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

% Judgment delivered on: 07.03.2017

\+ **O.M.P. (COMM) 371/2016 & IA No. 9480/2016**

MMTC LTD. ..... Petitioner

Versus

CHAUHAN JEWELLERS & ORS. ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Chinmoy Pradip Sharma and Mr Sayan Ray.

For the Respondents : Mr Alok Kumar and Mr Nair Renjith Ramesh and Mr Jitendra Kumar.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. MMTC Ltd. (hereafter 'MMTC') has filed the present petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') impugning an arbitral award dated 26.04.2016 (hereafter 'the impugned award') passed by an Arbitral Tribunal constituted of Justice S.N. Sapra (Retired), Presiding Arbitrator, Justice S.K. Mahajan (Retired) and Mr D.R. Jain. By the impugned award, the Arbitral Tribunal has dismissed the claims made by MMTC against the respondents and further directed MMTC to release and handover the title deeds of the property being Oberoi Club House, Apartment No.3, Oberoi Apartments, 2, Shamnath Marg, Civil Lines, Delhi, which was retained by MMTC as security for performance of the Agreement.

2. MMTC had made certain claims aggregating a sum of ₹57,74,349/-,

inter alia, on account of interest on delayed payments as well as short/non-payment of certain consignments of gold jewellery exported out of India.

3. Briefly stated, the necessary facts to consider the controversy involved in the present petition are as under:-

3.1 MMTC is a Government of India undertaking and is, *inter alia,* engaged in the business of commercial import and export of minerals, metals and other such items. Respondent no.1 is a firm (hereafter referred to as 'Chauhan Jewellers') and other respondents are the constituent partners of the said firm. The disputes between the parties relates to an Agreement entered into between MMTC and Chauhan Jewellers on 09.10.1990 (hereafter 'the Agreement') for export of gold jewellery to overseas buyers. At the material time, MMTC had floated a scheme under which MMTC was lending gold to entrepreneurs engaged in manufacturing jewellery. The arrangement was that MMTC would lend gold to the manufacturers of jewellery who would then export the same to various overseas buyers either introduced by MMTC or otherwise. The manufacturers would raise their invoice on MMTC and the shipment would be made on account of MMTC. MMTC in turn would raise invoice on the overseas buyers and also collect the sale proceeds of the jewellery. On receipt of the sale proceeds, MMTC would deduct the difference in the price of material supplied; pre-shipment or post shipment credit extended to the manufacturers; service charges; and other amounts on account of penalty or deductions made by the foreign buyers. The remaining balance would, thereafter, be released to the manufacturers.

3.2 The claims made by MMTC essentially relate to five consignments of jewellery exported to overseas buyers and in respect of five invoices, being invoice nos. CJ-25 dated 14.07.1993; CJ-26 dated 16.07.1993; CJ-27 dated 27.07.1993; CJ-31 dated 11.11.1993 and CJ-1 dated 28.06.1994.

3.3 In respect of the first two invoices being CJ-25 and CJ-26, MMTC received the payments from foreign buyers *albeit* belatedly and, therefore, MMTC's claim is limited to the interest on delayed realisation of sale proceeds. In respect of invoice nos. CJ-27 and CJ-31, MMTC asserted that it had received only part payments and, therefore, made a claim for the balance of the remaining amount. In respect of CJ-1, the consignment was not collected by the buyer and was returned. It is asserted that on the return of the consignment, the same was opened by the custom authorities and it was found that the jewellery contained was less than as claimed to have been exported.

3.4 The Arbitral Tribunal considered the claims made by MMTC. Insofar as the claim of interest on delayed realisation (relating to invoice nos. CJ-25 and 26) is concerned, the Arbitral Tribunal held that the payments for the consignments were to be received by MMTC from the foreign buyers as the exports had been made in the name of MMTC. The Arbitral Tribunal noted that the exports were to be made under letter of credit (L/C) to be opened by the foreign buyer. However, the foreign buyer, M/s Devji Prushottam Jewellers of Dubai, did not take delivery of the consignments and MMTC redirected the consignments to another buyer, namely, M/s Al-Aseer Jewellers. Since the original buyer, M/s Devji Prushottam Jewellers, did not take the delivery within time, there was some delay in realisation of the sale proceeds. The Arbitral Tribunal held that since the consignments were exported by MMTC and it was MMTC's decision that the consignments be directed to another buyer, Chauhan Jewellers had no role to play either in the export or receipt of payments and, therefore, could not be held responsible for delayed receipt. In the case of invoice no. CJ-27, MMTC had claimed that it had not received the full remittance. However, this was disputed by Chauhan Jewellers. The Arbitral Tribunal held that although MMTC had claimed that it had not received full remittance, it had not disclosed as to what was the shortfall in the amount received. The Arbitral Tribunal also noted that there was nothing on record to show the shortfall in the amounts received by MMTC against the aforesaid consignment and in the absence of any evidence, Chauhan Jewellers could not be held liable for making any payment. The Arbitral Tribunal also held that Chauhan Jewellers was not responsible for ensuring payments by foreign buyers against consignments, which were sent against L/C.

3.5 With respect to the consignment of jewellery sent against invoice no. CJ-31, the Arbitral Tribunal observed that the said consignment was not sent against L/C but 'against DA basis'. The Arbitral Tribunal noticed that a foreign buyer had issued a cheque for payment, which had bounced, however, MMTC had taken no action to recover the balance from the foreign buyer. The Arbitral Tribunal had also observed that it was "*not understood as to why the consignment was sent on DA basis instead of LC basis*" and, accordingly, held that Chauhan Jewellers would not be held liable for any short payment.

3.6 In regard to the consignment sent against CJ-1, it is admitted that the foreign buyer did not take delivery of the consignment and the same was redirected to India. The said consignment was opened by the custom authorities in the absence of any representative of Chauhan Jewellers and an examination report was prepared. The Arbitral Tribunal noted that as per the examination report, the seals on the parcel were shown to the appraisers who confirmed that they were not tampered with and were intact. This established that there was no evidence of pilferage from the parcel. The Arbitral Tribunal also observed that the report indicated that the jewellery which had come back from the buyer was intact and there was no loss of jewellery. The Arbitral Tribunal found that since the parcel was exported by MMTC, it was only MMTC who could take delivery of the same and since MMTC had not proceeded to claim the same, Chauhan Jewellers could not be blamed for the same.

Submissions

4. Mr Chinmoy Pradip Sharma, learned counsel appearing on behalf of MMTC submitted that the impugned award was liable to be set aside as, according to MMTC, it was contrary to the Agreement entered into between the parties. He submitted that in terms of the Agreement, export of jewellery was to be made by Chauhan Jewellers and not MMTC and, therefore, Arbitral Tribunal had proceeded on a palpably erroneous premise that Chauhan Jewellers had no role to play in the export of the consignments. He also drew the attention of this Court to clause 3 of the Agreement, which provided that the unit would stand guarantee for the full realisation of the sale proceeds by MMTC from the buyers. He submitted that in terms of the

aforesaid clause, the onus to realise the sale proceeds vested with Chauhan Jewellers and, therefore, the Arbitral Tribunal had erred in holding that Chauhan Jewellers could not be held responsible for delayed realisation or for shortfall in realisation of the sale proceeds.

5. Mr Sharma also earnestly contended that insofar as invoice no. CJ-31 is concerned, the consignment was made on "DA basis" at the request of Chauhan Jewellers and Arbitral Tribunal had grossly erred in ignoring the communications sent in this behalf. He referred to letter dated 04.07.1994 sent by Chauhan Jewellers to MMTC as well as MMTC's responses dated 05.07.1994 and 25.07.1994. He contended that the said letters indicated that the change of consignment from L/C basis to DA basis was made at the instance of Chauhan Jewellers and, therefore, MMTC could not be held responsible for non-receipt of the payment.

Reasoning and conclusion

6. Before proceeding further, it would be relevant to refer to certain clauses of the Agreement entered into between the parties on 09.10.1990. Clauses 1, 2, 3 and 5 are relevant and read as under:-

> "1. The export orders or contracts whether procured by MMTC or (unit) shall be in the name of MMTC. The orders procured by MMTC, if any, in addition to the commitments made by unit shall be treated in the same manner and priority as if the orders were procured by the unit. All shipping documents shall contain A/ c MMTC. All the shipments will be made by the unit on behalf of MMTC. The unit will submit their invoice along with full set of negotiable documents to mmtc and MMTC shall, in turn, submit their invoice and

other documents to the foreign buyer.

2. The foreign buyers shall open confirmed, irrevocable without recourse to drawer and 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 (1) above to MMTC. MMTC will, in turn, present those documents to their bankers for negotiations / collection as the case maybe.

3. On realisation of 100% sale proceeds by MMTC from overseas buyer against LC 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 shall be @ 0.50-2.5 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.

MMTC shall pay to the unit the amount as calculated on the basis of above para in Indian currency at the rate of exchange on which MMTC realises the sale proceeds.

The unit shall stand guarantee for the full realization of sale proceeds by MMTC from the buyers.

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> 5. All exports in which payments are not under LC shall be covered against ECGC comprehensive policy by MMTC, at the cost of the unit."

7. It is admitted that all consignments in question were made in the name of MMTC. It is also clear that the said consignments were to be made on the basis of irrevocable letter of credit opened in the name of MMTC. Thus, the conclusion of the Arbitral Tribunal that the amount could be recovered only by MMTC and Chauhan Jewellers had no role to play in recovering the sale proceeds cannot be faulted. Insofar as invoice nos. CJ-25 & CJ-26 is concerned, the Arbitral Tribunal had found that the consignments had been diverted by MMTC from M/s Devji Prushottam Jewellers of Dubai to M/s Al-Aseer Jewellers and this caused a delay in realisation of the sale proceeds. There is no dispute that full value of the consignments were realised by MMTC. The finding of the Arbitral Tribunal that there was nothing on record to show that the consignments were diverted to Al-Aseer Jewellers at the instance of Chauhan Jewellers is also uncontroverted. On the contrary, the letter dated 22.08.1994 sent by Chauhan Jewellers indicates that the consignments were diverted by MMTC. The Arbitral Tribunal held that in the circumstances, Chauhan Jewellers could not be held liable for delayed receipt of realisation since it had no role to play in the receipt of payments. MMTC has not produced any material on record which would indicate the said finding to be perverse or patently illegal. Clearly, if the consignments were diverted at the instance of MMTC - as claimed by Chauhan Jewellers - Chauhan Jewellers could not be held responsible for the delayed realisation of the sale proceeds. Clause 3 of the Agreement also does not further the case of MMTC as the same does not entail any

obligation on the part of Chauhan Jewellers to pay interest on delayed realisation. In any event, the Arbitral Tribunal has found that the delay was on account of MMTC's action. The said finding is a finding of fact and no interference with the Arbitral Tribunal's finding is called for on this count.

8. Insofar as invoice no. CJ-27 is concerned, the Arbitral Tribunal had found that there was nothing on record to show that the entire invoice had not been received. Plainly, in absence of any evidence to establish that MMTC had not realised the entire value of the consignment, the question of awarding the claim in favour of MMTC did not arise. Further, MMTC also failed to establish as to how it could have received short payment in respect of export against an irrevocable letter of credit. The terms of the Agreement also clearly required that the exports would be made against *irrevocable without recourse to drawer and divisible letter of Credit in the name of MMTC.* Thus, it is difficult to understand as to how MMTC could have realised short payment.

9. This Court finds no infirmity with the decision of the Arbitral Tribunal to reject MMTC's claim in respect of invoice no.CJ-27.

10. The consignment against invoice no. CJ-31 was not made against irrevocable letter of credit. Chauhan Jewellers had claimed that MMTC was responsible for changing the basis on which the consignment was exported from 'against LC' to 'against DA'. Mr Sharma had earnestly contended that the said contention was incorrect and the consignment was exported on DA basis at the request of Chauhan Jewellers. However, there is no material on record - at any rate none has been brought to the notice of this Court - which

would even remotely suggest that the export on ‘DA basis' was made at the instance of Chauhan Jewellers. It is relevant to note that invoice CJ-31 is dated 11.11.1993. Thus, the shipment was also made in November 1993. The invoice clearly indicates the terms of delivery and payment to be “DA – 90 DAYS”. Thus, the contention that Chauhan Jewellers had requested the consignment to be sent on DA basis by its letter dated 04.07.1994, appears to be erroneous. A perusal of the letter dated 04.07.1994 indicates that Chauhan Jewellers had referred to a purchase order for 5 kg gold received from M/s S.S. Jewellery Traders. Thus, it is clear that the said letter does not pertain to invoice no. CJ-31 which was in relation to a consignment shipped to M/s Al-Aseer Jewellers.

11. Therefore, the observation made by the Arbitral Tribunal that it was not understood as to why the consignment was sent on DA basis instead of L/C basis, cannot be faulted.

12. Undisputedly, the shipment made against invoice no. CJ-31 was not in terms of the Agreement between the parties. Further, in terms of clause 5 of the Agreement, MMTC was obliged to obtain an ECGC comprehensive policy for all exports, which were not covered under a L/C.

13. The Arbitral Tribunal had noted that MMTC had received a cheque from the buyer, however, the same had been dishonoured and although the same was dishonoured, MMTC had not taken any action in this regard. In the circumstances, the Arbitral Tribunal concluded that Chauhan Jewellers could not be held responsible for non-receipt of payment against invoice no. CJ-31. Undisputedly, if MMTC was not diligent in its actions for realisation of the sale proceeds and exports had been made contrary to the terms of the

Agreement, Chauhan Jewellers could not be held liable to secure MMTC for the loss incurred by it. In the circumstances, the impugned award cannot be held to be perverse or patently illegal.

14. Insofar as MMTC's claim against invoice no. CJ-1 is concerned, the Arbitral Tribunal had found that it was only MMTC who could take delivery of the jewellery that was returned and was lying with the custom authorities. The Arbitral Tribunal had also observed that MMTC had not bothered to take the delivery and Chauhan Jewellers could not be blamed for the same. This court does not find the said finding to be palpably erroneous.

15. This Court does not find the impugned award to be patently illegal, perverse or opposed to public policy.

16. Although, the contentions advanced on behalf of MMTC on merits have been considered, it is necessary to state that the scope of the present proceedings does not entail reappraisal of the evidence led and material placed before the Arbitral Tribunal. The enquiry in the present proceedings is limited to examining whether the impugned award is liable to be set aside on the grounds as set out in section 34(2) of the Act.

17. In the present case, MMTC has been unable to establish that the impugned award is perverse, patently illegal or falls foul of the public policy of India. Accordingly, the petition and the pending application are dismissed. No order as to costs.

VIBHU BAKHRU, J

MARCH 07, 2017
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