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

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Judgment delivered on: 09.01.2012

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FAO(OS) 11/2012

JK INDUSTRIES LTD

..... Appellant

Vs

DS STRATAGEM TRADE A.G.

..... Respondent

Advocates who appeared in this case:

For the Appellant: Mr Rajiv Nayar, Sr. Adv. with Mr Ramesh Singh, Mr A.T. Patra,
Ms Aradhana Patra & Mr Y.N. Bhardwaj, Advs.

For the Respondent: Mr Abhinav Vashist, Sr. Adv. with Mr P.K. Jain, Mr Rajesh
Roshan, Mr Rajeev Kumar & Mrs Alka Kumar, Advs.

CORAM :-

HON'BLE MR JUSTICE SANJAY KISHAN KAUL

HON'BLE MR JUSTICE RAJIV SHAKDHER

SANJAY KISHAN KAUL, J (ORAL)

Caveat No. 29/2012

Learned counsel for the caveator has entered appearance.

Caveat stands discharged.

CM No. 378-380/2012

Allowed subject to just exceptions.

Applications stand disposed of.

FAO(OS) No. 11/2012 & CM No. 377/2012 (Stay)

The present dispute between the parties is two-decade old arising from an agreement dated 16.01.1991 in terms whereof 5,00,000/- Metric Tons (MT) urea

for fertilizers was to be supplied by the appellant to the respondent. The product was to be sourced from Romania and was meant for delivery in China. The selling price was in the range of USD 157-159 per MT CIF FO China main port for the first three liftings and USD 127 per MT FOB Constantza Romania for the second three liftings. The lodging of the first shipment was required to be completed not later than 15.02.1991. Payments had to be made by prime bank letter of credit which was irrevocable, transferable and payable at site with partial delivery and partial payment admitted with quantity variation of more or less 5%. It is undisputed that a default occurred on the part of the appellant in complying with this obligation under the agreement which gave rise to claims by the respondent against the appellant. In view of Article 10 of the agreement containing the arbitration clause, the disputes were referred to the IICA in Geneva (Switzerland), the award being enforceable by the competent court of law at Geneva.

The history, even during the arbitration proceeding, has a prolonged process of adjudication and the award of the arbitral tribunal saw light of the day only on 15.05.1998. The arbitral tribunal consisted of Dr. Mostafa El-Said, Chairman, Mr Peter M. Wolrich, Arbitrator and Mr B. Sen, Arbitrator. The respondent was held entitled to a risk purchase amount of USD 8,48,750/- alongwith pendente lite and future interest and costs. The operative portion of the award is as under:

“In view of the foregoing the Arbitral Tribunal awards and declares as follows:

The defendant is liable to pay to the claimant the following amounts:

	US\$
1) The difference between the market Price and the contract price including	8,48,750.00

Insurance for the first shipment		
2) Rate of interest from 15 th March 1991		3,77,624.00
Till 31 st December 1997		
3) The ICC costs including Arbitrator's fees		1,41,500.00
4) The Claimant's Attorney fees		96,999.63
Total		14,64,873.63

To the sum of US\$ 1226374 (i.e., the sum of US\$ 848750 plus US\$ 377624). It has to be added any due interest after the 31st of December 1997 including the post award rate of interest, based on the LIBOR which is prevailing during the relevant time period, until payment is made.”

The next set of delay occurred as the appellant failed to pay its share of the arbitrators' fee and costs resulting in a copy of the award not being released to the appellant. It is only when these payments were made vide letter dated 24.09.2004 after six years that a copy of the award was made available and it is thereafter that OMP No. 484/2004 was filed on the original side of this court laying a challenge to the award under Section 34 of the Arbitration and Conciliation Act, 1996 (in short the 'Said Act') by the appellant. The objections filed were dismissed by the learned Single Judge in terms of the impugned order dated 24.11.2011.

We may notice at the threshold that one of the arbitrator Mr B. Sen has given a dissenting opinion on one issue, i.e., the determination of market price for risk purchase since the view of the majority was that the market price has to be CIF China port bulk at the time of delivery, i.e., 13.03.1991, while Mr B. Sen was of the view that the comparison of the market price on the date of breach had to be based on the prevailing price in Romania although it was also a controlled price. In fact it is this issue which is the main substratum of the

submissions of the learned senior counsel for the appellant before us.

Learned senior counsel for the appellant drew our attention to the findings of the Arbitral Tribunal in this behalf in terms whereof under the heading of 13th issue the arbitral tribunal reached the conclusion that the appellant was in default with regard to the first shipment only and that it must compensate the respondent for damages resulting therefrom. It is again undisputed that the Swiss law is the substantive law applicable and the measure of damages was to be calculated with reference to article 191 of the Swiss Code of Obligation (CO) which provided for three methods of calculating damages:

- (i) Actual damages.
- (ii) Difference against the price for which he has bought the substitute goods.
- (iii) Without need to buy substitute good, the difference between the market price and the contract price.

The option is with the claimant to chose any one of the methods according to the Swiss law. It is under the third option that the respondent claimed the measure of damages, i.e., the difference between the market price and the contract price. The Arbitral Tribunal discussed the aspect of the market price prevailing at the date of delivery which was the contentious issue. The respondent argued that the relevant market price was the price at which they could have purchased the replacement cargo and referred to FMB “Fertilizer Market Bulletin” issue of 04.03.1991 for establishing the market price which a seller would have asked for urea being USD 194-196 for CIF China. In the award a comparative chart has thereafter been produced.

On the other hand the respondent contended that the source of purchase of urea was Romania and at the time of scheduled delivery the prices were much

lower. In nutshell while the appellant contended that it is the controlled price in Romania which would govern such price, the respondent contended that it would be the price prevalent CIF China. The majority view has taken into consideration the principles governing such price fixation and observed as under:

“After lengthy deliberation, and careful study of the arguments and documents presented by both parties and after consulting the various publications on world market of Urea, particularly those published by the abovementioned sources, namely FMB, Fertecon and British Sulphur, the Arbitral Tribunal agreed on certain principles to govern its determination of the present sub-issue, namely what is the market price at the date of delivery of the first shipment, i.e., 13th March 1991. These principles are the followings:

- 1) Market price has to be related to the Agreement price. Referring to the Agreement of 7th Jan. 1991, price quoted for the first shipment is CIF Fo China Main Port and the source of supply is Romania. Price is for a bulk transaction of 500 000 MT and for bagged Urea. Hence market price would be for the same.
- 2) If at the time of delivery, i.e., 13th March 1991, it proved difficult, if not impossible, to purchase in bulk from Romania or to find prices quoted CIF China, the Arbitral Tribunal has to refer to the nearest comparable market price to the one specified and quoted in the Agreement.”

It is in the aforesaid principles that the findings are arrived at. These findings are best reproduced from the award itself and read as under:

“Applying the above two principles on the facts of the present case, the Arbitral Tribunal reached the following conclusion.

- 1) It was difficult, if not impossible to purchase Urea from Romania at the time of delivery i.e., 13th March 1991, particularly, if demand is for a bulk and abnormally huge transaction as the one agreed upon in the Agreement of 7th Jan. 1991. This fact was confirmed by the defendant itself in its letter dated march 22, 1991

and the document “certificate” attached to it which is issued by Chimica Enterprise for Foreign Trade and which was considered by the defendant itself as a reliable source for information. This document, dated 28th February 1991, states that due to changes in policy the Romanian government decided to give priority to the Romanian Agriculture Demand for Urea so that the quantities available for export were considerably diminished. Moreover, production capacities were reduced due to government decision to mainly use natural gas and electricity during winter period for domestic heating instead for the production of Urea.

Even if it is possible, under special circumstances to import Urea from Romania at the time of delivery, i.e., 13th March 1991, certainly this could not be done in bulk.

2) The bargaining position of the claimant at the time of delivery was much weakened compared with his position at the time of concluding the Agreement of 7.1.1991. The reasons for this were rightly stated by the claimant in its amended final pleading referred to earlier. Claimant is no longer able to buy in bulk and to negotiate a favourable price.

3) Consulting various sources of information and statistics on the market for Urea, it is quite clear that there was a sharp upward trend in the prices of Urea starting from end of August 1990 due to the break of the Arabian Gulf Crisis as the result of the invasion of Iraq of Kuwait. This trend had continued until the first week of March at changing rates. Starting from the second week the Urea market has changed gear. At the time of delivery it remained higher than at the time of concluding the present Agreement. This is true if we have referred to any of the sources available for information and statistics about the Ureas’ market “see the table presented by the defendant itself and which is reproduced in our discussion of the present issue”. This is also true for bulk or bagged Urea whatever the source of supply and more particularly for supply from East Europe. Reference has to be made to the documents attached to the Defendant submission dated April 4, 1991, particularly to Fertecon weekly Nitrogen Fax of 16 January 1991 and of 14 March 1991 as well as to Fertilizer Week January 14, 1991 and March 18, 1991.

In view of the above facts it is doubtful that the information provided by the Defendant through its communications with Romferchim of Romania is reliable. This information indicates that prices for Urea supplied for export from Romania did decline at the time of delivery as compared with their level at the time of concluding the present Agreement by about US\$ 10/MT from US\$ 130/MT to US\$ 120/MT.

The reasons for the non-reliability of this information are:

- 1) It is inconsistent with the information provided by the various sources of information and statistics concerning the market for Urea referred to above. Information published regularly by well-recognized organizations indicates that there was an increase in price not a decline for all types of Urea from whatever source at the time of delivery compared with the time of concluding the present agreement.
- 2) The Romanian market for Urea at the relevant time is a controlled market in which prices are arbitrarily determined and do not necessarily follow the trend in world free markets.
- 3) The information is related to a single transaction and price quoted for it may reflect various considerations other than the prevailing world price. In the absence of information that cover large number of transactions it is difficult to rely, in a controlled market, on one transaction to reach a definite and reliable conclusion as regard the real price of Urea supplied from Romania.”

The Arbitral Tribunal determined the market price: at the time of delivery, i.e., 13.03.1991 excluding Sinochem’s commission as USD 180 CIF bulk China port.

We have already noticed above the view adopted by the third arbitrator Mr B. Sen is a dissenting view who wanted the controlled prevailing price in Romania to be taken into account. In our considered view the course adopted by the majority view of the Arbitral Tribunal and upheld by the learned Single

Judge cannot be said to be perverse or devoid of any merit so as to call for interference by us. The scope of interference under Section 34 of the said Act is limited and it is not for the learned Single Judge or for us to form an opinion as to which would have been the better course of action to follow, so long as the view formed by the Arbitral Tribunal is a plausible one. The mere fact that there is a dissenting view in the Arbitral Tribunal would not make any difference as the majority view would have to be tested on the aforesaid parameters. We also cannot ignore the fact that while computing the value of damages for such risk purchase the basic principle is the concept of replacement. If this principle is taken into account the pricing of the same goods CIF China is a reasonable one.

The second aspect urged by learned senior counsel for the appellant is qua the period of interest on the quantum of damages. This has been dealt with in 15th issue. The relevant Swiss law, as contained in CO. Article 104 has been reproduced in the award and read as under:

“Co. 104

- (i) If an obligator is in default as to the payment of financial debt, he shall pay a penalty interest at five percent per annum, even if the contract provides for a lower rate.”

It is the submission of learned senior counsel that the quantification of debt took place only when the award was made and thus the appellant can be said to be in default as to payment of financial debt only when the sum is quantified. To buttress this submission learned counsel sought to rely upon the observations made in *Union of India vs Air Foam Industries (P) Ltd. AIR 1974 SC 1265 in para 9.*

On perusal of the judgment we find that firstly the said judgment dealt

with the different factual matrix and is not law for the principle that the date when damages were caused, should not be taken as a date from which interest is payable. Secondly, the legal principles enunciated in the judgment in any case would not apply as the law governing is a Swiss law and not the Indian law. We are unable to read Co. Article 104 in a manner as if to provide that interest is payable from the date of the award and not from the date of the default, i.e., 15.03.1991 as awarded.

We may note that the learned senior counsel sought to also contend that capitalization of interest is not permissible under the Indian law unless there is a contract to the contrary and thus the grant of such capitalized interest is contrary to the “public policy of India”. We are unable to accept this plea for the reason that “public policy of India” cannot imply that where the substantive law governing the amount awarded under the award is the Swiss law, recourse can be had to the Indian law to contend that the method of calculation of interest is not permissible. There is nothing shown to say that under the Swiss law capitalization of interest is impermissible.

The last aspect urged by learned senior counsel for the appellant arises from the provisions of the Foreign Exchange Regulation Act, 1973 (in short FERA). The learned Arbitral Tribunal has discussed this aspect noticing the plea advanced on behalf of the appellant herein that certain contractual provisions may attract prohibition contained in Section 9, 16 and 27 of the FERA which provides that activities which come within the purview of those sections cannot be undertaken without the previous permission of the Central Government or the Reserve Bank of India. We fail to see the merit in this plea as the contract between the parties is not governed by the laws of India and sub-Section (2) of Section 47 of FERA makes it clear that the implied term of every

contract “governed by law of any part of India” is that if such a permission is required, the permission must be first obtained. It is in this context that the Arbitral Tribunal observed that the agreement dated 07.01.1991 cannot be said to be ab initio illegally void in view of the provisions of FERA. The learned Single Judge found this clearly a plausible view. The submission of learned counsel for the appellant is that the recourse to sub-section (2) of Section 47 of the FERA could not have been resorted to when the governing law was Swiss law.

In our considered view this argument is self defeating as on one hand it is the prohibition arising out of sub-section (1) of Section 47 which is pleaded before us and, on the other hand it is contended that sub-section (2) should not apply. In any case once the transaction is governed by the Swiss law, the Act itself would not apply.

The aforesaid being the only submissions advanced before us by the learned counsel for the appellant and we finding no merit in the same, the appeal is dismissed with costs of Rs 25,000/-. The stay application is also, accordingly, dismissed.

SANJAY KISHAN KAUL,J

RAJIV SHAKDHER, J

JANUARY 09, 2012

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