

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ FAO(OS) 525/2006

Reserved on : April 30, 2009

Pronounced on : May 12, 2009

SINEXIMCO PTE. LTD.

..... Appellant

Through: Mr. A.K. Singla, Sr. Advocate with Mr.
Pankaj Gupta, Advocate.

versus

M.M.T.C. LIMITED

..... Respondent

Through: Mr. J.P. Sengh, Sr. Advocate with Ms.
Padma Priya, Mr. Sumit Gehlot, Ms. Garima
Kapoor, Mr. Sumit Batra, Advocates.

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

- 1. Whether the Reporters of local papers may be allowed
to see the judgment? yes**
- 2. To be referred to the Reporter or not? yes**
- 3. Whether the judgment should be reported in the Digest? yes**

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J U D G M E N T

VALMIKI J. MEHTA, J

1. This appeal has been filed challenging the judgment dated 3.7.2006 of the learned Single Judge passed in OMP No.204/2002, which OMP was the

objections/petition filed by the respondent herein to the award dated 8.3.2002 of the arbitrators. By allowing the objections, the learned Single Judge has allowed the respondent to forfeit, on account of losses caused to it by breach of two contracts by the appellant in failing to lift/purchase the material being Friable Chrome ore, an amount of USD 3,75,000 out of the total advance of USD 5,47,470 (total 15% value of each of the two contracts) lying with the respondent as advances received under the two contracts. The arbitrators by the award had only allowed forfeiture of 3% out of the 15% advance received, on the ground that the respondent had failed to prove the loss suffered, but the learned Single Judge has held that respondent has proved that it suffered loss of USD 3,75,000.

2. The facts of the case are that the appellant as the buyer and the respondent as the seller entered into two contracts dated 5.9.1995 for the supply of Friable Chrome Ore of 5000 tonnes each of two particular grades. The first grade was 50/48% at USD 205 per metric tonne and 46/44% grade at USD 155 per metric tonne. The materials under the contracts were to be lifted by the appellant by November-December 2005. After various extensions which were granted to the appellant, finally the last date for lifting of the material by the appellant was fixed as 31.5.1996 and by which date the appellant failed to lift the material. The appellant had also to open a Letter of Credit (hereafter "L.C.") in favour of the respondent by 6.5.1996.

3. On account of the breaches of the appellant, including inter-alia the breach of non-opening of the L.C. by the appellant till 6.5.1996, the respondent, more particularly considering the repeated extensions already granted, terminated the contract vide its fax dated 12.6.1996 and forfeited the advance of USD 5,47,470. By the fax dated 12.6.1996 the respondents rejected the request fax dated 30.5.1996 of the appellant for accepting the contract to have come to an end on account of force majeure. Arbitration was initiated by the appellant seeking refund of its advances of USD 5,47,470 and to which the respondent filed its counter-claim claiming an amount of USD 3,75,000 for the losses suffered by the respondent.

4. Before the Arbitrators on the pleading of the parties, which included the counter claim of the respondent, the following points for determination were framed:-

- A. *“Whether the force majeure conditions prescribed by Art. 17 of the contract agreement in question are not attracted in the present case, so as to relieve Claimant of its obligations and responsibility under the contract?”*
- B. *Whether action of respondent in refusing to adjust advance under Contract Nos. 37 and 39 has been arbitrary, discriminatory and against the spirit and substance of commercial transaction between the parties?*

C. Whether Claimant can be alleged to be in breach of its obligation by not lifting the consignment under the subject contract, in the facts and circumstances of the case?

D. In the event of answer to Issues A to C being against the Claimant and in favour of the Respondent, whether the Respondent's action of claiming forfeiture of entire amount of advance paid by Claimant against the above contract is legal, valid and justified on facts and in law?

E. Subject to the decision on above questions, what part of deposit/advance can be retained by the Respondent as a reasonable compensation in view of statutorily recognized principles laid down in Section 74 of the contract Act?

F. To what amounts and the amount of interest thereon is the Respondent liable to reimburse to the Claimant by way of adjustment against future supplies or otherwise?

G. Liability of the respondent as to costs of litigation?"

5. The Arbitrators answered points A to C in favour of the respondent herein and held that the appellant was guilty of breach of contract. The Arbitrators noted that the prices of the contracted material, being Friable Chrome Ore had fallen drastically over a period of time and consequently that was found to be the main reason for non-lifting of the contracted material by the appellant. The Arbitrators found the appellant guilty of breach of contract in not opening the L.C. by the stipulated date. However, on the points D & E as to whether the respondent was entitled to forfeit the advance payment lying with it, and if so, to what extent, the Arbitrators held the respondent was only entitled to retain 3% out of the 15% of the

advance moneys. This was done because the Arbitrators arrived at the finding that the respondent had failed to prove its loss, but, having found that certain administrative expenditure would have been incurred by the respondent, the Arbitrators awarded 3% out of the 15% of the advance money lying with the respondent. The arbitrators held that the respondent had failed to prove its losses because according to the arbitrators: the respondent had a back to back contract with its supplier the Orissa Mining Corporation (hereinafter OMC); that the respondent only used to receive 15% commission on sales from OMC; that respondent had failed to prove that OMC claimed losses from the respondent; that respondent failed to prove that the material sold to M/s Glencor was not the material which was mined for the appellant, and that the respondent's pleading did not show that any loss was caused to the respondent. It is relevant to note that the respondent had filed and proved before the Arbitrators its contract with M/s. Glencor International A.G.Baar, Switzerland dated 14.5.1996 (hereinafter M/s Glencor) and in its counter claim had given a chart showing the difference in the prices under the subject contract with the appellant (higher prices) and the contract with M/s. Glencor (lower prices) and had thereafter on account of the losses caused to it/respondent, made a counter claim of USD 3,75,000.

6. As already stated above the respondent being aggrieved by the award of the Arbitrators in disentitling them to the amount of counter claim of USD 3,75,000 and restricting the forfeiture amount to only 3% of the 15%, filed its objections to the award as OMP 204/02 before the learned Single Judge, which have been decided by the impugned judgment of the learned Single Judge allowing the respondent to retain USD 3,75,000.

7. In setting aside the award the learned Single Judge has primarily relied on firstly, the fact that the Arbitrators have ignored the only and relevant material piece of evidence being the contract of the respondent with M/s. Glencor dated 14.5.1996 which contract was reasonably proximate to the date of breach/date of lifting of the material by the appellant being 6.5.1996 and 31.5.1996 respectively and secondly, the material pleadings being the counter claim of the respondent herein did in fact make averments of the loss suffered. The learned Single Judge held that the Arbitrators ignored the material document/evidence and pleadings on irrelevant grounds such as the contract of the respondent with M/s. Glencor was not for the material mined for the subject contract, and was for a larger contract which included one additional type of Friable Chrome Ore (though it did include also the grades of Friable Chrome Ore, the contracted material) and that no loss was caused to respondent on account of the grounds detailed in para 5 above. The

learned single judge also held that no doubt it is settled law that a Court which hears an objection to an award has limited jurisdiction while hearing a challenge to the same, but, if the Arbitrators ignored a material document (*K.P. Poulose vs. State of Kerala and Anr., (1975) 2 SCC 236*) or rely on the legal proposition which legally erroneous (*Oil and Natural Gas Corporation Ltd. vs. Saw Pipes Ltd., 2003 (5) SCC 705*) the Court can definitely set aside the award of the Arbitrator.

8. The issue which arises for determination in the present appeal are:

(i) Whether this Court sitting as an appellate court should interfere with the findings of the learned Single Judge, when the learned Single Judge by giving detailed reasons has upset the findings of the Arbitrators by holding that the Arbitrator ignored the material piece of evidence and the relevant pleadings of the respondent?

(ii) Whether even if independently the award has to be looked at, is not the same liable to be set aside?

9. Before us the counsel for the appellant has urged the same issues as urged before the arbitrators that the respondent has not suffered any loss inasmuch as it

has not paid compensation to OMC for loss suffered by OMC or commission of 15% to Orissa Mining Corporation as the respondent had a back to back contract with OMC and the witnesses of the respondent have failed to prove the loss and also the fact that the respondent in spite of an application to file the documents with respect to its loss suffered qua OMC failed to file the same. The counsel for the appellant further contended that it was not as if the Arbitrators have ignored a material piece of evidence because reference is found to the contract with M/s. Glencor in the award and consequently it cannot be said that Arbitrators have mis-conducted themselves by ignoring material document/evidence. The counsel for the appellant has placed reliance upon the *Saw Pipes* case (supra) to contend that the learned Single Judge ought not to have interfered with the findings arrived at by the Arbitrators. The learned counsel for the appellant also referred to the written statement of the respondent before the Arbitrators, and more particularly its paragraph 24 at internal pages 8 and 9, as also the statement of the witnesses (Mr. C. Govindan Kutty and Mr. Samar Das) to support his arguments. The learned counsel for the appellant further elaborated that the respondent was only a commission agent and it was bound to prove that OMC had recovered from the respondent the amount which the respondent is claiming from the appellant.

10. We would like to deal first with the second issue stated in para 8 whether the award can be sustained as per the arguments raised by the appellant and whether the Arbitrators were justified in looking at the contract of the respondent with a third party M/s. Orissa Mining Corporation in order to arrive at a decision as to whether the respondent had suffered a loss or was it not enough for the respondent to have relied upon its contract with M/s. Glencor to show that the prices of the subject materials were much lower than the contracted prices on or around the breach of the contract/performance of the contract.

We clearly feel that the arbitrators have in the award relied upon legal propositions which are wholly unsustainable and which did in fact call for setting aside of the award, and which the single judge rightly did.

10(i) Admittedly the respondent was a trader and did not source goods from OMC for its own consumption. The goods were sourced from OMC to sell ahead to purchasers such as the appellant. We think there was clearly a legal misconception of the arbitrators with regard to the losses to be caused to the respondent. The issue with regard to the requirement of losses in the facts of this case was actually the loss of profits to the respondent, and not losses in the sense of actual loss of moneys which were caused to it by moneys going out of its pocket. The issue of losses on account of moneys going out of its pocket would have only

arisen if the respondent was not a trader but a consumer of goods, which admittedly is not the position in the present case. The contracts are only between the appellant as buyer and respondent as seller. It is a bilateral contract between the appellant and respondent and not a tripartite contract to which OMC is a party. It is wrong and indeed strange for the appellant to contend that respondent is only a commission agent when the contract between the appellant and respondent does not refer to the respondent as so and nor are the clauses as if the respondent is a commission agent. On account of the appellant buyer refusing to purchase due to fall in the prices, the respondent suffers a loss in the sense that, if the contract had been performed at the contracted higher rates then respondent would have got higher profits as the contracted material was available at much lower rates on the date of performance/breach, i.e., the loss is loss of higher profit margin. Also, the respondent had a long term supply contract with OMC for a year and which is for more than the quantity which was to be purchased by the appellant as stated by the witness C.Govindan Kutty. Thus, it was not required that only that ore which was to be specifically sourced to appellant could only have been the specific material which was necessary to be sold to Glencor before the respondent could maintain its counter-claim.

10(ii) In fact in law causing of actual loss by necessarily going through a new contract at lower price with third party like Glencor is also not required as per the law under Section 73 of the Contract Act. The proposition of law which the arbitrators have wrongly relied upon is that actual loss must be caused and it is not enough to show only fall in the prices to claim damages on account of breach of contract. As per Section 73 of the Contract Act, 1872 once there is breach of contract it is not necessary for the aggrieved party in order to claim damages to first incur an actual loss or actual loss of profits before the aggrieved party can successfully institute a claim for damages.

10(iii) We would at this stage seek to refer to a judgment of the Division Bench of this Court in *M/s Saraya Distillery, Sardarbaggar vs. Union of India, AIR 1984 Delhi 360* which holds that actual carrying out of the contract and actual incurring of losses is not a sine qua non to claim damages from the guilty party.

The following paragraphs of the said judgment are relevant which are reproduced below:

“7. Learned counsel for the contractor contended that before a party could claim damages he must go to the market, purchase the goods not supplied or short supplied and suffer actual loss. Only

then, argued the learned counsel, he would be entitled to damages. We do not agree.

9. What the buyer is deprived of in the usual course of things by non-delivery is the value of the goods at the time and place of the delivery, less price payable by him under the contract. This loss of value is the only natural result of the breach, the only kind of damage that ensues in the usual course of things. The quantum of damages on account of the breach of such contract would be the difference between the contract price and the market price of the goods in question at the time when the contract is broken. The provisions contained in S.73 do not envisage that the buyer must resort to actual purchase and suffer loss before claiming damages. It was so held in Ismail Sait & Sons. v. Wilson & Co., AIR 1919 Mad 1053. Similar view was taken in Vishwanath v. Amarlal AIR 1957 Madh Bha 190.

10. The Supreme Court in the case of M/s. Murlidhar Chiranjilal v. M/s. Harish-chandra Dwarkadas AIR 1962 SC 366 observed at page 369:

“The two principles on which damages in such cases are calculated are well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed; but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps : (British Westinghouse Electric and Manufacturing Co. Ltd. V. Underground Electric Rly. Co. of London (1912 AC 673 at p. 689). These two principles also follow from the law as laid down in S.73 read with the Explanation thereof. If, therefore, the contract was to be performed at Kanpur it was the respondent’s duty to buy the goods in Kanpur and rail them to Calcutta on the date of the breach and if it suffered any damage thereby because of the rise in price on the date of the breach as compared to the contract price, it would be entitled to be reimbursed for the loss. Even if the respondent did not actually buy them in the market at Kanpur on the date of breach

it would be entitled to damages on proof of the rate for similar canvas prevalent in Kanpur on the date of breach, if that rate was above the contracted rate resulting in loss to it. But the respondent did not make any attempt to prove the rate for similar canvas prevalent in Kanpur on the date of breach. Therefore, it would obviously be not entitled to any damages at all, for on this state of the evidence it could not be said that any damage naturally arose in the usual course of things.”

(emphasis supplied)

Learned counsel for the Contractor relied on a judgment of a learned single Judge of this court in Union of India v. Tribhuwan Dass, Lalji Patel, AIR 1971 Delhi 120. In this case it was observed that the Government can recover the loss only sustained by it and could not claim damages, if no loss was sustained. With respect we do not agree with this view. This is contrary to the observations made by the Supreme Court in M/s. Murlidhar Chiranjilal (supra). A Division Bench of this court in All India Institute of Medical Sciences v. American Refrigeration Co. Ltd. AIR 1982 Delhi 275 came to the conclusion that the case Union of India v. Tribhuwan Dass (supra) was wrongly decided. We hereby overrule the decision in Union of India v. Tribhuwan Dass.”

11. It is, therefore, clear that the only relevant evidence which was to be looked into in order to arrive at the loss caused to the respondent on account of admitted breach of contract by the appellant was not as to whether it suffered loss in its contract with M/s. Orissa Mining Corporation from which it had sourced the goods, but, whether there was fall in the market prices from those stated in the contract to those as found at the time of the performance/breach of the contract. The learned Single Judge has therefore rightly relied upon the contract of the respondent with M/s. Glencor and on the basis of the following chart (given by the

respondent in its counter claim and also reproduced in the judgment of the learned Single Judge) and held that the respondent had suffered a loss of USD 3,75,000:

<i>“</i>	<i><u>50/48% grade</u></i>	<i><u>46/44% grade</u></i>
<i>a) Contract price</i>		
<i>with the claimant</i>	<i>205 PMT</i>	<i>155 PMT</i>
<i>b) Price at which</i>		
<i>the cargo was sold</i>	<i>150 PMT</i>	<i>135 PMT</i>
<i>c) Difference</i>	<i>55 PMT</i>	<i>20 PMT</i>
<i>d) Amount of loss</i>		
<i>Suffered for 5,000 MT</i>	<i><u>2,75,000</u></i>	<i><u>1,00,000</u></i>
<i>e) Total</i>	<i>USD</i>	<i>3,75,000</i>
<i>f) Interest @ 20% from</i>		
<i>May 31,95 to</i>		
<i>October 31,1997</i>	<i>USD</i>	<i><u>1,65,000</u></i>
	<i>Grand Total USD</i>	<i><u>5,40,000”</u></i>

12(i) The learned Single Judge in our opinion rightly held that the material piece of evidence being the contract with the respondent with M/s. Glencor had not been adverted to by the Arbitrators inasmuch as mere reference to the document without reference to the relevant portion of the document is as good as ignoring the document/evidence inasmuch as the material portion of the same is not adverted to. It is undisputed that the material portion of the document showing the difference in the prices in the contract under the contract with M/s. Glencor and the subject contract has not been adverted to by the Arbitrators. The Arbitrators had simply referred to the contract of the respondent with M/s. Glencor for the reasons which are wholly irrelevant reasons. The contract with M/s Glencor is dated 14.5.1996 and which is very much proximate to the dates of breaches/performances of the appellant under the contract. The contract with M/s Glencor is for three qualities, two of which are those of the subject matter of the contracts.

12 (ii) We may note that the respondent had relied before the Arbitrators on the judgment of the Supreme Court reiterated as ***Dwarka Das vs. State of M.P. & Anr., (1999)3 SCC 500***. The said judgment is an authority for the proposition that some amount of estimation is always required in proof of damages and once there is material available which has nexus to the estimation of damages, then, it cannot be said that losses and damages should not be awarded. The Supreme Court

referred to its earlier judgments in the cases of *M/s. A.T. Brij Paul Singh & Ors. vs. State of Gujarat*, (1984) 4 SCC 59 and *Mohd. Salamatullah vs. Govt. of A.P.*, (1977) 3 SCC 590 to hold that evidence which is not of the same place but of a nearby place/vicinity can be used to determine the award of damages. Also it was held that in many cases there would be some amount of honest guesswork in quantification of damages and there was nothing illegal about the same. The spirit of the judgments and the law is that a party who is guilty of breach of contract is bound to compensate the person who is aggrieved and exaction in the proof of damages is an utopia which is not the object of law. The arbitrators acted on a wrong proposition of law in holding the judgment as not applicable on the reasoning that the judgment was under Section 73 of the Contract Act, 1872 and not under Section 74 of the said Act. Once damages have to be proved under Section 74 as the contract is such that damages have to be proved, then, the principle for determination of loss on damages has necessarily to be on the principles laid down under Section 73. Therefore, once we have in the facts of the present case the contract of the respondent with Ms/ Glencor which is around the same period as that of the breach/performance of the contract, the same is a relevant piece of evidence on the basis of which damages can be awarded. The Arbitrators were, therefore, wholly unjustified in ignoring this binding precedent of

the Supreme Court once the contract of M/s. Glencor was filed and proved before it.

13. The contention of the learned counsel for the appellant is that paragraph 24 of the written statement of the respondent shows that it suffered no loss, ignores the facts that the counter claim has been filed as a separate pleading than the written statement filed by the respondent, and therefore, both the written statement and the separate counter claim had to be read together. On reading so, it is clear that the respondent had made averments with respect to loss suffered on account of the lesser prices of the material sold to M/s. Glencor as compared to the prices under the subject contract. No doubt, the pleadings seems to be inartistically drafted with reference to the para 24 of the written statement, but, since there was a counter claim simultaneously filed by the respondent before the Arbitrators, one would have to then see both the written statement and counter claim together and on so doing it cannot be said that there is no pleading with respect to the losses suffered by the respondent inasmuch as the counter claim specifically mentions of the contract of the respondent with M/s. Glencor and in fact in paragraph 5 of the counter claim there is set out the chart showing the loss caused and as reproduced in para 13 above.

14. As regards the other contentions of the learned counsel for the appellant that the witnesses have admitted that no loss has been caused inasmuch as they do not have documents to prove the same and the respondent failed to file its correspondence and accounts with Orissa Mining Corporation, we feel that such documents are irrelevant in view of the respondent having already filed its contract with M/s. Glencor which as per the deposition of the witness the respondent had in fact performed and the witness has further also stated that he does not immediately have the details of the performance of the contract with M/s. Glencor since he has not brought the original record. The statement of witnesses have to be read as a whole and one part of it has to be read with the other parts. One part of a statement cannot be torn out of context from the whole statement. The so called admission in one part has to be necessarily read in the context of the entire deposition. When the statements of the witnesses are contrary to the documents which are on record as proved or admitted, then it is permissible to rely instead on the oral testimony to the documents on record. Also merely because there is a back to back contract does not lead to presumption that rates/prices in it will fall along with fall in the prices in the market and which the arbitrators have presumed by the existence of a back to back contract.

15. As regards the first issue stated in para 9 above which in this appeal we have been called to consider, in view of our decision in the second issue already given above, it is clear that there was only one view the Arbitrators could have taken in terms of the law as applicable and the facts which were found before them, but the Arbitrators wrongly choose to ignore the same and consequently the learned Single Judge was right in upsetting the award. In appeal, therefore, we would not like to take a different view once the learned Single Judge has clearly found that the learned Arbitrator has wrongly ignored the material piece of evidence and the learned Single Judge has further given valid reasons for holding that the contract with M/s. Glencor being proximate in time with respect to the date of breach/performance of the appellant, the Arbitrators were bound to consider the same and not ignore the same on irrelevant considerations. Sitting as an appellate court, therefore, we would not like to interfere with such valid reasons as recorded by the learned Single Judge and in fact to which we agree and which is also the position in law as held by a Division Bench judgment of this Court in *M/s. Saraya Distillery, Sardarbaggar's* case (supra).

16. We, therefore, find no merit in the appeal and the same is dismissed. In view of the fact that the appellant is found to have backed out of a contract upon discovering that the market rates of the contracted item had fallen we feel that the

appellant must pay costs of Rs. 30,000/- to the respondent not later than four weeks from today failing which interest at 9% per annum shall be payable on the said costs.

VALMIKI J. MEHTA, J

MUKUL MUDGAL, J

MAY 12, 2009
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