

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 17.07.2017

+ **O.M.P. (COMM) 16/2015**

NORDIC INTERTRADE AS (NORWAY) Petitioner

Versus

STEEL AUTHORITY OF INDIA LTD Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Jayant Mehta, Mr Sumeet Lall and Ms Yashasvi Singh.

For the Respondent: Mr Arvind Nigam, Senior Advocate with Mr Ashish Kumar, Mr Mihhil Sharda and Mr Rameez Raja.

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J

1. Nordic Intertrade AS (hereafter 'Nordic') - a company incorporated under the laws of Norway having its principal place of business located in that country - has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), impugning an arbitral award dated 23.01.2012 (hereafter 'the impugned award') passed by the sole arbitrator, Mr P.S. Bawa appointed by the Indian Council of Arbitration.

2. The impugned award was rendered in the context of disputes that had arisen between the parties in respect of a contract dated 01.02.2008 (hereafter 'the Agreement') whereby the respondent (hereafter 'SAIL') had

agreed to sell 5000 MT of Prime Mild Steel, Hot Rolled Plates (Non-Alloy) from India to Nordic.

3. The dispute between the parties essentially concerned the question whether Nordic would be liable to pay export duties that were imposed on export of the goods in question. Nordic claimed that in terms of the Agreement, it was not liable to pay any export duties. SAIL disputed the same. It claimed that on failure of Nordic to indicate a vessel during the agreed laycan before the expiry of the term of the Agreement, SAIL had invoked clause 9 (the Red Clause) of the Agreement, the effect of which was that the title of the goods passed from SAIL to Nordic. According to SAIL, since the export duties were notified after the title of the goods had passed to Nordic, it alone was responsible for payment of such duties.

4. In view of SAIL's refusal to load the cargo without securing receipt of the export duty, Nordic opened the letter of credit (L/C) for the amount of export duties under protest, which was encashed by SAIL. In its claim before the arbitral tribunal, Nordic claimed the amount of export duty as well as other costs and damages incurred. SAIL also raised counter claims for costs incurred by it in respect of litigation instituted by Nordic. The arbitral tribunal considered the claims and counterclaims and rejected the same by the impugned award. Nordic claims the decision of the arbitral tribunal to be perverse and contrary to the terms of the Agreement.

5. Briefly stated, the relevant facts necessary in respect of which the aforesaid controversy arises are as under:-

5.1 Nordic and SAIL entered into the Agreement dated 01.02.2008, pursuant to which, SAIL agreed to sell to Nordic, 5000 MT of Prime Mild

Steel, Hot Rolled Plates (Non-Alloy). In terms of the Agreement, the terms and conditions as contained in the "General Terms and Conditions of Export Contract (FOB)" were also applicable as an integral part of the Agreement. In terms of the Agreement, Nordic opened a L/C on 06.02.2008 for payment of the goods in question.

5.2 On 09.04.2008, SAIL issued a notice of readiness (NOR) of cargo and also called upon Nordic to nominate a suitable vessel within laycan period of 25.04.2008 to 29.04.2008. The Indian agent of Nordic, by an email dated 15.04.2008, advised the availability of a vessel MV "Rickmers, Chennai" with laycan of 07.05.2008 to 15.05.2008. SAIL responded to the said email on 17.04.2008. The controversy as to whether SAIL agreed to revised laycan, as suggested on behalf of Nordic, was a subject matter of dispute before the arbitral tribunal. On 06.05.2008, SAIL invoked clause 9 (the Red Clause) of the General Terms and Conditions of Export Contract (FOB) and negotiated the documents under the L/C opened by Nordic.

5.3 Thereafter, on 10.05.2008, SAIL submitted an NOR. On the same date, the Government of India, by a notification (Notification No.66 of 2008 - Customs) imposed an export duty of 15% *ad valorem* on the goods in question. The nominated vessel, MV "Rickmers, Chennai" arrived at Vizag Port on 12.05.2008. However, SAIL did not load the cargo but sent a letter dated 12.05.2008 requesting the agent to hold the berthing of the vessel till further advice from SAIL in view of "*some commercial settlements due from receiver of the cargo*". SAIL also sent a letter to Nordic calling upon Nordic to pay the export duty imposed by virtue of the aforementioned notification dated 10.05.2008. Thereafter, there was an

exchange of correspondence between the parties; SAIL continued to demand the export duties and Nordic disputed its liability to pay the same. Finally, Nordic opened the L/C for the amount of export duties payable on the goods on 28.05.2008. Nordic also sent a letter dated 29.05.2008 placing on record that it had paid the export duty under protest. The total amount of export duty paid by Nordic under protest amounted to ₹2,88,21,737/- (equivalent to € 460,779.18).

6. Nordic also claims that it paid detention charges of US\$ 242,414 equivalent to € 179,565 (to the shipper). On receipt of the L/C, SAIL loaded the goods onto the vessel.

7. Nordic sent legal notice dated 09.10.2009 calling upon SAIL to make a payment of € 724237 (equivalent to ₹4,98,99,929/-, calculated at the exchange rate of Euro 1 equal to ₹68.90). SAIL responded to the legal notice by its letter dated 21.11.2009 refuting Nordic's claim. Thereafter, on 31.03.2010, Nordic filed its application for arbitration with the Indian Council of Arbitration (ICA). The arbitration proceedings stood culminated into the passing of the impugned award.

Submissions

8. Mr Mehta, learned counsel appearing for Nordic advanced contentions on three fronts.

8.1 First, he stated that the decision of the arbitral tribunal that the parties had not agreed to revised laycan was *ex facie* contrary to the record and thus the impugned award is perverse and unsustainable.

8.2 Second, he contended that in terms of the Agreement, the liability to pay all custom duties lay squarely on SAIL. He referred to clause 9.3 of the Agreement and contended that the same clearly provided that the seller (SAIL) was obliged to deliver the goods FOB (SLSD) at its cost. He stated that in terms of clause 1.1 of the Agreement, all commercial terms and abbreviations used in the Agreement were to be interpreted by applying the rules of the 'ICC INCOTERMS 2000'. He next referred to the meaning of FOB under the ICC INCOTERMS 2000 (hereafter 'the INCOTERMS') and submitted that payment of all duties on export was SAIL's liability and the arbitral tribunal had grossly erred in denying Nordic's claim for reimbursement of detention charges, bank charges and legal expenses.

8.3 Third, he submitted that SAIL had deliberately delayed the loading of goods onto the vessel with the view to economically coerce Nordic into furnishing a L/C for the amount of export duty. He submitted that SAIL had after indicating its willingness to load cargo, prevented berthing of the vessel, thus resulting in heavy demurrages and costs. He argued that subject to adjudication of the disputes, SAIL could have loaded the cargo and afterwards pursued the matter regarding recovery of export duty. Even assuming that such duty was the liability of Nordic, however, SAIL's conduct of delay in loading of the cargo till Nordic furnished the L/C was wholly unjustified and the arbitral tribunal erred in not appreciating the same.

9. Mr Nigam, learned Senior Counsel appearing for SAIL countered the submissions made on behalf of Nordic. He submitted that the terms of the INCOTERMS did not apply where contracts indicated to the contrary. He referred to the INCOTERMS and drew the attention of this Court to the

contents of the chapter captioned "Introduction". He submitted that the purpose of the INCOTERMS is to provide rules for interpretation of terms of general trade and not to replace the contract between the parties; therefore, its application would have to be considered in the context of the Agreement.

10. Next, he submitted that the arbitral tribunal considered the contentions advanced on behalf of Nordic, which mainly related to the interpretation of the Agreement, and had rejected the same. He contended that the question of interpretation of the Agreement was within the jurisdiction of the arbitral tribunal and thus, no interference with the impugned award was called for.

Reasoning and Conclusion

11. The first and foremost question to be addressed is whether the decision of the arbitral tribunal that the laycan period of 07.05.2008 to 15.05.2008 was not accepted by SAIL, is perverse and unsustainable.

12. The arbitral tribunal referred to clause 2.1 of the Shipping Terms and Conditions, which reads as under:-

“Keeping in view the contract delivery period and the quantity of the Materials received at the load port(s), the Seller serve on the Buyer, by Fax/e-mail, the Notice of readiness of Materials for shipment (i.e. Seller's NOR) indicating the laycan during which the vessel should arrive, to nominate suitable vessel for shipment of the Materials.”

13. The arbitral tribunal held that the opening words, "*keeping in view the contract delivery period*" clearly required SAIL, to issue NOR within the contract period; that is, that the shipment be made by April

2008. In terms of the Agreement, SAIL had indicated laycan as 25.04.2008 to 29.04.2008. Nordic has sought to revise the same by its communication dated 15.04.2008. Mr Mehta had referred to this communication and contended that SAIL had agreed to the same. However, a bare perusal of the e-mail dated 17.04.2008 sent by SAIL, in response to Nordic's e-mail dated 15.04.2008 plainly indicates that SAIL had reiterated the laycan period as 25.04.2008 to 29.04.2008 against the laycan period of 07.05.2008 to 15.05.2008, as suggested by Nordic. Although SAIL had stated that the L/C must be extended upto 15.06.2008, it specified the last date of shipment as 30.04.2008. The arbitral tribunal considered the above exchange of e-mails and rejected the contention that SAIL had agreed to the revised laycan, as suggested by Nordic.

14. Mr Mehta contended that SAIL had clearly indicated that the L/C be extended upto 15.06.2008 and such extension was contemplated under clause 4.2 of the Agreement and, this clearly indicated that SAIL had agreed to the revised laycan.

15. In these proceedings, this Court is not called upon to sit as an appellate court in respect of the decision rendered by the arbitral tribunal and thus it is not necessary to re-appreciate the evidence produced. The scope of consideration in these proceedings is limited and this Court's scrutiny of the impugned award is limited to examine whether the arbitral tribunal's view is patently illegal or perverse. Plainly, the view expressed by the arbitral tribunal is a plausible one. The e-mail dated 17.04.2008, which is relied upon by Nordic to contend that SAIL had agreed to the revised laycan, plainly indicates SAIL's observations against the suggestion of laycan from 07.05.2008 to 15.05.2008 as 'C6529--25-29

APRIL 08'. Thus, the decision of the arbitral tribunal that SAIL had not agreed to the laycan as suggested by Nordic, cannot by any stretch, be considered as perverse or unreasonable on the touchstone of the *wednesbury* principle. In this view, no interference with the said decision is called for.

16. The next contention to be considered is whether the decision of the arbitral tribunal that Nordic was liable for payment of export duty is contrary to the Agreement, perverse or otherwise unsustainable.

17. Admittedly, SAIL had invoked clause 9 of the Agreement (the Red Clause) which is set out below:-

“9.0 Red Clause

9.1 In the event of:

(a) The failure of the Buyer to nominate a suitable vessel within the specified laydays, as mentioned in the Seller's Notice of Readiness (NOR)

Or

(b) The vessel nominated by the Buyer and accepted by the Seller failing to arrive at the designated load port within the agreed laycan for reasons other than Force Majeure, as defined under Clause 10 herein below:

Or

(c) The vessel (nominated by the Buyer and accepted by the Seller) being found unsuitable after its arrival at the

designated loadport, as certified by independent marine surveyor(s),

the seller shall be entitled to negotiate their Commercial Invoice against the L/C opened by the Buyer and realise 100% of the value of the materials ready for shipment on the basis of certificate issued by the Pre-shipment Inspection agency certifying that the contracted materials and quantity are ready for shipment and also that the materials are in good condition.

Remarks such as "materials partly rust stained/rusty edges/wet before shipment/rust stained/ some rusty edges' and/ or "stored in open area prior to loading" and/or "unprotected cargo" appearing in the Pre-shipment Inspection Certificate are acceptable.

- 9.2 The title having already passed on to the buyer, the materials will thereafter be held in custody by the seller at the risk and responsibility of the buyer at the storage yard of the seller. The materials will be covered by tarpaulin at the buyer's request and cost at the storage yard of the seller.

The cost of holding materials shall be as follows till the date of acceptance of vessel's NOR, when the vessel finally calls at the loadport :

US \$ PMT

- | | | |
|-----|--|-----|
| i] | For the first 15 days from the date of expiry of NOR | Nil |
| ii] | For any subsequent week(s) (7 days) or part thereof | 1 |

Buyer to ensure that payment towards Ground Rent and/or Tarpaulin cost is remitted and remittance Instruction duly forwarded by SWIFT message, before actual shipment, against the debit invoice.

9.3 The Buyer shall however nominate [another] suitable vessel within reasonable time from the date of realisation of payment, as mentioned above, for taking delivery of the cargo and subject to such vessel arriving at the designated loadport, the seller shall at his cost deliver the materials FOB [SLSD] in terms of Contract.

9.4 The Letter of Credit established by the buyer in favour of the seller shall make specific and unconditional provision to the above [9.1 to 9.3] effect.

L/C to be opened with First Class International Bank having Correspondent relationship with State Bank of India, Name of the Banks can be obtained by the buyer from SAIL.”

18. In terms of clause 9.1(a) of the Agreement, the failure of Nordic to nominate a suitable vessel within the specified laydays, as mentioned in SAIL's NOR would entitle SAIL to invoke the Red Clause and negotiate the L/C opened by Nordic. Since Nordic did not nominate the vessel during the laycan period indicated by SAIL in its NOR (25.04.2008 to 29.04.2008), SAIL's action to negotiate the L/C cannot be faulted.

19. Concededly, with the Red Clause being invoked, the title in the goods in question transferred from SAIL to Nordic. In terms of clause 9.2 of the Agreement, the attendant risk and responsibility for the materials also stood transferred to Nordic. During the course of arguments, Mr

Mehta had readily conceded that in the event any damage was caused to the goods after SAIL had invoked the Red Clause, the same would have to be borne by Nordic and not SAIL. Thus, there is no dispute that the responsibility for risks in relation to the goods in question rested with Nordic. The only question to be addressed is whether despite the transfer of title, responsibility and risks in relation to the goods to Nordic, the responsibility to pay the export duties levied for the first time, after the title in the goods had passed, would have to be borne by SAIL?

20. There is no dispute that it was SAIL's liability to pay custom duties that were in vogue prior to the invocation of the Red Clause as SAIL was responsible for bearing all duties. However, it was SAIL's case that it was not responsible for imposition of any cost resulting from any subsequent supervening event, including levy of export duties that were imposed after SAIL had invoked the Red clause.

21. The arbitral tribunal considered the issue and rejected Nordic's contention that notwithstanding the transfer of risk and responsibility relating to the goods, the liability to pay the export duty imposed for the first time after Nordic had acquired the title of the goods, would continue to be that of SAIL. The arbitral tribunal held as under:-

“The provision of clause 9.2 of the Red clause makes it amply clear that the title of the goods passes on the buyer on negotiating the documents and realizing 100% payment and thereafter the goods are to be held in the custody of the seller at the **risk and responsibility** of the buyer. M/s. SAIL as such after having realized 100% value of the goods on 7/5/2008 was holding the goods at their stockyard entirely at the risk of the buyer and any subsequent development effecting the cost structure of the contract was, accordingly, to the account of the buyer. In

the present case, the export duty imposed by GOI on 10/5/2008 was therefore liable to be borne by the claimant.”

22. This Court finds no infirmity with the aforesaid view and in any event the said decision cannot be stated to be perverse or patently illegal. The contention that the said view is contrary to the plain language of the Agreement is also unpersuasive.

23. Mr Mehta had referred to clause 9.3 of the Agreement and stated that in terms of the said clause, SAIL was obliged to deliver the materials FOB. He had further submitted that in terms of the INCOTERMS, in a FOB contract, the liability to pay all costs and custom duties are that of the seller. He relied on the definition of 'FOB' as provided under the INCOTERMS 2000 which reads as under:-

“FOB

Free on board (... named port of shipment)

"Free on Board" means that the seller delivers when the goods pass the ship's rail at the named port of shipment. This means that the buyer has to bear all costs and risks of loss of or damage to the goods from that point. The FOB terms requires the seller to clear the goods for export. This term can be used only for sea or inland waterway transport. If the parties do not intend to deliver the goods across the ship's rail, the FCA term should be used.”

24. He then referred to clause A6 relating to FOB terms (as given in the INCOTERMS) and submitted that all costs relating to the goods were payable by the seller. The relevant clauses: clauses A6 and B6 are set out below:-

“A6 Division of costs

The seller must, subject to the provisions of B6, pay

- all costs relating to the goods until such time as they have passed the ship's rail at the named port of shipment; and
- where applicable, the costs of customs formalities necessary for export as well as all duties, taxes and other charges payable upon export.

B6 Division of costs

The buyer must pay

- all costs relating to the goods from the time they have passed the ship's rail at the named port of shipment; and
- any additional costs incurred, either because the vessel nominated by him fails to arrive on time or is unable to take the goods, or closes for cargo earlier than the time notified in accordance with B7, or because the buyer has failed to give appropriate notice in accordance with B7, provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods; and
- where applicable, all duties, taxes and other charges as well as the costs of carrying out customs formalities payable upon import of the goods and for their transit through any country.”

25. Admittedly, SAIL was liable to pay customs duty relating to the goods till such time as they passed the ship's rail. However, the question is not of customs duty, which were otherwise in contemplation of the parties, but the additional export duty levied for the first time after the title of the

goods passed to Nordic and after SAIL had realised the entire consideration. The export duty of 15% was imposed by virtue of a notification issued by the Government of India on 10.05.2008 and, admittedly, the process of clearing the goods had commenced on 08.05.2006, after SAIL had invoked the Red Clause and received the consideration for the same. The arbitral tribunal thus considered that such duties which altered the cost structure after the title of the goods had passed were payable by Nordic. In effect, the arbitral tribunal held that such duties formed a part of additional costs incurred after the title and risk had passed to Nordic and which would also include additional costs incurred on account of any supervening event. The expression 'FOB' as used in clause 9.3 of the Agreement, must be understood in the context of the Red Clause.

26. The FOB shipment as explained under INCOTERMS is to be applied under normal circumstances and not in cases where any breach of contract is alleged. In the introduction to INCOTERMS, it is expressly stated as under:-

“... Although Incoterms are extremely important for the implementation of the contract of sale, a great number of problems which may occur in such a contract are not dealt with at all, like transfer of ownership and other property rights, breaches of contract and the consequences following from such breaches as well as exemptions from liability in certain situations. It should be stressed that Incoterms are not intended to replace such contract terms that are needed for a complete contract of sale either by the incorporation of standard terms or by individually negotiated terms.

Generally, Incoterms do not deal with the consequences of breach of contract and any exemptions from liability

owing to various impediments. These questions must be resolved by other stipulations in the contract of sale and the applicable law.”

27. It stands to reason that in the context of the Agreement between the parties, the expression 'FOB' as used in clause 9.3 cannot be understood in the manner as canvassed on behalf of Nordic. The definition of FOB as provided under the INCOTERMS and as quoted above, clearly indicates that the risk of loss or damages to the goods after the goods have passed the ship's rails, are with the buyer. Thus implying that risk prior to that point are with the seller. However, concededly, the risk of loss or damage to the goods would stand transferred to Nordic once SAIL had invoked the Red Clause. Thus, in the context of the Red Clause, the expression 'FOB' would only imply that, notwithstanding the invocation of the Red Clause, SAIL would be liable to deliver the goods onto the vessel but it does not mean that the risk of loss or damage remained with SAIL even after the title of the goods had passed to Nordic. It also stands to reason that payment for additional costs resulting from imposition of additional levy after the transfer of title of goods would also be Nordic's liability.

28. In view of the above, this Court is unable to accept that the decision of the arbitral tribunal suffers from any patent illegality or is perverse.

29. Even if it is accepted that the decision of the arbitral tribunal is erroneous, it is apparent that such error is within the exercise of its jurisdiction and does not invites any interference in these proceedings. (See: *Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49* and *Steel Authority of India Ltd. v. Gupta Brother Steel Tubes Ltd.: (2009) 10 SCC 63*).

30. The dispute between the parties relates to interpretation of the Agreement and it is well settled that the question as to interpretation of a contract between the parties is clearly within the jurisdiction of the arbitral tribunal. In *Mcdermott International Inc. v. Burn Standard Co. Ltd and Others.*: (2006) 11 SCC 181, the Supreme Court held as under:-

“112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See *Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission*: AIR 2003 SC 4519 and *D.D. Sharma v. Union of India* : (2004) 5 SCC 325].

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award.”

The aforesaid view was reiterated by the Supreme Court in *Sumitomo Heavy Industries Limited v. Oil and Natural Gas Corporation Limited*: (2010) 11 SCC 296 and *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran*: (2012) 5 SCC 306.

31. Although the decisions in *Steel Authority of India Ltd.* (*supra*) and *Sumitomo Heavy Industries Limited* (*supra*) were rendered in the context

of the Arbitration Act, 1940, the view expressed therein continues to be applicable as the scope of interference under the Act has not been widened but has only been narrowed down considerably.

32. The contention that the arbitral tribunal had erred in not accepting the claims for expenses and costs incurred by Nordic on account of SAIL's delay in loading the goods, is largely premised on the basis that Nordic was not liable to pay the export duties in question and thus, was rejected by the arbitral tribunal.

33. It was contended that even if Nordic was liable to pay the duties, SAIL ought to have paid the same and loaded the goods onto the vessel and, thereafter pursue Nordic for recovery of the additional duties paid by SAIL; since SAIL failed to do so, Nordic had to suffer additional costs on account of the vessel being on standby and SAIL is, therefore, liable for damages. This contention is unpersuasive. It was equally open for Nordic to immediately open the L/C for the additional duty imposed and make its claim for recovery against SAIL thereafter, as it has now done. If Nordic had done so, it would have mitigated its costs.

34. The parties had transacted for sale and purchase of goods on the understanding that delivery would be made against L/C and in the circumstances, the insistence on the part of SAIL to not to deliver goods without receipt of a L/C is understandable.

35. In any view of the matter, this Court cannot accept that any interference with the impugned award is called for on account of the arbitral tribunal rejecting Nordic's claim for cost and expenses arising from delay in loading of goods.

36. In view of the above, the present petition is dismissed. The parties are left to bear their own costs.

JULY 17, 2017
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VIBHU BAKHRU, J

