

IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment delivered on: 15.07.2022*

+ **O.M.P. (COMM) 487/2020 & IA No. 8758/2020**

GLITTER OVERSEAS & ORS. Petitioners

versus

MMTC LIMITED Respondent

Advocates who appeared in this case:

For the Petitioners : Mr. Santhosh Krishnan, Adv.

For the Respondent : Mr. Ashok Chhabra, Mr. S. Shantanu &
Ms. Shefali Gupta, Adv.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. Glitter Overseas (hereinafter '**Glitter**'), a partnership firm and its constituent partners have filed the present petition under Section 34 of the Arbitration and Conciliation Act (hereinafter '**the A&C Act**') impugning an arbitral award dated 08.01.2020 (hereafter '**the impugned award**') rendered by an Arbitral Tribunal comprising of a learned Sole Arbitrator (hereinafter '**the Arbitral Tribunal**').

FACTUAL BACKGROUND

2. On 17.01.1992, Glitter and the respondent (hereinafter '**MMTC**') entered into a 'Hypothecation Agreement for Pre and Post

Shipment Credit Advance’ (hereinafter ‘**the Hypothecation Agreement**’). In terms of the Hypothecation Agreement, MMTC agreed to grant Glitter financial assistance upto a limit of ₹25 lakhs, which was to be secured by goods or documents or title deeds. In terms of Clause 2 of the Hypothecation Agreement, Glitter agreed to pay interest at the rate of 15.5% per annum calculated on a daily balance basis. Further, in case of default in payment of the dues, Glitter also agreed to pay interest at the rate of 1% per annum over and above the interest rates applicable to cash credit facilities. In consideration of the Hypothecation Agreement, on 17.01.1992, petitioner nos. 2 and 3 signed and executed a Demand Promissory Note of a sum of ₹25 lakhs

3. In accordance with Clause 20 of the Hypothecation Agreement, the parties executed an agreement for ‘Export of Gold Jewellery’ (hereinafter ‘**the Export Agreement**’). In terms of the Export Agreement, Glitter agreed to export goods worth ₹20 crores through MMTC over a period of three years. Clause 3 of the Export Agreement stipulates that the foreign buyers would open “*confirmed, irrevocable without recourse to drawer and divisible letter of credit in the name of MMTC*” to effect payment against delivery of the goods. In terms of Clause 6 of the Export Agreement, the parties agreed that the exports which were not covered under the letters of credit, would be covered against an ECGC comprehensive policy by MMTC, at the cost of Glitter.

4. MMTC, from time to time, released gold of 0.995 purity (24 carats) at the prevailing international price, in favour of Glitter, for

manufacture and export of jewellery produced from the said gold. The jewellery had to be exported within a specified period of 120 days.

5. Disputes arose between the parties in respect of certain transactions between the years 1993-1996. MMTC claimed that Glitter was liable to pay an amount of ₹1,13,39,008.71/-, on account of shortfall in receipt of payment of twelve (12) invoices. In respect of five invoices, MMTC claimed that the importer/foreign buyer had accepted the delivery of goods, however, it had failed to make any payment. In respect of seven invoices, MMTC claimed that the foreign buyer neither took the delivery of the goods in question nor paid for the same. However, MMTC sold four of the said seven consignments to alternate foreign buyers.

6. MMTC further claimed that apart from the aforementioned invoices, it had released six kgs of gold on loan basis for manufacture and export of jewellery within the specified period of 120 days, in favour of Glitter. However, the gold in question was seized by the Indian Customs Authorities as Glitter failed to manufacture and export the jewellery within the specified period. The Customs Authorities seized 4 kgs of gold on 30.04.1996 and the remaining 2 kgs of gold was surrendered by Glitter to them.

7. MMTC also claimed an amount of ₹17,07,198/- on account of deferment of interest in respect of certain consignments. MMTC averred that two cheques (₹8,50,000/- and ₹8,57,198/-) dated 19.02.1996 were issued by Glitter, however, the said cheques were

dishonored and thus, Glitter was liable to pay an amount of ₹17,07,198/-.

8. MMTC, by a notice dated 09.08.1996, invoked the Arbitration clause as contained in the Export Agreement and raised a claim of ₹1.70 crores along with interest at the rate of 25% per annum. Thereafter, an arbitral tribunal was constituted to adjudicate the disputes between the parties; however, the matter continued to be pending before the originally constituted arbitral tribunal till the year 2015 without much progress. In the month of July, 2015, MMTC filed a petition under Section 11 of the A&C Act in this Court for appointment of another tribunal. By an order dated 18.01.2018, this Court appointed the learned Sole Arbitrator (the Arbitral Tribunal) to adjudicate the disputes between the parties.

9. In the month of October, 2018, MMTC also amended its Statement of Claims and sought to include interest at the rate of 24% per annum over the principal amount claimed for the period upto 30.09.2018.

10. Before the Arbitral Tribunal, MMTC claimed the following amounts: -.

Claim no. 1	Amount outstanding on account of 12 unpaid invoices including interest at the rate of 24% per annum as on 30.09.2018	₹7,70,41,474.45
Claim no. 2	Amounts due towards the value of the 6 KG Gold inclusive of	₹3,21,45,351.43/-

	interest payable up till 30.09.2018	
Claim no. 3	Amounts due on account of deferment of interest against which cheque issued and dishonoured inclusive of interest payable up till 30.09.201	₹1,09,73,775.03/-
Claim no. 4	Amount due on account of penalty payable to Custom Authority against which cheque issued and dishonoured inclusive of interest payable up till 30.09.2018	₹5,23,441.11/-
Claim no. 5	Amount due on account of non-submission of Sales Tax Form 3B inclusive of interest payable up to 30.09.2018	₹1,98,180.92
Claim no. 6	Costs	₹3,00,000
Claim no. 7	Award of interest at the rate of 24% per annum from the date of filing the amended statement of claim till the date of award.	

11. Glitter filed its Statement of Defence and denied its liability to pay the amounts, as claimed by MMTC. Glitter contended that no financial assistance was rendered by MMTC for export of jewellery. Glitter further claimed that it was only required to manufacture jewellery out of the gold received on loan from MMTC and its role was restricted to manufacturing the said jewellery. Glitter further claimed that it was MMTC's responsibility to collect the payment from the foreign buyers.

12. Glitter also raised certain counter-claims, but the same were not considered by the Arbitral Tribunal as it failed to pay the arbitration fees.

THE IMPUGNED AWARD

13. The Arbitral Tribunal framed the following issues for consideration: -

“1. Whether the claim is entitled to payment of a sum of Rs. 6,57,02,465.74 on account of payment of 12 invoices as mentioned in Para 30(a) of the amended Statement of Claim? OPC

2. Whether the claimant is entitled to interest on the above amount, if so, at what rate and for what period?
OPC

3. Whether the claimant is entitled to a sum of Rs. 3,21,45,351.43 on account of 06 Kg. gold as mentioned in para 30 (b) of the amended statement of claim?
OPC

4. Whether the claimant is entitled to payment of a sum of Rs. 1,09,73,775.03 on account of deferment of interest against dishonoured cheques as mentioned in para 30 (c) of the amended statement of claim?
OPC

5. Whether the claimant is entitled to payment of Rs. 5,23,441.11 on account of penalty payable to Customs Authorities as mentioned in para 30(d) of the amended Statement of Claim
OPC

6. Whether the claimant is entitled to payment of a sum of Rs. 1,98,180.92 on account non-supply of Sales Tax Forms 3B as mentioned in Para 30(e) of the Statement of Claim?
OPC

7. Whether the claimant is entitled to costs of the proceedings and if so, to what amount?
OPC”

Issue nos. 1 and 2

14. The Arbitral Tribunal held that Clause 4 of the Export Agreement fully safeguarded the interest of MMTC with respect to the sale proceeds of the exports. It further referred to Clause 24 of the Hypothecation Agreement and held that in terms of the said clause, if, for any reason, the export proceeds were not received by MMTC, Glitter would be liable to MMTC for such realisation. The Arbitral Tribunal further referred to certain letters issued by Glitter and held that Glitter was responsible to account for the “*due collection of 100% of the sale proceeds of the export*”.

15. The Arbitral Tribunal referred to the decision of this Court in ***Muzaffar Shah v. MMTC Limited: 2014 SCC OnLine Del 900***, wherein this Court had declined to interfere with the arbitral award passed in favour of MMTC. The arbitral tribunal in the aforesaid case had found that the concerned associate was liable for non-realisation of the sale proceeds.

16. The Arbitral Tribunal rejected Glitter’s contention that it was not responsible for obtaining an ECGC cover. It held that in terms of Clause 6 of the Export Agreement, MMTC was not responsible for securing an insurance cover from ECGC and the same had to be taken at the cost of Glitter.

17. The Arbitral Tribunal held that Glitter was liable to pay MMTC an amount of ₹1,02,62,076.88/- [₹1,13,39,008.74 less making charges

of ₹10,76,931.84/-] in respect of the twelve unpaid invoices (Issue no. 1). The Arbitral Tribunal further awarded interest at the rate of 24% per annum on the aforesaid amount, quantified at ₹5,98,58,350.74/-, in favour of MMTC (Issue no. 2).

Issue no. 3

18. The Arbitral Tribunal found that Glitter had failed to export manufactured jewellery from the six kgs of gold loaned to it by MMTC within the prescribed period of 120 days. The Arbitral Tribunal further found that Glitter had the option to either buy the gold or return the gold to MMTC, however, it had failed to exercise the aforesaid options.

19. The Arbitral Tribunal noted that the international price of gold at the material time was valued at ₹31,26,326/-. And, MMTC had quantified the said claim at ₹3,21,45,351.43/-, which included the difference of international and domestic price of gold, interest upto 30.09.2018 and other charges. Thus, the Arbitral Tribunal held that Glitter was liable to pay MMTC a sum of ₹3,21,45,351.43/-, on account of the six kgs of gold.

Issue no. 4

20. The Arbitral Tribunal also referred to certain communications exchanged between the parties and found that Glitter had admitted its liability to pay the Deferred Payment Interest. The Arbitral Tribunal noted that Glitter had issued two cheques dated 19.02.1996 amounting to ₹8,50,000/- and ₹8,57,198/- to MMTC, on account of Deferred

Payment Interest. And, the said cheques were dishonored. The Arbitral Tribunal held that Glitter was liable to pay a sum of ₹1,09,73,775.03/- (₹17,07,198/- on account of Deferred Payment Interest plus interest at the rate of 24% per annum till 30.09.2018).

21. The Arbitral Tribunal decided Issue nos. 5 and 6 against MMTC and in favour of Glitter. With respect to Issue no. 7, the Arbitral Tribunal awarded costs quantified at ₹20,00,000/-, in favour of MMTC.

22. By the impugned award, the Arbitral Tribunal awarded a sum of ₹1,02,62,076.88/- on account of the twelve unpaid invoices; ₹5,98,58,350.74/- on account of interest on the aforesaid unpaid invoices; ₹3,21,45,351.43/- on account of six kgs of gold confiscated by the Indian Custom Authorities; ₹1,09,73,775.03/- on account of deferred payment interest; and, ₹20,00,000/- on account of costs, in favour of MMTC. Further, the Arbitral Tribunal awarded *pendente lite* and future interest at the rate of 12% per annum on the aforesaid amounts.

23. Aggrieved by the impugned award, Glitter has filed the present petition.

SUBMISSIONS

24. Mr Krishnan, learned counsel appearing for Glitter, assailed the impugned award on several fronts. He submitted that the Arbitral Tribunal's finding with respect to the twelve outstanding invoices is patently incorrect and contrary to fundamental principles of law and

public policy. He submitted that MMTC was required to exercise care and diligence for ensuring recovery of the amounts due for the shipments made. He referred to Clause 3 of the Export Agreement and submitted that the said clause stipulated foreign buyers to open confirmed, irrevocable letters of credit in the name of MMTC. Thus, the said clause was a failsafe measure that ensured MMTC received payment prior to delivery. However, the letters of credit were not opened and MMTC had delivered the goods without exercise of any commercial prudence.

25. Thereafter, he submitted that the Arbitral Tribunal had failed to interpret the provisions of the contract harmoniously. He contended that Clause 4 of the Export Agreement would not operate in a vacuum and would be applicable only if the amounts were not recovered despite presentation of the letter of credit by MMTC. Further, it was submitted, that in terms of Clause 6 of the Export Agreement, MMTC was obliged to purchase an insurance policy from ECGC and the Arbitral Tribunal's finding that MMTC was required to take the export cover, only if called upon to do so by Glitter, is erroneous.

26. He referred to the decisions of this Court in *MMTC Ltd. v. New Sialkoti Jewellers: (2016) 234 DLT 150* and *MMTC Ltd. v. Chauhan Jewellers & Ors.: (2017) SCC OnLine Del 7373* and submitted that the Arbitral Tribunal's reasoning is contrary to the decisions of the two arbitral tribunals constituted in the aforementioned cases, which were rendered in the context of similar agreements and the challenge to the said arbitral awards were rejected by this Court. He contended that it

would be contrary to public policy to not follow the judicial precedent and therefore, the impugned award is liable to be set aside. He further submitted that reliance placed by the Arbitral Tribunal in the case of *Muzaffar Shah v. MMTC Limited* (*supra*) is misplaced as there is no discussion regarding the contractual provisions involved in the present case.

27. It was further submitted that Glitter could not be held responsible in respect of (i) Invoice Nos. 49, 50, 55, 56, and 68, as under Clause 4 of the Export Agreement, MMTC was at fault for having released the goods without letters of credit or ECGC insurance; (ii) Invoice Nos. 69, 70 and 71, as MMTC had not taken any steps to prevent confiscation and/or release of the consignments from the Sharjah Customs Authorities. He submitted that MMTC had taken steps to find alternate buyers for sale of consignments relating to Invoice nos. 72, 73, 74 and 75, however, no satisfactory explanation was provided by MMTC for not taking similar steps in regard to the consignments that were confiscated by the Sharjah Customs Authorities.

28. He further contended that the finding of the Arbitral Tribunal that petitioner no. 2 (respondent no. 2 in the arbitral award) had interpolated the documents facilitating the collection of the consignment by the foreign buyers, is erroneous, inasmuch as the said ground was not pleaded by MMTC and Glitter had no occasion to counter any such allegation. He referred to the decision of the Supreme Court in *Kishor Kirtilal Mehta v. Lilavati Kirtilal Mehta Medical Trust: (2007) 10*

SCC 21, in support of his contention that such evidence cannot be considered without reference to pleadings.

29. It was also submitted that the Arbitral Tribunal's decision to award interest at the rate of 24% per annum on the twelve outstanding invoices is also liable to be set aside as there is no provision in the agreements that authorised levying such an extortionate rate.

30. Next, he submitted that since the Hypothecation Agreement did not contain an arbitration clause, the disputes emanating from the said Agreement were not arbitrable.

31. Next, he submitted that MMTC was also guilty of contributory negligence and statutory non-compliance, which led to the confiscation of gold. He referred to the order dated 27.12.1996 of the Commissioner of Customs, in support of his contention. He also submitted that there was no basis for computing the amount of ₹3,21,45,351.43/- awarded in favour of MMTC.

32. Lastly, he submitted that the Arbitral Tribunal's decision to award a sum of ₹17,07,198/- on account of Deferred Payment Interest, in favour of MMTC, is erroneous, as the said claim is not premised on any contractual stipulations. The Arbitral Tribunal's decision to award the claimed amount was premised on two cheques issued by Glitter, which were dishonoured. He submitted that the said cheques were not issued towards any outstanding dues at the material time but were issued as security.

33. Mr. Chhabra, learned counsel appearing for MMTC, countered the aforesaid submissions. He submitted that the Arbitral Tribunal had interpreted the contract between the parties and evaluated the evidence led by the parties in a reasonable manner. The Arbitral Tribunal is the final adjudicator regarding interpretation of the contract and therefore, no interference is warranted with the impugned award. He submitted that the impugned award is neither in contravention of the fundamental policy of Indian Law nor could be held to be vitiated by patent illegality.

34. He referred to the decisions of the Supreme Court in *UHL Power Company Ltd. v. State of Himachal Pradesh: Civil Appeal no. 10341 of 2011, decided on 07.01.2022*; *Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation Limited: (2022) 1 SCC 131* and, of this Court in *Mumbai International Airport Limited v. Airports Authority of India: 2022 SCC OnLine Del 672*; *Gurdeep Singh v. Jaspal Kaur: 2022 SCC OnLine Del 626* and *Chief Engineer IV, Delhi State Industrial & Infrastructure Development Corporation. Ltd. v. Well Protect Manpower Services (P) Ltd.: 2022 SCC OnLine Del 901*, in support of his contention.

REASONS AND CONCLUSION

35. The first question to be addressed is whether the impugned award to the extent that it accepts MMTC's claim for non-receipt/shortfall in receipt of amounts against the invoices, is patently erroneous and vitiates the impugned award. As stated above, the controversy in

question relates to twelve invoices. A tabular statement indicating the twelve invoices is relevant and set out below:

#	Invoice	Invoiced Amount	Amount claimed	Amount claimed in Rupees
1	10.08.1993, No.49	\$56,804	\$56,804	Rs.17,82,510
2	08.09.1993, No.50	\$53,203	\$53,203	Rs.16,69,510
3	22.11.1993, No.55	\$41,302	\$41,302	Rs.12,93,166
4	03.02.1994, No.56	\$42,651	\$42,651	Rs.13,33,697
5	20.03.1995, No.68	\$42,042	\$42,042	Rs.13,43,242
6	22.03.1995, No.69	\$28,042	\$28,042	Rs.8,95,942
7	03.04.1995, No.70	\$28,143	\$28,143	Rs.8,91,852
8	05.04.1995, No.71	\$42,184	\$42,184	Rs.13,39,811
9	20.07.1995, No.72	\$42,644	\$7,586	Rs.2,38,516
10	20.07.1995, No.73	\$28,419	\$5,316	Rs.1,67,137
11	28.07.1995, No.74	\$28,418	\$6,031	Rs.189,638
12	28.07.1995, No.74	\$28,732	\$6,259	Rs.1,96,989

36. In respect of the invoices mentioned from Serial nos. 1 to 5 (Invoice nos. 49, 50, 55, 56 and 68), the importer/foreign buyer had accepted delivery of the goods but failed to make any payment. The Arbitral Tribunal accepted that Glitter was liable to pay for the same.

37. In respect of the goods accepted against three invoices (Invoice nos. 69, 70 and 71) as mentioned in Serial nos. 6 to 8 above, the foreign

buyer neither took delivery of the goods in question nor paid for the same. The jewellery exported was confiscated by the Custom Authorities at Sharjah. The Arbitral Tribunal accepted that Glitter was also liable to pay for the same.

38. In respect of the goods exported against the remaining four invoices as mentioned in Serial nos. 9, 10, 11 and 12 (Invoice nos. 72, 73, 74 and 75), the foreign buyer neither took delivery of the goods nor paid for the same. MMTC was proactive and found alternative buyers for the jewellery, however, the sale proceeds were less than the invoiced amount.

39. MMTC claimed that Glitter was liable to make good the shortfall and the Arbitral Tribunal had accepted the same. According to Glitter, MMTC had failed to exercise necessary care and diligence and is therefore, liable to bear the resultant loss. The export of jewellery was required to be made against the confirmed letter of credit. MMTC was also liable to secure the export proceeds by obtaining a comprehensive insurance policy from ECGC. Admittedly, MMTC had not done so.

40. Mr Krishnan contended that in terms of Clause 6 of the Export Agreement, MMTC was obliged to take an insurance policy from ECGC. He submitted that the Arbitral Tribunal had grossly erred in accepting that MMTC was required to take the export cover only if called upon to do so by Glitter. He submitted that the Export Agreement did not permit any such interpretation and the impugned award was contrary to the terms of the Export Agreement. He submitted that in

another case, an arbitral tribunal constituted by three former Judges of this Court had accepted the said contention and this Court had rejected the challenge to the arbitral award [*MMTC Ltd. v. New Sialkoti Jewellers (supra)*]. This Court had also similarly rejected MMTC's challenge to another award rendered by another arbitral tribunal comprising of three former Judges of this Court [*MMTC Ltd. v. Chauhan Jewellers & Ors. (supra)*]. He contended that the said decisions were cited before the Arbitral Tribunal. However, the Arbitral Tribunal has completely ignored the same.

41. The parties had entered into the 'Hypothecation Agreement for Pre and Post Shipment Credit Advance' on 17.01.1992. In terms of the Hypothecation Agreement, MMTC had agreed to extend financial facility "up to a limit of Rs.25 lakhs" to Glitter, carrying interest at the rate of 15.5% per annum. The Hypothecation Agreement contained extensive provisions for securing MMTC in respect of the financial assistance to be provided by it. Glitter had agreed to secure MMTC in respect of the amount advanced to it against the goods. In addition, Glitter had undertaken not to avail financial assistance by way of loans and advances from any bank or agency or individual, in respect of the goods hypothecated or charged to MMTC. In terms of the said Agreement, Glitter had agreed to route its exports to MMTC and the liabilities under the pre and post shipment credit were primarily required to be cleared by the export proceeds.

42. It is important to note that the Hypothecation Agreement did not contemplate MMTC advancing any gold loan to Glitter. It only

contemplated advancing funds for security against title of goods. The Hypothecation Agreement also contemplated that the parties would enter into a formal agreement for routing the entire exports through MMTC. Clause 20 of the said Agreement is relevant and set out below:

“20. The borrower undertakes to route its entire exports through the corporation for a minimum period of five years and also undertakes to purchase during this period and also in future its entire requirements of gold from the corporation only and shall enter into a formal agreement with the corporation in this behalf.”

43. It is also important to note that the Hypothecation Agreement does not contain an arbitration clause. Thereafter, the parties entered into the Export Agreement (captioned “*Agreement between MMTC and Gold Units for Export of Gold Jewellery*”). In terms of the Export Agreement, Glitter agreed to export goods worth ₹20 crores over a period of three years from the date of the Agreement with minimum of 20% in the first year; 35% in the second year; and, 45% in the third year. As noted above, MMTC issued a notice raising claims arising out of the Export Agreement.

44. At this stage, it is relevant to refer to certain clauses of the Export Agreement. The same are set out below:

“2. The export orders or contract whether procured by MMTC or M/s. GLITTER Overseas, shall be in the name of MMTC. The orders procured by MMTC, if any, in addition to the commitments made by unit shall be trusted in the same manner and priority as if the order were procured by the unit. All shipping

documents including GRI form-a 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 to MMTC and shall, in turn, submit their invoice and other documents to the foreign buyers.

3. The foreign buyers shall open confirmed irrevocable without recourse to drawer and divisible letter of credit in the name of MMTC. After affecting shipments, the unit will deliver shipping and other documents prepared as provided in Clause (2) above to MMTC. MMTC, in turn, will present those documents to their bankers for negotiation/collection as the case may be.
4. On realisation of 100% sale proceeds by MMTC from overseas buyers against L/C or on collection basis payment shall be released to the units after making deductions as under:-
 - i) All dues accruing to MMTC in repayment of credit sale price difference of the material supplies.
 - ii) 2.5% or more of invoice value as instalment of repayment of export promotion loan.
 - iii) Pre-shipment/post shipment credit extended against the order.
 - iv) MMTC's service charges which will be as under.
 - v) Any other claim lodged and/or penalty or 25% deductions imposed by foreign buyers or any other dues of the Corporation.

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

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

6. All exports in which payment are not under L/C shall be covered against the ECGC comprehensive policy by MMTC at the cost of the unit. The unit shall be wholly responsible for a satisfactory shipment of the goods as per the orders. The unit shall also ensure that goods shipped conform to the agreed quality and specification any inspection of goods, if considered necessary, shall be carried out by the unit or their agent at their own expenses.

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10. In consideration to the overall associating agreement under the contract the unit will get name included in all the orders/contracts as one of the exporters, and as agreed that all exports documents in such case will be prepared in the name of MMTC. The Loan/advance facility will be extended subject to condition that the unit shall give sole selling agency or its exports to MMTC for a minimum period of 5 years, alongwith a further commitments of purchase of its entire requirements of gold during this period and in future from MMTC only. In the event of where part of whole of the loan is not repaid within the stipulated period of three years, MMTC will have the right to seize the assets hypothecated to the Corporation and also proceed against the personal guarantee for recovery of principal, interest and any other possible loans.

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.

11. In the event of any question of disputes arising under order out of relating to the construction, meaning and acceptance or effect of this contract or breach thereof, the matter in dispute shall be referred to two arbitrators, one to be nominated by MMTC and the other by the unit. In case of the said arbitrators not agreeing, then the dispute shall be referred to an umpire to be appointed by the Arbitrators in writing before proceeding on the reference.

The decision of the arbitrators in the event of their no agreeing to the Umpire, shall be final and binding on the parties.

The provisions of the Indian Arbitration Act, 1940 and the rules made thereunder and may statutory. Modifications thereof shall be deemed to apply to the proceeding. The arbitrators or the Umpire, as the case may be shall be entitled with the consent of the parties to enlarge the time, from time to time, for making the award. The arbitrators, Umpire shall give a reasoned award. The venue of arbitrator shall be New Delhi.”

45. The Arbitral Tribunal held that Clause 4 of the Export Agreement “*fully safeguards the interest of MMTC with regard to the sale proceeds of the export*”. The Arbitral Tribunal referred to the Hypothecation Agreement and observed that Clause 22 of the Hypothecation Agreement also lent credence to the view that if the sale proceeds were

not received, the concerned associates (in this case, Glitter) would be liable for its realisation. In addition, the Arbitral Tribunal also referred to certain letters issued by Glitter, which indicated that it had not disputed its liability for realisation of the exports done through MMTC. After setting out the various letters sent by Glitter, the Arbitral Tribunal held as under:

“37. A bare perusal of the letters extracted above leaves no manner of doubt that it was the responsibility of the Respondents to account for the sale proceeds of the export to the Claimant. These letters make it clear that the Respondents used to deal with the foreign buyers, arrange payments from them and used to remit the same to the Claimant from time to time. In the meanwhile, the Respondents were also seeking regularisation of their packing credit limits which according to them had swelled to Rs.2.75 Crore at one point of time. Indeed the parties were ad-idem that in any eventuality, whatsoever, it would be the responsibility of the Respondents to procure the sale proceeds and deposit them with the Claimant. The contention now being advanced on behalf of the Respondents that they were only responsible for payment in case the foreign buyer refused to accept the delivery on any count is belied from the letters written by the Respondents. Indeed, the Respondents had unequivocally undertaken to ensure payment to the Claimant in respect of the export.”

46. In another case, the arbitral tribunal had held in favour of MMTC and found that the concerned associate was liable for non-realisation of the sale proceeds. The award in that case was a subject matter of challenge before this Court and this Court had declined to interfere with

the arbitral award [*Muzaffar Shah v. MMTC Ltd.: 2014 SCC OnLine Del 900*]. The appeal against the said decision was summarily dismissed by the Division Bench [*Muzaffar Shah v. MMTC Ltd.: FAO(OS) 469/2014, decided on 12.11.2014*]. A Special Leave Petition preferred against the said decision was also dismissed by the Supreme Court. The Arbitral Tribunal relied on the said decision in support of its view that Glitter was fully responsible for the realisation of the export proceeds.

47. In view of the above, this Court does not find merit in the contention that the decision of the Arbitral Tribunal is perverse or one that no reasonable person could accept.

48. The next aspect to be examined is whether the Arbitral Tribunal had erred in accepting that MMTC was not responsible for securing an insurance cover from ECGC. It was Glitter's case that in terms of Clause 6 of the Export Agreement, MMTC was responsible for ensuring that the exports were covered against "*ECGC comprehensive policy*".

49. A plain reading of Clause 6 of the Export Agreement indicates that the parties had agreed that "*all exports in which payments are not under LC should be covered against ECGC comprehensive policy by MMTC, at the cost of unit*". *Prima facie*, the use of the words "*by MMTC*" would indicate that the responsibility of ensuring that the export proceeds were secured by a cover of ECGC comprehensive policy, rested with MMTC. However, it was MMTC's case that it was required to obtain such a cover only if it was called upon to do so by Glitter and at its cost. The witness examined by MMTC had also

deposed that copies of the invoices were prepared by Glitter and the same indicated the cost of gold, MMTC's service margin, labour making charges and insurance charges that were to be borne by Glitter. It was, thus, suggested that if the documents prepared by Glitter did not contain any insurance charges, MMTC was not required to obtain any ECGC cover.

50. MMTC's witness was cross-examined in this regard. He was specifically asked as to which provision of the contract contemplated a request from the associate to take the ECGC cover. According to the witness, the same was mentioned in Clause 6 of the Export Agreement. The Arbitral Tribunal accepted MMTC's contention. The relevant extract of the impugned award reads as under:

“41. Clause 6 of Agreement Ex.C-4 has to be read in the context that all papers of export were to be routed though MMTC in its name even though the real exporter was the associate. The clause makes it amply clear that the ECGC cover had to be taken at the cost of the associate. The evidence led on record also makes it clear that all the documents of export including the invoices were prepared by the associate. A perusal of the invoices prepared in this case by the Respondents makes it amply clear that they had included the charges for transit insurance of the export material but had not included or requested for inclusion of the charges for obtaining an ECGC cover. If an ECGC cover was imperative, the invoice would include the charges for the same to be borne by the Respondents. The argument that the ECGC cover had to be undertaken by NMTC, therefore, is not tenable.

42. Even otherwise, in none of the letters reproduced above, any objection has been taken by the Respondents for not obtaining an ECGC cover in respect of the exports. Rather, the Respondents have taken on to themselves the complete responsibility of making payments of the sale proceeds of the export. The arguments now advanced is an afterthought and needs to be rejected.”

51. There is merit in the contention that the Arbitral Tribunal’s reasoning is contrary to the decisions of the two arbitral tribunals, which were rendered in the context of similar agreements in other cases and the challenge to the said arbitral awards was rejected by this Court [*MMTC Ltd. v. New Sialkoti Jewellers (supra)* and *MMTC Ltd. v. Chauhan Jewellers & Ors.: 2017 SCC OnLine Del 7373 (supra)*].

52. It is also pointed out that the decision of this Court in *Muzzafar Shah v. MMTC Ltd. (supra)* – which was relied upon by the Arbitral Tribunal – had not considered failure on the part of MMTC to secure an insurance cover, in terms of Clause 6 of the Export Agreement. It was submitted that these decisions were cited before the Arbitral Tribunal but the Arbitral Tribunal has completely ignored the same.

53. This does present a case where the decision of the Arbitral Tribunal is in conflict with earlier decisions of other arbitral tribunals, which were not interfered by this Court. The key question to be addressed is whether this would vitiate the impugned award. Mr Krishnan has earnestly contended that not following the judicial

precedent would be contrary to the public policy and the impugned award is liable to be set aside on the said ground.

54. This Court is unable to accept the said contention. Merely because the impugned award is contrary to the arbitral awards rendered in other cases does not render it amenable to challenge under Section 34 of the A&C Act. It is trite law that an arbitral award can be set aside only if an arbitral tribunal's view is not a possible view and no reasonable person could possibly accept the same. If an arbitral tribunal's decision is found to be a possible one, the same would warrant no interference in proceedings under Section 34 of the A&C Act. It does follow that in certain contentious cases, where there are two plausible views, the decision of an arbitral tribunal accepting either one of them, would not render the award vulnerable under Section 34 of the A&C Act.

55. In cases, where the question of law stands determined by an authoritative decision of a superior court, ignoring such a binding precedent may be a good ground to challenge an arbitral award. However, it is erroneous to assume that the decisions of this Court in *MMTC Ltd. v. New Sialkoti Jewellers* (*supra*) and *MMTC Ltd. v. Chauhan Jewellers & Ors.: 2017 SCC OnLine Del 7373* (*supra*) authoritatively decided the issue between the parties on merits. This Court had merely dismissed the challenge to the arbitral awards as the same did not fall within the limited scope of interference available under Section 34 of the A&C Act. It is necessary to bear in mind that an application to set aside an arbitral award under Section 34 of the A&C

Act is not in the nature of a first appeal against a decree, where the court examines a decree to determine whether questions of law and fact are correctly determined by the Trial Court. Therefore, the rejection of an application under Section 34 of the A&C Act cannot be construed to mean that the court has concurred with the view of the arbitral tribunal.

56. Having stated the same, there may be cases where the courts may decide a question of law on merits so as to avoid any uncertainty. In ***National Highway Authority of India v. Progressive-MVR (JV): 2018 14 SCC 688***, the Supreme Court had found that different tribunals had rendered contrary decisions regarding interpretation of a clause of a contract and decided to authoritatively interpret the same. However, this Court in ***MMTC Ltd. v. New Sialkoti Jewellers (supra)*** and ***MMTC Ltd. v. Chauhan Jewellers & Ors. (supra)***, had not interpreted Clause 6 of the Export Agreement. It had merely found no ground to interfere with the arbitral awards in the said cases.

57. In the circumstances, the Arbitral Tribunal's decision regarding MMTC's liability under Clause 6 of the Export Agreement must be tested on a standalone basis and on the anvil of the grounds as available under Section 34 of the A&C Act.

58. Tested on the aforesaid anvil, this Court is unable to accept that the Arbitral Tribunal's reasoning is one that no person could possibly accept. The view of the Arbitral Tribunal that since Glitter was required to prepare all the documents, it was essential for Glitter to include charges for the ECGC insurance cover for MMTC to secure the same,

cannot, by any stretch, be held to be an implausible one; or one that vitiates the impugned award on the ground of patent illegality on the face of the award.

59. The next contention to be examined is whether the impugned award is liable to be set aside on the ground that the Arbitral Tribunal had made observations to the effect that petitioner no.2 had played an active part in interpolation of the documents, facilitating the collection of the consignment by the foreign buyer. Admittedly, no such ground was pleaded by MMTC and therefore, there was no occasion for Glitter to counter any such allegation. There is merit in the contention that Glitter's defence could not be rejected on the ground of any such allegation. The said issue was raised in the context of certain foreign buyers collecting the jewellery, which was sent on COD basis, without making any payment. It is seen that neither of the parties had provided any explanation as to how certain buyers were successful in taking deliveries of the goods without making any payment. According to MMTC, Glitter was required to bear the entire responsibility as Glitter had identified the buyers and was responsible for preparing the documents. According to Glitter, it was discharged of all the liabilities once it had manufactured the jewellery and supplied the same for export.

60. Since none of the parties had raised any specific allegation as to how certain buyers had taken delivery of the goods, the observation to the effect that petitioner no. 2 had played an active part in interpolation/manipulation of documents to enable foreign buyers to

take delivery without payment, is extraneous to the subject dispute before the Arbitral Tribunal. However, it is apparent that the impugned award does not rest on the finding that petitioner no. 2 had interpolated the documents in respect of the goods exported against the three invoices (Invoice Nos. 49, 50 and 55). The impugned award is primarily based on the Arbitral Tribunal's finding that the goods in question were exported by Glitter *albeit* in the name of MMTC; it had identified the buyers; prepared all the documents; and in addition, was also responsible for securing MMTC in respect of the export proceeds. Thus, notwithstanding that the observations regarding interpolation are not sustainable, the same do not vitiate the impugned award.

61. The Arbitral Tribunal also accepted MMTC's claim in respect of the consignments that were confiscated by the Sharjah Customs Authorities. It was contended by Mr Krishnan that MMTC had not taken any steps to prevent confiscation and/or release of goods. He submitted that MMTC had taken steps, with the consent of Glitter, to find alternative buyers for sale of consignments, which were not delivered to the original buyers. Whereas MMTC had sold four such consignments to alternate buyers, it had provided no explanation for not taking any similar steps in regard to the consignments that were confiscated by the Sharjah Customs Authorities.

62. Once it is accepted that Glitter was responsible for the entire export including delivery of the goods to the original buyer and recovery of the amount, the onus to take steps to mitigate losses would also fall substantially on Glitter. In such circumstances, it would be

necessary for Glitter to prove that it had taken an initiative in this regard but was unable to take the necessary steps for reasons attributable to MMTC. There appears to be no reason why release of three consignments could not be secured from the Sharjah Customs Authorities. Neither of the parties have been able to establish any reasons for the same. However, in view of the finding of the Arbitral Tribunal that Glitter was responsible for the entire export, the necessary documentation and to secure MMTC for the sale proceeds; MMTC's claim could not be rejected for want of explanation as to how the consignments were confiscated by the Sharjah Custom Authorities.

63. In view of the above, this Court finds no ground to interfere with the Arbitral Tribunal's decision to award a sum of ₹1,02,62,076.88/-, in favour of Glitter (the invoiced amount less making charges).

64. The next question to be examined is in regard to award of interest. The Arbitral Tribunal awarded interest at the rate of 24% per annum on the amount of ₹1,02,62,078.88/-, as awarded against non-receipt/shortfall in receipt of payments against the twelve invoices, quantified at ₹5,98,58,350.74/-. The amended Statement of Claims does not indicate the basis for claiming interest at the rate of 24% per annum. However, the witness examined on behalf of MMTC had produced a printout from the website of State Bank of India, which showed that the rate of interest had increased to 19% per annum with effect from 02.03.1992. In addition, he had stated that SBI charges 2% penal interest, which according to him would work out to 24%. He had also deposed that Glitter had agreed to pay interest at the rate of 1% per

annum over and above the SBI rate. The Arbitral Tribunal had apparently relied on the said testimony.

65. Mr Krishnan had contended that the said rate of interest is extortionate. He also pointed out that the Export Agreement (in respect of which MMTC had filed its claim) did not provide any payment of interest as referred to in the testimony relied upon by the Arbitral Tribunal. Further, the Hypothecation Agreement, which was for a relatively similar amount of ₹25 lacs provided for interest at the rate of 15.5%. He submitted that the Arbitral Tribunal had referred to the case *Muzaffar Shah v. MMTC Ltd.* (*supra*) but even in that case, the arbitral tribunal had not awarded interest at the rate of 24%.

66. Concededly, the rate of interest at the rate of 24% per annum is high. The Export Agreement contains no clause, whereby Glitter had agreed to pay interest at the rate of 1% above the SBI rate. There is no basis for awarding interest at the rate of 24% per annum considering that even according to MMTC, the rate of interest charged by SBI was increased to 19% in the year 1992. Further, it is common knowledge that interest rates have come down significantly over the years.

67. Mr Chhabra, learned counsel appearing for MMTC, fairly stated that MMTC would have no objection if the interest is reduced to a reasonable rate.

68. In view of the concession made on behalf of MMTC, the interest awarded by the Arbitral Tribunal at the rate in excess of 12% per annum, is set aside.

Re: Six kgs of gold confiscated by the Indian Custom Authorities

69. MMTC had lent six kgs of gold valued at ₹31,26,326/- to Glitter. The said gold was imported without payment of custom duty and therefore, was required to be exported within the prescribed period (120 days) or was otherwise required to be subjected to the necessary duties. It was MMTC's case that Glitter had failed to export the manufactured goods within the stipulated period and this had rendered the gold liable for confiscation by the Custom Authorities. Initially, the Custom Authorities had seized four kgs of gold. Thereafter, Glitter had also surrendered remaining two kgs of gold.

70. The Arbitral Tribunal had accepted the claim and held as under:

“59. From the above, it is very clear that the Respondents had kept with them six kgs of gold in violation of the terms under which it was loaned to them. The Respondents were required to export jewellery manufactured from this gold within the period of 120 days which they did not. They were asked to purchase the six kgs of gold as it had remained with them beyond the permissible limit. They did not do so and instead wrote a letter claiming that they were arranging packing credit from a bank. They assured that they will be able to export gold in the form of jewellery by the first week of November, 1995. They again failed to do so resulting in the seizure of this gold by the Customs Authorities in April, 1996. The Respondents had the option to return gold to MMTC

or buy it. They did not exercise either of these options nor paid the value of the same with the result that the claimant was deprived of its value. The gold was loaned to the Respondents at the International price of gold. Its value was Rs.31,26,326/- at the relevant time. The claimant has added the difference of international and domestic price of the gold, interest upto 30/09/2018 and other charges. I, therefore, hold that the claimant is entitled for a sum of Rs.3,21,45,351.43. Issue No.3 is decided accordingly.”

71. It was contended on behalf of Glitter that MMTC was also a party to the proceedings initiated by the Custom Authorities. It was equally, if not more, responsible for non-fulfilment of the conditions on which the said gold was imported. The Custom Authorities had issued a show cause notice to both the parties. Glitter had provided a response. However, MMTC had failed to respond to the said notice. Mr Krishnan submitted that gold in question was confiscated for reasons attributable to both the parties and therefore, MMTC was also guilty of contributory negligence and statutory non-compliance that led to confiscation of gold. It was also submitted that there is no basis for computing the amount of ₹3,21,45,351.43/- awarded in favour of MMTC.

72. Admittedly, six kgs of gold was imported by MMTC and handed over to Glitter for converting the same to jewellery and exporting the same. The said import was not subjected to custom duties as it was to be exported. It is apparent that the purpose was to make the gold available to export oriented units at international prices. MMTC claimed that Glitter was required to make good the value of the said

gold since it was confiscated on account of failure on the part of Glitter to export the same.

73. Since the gold was imported by MMTC, it was also a party to the proceedings initiated by the Custom Authorities. It is possible that MMTC could have paid a fine and the necessary duties for redemption of the confiscated gold. However, it is difficult to accept that the impugned award is vitiated by patent illegality as the Arbitral Tribunal had erred in not appreciating that there was any contributory negligence on the part of MMTC. There was no negligence on the part of MMTC to import the gold to make the same available at international prices to Glitter.

74. The Arbitral Tribunal found that Glitter had failed to export jewellery manufactured from the said gold within a period of 120 days, as committed by it. The Arbitral Tribunal also examined certain communications, which indicated that even after a period of 120 days, Glitter had retained the gold as it proposed to export the same after converting it into jewellery. The gold was required to be exported and MMTC could not have fulfilled this condition as the jewellery was to be exported by Glitter.

75. Glitter's contention that MMTC is also liable for confiscation of the gold is premised on the basis that MMTC could have paid the necessary fines and duties for redeeming the gold, which was confiscated on account of failure to export the same. The said contention is unpersuasive and this Court is unable to find any fault with

the decision of the Arbitral Tribunal in accepting that Glitter was liable for the value of the gold that was confiscated by the Custom Authorities.

76. Insofar as the quantification of the claim is concerned, there is merit in Mr Krishnan's contention that there appears to be no basis for awarding a claim of ₹3,21,45,351.43/-. There are documents on record, which indicate that the at the time of seizure, the gold was valued at ₹31,26,326/-. Therefore, MMTC had incurred a loss to that extent at the material time. There is no material to indicate as to how this figure swells up to ₹3,21,45,351.43/-. The amended Statement of Claims states that the respondent is liable to pay the value of six kgs of gold plus the difference between the international and domestic price, interest, customs duty and other charges. Paragraph 17 of the amended Statement of Claims is set out below:

“17. Since the Respondents have not even paid for the value of the 6 kgs. of gold, the Respondents are liable to pay the International price of the gold plus the difference price between the international and the domestic price, besides the interest customs Duty and other charges.”

77. In Clause (b) of Paragraph 30 of the Statement of Claims, MMTC has quantified the claim as under:

“30. That the liability of the Respondents is joint and several and falls under the following heads:

a) xxxx xxxx xxxx

b) Amounts due towards the value of the 6 kg Gold inclusive of interest payable up till 30.09.2018 is Rs.3,21,45,351.43/- .”

78. The Arbitral Tribunal merely accepted the said amount without indicating any basis for the same.

79. The amended Statement of Claims also does not expressly indicate that value of six kgs of gold at the material time was ₹31,26,326/-, as noted by the Arbitral Tribunal in the impugned award. However, Glitter has not disputed the said value, therefore, the same may be accepted. But there is no basis for entering an award for a sum of ₹3,21,45,351/-. The award of the said amount cannot be sustained as the Arbitral Tribunal has not provided any reason for quantifying the said amount. The same is also not discernible from the claim made by MMTC. Therefore, the impugned award to the extent it awards a sum in excess of ₹31,26,326/-, in respect of MMTC's claim on account of six kgs of gold confiscated by the Custom Authorities, is set aside.

Re: Award of ₹17,07,198/- as deferred payment interest

80. MMTC had claimed the aforesaid amount on account of Deferred Payment Interest. In its amended Statement of Claims, MMTC has articulated the said claim as under:

“19. Besides the above payments, the Respondents are also liable to pay a sum of Rs. 17,07,198.00 on account of Deferred Payment Interest which is admitted by the Respondent vide its letters dated 25.1.1995, 31.1.1995, 14.2.1995, 20.2.1995, 13.3.1995, 15.3.1995 end 4.10.1995. The Respondent in order to meet its liability towards Deferred Payment Interest finally had issued two cheques bearing Nos. 244312 dated 19.2.1996 for Rs. 8,50,0060.00 drawn on Oriental Bank of

Commerce, Overseas Bank of Commerce, Overseas branch, New Delhi in favour of MMTC Limited. The MMTC Limited presented the cheques and the said cheques were dishonoured and were returned unpaid by the banker of the Respondents with the remarks referred to drawer. MMTC Limited has already filed a complaint under Section 138 of Negotiable Instruments Act against the Respondents which is pending in the Patiala House Courts.”

81. As is apparent from the above, the amended Statement of Claims does not indicate the nature of the said liability. The Arbitral Tribunal had relied upon the testimony of MMTC’s witness, who had explained that the said liability was for deferment of collection of interest in respect of certain consignments. He had explained that certain consignments were exported but the payments were not received within the stipulated time and therefore, Glitter had requested MMTC to defer the interest and paid charges for the same.

82. MMTC had relied primarily on certain letters issued by Glitter enclosing therewith cheques towards deferment of interest payable. MMTC has not produced any details of the consignments on which the interest was not collected against payment of deferment charges. There was no material on record to indicate as to how this amount was computed. According to MMTC’s witness, deferment charges were in the nature of interest beyond the period of which the proceeds of certain consignments were to be recovered. There were no details regarding the said consignments.

83. The opening sentence of Paragraph 7 of the amended Statement of Claims indicates that its present Statement of Claims was essentially confined to thirty-three kgs of gold that was exported in twelve consignments. The opening sentence of Paragraph 7 of the amended Statement of Claims is relevant and set out below:-

“7. That the present statement of claim is confined to 33 kgs of gold which was released in 12 consignments per details given hereunder..”

84. In view of the above, it appears that the interest deferment charges were also relatable to the twelve consignments, which were the subject matter of the principal claim. The Arbitral Tribunal had also awarded interest on the amounts recoverable by MMTC against the said consignments. Therefore, it is difficult to understand as to how a further claim of interest would arise in respect of the said amounts. It is apparent that the Arbitral Tribunal had awarded the said claim merely on the statement made by MMTC without comprehending the underlying liability or adjudicating the same. The complaint instituted by MMTC under Section 138 of the Negotiable Instruments Act, 1881 was also rejected as MMTC was unable to prove that the said cheques were issued against any liability.

85. In view of the above, the award for a sum of ₹17,07,198/- in favour of MMTC is liable to be set aside. Consequently, the interest awarded on this amount is also liable to be set aside.

CONCLUSION

86. Thus, the impugned award, to the extent it allows, interest on unpaid invoices at the rate in excess of 12% per annum; a sum in excess

of ₹31,26,326/- on account of six kgs of gold confiscated by the Indian Custom Authorities; a sum of ₹17,07,198/- on account of Deferred Payment Interest and interest awarded on the said amount, is set aside.

87. The petition is, accordingly, allowed to the aforesaid extent. All pending applications are disposed of.

JULY 15, 2022
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VIBHU BAKHRU, J



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