Delhi High Court

Glencore International Ag vs Dalmia Cement (Bharat) Limited on 3 July, 2017

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on:03.07.2017

+ EX.P. 75/2015 & EX APPL. (OS) No. 1216-1217/2015

GLENCORE INTERNATIONAL AG .... Decree Holder

Versus

DALMIA CEMENT (BHARAT) LIMITED .... Judgement Debtor

Advocates who appeared in this case:

For the Decree Holder : Mr Gourab Banerjee, Mr Sumeet Lall, Mr Sahil Malhotra, Ms Marisha Shukla and Mr. Sidhant Kapoor.

For the Judgement Debtor: Mr Ashish Dholakia, Mr Ankur Mahindro, Mr Kishore Kumar, Mr S. Choudhary.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. Glencore International AG (hereafter 'Glencore'), a company incorporated in accordance with the laws of Switzerland, has filed the above captioned petition for enforcement of a foreign award dated 17.11.2014 (hereafter 'the Award'). The Award was rendered by an arbitral tribunal - comprising of Simon Crookenden QC, David Joseph QC and Christopher Style QC (presiding) - constituted under the Arbitration Rules of the London Court of International Arbitration. The arbitral tribunal was constituted pursuant to a request made by Glencore to the London Court of International Arbitration (LCIA) in context of its disputes with Dalmia Cement (Bharat) Limited (hereafter 'Dalmia'), the Judgment Debtor.

2. The Award was rendered in the context of disputes that had arisen between the parties in connection with the agreement dated 22.02.2011 (hereafter 'the Agreement') whereby Glencore had agreed to supply and Dalmia had agreed to purchase coal of Indonesian origin, to be shipped in nine consignments (shipment nos. 1 to 9). Whilst it was the case of Glencore that Dalmia had breached the Agreement by effectively not accepting delivery of shipment nos. 7 to 9, Dalmia disputed the same and contended that delivery of such shipments was dependent upon the quality of coal delivered under shipment no. 6. Dalmia further claimed that the quality of coal delivered by Glencore in shipment nos. 1 to 6 was not as per the specifications as agreed under the Agreement. The arbitral tribunal considered the rival contentions and found that Dalmia had breached its contractual commitments by non acceptance of delivery of shipments nos. 7 to 9 and entered the Award in favour of Glencore.

3. Dalmia has filed objections under section 48 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') inter alia praying that enforcement of the Award be declined.

4. Dalmia has opposed the enforcement of the Award essentially on three grounds: first, that Dalmia was unable to present its case before the arbitral tribunal as the arbitral tribunal rejected its Request for Production of Documents; second, that the Award is opposed to the Public Policy of India as the arbitral tribunal had awarded damages in favour of Glencore, without Glencore establishing/ furnishing any documentary proof of the loss suffered by it; and third, that the Award is opposed to fundamental policy of Indian law in as much as the arbitral tribunal granted liberty to Glencore to file additional documents, on selective basis, just prior to the final hearing. This, Glencore claims, was not a judicial approach.

5. Briefly stated, the relevant facts necessary to address the controversy are as under:

5.1 Glencore is an international commodities trading company. Dalmia is an Indian company inter alia engaged in manufacture and sale of cement. Glencore and Dalmia entered into the Agreement on 22.02.2011, whereby Glencore agreed to sell and Dalmia agreed to purchase Steam Coal (Non-Coking) of Indonesian origin in bulk (hereafter referred to as 'coal') FOB Muara Bangkong Anchorage, Indonesia. In terms of the Agreement, Glencore was to deliver coal in nine shipments - five shipments of 60,000 metric tonnes +/- 10% each and four shipments of 50/60,000 metric tonnes +/- 10% each, at the rate of USD 100 per MT - to a port of discharge in India. The coal purchased by Glencore pursuant to the Agreement was sourced by Glencore from PT Riau Baraharum (hereafter 'RBH').

5.2 Shipment nos. 1 to 5 were delivered during the period of March - October, 2011. After the first shipment was delivered, Dalmia, by a letter dated 15.04.2011 addressed to Glencore, stated that the coal supplied was oversized and had got stuck in the conveyor hoppers and chute points, which had delayed the discharge of coal from the Chennai port. By another email dated 13.06.2010, Dalmia stated that shipment no. 1 was contaminated by white clay shale and also sent photographs to substantiate its claim. Thereafter, several emails were sent by Dalmia raising concerns about the quality of coal in shipment nos. 1 to 5 as well as about the delay in those shipments. On 21.10.2011, Dalmia sent an email stating that there were "unacceptable variations" in shipment no. 5 and that there has been no improvement in the quality of coal. Dalmia also stated that "We would like to inform you that we are unable to accept any more RBH cargos. All future pending shipments of our existing contract may please be kept on 'Hold' till further advice". As there were quality issues with the coal, Dalmia refused to agree for laycans and to accept delivery for the remaining shipments. The performance of the Agreement remained suspended from October, 2011 to July, 2012.

5.3 Whereas it was Dalmia's case that suspension of the Agreement was agreed by both the parties, Glencore claimed that Dalmia had unilaterally suspended it. Negotiations ensued between the parties for entering into an agreement for the sixth shipment. Dalmia sent an email dated 19.07.2012, inter alia, stating that "incase of any quality issue in the 6th shipment, DCBL[Dalmia] shall not be under any contractual obligation to perform balance 3 shipments and the matter shall be discussed". Glencore responded to the said mail on the same date stating that if there is any "quality issue with the 6th shipment, we will as always sit down with Dalmia and discuss an amicable solution for the balance quantities". Thereafter, the parties entered into an addendum agreement (hereafter 'the addendum agreement') dated 19.07.2012 - later on amended by another

addendum agreement dated 06.09.2012 (hereafter 'the second addendum agreement') - setting out the terms and conditions for the sixth shipment. The price of the coal was fixed at USD 90 per MT.

5.4 Disputes arose between the parties with regard to the sixth shipment as well. Dalmia by an email dated 11.10.2012 rejected the cargo (the sixth shipment) due to "low CV and High 5". Glencore replied on 12.10.2012 stating that the cargo was as per specifications agreed under the addendum agreement and further proposing the laycan dates for the remaining 3 cargoes. Dalmia sent a reply on 17.12.2012 and stated that they can consider accepting the remaining shipments on a mutually acceptable schedule, price, new source and specifications.

5.5 Thereafter Glencore sent various requests proposing the laycan dates to Dalmia. As Dalmia refused to agree to the laycans, Glencore sent a legal notice on 30.04.2013 calling upon Dalmia to agree to the proposed laycan dates and further stating that if Dalmia did not agree to the said dates, it would amount to a repudiatory and/or material breach entitling Glencore to terminate the Agreement and seek damages from Dalmia. On 15.05.2013, Glencore sent another notice proposing three more laycan dates and stated that if the said dates are not accepted by Dalmia, the Agreement shall automatically terminate within 30 days(that is, on 14.06.2013). Glencore also invoked the arbitration clause. The said notices were responded to by Dalmia on 12.06.2013, wherein Dalmia raised claims on account of alleged loss suffered by it on account of delay in the shipments; defective quality of coal; and demurrage charges. Dalmia also stated that it was agreeable to take the remaining three shipments (shipment nos. 7 to 9) at a time and price mutually agreeable to both the parties.

6. Thereafter Glencore sent a Request for Arbitration to the Registrar LCIA, pursuant to which the arbitral tribunal was constituted.

7. Before the arbitral tribunal, Glencore filed its Statement of Claim. It claimed that the conduct of Dalmia in not accepting the remaining three shipments at contractual rates amounted to repudiatory and/or material breach. Glencore based its claim for damages for non acceptance of those shipments (shipments nos. 7 to 9) on the basis of the difference in the contractual price of coal and the market price of coal on the date of termination, that is, 15.06.2013. Thus Glencore claimed to have suffered a loss of USD 5,452,480 [1,76,000 x 30.98]. Glencore further claimed interest and costs. However Glencore agreed to give a credit for USD 155,495.04 to Dalmia for demurrages in respect of the sixth shipment (shipment no. 6).

8. Dalmia countered the aforesaid claims on various grounds. Dalmia relied on the email dated 19.07.2012 to contend that it was not contractually obliged to accept the delivery of shipment nos. 7 to 9 if the coal supplied by Glencore in shipment no. 6 failed to comply with the Typical Specifications as mentioned under clause 2 of the Agreement.

9. Dalmia also raised counter claims. Dalmia claimed USD 711,907 on account of additional losses as it had to procure coal at a higher cost during the period when the Agreement was suspended (October,2011 - September,2012). Dalmia also claimed USD 2,156,394/- as losses on account of defective quality of coal supplied by Glencore. Dalmia contended that the certificates issued by IIA

were ineffective as they failed to apply the required standards ("ASTM" standards) and further that the tests conducted at the instance of Dalmia at the port of discharge indicated that the samples were beyond the rejection limits. Dalmia further claimed USD 155,495.04 on account of demurrage in addition to interest and costs.

10. The arbitral tribunal summarized the issues involved as under:

> "(1) Quality: did the Coal supplied by Glencore in Shipments One to Six comply with the required Quality Parameters? This involves considering (i) whether, as contended by Glencore, the IIA Certificates were pursuant to the Contract to be final and binding as to quality; (ii) whether the said IIA Certificates were contractually effective; and
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> (iii) whether the Coal complied with the required Quality Parameters.
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> (2) The negotiations in July 2012: was Dalmia released from any obligation to accept Shipments Seven to Nine because there was a "quality issue" with Shipment Six? This involves considering (i) whether the parties concluded a collateral agreement; and (ii) whether Glencore is estopped from contending that Dalmia is obliged to accept Shipments Seven to Nine;
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> (3) Glencore's claim for damages.
>
> (4) Dalmia's counterclaims for damages."

11. In respect of issue no. 1, the arbitral tribunal rejected Dalmia's contention that coal supplied by shipment nos. 1 to 6 did not comply with the applicable quality parameters. The arbitral tribunal further held that IAA Certificates for shipment nos. 1,2,4,5 and 6 complied with clause 8 of the Agreement and were final and binding for all purposes. The arbitral tribunal held that the coal shipped under those shipments fell within the tolerance limits and therefore, complied with the required Quality Parameters. In respect of shipment no. 3, arbitral tribunal held that "the Tribunal finds that the IIA Certificate for Shipment Three, as modified in respect of Ash by the Umpire Analysis, although based on a sampling process which had been superseded, nevertheless represents the best evidence of the quality of the Coal". The arbitral tribunal decided issue no. 1 in favour of Glencore by holding that shipment nos. 1 to 6 complied with the applicable Quality parameters.

12. The arbitral tribunal rejected Dalmia's contention that emails dated 19.07.2012 constituted a "collateral agreement" between the parties with respect to shipment nos. 7 to 9. The arbitral tribunal held that there was no offer and acceptance and clearly, no consensus between the parties. The arbitral tribunal held that both the parties had sought to modify the terms of addendum agreement but had signed the said agreement without the modifications and therefore, both the parties must have agreed to be bound by the terms of the addendum agreement alone. Accordingly, the arbitral tribunal decided issue No. 2 in Glencore's favor by holding that no "collateral agreement" existed between the parties.

13. The arbitral tribunal held that Dalmia's failure to agree on laycan dates amounted to a material breach as per clause 23 of the Agreement and therefore, held that Dalmia was entitled to damages for breach of the contract as per section 50 of the Sale of Goods Act, 1979 (UK Act). The arbitral tribunal held that Glencore was entitled to recover damages at the rate of USD 30.98 per MT - being the difference of the contract price and the market price as on 15.06.2013 - and awarded damages quantified at USD 4,461,120 (30.98 x 144,000). However, the arbitral tribunal also awarded a credit of USD 155,495 - being demurrage on shipment no. six - in favor of Dalmia. Resultantly a net sum of USD 4,305,625 was held as payable by Dalmia.

14. As a consequence of the finding that all the shipments were within the Rejection Limits and there was no breach on part of Glencore in respect of quality of the coal, the arbitral tribunal rejected the counter claims preferred by Dalmia.

15. The operative part of the Award reads as under :

> "209. After consideration of all of the factual and legal submissions which have been presented to us and for the reasons set out in full above, we award, declare and adjudge as follows:
>
> (1) We order Dalmia to pay Glencore USD 4,573,013, being damages of USD 4,305,625 and interest of USD 267,388.
>
> (2) We order Dalmia to pay Glencore GBP 62,879.42 in respect of Arbitration Costs.
> (3) We order Dalmia to pay Glencore GBP 370,000 in respect of Legal Costs.
>
> (4) We order Dalmia to pay Glencore interest at. 4.25% per annum on the outstanding amount of this Award from the date of this Award until payment compounded quarterly. (5) We dismiss all other claims."

Submissions

16. Mr Dholakia, learned counsel appearing for Dalmia opposed the present petition essentially on three grounds.

16.1 First, he submitted that enforcement of the Award ought to be declined in terms of section 48 (1) (b) of the Act as Dalmia was unable to present its case. He stated that Dalmia had filed a request for production of documents (RPD) that were exclusively in possession of Glencore; but, the same was rejected by the arbitral tribunal. Such documents included Glencore's agreement with RBH. He earnestly contended that the agreement/ arrangement between Glencore and RBH was essential for Dalmia to show that the alleged loss suffered by Glencore, on account of non-acceptance of deliveries, was not the difference between the contracted price and the market price of coal, as claimed. Glencore was only entitled to a specified margin on the price of coal and therefore, its loss, at the highest, would be restricted to the specified margin. He submitted that the damages as claimed by Glencore was in excess of the actual loss suffered by Glencore, but Dalmia could not

present this case as the arbitral tribunal had declined its request for production of documents.

16.2 Second, Mr Dholakia contended that the award of damages in favour of Glencore was without any application of mind. He submitted that measure of damages as contemplated under the Sale of Goods Act, 1979 (UK Act) was only a prima facie measure and the arbitral tribunal had not permitted the discovery of the actual loss. He submitted that Glencore was a mere trader and its loss would only be the commission or the trading margin that would have been available to Glencore, had the supplies been made. He submitted that the award of damages without the reference to the actual loss suffered was opposed to public policy and thus, the enforcement of the Award ought to be rejected in terms of section 48 (2) (b) of the Act. He relied on the earlier decisions of this court in the case of Vivek Rai v. Aakash Institute : 2015 (149) DRJ 309 and Xstrata Coal Marketing AG v. Dalmia Bharat (Cement) Limited: 2016 (6) ArbLR 270 (Delhi) in support of his contention.

16.3 Third, Mr Dholakia submitted that the enforcement of the Award ought to be declined as the Award was opposed to the fundamental policy of Indian Law. He submitted that the arbitral tribunal had not followed a judicial approach inasmuch as it had permitted Glencore to place certain documents on record at the pre-hearing stage, which placed Dalmia at significant disadvantage. He submitted that permitting additional documents to be placed at such belated stage vitiated the arbitral process. He relied on the decision of the Supreme Court in the case of Oil and Natural Gas Corporation Limited v. Western Geco International Ltd.:

(2014) 9 SCC 263 in support of his contention that a judicial approach formed an integral part of the fundamental policy of Indian Law and failure to adopt such approach rendered enforcement of the Award contrary to the public policy of India.

17. Mr Gourab Banerjee, learned Senior Counsel appearing for Glencore countered the submissions made by Mr Dholakia. At the outset, he referred to the decisions of the Supreme Court in Renusagar Power Co. Ltd. v. General Electric Co.: 1994 Supp (1) SCC 644 and Shri Lal Mahal Ltd. v. Progetto Grano Spa: (2014) 2 SCC 433 in support of his contention that the grounds for refusing enforcement of a foreign award under section 48 of the Act are highly restricted and it is not open for any party resisting the enforcement of the award to re-agitate the disputes on merits.

18. He submitted that Dalmia's request for production of documents was rejected on the ground of lack of sufficient relevance and materiality. Such decisions were within the domain of the arbitral tribunal and were not amenable to a judicial review in proceedings for enforcement of the arbitral award. He submitted that declining Dalmia's request for production of documents did not imply that it was unable to present its case. He submitted that Dalmia had been given full opportunity to defend the claims made by Glencore and the matter was fully contested by it.

19. In so far as the issue regarding measure of damages is concerned, Mr Banerjee contended that the quantum of damages were considered by the arbitral tribunal under four heads, namely: (a) market price, (b) quantity,

(c) duty to mitigate and (d) savings. He submitted that the matter regarding assessment of damages is a matter pertaining to the merits of the disputes and within the exclusive jurisdiction of the arbitral tribunal. Thus, the said issue could not be re-agitated in the present proceedings.

20. He also countered the contention that the arbitral process was vitiated by arbitral tribunal's decision to permit Glencore to produce additional documents. He submitted that this decision was within the domain of the arbitral tribunal and was not subject to re-examination in the present proceedings. He further submitted that Glencore had produced additional documents including Preliminary Reports of Analysis (PRAs) in response to the amended statement of defence and counter claims filed by Dalmia and thus, the decision of the arbitral tribunal to permit additional documents could not be faulted.

Reasoning and Conclusions:

21. The first and foremost issue to be considered is whether the enforcement of the Award ought to be declined on the ground that Dalmia was unable to present its case. In terms of section 48 (1) (b) of the Act, enforcement of a foreign award may be refused, at the request of the party against whom it is sought to be enforced, only if that party furnishes to the court proof that it "was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case". In the present case, there is no allegation that Dalmia was not given proper notice of the appointment of the arbitral tribunal or the arbitration proceedings. Dalmia has sought to rest its case on the ground that it was unable to present its case on account of arbitral tribunal rejecting its application for production of the agreements entered into between Glencore and RBH (which was Glencore's source for procurement of coal). In this regard, it is necessary to refer to Dalmia's request for production of documents, which was made on 7th March, 2014 whereby Dalmia had, inter alia, requested for production of the following documents:

> "All documents, including agreements executed by Glencore with RBH relating to the supply of the Seventh to Ninth Shipments and documents setting out the commission or margin that Glencore would have earned, evidencing or relating to (1) costs or losses avoided by Glencore as a result of not having to deliver the Seventh to Ninth Shipments and (2) any substitute shipments (including the terms of any such shipments) that Glencore was able to make to other parties as a result of Dalmia not taking the Seventh to Ninth Shipments."

22. The reasons provided by Dalmia for seeking production of the aforementioned documents were articulated as under:-

> "It is Dalmia's case that credit should be given for costs or losses avoided by Glencore as a result of not having to deliver the Seventh to Ninth Shipments. See Dalmia SoD, para. 28.3.
>
> Glencore contends that no such credit should be given. See Glencore Reply, para.36.

> Further Dalmia contends that Glencore was under a duty to mitigate its loss: see Dalmia Reply, para. 31.
>
> Dalmia is entitled to disclosure of documents which evidence the magnitude of costs or losses avoided by Glencore and any steps that Glencore may actually have taken to mitigate its loss."

23. Glencore objected to the aforesaid request on the following grounds:-

> "The request lacks relevance to the case and materiality to its outcome (Article 9.2 (a)). Dalmia has not particularised why Glencore is not entitled to the usual difference between contract and market for the coal as their claim for damages for non-acceptance. That measure assumes replacement sales, with equivalent commissions/margins/costs, so that any actual commissions/margins/costs are irrelevant. That measure also replaces any question of mitigation, so any actual substitute shipments are also irrelevant. "

24. The aforesaid issue was considered by the arbitral tribunal and Dalmia's request for production of the aforesaid documents was rejected as the arbitral tribunal was of the view that Dalmia's request lacked "sufficient relevance and materiality". It is apparent from the above that the arbitral tribunal had taken the decision regarding discovery of documents after evaluating the question of its relevance and materiality. Undisputedly, Dalmia had full opportunity to present its case but had been unable to persuade the arbitral tribunal that the documents sought to be produced were relevant or material to the disputes raised. It was Glencore's case that the actual commissions/margins/costs at which it was sourcing the coal were not relevant. Further the terms at which the shipment procured had been disposed of by Glencore, if at all, were also equally irrelevant. The arbitral tribunal had accepted Glencore's contention that Dalmia's request lacked relevance and materiality.

25. The inability to present a case as contemplated under section 48(1)(b) of the Act (which is pari materia to Article V(I)(b) of the New York Convention) must be such so as to render the proceedings violative of the due process and principles of natural justice. It is rudimentary that for a fair decision each party must have full and equal opportunity to present their respective cases and this includes due notice of proceedings. In the event a party opposing the enforcement of a foreign award is able to present sufficient proof of such infirmity in the arbitral proceedings, the courts may decline to enforce the foreign award.

26. A clear distinction needs to be drawn between cases where a party is unable to present its case, rendering the arbitral award susceptible to challenge as falling foul of the minimal standards of due process/natural justice and cases where the arbitral tribunal does not accept the case sought to be set up by a party. The latter case, obviously, does not give rise to a ground as mentioned in section 48 (1) (b) of the Act, even if the decision of the arbitral tribunal is erroneous.

27. In the present case, Glencore had claimed damages resulting from breach of contract on the part of Dalmia by not accepting deliveries on contractual prices. The measure of damages adopted by Glencore was the difference between the contracted and prevalent market price. Dalmia sought to set up the case that it was entitled to credit on costs and losses avoided by Glencore and thus sought discovery of certain documents evidencing costs or losses avoided by Glencore as a result of not having to deliver shipment nos. 7 to 9 and any substitute shipments made by Glencore as a result of Dalmia not taking the delivery of shipments in question. Dalmia also sought discovery as to the magnitude of costs. The arbitral tribunal accepted Glencore's contention that the said documents were not relevant given that it was claiming damages on the basis of replacement sales. Dalmia may be aggrieved by rejection of its contentions but this is not a case where Dalmia was prevented from canvassing them.

28. Undisputedly, the contract between Dalmia and Glencore was on principal to principal basis. There was no obligation on the part of Glencore to source the coal from any particular entity. In the circumstances, this court is also unable to accept that Dalmia had made out sufficiently compelling grounds for discovery of documents as claimed by it. In any view of the matter, Dalmia was not precluded from setting up the case as it thought fit. In the given facts, this court is not persuaded to accept that the arbitral tribunal had not followed the due process or had not provided sufficient opportunity to Dalmia to present its case.

29. Dalmia's contention that the damages awarded by the arbitral tribunal are in conflict with the fundamental policy of Indian Law is also unmerited. The arbitral tribunal had found that Dalmia had breached the contract of sale of goods by not accepting delivery and making payments for the same. Glencore had placed sufficient material on record to establish the market price. Glencore had produced the expert evidence of one Mr Gerard McCloskey as to the market price of Indonesian coal and the arbitral tribunal had noted that the expert witness (Mr Gerard McCloskey) was not cross-examined and his evidence was not challenged. The arbitral tribunal had accepted the aforesaid evidence which indicated the market value of the coal at USD 69.02 per MT and accordingly, held that Glencore was entitled to recover damages at the rate of USD 30.98 per MT, which was the difference between the contract price of USD 100 per MT and the market price of USD 69.02 per MT. The arbitral tribunal had also considered the question as to the quantity of coal in the three shipments and had concluded that Dalmia was required to lift quantities of 54,000 MT, 45,000 MT and 45,000 MT in the 7th, 8th and 9th shipment respectively; thus aggregating a total of 144,000 MT. The arbitral tribunal also held that Dalmia was not entitled to any credit regarding costs or losses which Glencore had avoided consequent to terminating the contract as Glencore's case was based on replacement sales (based on a premise that Glencore delivers coal to a hypothetical buyer assuming that all costs are equivalent). Thus, the arbitral tribunal concluded that Glencore was entitled to USD 4,461,120 (USD 30.98 x 144,000 MT). Since Glencore had agreed to give a credit for USD 155,495 - being the demurrages due on the 6th shipment - the tribunal awarded total damages of USD 4,305,625 after deducting the aforesaid amount of USD 155,495.

30. In cases where there is a ready market for the goods agreed to be purchased and sold, it is well established that the difference in the contracted price and the market price would be a reasonable measure of damages. In Barrow v. Arnaud : [1846] 8 QB 595, the court had articulated the said

principle as under:-

> "where a contract to deliver goods at a certain price is broken, the proper measure of damages in general is the difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser, having the money in his hands, may go into the market and buy. So, if a contract to accept and pay for goods is broken, the same rule may be properly applied, for the seller may take his goods into the market and obtain the current price for them."

31. The above principle has also been accepted in the provisions of section 50 and 51 of the Sale of Goods Act, 1979 (U.K. Act). section 50 of the U.K. Act reads as under:

> "50. Damages for non-acceptance.
>
> (1)Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.
>
> (2)The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.
>
> (3)Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept."

32. The above measure of damages is also accepted in India as is plainly clear from illustration (d) to section 73 of the Indian Contract Act, 1872, which reads as under:-

> "(d) A contracts to buy B's ship for 60,000 rupees, but breaks his promise. A must pay to B, by way of compensation, the excess, if any, of the contract price over the price which B can obtain for the ship at the time of the breach of promise."

33. Undisputedly, in certain cases a different measure of damages may be adopted and Mr Dholakia is correct in his submission that section 50(3) of the UK Act expressly provides that the measure of damages would prima facie be determined in the manner as indicated therein. However, it is implicit in such submission that such measure, which has been accepted by the arbitral tribunal, cannot be considered to be perverse so as to render enforcement of the Award contrary to the public policy of India. In view of the above, the contention that the enforcement of the Award is opposed to public policy or is in conflict with the fundamental policy of Indian law is unmerited.

34. The reliance place on the case of Xstrata Coal Marketing AG v. Dalmia Bharat (Cement) Limited (supra) and Vivek Rai v. Aakash Institute (Supra) is wholly misplaced. In Xstrata's case, this court had held that an award or damages, which has no reasonable nexus with the agreement and is based

on unfounded surmises, would militate against the fundamental policy of Indian law and such arbitral award, which is not based on any material at all, would be unsustainable. In the present case, it cannot be accepted that the award of damages is either unreasonable or is based on no material at all. In Vivek Rai's case, the court found that the award of damages was unconscionable; no such ground is made out in the present case. In these proceedings, this court is not called upon to re- appreciate the evidence and reassess the damages awarded.

35. The contention that the arbitral tribunal did not adopt the judicial approach as it permitted Glencore to produce additional documents is also without substance.

36. Dalmia had filed an amended statement of defence and counter claims on 08.09.2014 (Glencore asserts that it was filed on 09.09.2014). In response to the same, Glencore sought to rely on certain additional documents. It, accordingly, applied to the arbitral tribunal for permission to do so. The said request was opposed by Dalmia. The arbitral tribunal considered the same on 23.09.2014 and Glencore was permitted to put in evidence in question at the belated stage. In its order dated 23.09.2014 (5th procedural order), the arbitral tribunal, inter alia, observed as under: "production is late, but this is the consequence of the way the Respondent's case has developed. The tribunal is satisfied that the Respondent will not be prejudiced by late production. It has known that the Claimant Intended to rely on these documents since 10 September 2014; it has therefore had time to consider this evidence and respond as it thinks fit. It can test its veracity and validity as the Evidentiary Hearing and the tribunal can decide then what weight to give to this".

37. The parties were directed to exchange pre-hearing written submissions on 01.10.2014 which the parties did. The evidentiary hearings were held thereafter between 6th and 10th October, 2014.

38. It is apparent from the above that Dalmia had full opportunity to deal with the documents produced by Glencore. This court finds no infirmity with the procedure as adopted by the arbitral tribunal as Dalmia had full opportunity to contest the veracity and the evidentiary value of the documents produced by Glencore. In view of the aforesaid, this court is not persuaded to decline enforcement of the Award. The objections raised by Dalmia in this regard are, accordingly, rejected.

39. List on 02.08.2017 for further proceedings.

VIBHU BAKHRU, J JULY 03, 2017 RK/pkv