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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. (COMM) 361/2016, CAV No.678/2016**
& IA Nos.9310-9311/2016

MMTC LTD.

..... Petitioner

Through: Mr Sandeep Sethi, Senior Advocate
with Mr Chinmoy P. Sharma and Mr
Vishal Balecha, Advocates.

versus

NEW SIALKOTI JEWELLERS & ORS.

..... Respondents

Through: Mr Asheesh Jain & Mr Yudhister
Singh, Advs for R-1/applicant.*

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

VIBHU BAKHRU, J (ORAL)

1. MMTC Ltd. has filed this petition under Section 34 of the Arbitration & Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that the award dated 14.04.2016 (hereafter the 'impugned award') passed by the Arbitral Tribunal comprising of Justice S.K. Mahajan (Retired), Justice S.N. Sapra (Retired) and Ms Justice Rekha Sharma (Retired) be set aside.

2. By the impugned award, the claims made by the petitioner (hereafter 'MMTC') against the respondents for an aggregate sum of ₹1,52,34,218.30/- were rejected.

3. MMTC is the Government of India undertaking and is, *inter alia*, engaged in the business of importing and exporting minerals and metals. MMTC has been assisting entrepreneurs *inter alia* in exporting gold and other jewellery items made of precious metals by rendering financial assistance under various schemes.

4. It is stated that the MMTC sanctioned and granted Packing Credit Facilities for pre and post shipment to respondent no. 1, M/s New Sialkoti Jewellers (hereafter 'NSJ'), for an amount of ₹25 lakhs which was later enhanced to ₹1 crore. In connection with the aforesaid facility, respondent Nos. 2 to 4 (the constituent partners of NSJ) executed the following documents:-

“i) Hypothecation Agreements for pre and post shipment credit advances dated 21.05.1989 and 01.06.1989.

ii) Agreement between MMTC and gold unit for export of gold jewellery dated 21.05.1989 and 01.6.1989 (hereafter 'the Associateship Agreement').

iii) Agreement of Guarantee dated 21.05.1989 and 01.6.1989.

iv) Promissory Notes dated 21.05.1989 for Rs. 25.00 lakhs

and dated 01.6.1989 for Rs.50.00 lacs.”

5. In terms of the Associateship Agreement, MMTC agreed to release gold of 0.995 purity (24 carats) at the prevalent international price, in favour of NSJ for the manufacture of gold jewellery for export. In addition to the aforementioned agreements, MMTC also entered into a Tripartite Supplementary Agreement dated 02.08.1989 (hereafter 'the Tripartite Agreement') with M/s Ram Prakash Sunder Dass & Sons of London (hereafter 'RPSDS') and M/s NSJ. In terms of the aforesaid tripartite agreement, RPSDS was required to make payment of the invoiced value directly to MMTC and NSJ was entitled to 17% of the invoiced value of goods exported by NSJ to RPSDS as labour charges.

6. MMTC raised certain disputes in connection of the two agreements, namely the Associateship Agreement and the Tripartite Agreement; essentially, MMTC made two claims. The first claim being a claim for a sum of ₹55,55,942/- was in connection with the Tripartite Agreement dated 02.08.1989 and the second claim for a sum of ₹12,79,983/- was in connection with Associateship Agreement dated 21.05.1989. In addition to the aforesaid claims, MMTC also claimed interest and costs.

Re: the first claim of ₹55,55,942/-

7. Briefly stated, the facts relating to the first claim are that there were thirty-three transactions of export of gold to M/s RPSDS which were effected during the period 09.04.1991- 31.10.1992. MMTC received the remittances against the said thirty-three transactions and remitted the labour charges at the rate of 17% to NSJ. It is the MMTC's case that NSJ was entitled to 17% of the price of gold as on the date when the gold was purchased. After the purchase, there were fluctuations in the price of gold as well as in the exchange rate. Consequently, amounts received by MMTC as translated in Indian currency (INR) were in excess of the INR value of items as invoiced. According to MMTC, NSJ was not entitled to any part of the excess amount received on account of fluctuation in the exchange rate and the price of gold. However, MMTC remitted such excess amount to NSJ.

8. It is MMTC's case that an excess amount of ₹55,55,942/- was paid to NSJ by a mistake. MMTC claims that the said mistake was discovered on 30.09.1997 and accordingly, a Statement of Claims claiming the aforesaid amount of ₹55,55,942/- of over payment was filed on 18.11.1997.

9. As indicated above, there were thirty-three transactions of export of

gold jewellery by NSJ to RPSDS under the Tripartite Agreement; these were effected during the period 09.04.1991 to 31.10.1992. The last payment against the aforesaid transaction was made on 22.04.1993 and the statement of claim claiming the aforesaid amount was filed on 18.11.1997. In these circumstances, the respondents raised an objection that the aforesaid claim was barred by limitation. MMTC contended that the mistake regarding the over payment was discovered on 30.09.1997 and therefore, its claim was within time.

10. MMTC examined four witnesses in support of its claims which also included one, Mr C.I. Joy, Senior Manager (Finance and Accounts) Jewellery Division, who was stated to have discovered the mistake regarding over payment. He was cross-examined and the Arbitral Tribunal found that his testimony was not credible. He was not aware about the names of the officers who were responsible for making the over payment. There was no material to indicate that he had examined the invoices; Mr Joy had stated that he had found that there was over payment from verification of the agreement between the parties. More importantly, the Arbitral Tribunal noted that Mr Joy had not made any noting regarding the discovery of the alleged mistake. Before the Arbitral Tribunal, another officer (Deputy

General Manager) also claimed that he discovered the mistake of over payment. However, it was not MMTC's case that the mistake was discovered by the said Deputy General Manager. After appreciation of the testimony of the witness, the Arbitral Tribunal concluded that the story of the alleged mistake having been discovered on 30.09.1997, was a concocted one and therefore, the Tribunal held that the claim was barred by time.

11. Mr Sandeep Sethi, learned Senior Counsel appearing for the petitioner earnestly contended that the impugned award was perverse and contrary to the terms of the Agreement. He contended that the Arbitral Tribunal had grossly erred in not appreciating the evidence led by MMTC which clearly established that the mistake as to over payment to NSJ had been discovered only on 30.09.1997. He further submitted that the Arbitral Tribunal took the adverse view only for the reason that there was no noting as to the discovery of the mistake and the General Manager, who is stated to have discovered the mistake, was neither produced as a witness nor his affidavit was filed in the proceedings.

12. Mr Sethi submitted that both the aforesaid considerations were immaterial as Mr C.I. Joy who had also discovered the mistake, had been produced.

13. Before proceeding to examine the aforesaid contentions, it is necessary to keep in mind that the scope of interference with an Award under Section 34 of the Act is highly restricted. The Court while considering a Petition under Section 34 does not sit as an appellate court and cannot interfere with the findings of fact arrived at by the Tribunal unless the same are grossly perverse. In the **Associate Builders v. Delhi Development Authority: (2015) 3 SCC 49**, the Supreme Court has explained the above principle in the following manner:-

“It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.”

14. A similar view was expressed by the Supreme Court in **P.R. Shah, Shares and Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd: (2012) 1 SCC 594** wherein the Court observed as under:

"21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the

evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second Respondent and the Appellant are liable. The case as put forward by the first Respondent has been accepted. Even the minority view was that the second Respondent was liable as claimed by the first Respondent, but the Appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a nonmember, had no jurisdiction to decide a claim against another member. The finding of the majority is that the Appellant did the transaction in the name of the second Respondent and is therefore, liable along with the second Respondent. Therefore, in the absence of any ground Under Section 34(2) of the Act, it is not possible to reexamine the facts to find out whether a different decision can be arrived at.”

15. In the present case, the Arbitral Tribunal examined the testimony of the witnesses and concluded that the explanation that the mistake as to overpayment was discovered on 30.09 1997 was a concocted story. The said conclusion can by no stretch be stated to be perverse. The fact that there were no notes on the file regarding discovery of mistake was relevant a factor for the Tribunal to consider whether the explanation provided for the gross delay was credible. As stated above, it is not for this court to re-appreciate the evidence. However, even if this court was to do so, the conclusion would be no different as I find no infirmity with the view taken by the Arbitral Tribunal.

Re: the second claim of ₹12,79,983/-

16. Insofar as the second claim is concerned, MMTC claims that it has not received the payment against an invoice dated 31.07.1990 for ₹12,79,983/- for jewellery exported to M/s Patni Jewellers of London, U.K and, therefore, respondents are liable to make good the aforesaid amount. In terms of the Associateship Agreement, deliveries to foreign buyers were to be against the confirmed letters of credit. Clause 2 and 3 of the Associateship Agreement are relevant and are reproduced below:-

“2. The foreign buyers shall open confirmed, irrevocable without recourse to drawer & divisible letter of Credit in the name of MMTC. After effecting shipments, the unit will deliver shipping and other documents prepared as provided in clause (2) above to MMTC. MMTC will, in turn, present those documents to their bankers for negotiations/collection as the case may be.

3. On realization of 100% sale proceeds by MMTC from overseas buyer against L/C or on collection basis, payment shall be released to the unit after making deductions as under:-

i) All dues accruing to MMTC in repayment of credit sale price difference of the material supplied.

ii) Pre-shipment/post-shipment credit extended against the order. Iii) MMTC's service charges which will be @ 0.25% of the value of exports.

iv) Any other claim lodged and/or penalty or deductions imposed by foreign buyers or any other dues of the Corporation.”

17. Thus, the payment from M/s Patni Jewellers was to be received by MMTC's banker against the letter of credit opened by M/s Patni Jewellers. It is also the admitted case of the parties that under the Associateship Agreement, jewellery was to be exported to M/s Patni Jewellers in the name of MMTC. It is also not MMTC's case that no such letter of credit was opened in the instant case. However, MMTC has not produced any material with regard to the fate of the Letter of Credit against which jewellery was exported to M/s Patni Jewellers. MMTC has failed to explain as to the circumstances in which the payment remained due from M/s Patni Jewellers Ltd. No explanation whatsoever was offered by MMTC as to the fate of the letter of credit or as to how the instruments were negotiated by bankers. In the aforesaid circumstances, the Arbitral Tribunal found that this was a clear case of negligence on the part of the MMTC. The Arbitral Tribunal also recorded that during the course of hearing, they were informed that payment in respect of consignment was received by the London office of the bank to its Delhi Office but MMTC had not received any such payment. In the aforesaid circumstances, the Arbitral Tribunal held that in either event MMTC was not entitled to enforce the payment from the respondents and its claim for non-recovery of price of consignments sent to M/s Patni Jewellers

was without basis.

18. Mr Sandeep Sethi contended that the Arbitral Tribunal's decision to reject the second claim was also perverse and contrary to the express terms of the contract between parties. He submitted that since MMTC has not received funds for export of consignment, it was, irrespective of the reasons for such non receipt, entitled to recover the same from the respondents. Although, he conceded that there was no material on record which would indicate the fate of the Letter of Credit or as to how the documents had been negotiated by MMTC's bankers, he contended that the absence of the documents could not defeat MMTC's claim and the Arbitral Tribunal had grossly erred in rejecting the claim.

19. The Arbitral Tribunal had concluded that MMTC was negligent. The facts clearly support the said conclusion. This court had pointedly asked Mr. Sethi as to what has happened to the Letter of Credit and what were the steps taken by MMTC for recovering the amount invoiced. He fairly submitted that there were no documents or material on record which could even remotely indicate the answer to the aforesaid queries. It is thus obvious that MMTC is either completely ignorant of the relevant facts or has deliberately concealed the same. In either case, the only plausible conclusion that can be

drawn is that MMTC has been grossly negligent. I find it difficult to accept the proposition that notwithstanding the negligence on the part of MMTC, it would be still entitled to recover the amount from the respondents. Merely because payments were guaranteed, would not entitle MMTC to recover the sums from the respondents unless it could explain as to how it was transacted with the consignment and the letter of credit. MMTC has offered no explanation whatsoever as to how its bankers had negotiated the letter of credit.

20. In the aforesaid circumstances, the Arbitral Tribunal found that the claims made by MMTC were frivolous and accordingly, awarded cost of ₹5 lakhs. Given the facts of the present case, the said conclusion cannot be faulted. The petition is, accordingly, dismissed.

AUGUST 04, 2016

pkv

VIBHU BAKHRU, J

**Note: The attendance of the Advocates added vide order dated 09.08.2016.*