

Muzzafar Shah Vs. Mmtc

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SooperKanoon Citation : sooperkanoon.com/1130202

Court : Delhi

Decided On : Feb-26-2014

Judge : Vipin Sanghi

Appellant : Muzzafar Shah

Respondent : Mmtc

Advocate for Def. : Mr. Lakshay Sawhney, Mr. Aditya Sarin

Advocate for Pet/Ap. : Mr. Romy Chacko

Judgement :

\$~R-9. * IN THE HIGH COURT OF DELHI AT NEW DELHI Date of Decision:

26. 02.2014 + CS(OS) No.345/2006 MUZZAFAR SHAH Through: Petitioner Mr. Romy Chacko, Advocate versus M.M.T.C. Through: Respondents Mr. Lakshay Sawhney & Mr. Aditya Sarin, Advocates. CORAM: HON'BLE MR. JUSTICE VIPIN SANGHI

JUDGMENT

VIPIN SANGHI, J.

(ORAL) 1. These are objections preferred under Section 33 of the Arbitration Act, 1940 (the old Act) to the arbitral Award dated 25.10.2004 made by the learned Arbitrator Mr. Justice S.Ranganathan, retired Judge, Supreme Court of India,

whereby the claim of the respondent has been allowed against the petitioner along with interest.

2. The respondent MMTC introduced a Domestic Tariff Area Scheme under which it imported gold at concessional rates and supplied it to established manufacturers of gold jewellery in India for manufacture of ornaments which were eventually exported abroad. Under this scheme, the respondent provided assistance to manufacturers and exporters of gold jewellery abroad.

3. The petitioner approached the respondent claiming that it had a firm contract with M/s 100 Carats USA Inc. in USA for supply of substantial quantities of gold jewellery. The petitioner requested the respondent MMTC for providing assistance to promote these exports. The petitioner requested the MMTC for providing packing credit limit of Rs.25 lacs subject to the petitioner furnishing necessary collateral security therefor. The petitioner also placed an order dated 29.07.1991 received from the aforesaid American firm for 4 kgs of (assorted plain gold jewellery) of an approximate value of Rs.12,75,000/- on cash on delivery (COD) basis. The details of the bank accounts were also indicated. The petitioner indicated a monthly requirement of 15 kgs of gold. The respondent sanctioned a packing credit limit of Rs.25 lacs on the petitioner executing several documents.

4. On 18.05.1992, an agreement was entered into between the parties (Exb. CW-1/2). Under this agreement, the petitioner agreed to export goods of minimum worth equivalent to 8 times the packing credit limit sanctioned with further annual increases. Clause 2 of the agreement provided as follows:

2. The export orders or contracts whether procured by MMTC or M/s Maharajas Den shall be in the name of MMTC. The orders procured by MMTC, if any, in addition to the commitment by the unit shall be treated in the same manner and priority as if the order were procured by the unit. All shipping documents including GR-1 forms shall be in the name of 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/other documents to the MMTC and MMTC shall, in turn, submit their invoices and other documents to the foreign buyers, 5. Under the agreement, it was contemplated that the foreign buyer shall arrange for payment

of the respondents invoice in cash by opening a confirmed and irrevocable letter of credit in favour of the respondent. Clause 4 dealt with the aspect of disbursement of the amount upon realisation of 100% of the sale proceeds to the petitioner, after adjustment of the dues of the respondent MMTC, and meeting of other claims lodged and/or penalty and deductions imposed by the foreign buyer or any dues of the respondent corporation. The respondent agreed to pay to the petitioner the amount as calculated on the basis of the above para in Indian currency at the rate of exchange on which MMTC realises the sale proceeds. This clause also provided that the unit shall stand guarantee for the full realisation of sale proceeds by MMTC from the buyers.

6. Clause 5 required the petitioner to obtain insurance policy in the name of the respondent MMTC at its own cost to cover the exported goods. The petitioner was made responsible for the quality, specification and proper shipment of the exported goods. Under the agreement, the parties agreed that all the export documents will be prepared in the name of the respondent MMTC. The loan/advance facility was to be extended subject to the condition that the petitioner unit shall give sole selling agency for its export to MMTC for a minimum period of five years, along with further commitment of purchase of its entire requirements of gold during this period and in future from the respondent MMTC only. It was also agreed that in the event of part or whole of the loan not being repaid within the stipulated period of three years, the respondent MMTC shall have the right to cease the assets hypothecated to it and also proceed against the personal guarantee for recovery of principal, interest or any other loans.

7. Clause 11 specifically provided that the petitioner unit is doing this to establish privity of the contract between MMTC and the foreign buyer, in order to save sales/other tax liability on such exports. If sales tax is levied in any of the exports taking place through MMTC, the unit shall bear sales/other tax liability.

8. On 25.09.1992, the petitioner unit applied to the respondent for a loan of 8 kgs of gold on the terms and conditions specified in the application (CW-1/3). In this application, the petitioner, inter alia, stated in para 9 as follows:

We agree that service charges of MMTC are net and the profits/loss in execution of the order shall be to our account. In case (of) any dispute in connection with the execution of the export order, we agree to settle all matters with the buyers directly without any liability loss/claim whatsoever on account of MMTC. As such we request you to release the packing credit of an amount equivalent to the purchase value. (emphasis supplied) 9. Further gold was loaned at the request of the petitioner of 3 kgs and 2 kgs on the same terms and conditions as before. The sanctioned loan of 8 kgs of gold was exhausted by the petitioner. Thereafter, further applications were made by the petitioner to obtain loan of gold. In all, 13 kgs of gold was loaned to the petitioner. In all, 5 invoices were raised by the respondent MMTC on the foreign buyer towards the price of the exported goods aggregating to Rs.47,74,747/-. However, no payment was received by the respondent. Consequently, after issuing legal notice to the petitioner, the respondent started arbitration. Initially, Mr. Justice H.L. Anand (Retd.) was nominated as the arbitrator. Since the petitioner failed to nominate another person as the arbitrator, Mr. Justice H.L. Anand (Retd.) acted as the sole arbitrator. However, he resigned on account of his ill health and the arbitrator Mr. Justice S. Ranganathan (Retd.) was appointed by the Supreme Court. The proceedings were continued before the learned arbitrator Mr. Justice S. Ranganathan (Retd.) from the stage at which they had been left by the erstwhile arbitrator. As noticed above, the learned arbitrator has allowed the respondents claim along with interest.

10. The first submission of the learned counsel for the petitioner is that the filing of the Award in the court was beyond limitation. In this regard, the submission is that the Award was made on 25.10.2004. Signed copies of the award were delivered to the parties at that stage. Despite this being the position, the respondent - in whose favour the award was made did not initiate proceedings under Section 14 of the old Act, to require the learned arbitrator to file the Award in the Court. The respondent did not seek the passing of the judgment in terms of Act under section 17 of the old Act.

11. On 09.04.2005, the learned Arbitrator sent a communication to the parties, recording that he had learnt from the counsel for the MMTC that the arbitration proceedings were governed by the old Act, and that the Award had to be filed in

the Court under the provisions of the old Act. The Arbitrator recorded that he was not aware of this position, as he had taken over the proceedings only sometime in 2002 in pursuance of an order passed by the Supreme Court appointing him as the Arbitrator in place of Mr. Justice H.L.Anand (retd.). In this communication, he further recorded that the records of the arbitration with Mr. Justice H.L.Anand could not be obtained by the parties and submitted to him, and that the arbitration had proceeded before him entirely on the duplicate set of papers filed by the parties. He recorded that he did not have any details of the original reference to the arbitration in the case. The learned Arbitrator called upon the parties to confirm whether the aforesaid presumption (that the old Act applied and not the Arbitration and Conciliation Act, 1996 (the New Act)) is correct, and whether the Award had to be filed in the Court in terms of the old Act. The claimant-respondent herein was requested to take delivery of the original Award along with a letter authorizing him to file the Award in the High Court of Delhi.

12. On 29.04.2005, the respondent-claimant confirmed to the learned Arbitrator that since the arbitration commenced prior to the coming into force of the New Act, the Award would be governed by the old Act. The respondent also desired that the learned Arbitrator may indicate his convenience when the original Award could be taken delivery of and filed in the Court.

13. On 03.05.2005, the petitioner sent a communication to the learned Arbitrator stating that since the original records were not obtained prior to the passing of the Award, and the Arbitrator was not aware whether the proceedings were conducted under the old Act or the new Act, the original record be summoned and the matter be re-heard as, otherwise, it could prejudicially affect the petitioner.

14. Vide letter dated 23.07.2005, the learned Arbitrator forwarded the original Award made on 25.10.2004, together with the covering letter authorizing the filing of the Award in the Court to the counsel for the respondent/MMTC-claimant for necessary action. The request of the petitioner contained in the letter dated 03.05.2005 was rejected on two counts. It was noted that, firstly, the necessity of getting the original record was considered at the sittings of the Tribunal, and both counsel had expressed their consent to proceed on the basis of reconstructed

paper book, which was submitted to the Arbitrator. Secondly, hearing having concluded and the Award made, the Arbitrator was functus officio, and had no jurisdiction to reopen the matter.

15. On 31.07.2005, the learned Arbitrator delivered the original award dated 25.10.2005 for being filed in this Court, or in an appropriate Court. He authorized the counsel for the respondent-claimant/MMTC to file the Award in the proper court under the provisions of the Act. The memo of filing of the Award was also provided for being used, if necessary. In this background, the Award came to be filed in the Court on 18.08.2005.

16. The submission of learned counsel for the petitioner is that under Article 119 of the Schedule to the Limitation Act, the time for making an application for filing of the Award in Court is 30 days, and the said period begins on the date of service of the notice of the making of the Award. He submits that from the communication of the learned Arbitrator dated 09.04.2005, it is evident that the signed copies were provided to the parties upon the Award being made on 25.10.2004. Despite receiving notice of making of the Award, the respondent did not take steps to file an application in this Court within 30 days under Sections 14 and 17 of the Act. Consequently, the Award could not have been filed thereafter, and the filing of the Award itself is barred by limitation.

17. Learned counsel for the petitioner has placed reliance on the judgment of the Supreme Court in Patel Motibhai Naranbhai and Anr. Vs. Dinubhai Motibhai Patel and others (1996) 2 SCC585 in support of his submissions. In this case, the Arbitrator had made the Award on 26.02.1986, and gave an intimation of the making of the Award to the parties. Thereafter, on 24.04.1986, one of the parties, namely, the appellant before the Supreme Court required the Arbitrator not to file the Award. Because of the said communication, or for some other reason, the Award was not filed in the Court. Since no application had been made by either of the parties under Section 14 of the Act within the period of limitation of 30 days of the notice of making of the Award, neither party could apply for a direction from the Court to the Arbitrator to file the Award. Civil litigation was started by one of the parties, and rights were claimed on the basis of the Award. Objection was raised

by the opposing party - that by placing reliance on the Award, the plaintiff was, in effect, seeking to enforce the Award which has neither been registered, nor made Rule of the Court in accordance with law. At that stage, on 08.02.1992, a request was made to the Arbitrator to file the Award. After a long lapse of six years, the Arbitrator not only made an application for filing the Award in Court, but also applied for passing of a decree in terms of the Award and engaged a lawyer for that purpose. I may note that the Supreme Court has commented on the said action of the learned Arbitrator by observing that, this action of the arbitrator is incomprehensible. It appears that he had decided to shed the mantle of an Arbitrator and join force with a party in the dispute.

18. The court of Civil Judge, (S.D.) at Anand, passed a decree in terms of the Award on 05.10.1994. The application made by one of the parties to seek the passing of the decree in terms of the Award was also disposed of on 05.10.1994. The appeal against the decree having been dismissed, the appellant moved the Supreme Court.

19. The Supreme Court observed that the only question that fell for consideration was, whether the Arbitrator could after a long lapse of nearly six years from the date of the filing of the award ask for a decree in terms of the award, especially when neither of the two parties made any application for filing of the award in court even after receiving intimation of making of the award.

20. The Supreme Court observed that there was no specific provision in the Act casting a duty on the Arbitrator to file his Award in Court suo motu. Article 119 of the Schedule to the Limitation Act lays down the time limit for making an application for filing the award in court, or for setting aside the award or getting the award remitted for reconsideration. In para 9 of the judgment, the Supreme Court observed as follows:

9. Under sub-section (2) of Section 14, a duty is cast upon the Arbitrator to file the award or cause the award to be filed in the court at the request of the party to the arbitration agreement or if so directed by the court. There is no provision which requires the Arbitrator to apply to the court for filing of the award and pass a decree in terms of the award. An application for filing the award in court has to be

made within thirty days from the date of service of the notice of making of the award under Article 119 of the Limitation Act. Even if it is held that Article 119 will apply only to an application made by a party and not by the Arbitrator, Article 137 will come in the way of the Arbitrator's making any application beyond the period of three years from the date of making of the award.

(emphasis supplied) 21. The Supreme Court was of the view that the party in whose favour the Award had been made, having failed to file an application under Section 14(2) of the Act, which had become barred by limitation, induced the Arbitrator to make the application for filing of the Award, and for making it a Rule of the Court. In other words, a party to the dispute, with the help of the Arbitrator, did indirectly what he could not do directly. The Supreme Court held that law cannot be allowed to be circumvented in this fashion. The Supreme Court observed that the Court should have declined to entertain the application moved by the Arbitrator nearly six years after the making of the Award, and that the Court should not come to the aid of a party where there has been an unwarrantable delay in seeking the statutory remedy. Any remedy must be sought with reasonable promptitude having regard to the circumstances. In these circumstances, the Supreme Court allowed the appeal and set aside, inter alia, the decree passed in terms of the Award by the Civil Judge, S.D., dated 05.10.1994.

22. In *Champalal Vs. Mst. Samrath Bai*, AIR 1960 SC629 one of the submissions raised was that the filing of the award was not within time. In that case as well, the award was filed by the arbitrators in the Court. The Court rejected this submission in para 4 by observing:

4. In our opinion Points 1, 2 and 3 are wholly without substance. The award was made on October 18, 1946, and the arbitrators filed it in the Court of the First Additional District Judge and they also gave notice to the parties by registered post informing them of the making of the award. It has not been shown as to how the filing of the award is barred by limitation. Article 178 of the Limitation Act which was relied upon by the appellant applies to applications made by the parties and not to the filing of the award by the arbitrators.

(Emphasis supplied) 23. This Court in *Moti Ram Vs. Mangal Singh & Ors.*, 8 (1972) DLT312 considered this precise question viz. whether there is any period of limitation as provided in the Limitation Act, 1908 (hereinafter to be called the Act) which governs the case when the arbitrators file the award in the court. In this case the award was signed by the arbitrators on 12.01.1958. On 25.05.1965, the arbitrators filed the award in the Court. The petitioner objected to the award being made a Rule of the Court, inter alia, on the ground that the award had not been filed in the Court within time. The Trial Court did not accept this objection of the petitioner. It was held that there was no period of limitation for filing of an award by the arbitrators in the Court. After referring to several decisions of other High Courts, this Court held that there is no limitation prescribed for filing of an award by the arbitrator in the Court. The Court concluded that neither Article 158, nor 178, nor 120 of the Schedule to the Limitation Act applied. It was held that no provision of the Limitation Act, 1908 is applicable, and hence, an award filed by the arbitrators was not barred by time. The Kerala High Court has also taken the same view in *J.B. Enterprises Vs. State of Kerala & Anr.*, AIR (1990) Ker 65.

24. A perusal of the aforesaid decisions, as well as Section 14(2) of the old Act shows that the Arbitrator may, at the request of any party to the arbitration agreement, or if so directed by the Court, cause the award or a signed copy of it, together with any depositions and documents which may have been taken and proved before him, to be filed in the Court. Therefore, it cannot be said that the Arbitrator had no authority or locus-standi to cause the filing of the Award and the proceedings in this Court on a request being made by the party to the arbitration agreement. Even in *Patel Motibhai Naranbhai and Anr.* (supra), the Supreme Court has not held that the arbitrator could not have filed the award in Court of his own. What the Supreme Court found objectionable and unpermissible was the Act of the arbitrator in applying to the Court to pass a decree in terms of the award.

25. The judgment relied upon by the petitioner in *Patel Motibhai Naranbhai and Anr.* (supra), as would be seen from the aforesaid analysis, has no application in the facts of this case. This is for the reason that unlike in the case of *Patel Motibhai Naranbhai and Anr.* (supra), in the present case, the learned Arbitrator sent the first communication to the parties, after the making of the Award on

25.10.2004, on 09.04.2005, i.e. in less than six months of the making of the Award. In fact, he recorded that he was not aware that the proceedings were governed by the provisions of the old Act. The reason for his ignorance in this regard is also explained in the said communication, relevant portion of which reads as follows:

The Award in the above matter was made on 25.10.2004 and signed copies of the Award were delivered to the counsel for the claimant and to a representative of the MMTC. I am now given to understand by counsel for MMTC that the arbitration proceedings were governed by the Arbitration Act of 1940 and that the Award had to be filed in Court under the old Act. I was not aware of this as I took over the proceedings only some time in 2002 in pursuance of an order of the Supreme Court appointing me as Arbitrator in place of Shri Justice H.L.Anand. Records of the Arbitration with Shri Justice Anand could not be obtained by the parties and submitted to me and the arbitration before me proceeded entirely on the basis of a duplicate set of papers filed by the parties. I do not have therefore any details of the original reference to arbitration in this case. I request counsel of both parties to confirm whether the above presumption is correct and whether the Award has to be filed in Court in terms of the 1940 Act. If so, counsel for MMTC is requested to take delivery of the original of the Award along with a letter authorizing him to file the Award in the High Court of Delhi.

26. Therefore, it is evident, that had the learned Arbitrator been aware of the fact that the proceedings were governed by the old Act, and not by the new Act, the Arbitrator may have caused the filing of the Award in the Court much earlier. Moreover, unlike in the case of Patel Motibhai Naranbhai and Anr.(supra), in the present case, the learned Arbitrator has not approached this Court with a prayer that the Award be made a Rule of the Court. The conduct of the learned Arbitrator, as is evident from the correspondence above referred to in the present case, is completely transparent and does not betray the feeling of bias or unwarranted desire on his part to have the Award made a Rule of the Court in favour of the respondent. Moreover, the delay in the case of Patel Motibhai Naranbhai and Anr. (supra) was six years, whereas in the present case, there is hardly any delay. Moreover, even if Article 137 of the Schedule to the Limitation Act were to be

applied - which possibility has also been considered by the Supreme Court in para 9 of the judgment in Patel Motibhai Naranbhai and Anr. (supra), there is no delay at all. This submission of learned counsel for the petitioner is, therefore, rejected.

27. Learned counsel for the petitioner next argued that the proceedings and the Award are vitiated by the fact that the arbitral tribunal was not even aware of the position that it was the old Act which was applicable, and not the new Act. He submits that this had a bearing on the determination of the disputes between the parties by the learned Arbitrator. I do not find merit in this submission for the reason that the petitioner has not been able to point out as to what, if any, illegality crept into the proceedings held by the learned Arbitrator on account of the same being treated as those governed by the new Act and not by the old Act. The provisions of the new Act, in fact, bring about greater transparency when compared to the provisions of the old Act in the matter of conduct of the arbitral proceedings. If the learned arbitrator conducted the proceedings while remaining under the impression that the new Act was applicable, the petitioner can have no grievance. Moreover, it is not pointed out by the petitioner that, while the proceedings were in progress before the learned Arbitrator, the petitioner raised any objection with regard to the procedure being adopted on the ground that it was contrary to the provisions of the old Act. Similarly, the petitioner has not been able to point out as to how the making and framing of the Award has been vitiated, merely because the learned Arbitrator was under the impression that the new Act was applicable.

28. The next submission of learned counsel for the petitioner is that the original record was not requisitioned from the erstwhile arbitrator Mr. Justice H.L.Anand.

29. In this regard, I may refer to the proceedings held before the learned Arbitrator in the second sitting on 13.07.2002. In these proceedings, the learned Arbitrator recorded that, MMTC had been requested to obtain the records pertaining to the arbitration from Mr. Justice H.L.Anand and to submit the same before him. The same had not been done. The respondentclaimant was then directed to make a specific request to Mr. Justice Anand and obtain the record and produce the same to the Arbitrator on the next date of hearing or in the alternative supply copies of all

documents so far filed in the case. A specific direction to the counsel for MMTC, in this regard, is enclosed.

(emphasis supplied) 30. On 12.12.2002, learned Arbitrator sent a communication to the parties. In this communication, he, inter alia, records, It is stated that the parties have not been able to get records from Shri Justice Anands office. It has now been suggested by the parties that both of them will prepare a separate paper book containing all the pleadings and the affidavit by way of evidence which has been filed on behalf of the MMTC from the papers in their possession. It is accordingly directed that the parties should prepare a separate agreed paper book containing all the pleadings and the affidavit by way of evidence earlier filed in this case on behalf of MMTC. The sitting schedule for 11th December, 2002, is accordingly adjourned to Monday, 10th February, 2003 at 4.30 p.m. Parties should be ready to proceed with the cross-examination of the witness for the claimant. Parties are also directed to remit the arrears of fees, if any, to the arbitrator within two weeks from today.

(emphasis supplied) 31. It appears that in pursuance of the aforesaid communication of 12.12.2002, the respondent-claimant filed photocopies of documents which had been filed before the earlier Arbitrator. The learned Arbitrator sent a communication to the parties on 08.04.2003, inter alia, recording as follows:

.....Counsel for the claimant has already filed a set of papers being photocopies of documents filed earlier before the earlier Arbitrator. The counsel for the respondent may verify these papers and get the set ready by the next date of hearing. The next sitting of the Tribunal is fixed for 4 p.m. on Monday, the 11th August, 2003. On that day, MMTC should be ready with its witness for cross-examination by the counsel for the respondent.

(emphasis supplied) 32. On 27.10.2003, in the fifth sitting, the learned Arbitrator, inter alia, passed the following order:

This matter was fixed for deposition of the witness today. But both counsel agreed before me that it may not be necessary to record oral evidence in the case and

that both parties are prepared to address their arguments on the basis of the pleadings and affidavits which have been filed by the two parties.

(emphasis supplied) 33. The proceedings were concluded in the sixth sitting on 16.04.2004 after the conclusion of the arguments of the parties.

34. From the aforesaid, it would be seen that the original arbitral record could not be requisitioned from the erstwhile Arbitrator, and the respondent was required to file copies of all the documents which formed a part of the arbitral record before the erstwhile Arbitrator. The said documents were filed, and the petitioner was also asked to verify the same. The parties agreed to proceed on the basis of the record and dispensed with the leading of oral evidence. Thereafter, the arguments were heard and the Award reserved. At no stage, the petitioner raised any objection to the proceedings being held and concluded on the basis of the copies of the documents. The petitioner never complained that the copies of the complete record had not been filed before the learned Arbitrator. In fact, the petitioner proceeded to participate in the arbitration proceedings which were held on the basis of the copies filed before the erstwhile Arbitrator. In fact, the aforesaid orders/communications clearly show that the petitioner consented to the arbitration proceeding on the basis of copies only. Therefore, this grievance of the petitioner is completely misplaced and appears to be an afterthought. The petitioner sought to rake up the said issue for the first time in his communication dated 03.05.2005, after the making of the Award on 25.10.2004. The petitioner has not been able to point out as to how the petitioner has been prejudiced on account of original record not being available before the learned Arbitrator. The impugned award has been passed on the basis of undenied and undeniable documents and on the interpretation of the contractual terms and application of law. This objection is, therefore, rejected.

35. The next submission of learned counsel for the petitioner is that the Award is bad on merits. In this respect, the first submission of learned counsel for the petitioner is that from the contract between the parties, it is evident that the exporter was the respondent MMTC. The entire documentation was in the name of MMTC. The right to receive payment from the foreign buyer was exclusively that of

the respondent MMTC. In para 14 of the impugned award, the learned arbitrator has returned a finding that:

there can be no doubt that it is only MMTC which can collect the price of the goods from the foreign buyer. Whatever rights the associate has under the agreement are qua MMTC and have to be worked out between MMTC and itself. There is no privity of contract between the associate and foreign buyer which will enable the associate to collect the sale proceeds of the goods from him. Clause 4 of the agreement is very clear and specific that the price of the goods will be realised by MMTC, which after reimbursing itself for the amounts due to it from the associate towards packing credit facilities, interest and other charges, will pass on only the surplus, if any, to the associate. It is clear that though it is the associate which secures orders, purchases gold, incurs labour charges, manufactures jewellery and arranges for their despatch to the foreign buyer, the parties have entered into an arrangement, the legal incidents of which ensure that MMTC, which has provided the entire finances, is enable to deal directly with the foreign buyer and collect the price, while the associate unit is precluded from having any direct contact with the foreign buyer in the export transaction. In the aforesaid quotation, the expression associate refers to the petitioner.

36. Learned counsel submits that the award made by the learned arbitrator is contradictory inasmuch, as, even in the face of the aforesaid finding, the learned arbitrator has held the petitioner liable for the failed consideration in respect of export of jewellery made by respondent MMTC.

37. The next submission of learned counsel for the petitioner is that the learned arbitrator has sought to place reliance on the following clause contained in clause 4 of the agreement - The unit shall stand guarantee for the full realisation of sale proceeds by MMTC from the buyers. He submits that this only indicated that, in future, the petitioner shall stand guarantee. However, no guarantee was furnished at the time when the agreement was entered into. There is no agreement of guarantee executed by the petitioner. Therefore, the same could not be enforced against the petitioner.

38. He further submits that for a contract of guarantee to be operative, it has to be a tripartite agreement between the debtor i.e. the foreign buyer, the creditor i.e. the respondent MMTC and the alleged guarantor i.e. the petitioner. He submits that in the present case, there is no such tripartite agreement in existence inasmuch, as, the petitioner and the foreign buyer have never undertaken to the respondent that the debt owed by the foreign buyer shall be paid by the petitioner in case it is not so paid by the foreign buyer. In support of this submission, he places reliance on the judgment of the Supreme Court in Punjab National Bank Ltd. v. B.C. Mills, AIR 1970 SC1973 and in particular paras 9 and 10 thereof, which reads as follows:

9. Section 124 of the Indian Contract Act defines a contract of indemnity. A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a contract of indemnity. Section 126 defines a contract of guarantee. It states:

A contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the surety: the person in respect of whose default the guarantee is given is called the principal debtor, and the person to whom the guarantee is given is called the creditor. A guarantee may be either oral or written.

10. A promise to be primarily and independently liable for another person's conduct may amount to a contract of indemnity. A contract of guarantee requires concurrence of three persons - the principal debtor, the surety and the creditor - the surety undertaking an obligation at the request express or implied of the principal debtor. The obligation of the surety depends substantially on the principal debtor's default; under a contract of indemnity liability arises from loss caused to the promisee by the conduct of the promisor himself or by the conduct of another person.

39. The next submission of learned counsel for the petitioner is that the contract in question is vague and uncertain, since it was not clear to the parties at the time when the contract was entered into as to what would be the extent of the liability to be borne by the petitioner. In this regard, he places reliance on the judgment of

House of Lords in *G. Scammel & Nephew Ltd. v. H.C. & J.G. Ouston*, 1941 Appeal Cases 251.

40. On the other hand, the submission of learned counsel for the respondent is that all the aforesaid submissions of the petitioner were also raised before the arbitral tribunal and each one of them have been specifically dealt with and rejected by the learned arbitrator in his detailed and reasoned award. Learned counsel submits that the petitioner cannot seek to re-agitate the same submission as if this court is hearing an appeal from the award.

41. So far as the submission that the award is contradictory in view of the findings returned in para 14 as extracted above, I find absolutely no merit in this submission. It is obvious, that the petitioner was the manufacturer and real exporter inasmuch, as, it was for his benefit that the respondent had provided the gold loan. It is the petitioner who had arranged the foreign buyer. Obviously, the petitioner was the one who knew the foreign buyer; its location; its reputation and standing, and; it entered into negotiation with regard to the finished gold jewellery to be supplied, and the rate at which it was to be supplied. The respondent MMTC was only acting as a supporting agency, to boost export of finished gold jewellery. For the said purpose, it was only charging some consideration. The risk in the whole transaction was clearly that of the petitioner. It was for this reason that the petitioner had undertaken that in case the foreign buyer does not pay the consideration for the exported jewellery, the petitioner would be liable. It is for this reason that the petitioner was obliged to secure insurance at its own cost.

42. Each of these submissions were raised by the petitioner before the learned arbitrator, squarely considered and rejected by the learned arbitrator. I consider it appropriate to extract the relevant portions of the award in this regard:

15. This arrangement, while excellently suited to the practicalities of the situation, so long as MMTC was able to realize the sale proceeds, would have proved detrimental to MMTC in cases where, for one reason or the other, the sale price was not realized or realizable. A very anomalous situation would arise since MMTC, with no information about, or access to, the buyer save his address can take no effective steps for realizing the price from him; and the associate, though

more close to the buyer commercially and otherwise, cannot take any active steps in this direction due to lack of privity of contract with him. Possibilities of cases of collusion could also not be ruled out. To safeguard itself against this situation, the arrangement between the parties has incorporated clauses 4 of the agreement dated 18.05.92 as well as clause 9 of the application for gold and packing credit to protect the interests of MMTC. It is indeed on these clauses that Sri Sanjeev Puri, Counsel for MMTC has relied in support of its claim.

16. The claim of the MMTC is well founded. Indeed, the correspondence between the parties [C.W19 to 13]. clearly shows that the respondent has admitted responsibility for the realization of the sale proceeds of the goods. Shri Chacko says that this was only a gesture of courtesy and business goodwill extended to MMTC by the respondent. Whatever that may, there is no doubt that the clauses referred to earlier impose an obligation on the respondent to make good the sale proceeds to MMTC.

17. Shri Chacko however seeks to get over the obligation under clause 4 of the agreement of 18.05.92 on three grounds. He first says that this was an onerous clause which he was forced to agree to as MMTC was the dominant party under the contract and could dictate its terms. This argument is not tenable. As indicated earlier, this agreement was entered into in pursuance of a scheme drawn up by the MMTC and accepted by a large number of gold ornament manufacturers and had been drawn up to ensure, promote and safeguard the interests of both the parties. There is no material to accept a plea that any of the clauses were the result of coercion or undue influence on the part of MMTC.

18. The second point made by Shri Chacko, relying on the words shall stand guarantee in clause 4, is that it only envisages an agreement to provide a guarantee in future and does not amount to a guarantee undertaken in praesenti. This argument proceeds on a misinterpretation of the clause. The agreement sets out all the terms/conditions of the arrangement between the parties, one of which is that the associate has agreed to guarantee the due realization of the sale proceeds by MMTC. The word shall has been used as the guarantee will be operative in future when there is a default on the party of the buyer. The idea could

perhaps have been expressed better but it is not correct to read the clause as if the guarantee was not intended to be operative at once.

19. The third point made by Shri Chacko is that the clause should be held as void for uncertainty as the terms and conditions of the guarantee are not clearly spelt out. In support of his contention, he referred to the decisions in *Scammel and Nephew Ltd. Vs. Ouston* [1941 A.C. 251]. and *Teamco Pvt. Ltd. Vs. Mani* [AIR1967 Calcutta 168].. Those decisions rested on the special facts and terms of agreements in the cited cases which were entirely different. So far as the present case is concerned, all the relevant terms and conditions necessary for the enforcement of the guarantee: the name of the foreign buyer, the amount of the invoices and the time for payment are within the knowledge of the associate and agreed to between the associate and MMTC. It is difficult to accept the contention that the terms of the clause are vague, uncertain or inchoate.

20. Lastly, Shri Chacko referred to the following observations of the Honble Supreme Court in *Punjab National Bank vs. Biram Cotton Mills* [AIR 1970 SC1973:

A contract of indemnity requires concurrence of three persons the principal debtor, the surety and the creditor - the surety undertaking an obligation at the request express or implied of the principal debtor and submitted that this requirement was not fulfilled in the present case, as there was nothing to show that the foreign buyer had requested the associate to guarantee the due payment by it of the sale proceeds to MMTC. However, a request by the principal debtor may be express or implied. In this case, the foreign buyer is connected with the associate and agreed to place on MMTC an order for jewellery to be manufactured and exported by the associate from the gold supplied by MMTC. He is aware that it was at the request of the associate that the gold was being exported in the name of MMTC. The transactions were in pursuance of a scheme which was given due publicity and the buyer who is a stranger to MMTC could not but have been aware that the MMTC will not do this and take the risk of non-payment without an assurance of guarantee by the associate. A request by foreign buyer to the associate to furnish a guarantee for due realization of the sale proceeds must be implied in the special circumstances surrounding the transactions.

21. Even if, for one or the other reason urged by the counsel for the respondent, the guarantee is considered to be ineffective as being one between MMTC and the associate and not a tripartite transaction, clause 9 of the subsequent applications of the associate contain indemnity clauses under which the associate is bound to make good any loss that may be incurred by MMTC due, inter alia, to non-realisation of the sale proceeds from the buyers.

43. A perusal of the aforesaid extract from the impugned award would show that there is no error, much less a patent error or an error on the face of the record in the reasoning adopted by the learned arbitrator. Apart from making the same submissions before this court, learned counsel for the petitioner has not pointed out as to what, according to him, is the patent error/ error on the face of the record in the aforesaid discussion found in the impugned award, whereby the petitioners pleas on merits were rejected.

44. The submission that clause 4 used the language shall stand guarantee and that it envisaged an agreement to provide a guarantee in future does not amount to a guarantee undertaken in praesenti has been duly considered and rejected in para 18 of the award. The arbitrator has interpreted the contractual terms which was entirely within his domain. It is not for this court to interpret the agreement. It is not shown as to how the said interpretation could be said to be patently erroneous or as disclosing an error on the face of the record.

45. The learned arbitrator has duly considered the decisions relied upon by the petitioner including the case of G. Scammel & Nephew Ltd (supra) in para 19, and Punjab National Bank Ltd. (supra) in para 20. The learned arbitrator has held that the contractual term contained in clause 4 of the agreement constituted an agreement of guarantee and, in any event, it tantamounts to an indemnity clause on the part of the petitioner. Therefore, there is absolutely no merit in any of the submissions made by the petitioner to assail the impugned award on merits.

46. For the aforesaid reasons, I find no merit in this petition and dismiss the same leaving the parties to bear their respective costs.

47. Accordingly, the objections are dismissed and the Award is made a Rule of the Court. A decree shall follow in terms of the Award. VIPIN SANGHI, J
FEBRUARY 26 2014 sl/sr

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