

(2015) 05 DEL CK 0250

In the Delhi High Court

Case No : O.M.P. 291/2015 & IA 9556 of 2015

Sunagro Seeds Pvt. Ltd.

APPELLANT

Vs

National Seeds Corporation Ltd.

RESPONDENT

Date of Decision : 06-05-2015

Acts Referred:

Contract Act, 1872 — Section 73

Citation : (2015) 05 DEL CK 0250

Hon'ble Judges : V. Kameswar Rao, J

Bench : Single Bench

Advocate : Ratnakar Maltiyar, for the Appellant

Final Decision : Dismissed

Judgement

V. Kameswar Rao, J.

IA 9556/2015

Exemption allowed, subject to all just exceptions. Application stands disposed of.

O.M.P. 291/2015

1. The challenge in this petition is to the award dated February 16, 2015 passed by the Ld. Sole Arbitrator on issue no. 12 whereby the Ld. Arbitrator has allowed the counter claim of the respondent granting the respondent against the petitioner an amount of Rs.1,38,58, 650/-. The counter claim of the respondent was in the nature of damages sought against the petitioner for non- lifting of onion seeds.

2. The undisputed facts are that a total quantity of 1075 quintals of onion seeds were booked/indented by the petitioner. The details of the booked/indented seeds are as under;

3. It is an undisputed fact that the onion seeds booked between the period May 9, 2011 to September 8, 2011 were to be governed as per the terms and

conditions provided in the Seed Dealership Agreement dated July 23, 2007. Two relevant clauses in this agreement are clause 20 and 21. The same are reproduced as under;

20. If the Dealer fails to either lift the quantity allotted within 15 days of NSC's intimation or to suggest a schedule of supply as envisaged in clause 18. NSC may in its discretion cancel the allotment and dispose off the relevant quantity of seed in any other manner and treat such lapses on the part of the Dealer as shortfall in lifting the committed quantities, for which the Dealer is liable to pay to NSC liquidated damage as per clause 21.

21. The Dealer would be free to restrict the ultimate purchase of seed to the extend of only 60 per cent of the quantity originally indented or the full quantity allotted by NSC whichever is less. If the Dealer fails to lift/accept the quantity allotted by NSC or 60 per cent of the original indent whichever is less the Dealer shall pay to NSC liquidated damage at the rate prescribed in the Schedule.

4. It may be noted here, as per clause 3.3 at page 138 of the documents, the liquidated damages payable by the dealer to NSC is 3% of the cost of the seed not accepted lifted at the general sale price applicable at the time of supply.

5. Out of the total 1075 quintals booked/indented onion seeds only 394 quintals of onion seeds were lifted by the petitioner. In other words, 681 quintals of seeds remained un-lifted. The petitioner never communicated to the respondent that it will be lifting only 60% of the booked/indented seeds an option which was available to it as per clause 21 of the Sale Dealership Agreement dated July 23, 2007.

6. The Learned Arbitrator in para 15.13.2 had posed for his determination the following points;

i) Whether terms and conditions applicable on the booking/indenting of the Onion seed leading to non-lifting a portion thereof will be covered by the Seed Dealership Agreement of 23.07.2007 or subsequent agreement executed on 14.2.2012 (retrospectively w.e.f. 01.10.2012).

ii) Date on which breach of agreement occurred.

iii) Interpretation of Clause 20 and 21 of the Agreement dated 3.07.2007 and Clause 3.3. of the schedule attached to the agreement.

iv) Quantity of the seed which remained un-lifted for which Claimant is liable to pay liquidated damages.

v) Quantum of liquidated damages.

vi) Date on which Claimant has communicated its inability to lift the booked stock.

vii) Whether the Claimant has restricted the ultimate purchase to 60% of the quantity originally indented, if yes when and how?

7. The Learned Arbitrator has found that on July 8, 2011, respondent has informed the petitioner that out of 475 quintals of onion seeds booked/indented in May 2011 only 194 quintals have been lifted. He also noted that respondent's letter dated July 8, 2011 refer to schedule of lifting agreed by the petitioner for the balance un-lifted quantity in July, 2011. The petitioner agreed to lift the balance quantity every week vide its letter dated July 21, 2011. The Arbitrator noted, as per clause 20 of the Seed Dealership Agreement, dealer was required to lift the quantity allotted within 15 days of NSCs intimation. The petitioner failed to adhere to the timelines which resulted in the breach of agreement.

8. Learned Arbitrator also noted that the petitioner failed to lift the seeds as per the agreed schedule vide respondent's letter dated July 8, 2011 and the petitioner's letter dated July 21, 2011. The respondent's letter dated July 25, 2011 reminds the petitioner to fulfil its obligation to lift the balanced onion seeds.

9. The Learned Arbitrator also noted that another lot of 600 quintals was booked/indented on August, 30, 2011 and September 8, 2011. A schedule of lifting of these 600 quintals seeds was from October 8, 2011 to November 20, 2011 proposed by the petitioner vide its letter dated September 8, 2011. However, seeds were not lifted by the petitioner as per its own commitment as noted by the Learned Arbitrator from the respondent's letter dated January 3, 2012. The Learned Arbitrator was of the view that there was again a breach of agreement/contract. He noted that the petitioner had only on January 17, 2012 communicated to the respondent its inability to lift the un-lifted booked/indented onion seeds due to bad market condition. He noted that the petitioner again vide its letter dated April 27, 2012 retracted from its earlier stated position of January 17, 2012 of its inability to lift the balance quantity of un- lifted onion seeds and commenced fresh negotiations vide its letter dated April 27, 2012 for reducing the dealer price to Rs.150/- per kg from original price of RS.300/-.

10. Even, thereafter, the respondent had called upon the petitioner vide its communications dated April 19, 2012, April 25, 2012, May 4, 2012 and May 9, 2012 to lift the balance quantity of booked/indented quantity failing which the petitioner would be responsible for the loss suffered by it. The petitioner again in response to all these communications, vide its letter dated May 11, 2012 offered to lift 250 quintals of onion seeds. This offer was accepted by the respondent. Further, the petitioner vide its letter dated June 29, 2012 offered to lift 400 quintals. The respondent responded to this offer by stating that the petitioner has failed to meet its commitment to lift the booked/indented seeds in spite of the repeated reminders and as such, now they had decided to invite tenders to liquidate the unsold stocks indented/booked by the petitioner. The Learned Arbitrator was of the following view;

(a) That Claimant has repeatedly failed to meet its commitment to lift the booked/indented onion seed as required under Clause 20 of the Seed Dealership Agreement.

(b) That the loss suffered by the Respondent is attributable to the continuous unfulfilled promises and commitments made by the Claimant from June/July 2011 onwards and extended till as late as April/May, 2012. The facts on record clearly establish that the Claimant has indulged in unfair trade practice of keeping the Respondents on tenter-hook by continuously renewing the schedule and not fulfilling commitments repeatedly made. The Respondent has made all efforts to accommodate the Claimant but misleading behavior of the Claimant led to loss suffered by the Respondent.

(c) That the Tribunal is of the opinion that claimant has failed to exercise option of restricting the ultimate purchase of onion seed to the extent of only 60% of the quantity originally indented and as such not entitled to the benefit of clause 21 of the Agreement dated 23.7.2007 and or Clause 3.3 of the Schedule thereof. Tribunal is of the opinion that overt and covert actions of the Claimant give no notice to the Respondent about his intention of restricting lifting of indented/booked seeds. In other words restriction of indented/booked seed quantity cannot be inferred from misleading actions and unfair trade practices of the Claimant and as such it is not legally tenable to allow the benefits of clause 21 of the Agreement read with Clause 3.3. of the Schedule to the Claimant.

(d) That the liability of the Claimant will be to pay liquidated damages on entire un-lifted 681 qtls. of seed.

11. In view of above, the liability of the Claimant was determined by the learned Arbitrator as under:

12. The only submission made by Learned Counsel for the petitioner is that even if the petitioner has failed to lift the onion seeds, still the liability in terms of clause 20 and 21 read with clause 3.3 of the schedule, as reproduced above, cannot be over and above Rs.1,65,600/-. He states, the liability having been prescribed in the contract, Learned Arbitrator having gone beyond the contract and determine the liability on a principles underlying in Section 73 of the Contract Act is totally untenable. He relied upon the judgments of this Court reported as 2012 (2) RAJ 390 Delhi Vishal Engineers and Builders Vs. Indian Oil Corporation Ltd.; 2007 (5) RAJ 608 (Delhi) to contend that the arbitrator being the creature of a contract could not have gone beyond the contract. He also stated that the respondent was required to prove the loss suffered by it in consequence of breach of contract committed by the petitioner.

13. Having considered the submissions made by Learned Counsel for the petitioner, suffice to state, meaningfully read the conclusion of the Learned Arbitrator, was that the petitioner having not expressed its intention to lift only 60% of the quantity at the outset and even after prescribing the schedule, failed to lift the onion seeds which resulted in a loss to the respondent, need to be compensated by the petitioner. Insofar as the submission that in view of the position of the contract in terms of clause 20 and 21, the liability could not have exceeded beyond Rs.1,65,600/- is concerned, suffice to state, the clause 20 and

21 would come into play only when the dealer fails to lift the quantity allotted within 15 days of the respondent's intimation or fails to suggest the schedule of supply as envisaged in clause 18 and not where the party that is the petitioner had repeatedly failed to meet its commitment/schedule to lift the booked/indented onion seeds. In fact, it was concluded by the Learned Arbitrator that the petitioner had continuously unfulfilled promises and commitments made by it from June/July 2011 onwards till April/May, 2012. He was of the opinion that the petitioner was not entitled to the benefit of clause 21 or clause 3.3 of the schedule thereof. He worked out the liability in the manner already reflected above. The view taken by the Learned Arbitrator is a plausible view. Insofar as the judgments relied upon by Learned counsel for the petitioner are concerned, the proposition of law laid down in those judgments are well settled. However, the same are not applicable on the facts of the case. I do not see any merit in the petition.

14. The petition is accordingly dismissed.