only upon readiness of the cargo from all three suppliers of the petitioner. The analysis of the learned Arbitrator on this point supports his conclusion that the petitioner was responsible for the delay up to 02.07.2013, and that it was also disentitled to claim liquidated damages from 01.08.2013.

16. The learned Arbitrator has also discussed further correspondence between the parties and the petitioner's suppliers, and came to the conclusion that the consignment reached the port of Bremerhaven only on 14.08.2013 on account of various defaults committed by the petitioner herein. These findings are supported by correspondence, to which the learned Arbitrator has elaborately referred. In particular, he has found that

⁶ Paragraph 5.73 of the impugned award.



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the petitioner had not made payment of the dues of its suppliers, as a result of which they did not release the goods.

17. For the period thereafter, the learned Arbitrator found that the respondent had started negotiating for a new vessel as the original vessel had been missed. The respondent engaged a different vessel which was to arrive at Bremerhaven between 23.09.2013 and 25.09.2013. The arrival of the vessel was, however, delayed and it finally sailed on 05.10.2013. These findings support the conclusion of the learned Arbitrator, that the respondent had been adhering to the terms of the Agreement and had taken all possible steps to engage a vessel despite the delay in availability of the cargo. It is also clear from the record that the petitioner, on the other hand, did not raise any dispute or demur in this regard, and amended the LC to reflect the delay in shipping.

18. The learned Arbitrator has, thus, found that all elements of the cargo were to be shipped as a bulk cargo and not separately, that delays attributable to the petitioner caused the cargo to be available at the loading port only on 14.08.2013, and that the respondent made all efforts to locate a suitable vessel, which was, however, available only for sail on 05.10.2013. These findings are sufficient to establish the respondent's entitlement to the agreed contract price, and to reject the petitioner's counterclaim for liquidated damages.

19. In reaching this conclusion, the Court bears in mind that an arbitrator is tasked with appreciation of the evidence, to which the Court must defer, absent a finding of perversity or manifest arbitrariness. I am unable to find any such ground in the present case, to interdict the findings of the learned Arbitrator.



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20. It is in the light of the same factual findings that Claim A, awarded in favour of the respondent, must be considered. The petitioner's argument is that Claim A has been awarded in excess of the amount claimed. The claim, to the extent of Rs.1.33 crores, is based upon the invoices raised by the respondent in terms of the Agreement. The remaining amount of Rs.4,00,000/-, although included in the award as part of Claim A, is, in fact, an agreed amount under Claim C, as recorded in paragraph 9.1 of the Award, which reads as follows:

"9.1. Relating to claim 'c', already the parties had concurred for payment of Rs.4,00,000/- and it is on that basis the parties argued before the High Court and the High Court had directed the payment of Rs.2.74 crores. Therefore, the same point cannot be reagitated. Accordingly the claim is rejected."

The aforesaid agreement, to the extent of payment of Rs.4,00,000/-, is reflected in an order dated 29.10.2013 in O.M.P. 1076/2013. The amount mentioned in the said order is clearly Rs. 2.74 crores, as opposed to the amount of Rs.2.7 crores mentioned in the Agreement. No fault can, therefore, be found on this ground.

21. As far as Claim D is concerned, the award of interest, at the rate of 18% p.a., is sought to be assailed. The learned Arbitrator notes that the contract is a commercial contract. The invoices raised by the respondent available on the arbitral record, mentioned the rate of 18% per annum and, in fact, the counterclaim raised by the petitioner herein also claimed interest at the same rate. I, therefore, find no ground for interference with this claim, either.

22. The award of costs of Rs.25,00,000/- is also not liable to be interfered with. The award of costs is discretionary, and the quantum of



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Rs.25,00,000/- does not appear to be excessive, having regard to the nature and quantum of claims and counterclaims.

E. Conclusion:

23. For the aforesaid reasons, I do not find any merit in the present petition. The petition is, therefore, dismissed. All pending applications also stand disposed of.

PRATEEK JALAN, J

AUGUST 1, 2024

“Bhupi/Kb”/

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