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Court : Delhi

Decided On : Dec-23-2015

Judge : S. Ravindra Bhat & the Honourable Ms. Justice Deepa Sharma

Appeal No. : FAO(OS) Nos. 314, 477 of 2010, C.M. APPL. Nos. 8212, 19883 of 2010, 22834, 24926, 22632 of 2015 & CRL. M.A. No. 12620 of 2010

Judgement :

S. Ravindra Bhat, J.

1. The present appeal, under Section 37 of the Arbitration and Conciliation Act (hereafter the Act ?) is directed against the judgment and order of a learned Single Judge, dated 17.02.2010 in OMP 40/2000. The impugned judgment dismissed the objections of the appellant (hereafter MMTC ?) to the majority award of a three member Arbitral tribunal (hereafter the Tribunal ?) dated 23.08.1999. The award had directed payments to the claimant/respondent (hereafter Belcom ?) by MMTC.

2. The facts relevant for this case are that on 14.10.1991, Contract No.35 was executed between MMTC and Belcom for sale of 50,000 metric tonnes of Muriate of Potash (MOP) at a price of Rs. 2,766.50 per metric ton. This was an F.O.B. contract.. The said contract contained a payment clause by which MMTC was to open a Letter of Credit with the Bank for Foreign Trade of USSR, Minsk “ Bank of Foreign Economic Affairs [hereafter BFEA ?], valid for a period of 90 days. The relevant portion of the payment clause is reproduced herein below:

PAYMENT:-

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

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

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

vii) Sellers' Certificate showing 2 original Bill of

Lading..... ?

3. On 24th October, 1991, MMTC, the purchaser opened a Letter of Credit for 25,000 metric tonnes, valid for 90 days, i.e. valid till 22nd January, 1992. On 15/16.12.1991, documents were presented to the MMTC's banker, the Oriental Bank of Commerce [hereafter OBC ?], which then was obliged in terms of the LOC to make payment in accordance with its terms and in accordance with international banking practise and customs. However, Belcom, fearing disintegration of the USSR, wrote to MMTC on 18.12.1991 directing them to not release payment for the shipment of MOP by vessel Indian Renown ?. On this basis, MMTC by its letter dated 20.12.1991 instructed its banker OBC, to not pay under the said LOC.

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

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

On 05th December, 1991, the vessel with cargo left the Russian port and it arrived in India on 05th January, 1992. On 14th February, 1992, Reserve Bank of India (RBI) granted permission to the claimant, Belcom, to open a Rupee Escrow Account, subject to certain conditions. One of the conditions imposed by the RBI was that payments that became due prior to freezing of central account of USSR on 27.12.1991, would not be deposited in the Escrow account. Condition No.(xii) imposed by the Reserve Bank of India through the aforesaid letter is reproduced hereinbelow:-

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

5. On 20th February, 1992, Belcom requested MMTC to withhold the payments of the shipment in issue until all questions connected with the said payment had been resolved. On 29th May, 1992, MMTC's banker, Oriental Bank of Commerce made payment of Rs. 3,71,10,195.54 to State Bank of India for crediting the Bank for Foreign Trade of USSR, Minsk, on behalf of the petitioner-objector in connection with the aforesaid transaction. It seems after the amount had been credited to the Bank for Foreign Trade of USSR, the said foreign bank was agreeable to reversal of the credit entry, but the Reserve Bank of India by its Telex dated 28th October, 1992, refused to do so. The aforesaid Telex dated 28th October, 1992 of Reserve Bank of India reads as under:

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

6. On 12.09.1996, the MMTC wrote to RBI stating that amounts had been paid •to the wrong account of BFEA of erstwhile USSR Minsk Branch, where it is lying frozen and that although the petitioner-objector had made the payment, respondent-claimant represented that it had not received the said amount. By the said letter, petitioner-objector sought to recall its remittance. On 17.10.1997, Belcom invoked the arbitration clause incorporated in the contract. Both MMTC and the Belcom appointed one Arbitrator each, while the Supreme Court by its order dated 19th November, 1998 appointed Justice Ranganath Misra, former Chief Justice of India as the Presiding Arbitrator. The Tribunal rendered a plurality of awards. The majority comprised of Justice Ranganath Misra, retired Chief Justice of India and Justice S.K. Jain (retired Judge, Allahabad High Court) whereas the minority award was rendered by Dr. K.S. Sidhu, who rejected Belcom's claim.

7. The majority award is premised on the following reasoning of Justice Misra:

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

(iv) Lastly, MMTC, vide the last but one para of its letter dated 12.9.96 (Annexure C-10), had admitted that they were remitter of the funds and the funds did not reach the intended beneficiary, i.e. Belcom. ?

The same reasoning was adopted by Justice S.K. Jain:

Belcom vide its letter dated 18-12-91 (Annexure C-2) had advised MMTC not to make payment, whereupon MMTC, in its turn, vide its letter dated 20-12-91 (Annexure C-3) instructed its bankers not to release payment of MOP shipment per Vessel Indian Renown to the account of M/s Belcom of USSR. The Contract was amended on 1.1.92. It is, therefore, clear that the payment having been deferred could not be considered to have become due before 27-12-91, particularly when the vessel Indian Renown arrived in the Indian Port of discharge on 5-1-92, and MMTC received shipment in January, 1992 itself. So the payment in question does not fall within the mischief of preclusion clause (xii) of the letter dated 14-2-92 of the Reserve Bank of India. In view of the exceptional circumstances prevailing due to the break up of USSR, Belcom had well in advance, on 18-12-91, advised MMTC not to make in their account until receipt of their special confirmation. On 20-12-92 (Annexure C-3) accordingly advised their bankers. After having not acted in accordance with the amended clause 6 (VIII) of the contract and making payment into the old frozen account, MMTC cannot be allowed to take shelter of clause (xii) of the above mentioned letter of Reserve Bank of India. ?

8. As is seen, the MMTC's inability to make direct payment after the amendment (of the Contract, on 1-1-92) was held to be its fault; also, the above reasoning suggests that postponement of payment by virtue of instruction given to OBC (MMTC's banker) on 20.12.1991 meant that payment under the LOC (in respect of which documents had been presented earlier, had not fallen due. Consequently, the ban on payments falling due before 14.12.1991 did not bar direct payment to Belcom.

9. The learned Single Judge accepted MMTC's contention that the Tribunal had not decided the issue of limitation. However, on this issue, he rejected MMTC's contention that the claim was time-barred and observed as follows:

I am of the view that even though the Arbitrators have not decided the plea of limitation, it would make no difference because the petitioner-objector right from 1992 to 1996, had been making efforts to ensure that the Reserve Bank of India agreed to reverse the credit entry. In fact, petitioner-objector was all throughout

trying to ensure that payment was actually received by the respondent- claimant. In fact, petitioner-objector's letter dated 12th September, 1996 constitutes an acknowledgement to the effect that consideration of Rs. 3.71 crores under Contract No.35 had not been received by the respondent-claimant. It seems to me that the issue of limitation was really not pressed by the petitioner-objector during the course of the hearing in view of its contemporaneous conduct in particular the letter dated 12th September, 1996. ?

10. On the merits, the learned Single Judge inter alia, held as follows:

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

31. Moreover, Reserve Bank of India's letter dated 14th February, 1992 did not mandate that payment had to be made by the petitioner-objector to respondent-claimant only by way of a Letter of Credit as stipulated in the original contract dated 14th October, 1991. There is nothing in the Reserve Bank of India's letter

dated 14th February, 1992, which prevented the petitioner-objector or its bankers from withholding payments till all issues were amicably resolved. In any event, I am of the opinion, that petitioner-objector's bank, Oriental Bank of Commerce could not have made payment under an expired Letter of Credit inasmuch as payment was made on 29th May, 1992 whereas the Letter of Credit had expired on 22nd January, 1992. ?

Contentions of the parties

11. It was firstly argued that the learned Single Judge assumed incorrectly that a valid acknowledgment of debt had been made by MMTC in its letter of 12th September, 1996 to the effect that consideration of Rs. 3.71 crores under Contract No.35 had not been received by Belcom. It is submitted, in that regard, that the letter states that remittance of payment had been made which according to Belcom, was into a wrong account; RBI (to whom the letter was addressed) was requested to reverse the credit. Counsel urges that given the nature and tenor of this letter, it cannot be inferred to be an acknowledgment- rather, it clearly states that amounts had been paid to the bank nominated by Belcom in the contract.

12. On the merits, it was urged by MMTC that the majority award committed a patent illegality inasmuch as it presumed that once deferment of payment was requested by MMTC (at Belcom's request) in effect, payment was not due and, therefore, the preclusion clause in RBI's letter dated 14.02.1992 did not apply. Learned senior counsel argued that MMTC's position consistently had been that payment had to be made either in terms of the LOC, or in terms of directions of RBI, since it had complete regulatory control over banking in India and also exercised foreign exchange control. RBI had unequivocally stated that payments, which fell due after 27.12.1991, were to be made into Escrow accounts, and payments falling due before that date had to be in their own terms. MMTC, it was argued, had been informed by OBC on 20.02.1992 that the BFEA was demanding payment or else threatening to claim interest. This was informed to Belcom in MMTC's letter dated 21.12.1992, which was sent on 24.12.1992. Learned counsel for MMTC submitted that the impugned award was opposed to public policy as it was contrary to Reserve Bank of India's directions in particular condition No. (xii)

in RBI's letter dated 14th February, 1992. It was argued that MMTC had made payment in conformity with the contractual terms as well as Government policy. Since there was no other manner by which the MMTC could have paid Belcom, the question of seeking recourse to payment through Escrow account on an interpretation of the RBI's letter did not arise.

13. Learned counsel relied on the provisions of the UCP (Unified Customs and Practise) relating to commercial credits, and argued that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay. Under the circumstances, the extraneous factor of an amendment to the contract, which did not affect the liability of the banker to comply with the terms of the demand made as soon as the documents were presented (in the present case, on 16.12.1991). The fact that payment was agreed mutually to be deferred, did not alter the banker's liability to pay to the corresponding banker of Belcom. The fact that the LOC's validity was for 90 days did not render the obligation of OBC to pay in terms of the documents, the presentation of which amounted to acknowledgment of the bank's liability; the bank did not return the document and was obliged to pay under its terms.

14. Belcom argues that the majority award did not disclose any error, much less patent illegality, which warranted interference and that the impugned judgment should not be disturbed. It is firstly urged that the Letter of Credit was alive only for 90 days; its validity ended on 23.01.1992 (concededly it was open on 24.10.1991 and was valid for 90 days). In these circumstances, the payment could not have been released at all after the expiration of the validity of the instrument. Fundamentally, therefore, the decision taken by MMTC was untenable.

15. Sh. Biraja Misra, Power of Attorney holder on behalf of the Belcom, who had appeared in person, further urged that since the contract, i.e. No.35 was amended, and in terms thereof, MMTC was under an obligation to make the payment to Belcom, the payment ostensibly made to the bank in terms of the Letter of Credit did not discharge its contractual obligations; more so, since the materials on record suggested that the erstwhile BFEA Bank received the amount in May 1992

and distributed it to a successor bank later on that year. Belcom had the benefit of a fiscal rate of currency equivalent at around 1/10th the value late in 1999 and eventually closed its account in 2000. As a consequence, the contractual obligation of MMTC subsisted by virtue of the amendment agreed to particularly by the parties. MMTC's breach of the contract was established by its non-compliance of the newly negotiated terms that were binding upon it. It was also urged that there is no fundamental flaw or patent illegality in the finding of the arbitral tribunal that there was no bar in the payment directly to Belcom given the nature of the transaction. In this regard, it is submitted that the RBI's letter of 04.02.1992 prohibiting payments into escrow account was only in respect of payments that fell due on 27.04.1991. In this case, the payments had been postponed and had not fallen due. Either the amount could well have been paid into escrow account by MMTC or at the highest it could have sought clarification from the RBI. It chose recourse to neither course of action. This led to Belcom's loss because it had parted with the goods and MMTC had refused to make payments directly to it. It is also urged that the question of OBC making payment to the BFEA Bank on 27.05.1992 could never have arisen firstly because the Letter of Credit had itself expired and consequently because it is inconceivable that the documents would have been withheld for so long.

16. Sh. Misra urged that there was sufficient material on record for the learned Single Judge to conclude that the claims were not time-barred. In this regard, he reiterated the observations in the impugned judgment; besides he referred to a letter written by MMTC in 1995 which admittedly was not part of the record nor adverted to in the award or the pleadings of the parties to say that the question of payment was alive and MMTC continued to correspond both with Belcom and RBI to ensure that the credits made over to the BFEA Bank were reversed by the Indian Bank to enable Belcom to receive payment. This, it was submitted, was sufficient acknowledgement of duty within the expression understood in Section 18 of the Limitation Act so as to extend the period of limitation. Consequently, the claim “ made in 1999, through a demand for arbitration was instituted within the period of limitation.

Reasoning and Conclusions

17. The first question which this Court has to address itself to is the issue of limitation. MMTC had urged the question of limitation in its written statement as well as the submissions made before the Tribunal. However the Tribunal did not even advert to it much less discuss it. The learned Single Judge in the impugned judgment did notice this omission. However, he proceeded to analyze and appraise the facts as evident from the record before the Tribunal and concluded that the claim made by Belcom, was within the period of limitation. In so holding he was influenced by a letter written by the MMTC in 1996 to the RBI. The letter in effect stated that the credits given to the USSR bank should to be reversed. The RBI did not agree to the request. This, according to the learned Single Judge constituted an acknowledgment on the part of the MMTC that it still owed debts that were payable to Belcom.

18. Belcom reiterated its submissions made before the learned Single Judge and submitted in addition that the MMTC had written a letter earlier in 1995. Mr. Misra who appeared for Belcom sought to use the said letter even though he frankly conceded that it was not part of the Tribunal's record. The question then is, from the materials appearing on record, whether the findings of the learned Single Judge regarding the facts and circumstances on the question of limitation were justified and sound.

19. This Court is of the opinion that limitation is a threshold issue which ought to have been addressed by the Tribunal. The Supreme Court in *South East Asia Shipping Co. Ltd. Vs. Nav Bharat Enterprises Pvt. Ltd. and Others* [(1996) 3 SCC 443] ruled that a cause of action is a "bundle of facts" that gives cause to enforce a legal injury for redress in a court of law. By reason of Section 21, arbitral proceedings are deemed to commence on the date on which a request for dispute to be referred to arbitration is received by the respondent. As between civil disputes and arbitration, parties consent to the substitution of a mutually agreed (or court directed) arbitrator; in all other respects substantive law applicable in civil cases and claims would equally apply. The Supreme Court in *Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta* [AIR 1994 SC 1615] held that:-

"8.It would, therefore, be clear that the provisions of the Limitation Act would apply to arbitrations and notwithstanding any term in the contract to the contrary, cause of arbitration for the purpose of limitation shall be deemed to have accrued to the party in respect of any such matter at the time when it should have accrued but for the contract.....

xxx xxx xxx

11. In *West Riding of Yorkshire County Council v. Huddersfield Corporation*, (1957) 1 All ER 669, the Queens Bench Division, Lord Goddard, C.J. (as he then was) held that the Limitation Act applies to arbitrations as it applies to actions in the High Court and the making, after a claim has become statute-barred, of a submission of it to arbitration, does not prevent the statute of limitation being pleaded. Russell on Arbitration, 19th Edition, reiterates the above proposition. At page 4 it was further stated that the parties to an arbitration agreement may provide therein, if they wish, that an arbitration must be commenced within a shorter period than that allowed by statute; but the court then has power to enlarge the time so agreed. The period of limitation for commencing an arbitration runs from the date on which the cause of arbitration accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration takes place upon the dispute concerned.

12. Therefore, the period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of civil action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued.

xxxx xxxx xxxx xxxx

14. The Law of Arbitration by Justice Bachawat in Chapter XXXVII at p. 549 it is stated that just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date when the claim accrues, as

also in the case of arbitrations, the claim is not to be put forward after the expiration of a specified number of years from the date when the claim accrues. For the purpose of Section 37 (1) "action" and "cause of action" in the Limitation Act be construed as arbitration and cause of arbitration. The cause of arbitration, therefore, arises when the claimant becomes entitled to raise the question, i.e. when the claimant acquires the right to require arbitration. The limitation would run from the date when cause of arbitration would have accrued, but for the agreement.

15. Arbitration implies to charter out timous commencement of arbitration availing the arbitral agreement, as soon as difference or dispute has arisen. Delay defeats justice and equity aid the promptitude and resultant consequences. Defaulting party should bear the hardship and should not transmit the hardship to the other party, after the claim in the cause of arbitration was allowed to be barred. The question, therefore, as posed earlier is whether the court would be justified to permit a contracting party to rescind the contract or the court can revoke the authority to refer the disputes or differences to arbitration. Justice Bachawat in his Law of Arbitration, at p. 552 stated that "in an appropriate case leave should be given to revoke the authority of the arbitrator". It was also stated that an ordinary submission without special stipulation limiting or conditioning the functions of the arbitrator carried with it the implication that the arbitrator should give effect to all legal defences such as that of limitation. Accordingly the arbitrator was entitled and bound to apply the law of limitation. Section 3 of the Limitation Act applied by way of analogy to arbitration proceedings, and like interpretation was given to Section 14 of the Limitation Act. The proceedings before the arbitration are like civil proceedings before the court within the meaning of Section 14 of the Limitation Act. By consent the parties have substituted the arbitrator for a court of law to arbitrate their disputes or difficulties. It is, therefore, open to the parties to plead in the proceedings before him of limitation as a defence."

20. In the present case, the Tribunal's omission to address itself to the question, squarely stated by MMTC itself constitutes a patent illegality within the meaning of the formulation by the Supreme Court in the Oil and Natural Gas Commission v. Saw Pipes Ltd [2003 (5) SCC 705] judgment. In the present case, there is no

dispute at all that the money had become payable sometime on 18th or 19th of December 1991, since documents were presented to the issuing bank on 15/16th December, 1991. On 18th of December 1991 Belcom wrote to MMTC to ask the USSR Bank for deferment of payment in view of the imminent threat of disintegration of the erstwhile USSR. MMTC complied even though the documents had been presented earlier on 16.12.1991 to its bank by the negotiating (Russian bank, designated by Belcom). The issuing Bank, OBC, accordingly advised the USSR bank to defer payment. The parties' fears were well grounded; Soviet Russia did disintegrate at the end of 1991 " on 31st of December 1991. As a result, commercial transactions between the erstwhile and now defunct USSR and India had to be somehow transacted through a lasting arrangement. This is where the RBI formulated its policy directive embodied in a direction which is both binding under the foreign exchange control laws (Foreign Exchange Regulation Act, 1974) as well as the Banking Regulation Act 1949. It was embodied in the letter of 14th of February 1992. Simply put, it required that all payments due or falling due before 27th of December 1991, were to be negotiated in their terms and those falling thereafter i.e. were to be deposited in escrow accounts. Correspondence ensued between parties thereafter; it ultimately culminated in payments made out by the issuing bank to the BFEA bank on 29.05.1992. This position was made known to all parties; there is no dispute by Belcom that such was the case. That being so, the reliance by Belcom " which concededly made a demand for arbitration only in 1997, that payment should have been within that time had to be viewed from this perspective. It is here that the learned Single Judge, in our opinion, fell into a clear error of law. Having noticed that the payment was made on the 29th May 1992 " a fact which is a matter of record and not disputed by Belcom; in fact Belcom does not dispute knowledge of this fact- the question was whether the demand for arbitration made earliest in 1997 " preceded by an notice in November 1996 constituted a claim within the period of limitation.

21. The letters written by MMTC, in our opinion, does not constitute an acknowledgment of debt within the meaning of the expression under section 18 of the Limitation Act. This is for the simple reason that the letter was written on 12.09.1996 " clearly 3 years after the payment was made by the OBC to the BFEA bank. It is established law that an acknowledgment of debt to be valid and binding

and result in extension of the period of limitation, should be made within the period of limitation prescribed in the first instance. Even if the letter relied upon by Belcom indeed was an acknowledgment, (arguendo of course) it was clearly made after the period of limitation thus falling outside the mischief of Section 18. It is here that this Court is of the opinion that the learned Single Judge clearly fell into error in holding that the letter led to an extension of limitation period as it amounted to an acknowledgment of debt. As to Belcom's submission made for the first time in appeal (not made in the tribunal or before the learned Single Judge) that an earlier letter of 1995 existed, this Court is unable to accede to its argument and consider the submission. Clearly having lost its opportunity to make any submission with regard to the existence of the letter of which it now proposes and propounds in that appellate proceedings, Belcom cannot be allowed to take advantage of that omission just as it cannot lay claim over a time-barred debt.

22. Section 18 of the Limitation Act reads as follows:

"18. Effect of acknowledgment in writing.- (1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.

(2)

Explanation.- For the purposes of this section,-

(a) an acknowledgement may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the property or right..."

The importance of an acknowledgement of a recoverable or extant debt, was highlighted by the Supreme Court in Khan Bahadur Shapoor Freedom Mazda v.

Durga Prasad Chamaria [AIR 1961 SC 1236] as follows:

The statement on which a plea of acknowledgement is based must relate to a present subsisting liability though the exact nature or the specific character of the said liability may not be indicated in words. Words used in the acknowledgement must, however, indicate the existence of jural relationship between the parties such as that of debtor and creditor, and it must appear that the statement is made with the intention to admit such jural relationship.

In construing words used in the statements made in writing on which a plea of acknowledgement rests oral evidence has been expressly excluded but surrounding circumstances can always be considered. _ The effect of the words used in a particular document must inevitably depend upon the context in which the words are used and would always be conditioned by the tenor of the said document. ?

23. Furthermore, this Court is of opinion that the learned Single Judge also erred in not construing the tenor and purpose of the letter written by MMTC to the RBI on 12.09.1996 which has been construed as an acknowledgement. This letter is written (along with a previous letter of 01.03.1996) to the RBI (it was Annexure C-10 in the Tribunal's proceedings) to persuade RBI to permit for transfer of credit from BFEA Minsk (the Russian bank to whom the payment was made in the first instance) to Belcom's escrow account, with Citibank, Mumbai. If the letter is seen as a whole, it is not an acknowledgement of debt, but rather, it reinforces the MMTC's plea of due payment and is an effort to ensure that Belcom is able to receive the amount (in turn that it releases other payments due to it, under separate contracts, payable to MMTC itself). There is in fact no acknowledgement at all, if the letter is seen as a whole.

24. For the above reasons, it is held that the learned Single Judge fell into error in holding that MMTC had acknowledged its debt to Belcom, which had the effect of extending the period of limitation for making a claim.

Consequently, it is held that the Arbitral Tribunal's majority award was in patent error in entertaining, adjudicating and allowing a time-barred claim.

25. This court next proposes to consider the merits of the dispute, in the context of the Tribunal's decision that MMTC was in breach of contract entitling Belcom to compensation and damages.

26. The undisputed facts here are that the parties entered into contract on 14.10.1991, (Contract No.35) for sale of 50,000 metric tonnes of Muriate of Potash (MOP) at a price of Rs. 2,766.50 per metric ton (F.O.B.), by Belcom to MMTC. The payment clause, i.e Clause 7 stipulated that within seven days after receiving Belcom (sellers') telegraphic address of readiness of the goods for shipment MMTC was to open with the Russian Bank (the Bank for Foreign Trade of the USSR, Minsk), in favour of the sellers an irrevocable Letter of Credit in Indian Rupees for the 80.5% value of the goods mentioned in the sellers' cable plus 5% to cover possible increase of the quantity of the shipment. The Letter of Credit shall be opened for validity of 90 days. Payment of the goods shall be made in Indian Rupees through the aforesaid Letter of Credit against presentation to the Bank for Foreign Trade of the USSR, Minsk of the under mentioned documents. The Letter of Credit was issued by Oriental Bank of Commerce at the behest of MMTC; the negotiating bank did present the documents mentioned in clause 7 on 16th December 1991. On 18th December, 1991, Belcom requested the MMTC to instruct the issuing Bank (Ob C) to postpone or defer payment "which was due on the expiration of the stipulated period, in terms of the Letter of Credit and the norms applicable to it. MMTC wrote to OBC, which did not release payments. The Soviet Union disintegrated on 31.12.1991; the RBI instructed all banks who had obligations under valid letters of credit, to await its directions. In the meanwhile, on 01.01.1992, the parties mutually agreed to the following amendment to the payment clause in the main contract:

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

27. With the disintegration of USSR and the credit freeze imposed by RBI, Belcom wrote to that body (RBI) on 11.02.1992, seeking permission for release of amounts

due to it. It is important to notice that this letter has not been discussed; it at any rate appears in line with the amended contract (dated 01.01.1992) which states that MMTC agrees to deposit the amount into an account established with prior approval of the Reserve Bank of India. The letter of RBI no doubt (in response to Belcom's request for payment into a separate account) permits to Belcom's opening a rupee Escrow Account in the name of M/s Belcom, Minsk, subject to the following conditions i) xii) payments by MMTC that became due prior to freezing of Current Account of former USSR on 27-12-1991 cannot now be paid into Escrow A/c.. Thereafter, there was no correspondence between RBI and Belcom. It was under these circumstances that OBC (on 20.02.1992) wrote to MMTC stating that the Russian bank, the Bank for Foreign Trade of the USSR, Minsk was pressing for payment or else insisting that interest was payable. The MMTC appears to have awaited further instructions from Belcom; the latter could not obtain any further clarification and consequently, the OBC released payment to the Russian bank on 29.05.1992. There is material on the record (in the form of Telex by OBC dated 13.10.1993 to MMTC that the Bank for Foreign Trade of the USSR, Minsk had credited Belcom's account with the amount on 18th December 1992; a similar letter of OBC dated 18.10.1993; letter dated 02.11.1993 to the OBC on the subject by the Bank for Foreign Economic Affairs of the USSR that since the RBI " after consultation of Government of India did not permit transfer of the amount to the Escrow account opened by Belcom, the amount was credited to its account on 18.12.1992 with Bank for Foreign Trade of the USSR, Minsk). These were part of the record and specifically discussed in the separate (concurring majority) award of Mr. Justice S.K. Jain (ret'd) in Para 10 (VI). These clearly point to the fact that there could not have been any dispute that Belcom's account, designated in the original contract, received the credit. It cannot also be disputed that the disintegration of USSR added a dimension not contemplated by the parties. Nevertheless, the OBC and MMTC were bound by RBI directives; they awaited instructions. RBI's instructions (to the specific request of Belcom that amounts payable under the contract be deposited in the escrow account, and not released in terms of the Letter of Credit) was rejected on 14.02.1992 and even later. The question then is whether the Tribunal's appreciation of the facts and applicable law in this regard was correct, or fundamentally erroneous.

28. The Tribunal's majority award is premised on the reasoning that since the contract was amended on 01.01.1992, it was clear that the payment having been deferred could not be considered to have become due before 27-12-1991 as the MMTC received the goods in January, 1992. This Court is of opinion that this reasoning is in fundamental and patent error of law. Granted, Tribunals have sufficient autonomy to err within their jurisdiction, both with respect to interpretation of contracts as well as interpretation of law. However, when the error is based on a patent and fundamental understanding of the law, and is manifestly illegal, it enters the unsustainable " and unsheltered arena; it can be set aside by a court under Section 34 of the Act.

29. MMTC's plea (articulated in Ground Nos. 10.6 and 10.7 of the Objections/Petition under Section 34 and its Memo of appeal, Paras 5 to 5.5) that the export transactions were covered by Uniform Customs and Practice for Documentary Credits (UCPC) which meant that payments governed by letters of credit had to be regulated in accordance with those provisions. The argument here was that the findings of the Tribunal- based on its assumption that payments were not due before 27.12.1991 " are factually unfounded, given the absolute obligation of a credit issuing bank, in terms of the UCPC. It was argued that since the payments fell due after the Russian Bank presented documents on 16.12.1991 and were payable but for request for deferment, there was no question of the subsequent amendment of the contract subsuming or overriding the letter of credit obligation of OBC which did not find any discrepancy in the documents presented.

30. The English Court of Appeal in *Malas (Hamzeh) and Sons v. British Imex Industries Ltd* explained the absolute nature of the liability of a banker (who issues a letter of credit) [(1958) 2 Q.B. 127]as follows:

...the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay...."

In the present case, the letter of credit issued by OBC contains a specific stipulation that it is governed by UCP 400 (i.e the 1983 edition). The UCP is attempt to globalize and standardize norms governing international documentary

credit instruments and has been recognized time and again as a source of law, albeit customary law. This was so stated in *Glencore International AG v Bank of China* [[1996] 1 Lloyd's Rep 135, 148]:

"Practice is generally governed by the Uniform Customs and Practice for Documentary Credits (the "UCP"), a code of rules settled by experienced market professionals and kept under review to ensure that the law reflects the best practice and reasonable expectations of experienced market practitioners. When courts, here and abroad, are asked to rule on questions such as the present they seek to give effect to the international consequences underlying the UCP. ?

In Schetzie and Fontane, *Documentary Credit Law throughout the World* [(2001) (ICC Publication No 633)], there is a useful discussion (@ para 2.2.4) of the relationship of national law and the UCP:

"While the UCP aim to harmonise worldwide trade practices and aim to safeguard the interests of the international trade and banking community, national laws vary from country to country. The application of national laws to issues not expressly addressed by the UCP can result in a de-internationalisation of the rules and conflict with their purpose. The application of national laws and doctrines needs to be handled carefully. If the UCP generally address an issue in question but do not provide for an explicit solution to a particular aspect of it, there is also the option of considering whether a solution can be found in a general rule contained in the UCP. An interpretation of the UCP in accordance with their aims and evaluations is generally preferable. ?

Similarly, in Kurkela, in *Letters of Credit and Bank Guarantees under International Trade Law* [(2006) (ICC Publication No 966)], at para V.I.4 states that:

"The interpretation of such rules should be global and universal and a court must recognise the international nature of the UCP and approach its construction in that spirit. It and should avoid parochial concepts and meanings. ?

The Court of Appeal, in England, in *Fortis Bank SA/NV and another v Indian Overseas Bank* [[2011] EWCA Civ 58] held that:

a court must recognise the international nature of the UCP and approach its construction in that spirit. It was drafted in English in a manner that it could easily be translated into about 20 different languages and applied by bankers and traders throughout the world. It is intended to be a self-contained code for those areas of practice which it covers and to reflect good practice and achieve consistency across the world. Courts must therefore interpret it in accordance with its underlying aims and purposes reflecting international practice and the expectations of international bankers and international traders so that it underpins the operation of letters of credit in international trade. A literalistic and national approach must be avoided . ?

31. Indian Courts too recognize the vital need to respect autonomy of commercial credit instruments. [Federal Bank Ltd. v. V.M. Jog. Engg. Ltd., (2001) 1 SCC 663; Tarapore and Co. v. V.O. Tractors Export (1969) 1 SCC 233; U.P. Coop. Federation Ltd. vs. Singh Consultants and Engineers (P)Ltd 1988 (1) SCC 174, Himadri Chemicals Industries Ltd. vs. Coal Tar Refining Co. (2007) 8 SCC 110] In National Bank v Ghanshyam Das Agarwal [(2015) 4 SCC 228] the Supreme Court emphasized this in the following terms:

Heavy and fiduciary responsibility, therefore, rests on the Opening Bank which furnishes the Letter of Credit to ensure that payment is secured unless the documentation is defective and/or the invocation of the Letter of Credit is discrepant. In every legal system spanning our globe, jural opinion is unanimous to the effect that the Opening Bank cannot disregard, delay or dilute its responsibility to make payment strictly and promptly as obligated by the terms of the Letter of Credit. This Bank owes a duty to all concerned to ensure that any action taken by it would not enable or conduce the frustration of the obligations contained in a Letter of Credit, as recognised by International Banking norms or extant Uniform Customs and Practice for Documentary Credits (UCP) 500. As we see it, therefore, keeping in perspective that the Importer's Bank i.e., Appellant before us, should not have certified the documentation, reasonably anticipating or being aware of the possibility that this certification could be abused. Law assures the Exporter and its Bank to repose in the expectation, nay, certainty, that the consignment, which is the subject-matter of the Letter of Credit, is not usurped by

the Importer/Consignee or its agents, without remitting payment to the consignor's Bank. This is a strict liability cast on the bank which opens the Letter of Credit, since otherwise International trade and commerce will virtually and indubitably come to a standstill. ?

In an earlier decision, *United Commercial Bank v Bank of India* [(1981) 2 SCC 766], the Supreme Court observed as follows:-

"32. Banker's commercial credits are almost without exception everywhere made subject to the code entitled the "Uniform Customs and Practices for Documentary Credits", by which the General Provisions and Definitions and the Articles following are to "apply to all documentary credit and binding upon all parties thereto unless expressly agreed". A banker issuing or confirming an irrevocable credit usually undertakes to honour drafts negotiated, or to reimburse in respect of drafts paid, by the paying or negotiating intermediate banker and the credit is thus in the hands of the beneficiary binding against the banker. The credit contract is independent of the sales contract on which it is based, unless the sales contract is in some measure incorporated. Unless documents tendered under a credit are in accordance with those for which the credit calls and which are embodied in the terms of the paying or negotiating bank, the beneficiary cannot claim against the paying bank and it is the paying bank's duty to refuse payment."

It was also held that:-

"34. The authorities are uniform to the effect that a letter of credit constitutes the sole contract with the banker, and the bank issuing the letter of credit has no concern with any question that may arise between the seller and the purchaser of the goods, for the purchase price of which the letter of credit was issued. There is also no lack of judicial authority which lay down the necessity of strict compliance both by the seller with the letter of credit and by the banker with his customer's instructions."

32. There is no controversy that the documents in the present case (presented on 16.12.1991) were to be dealt with in the stipulated period, by OBC failing which the UCP provisions enjoined that it lost its right to object to their correctness or allege

discrepancy (so as to deny liability). The deferment of payment did not, in the opinion of the court, in any manner alter this circumstance- or for that matter, extinguish its liability, which arose on account of this omission. Here, Belcom's submission that the Letter of Credit expired on 25th January 1991 and thus payment could not have been made under it, is meritless for the simple reason that liability arose within the period of its existence and validity. The expiry of the instrument in no way diminished the Bank's obligation to pay up once the negotiating bank demanded the credit in its terms- in the present case, it did so, resulting in payment on 29.05.1992.

33. Article 3 of UCP 400 highlights that credits by their very nature are separate transactions and banks are in no way concerned with or bound by the transaction which is sought to be secured by payment through them. Article 4 states that in credit operations all parties concerned deal in documents, and not in goods, services and/or other performances to which the documents may relate. Articles 10 and 16 to the extent they are relevant, are extracted below:

Article 10

a. An irrevocable credit constitutes a definite undertaking of the issuing bank, provided that the stipulated documents are presented and that the terms and conditions of the credit are complied with:

- i. if the credit provides for sight payment - to pay, or that payment will be made;
- ii. if the credit provides for deferred payment - to pay, or that payment will be made, on the date(s) determinable in accordance with the stipulations of the credit;
- iii. if the credit provides for acceptance - to accept drafts drawn by the beneficiary if the credit 'stipulates that they are to be drawn on the issuing bank, or to be responsible for their acceptance and payment at maturity if the credit stipulates that they are to be drawn on the applicant for the credit or any other drawee stipulated in the credit;
- iv. if the credit provides for negotiation - to pay without recourse to drawers and/or bona fide holders, draft(s) drawn by the beneficiary, at sight or at a tenor, on the

applicant for the credit or on any other drawee stipulated in the credit other than the issuing bank itself, or to provide for negotiation by another bank and to pay, as above, if such negotiation is not effected.

Article 16

a. If a bank so authorized effects payment, or incurs a deferred payment undertaking, or accepts, or negotiates against documents which appear on their face to be in accordance with the terms and conditions of a credit, the party giving such authority shall be bound to reimburse the bank which has effected payment, or incurred a deferred payment undertaking, or has accepted, or negotiated, and to take up the documents.

b. If, upon receipt of the documents, the issuing bank considers that they appear on their face not to be in accordance with the terms and conditions of the credit, it must determine, on the basis of the documents alone, whether to take up such documents, or to refuse them and claim that they appear on their face not to be in accordance with the terms and conditions of the credit.

c. The issuing bank shall have a reasonable time in which to examine the documents and to determine as above whether to take up or to refuse the documents.

d. If the issuing bank decides to refuse the documents, it must give notice to that effect without delay by telecommunication or, if that is not possible, by other expeditious means, to the bank from which it received the documents (the remitting bank), or to the beneficiary, if it received the documents directly from him. Such notice must state the discrepancies in respect of which the issuing bank refuses the documents and must also state whether it is holding the documents at the disposal of, or is returning them to, the presentor (remitting bank or the beneficiary, as the case may be). The issuing bank shall then be entitled to claim from the remitting bank refund of any reimbursement which may have been made to that bank.

e. If the issuing bank fails to act in accordance with the provisions of paragraphs (c) and (d) of this article and/or fails to hold the documents at the disposal of, or to return them to, the presentor, the issuing bank shall be precluded from claiming that the documents are not in accordance with the terms and conditions of the credit.

f. If the remitting bank draws the attention of the issuing bank to any discrepancies in the documents or advises the issuing bank that it has paid, incurred a deferred payment undertaking, accepted or negotiated under reserve or against an indemnity in respect of such discrepancies, the issuing bank shall not be thereby relieved from any of its obligations under any provision of this article. Such reserve or indemnity concerns only the relations between the remitting bank and the party towards whom the reserve was made, or from whom, or on whose behalf, the indemnity was obtained. ?

34. The OBC had little choice but to honour the demand by the Bank for Foreign Trade of the USSR, Minsk (i.e the negotiating Russian Bank, nominated under the contract by Belcom) because the payment had fallen due after the period (contemplated under Article 16 and the letter of credit) had lapsed. That payment was deferred did not mean that it was not due as was erroneously found by the Tribunal. This obligation was reinforced once RBI categorically ruled out payment into the escrow account, proposed by Belcom in its letter of 11.02.1992: as is clear from RBI's condition in its letter of 14.02.1992, i.e that payments by MMTC that became due prior to freezing of Current Account of former USSR on 27-12-1991 cannot now be paid into Escrow A/c.. In the circumstances, MMTC could not have prevented payment by OBC to the Russian Bank.

35. In terms of Saw Pipes (supra) a fundamental error of law is one which is the result of a patently erroneous understanding of the obligations of parties in terms of law administered by Indian courts. Repeated decisions of the Supreme Court have reiterated that autonomy of commercial credit documents have to be respected; indeed they are the life blood of international commerce. In the present case, the Tribunal's complete disdain of this clear position renders the majority award patently illegal. This court also notices that Belcom never disclosed the

dates or amounts received by it, considering that the statement of claim was made by it in 1997. Even if its claim were to be considered as merited “arguendo-the fact remained that it could at best have sued as a buyer for balance of price unpaid, and not for entire amount, considering that the amounts were credited to its account in December 1992. Its non-disclosure of these vital facts ought to have alerted the Tribunal, to say the least: especially in the background of MMTC's consistent plea that the award amounted to double payment and that the OBC's payment to the Russian Bank resulted in discharge of its liability.

36. For the above reasons, this court is of the opinion that the impugned judgment and order of the learned Single Judge cannot be sustained; it is set aside. The majority award of the Tribunal, holding MMTC liable is, therefore, set aside. Belcom had filed its appeal, claiming to be aggrieved by the direction in the impugned judgment reducing the interest rate from 18% per annum to 9% per annum. This appeal too has to, for the same reasons, fail. The award is consequently set aside. FAO (OS) 314/2010 is allowed; FAO (OS) 477/2010 is dismissed. No costs.

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