Trimex International Fze, Dubai vs Jayswals Neco Ltd. on 21 May, 2014

Equivalent citations: AIR 2015 (NOC) 168 (DEL.), 2014 (5) ADR 491, (2014) 2 ARBILR 547, (2014) 210 DLT 566

Author: Manmohan Singh

Bench: Manmohan Singh

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*          IN THE HIGH COURT OF DELHI AT NEW DELHI

%                                      Judgment pronounced on: May 21, 2014

+                              O.M.P. 348/2008

           TRIMEX INTERNATIONAL FZE, DUBAI           ..... Petitioner
                        Through  Mr.Kailash Vasdev, Sr. Adv. with
                                 Mr.Devadatt S. Kamat, Ms.Saniya
                                 Hussain and Ms.Ekta Mehta, Advs.

                               versus

           JAYSWALS NECO LTD                                  ..... Respondent
                       Through               Mr.Girish Chandra, Adv.

CORAM:
   HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.
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1. By way of present petition under Section 34 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") the petitioner has assailed award dated 14th March, 2008 passed by the Learned Sole Arbitrator praying for setting aside of the arbitral award as per the grounds stated in the petition.

2. Brief facts of the case are as under :-

> (i) The petitioner is a company registered and based in Dubai and is mainly in the business of trading in minerals. The respondent is an end user of metallurgical coke and procures/imports the coke from different sources in the world. The respondent desired the petitioner to procure metallurgical coke of Chinese origin and supply the same for its use in India which was crystallized into a contract document dated 4th October 2000.

(ii) It is the case of the petitioner that the respondent had filed a claim for levying penalty against the petitioner under the contract dated 4th October 2000 for alleged under size coke. The petitioner had in defence contended that it was not the seller of the goods and that it was only a facilitator and that the supplier is responsible if at all for any under-size cargo. It is also contended by the petitioner that without prejudice and in any event that even if the petitioner is held to be the seller, the penalty can be levied only as per the load port analysis as provided under the contract. It was also contended that the respondent had accepted this fact and had paid the original sellers the consideration by deducting the value of under-size cargo as per the load port analysis. It was submitted that the respondent's claim on the basis of discharge port analysis was completely unsustainable.

The Learned Arbitrator by his award dated 14th March 2008, proceeded to award the penalty to the respondent on the basis of discharge port analysis and awarded a sum of US$ 65,000. The petitioner has assailed the said award before this court under section 34 of the Act.

3. Petitioner submits that the learned arbitrator fell grave error in law by computing the penalty towards supply of under sized cargo on the basis of the discharge port analysis when the provisions of the contract dated 4 th October 2000 clearly provide the computation to be carried out on the basis of the load port analysis which renders the award contrary to the provisions of the contract and also against the public policy.

4. In the written submissions filed on behalf of the petitioner it is stated that a plain reading of the contract would clearly show that the only permissible basis for levying penalty on under-sized coke has been provided only on the basis of load port analysis and no penalty is leviable for under- sized cargo on discharge port analysis.

5. It is submitted that as per Clause 3(iii) of the contract unequivocally provides that load port analysis would be "basis" for determining the quality of shipment for the purpose of

(a) acceptance;

(b) acceptance with penalty;

(c) rejection as per sub Clause (i) The claim of the respondent falls within (b) above which is 'acceptance with penalty'. Therefore, penalty can be levied only as per the terms of the contract and not otherwise and there was no provision whatsoever in the entire contract which states that the penalty can be levied for under-size cargo as per the discharge port analysis.

6. It is submitted by the petitioner that the reason for load port analysis being the basis for determining penalty is that 'metallurgical coke' is a brittle commodity and is vulnerable to improper handling and/or even normal shifting from place to place therefore the sellers always insist on load port analysis which is to be reckoned for all practical purposes regarding quality of the goods and this fact was accepted in letter dated 8 th January 2001 by Mr. Govindan, MD of the respondent

company , wherein, he has stated that if the percentage of under-sized cargo exceeds 5/6% then at disport it will be more than 10%. It is submitted that the contract dated 4 th October 2000 being a CIF contract, the risk in the goods passes to the buyer once it crosses the ship's rail. It is for this specific reason that Clause 14 of the said contract provides for transfer of property in the goods and consequently the risk factor.

7. It is further submitted by the petitioner that the respondent had expressly claimed penalty under the terms of the contract. The Ld. Arbitrator thus could not have levied penalty on the basis of discharge port analysis which is completely against the terms of the said contract. The petitioner relied on Supreme Court in J.G Engineers Pvt. Ltd vs. Union of India (2011 5 SCC 758) and held that it is well settled that where the contract in clear and unambiguous terms, bars or prohibits a particular claim, any award made in violation of the terms of the contract would violate Section 28(3) of the Act and would be considered to be patently illegal and therefore, liable to be set aside under Section 34(2)(b) of the Act.

8. It is submitted by the petitioner that mere reliance of correspondence between the parties cannot make the petitioner as seller. It is submitted that the respondent's reliance on correspondence between itself and the petitioner is irrelevant for the purposes of determining who is the seller of the goods. A seller of the goods is the one who is capable of transferring the property in the goods to the buyer. It is further submitted that General Nice Development Ltd alone could have transferred the property in goods to the respondent and as such alone is the seller of the goods. There was no transaction of sale and purchase between General Nice Development Ltd and the petitioner and as such the petitioner cannot be a seller.

9. In the written submissions filed on behalf of respondent, it is stated that it was the petitioner who had assured and made promise to the respondent to supply the goods as a seller. Therefore, the petitioner was required to perform the promise in full satisfaction to the respondent as he was bound to do vide Section 40 of the Indian Contract Act. It is further submitted that the petitioner as a principal seller/promisor executed the agreement/contract dated 4th October, 2000 and was responsible for supply of material as per Clause 1 of the Contract.

10. It is submitted by the respondent that the agreement dated 4 th October, 2000 between petitioner and the respondent was acted upon as the said contract was never terminated or rescinded by the petitioner and there was reference of it in every correspondence till the present dispute arose. It is submitted that performance bank guarantee dated 22 nd November, 2000 was provided by the petitioner to the respondent for US $ 92,664/- in respect of contract dated 4th October, 2000. It was never revoked till its expiry on 31 st January, 2001. On 24th December, 2000 the petitioner wrote to respondent giving details of the vessel for supply of goods and on 18 th January 2001 the petitioner wrote to the respondent that in connection with contract dated 4th October, 2000 they were enclosing copy of invoice, bill of lading, certificate of sampling and analysis, certificate of weight and certificate of origin.

11. It is alleged that the load port analysis protects the seller against rejection and ensures payment to the seller. It is assumed that parameters such as ash, volatile matter, sulphur, phosphorous, M40,

M10 CSR,CRI would not change during transit. However, size and moisture can change. Thus, the buyer can claim a penalty for these two parameters (for which he could not have rejected the consignment anyway) based on the discharge port analysis report.

12. It is further submitted by the respondent that it is well settled law that joint and several liability arises when two or more persons in the same instrument promises jointly to do the same thing and also make separate promises to do the same thing. It gives rise to one joint obligation and as many several obligations as there are joint and several promisors. As per Section 40 of Indian Contract Act- from the nature of the case, execution of contracts, correspondence, conduct and intention of the parties it is evident that the petitioner had promised to supply the material to the respondent and hence is liable to pay awarded amount to the respondent.

13. The matter came up for hearing when Mr. Kailash Vasudev, Senior advocate appeared on behalf of the petitioner and Mr. Girish Chandra, Advocate appeared on behalf of respondent and have made their respective submissions.

14. Mr. Vasudev, learned Senior Advocate appearing on behalf of the petitioner has made his submissions in support of the challenge laid against the award dated 14th March, 2008 passed by the learned sole Arbitrator and his submissions can be outlined in the following manner:

> a) Firstly, learned counsel for the petitioner argued that the award dated 14th March, 2008 passed by the learned arbitrator is contrary to the terms of the contract entered between the parties on 4 th October, 2000.

It has been argued by the learned counsel for the petitioner that the claim of the respondent under the contract was for levying of the penalty against the alleged under sizing of the coke (-25mm). The said penalty as per the learned counsel for the petitioner ought to have computed by the learned arbitrator by applying the mode of the computation prescribed under the contract. It has been argued that the learned arbitrator completely ignored the mode of the computation of penalty prescribed under the agreement and as such the award is totally contrary to the terms of the contract as no prudent person can arrive at the said findings as mentioned in the award after reading the terms of the contract.

b) Learned counsel for the petitioner drawing aid from the previous submission has sought to argue that the contract dated 4th October, 2000 provides load port analysis as a basis for computing the penalty and determining the same which is payable by the petitioner. On the contrary, the respondent had sought the claim of USD 1,78,000.00. The relevant portion of the claim reads as under :

> "On the basis of penalty under the contract, the claim is as follows :
>
> Total quantity as per Draught Survey - 29609.100 MT Moisture content at load port - 11.94% Moisture allowed at load port - 5.00% Excess moisture (11.94% - 5.00%) - 6.94% Weight deducted due to excess moisture - 2054.872 MT Paid quantity -

27554.228 MT (-) 25 mm size as per discharge port - 16.78% (a) (-) 25 mm degradation allowed - 4.00% (b) Actual (-) 25 mm size at load port - 12.78(a-b) (c) (-) 25 mm allowed at load port - 5.00% (d) Excess % of (-) 25mm size at load port - 7.78% (c-d) (e) Credit give in invoice for excess fines - 1.32 (f) Credit Balance for excess fine (7.78% - 1.32%) - 6.46% (e-f) (g) @ 1 US $ per percent i.e. @ US$6.46 on Paid quantity i.e. US$6.46 x 27554.228MT - US$1,78,000.00"

The Arbitrator awarded a sum of USD 65,000 on the basis of the analysis done after taking into consideration the discharge port analysis as a criteria for determining the penalty. It has been argued that the dispute relates to under sizing of the coke and as per the learned counsel for the petitioner the terms of the contract clearly provide for the load port analysis as a criteria for determining and levying the penalty.

Learned counsel has read over the clauses contained in the contract more particularly Clause 3 read with Annexure 1 of the contract, clause 6, clause 8(2) (g) and clause 9 of the contract. The same read as under:

"3. QUALITY :

i. Contract specifications (on dry basis except total moisture content and specification limits for acceptance and rejection limits shall be as per Annexure 1. ii. Determination of quality, moisture content and screening for size shall be in accordance with ISO standards and methods. iii. Analysis as per (ii) above shall be carried out at load port in respect of all the parameters mentioned in Annexure 1 and the same shall be the basis for determining the quality of the shipment, for the purpose of acceptance, acceptance with penalty or rejection as per sub clause (i) and regulating payment through LC accordingly.

Note 1) The mutual agreed independent surveyor who shall undertake analysis of cargo (including screening for size) at load port shall be Inspectorate, China. Note 2) The mutually agreed independent surveyor who shall undertake analysis of cargo (including screening for size) at discharge port, shall be SGS India Ltd.

Note 3) The mutually agreed independent surveyor for determination of weight of the shipment by Draught Survey at load port shall be Inspectorate, China.

iv. Pre-shipment quality, analysis of the cargo shall be furnished by the seller to the buyer, by weekly/fax messages for daily production, transportation to port in continuation and unloading in seller's plots at port earmarked for fresh production as per Annexure 4. Seller shall take all reasonable precaution to ensure segregation of fresh stock for shipment to the buyer from old stock already at load port, till complete loading into the vessel accepted by the buyer. v. Prior to the shipment, the cargo should be screened on - 25mm screen at the load port."

Clause 6 of the contract states that penalty is to be levied under Clause 3 read with Annexure 1. Clause 6 reads as under :

> "6. Penalty Please see Annexure 1 read with Clause 3 above."

Clause 8(2) provides that "where penalties are leviable, on the basis of the quality of the shipment arrived at as per clause 3(iii) above, appropriate deduction shall be made by the Seller in the invoice as per Annexure 1 to this contract - which shall form part of the documentary credit - the correctness of which shall be verified by the negotiating bank before releasing payment to the Seller from the payment due to the Seller through LC."

Clause 9 deals with sampling and analysis. It states that the sampling and analysis at the load port shall be Inspectorate China and at discharge port shall be SGS India Ltd. It further states that the notes 1 to 3 under Clause 3 shall be final and binding upon the parties. Clause 9 reads as follows :

> "9 Sampling and Analysis :
>
> i) The sampling and analysis of the commodity relating to the shipments at the load port shall be Inspectorate China and at discharge port shall be SGS India Ltd. vide notes 1 to 3 under Clause 3(iii) whose findings shall be final and binding on both parties."

As per the learned counsel for the petitioner, the conjoint reading of the aforementioned clauses under the contract would show that the load port analysis would be the basis for determining the quality of the shipment for the purpose of acceptance, acceptance with penalty and rejection as per sub clause (i) and the penalty shall be computed as per the said basis only which shall be final and binding between the parties. As per the learned counsel for the petitioner, there is no provision in the entire contract which states that the penalty can be levied for the undersize cargo as per the discharge port analysis. It has been argued that the learned arbitrator while believing the computation of the respondent by awarding the sum of USD 65,000 as per the discharge port analysis has acted completely beyond jurisdiction being a creature of the contract and has rewritten the contract warranting interference of this Court.

c) Learned counsel for the petitioner has argued that there exists a rationale behind taking the load port analysis as the basis for determining the penalty as metallurgical coke is a brittle commodity and is vulnerable to improper handling and even normal shifting from place to place, therefore the sellers always insist on load port analysis which is to be reckoned for all practical purposes regarding the quality of the goods. It has been argued that the respondent's witness CW4 has also admitted in his letter dated 8th January, 2001 that the change in the size of the cargo varies at the load port and the discharge port. It is thus argued that the learned arbitrator while ignoring the clear terms of the contract and also the practical considerations which are relevant for the purposes of determining the penalty or quality of the goods to be sold to the respondent herein has clearly acted beyond the public policy and thus award dated 14th March, 2008 is liable to be set aside. d. Learned counsel for the petitioner has further argued that the award dated 14th March, 2008 fails to take

into the consideration the policy of the law and the express terms of the contract in clause 14 of contract that the seller is not responsible for the deterioration in the cargo after the cargo crosses the ship rail as the title in the property of the said goods passes at the time of the shipment. Learned counsel in this respect has read over clause 14 of the contract which lays reference to INCOTERMS providing similar provision. Section 4 of the Sales of Goods Act also engrafts the same principle. On that basis it has been argued by the learned counsel for the petitioner that it is the policy of the law that the seller is not responsible for the deterioration of the goods after the goods passes the ship rail and the damages on the said count are impermissible. As such, the award is clearly in violation of the terms of the contract as it takes into consideration the discharge port analysis as the basis for levying the penalty. The award dated 14th March, 2008 is thus liable to be set aside.

e. Learned counsel for the petitioner also assailed the award on the ground that the award is unreasoned as to taking the discharge port analysis as the basis for determining the penalty. Thus, the award is unreasoned award and is required to be interfered with under the provisions of Section 34 of the Act.

f. Learned counsel for the petitioner has argued that the contract dated 4th October, 2000 never came to be acted upon in view of the subsequent contracts. It has been argued that there are several documents on record including Bill of Lading, commercial invoice, certificate of origin, marine cargo policy, letter of credit which clearly goes on to show that the petitioner was not seller of the goods but the entity namely General Nice Development Ltd was the seller of the goods.. The original contract dated 4th October, 2000 was never given effect due to the subsequent changes which emerged when M/s PEC Ltd refused to open the letter of credit in favour of the petitioner and wanted to deal with the supplier directly and independently. It is submitted that the petitioner has explained the process of the subsequent contracts and how the sale ultimately did not conclude under the contract in the additional affidavit in reply to the statement of the claim. It has been argued that the petitioner was merely acting as facilitator of the transaction by undertaking correspondence on behalf of General Nice Development Ltd and also offering its services in different areas to facilitate the smooth conclusion of the transaction originally initiated by it. It has been argued that the seller is the person who is capable of transferring the property in the goods to the buyer. In the instant case, as per the learned counsel for the petitioner, the trappings of the seller in the petitioner are missing and as such the petitioner cannot be called as seller and the liability contained in the penalty cannot be ascribed to that of the petitioner. The learned arbitrator having failed to consider the said position clearly acted beyond the policy of the law and as such the award is required to be interfered with by this court. g. Learned counsel for the petitioner has argued that there is another OMP No.187/2009 filed by General Nice Development Ltd and the findings mentioned therein have bearing upon the instant case which would show that the sale of the goods had in fact happened under the contract dated 28th November, 2000 and not under the contract dated 4th October, 2000. Thus, the petitioner cannot be held liable for the penalty under the contract dated 4th October, 2000.

h. Learned counsel for the petitioner has argued that the claim of the petitioner is not maintainable under the provisions of Section 41 of the Indian Contract Act, 1872 which clearly bars the enforcement of the promise when the performance is accepted from third party. It has been argued

that the respondent by accepting the performance of the contract from General Nice Development Ltd is now estopped from insisting the liability towards the damage caused to the goods from the petitioner when the petitioner never performed the promise at the first place and it is General Nice Development Ltd. who is acting as seller. Learned counsel for the petitioner has relied upon the judgments of the apex Court in the case of Kapur Chand v. Mir Nawab, AIR 1963 SC 250 and Textile and Yarn (P) Ltd v. Indian National Steamship Co. Ltd., AIR 1964 Cal 362 in order to support the said proposition. It has been argued that the award dated 14th March, 2008 not appreciating the said position in law is illegal and against the public policy. i. The learned counsel in support of his submission has also referred Section 4 and 19 of the Sale of Goods Act, 1930. Section 4 of the Sales of Goods Act, 1930 reads as follows :

> "4. Sale and agreement to sell :
>
> (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part owner and another.
>
> (2) A contract of sale may be absolute or conditional.
>
> (3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell. (4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

Section 19 of the Sale of Goods Act, 1930 also provides for passing of the property in goods :

> "19(1) Where there is a contract for a sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case."

It is submitted that a mere reading of the above would show that seller is not liable for any damage to the goods after the goods passes the ship's rail. The basis for determining the quality has to be necessarily the analysis obtained at the load port only and not discharge port analysis.

j. Learned counsel for the petitioner has relied upon the following judgments of the Supreme Court of India relating to the scope of interference of the court hearing the objections against the arbitral award under the provisions of the Section 34 of the Act.

i) In the case of Oil and Natural Gas Corporation Ltd. vs. Saw Pipes Ltd., (2003) 5 SCC 705 the Apex Court held as under :

> "12.....The decision of the Tribunal must be within the bounds of its jurisdiction conferred under the Act or the contract. In exercising jurisdiction, the Arbitral Tribunal cannot act in breach of some provision of substantive law or the provisions of the Act.

15. The result is if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered under Section 34. However, such failure of procedure should be patent affecting the rights of the parties."

ii) In the case of Hindustan Zinc Ltd. vs. Friends Coal Carbonization, (2006) 4 SCC 445 the Apex Court held as under :

> "14....This Court in Saw Pipes has made it clear that it is open for the Court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegally and opposed to public policy of India."

k. It is argued that the Respondent had expressly claimed penalty under the terms of the contract. The learned Arbitrator thus could not have levied penalty on the basis of discharge port analysis which is completely against the terms of the said contract. The Supreme Court in J.G. Engineers Pvt. Ltd. vs. Union of India (supra) (para 10,28) held that:

> "It is well-settled that where the contract in clear and unambiguous terms, bars or prohibits a particular claim, any award made in violation of the terms of the contract would violate Section 28(3) of the Act, and would be considered to be patently illegal and therefore, liable to be set aside under Section 34(2)(b) of the Act."

In another case the Supreme Court in Delhi Development Authority vs R.S. Sharma and Co., New Delhi (2008) 13 SCC 80 has held that an arbitral award which is against the terms of contract is liable to be set aside, as given below:-

> 21. From the decisions, the following principles emerge:
>
> (a) An award which is .....(iii) against the terms of the respective contract; ..... is open to interfere by the court under Section 34 (2) of the Act....."

l. It is also argued that under the provisions of the Act a non-speaking award is exfacie illegal as per Section 31(3) which is reproduced here for the sake of convenience as follows;

> "31. Form and contents of arbitral award-..... (3) The arbitral award shall state the reasons upon which it is based, unless-

(a) the parties have agreed that no reasons are to be given, or

(b) the award is an arbitral award on agreed terms under section 30....."

In Som Datt Builders Ltd. v. State of Kerala, (2009) 10 SCC 259, the Hon'ble Supreme Court has categorically stated that the requirement of reasons is not an empty formality and merely noticing the submissions of the parties or reference to the documents is no substitute for reasons. The relevant portion of the judgment reads as follows;

"25. The requirement of reasons in support of the award under Section 31(3) is not an empty formality. It guarantees fair and legitimate consideration of the controversy by the Arbitral Tribunal. It is true that the Arbitral Tribunal is not expected to write a judgment like a court nor is it expected to give elaborate and detailed reasons in support of its finding(s) but mere noticing the submissions of the parties or reference to documents is no substitute for reasons which the Arbitral Tribunal is obliged to give. Howsoever brief these may be, reasons must be indicated in the award as that would reflect the thought process leading to a particular conclusion. To satisfy the requirement of Section 31(3), the reasons must be stated by the Arbitral Tribunal upon which the award is based; want of reasons would make such award legally flawed."

In view of the aforementioned submissions and the case laws cited, it has been prayed by the learned counsel for the petitioner that this court should set aside the award dated 14th March, 2008.

15. Per contra, Mr. Girish Chandra, learned counsel for the respondent has made his submissions which can be outlined in the following manner:

a) Learned counsel for the respondent argued that this court should reject the challenge to the award dated 14th March, 2008 which has been laid by the petitioner in as much as the petitioner is merely re-agitating the same pleas raised by the petitioner before the arbitral tribunal and also calling upon this court to revisit and re-appreciate the evidence in order to arrive at the different conclusion. It has been argued that the petitioner is calling upon this tribunal to interfere with the award on the basis of the disputed facts making this court as fact finding court which is not the scope of the enquiry under the provisions of Section 34 of the Act. It has been argued that the challenge to the award raised by the petitioner clearly falling outside the permissible scope of interference to the arbitral award under the provisions of the Section 34 of the Act.

b) Learned counsel for the respondent has argued that the provisions of Section 41 of the Indian Contract Act, 1872 are not applicable to the instant case as the respondent never accepted the performance of contract from the third party which may result in discharge of the petitioner. On the contrary, it is the petitioner who had introduced M/s General Nice Development Ltd. to respondent even prior to the execution of the contract dated 4th October, 2000 as is evident from minutes of the

meeting dated 20th September, 2000. Learned counsel for the respondent has read over the said minutes which clearly reveal a prior consensus which was formed between the petitioner and respondent to involve General Nice Development Ltd. as an entity authorized to perform the contract. Learned counsel for the respondent has further read over the terms of agreement dated 4th October, 2000 including clause 1 containing the non obstante clause stating that notwithstanding the buyers approval of the source of the commodity, the seller shall assume, under the sub clause, complete and undisputed responsibility for the performance of the contract in so far as it relates to quantity and quality of the commodity supplied etc. Thus, as per the learned counsel for the respondent, Section 41 of Indian Contract Act, 1872 cannot be invoked in the instant case and on the other hand it is the case of Section 40 of the Indian Contract Act where the petitioner is the principal seller or promisor and General Nice Development Pvt. Ltd. was authorized by the petitioner to perform the promise in view of the agreed terms with that of the respondent. As per the learned counsel for the respondent, this court should reject the challenge so far as it relates to applicability of Section 41 of the Indian Contract Act, 1872.

c) Learned counsel for the respondent has argued that the agreement dated 4th October, 2000 was clearly acted upon and the petitioner performed its obligations under the said agreement. It has been argued that the respondent had placed on record, various documents of Arbitral Tribunal including the ones showing the obligations performed on the part of the petitioner pursuant to the entering into the contract dated 4th October, 2000 with that of the respondent. The said documents include the Performance Bank Guarantee provided by the petitioner to the respondent for USD 92,664 dated 22nd November, 2000, letter dated 24th December, 2000 written by the petitioner to the respondent giving details of the vessel for supply of the goods under the contract no. JNL:MC:39:2000 dated 4th October, 2000, communication dated 18th January, 2001 written by the petitioner to respondent enclosing invoice, Bill of Lading, certificate of Sampling and Analysis, certificate of weight and certificate of origin amongst others. By placing the reliance on the said documents which were given exhibit marks before the arbitral tribunal, it has been argued by the counsel for the respondent that the plea taken by the petitioner that the agreement dated 4th October, 2000 was never acted upon is totally frivolous and liable to be rejected.

d) Learned counsel for the respondent has argued that the petitioner is entitled to pay the penalty for the undersize cargo inspected at the discharge port as per the terms of the contract. It has been argued that there are number of the correspondences exchanged between the respondent and the petitioner starting from 27th January, 2001 to 21st February, 2001 which clearly goes on to show that the concerns regarding the degradation of the goods was pointed by the respondent to the petitioner and General Nice Development Ltd and both agreed to the position that the degradation of the goods should not be 4 % from the load port to the discharge port during the transit. It has been argued that once the joint inspection was carried at the survey conducted on 10th March, 2001, the degradation was found to be at 16.78%. All this would mean that the load port analysis was inaccurate and the discharge port analysis clarifies the position and on that basis even if 4% degradation is adjusted, still the petitioner is not absolved from the liability. Thus, the award dated 14th March, 2008 passed by the learned sole arbitrator is in accordance with the terms of the contract as well as the material placed before him and does not deserve any interference by this court.

e) Learned counsel for the respondent has argued that the petitioner has wrongfully stated that the terms of the contract provide the load port analysis as basis for the computing the penalty towards the undersize cargo. It has been argued that clause 3 (iii) of the contract makes a load port analysis as basis for either to accept, accept with penalty or reject the shipment. In terms of Annexure I, the contract cannot be rejected on the counts of moisture and size as parameters in the characteristics of the goods and only penalty can be claimed for the same.

It has been argued that clearly the penalty is permissible for the alteration in size and moisture in goods as parameters and thus, the discharge port analysis may be taken into consideration for computing such penalty. It has been argued that the discharge port analysis do not give the right to the buyer to reject but it does give right to the buyer to recover the penalities who have already paid on the basis of the load port analysis. Thus, the petitioner has given incorrect interpretation to the provisions of the contract. As per the learned counsel for the respondent, the view taken by the arbitrator is plausible one and as per the terms of the contract and based on the practical consideration and as such the challenge on this count is also required to be rejected.

f) Learned counsel for the respondent has further argued by replying to the submissions of counsel for the petitioner that the clause 14 of the contract does not pertain the risk involved in relation to variation in size during the transit of the product. The said clause and INCOTERMS relate to the passing of the risk and title relating to the property. It has been argued that as per the provisions of Section 40 and Section 59 of the Sales of Good Act, the risk of extraordinary deterioration will be borne by the seller as against the ones which is a necessary incident. Thus, the petitioner is wrong in law to say that the load port analysis has the absolute finality attached to it and in no circumstances, the petitioner can be held liable.

g) Learned counsel for the respondent has argued that in the instant case the provisions of Section 41 of the Indian Contract Act are not applicable and instead the provisions of Section 43 of Indian Contract Act are applicable as the petitioner and General Nice Development Ltd both are joint promisors and the respondent being a promisee has the option to either sue one of the joint promisor or all of them in order to insist the performance of the obligation.

In view of the aforementioned submissions advanced by the learned counsel for the respondent, it has been prayed that this court should affirm the award dated 14th March, 2008 passed by the learned sole arbitrator.

16. I have gone through the award dated 14th March, 2008, challenged laid by the petitioner and the reply filed by the respondent and the documents filed by the parties in the matter which were placed before the learned arbitral tribunal. I have also given careful consideration to the submissions advanced by the learned counsel for the parties at the bar. I shall now proceed to discuss the aspects which fall for consideration before this court.

17. As a matter of backdrop, it is noteworthy to mention few facts which may aid in deciding the present case and understand the nature of arrangement entered between the parties. The facts are as follows:

a) That Jayaswals Neco Ltd/ respondent herein and one M/s. Trimex International FZE, Dubai (Trimex)/ Petitioner herein had been negotiating for the purchase of shipment of low ash metallurgical coke (LAMC) of Chinese origin. A contract was entered into between petitioner and respondent on 4th October, 2000 in terms of which respondent agreed to purchase from a seller who has to source 30,000 Metric Tonnes (MT) of freshly manufactured LAMC of Chinese origin to the respondent and supply the same. Petitioner wanted a Letter of Credit (LoC) in its favour prior to the shipment of the cargo. Since Respondent did not have sufficient limit with its bank, it approached PEC Ltd. (PEC) a Government of India Enterprise to open a LoC. PEC agreed to open the LoC only in favour of General Nice Development Ltd (GNDL) from whom petitioner was to purchase the goods. PEC ultimately effected sale to JNL after purchasing the same from GNDL. In terms of the above arrangement on 22nd November 2000, JNL entered into a contract with PEC to enable PEC to issue a LoC in favour of GNDL. Trimex forwarded to JNL a Letter of Guarantee dated 22nd November 2000 for US Dollar (USD) 92,664 issued by HSBC Bank (HSBC), in terms of which HSBC undertook to pay the said sum to JNL if Trimex failed to comply with the provisions of the contract.

b) Thereafter, there was another contract dated 28th November 2000 entered between the respondent herein and one entity namely General Nice Development Ltd on similar lines with that of agreement dated 4th October 2010 which was entered into between the petitioner and respondent. This agreement dated 28 th November 2000 was necessitated as per the understanding of the parties for the purposes of opening of LOC as PEC has refused to give the LOC to the petitioner and thus involvement of General Nice Development Ltd became essential.

c) However, immediately once the working of the agreement commenced, it appears from the correspondences exchanged between the parties including of respondent with the petitioner as well as with General Nice Development Ltd that the both the petitioner as well as General Nice Development Ltd were acting as joint promisors and it was the understanding of the respondent that both the petitioner as well as General Nice Development Ltd shall comply with their respective obligation to supply the goods namely metarlurgical coke as per the terms of the contract and perform their obligation as to the conducting of surveys, payment of the penalties as per the terms set out in the agreement.

d) When the consignment arrived at Vishakapatnam and was subjected to analysis by SGS India Ltd., it transpired that as much as 13.90% of the material was in excess of the permissible undersized fraction.

In other words, while the permissible size was between 25 mm and 70 mm, it transpired that while at the discharge port 16.78% of the total consignment was below 25 mm size, after allowing for a 4% degradation, the actual size of the consignment below 25 mm was 12.78% at the load port. A further 5% was allowed as a margin at the load port and, therefore, the total excess percentage of less than

25 mm size at the load port worked out to 7.78%. It is not in dispute that to an extent of 1.32%, credit was given in the invoices for the excess quantity and, therefore, the total percentage of the consignment below 25 mm size was worked out at 6.46%.

e) The respondent filed separate claims against General Nice Development Ltd and petitioner seeking the joint and several liability towards payment of the penalty as per the clauses envisaged under the agreements providing for the mode of computation of penalties on the same lines. The said claims were subjected to arbitral proceedings. So far as the claim of the respondent against General Nice Development Ltd is concerned, the arbitral award was rendered on 25th June 2008. The challenge to the said award dated 25th June 2008 was laid before this court in the form of objections under the provisions of section 34 of the Arbitration and Conciliation Act, 1996 as OMP no. 187/ 2009.

f) The said OMP no. 187/2009 was disposed off by way of order dated 27.11.2012 passed by the learned Single Judge of this court. The reading of the claims as reproduced in the order dated 27.11.2012 against General Nice Development Ltd vis a vis the claim statement filed by the respondent against the petitioner herein would show that the claims in both the cases were identical and insist the payment of the penalty on joint and several basis.

g) The Order dated 27.11.2012 passed in OMP no. 187/2009 further corrects the inaccuracy in computation of the claim made by the respondent/ Jayaswal Neco Ltd and granted by the arbitral tribunal in the said claim. The learned Single judge observed that the penalty has to be computed on the basis 6.46 % of the total quantity of goods supplied which were found to be undersized falling short of the permissible degradation fraction. As per the learned Single Judge the computation shall be based on 6.46 / 100 x 27554.228 = 1780.0031288 MT and the penalty has to be computed on the basis of 1780 x 6.46 USD as penalty. The Learned Single Judge also observed that the penalty was inaccurately computed by the respondent and the award also granted the penalty on the basis of entire quantity which is 27554.228 MT instead of 1780.0031 MT. The observations of the learned Single Judge arriving at the said findings are reproduced hereinafter:

> "19. As regards the rate at which the penalty had to be computed, the relevant clause states that for a size of less than 25 mm, the supplier would have to pay ?USD 1.00/MT for each 1% above 5%, fractions pro rata. This is to be read with the Schedule appended to the agreement in Part-II where in respect of size less than 25 mm, the penalty is indicated as for every 1% above 5% at USD 1.00/MT with fraction pro rata.
>
> 20. There is merit in the contention that for every percentage above 5%, the penalty would be USD 1 per MT. Although it was sought to be argued by Mr. Sarin that the penalty is only for the excess percentage above 5% and, therefore, at the highest, it would work out at USD 1.46, this Court finds that the said interpretation overlooks the fact that the actual excess percentage at the load port was 12.78% and at the discharge port it was 16.78%, both being well above 5%. There is no question of further allowing a margin of 5% from the final figure of 6.46%.

> 21. Consequently, as far as the penalty amount is concerned, this Court finds no justification for the learned Arbitrator to have awarded JNL an exorbitant sum of USD 178,000 by multiplying the total consignment quantity into USD 4.14. This was not even claimed by JNL. (Emphasis Supplied)
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> 22. As noted hereinbefore, JNL has made an obvious error in computing the quantity for which penalty has to be paid. Instead of claiming penalty for 1780 MT, JNL has sought to claim the penalty for the entire quantity of 27554.228 MT. This was allowed as such and constitutes an error apparent on the face of the Award.
>
> 23. Consequently, this Court holds that JNL would be entitled to 1780 x 6.46 USD as penalty."

18. As I have observed earlier that the claim statement filed by the respondent against the petitioner as well as General Nice Development Ltd is the same and the happenings of events including the survey reports at the load port and discharge port are also the same and the mode of the computation of the penalty is also identical. Therefore, I do not find any reason to disbelieve the findings arrived at by learned Single Judge in OMP No.187/2009 and computation of the penalty as mentioned in the order dated 27th November, 2012. Consequently, the award dated 14th March, 2008 under challenge equally is based on the incorrect premise while computing the penalty as per the claim raised by the respondent and the entitlement of the penalty shall be in terms of the order dated 27th November, 2012 fixed by the learned Single Judge while disposing of the OMP No.187/2009.

19. Similarly, the learned Single Judge also fixed up the entitlement of the respondent towards interest component which is 9 % simple interest per annum from 10th March 2001 uptil the date of the payment. The learned Single Judge observed thus:

> "24. On the question of interest, it is seen that the learned Arbitrator has awarded 12% pre-reference and pendente lite interest. The learned Arbitrator has further awarded future interest @ 18% per annum compounded quarterly. As regards the post- Award interest, in the absence of any agreement between the parties regarding payment of compound interest, the learned Arbitrator could not have awarded the compound interest, and that too compounded quarterly. This Court is of the view that considering interest would begin to run from 10th March 2001, which is the date of the joint inspection, it would be appropriate to direct that GNDL should pay JNL simple interest @ 9% p.a. throughout from 10th March 2001 till the date of payment.
>
> 25. In other words, it is directed that JNL will be entitled to be paid a sum of equivalent of 1780 x 7.46 USD with the exchange rate being that prevalent as of today, i.e. the date of disposal of the objections of GNDL, as a result of which the Award becomes enforceable. The amount thus calculated will be paid together with simple interest @ 9% p.a. from 10th March 2001 till the date of payment."

20. Upon perusal of the observations of the learned Single Judge passed in OMP No.187/2009, it can be seen that this court has already determined the entitlement of the quantum of the penalty payable to the respondent by General Nice Development Ltd. and also the interest component which should be at the rate of 9 % simple interest. As the claims of the respondent are same towards the petitioner and General Nice Development Ltd, which can be seen from the claim statement of the respondent filed before the arbitral tribunal. Therefore, I find concurrence with the computation of the penalty and interest component as done by the learned Single Judge in the order dated 27th November, 2012. The award dated 14th March, 2008 to the extent it takes the contrary view and is accordingly modified in view of the findings of this court in order dated 27th November, 2012 passed in OMP No.187/2009.

21. The only issue which the learned Single Judge has left open to be determined is the entitlement of the respondent to recover the penalty as per the order dated 27th November, 2012 would be dependent upon the amount which is recoverable by the respondent from the petitioner. In short, the question which falls for the consideration is as to whether the Petitioner and General Nice Development Ltd were seller and his representatives or the joint promissors in law. The determination of the nature of relationship between them after discerning the intent of the parties shall further lead to the adjustments of the sums between the petitioner and General Nice Development Ltd which shall be payable to the respondent.

22. In order to answer the said question, it is necessary to carefully go through the terms of the agreement dated 4th October, 2000 entered between the petitioner and the respondent and agreement dated 28th November, 2000 so that intention of the parties may be gathered by reading the agreements as a whole. Once the terms of the agreement dated 4th October, 2000 and 28th November, 2000 are read conjointly and holistically, it can be seen that there exists no stipulation in the agreement that either petitioner or General Nice Development Ltd is acting as representative of each other where there is one person as a seller and another as a representative of the seller. The obligations of petitioner as well as that of General Nice Development Ltd are coinciding with each other. In both the agreements the petitioner as well as General Nice Development Ltd are acting as sellers and the respondent is acting as a buyer. The obligation to pay the penalty in relation to degradation of the material and the mode of computation of the penalty under the agreement dated 4th October, 2000 as well as in agreement dated 28th November, 2000 are also identical as it can be seen from the reading of the clauses of the agreements side by side. There is no clause in the latter agreement dated 28th November, 2000 making reference to the previous agreement dated 4th October, 2000 which may connect both the agreements establish any kind of relationship of principle and agent or employer or employee between the petitioner and General Nice Development Ltd. Thus from the fair and meaningful reading of both the agreements, it can be said that the intention of the parties was that both the petitioner as well as General Nice Development Ltd. should act as joint promisors though the performance under the contract was same.

23. Learned counsel for the petitioner strenuously argued that the petitioner is not the seller and was merely acting as a facilitator and the contract was not acted upon. I find that the documents executed between the petitioner and respondent including Performance Bank guarantee dated 22nd November, 2000, clearly shows to the contrary. The petitioner has even intimated to the respondent

about the effecting of the supplies through General Nice Development Ltd. by its letter dated 24th December, 2000 and also participated in the joint inspection and surveys carried out the discharge port and all other obligations which are mandated under the contract dated 4th October, 2000. Therefore, I do not find merit in the submission that the petitioner was no one under the contract and mere fact that the goods have moved from General Nice Development Ltd would absolve the petitioner from its contractual obligations contained in 4th October, 2000 when the petitioner acted with the General Nice Development Ltd. towards performance of the obligations due to the respondent.

24. The plea of learned counsel for the petitioner that once the respondent has accepted the performance of the obligation under the contract from the third party, the provisions of Section 41 of Indian Contract Act would come into play. The said provision would not come into play as condition sine qua non for attracting the said provision is the acceptance of the performance from the third party.

25. In the instant case, the petitioner attempted to first perform the agreement on its own and thereafter introduced General Nice Development Ltd as another contractor known to the petitioner and participated with General Nice Development Ltd. jointly towards performance of the obligation. Thus, the plea of the learned counsel for the petitioner cannot be accepted that the respondent has accepted the performance from the third party. The respondents as is evident from the correspondences exchanged between the parties always insisted the performance of the obligations from both the petitioner as well as General Nice Development Ltd. and maintained the said position throughout the term of the agreement. Even the claim presented before the arbitral tribunal in the arbitration proceedings clearly seek the joint and several liability of petitioner as well as General Nice Development Ltd. For all these reasons, it cannot be said that petitioner stands discharged due to the acceptance of the performance by the respondent from the third party and General Nice Development Ltd. is not stranger but the joint promissor alongwith the petitioner and both of them acted towards performance of the common promise which was the subject matter of two contracts entered by the petitioner as well as General Nice Development Ltd. containing the identical terms and obligations. Therefore, the provisions of Section 41 of Indian Contract Act have no application in the instant case.

26. It can be argued by the petitioner that in view of my finding that there is no indication in the agreements dated 4th October, 2000 as well as 28th November, 2000 about the nature of the relationship between the petitioner as well as General Nice Development Ltd being representative of each other, they are ofcourse to be treated as stranger to each other. I am of the view that the said argument would be untenable in as much as if both the contracts do not connect petitioner as well as General Nice Development Ltd as seller and his representative does not imply that both cannot become joint promissors towards performance of common promises. It is one thing to say that the seller is getting the performance of the contract performed through his representative or employee or agent acting on his behalf, however it is altogether another thing to say that both the promissors are acting towards the performance of the common promises by entering into separate agreements as a workable arrangement and both the agreements are functioning as the performance insisted from both the promissors and they acted accordingly by participating in the same. Afortiori, it

follows that the intention of the parties was that both the petitioner as well as General Nice Development Ltd should act as joint promissors.

27. It is well settled principle of law that Section 43 of the Indian Contract is a departure from the English law which is that in case of the joint promisors giving a common promise to perform to the promisee, Indian law makes the liability of the promisors joint or several. The promisee has the option to sue either one or all of the promisors in the proceedings and it is no defence in such proceedings that all the joint promissors ought to have been made party in the said proceedings. (This has been laid down in the case of Jainarain Ram Lundia v. Surajmal Sagarmal and Others, 1949 FCR 349. This view has been holding the field till date and has been followed from time to time by the courts even after independence including in the case of Union of India v. The East Bengal River Steamer Services Ltd., AIR 1964 Cal 196).

28. In the instant case, the respondent as a promisee has chosen to arbitrate with both the petitioner as well as with General Nice Development Ltd and had also sought the liability towards the penalty jointly and/ or severally. I have already arrived at the finding by appreciating the material placed before the arbitral tribunal including the correspondences exchanged between the parties clearly showing the act and conduct of the parties which is that the parties proceeded with the working of the agreements and never repudiated the agreement on the count that they are not obligated to perform their respective promises. The respondent always insisted the performances from both petitioner as well as from General Nice Development Ltd who both agreed to perform their part of the contract and further agreed to jointly resolve the issue of the penalty after conducting the joint inspection at the discharge port dated 10th March, 2001. In view of the said position emerging from the intent of the parties, agreement and material placed before the arbitral tribunal, it can be safely said that the petitioner and General Nice Development Ltd were acting as a joint promissors.

29. So far as the submissions of the learned counsel for the petitioner are concerned, the same are dealt with in the following manner:

> a) The submission of the learned counsel for the petitioner that the load port analysis shall be considered as the criteria for determining the penalty as per clause 3 of the agreement dated 4th October, 2000 is not correct interpretation as accorded by the learned counsel for the petitioner and the same cannot be accepted. The careful reading of the clause 3, 6, 9 along with the annexure 1 would reveal that the load port analysis is merely a criteria for the acceptance or rejection or acceptance with penalty. The conjoint reading of the aforesaid clauses along with annexure 1 makes it clear that for the parameters like size and moisture, no rejection is permissible and only penalty is computed on the basis of the variation. Thus, the process of the acceptance and rejection is altogether distinct from that of the mode of the computation of the penalty.

The explanatory notes to Annexure 1 clearly state that the penalty is to be determined as per the surveyors report mentioned in the relevant provisions of the contract. The reading of the other provisions of the contract would show that there is clearly a mechanism provided to find out the

variation in the size of the goods and other parameters by carrying out the load port analysis and discharge port analysis. Thus, the interpretation of the clause 3 that the load port analysis which may be relevant for the purposes of acceptance or rejection or acceptance with penalty would ipso facto the sole basis for the mode of the computation of the penalty is not correct. The same is also evident from the explanatory notes provided in clause 3 which also provides for surveys both at the load port as well as the discharge port. Furthermore on similar lines, the learned Single Judge in OMP No.187/2009 has computed the penalty and interest component and thus I find that the said computation has been properly made and the interpretation provided by the learned senior counsel for the petitioner is not correct.

b) The submission of the learned senior counsel for the petitioner that the seller is not responsible for the damage or loss of the goods during the transit and the risk is passed after the goods pass the ship rail. There is no quarrel to the said proposition. However, the said terms and conditions are subject to the contract between the parties. In the instant case, the agreement dated 4th October, 2000 clearly provide for the mechanism for the load port surveys and the discharge port surveys and the penalty has to be computed after considering the report of the surveyors appointed in the contract whose decisions are not questionable. Plainly, the parties by agreement have departed from the said provision partly by agreeing to the contrary. Thus, the submission of the learned senior counsel for the petitioner is not acceptable. So far as the passing of the risk under clause 14 of the agreement is concerned, the said clause 14 does not cover the eventuality relating to degradation of the size of the goods for which there are separate provisions provided in the agreement. The submission of the learned counsel for the petitioner is misconceived and as such is rejected.

30. I have already answered to the other submissions advanced by the learned counsel for the petitioner during my discussion held in the preceding paragraphs of this order.

31. The resultant effect of the aforementioned discussion is that the award dated 14th March, 2008 so far as it determines the penalty erroneously along with the interest component is modified and the findings rendered in the OMP No. 187/2009 in order dated 27th November, 2012 relating to computation of penalty and interest are accepted as findings in the present case. The award is accordingly modified to the said extent. The liability of the petitioner to pay the penalty and interest as per the computation done by the learned Single Judge in OMP No.187/2009 in terms of the order dated 27th November, 2012 shall be in equal proportion with that of General Nice Development Ltd being one of the joint promissor. Therefore, the petitioner is liable to pay 50 % of the penalty and interest component as the computation provided in the order dated 27th November, 2012.

32. With these observations, OMP No.348/2008 is disposed off.

(MANMOHAN SINGH) JUDGE MAY 21, 2014