

# IN THE HIGH COURT OF SINDH KARACHI

## Suit No. 547 of 2007

[Trading Corporation of Pakistan (Pvt) Limited versus Adam Sugar Mills Limited]

Plaintiff : Trading Corporation of Pakistan (Pvt) Limited through Mr. Rafiq Ahmed Kalwar, Advocate.

Defendant : Nemo.

Date of hearing : 13-02-2020

Date of order : 12-05-2020

### ORDER

Adnan Iqbal Chaudhry J. - This order decides objections to an Arbitration Award.

2. The Plaintiff, Trading Corporation of Pakistan (TCP) entered into a contract dated 10-06-2004 with the Defendant for purchasing 12,000 metric tons of sugar @ Rs. 16,490 per metric ton. Pursuant to a policy of the Economic Coordination Committee to regulate sugar price, the contract provided that after the advance of 70%, the next 15% of the purchase price was conditioned on confirmation by the Provincial Cane Commissioner that the Defendant had made entire payment to sugar cane growers before 15-06-2004. The next 10% of the purchase price was conditioned on start of crushing season on 01-11-2004; and the last 5% was payable on replacement of the purchased sugar crop by 31-01-2005.

3. In terms of the contract, the TCP paid to the Defendant 85% of the purchase price being Rs. 168,198,000/- under cover of letter dated 09-07-2004 when the TCP received a certificate from the Cane Commissioner Punjab that the Defendant had cleared its dues to cane growers. However, subsequently, the Cane Commissioner issued show-cause notice dated 21-08-2005 to the Defendant alleging that it had obtained the clearance certificate by misrepresentation, and the TCP

was requested by the Cane Commissioner not to make further payment to the Defendant.

4. The Defendant contested proceedings before the Cane Commissioner and contended that the amount due to one cane grower was deposited in the bank when he did not come forth to receive payment within time, hence there was no misrepresentation in obtaining the clearance certificate. In the meantime, as requested by the Cane Commissioner, the TCP withheld 10% of the purchase price next due to the Defendant on commencement of cane crushing. The Defendant treated that as non-performance by TCP, and by letter dated 31-12-2004 the Defendant rescinded the contract. Of the purchase price received from TCP (Rs. 168,198,000/-), the Defendant deducted 2% of the bid money and 3% of the performance bond, total Rs. 9,894,000/-, and sent a refund cheque of Rs. 158,304,000/- to TCP on 17-03-2005. Since the TCP wanted specific performance of the contract, it returned the cheque to the Defendant under cover of letter dated 22-03-2005.

5. Thereafter, the TCP and the Defendant engaged in collateral proceedings over possession of the sugar stock when the Defendant created third-party interest therein. As regards the proceedings before the Cane Commissioner, those culminated in 2006 by the order of the Secretary Food in appeal stating that since the Defendant had after the show-cause notice made payment to the outstanding cane grower along with the markup imposed by the Cane Commissioner, the matter did not require further proceedings.

6. With regards to the subject sugar contract, both parties filed suits before the High Court of Sindh at Karachi. Subsequently, the Defendant withdrew its suit, and in view of the arbitration clause in the contract, the Defendant filed an application under section 34 of the Arbitration Act, 1940 in TCP's suit, which was granted and the dispute was referred to arbitration by two arbitrators.

7. Before the arbitrators, both parties filed independent claims. The TCP pressed its claim to the extent of damages of Rs. 364,822,577/-. A break-up of the damages claimed by TCP was filed as follows:

**"TCP'S CLAIM ON ACCOUNT OF PURCHASE OF 12,000 M. TONS SUGAR FROM M/S. ADAM SUGAR MILLS LIMITED.**

|                                                                                       | <u>(Amount in Rs)</u>                                                                    | <u>(Amount in Rs)</u>  |
|---------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------|------------------------|
| 01. Total Value of 12,000 M.t. Sugar @ Rs.16,490/- PMT                                | <u>197,880,000/-</u><br>(Not to be included in the total. It is full value of the sugar) |                        |
| 02. Advance payment of 85% value of sugar to be refunded by the party                 | 168,198,000/-                                                                            |                        |
| 03. Penalty @ 25% on purchase Price (85% paid amount)                                 | 42,049,500/-                                                                             |                        |
| 04. Interest @ 10% p.a. on 85% paid Amount from July, 04 to Dec, 05 (549 days)        | 25,298,822/-                                                                             |                        |
| 05. Price difference @ Rs.10/- K.g.                                                   | <u>120,000,000/-</u>                                                                     | 355,546,322/-          |
| <b>Other Incidentals</b>                                                              |                                                                                          |                        |
| 06. Muqaddum chargers @ Rs.10,000/- p.m. from July 04 to Dce, 05.                     | 180,000/-                                                                                |                        |
| 07. Godown insurance @ 4,44 PT per month from July, 04 to Dec, 05.                    | 959,040/-                                                                                |                        |
| 08. Survey / Samples /PSI / Advertisement / Tender Notice Expenses etc., @ Rs.50/-PT. | 600,000/-                                                                                |                        |
| 09. 3.5% income tax (deduction at source) against adhoc payment                       | 5,886,930/-                                                                              | 7,625,970/-            |
| 10. Legal & Administrative Exp.                                                       |                                                                                          | 1,650,285/-            |
| 11. Total damages/Amount                                                              |                                                                                          | <u>364,822,577/-</u> " |

8. The claim of the Defendant against the TCP was also for damages of Rs. 889,452,000/- for loss of business, reputation and goodwill.

9. The arbitrators concluded that :

*"The Claimants (TCP) are entitled to Rs. 5,936,400/- and are not entitled to markup on this amount."*

*"The Respondents (Defendant) are not entitled to Rs. 88,945,000.75 or any part thereof as they did not prove any damages and/or loss suffered by them."*

*“The upshot of the above discussion is that we make this Award and allow Rs. 5,936,400/- to the Claimants. We allow Rs. 3,957,600/- to the Respondents on account of Bid Money.”*

10. The Defendant has not challenged the Award. However, TCP moved CMA No. 7165/2007 under section 151 CPC praying for modification of the Award. By order dated 06-02-2013 the said CMA was treated as the requisite application to object to the Award, but it was questioned whether it was within the period of limitation. The Award was filed in Court on 08-05-2007. Under Article 158 of the Limitation Act, 1908, the 30 day period for filing an application to contest an Award commences from the date of service of the notice of filing of the award. Notice of filing of the Award was issued by the Court to the parties on 05-06-2007, and as per the bailiff's report, it was served on TCP on 20-08-2007, presumably due to the intervening summer break. However, it appears that the TCP acquired knowledge of the filing of the Award from the Arbitrators and filed the said CMA/objections on 15-08-2007 i.e., even before receipt of notice from the Court. Therefore, the question of limitation does not arise.

11. Heard the learned counsel and perused the record.

12. Mr. Rafiq Kalwar, learned counsel for the TCP accepted that of the amount of Rs. 168,198,000/- paid by the TCP as purchase price to the Defendant, a sum of Rs. 158,304,000/- was refunded by the Defendant. The written arguments of the Defendant before the arbitrators also state that though the TCP had initially returned the refund cheque, but subsequently it received the said amount pursuant to order dated 31-08-2005 passed in HCA No. 132/2005. The TCP has also not claimed that amount in para 1 of its CMA No.7165/2007. Hence, excepting a sum of Rs. 9,894,000/-, the TCP had received back the purchase price paid by it to the Defendant.

13. With regards to TCP's claim of 10% interest and 25% penalty on the advance paid to the Defendant (serial 3 and 4 of the break-up), since that was being claimed on the basis of a stipulation in clause 9(d) of the contract, the arbitrators held that such claim was hit by section 74 of the

Contract Act and the TCP could at best claim only reasonable compensation. As regards the other heads of claim at serial 5 to 10, the arbitrators held that the TCP had not lead evidence to prove the same. Regards the claim for damages by the Defendants, the arbitrators held that the Defendant too had not lead evidence to prove the same.

14. The arbitrators noted that the amount of the 2% bid money was Rs. 3,957,600/- and the amount of the 3% performance bond was Rs. 5,936,400/- (total Rs.9,894,000/-). The said figures were not in dispute. Though the arbitrators observed: *"We hold that it seems that none of them (the parties) had committed breach of contract"*, nonetheless in the circumstances of the case the arbitrators were inclined to award the TCP an amount equivalent to the performance bond. Though the award also says *"We allow Rs. 3,957,600/- to the Respondents on account of Bid Money"*, that is only to say that the Defendant is entitled to retain the bid money of Rs. 3,957,600/- already deducted by it. Had the arbitrators intended to award an additional sum of Rs. 3,957,600/- to the Defendant, they would have deducted that amount from Rs. 5,936,400/- and awarded the TCP only Rs. 1,978,800/-. Therefore, to that extent the award requires a clarification which can be done by modifying the award under section 15 of the Arbitration Act, 1940.

It is apparent that in awarding the TCP an amount equivalent to the performance bond, and in allowing the Defendant to retain the bid money, the arbitrators acted on equitable considerations. Since none of the parties have taken any issue to that, I leave the matter at that.

15. Coming now to TCP's objection to the award. Mr. Rafiq Kalwar Advocate submitted that the finding of the arbitrators that the Defendant had not committed breach of contract was erroneous. But for the sake of argument even assuming that to be the case, Mr. Kalwar conceded that TCP had not lead evidence with regards to the amount claimed at serial 5 to 10 of the claim sheet and he did not contest the award to that extent. However, he submitted that when the arbitrators awarded TCP the amount of the performance bond which the TCP was entitled to forfeit under clause 6(b) of the contract, then the arbitrators ought to have also awarded 10% interest and 25% penalty on the

advance payment under clause 9(d) of the contract, and forfeiture of the bid-money under clause 5(b) of the contract which were sums stipulated in the contract for which no evidence was required.

16. The claim for 10% interest and 25% penalty on the advance payment under clause 9(d) of the contract has been categorically rejected by the arbitrators by reason of section 74 of the Contract Act viz., that where a contract contains a stipulation by way of penalty on breach of contract, then the party complaining of the breach is entitled at best to reasonable compensation. It is not the case of TCP that the said law has been wrongly applied by the arbitrators. In view of *Province of West Pakistan v. Mistri Patel & Co.* (PLD 1969 SC 80), also relied upon by the arbitrators, section 74 of the Contract Act would also hit the forfeiture in clauses 5(b) and 6(b) of the contract. However, what the learned counsel has failed to notice is that though the quantum of the compensation awarded to TCP is equivalent to the performance bond, it has not been awarded by the arbitrators on the basis of clause 6(b) of the contract or as reasonable compensation under section 74 of the Contract Act, but as discussed above, on an equitable consideration of the matter.

17. For the foregoing reasons, save the clarification/modification discussed above, the award does not call for any interference. Consequently, CMA No. 7165/2007 is dismissed. The award is modified under section 15 of the Arbitration Act, 1940 and made rule of the Court by decreeing only that the Plaintiff (TCP) is entitled to a sum of Rs. 5,936,400/- against the Defendant along with markup under section 29 of the Arbitration Act, 1940 @ 8% per annum from the date of decree till realization.

**JUDGE**

Karachi  
Dated: 12-05-2020