

[2019] 13 S.C.R. 1162

A M/S VIJAY TRADING AND TRANSPORT COMPANY

v.

CENTRAL WAREHOUSING CORPORATION

(Civil Appeal No.655 of 2016)

B NOVEMBER 07, 2019

**[R. BANUMATHI, A.S. BOPANNA AND
HRISHIKESH ROY, JJ.]**

- Arbitration and Conciliation Act, 1996: s.34 – Appellant contractor entered into an agreement with respondent corporation for carrying out work of Handling and Transportation at Inland Clearance Depot – Respondent corporation terminated the contract due to appellant's non-performance of contractual obligations and forfeited the security deposit and also fork lift and hand trolleys – Arbitration award in favour of respondent corporation – Held:*
- C *Failure to transport the container to the Port at Navi Mumbai resulted in missing of the export schedule – Taking into consideration the failure of the appellant to deliver the container at the Port at Navi Mumbai and the time taken in recovery of the container and the expenditure incurred by the respondent-Corporation in particular, furnishing of bank guarantee of Rs.10 lakhs, the detention of the equipments cannot be said to be arbitrary or beyond the terms of the agreement – Arbitrator and courts below recorded the concurrent findings that the appellant Contractor failed in carrying out the work as per the terms and conditions of the contract – Arbitrator rightly allowed the detention and forfeiture of the equipments of the contractor – Similarly, counter claim for the damages for the alleged detention and use of hand trolleys was rightly rejected – No reason warranting interference with the award passed by the Arbitrator – Contract – Termination of – Export-Import.*
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G Dismissing the appeal, the Court

HELD: 1. The Export loaded Container was handed over by the Manager, ICD, Varanasi to the appellant on 06.11.2001 for delivery of the container at JNP, Navi Mumbai; but the

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appellant failed to transport the container to the destination port and only with the intervention of the Court, the container was located and recovered at Ghaziabad and received back at ICD, Varanasi on 23.05.2003. But by then, the said container already missed the export schedule. When the said Export loaded Container was entrusted to the appellant, the appellant ought to have transported the container to the port of destination with due diligence. The respondent-Corporation was justified the forfeiture of the security deposit on two counts:- firstly, in view of the heavy claim raised by the Exporter for which they have filed a claim of Rs.40 lakhs before the Consumer Forum and secondly, on account of bank guarantee in the sum of Rs.10 lakhs furnished by the respondent-Corporation for release of the container. The Arbitrator and courts below recorded the concurrent findings by holding the termination of the contract legal and levy of forfeiture of the security amount and the levy of fork lift is justified. [Para 11][1168-C-F] A

2. The container handed over to the appellant was detained by the third party who filed a Civil Suit against the appellant stating that his dues had not been cleared by the appellant. The respondent-Corporation had filed an application in the said suit for release of the container which was rejected by the Civil Court, Ghaziabad on 28.11.2002 and the respondent had to file a Civil Revision Petition before the High Court in which a direction was issued to the trial court to dispose of the application afresh. It was thereafter, the trial court released the container on furnishing a bank guarantee of Rs.10 lakhs by the respondent-Corporation. The trial court released the container only on furnishing of bank guarantee of Rs.10 lakhs. It is stated that the said civil suit is still pending in the Ghaziabad Court and is at the stage of recording evidence. As held by the Arbitrator, the appellant was given a contract to assist in smooth running of international business of import and export and to have the time management on top priority. Failure to transport the container to the Port at Navi Mumbai resulted in missing of the export schedule. Taking into consideration the failure of the appellant to deliver the container at the Port at Navi Mumbai and the time

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- A taken in recovery of the container and the expenditure incurred by the respondent-Corporation in particular, furnishing of bank guarantee of Rs. 10 lakhs, the detention of the equipments cannot be said to be arbitrary or beyond the terms of the agreement. [Paras 12, 13][1168-G-H; 1169-A, D-E]
- B 3. Even before filing of the objection petition under Section 34 of the Act, the appellant received the full payment due and payable to him as per the arbitral award. According to the respondent-Corporation, the appellant has not disclosed the receipt of the money at the time of filing the petition under Section 34 of the Act. The Arbitrator and the Courts below have recorded the concurrent findings that the appellant Contractor has failed in carrying out the work as per the terms and conditions of the contract and the Arbitrator has rightly allowed the detention and forfeiture of the equipments of the contractor and disallowed the counter claim No.4 of the appellant. Similarly, counter claim No.5 which was for the damages for the alleged detention and use of hand trolleys was rejected and thus, the counter claim Nos.4 and 5 were rightly disallowed by the Arbitrator. [Paras 14, 15][1169-F-H; 1170-A-B]
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E CIVIL APPELLATE JURISDICTION: Civil Appeal No. 655 of 2016.

From the Judgment and Order dated 19.07.2010 of the High Court of Delhi at New Delhi in CM No. FAO (OS) 435/2010.

F Aniket Jain, Arvind Kumar Gupta, Abinash Kumar Mishra, Advs. for the Appellant.

G K.K. Tyagi, Iftekhar A., P. Narasimhan, Advs. for the Respondent.

H The Judgment of the Court was delivered by

R. BANUMATHI, J.

- G 1. This appeal arises out of the impugned judgment dated 19.07.2010 passed by the High Court of Delhi in FAO(OS) No.435 of 2010 in and by which the High Court dismissed the appeal filed by the appellant thereby upholding the judgment of the learned Single Judge thereby affirming the dismissal of the objections filed under Section 34 of the Arbitration and Conciliation Act, 1996 against the arbitral award dated 18.03.2005.

2. Brief facts which led to filing of this appeal are as under:- A

An agreement dated 30.08.2001 was entered into between the respondent-Central Warehousing Corporation and the appellant for a period of two years from 28.08.2001 to 27.08.2003 for carrying out the work of Handling and Transportation at Inland Clearance Depot (ICD), Varanasi. The respondent-Corporation terminated the contract on 21.02.2002 under Clause X(A) and X(B) of the agreement due to appellant's poor performance as Handling and Transportation Contractor and deterioration of the situation at the Inland Clearance Depot. The security deposit furnished by the appellant upto the date of termination was also forfeited. C

3. Dispute arose between the parties which led to the appointment of an arbitrator vide reference order dated 23.09.2002. The respondent-Corporation claimed a sum of Rs.98,06,000/- with interest @ 18% thereon. It was contended by the respondent-Corporation that the performance of the appellant was not found satisfactory particularly, in regard to Export loaded Container No.TRIU-4991702x40', which was illegally detained by the appellant and the appellant failed to transport the container to the Port at Navi Mumbai. The said container was handed over to the appellant on 06.11.2001 from the Inland Clearance Depot, Varanasi and did not reach its destination, JNP, Navi Mumbai within the stipulated time period i.e. upto 16.11.2001. When the exporter, M/s Bhola Nath Industries pressed for early recovery of the container and also raised claims towards compensation for loss of the container, the respondent-Corporation started inquiries and issued several notices to the appellant for recovery of the container and non-performance of contractual obligations. Only after intervention of the Courts, the container was located and recovered at Ghaziabad and received back at ICD, Varanasi on 23.05.2003. But by then, the said container missed the export schedule. The exporter initially declared that the cargo stuffed in the container was of no use to him; but subsequently, reprocessed the same to make it usable. E

4. The appellant filed counter claims under various heads claiming Rs.52,00,000/- with interest @ 18% thereon. It was submitted by the appellant that the container in question was illegally detained by M/s ODC Roadways to whom the container was entrusted for transportation to Port, Navi Mumbai. According to the appellant, it had taken all possible steps including approaching the High Court for speedy H

- A recovery of the container and in spite of all the efforts taken by the appellant, respondent-Corporation terminated the contract illegally.

5. Taking into consideration the claim and grounds for termination and also the reply filed by the appellant, the Arbitrator vide award dated 18.03.2005 upheld the termination of the contract as valid and decided

- B certain claims of the respondent in its favour. Certain counter claims of the appellant were also allowed by the learned Arbitrator. Other claims including counter claim No.3 (claim of Rs.4,30,284/- towards refund of security deposit) and counter claim No.4 (claim of Rs.15,75,484/- including interest of Rs.4,64,815/- towards illegal detention of the fork lift) were decided against the appellant. It was held by the Arbitrator that the termination of the contract is legal and justified and in view thereof, the respondent had the right to forfeit the security deposit. As to the claim of the appellant towards alleged detention of the fork lift and hand trolleys, the Arbitrator held that the detention of the equipments is right and justified. The Arbitrator held that it is seen from Clause 5(g) of the tender conditions of the contract that the respondent has the right to demand the balance due when sufficient sum is not available to cover the full amount recoverable from security deposit and other dues. In view of the heavy claim amount of M/s Bhola Nath Industries and Customs/Excise Department and others, the learned Arbitrator concluded E that there is no illegality in the action on the part of the claimant in detaining the equipments like fork lift and hand trolleys as security.

6. The appellant filed objections under Section 34 of the Arbitration and Conciliation Act contending that the order of termination whereby the security deposit was also forfeited does not record any reason for

- F forfeiture of the security deposit. Similarly, no reason has been given by the Arbitrator for rejecting the counter claim No.3. In support of its counter claim No.4, the appellant averred that for successful executing of the contract, it had employed one fork lift and four hand trolleys at Inland Clearance Depot, Varanasi, which were owned by them and the same have been illegally detained by the respondent. On behalf of the respondent-Corporation, it was contended that the forfeiture of the security deposit was justified on the following reasons – firstly in view of the heavy claim raised by M/s Bhola Nath Industries before the Consumer Forum, Lucknow and secondly, on account of bank guarantee to sum of rupees ten lakhs furnished by the respondent for release of the

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container. The respondent submitted that a claim of rupees forty lakhs was lodged by M/s Bhola Nath Industries Ltd. Accordingly, it was decided not only to withhold the payment due to the appellant, but also to forfeit all the equipments in use.

7. Considering the objections of the appellant and the claim of the respondent-Corporation, the learned Single Judge of the High Court found no infirmity in the reason recorded by the learned Arbitrator while rejecting counter claim No.4. Counter claim No.3 was allowed to the extent that in case the bank guarantee furnished by the respondent-Corporation is discharged, the appellant would be entitled to refund the security deposit in the sum of Rs.4,30,284/- . The appeal filed by the appellant under Section 37 of the Arbitration and Conciliation Act was dismissed vide the impugned judgment affirming the order of the learned Single Judge.

8. Before the Supreme Court, the appellant has only pressed counter claim Nos.3 and 4. Mr. Aniket Jain, learned counsel for the appellant has contended that the courts below erred in not appreciating the fact that the appellant exercised due diligence and has taken efforts for the recovery of illegally detained container including lodging of FIR and initiating legal proceedings. It was submitted that the courts below failed to appreciate that the conditions imposed regarding the refund of security deposit is beyond the terms of the agreement between the parties as well as the terms of reference made to the arbitrator and the order of the learned Single Judge to replace the bank guarantee is untenable and prayed for allowing of the appeal.

9. Insofar as the forfeiture of security deposit is concerned, Mr. K.K. Tyagi, learned counsel for the respondent-Corporation has submitted that M/s Bhola Nath Industries, whose containers remained missing for a long time on account of the conduct of the appellant had lodged a claim against the respondent for a sum of rupees forty lakhs and though the same has been dismissed for non-prosecution, the same may be restored at any time at the instance of the complainant M/s Bhola Nath Industries Ltd. It was therefore, contended that the forfeiture of the security amount and fork lift cannot be said to be arbitrary or unjustified and in accordance with the terms of the contract. Learned counsel further submitted that the respondent Corporation had to furnish a bank guarantee of rupees ten lakhs to get the container released in

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- A view of the suit filed by the third party-M/s ODC against the appellant for retaining the container till their dues are paid by the appellant and the case is still pending and therefore, the learned Arbitrator has rightly upheld the act of the respondent-Corporation in forfeiting the security deposit.

10. We have carefully considered the contentions of both the parties
B and perused the impugned judgment and the award passed by the learned Arbitrator and the order of the learned Single Judge and other materials on record.

11. The Export loaded Container No.TRIU-4991702x40' was handed over by the Manager, ICD, Varanasi to the appellant on 06.11.2001
C for delivery of the container at JNP, Navi Mumbai; but the appellant had failed to transport the container to the destination port and only with the intervention of the Court, the container was located and recovered at Ghaziabad and received back at ICD, Varanasi on 23.05.2003. But by then, the said container already missed the export schedule. When the
D Export loaded Container No.TRIU-4991702x40' was entrusted to the appellant, the appellant ought to have transported the container to the port of destination with due diligence. The respondent- Corporation has justified the forfeiture of the security deposit on two counts:- firstly, in view of the heavy claim raised by M/s Bhola Nath Industries Ltd. for which they have filed a claim of rupees forty lakhs before the Consumer
E Forum, Lucknow and secondly, on account of bank guarantee in the sum of rupees ten lakhs furnished by the respondent-Corporation for release of the container. The learned Arbitrator and the Courts below have recorded the concurrent findings by holding the termination of the contract legal and levy of forfeiture of the security amount of Rs.4,30,284/- and the levy of fork lift is justified.

12. The container handed over to the appellant was detained by the third party-M/s ODC Roadways represented by Sh. Prabhu Nath Sing, who filed a Civil Suit No.1127 of 2001 against the appellant stating that his dues had not been cleared by the appellant. The respondent-G Corporation had filed an application in the said suit for release of the container which was rejected by the Civil Court, Ghaziabad on 28.11.2002 and the respondent had to file a Civil Revision Petition No.180 of 2002 before the High Court of Allahabad in which a direction was issued to the trial court to dispose of the application afresh. It was thereafter, the trial court released the container on furnishing a bank guarantee of rupees H

ten lakhs by the respondent-Corporation. The trial court released the container only on furnishing of bank guarantee of rupees ten lakhs. It is stated that the said civil suit is still pending in the Ghaziabad Court and is at the stage of recording evidence.

13. Insofar as the allegation of detention of fork lift and hand trolleys, the respondent-Corporation has stated that after finalisation of the arbitration case between the respondent-Corporation and the appellant, all the dues as per the order of the Arbitrator has been paid to the contractor; but the appellant did not approach the respondent-Corporation for lifting their equipments and as such the same were lying at ICD, Bhadohi occupying valuable space. According to the respondent-Corporation, for the space occupied by the equipments, the total rent for the period up to 31.05.2007 works out to Rs.41,746/- and Rs.89,049/- for fork lift and hand trolleys respectively. Be that as it may, according to the respondent-Corporation, the detention of the equipments were made as per the terms of the agreement at Clause 5(g) and the same was accepted by the arbitrator. As held by the learned Arbitrator, the appellant was given a contract to assist in smooth running of international business of import and export and to have the time management on top priority. Failure to transport the container to the Port at Navi Mumbai resulted in missing of the export schedule. Taking into consideration the failure of the appellant to deliver the container at the Port at Navi Mumbai and the time taken in recovery of the container and the expenditure incurred by the respondent-Corporation in particular, furnishing of bank guarantee of rupees ten lakhs, the detention of the equipments cannot be said to be arbitrary or beyond the terms of the agreement.

14. It is pertinent to note that the appellant has received an amount of Rs.11,06,598/- as the amount allowed by the Arbitrator vide award dated 18.03.2005 by DD No.079915 dated 03.09.2005. Thus, even before filing of the objection petition under Section 34 of the Act, the appellant has received the full payment due and payable to him as per the arbitral award dated 18.03.2005. According to the respondent-Corporation, the appellant has not disclosed the receipt of the money at the time of filing the petition under Section 34 of the Act.

15. The learned Arbitrator and the Courts below have recorded the concurrent findings that the appellant Contractor has failed in carrying out the work as per the terms and conditions of the contract and the

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- A learned Arbitrator has rightly allowed the detention and forfeiture of the equipments of the contractor and disallowed the counter claim No.4 of the appellant. Similarly, the counter claim No.5 which was for the damages for the alleged detention and use of hand trolleys has been rejected and thus, the counter claim Nos.4 and 5 have been rightly disallowed by the
- B learned Arbitrator. We do not find any reason warranting interference with the award passed by the Arbitrator and the impugned judgment and this appeal is liable to be dismissed.

16. In the result, the impugned judgment dated 19.07.2010 passed by the High Court in FAO(OS) No.435 of 2010 is affirmed and this C appeal is dismissed. No costs.

Devika Gujral

Appeal dismissed.