2023INSC747

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S). 2437 OF 2010

H. J. BAKER AND BROS. INC. …APPELLANT(S)

VERSUS

THE MINERALS AND METALS TRADE CORPORATION LTD. (MMTC) …RESPONDENT(S)

WITH

CIVIL APPEAL NO(S). 5286-5287 OF 2023
[@ SPECIAL LEAVE PETITION (CIVIL) NO(S). 12870-12871 OF 2011]

J U D G M E N T

S. RAVINDRA BHAT, J.

1. Leave granted in SLP (Civil) No(s). 12870-12871 of 2011.

2. These appeals are directed against a common judgment of the Delhi High Court[1], which partly interfered with an arbitration award. One appeal has been preferred by the respondent – MMTC Limited in arbitration (hereafter "MMTC") to the extent that the impugned judgment did not set aside the award, and the

1 By final order dated 27-07-2009 in F.A.O. (OS) No. 477 of 2001.

other appeal by the arbitration claimant – M/s H.J Baker & Bros. INC (hereafter "Baker") to the extent it did.

Essential facts

3. MMTC entered into an agreement dated 14-01-1986 with Baker for the purchase of US-origin sulphur. In terms of the agreement, MMTC was to purchase on an annual basis 60,000 metric tons of sulphur (+/- 5% for shipping convenience). The agreement was to be operative for three years from 01-06-1986 and thereafter was to be extended annually on ever green basis unless terminated by either party through six month's written notice. Under the contract, MMTC purchased the material till 1991. On 20-12-1991, MMTC telexed Baker, confirming supply-price for the period from January to June 1992. As no vessel was nominated for this purpose, by a fax dated 27-01-1992, Baker requested nomination of a vessel. On 31-01-1992, MMTC communicated that it would be nominating its vessel in March 1992 for 25,000 metric tons of sulphur in May-June 1992. Thereafter some correspondence was exchanged between the parties over the nomination of the vessel.

4. The quantity of 50,000 metric tons of sulphur for January-July 1992 was not lifted by MMTC. Instead, MMTC by fax, on 08-04-1992 informed Baker that the import of sulphur was de-canalised by the Union Government on 20-02-1992 and consequently, it could not nominate any vessel against the balance

quantity in the contract. Baker did not accept MMTC's reason for not nominating the vessel and lifting the balance quantity of sulphur. Baker kept insisting upon lifting the desired quantity and also stated that because of MMTC's inaction, it was incurring storage expenses as well. MMTC, by its letter dated 21/22-05-1992 stated that import of sulphur directly from the Gulf was at lower landed costs and because of the changed situation, namely, de-canalising of sulphur import by the Union Government, its import from the USA or Canada ceased to be competitive. MMTC requested for cost and freight prices (hereafter, "C & F prices") mentioning that it was eager to continue relations with Baker. The latter maintained that de-canalisation would not affect the contract between the parties and MMTC had to purchase the quantity at agreed prices. Ultimately, Baker sent a legal notice to MMTC claiming damages for the past three half-yearly semesters i.e. January-June 1992, July- December 1992 and January-June 1993. This was followed by another legal notice dated 19-07-1993. By this legal notice, arbitration was invoked by Baker.

5. A three-member tribunal was constituted, which adjudicated the claims. Eventually, under the award[2], MMTC was held liable to pay US $ 5,10,215/- to Baker, for two distinct periods. The award was challenged by MMTC through objections. The objections were rejected by the learned single judge and the award was made the rule of court.[3] MMTC appealed the affirmation of the award by the learned single judge. On appeal, the Division Bench, by the

2 Award dated 07.02.1996
3 By order dated 05.09.2001 in Suit No 1038-A of 1996& IA No 6093 of 1996.

impugned order upheld the single judge's findings, to the extent the award granted damages for the period January-June, 1992, but set it aside for the balance period.

6. Some of the relevant clauses of the agreement dated 14.01.1986 which are material for this case are extracted below:

> *"**Clause 6**:- The price will be settled half yearly and shall be in line with Canadian producers prices to their long terms contract customers. Both parties will make utmost efforts to settle the prices for supplies during January - June by 15th January and for supplies during July -December by 15th July of that year. In case no settlement on price for deliveries during a semester is possible, the quantity allocated for that period may stand lapse or reduced and both parties shall meet again to negotiate prices for subsequent period."*
>
> ***Clause 5**:- The agreement shall be operative for three years from 1st January, 1986 and will be extended annually on ever green basis unless cancelled by either party on six months written notice."*

7. In arbitration, Baker contended that MMTC had committed a breach of the contract dated 20.12.1991 for the purchase of 50,000 metric tons of sulphur during the period January-June 1992 (first half of 1992). Baker claimed damages for MMTC's failure to lift sulphur of the same quantity during the second half of 1992 and two half yearly semesters each of 1993 and 1994. The three-member tribunal held that MMTC had committed a breach of the contract and its commitments and responsibility to lift 50,000 metric tons of sulphur during the first half of 1992 remained intact. The single judge found that this plea was justified, and upheld the tribunal's findings for award of damages for the period January-June, 1992 at US$ 200,000/- and for the balance period

(June-December 1992) at US$ 300,000/-. Damages for the latter period were held to be unwarranted by the impugned judgment.

Contentions of parties

8. Appearing for Baker, Mr. Ramesh Singh, learned senior counsel and Ms. Bina Gupta, learned counsel, argued that the basis on which the impugned order proceeded to interfere with the award, i.e., it did not take into account the principles underlying the award of damages is incorrect. It was urged that the circumstance that a party had not gone to the market or did not make attempts to mitigate its losses, disentitled it to damages, is an incorrect premise. On the other hand, whether a party goes to the marketplace is immaterial and the court can award damages, keeping in mind the difference between the contract price and the market price. Reliance was placed on a decision of the court in *M/S. Murlidhar Chiranjilal vs M/S. Harishchandra Dwarkadas & Anr (hereafter, "Murlidhar Chiranjilal")*[4] that even if a party does not purchase the goods in the market *"on the date of breach it would be entitled to damages on proof of rate for similar canvas prevalent"* at the relevant place *"on the date of breach, if that rate was above the contracted rate resulted in loss to it."*. The decision in *Foley vs. Classique Coaches Ltd.*[5] too was relied on to support the above view.

9. Baker argued that the assumption by the Division Bench, that the price of the goods, on the date of the breach, was not proved is unwarranted. Counsel

4 1962 SCR (1) 653
5 (1934) 2 K.B. 1

relied on the award, to show that the prices for the relevant period, formed part of the consideration, which weighed with the tribunal, in ultimately fixing the market price, on a reasonable basis, i.e., at US$ 300,000/. It was urged that the price lists for the period, on the contractual goods, published by the standard "Fertecon" reports, which the parties agreed, reflected the sale position of sulphur in the international market. The reports spoke about a large number of sales at prevalent market prices of sulphur during 1992. It was argued that the view in the award regarding the measure of damages, as well as damages was fair, evidence based and not arbitrary. To underline this, it was argued that Baker had also placed on record, some invoices in support of its claim about the sale price of the relevant goods, during the subject period. As long as the award contained a plausible basis for grant of the amount, which it did, towards damages, it could not have been set aside, as the impugned judgment did.

10. It was contended that the award of damages for the earlier period too, was based on the actual quantities that had to be lifted. The basis for granting damages, therefore, did not vary, given that the determination of what was the market price was the same. In these circumstances, the rejection of the award of damages for the second period was illogical and unjustified, in appeal against dismissal of objections to the award. Baker also supported the impugned judgment, to the extent it upheld the grant of damages, in the award, for the first period.

11. Ms. Kiran Suri, learned senior counsel appearing for MMTC, justified the impugned judgment to the extent it set aside the award. She argued that the award of damages and compensation for breach of contract has to be in accordance with Section 73 of the Indian Contract Act, 1872 (hereafter, "the Contract Act").

12. It was also argued that the impugned judgment, to the extent it upheld the ground of damages and the learned single Judge's dismissal of the objections, was also suscept to attack. Learned counsel urged that the Baker was made aware that the quantity contracted could not be in effect purchased on account of the de-canalization order. MMTC, as a public sector agency of the Union Government was bound in law by the de-canalisation order and also obliged to source goods at the least available price. Baker did not deny this fact when notified about it. In the circumstances, the award of damages for the entire period, at least from the date of the issuance of the de-canalisation order to the end of June, was unjustified. The award and the judgments of the Court are, therefore, unsustainable in law.

13. Learned counsel also took exception to the grant of interest by the award. It was submitted that the judgments of this Court have consistently established that when awarding direct payment in foreign currency in the context of international contracts, the approach of the Tribunal should be based upon the prevailing prime lending rate or LIBOR rate. In this case, those principles were

thrown to the wind by the Courts below and the Tribunal. It was submitted, therefore, that the impugned judgment discloses an error of law.

Analysis and conclusions

14. As far as the first period is concerned, this court notices that the Division Bench affirmed the findings in the award, and the judgment of the single judge that the award could not be interfered with. The single Judge relied on the judgment of this court in *Arosan Enterprises Ltd v Union of India*[6] which explained the scope of interference with awards, which is extremely limited. It was held that the quantum of damages and mitigation of losses are questions of fact that should not be interfered with as the court does not exercise appellate jurisdiction over the award. The impugned judgment held that MMTC was precluded from urging this aspect, because this question of proof of damages and mitigation was not argued before the single judge. MMTC did not deny that the plea of mitigation of losses was not raised before the tribunal. Since on this aspect, the conclusions of the courts below have affirmed the award, this court finds no good reason to interfere with the findings.

15. As far as the second aspect, (i.e. damages payable for the breach of contract for the later period) is concerned, this court notices that although MMTC claims that the Union Government had directed canalisation on 29.02.1992, this communication was addressed to Baker on 08.04.1992. Before

6 (1999) Supp 2 SCR 621; (1999) 9 SCC 449

the tribunal in the arbitration proceeding, the MMTC made no attempt to produce a copy of the canalisation order. The least expected of the MMTC was to intimate Baker that the alacrity required that at the earliest point in time, i.e. first week of March, 1992 expressing its inability to continue with the arrangement. It did not choose to do so and waited till April to share with Baker, that a de-canalisation order had been issued. Its reason for not lifting the goods was attributed to de-canalisation again on 31.08.1992 when MMTC intimated to Baker that the de-canalisation order had resulted in large sulphur consuming units importing sulphur from Gulf countries where the landing cost was much lower than the landing cost of sulphur from US and other north American based suppliers. Again, nothing had prevented MMTC, at least from the record, and nothing was shown to prevent it from communicating this aspect at the earliest point of time, for Baker to have made alternative arrangements. For these reasons too, the award for the previous period does not call for interference.

16. Turning now to the award for the balance period, July-December 1992, there cannot be two opinions about the fact that the measure of damages has to be in accord with the previous underlying Section 73 of the Contract Act, i.e. the market price of goods on the date of the breach, less the contract price. The Division Bench, after noticing the record held that Baker had clearly shown its disinclination to negotiate the price for the second half of 1992 before resolving the shipping problem that period. In the circumstances, there was no negotiation and no attempt was made on its behalf to contact MMTC after April 1992 save a

few letters. This formed the only basis for the grant of award for the second half to the extent of US$ 3,00,000. The Tribunal had noted that the sale prices “in the semester have been shown as ranging from US$ 37 per MT to US$ 55 per MT, as per some invoices filed on behalf of Baker”. For that period, Fertecon prices were shown to be $ 58 to $ 63 in terms of some invoices filed on behalf of Baker. Nevertheless, the tribunal fixed the sale price at US$ 49 per MT as noted from the documents filed by Baker from July to December 1992.

17. The depositions on behalf of Baker conducted during the arbitration proceeding were taken into account by the Division Bench. It reveals that then Baker’s Vice President had admitted that several contracts were entered at varying rates, including with Chimiques du Senegal (Senegal) at different rates. Other contracts too were spoken about, all indicating a varying price range depending on the distance to be covered and the quantity in question.

18. It was admitted in the deposition that even the quantity of goods to be lifted in the first period, to MMTC was not readily available in January, but could have been made available only in March 1992. Given all these circumstances, the least that Baker could have done was to produce evidence that it possessed on record, which is the sale of 50000 MT sodium. In some cases, Baker had claimed that the company was bound by confidential clauses in agreements with other buyers. Yet, in the contracts where the costs were made available that could have been revealed and all the invoices were

admissible as were the copies of contracts. No attempt was made by the Baker which relied largely upon the few invoices which it chose to tender in the arbitration proceedings and the Fertecon prices published from time to time. Interestingly, the tribunal rejected the contract standard, i.e. the Canadian purchaser's prices on the ground that that was the basis of the contract. The award is bereft of any reasoning why given that Baker was a New York based supplier which sourced its supplies from various parts of the world had agreed to supply in the contracts in question based upon the Canadian prices, and instead, arbitrarily outrightly rejected that standard.

19. The failure to produce the best evidence that Baker possessed in the form of contracts for the balance quantity and the payments received as proof of damage suffered and the shipping arrangements in question as well as the shipments as billed from time to time with full particulars, in the Division Bench's opinion, disentitled it to any compensation for the later period given that it was made well aware in April 1992 that the arrangement could not be continued by MMTC. The findings of the Division Bench, therefore, are in accord with law.

20. It is undeniable that the measure of damages, *per* Section 73 of the Contract Act, is the difference between the price at which goods sell at the marketplace on the date of breach, and the contract price. As observed in *Murlidhar Chiranjilal* where goods are to be bought and sold the

> *"damages has to be calculated as they would naturally arise in the usual course of things from such breach. That means that the respondent had to prove the market rate at Kanpur on the date of breach for similar goods and that would fix the amount of damages, in case that rate had gone about the contract rate on the date of breach." We are therefore of opinion that this is not a case of the special type to which the words "which the parties knew, when they made the contract, to be likely to result from the breach of it" appearing in Section 73 of the Contract Act apply. This is an ordinary case of contract between traders which is covered by the words "which naturally arose in the usual course of things from such breach" appearing in Section"*

In that case, the seller failed to prove the price of goods, on the date of the breach, at the place of delivery; the court refused to award compensation. In the present case, this court holds that the impugned judgment applied the correct principles of law, in partly setting aside the award.

21. As far as the issue of interest is concerned, interestingly, Baker had sought it *pendente lite* and future interest till payment @ 18% per annum besides any relief. The MMTCs reply did not refute this claim and was entirely silent on this aspect. Furthermore, no argument appears to have been addressed on the question before the tribunal, which granted 12% p.a. The judgments of this court, notably in *Vedanta Ltd. v. Shenzhen Shandong Nuclear Power Construction Co. Ltd (hereafter, "Vedanta Ltd.")*[7] have disapproved a uniform award of interest in foreign currency, and recommended that LIBOR rates plus the prevailing rate in percentage points, should be awarded. However, this court notes that on the rate of interest, there have been concurrent findings; moreover, the distinction noted by *Vedanta Ltd,* per se does not constitute 'patent

7 2018 (12) S.C.R 829

illegality', that vitiates the award. For instance, if the parties agree to a particular rate of interest, that would undoubtedly prevail.

22. For the above reasons, the appeals fail and are dismissed. No costs.

.....J.
[S. RAVINDRA BHAT]

.....J.
[ARAVIND KUMAR]

NEW DELHI,
AUGUST 18, 2023.