

F-7

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

+ O.M.P. 40/2000 & I.A. 5324/2005

M.M.T.C. LTD.

..... Petitioner

**Through: Mr. P.P. Malhotra, ASG with
Mr. Jagdeep Kishore, Advocate.**

versus

BELECOM J.V.

..... Respondent

**Through: Mr. Darpan Wadhwa, Advocate with
Mr. M.R. Shamshad & Ms. Divya
Jha, Advocates.**

Date of Decision : FEBRUARY 17, 2010

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No. |
| 2. To be referred to the Reporter or not? | Yes. |
| 3. Whether the judgment should be reported in the Digest? | Yes. |

J U D G M E N T

MANMOHAN, J (ORAL)

1. O.M.P. No.40/1999 has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “Act, 1996”) challenging the majority arbitral award dated 23rd August, 1999 to the extent it awards respondent-claimant’s claim with regard to Contract No. 35 executed between the parties.

2. The facts relevant for this case are that on 14th October, 1991, Contract No.35 was executed between petitioner-objector and the respondent-claimant for

sale of 50,000 metric tonnes of Muriate of Potash (MOP) at a price of Rs.2,766.50 per metric ton (F.O.B.). The said contract contained a payment clause whereunder petitioner-objector was to open a Letter of Credit with the Bank of Foreign Trade of USSR, Minsk, valid for a period of 90 days. The relevant portion of the payment clause is reproduced hereinbelow:

“PAYMENT :-

Within 7 days after receiving the sellers’ telegraphic advice of the readiness of the goods for shipment, the buyers shall open by cable with the Bank for Foreign Trade of the USSR, Minsk, in favour of the sellers an irrevocable Letter of Credit in Indian Rupees for the 80.5% value of the goods mentioned in the sellers’ cable plus 5% to cover possible increase of the quantity of the shipment. The Letter of Credit shall be opened for validity of 90 days. Payment of the goods shall be made in Indian Rupees through the aforesaid Letter of Credit against presentation to the Bank for Foreign Trade of the USSR, Minak of the under mentioned documents.

It is agreed that for the shipment of 50,000 i.e. 5%, 95% less franchise of 0.5% of the invoice value will be payable. Balance will be payable after discharge port results are found in conformity with the contractual specifications etc. In case of variations, penalty imposed by the Ministry of Chemical & Fert. Govt. of India would be adjusted from the amount due to the Sellers.

- i) Copy of Tlx advice from sellers to Buyers immediately upon sailing of the vessel giving name of the vessel, date of sailing, quantity loaded and invoice value.*
- ii) Full set of “clean on board” Bill of Lading in long form (one original and 3 copies) showing the Ministry of Chemical & Fertilizer (Deptt. of Fert.) as Consignee-marked freight payable by the Charterers Hotify-Ministry of Chemicals & Fertilizers (Deptt. of Fert.) Charter party bills of lading acceptable provided it bears an endorsement that all terms and conditions of the relevant Charter Party are deemed to have been incorporated therein.*
- iii) Invoice in four copies in the name of the IDITC on behalf of ministry of C & Fert. (Deptt. of Fert.)*
- iv) Certificate of weight issued by the port authority, otherwise Bill of Lading will serve as weight certificate.*
- v) Certificate of Quality issued by the Sellers/Producer.*
- vi) Certificate of Origin in four copies.*

vii) *Sellers' Certificate showing 2 original Bill of Lading.....”*

3. On 24th October, 1991, petitioner-objector who was the purchaser opened a Letter of Credit for 25,000 metric tonnes, valid for a period of 90 days, that means, valid till 22nd January, 1992.

4. Fearing disintegration of USSR, respondent-claimant wrote to petitioner-objector requesting it not to pay under the Letter of Credit. Petitioner-objector on its part, vide letter dated 20th December, 1991, instructed its banker Oriental Bank of Commerce, not to pay under the said Letter of Credit.

5. As USSR disintegrated on 31st December, 1991, petitioner-objector/buyer and the respondent-claimant/seller agreed to amend the payment clause in the contract as under:

“ MMTC is also agreeable to make payment in Indian Rupees under L/C or CAD basis, into the seller's account with a Bank in India, if such an account is established with prior approval of the Reserve Bank of India and Government of India for purpose of exports from India to Belorussia.”

6. On 05th December, 1991, the vessel with cargo left the Russian port and it arrived in India on 05th January, 1992.

7. On 14th February, 1992, Reserve Bank of India granted permission for a Rupee Escrow Account to be opened by the respondent-claimant subject to certain conditions. One of the conditions imposed by the Reserve Bank of India was that payments that became due prior to freezing of central account of USSR on 27th December, 1991, would not be deposited in the Escrow account. Condition No.

(xii) imposed by the Reserve Bank of India vide the aforesaid letter is reproduced hereinbelow:-

“ xii) Payments by MMTC that became due prior to freezing of Central Account of former USSR on 27-12-91 cannot now be paid into Escrow A/c.”

8. On 20th February, 1992, respondent-claimant requested petitioner-objector to withhold the payments of the shipment in issue until all questions connected with the said payment had been resolved.

9. However, on 29th May, 1992, petitioner-objector's bank, Oriental Bank of Commerce made payment of Rs.3,71,10,195.54 to State Bank of India for crediting the Bank of Foreign Trade of USSR, Minsk, on behalf of the petitioner-objector in connection with the aforesaid transaction.

10. It seems even after the amount had been credited to the Bank of Foreign Trade of USSR, the said foreign bank was agreeable to reversal of the credit entry, but the Reserve Bank of India vide its Telex dated 28th October, 1992, refused to do so. The aforesaid Telex dated 28th October, 1992 of Reserve Bank of India reads as under:

“AS THE MATTER RELATED TO ALL LETTERS OF CREDIT OPENED PRIOR TO 31ST DECEMBER, 1991 THE SAME WAS TAKEN UP BY US WITH GOVT. OF INDIA. GOVT. OF INDIA HAVE NOW ADVISED US THAT AS ALL THE RELATIVE LC'S WERE OPENED PRIOR TO 31-12-1991 AND AS SUCH PAYMENT HAS TO BE REGULATED IN TERMS OF OUR PAYMENT ARRANGEMENTS WITH FORMER USSR. THEY ARE THEREFORE NOT AGREEABLE TO REVERSAL OF THESE ENTRIES.”

11. On 12th September 1996, petitioner-objector wrote to Reserve Bank of India admitting that amounts had been paid *“to the wrong account of BFEA of erstwhile USSR Minsk Branch, where it is lying frozen”* and that although the petitioner-objector had made the payment, respondent-claimant represented that it had not received the said amount. By the said letter, petitioner-objector sought to recall its remittance.

12. On 17th October, 1997, respondent-claimant invoked the arbitration clause incorporated in the contract. Both petitioner-objector and the respondent-claimant appointed one Arbitrator each, while the Supreme Court vide its order dated 19th November, 1998 appointed Justice Ranganath Misra, former Chief Justice of India as the Presiding Arbitrator.

13. On 23rd August, 1999, the three Arbitrators published three separate awards. Insofar as Contract No.35 was concerned, by a majority of two is to one, the Arbitral Tribunal awarded respondent-claimant's claim of Rs.3,71,10,195.54/- along with interest @ 18% in favour of the respondent-claimant.

14. On 22nd November, 1999, petitioner-objector filed the present objection petition under Section 34 of the Act, 1996.

15. Mr. P.P. Malhotra, learned Additional Solicitor General along with Mr. Jagdeep Kishore, learned counsel for petitioner-objector submitted that the

respondent-claimant's claim was barred by limitation inasmuch as the cause of action if any, had accrued in May, 1992 when the payment had been made by Oriental Bank of Commerce into the respondent-claimant's account of Bank of Foreign Trade, USSR, whereas the present reference had been raised by the respondent-claimant only in October, 1997. In this connection, learned counsel for petitioner-objector relied upon a judgment of the Supreme Court in ***State Bank of India vs. B.S. Agriculture Industries (I)*** reported in **(2009) 5 SCC 121** wherein it has been held as under:

“11. Section 24-A of the Act, 1986 prescribes limitation period for admission of a complaint by the consumer for a thus:

“24-A. Limitation period.—(1) The District Forum, the State Commission or the National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen.

(2) Notwithstanding anything contained in sub-section (1), a complaint may be entertained after the period specified in sub-section (1), if the complainant satisfies the District Forum, the State Commission or the National Commission, as the case may be, that he had sufficient cause for not filing the complaint within such period:

Provided that no such complaint shall be entertained unless the National Commission, the State Commission or the District Forum, as the case may be, records its reasons for condoning such delay.”

It would be seen from the aforesaid provision that it is peremptory in nature and requires the consumer forum to see before it admits the complaint that it has been filed within two years from the date of accrual of cause of action. The consumer forum, however, for the reasons to be recorded in writing may condone the delay in filing the complaint if sufficient cause is shown. The expression, “shall not admit a complaint” occurring in Section 24-A is sort of a legislative command to the consumer forum to examine on its own whether the complaint has been filed within the limitation period prescribed thereunder.

12. As a matter of law, the consumer forum must deal with the complaint on merits only if the complaint has been filed within two years from the date of accrual of

cause of action and if beyond the said period, the sufficient cause has been shown and delay condoned for the reasons recorded in writing. In other words, it is the duty of the consumer forum to take notice of Section 24-A and give effect to it. If the complaint is barred by time and yet, the consumer forum decides the complaint on merits, the forum would be committing an illegality and, therefore, the aggrieved party would be entitled to have such order set aside.

13. In Union of India v. British India Corpn. Ltd. while dealing with an aspect of limitation for an application for refund prescribed in the Business Profits Tax Act, 1947 this Court held that the question of limitation was a mandate to the forum and, irrespective of the fact whether it was raised or not, the forum must consider and apply it.

14. In HUDA v. B.K. Sood this Court while dealing with the same provision viz. Section 24-A of the Act, 1986 held: (SCC pp. 167-68, paras 10-12)

“10. Section 24-A of the Consumer Protection Act, 1986 (referred to as ‘the Act’ hereafter) expressly casts a duty on the Commission admitting a complaint, to dismiss a complaint unless the complainant satisfies the District Forum, the State Commission or the National Commission, as the case may be, that the complainant had sufficient cause for not filing the complaint within the period of two years from the date on which the cause of action had arisen.

11. The section debars any for a set up under the Act, admitting a complaint unless the complaint is filed within two years from the date of which the cause of action has arisen. Neither the National Commission nor had the State Commission considered the preliminary objections raised by the appellant that the claim of the respondent was barred by time. According to the complaint filed by the respondent, the cause of action arose when, according to the respondent, possession was received of the booth site and it was allegedly found that an area less than the area advertised had been given. This happened in January 1987. Furthermore, the bhatties which were alleged to have caused loss and damage to the respondent, as stated in the complaint, had been installed before 1989 and removed in 1994. The complaint before the State Commission was filed by the respondent in 1997, ten years after the taking of possession, eight years after the cause of alleged damage commenced and three years after that cause ceased. There was not even any prayer by the respondent in his complaint for condoning the delay.

12. Therefore, the claim of the respondent on the basis of the allegations contained in the complaint was clearly barred by limitation as the two year period prescribed by Section 24-A of the Act had expired much before the complaint was admitted by the State Commission. This finding is sufficient for allowing the appeal.”

15. In a recent case of Gannmani Anasuya v. Parvatini Amarendra Chowdhary this Court highlighted with reference to Section 3 of the Limitation Act that it is for the court to determine the question as to whether the suit is barred by limitation or not irrespective of the fact that as to whether such a plea has been raised by the parties; such a jurisdictional fact need not be even pleaded.

16. Insofar as the present case is concerned, at the first available opportunity in the written statement itself the Bank raised the plea that the complaint was barred by limitation. However, the objection with regard to limitation went unnoticed by all the three for a, namely, the District Forum, the State Commission and the National Commission. Since the question relating to limitation goes to the root of the matter and may render the order illegal, we would now see whether the complaint was filed within time i.e. within two years of accrual of cause of action.

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19. By no stretch of imagination, can it be said that the limitation came to be extended by the Bank's reply dated 11-3-1997. As a matter of fact, the Bank had communicated to the complainant long back vide its letter dated 28-3-1995 that the bills have been returned to B.M. Konar (Sales Manager of the complainant firm) on 10-5-1994 and the matter should be taken up with him (B.M. Konar). The complaint filed on 5-5-1997 is even beyond two years therefrom. There is no application for condonation of delay nor any sufficient cause shown and, therefore, the question of condonation of delay in filing the complaint does not arise.”

16. Learned counsel for petitioner-objector further submitted that the impugned award was opposed to public policy as it was contrary to Reserve Bank of India's directions in particular condition No. (xii) in Reserve Bank of India's letter dated 14th February, 1992. They stated that petitioner-objector had made payment in conformity with the contractual terms as well as the Government policy.

According to them, there was no other manner by which the petitioner-objector could have paid the respondent-claimant. In this connection, learned counsel for petitioner relied upon a judgment passed by the Supreme Court in the case of ***Oil & Natural Gas Corporation Ltd. vs. Saw Pipes Ltd.*** reported in (2003) 5 SCC 705 wherein it has been held as under:

“13. The question, therefore, which requires consideration is — whether the award could be set aside, if the Arbitral Tribunal has not followed the mandatory procedure prescribed under Sections 24, 28 or 31(3), which affects the rights of the parties.....Similarly, under sub-section (3), the Arbitral Tribunal is directed to decide the dispute in accordance with the terms of the contract and also after taking into account the usage of the trade applicable to the transaction. If the Arbitral Tribunal ignores the terms of the contract or usage of the trade applicable to the transaction, whether the said award could be interfered.....

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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.

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16. The next clause which requires interpretation is clause (ii) of sub-section (2)(b) of Section 34 which inter alia provides that the court may set aside the arbitral award if it is in conflict with the “public policy of India”. The phrase “public policy of India” is not defined under the Act. Hence, the said term is required to be given meaning in context and also considering the purpose of the section and scheme of the Act. It has been repeatedly stated by various authorities that the expression “public policy” does not admit of precise definition and may vary from generation to generation and from time to time. Hence, the concept “public policy” is considered to be vague, susceptible to narrow or wider meaning depending upon the context in which it is used. Lacking precedent, the court has to give its meaning in the light and principles underlying the Arbitration Act, Contract Act and constitutional provisions.

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31. Therefore, in our view, the phrase “public policy of India” used in Section 34 in context is required to be

given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term “public policy” in Renusagar case it is required to be held that the award could be set aside if it is patently illegal. The result would be — award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or*
- (b) the interest of India; or*
- (c) justice or morality, or*
- (d) in addition, if it is patently illegal.*

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.”

17. Learned counsel for petitioner also submitted that the impugned award was vitiated by fraud. They pointed out that respondent-claimant had all throughout taken the stand that it had not received any amount that had been transmitted by the petitioner-objector’s bank under the Letter of Credit, even though it had subsequently transpired that monies had been received and withdrawn by respondent-claimant.

18. In this context, learned counsel for petitioner drew my attention to the reply filed by respondent-claimant in response to the application being I.A. No.5324/2005. It is pertinent to mention that by the aforesaid application, petitioner-objector had sought permission to place on record additional documents including letters written by the Ambassador of India in Minsk confirming that

money had been withdrawn by the respondent-claimant before they had closed their bank account with Belvnesheconombank in May, 2000. The letter dated 08th June, 2005, written by the Ambassador of India is reproduced hereinbelow for ready reference:

"MSK/COM/208/4/95

8th June, 2005

Dear Shri Fernandez,

Please refer to your D.O. No.11/8/2005-FT(M&O) dated 6th June, 2005 regarding MMTC Limited.

Through our various communications to MMTC and the M/O Commerce and Industry the Embassy had re-confirmed all the facts and information regarding non-credit of Rs.3.71 crores as alleged by M/S. Belcom to their account with Belvnesheconombank and non-payment of Rs.90 lakhs to MMTC by M/S. Belcom.

Through our persistent efforts, we were able to obtain necessary confirmation from Belvnesheconombank, Minsk that the sum of Rs.3.71 Crores was indeed credited into the account of M/s. Belcom in January, 1993 and the money was withdrawn by them before they closed their account with Belvnesheconombank in May, 2000.

I am sure this has strengthened the hands of MMTC in its legal fight for recovery of its outstanding dues of Rs.90 lakhs from M/S. Belcom.

I had vide my letter of even number dated 8th April, 2005 also suggested that the only two options now available for MMTC to recover the outstanding dues from M/S. Belcom was either through the intervention of higher government authorities or through a court of law.

With regards,

Yours sincerely,

*Sd/-
(Tara Singh)*

*Dr. Christy Fernandez
Additional Secretary
M/O Commerce & Industry,
Udyog Bhawan,
New Delhi."*

19. Mr. Jagdeep Kishore further submitted that the interest awarded by the Arbitrator was disproportionate and contrary to law.

20. On the other hand, Mr. Darpan Wadhwa, learned counsel for respondent-claimant pointed out that issues had been separately settled for each of the six contracts in which disputes had arisen between petitioner-objector and the respondent-claimant. He stated that in respect to Contract No.35, the issue of limitation was not framed as the said contention had not been raised during the arbitral proceedings. In this connection, Mr. Wadhwa, laid emphasis on the fact that the issue of limitation had been specifically framed in other contracts namely, Contract Nos. 23, 26 and 72, even though the issues had been framed by a common order dated 13th February, 1999. He submitted that the arbitral tribunal was not required to go into the limitation issue as it had not been raised. In any event, according to him, even if such an argument had been raised, but as no finding had been rendered thereupon, it would be deemed to have been rejected.

21. Mr. Wadhwa, submitted that the impugned award was not contrary to the public policy as the same was not contrary to Reserve Bank of India's guidelines in particular, condition No.(xii) in the Reserve Bank of India's letter dated 14th February, 1999. He submitted that there was no evidence to conclude that the amount due to the respondent-claimant under the contract had become payable prior to 27th December, 1991. He pointed out that none of the Arbitrators had come to the conclusion that the property in goods had passed at any time prior to 27th December, 1991 or that the amount had become due at anytime prior thereto. Mr. Wadhwa, emphasised that the shipment arrived at the Indian port and was

discharged only in the month of January, 1992. According to him, therefore, condition No.(xii) of the Reserve Bank of India permission dated 14th February, 1992 was not attracted and payment by petitioner-objector into the Escrow account as instructed by respondent-claimant, would have been legal and valid.

22. As far as the petitioner-objector's contention that the award was vitiated by fraud was concerned, Mr. Wadhwa submitted that there was no pleading to this effect in the objection petition. He stated that payment into the respondent-claimant's account in May, 1992 would not discharge petitioner-objector's liability as the Letter of Credit had expired and payment after expiry of the Letter of Credit was not permissible. He further stated that respondent-claimant had clearly instructed the petitioner-objector by several letters not to make payment under the Letter of Credit to the Minsk account. Mr. Wadhwa further contended that even the petitioner-objector had acknowledged respondent-claimant's instructions as aforesaid and had vide its letter dated 12th September, 1996 admitted that payment had infact been made into the wrong account and that respondent-claimant had not been able to access those funds. As far as receipt of some portion of payments in 2002 was concerned, Mr. Wadhwa drew my attention to the reply filed by respondent-claimant to I.A. 5324/2005. In the said reply affidavit, respondent-claimant has averred as under:

“4. xxx xxx xxx

(f) On 19-2-2002, the said Bank has certified various foreign currency accounts of the respondent lying blocked with it. The said certificate evidences that the sum of Rs.3,97,52,253.57 was lying in the frozen Indian rupee account of the respondent with the said Bank as on 19-2-2002 along with various amounts in other foreign currencies. This includes the remittance made by the

petitioner. A copy of the said certificate along with an English translation thereof are annexed herewith and marked as ANNEXURE-A (Colly).

(g) In 2002, the State Budget of the Republic of Belarus provided that amounts in foreign currency which had been blocked with Vnesheconombank of the USSR on 1-1-1992 and ascribed to the internal State debt, based on the decree of the Council of Ministers of the Republic of Belarus would be used to reimburse the public sector enterprise for transportation and supply of gas viz., Beltransgas. A copy of the extract of Article 31 of the State Budget of the Republic of Belarus for 2002 and English translation thereof are annexed herewith and marked as ANNEXURE-B (Colly).

(h) Under this provision, the amount of Rs.3,97,52,253.57 lying in the Indian Rupee account of the respondent with the said Bank was converted into US Dollars at a rate fixed by Belarus authorities viz. Indian Rupees 132.74 to US\$ 1. (It may be mentioned that the exchange rate between the Indian Rupee and the US\$ at the time was actually around Rs.46 to US\$ 1). At the said value fixed by the Belarus authorities, the amount was converted into US\$ 2,99,467.72.

(i) After conversion of the other foreign currency amounts of the respondent into US\$, the said Bank certified the total amount of foreign currency holding of the respondent as indicated in Annexure A hereto. The total amount of the said holding in US\$ came to US\$ 311601.39.

(j) The amount of US\$ 311601.39 was thereafter converted into Belarus Rubles at an exchange rate of Belarus Rubles 1920 to US\$ 1 amounting to Rubles 59,82,74,668.

(k) Based on these documents, the office of the Chief State Treasury of the Finance Ministry of the Republic of Belarus issued a '**Conclusion**' dated 27-12-2002 holding that the aforesaid balance of Rubles 59,82,74,668 was blocked in the respondent's account and an amount of Rubles 59,82,71994 was available for off-setting. A copy of the said '**Conclusion**' dated 27-12-2002 and English translation thereof are annexed herewith and marked as ANNEXURE 'C' (Colly).

(l) Upon issuance of this Conclusion under the

provisions of the State Budget, the entire foreign currency holding of the respondent was converted into Rubles at the specified exchange rate and transferred to a special Account with the Ministry of Finance and the foreign currency account with the said Bank was closed down. (The said Bank account was not closed in May 2000 as erroneously stated in the letters dated 8-6-2005 and 27-6-2005 annexed with the said Application).

(m) It is further submitted that, with respect to the contract in question in the present petition (viz. Contract No.35), the majority of the Arbitral Tribunal have awarded the sum of Rs.3.71 crores in favour of the respondent along with interest @ 18% per annum from 3-3-1992 until actual payment is made, which works out to a sum of over Rs.9.12 crores as on 3-11-2005. The respondent submits, on the basis of the afore-mentioned facts, that this amount has not been realised by the respondent from the petitioner and there is no ground whatsoever for setting aside the award even on the allegations contained in the said Application.

(n) To sum it up, had MMTC paid in accordance with the amended contract Belcom would have received \$1.85 million (at the then prevailing exchange rate of Rs.20 per US\$ in 1992). Even in 2002 at the prevailing exchange rate of Rs.46 to the dollar Belcom would have received \$806,740. However, at the Government denominated exchange rate of Rs.132.74 per US\$ Belcom received only \$279,570 which was converted into Belarus rubles and paid for in kind by offsetting against gas supplies.

It may be noted that at no stage Belcom had the option to withdraw the frozen funds and the cessation of the bank a/c was consequent to a decree by the state applicable to one and all and not an act of freewill on the part of Belcom. Thus the act of MMTC in not honouring the amended contract and explicit instructions resulted in Belcom suffering a principal loss of \$1.65 million (\$1.85 million - \$279,570) on 27.12.2002 and interest thereon for over 13 years – not to mention the loss of opportunities; all of which combined led to a severe blow being dealt to Belcom's business."

23. In rejoinder, Mr. Jagdeep Kishore, learned counsel for petitioner-objector submitted that the issue of limitation had been specifically raised in the pleadings

and had been urged during the arbitral proceedings. In this connection, Mr. Jagdeep Kishore, handed over in Court copies of the Statement of Claims, Written Statements as well as the Written Submissions filed by the petitioner-objector before the arbitral tribunal after the arguments had been concluded.

24. Mr. Jagdeep Kishore further stated that the issue of fraud came to the knowledge of the petitioner only in 2005 when it moved I.A. No.5324/2005 because it was only then that petitioner-objector came to know about the withdrawal of money by the respondent-claimant from its account at Belvnesheconombank, Minsk.

25. Having heard the parties, I am of the view that the scope of interference by this Court with an arbitral award under Section 34(2) of Act, 1996 is extremely limited. Supreme Court in *Delhi Development Authority Vs. R.S. Sharma and Company, New Delhi* reported in (2008) 13 SCC 80, after referring to a catena of judgments including *Oil & Natural Gas Corporation Ltd.* (supra) has held that an arbitral award is open to interference by a court under Section 34(2) of the Act, 1996 if it is contrary to either the substantive provisions of law or the contractual provisions and/or is opposed to public policy.

26. In fact, the Supreme Court in *McDermott International Inc. Vs. Burn Standard Co. Ltd. & Ors.* reported in (2006) 11 SCC 181 has succinctly summed up the scope of interference by this Court by stating “*the 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only,*

like, in case of fraud or bias by the arbitrators, violation of natural justice, etc.....”

27. In the present case even though none of the three Arbitrators have given any finding on the issue of limitation, I find from the documents handed over by Mr. Jagdeep Kishore in rejoinder, that the said plea of limitation had been raised by the petitioner-objector. Section 3 of the Limitation Act clearly stipulates that a proceeding instituted after the prescribed period shall be dismissed even though limitation had not been set up as a defence by any one of the parties. Consequently, in my view, the issue of limitation should have been decided by the arbitral tribunal in the present case.

28. I am of the view that even though the Arbitrators have not decided the plea of limitation, it would make no difference because the petitioner-objector right from 1992 to 1996, had been making efforts to ensure that the Reserve Bank of India agreed to reverse the credit entry. In fact, petitioner-objector was all throughout trying to ensure that payment was actually received by the respondent-claimant. In fact, petitioner-objector's letter dated 12th September, 1996 constitutes an acknowledgement to the effect that consideration of Rs. 3.71 crores under Contract No.35 had not been received by the respondent-claimant. It seems to me that the issue of limitation was really not pressed by the petitioner-objector during the course of the hearing in view of its contemporaneous conduct in particular the letter dated 12th September, 1996. The aforesaid letter reads as under:-

“No.

September 12, 1996

*Reserve Bank of India
Exchange Control Department
Central Office Building
MUMBAI.*

*SUB:- Payment of Rs.3.71 crores to M/s. BELCOM
MINSK*

Dear Sir,

We refer to our letter dated March 1, 1996 stating Chronologically all the facts relating to the supply of MOP by M/s. Belcom Minsk in 1991 and its payment to the wrong account of BFEA OF ERSTWHILE USSR, Minsk Branch where it is lying frozen.

The current status is that though MMTC has made the payment, BELCOM has not received the said amount of Rs.3.71 crores.

After reconciliation of accounts with M/s. BELCOM of past contracts, we have found that MMTC is due to receive Rs.80 Lakhs towards freight, demurrage etc. M/s. BELCOM has pleaded inability to pay these dues until they receive Rs.3.71 crores remitted by us.

We, therefore, request you to immediately reverse this wrong credit of Rs.3.71 Crores to our a/c.

As we are the remitter of the funds and the funds did not reach the intended beneficiary who in turn, are not able to pay our dues, we have no choice except to recall our remittance to recover our dues.

The above prompt action would preempt any adverse legal complications and litigations.

*Yours faithfully,
FOR MMTC LIMITED*

*Sd/-
(S.K. PATRA)
GENERAL MANAGER”*

29. As far as the Award being opposed to public policy is concerned, I am of the view that the majority arbitrators have given cogent reasons for coming to the

conclusion that withholding payment under Letter of Credit would not amount to violation of condition No. (xii) of the Reserve Bank of India's letter dated 14th February, 1992. The relevant reasoning contained in the majority arbitral award is reproduced hereinbelow:

"A. Justice Ranganath Misra, Former Chief Justice of India.

18. If payment was being withheld on the request of Belcom, the Bank was not making itself liable for interest for not paying. The L/C stood discharged by lapse of time and in the absence of a fresh L/C or extension of life the Bank had no liability in presenti as on 29.5.92 to pay.

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21. Again, in the face of the instructions and correspondence over the cancellation of the L/C, the question of Belcom's claim having become due within the meaning of clause 12 of Reserve Bank of India's stipulation cannot be taken for granted. As already indicated, the beneficiary under the L/C having notified MMTC and its bank not to pay until acceptance of the documents by it, the liability to pay had not matured so as to give rise to clause 12 to operate.

22. Even conceding that clause 12 operated, in the face of repeated instructions, MMTC and its Banker should not have paid the amount overlooking clear instructions. I am not able to accept Brother Sidhu's view that MMTC acted properly and its liability stood wiped out by that payment. In fact, I have not been able to find any justification for MMTC's or its Banker's action.

23. In the facts and circumstances one must take an equitable and practical view of the situation. The consequence of payment into BFER account was known. That is why the escrow account was opened. Therefore, Belcom should not have been pushed into the dead end by MMTC and its Bank.

B. Justice S.K. Jain

h) xxx xxx xxx

- (iii) *As mentioned in the earlier part of this award, Belcom had sent a copy of letter dated 14.2.92 of Reserve Bank of India granting permission to open Escrow Account with Citibank, Bombay, subject to certain conditions, including condition No.(xii) containing the preclusion clause. Much after receipt of the said letter, MMTC vide its telex dated 25/26.2.92, assuring Belcom of prompt remittance of all dues into their Escrow account on receipt of their bankers of instructions for cancellation of L/C from Belcom's Bankers. On receipt of the said telex message, Belcom's bankers Vescheconom Bank, immediately addressed letter dated 26.2.92 to the bankers of MMTC to handover the documents to the representative of Belcom for presentation directly by the buyer. Once documents were advised to be returned, or had actually been returned, payment could no longer be made against L/C. Again Belcom vide its letter dated 18.12.91 (Annexure C-2), had advised MMTC not to make payment whereupon MMTC, in its turn, vide its letter dated 20.12.91 (Annexure C-3), instructed its bankers not to release payment of MOP shipment per Vessel "Indian Renown" to the account of M/s Belcom of USSR. The Contract was amended on 1.1.92. It is, therefore, clear that the payment having been deferred could not be considered to have become due before 27.12.91, particularly when the vessel "Indian Renown" arrived in the Indian Port of discharge on 5.1.92, and MMTC received shipment in January, 1992 itself. So, the payment in question does not fall within the mischief of preclusion clause (xii) of the letter dated 14.2.92 of the Reserve Bank of India. In view of the exceptional circumstances prevailing due to the break up of USSR, Belcom, had well in advance, on 18.12.91, advised MMTC not to make in their account until receipt of their special confirmation. On receipt of the said letter, MMTC had, vide their letter dated 20.12.92 (Annexure C-3) accordingly advised their bankers. After having not acted in accordance with the amended clause 6(VIII) of the contract and making payment into the old frozen account, MMTC cannot be allowed to take shelter of clause (xii) of the above mentioned letter of Reserve Bank of India.*
- (iv) *Lastly, MMTC, vide the last but one para of its*

letter dated 12.9.96 (Annexure C-10), had admitted that they were remitter of the funds and the funds did not reach the intended beneficiary, i.e. Belcom.”

30. In view of aforesaid finding of fact and interpretation of the contract as well as Reserve Bank of India's letter dated 14th February, 1992, I am of the opinion that this Court cannot upset the said conclusion as if it were an appellate court. In fact, Supreme Court in ***State of Rajasthan Vs. Puri Construction Co. Ltd. & Anr.*** reported in **(1994) 6 SCC 485** has held that “*Court cannot substitute its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties...Whether a particular amount was liable to be paid is a decision within the competency of the arbitrator. By purporting to construe the contract the Court cannot take upon itself the burden of saying that this was contrary to the contract and as such beyond jurisdiction. If on a view taken of a contract, the decision of the arbitrator on certain amounts awarded is a possible view though perhaps not the only correct view, the award cannot be examined by the court. Where the reasons have been given by the arbitrator in making the award the court cannot examine the reasonableness of the reasons. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisal of evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a judge on the evidence before the arbitrator”.*

31. Moreover, Reserve Bank of India's letter dated 14th February, 1992 did not mandate that payment had to be made by the petitioner-objector to respondent-

claimant only by way of a Letter of Credit as stipulated in the original contract dated 14th October, 1991. There is nothing in the Reserve Bank of India's letter dated 14th February, 1992, which prevented the petitioner-objector or its bankers from withholding payments till all issues were amicably resolved. In any event, I am of the opinion, that petitioner-objector's bank, Oriental Bank of Commerce could not have made payment under an expired Letter of Credit inasmuch as payment was made on 29th May, 1992 whereas the Letter of Credit had expired on 22nd January, 1992.

32. I am also of the view that the impugned award was not vitiated by fraud. In fact, there is no averment of fraud leave alone particulars of fraud in the objection petition filed by the petitioner-objector. Since in rejoinder, Mr. Jagdeep Kishore has argued that fraud was discovered only in May, 2005 as payments had been received by the respondent-claimant in 2002 after the passing of the award, I am of the view that the said subsequent development cannot be a ground for setting aside an award under Section 34 of the Act, 1996. In fact, payments, if any, received by the respondent-claimant subsequent to passing of the award, can be raised as a valid defence only in the execution proceedings, if any to be filed by the respondent-claimant. Accordingly in the execution petition if any to be filed, the petitioner-objector would be entitled to take the plea that by virtue of payment having been received by the respondent-claimant, there was a valid discharge of the amount due and payable under the impugned award. Consequently, the issue of discharge on account of respondent-claimant having received payment in May, 2002, is left open to be decided in the execution proceedings. However, I clarify I am expressing no opinion on the issue of receipt of payment in 2002 constituting a

valid discharge of the amount due and payable by the petitioner-objector under the impugned award.

33. As far as the award of interest is concerned, I deem it appropriate to reduce the rate of interest to 9% per annum simple interest. In this connection, I may refer to observations of the Supreme Court in cases of *State of Rajasthan & Anr. Vs. M/s. Ferro Concrete Construction Pvt. Ltd.* reported in 2009 (8) SCALE 753 and *Krishna Bhagya Jala Nigam Ltd. vs. G. Harischandra Reddy & Anr.* reported in (2007) 2 SCC 720 wherein the Court has held as under :-

“A. *State of Rajasthan & Anr. Vs. M/s. Ferro Concrete Construction Pvt. Ltd.*

36. In regard to the rate of interest, we are of the view that the award of interest at 18% per annum, in an award governed by the old Act (Arbitration Act, 1940), was an error apparent on the face of the award. In regard to award of interest governed by the Interest Act, 1978, the rate of interest could not exceed the current rate of interest which means the highest of the maximum rates at which interest may be paid on different classes of deposits by different classes of scheduled banks in accordance with the directions given or issued to banking companies generally by the Reserve Bank of India under the Banking Regulation Act. Therefore, we are of the view that pre-reference interest should be only at the rate of 9% per annum. It is appropriate to award the same rate of interest even by way of pendent lite interest and future interest upto date of payment.”

B. *Krishna Bhagya Jala Nigam Ltd. vs. G. Harischandra Reddy & Anr.*

“11. here also we may add that we do not wish to interfere with the award except to say that after economic reforms in our country the interest regime has changed and the rates have substantially reduced and, therefore, we are of the view that the interest awarded by the arbitrator at 18% for the pre-arbitration period, for the pendente lite period and future interest be reduced to 9%.”

34. Consequently, keeping in view the aforesaid judgment and the current rate of interest, the impugned Award is modified to the extent that the rate of interest as awarded by the Arbitrator is reduced to 9% per annum simple interest. However, it is made clear that in case the aforesaid payment under the Award is not made within a period of 90 days from today, the post-decretal rate of interest would stand increased to 11% per annum simple interest. Accordingly, present petition stands dismissed but with no order as to costs.

MANMOHAN,J

FEBRUARY 17, 2010

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