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Calcutta High Court

Case No: E.O.S. No. 11 of 2003

Centrotrade Minerals and Metals Inc.		APPELLANT
	Vs	
Hindustan Copper Ltd.		RESPONDENT

Date of Decision: March 10, 2004

Acts Referred:

- Arbitration Act, 1940 - Section 2, 30, 4, 6
- Arbitration and Conciliation Act, 1996 - Section 30, 34, 36, 44, 47

Citation: (2005) 2 CALLT 657

Hon'ble Judges: Jayanta Kumar Biswas, J

Bench: Single Bench

Advocate: Sudipto Sarkar, Siddhartha Mitra, Tapati Ghosh and Suparna Roy Chatterjee, for the Appellant; Debabrato Roychoudhury and Jayanta Dutta, for the Respondent

Judgement

J.K. Biswas, J.
This is an application under Sections 48 and 49 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act").

2. By this application the petitioner wants to enforce a foreign award. It was filed in the Court of the District Judge of South 24-Parganas at Alipore on January 24th, 2002; there it was registered as Arbitration Execution Case No. 1 of 2002. Subsequently the petitioner moved an application under Clause 13 of the Letters Patent before this Court. By an order dated September 18th, 2003 passed in such application, this application was transferred from the Court of the District Judge of South 24-Parganas at Alipore to this Court. On transfer it was registered in this Court as Extraordinary Suit No. 11 of 2003. The respondent has filed opposition affirmed on December 6th, 2003. The petitioner has filed reply affirmed on December 17th, 2003.

3. A tender dated August 30th, 1995 was floated by the respondent for supply of 15,000/- ± 5% DMT to copper concentrate. Offer to sell made by the petitioner was accepted by the respondent. Consequently, the parties executed the contract dated January 16th, 1996. The contract contained an arbitration clause for resolution of all disputes and differences, should any arise between the parties. Disputes and differences, however, arose between the parties. In terms of the arbitration agreement the petitioner approached the Indian Council of Arbitration for adjudication of the disputes by arbitration. Claims of the petitioner were as follows :

"(a) An award for a sum of US $ 383,442.90 (equivalent to Indian Rupees 1,36,73,573.00 calculated at the exchange rate of Rs. 35.66 as prevailing on May 10, 1997) in respect of the goods shipped on board the vessel M.V. "MARITIME MASTER" and M.V. "LOK PRITI";

(b) An award be made for interest pendente lite at such rate as the claimant is entitled to under the law;

(c) An award be made for interest on the sum awarded until decree is pronounced in terms of the award;

(d) Costs."

The arbitrator appointed by the Indian Council of Arbitration made a nil award dated June 15th, 1999.

4. Being aggrieved, in terms of the arbitration agreement the petitioner approached the ICC International Court of Arbitration for a second arbitration by way of appeal. The sole arbitrator appointed by this forum by his award dated September 29th, 2001 directed as follows:

"For the above reasons I THEREFORE AWARD and ADJUDGE that:

(1) HCL do pay Centrotrade the sum of $152,112.33, inclusive of interest to the date of this Award in respect of the purchase price for the first shipment.

(2) HCL do pay Centrotrade the sum of $15,815.59, inclusive of interest to the date of this Award in respect of demurrage due on the first shipment.

(3) HCL do pay Centrotrade the sum of $284,653.53, inclusive of interest to the date of this Award in respect of the purchase price on the second shipment.

(4) HCL do pay Centrotrade their legal costs in this arbitration in the sum of $2,733 and in addition the costs of the International Court of Arbitration, the Arbitrator''s fees and expenses totaling $29.000.

(5) HCL do pay Centrotrade compound interest on the above sums from the date of this Award at 6% p.a. with quarterly rests until the date of actual payment."

The present application has been made for enforcement and execution of this award dated September 29th, 2001.

5. Mr. Roychoudhury appears for the respondent. He submits that the application filed by the petitioner under Sections 48 and 49 of the Act is liable to be dismissed, because (a) the award is not a foreign award as defined in Section 44 of the Act, and (b) in compliance with Section 47(c) of the Act the petitioner has not produced evidence to prove that the award is a foreign award.

6. Mr. Sarkar appears for the petitioner. He submits that from the materials on record it is clear that the award is a foreign award within the meaning of Section 44 of the Act. At the time of filing the application the petitioner complied with the requirements mentioned in Section 47 of the Act.

7. As to whether the award is a foreign award, I find that it has been made by the arbitrator appointed by the ICC International Court of Arbitration; it has been made on differences between the petitioner and the respondent, and such differences arose out of a legal relationship, (contractual), considered commercial under the law in force in India. The arbitral award has been made in pursuance of an agreement in writing for arbitration to which convention set forth in the first schedule to the Act applies. It has been made in the United Kingdom that the Central Government by notification in the official gazette has declared to be one of the territories to which the convention set forth in the first schedule to the Act applies. I therefore find no merit in the contention of the respondent that the award sought to be enforced and executed by the petitioner by this application is not a foreign award within the meaning of Section 44 of the Act.

8. From the records of the case I find that at the time of making the application the petitioner complied with the necessary requirements of Section 47 of the Act. The application for enforcement and execution of the foreign award was filed on January 24th, 2002. At the time of filing the application the petitioner produced before the Court of the District Judge of South 24-Parganas at Alipore (a) a copy of the foreign award dated September 29th, 2001, duly authenticated by the Secretary General of the ICC International Court of Arbitration; (b) a copy of the contract dated January 16th, 1996, containing the agreement for arbitration, duly certified by one Deborah L. Shapiro that it is a true copy of the original contract.

9. However, apart from producing the certified copy of the foreign award and the certified copy of the contract containing the agreement for arbitration, and making statement in the application that the award was a foreign award, the petitioner did not produce any other evidence to prove that the award was a foreign award. From January 24th, 2002 till May 16th, 2003 the application remained pending before the District Judge of South 24-Parganas at Alipore. In spite of opportunities given to the objection, the respondent did not file any objection to the application there. It moved various miscellaneous applications for transfer, stay, etc. In its opposition

affirmed on December 6th, 2003 in this Court the respondent has not taken the plea that the petitioner did not produce necessary evidence to prove that the award is a foreign award. The contention has been raised by the learned counsel only in course of argument. I find that in the application the petitioner has stated that the award is a foreign award. The respondent has not challenged the genuineness of the award. Hence I am of the view that the evidence on record is sufficient to prove that the award sought to be enforced and executed is a foreign award.

10. Mr. Roychoudhury next submits that the award has, in fact, nullified the domestic award which preceded it regarding the same dispute between the parties. In view of Sections 34 and 36 of the Act the preceding domestic award could not be nullified by the arbitrator by making the award sought to be enforced. The domestic award could be challenged by the petitioner only u/s 34 of the Act. Since the domestic award was not challenged, by fiction of law contemplated in Section 36 of the Act, it became a decree of the Court. Such a deemed decree of the Court could not be annulled by the arbitrator appointed by the ICC International Court or arbitration by making a foreign award. So under the Indian law (i.e. the Act) the second paragraph of the arbitration agreement, providing for two tier arbitration, is not a valid agreement, and hence in view of Section 48(1)(a) of the Act, the award is not enforceable.

11. Mr. Sarkar replies that the arbitration agreement is not invalid under any provision of the Act. Sections 34 and 36 of the Act do not impede the parties'' entering into an agreement for a two tier arbitration regarding the same dispute. Legal position regarding more than one arbitration for same dispute will appear from the decisions in Heeralal Agarwalla and Co. Vs. Joakim Nahapiet and Co. Ltd., ; Fazalally Jivaji Raja v. Khimji Poonji and Co.. AIR 1934 Bom 476; Hanskumar Kishanchand Vs. The Union of India (UOI), ; M.A. and Sons Vs. Madras Oil and Seeds Exchange Ltd. and Another, . Courts have always approved agreement by parties to submit to more than one arbitration regarding same dispute.

12. The question is whether the arbitration agreement is invalid. It will be useful to consider the decisions cited at the bar, before taking up the question for examination. In Hiralal Agarwalla''s case the disputes between the parties were referred to arbitration. Since the two arbitrators failed to agree, the matter was referred to umpire. Against the award of the arbitrators the aggrieved party appealed to the appellate forum mentioned in the relevant rules and bye-laws of the association, whereby the parties had agreed to bind themselves. The appellate forum transmitted the award to the Court. The party aggrieved by the award of the appellate forum filed an application for an order to take the award made by the appellate forum of the file of the Court. The learned single Judge held that the award made by the appellate forum was contrary to the scheme of the Indian Arbitration Act, 1899. He held that under this Act the only persons or tribunals that could have seisen of the arbitration were the "arbitrators or umpire," and that there

was no recognition in the Indian Arbitration Act, 1899 of an award by a tribunal superior to the umpire. In appeal the Division Bench of this Court held that there was nothing in the Indian Arbitration Act, 1899 to prevent the parties from agreeing to a submission containing in it a further submission to arbitration.

13. Relying on the Division Bench decision of this Court in Hiralal''s case a similar question was answered in the affirmative in the subsequent Bombay decision in Fazalally''s case. In this case, after considering the provisions in Sections 2, 4(b) and 6 of the Indian Arbitration Act, 1899, the learned Judge observed as follows:-

"... The intention of the parties is to be the sole guide for determining the mode of working out the submission and reaching a final decision. The law of arbitration is based upon the principle of withdrawing the disputes from the ordinary Courts and enabling the parties to substitute a domestic Tribunal. Once the tribunal reaches a final decision as contemplated or agreed upon by the parties, then the Arbitration Act steps in to help the parties to enforce the said decision."

14. Similar was the view taken by a Division Bench of the Madras High Court in M.A. Son''s case. Paragraph 11 of this decision reads as under:-

"(11) The third point may be quite briefly disposed of. Actually it largely depends upon the interpretation to be placed upon the words in condition No. 7 of the First Schedule to the Arbitration Act, that "the award shall be final and binding on the parties and persons claiming under them respectively". Naturally, these words have to be construed as subject to any right of appeal, which might be provided for either by the contract itself, or by any by-law governing the parties; Heeralal Agarwalla and Co. Vs. Joakim Nahapiet and Co. Ltd., is clear authority for this view. No doubt, except upon grounds specified in Section 30 of the Act, an award is not liable to be set aside, and is final between the parties. But, what is the award that is final between the parties, when the procedure governing the parties itself makes provision for an initial award on arbitration, and an appeal which may be instituted by either party aggrieved? An "award" is defined in Section 2(b) of the Act as an "arbitration award". As observed by the Supreme Court in (S) Garikapatti Veeraya Vs. N. Subbiah Choudhury, the legal pursuit of successive remedies will make them all proceedings ''connected by an intrinsic unity'' and ''to be regarded as one legal proceeding''. In that sense, it is the award by the appellate Tribunal, if an appeal is preferred which becomes the final award that governs the parties. The passage from Rassell on Arbitration that we set forth earlier, as well as the decision of the Calcutta High Court in Heeralal Agarwalla and Co. Vs. Joakim Nahapiet and Co. Ltd., make it clear that it is perfectly legal to provide for different stages of arbitration, such as, from a single arbitrator to a committee of appeal, etc. It is the award which finally emerges from this procedure, which is conclusive as between the parties, and not liable to be set aside, except as provided for in Section 30 of the Arbitration Act 10 of 1940. For these reasons, we must hold that the provision for appeal is not ultra vires the law of arbitration enacted in Act 10 of 1940. On this ground also the

appellants will have to fail."

15. Keeping in mind the principles explained in the above decisions, now the question of validity of the arbitration agreement in this case can be taken up. In the present case the arbitration agreement was in Clause 14 of the contract; it is reproduced below:-

"14. Arbitration :

All disputes or differences whatsoever arising between the parties out of, or relating to, the construction, meaning and operation or effect of the contract or the breach thereof shall be settled by arbitration in India through the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration.

If either party is in disagreement with the arbitration result in India, either party will have the right to appeal to a second arbitration in London, UK in accordance with the rules of conciliation and arbitration of the international chamber of commerce in effect on the date hereof. The results of this second arbitration will be binding on the both the parties Judgment upon the award may be entered in any Court in jurisdiction."

16. The arbitration agreement shows that the parties agreed not to bind themselves by the domestic award. They rather agreed that whoever might feel aggrieved by the domestic award, would be entitled to appeal to the ICC International Court of Arbitration for a second arbitration. They agreed to bind themselves only by the award to be made by such appellate forum. The parties here consciously agreed to have a two tier arbitration of the disputes and differences, should any arise between them out of the contract.

17. Under the Arbitration Act, 1940 (this Act was in force on the date of execution of the contract by the parties) the award passed by the arbitrator was not to attain the status of a decree by fiction of law. For this the competent Court was required to pronounce the judgment. By operation of law the first arbitration took place under provisions of the Act, which came into force a few days after the parties executed the contract.

18. Hence I find, in this case, on agreement, the parties waived their rights to challenge or to enforce the award, should there be one, made by the arbitrator of the first instance; they rather chose to have the benefit of a second round of arbitration, and agreed to bind themselves only by the award to be made in the second arbitration. With the Act occupying the field a few days after the agreement there was no significant change in the effect of the agreement. The changed position was that in the event of a domestic award, the parties would not challenge it u/s 34 of the Act or enforce it u/s 36 thereof, and they would rather bind themselves by the foreign award.

19. In my view, the agreement by the parties not to bind themselves by the domestic award does not violate Sections 34 and 36 of the Act. Contention of learned counsel for the respondent that use of the word "only" in Section 34 shows the legislative intendment that a domestic award cannot be challenged in any manner, except in the manner provided by Section 34 of the Act, is a valid contention only when question arises for challenging a binding domestic award. When the parties consciously agree to have the domestic award followed by a foreign award, it cannot be said that the parties contract against provisions of Section 34 of the Act. Section 34 envisages existence of a domestic award whereby award whereby the parties agree to bind themselves. Provisions of the Act are not intended to curtail powers of the contracting parties to contract in the manner they wish, and for the purposes as are permissible under the laws governing contract. There is nothing to show that the contract is contrary to provisions contained in the Indian Contract Act, 1872. The freedom enjoyed by the contracting parties to contract has not been curtailed at any point of time by any provision contained in the laws regarding arbitration.

20. I therefore find nothing wrong with the arbitration agreement whereby the parties in this case agreed to bind themselves only by the foreign award that was to be preceded by a domestic award.

21. Mr. Roychoudhry then submits that in view of Section 48(1)(b) of the Act, the award is not enforceable, as neither notice of appointment of the arbitrator was given to the respondent, nor was it given opportunity to present its case. The arbitrator followed the ICC Arbitration and Conciliation Rules, though they were not mentioned by the parties in the arbitration agreement; hence in view of Section 48(1)(d) of the Act the award is not enforceable.

22. Mr. Sarkar replies that the respondent was given all opportunities to present its case, but it showed total non-cooperation with the arbitrator. The arbitral procedure followed by the arbitrator does not militate against the arbitration agreement.

23. I find that the petitioner approached the ICC International Court of Arbitration on February 22nd, 2000. The respondent filed a suit in the Court of Civil Judge, Junior Division, Khetry on March 28th, 2000; it wanted to stop the second arbitration in terms of the arbitration agreement. The arbitrator was appointed on June 7th, 2000. Till August 2001 the respondent maintained that the second part of the arbitration agreement being against the public policy of India, the arbitration through the ICC International Court of Arbitration was not permissible. On this ground the respondent refused to participate in the arbitral proceeding. It took the matter upto the Apex Court. Ultimately when it failed to obtain any order to stop the arbitration, it filed its submissions running into seventy-five pages. Though the papers reached the arbitrator beyond the stipulated date, he has considered such submissions. He, however, did not find any merit in the case made out by the respondent. The arbitrator has recorded that at every stage he consulted the procedural aspects with the Solicitors representing the respondent. There is no proof that the respondent

ever objected to the rules and procedure followed by the arbitrator or that the arbitrator followed a procedure not contemplated in the agreement. It is apparent from the award that all opportunities were given to the respondent to present its case. I find no merit in the contentions that notice regarding appointment of the arbitrator was not given to the respondent or that the terms of reference were settled behind its back. The respondent had full knowledge of everything; it was informed about everything. Hence I find no substance in the grievance that the respondent was unable to present its case or that procedure not contemplated by the agreement of the parties was followed by the arbitrator.

24. Mr. Roychoudhry''s last submission is that the consequences following from the second paragraph of the arbitration agreement, providing for a second round of arbitration through the ICC International Court of Arbitration, being contrary to provisions in Sections 34 and 36 of the Act, enforcement of the award wd be contrary to the public policy of India. Enforcement of the award would be contrary to public policy of India, also because the arbitrator directed payment in foreign currency. As held in M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., for interpreting provisions of the Act, decisions given in cases governed by the Arbitration Act, 1940 are of no help. The phrase "public policy" has been explained in Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd., 2002 (3) Supreme 449. Hence in view of Section 48(2)(b) of the Act enforcement of the award should be refused.

25. In reply Mr. Sarkar submits that enforcement of the award would not be contrary to the public policy of India. Public policy of India does not prohibit an arbitration agreement that provides more than one round of arbitration regarding same dispute. The expression "public policy" is to be understood in the manner explained in Renusagar Power Co. Ltd. v. General Electric Co. 1994 supp (1) SCC 644 and Smita Conductors Ltd. v. Eruo Alloys Ltd. (2001) 7 SCC 728. In Harendra H. Mehta and Others Vs. Mukesh H. Mehta and Others, principles regarding enforcement of a foreign award were laid down. Enforcement of the award would not be contrary to public policy of India on the ground that the arbitrator directed payment in foreign currency. As held in Forasol Vs. Oil and Natural Gas Commission, payment in such a case is to be made in Indian currency on the basis of conversion rates prevailing on the date of the decree. So there is no ground to refuse enforcement of the award.

26. Agreement by a party to waive his statutory right cannot be said to be illegal or against any public policy of the country. When the statute gives a particular right; it is entirely up to a party to take the benefits of such a right. If the party exercises the right, it benefits such party only; and such exercise affects the party who suffers the corresponding obligation or duty. If such a statutory right a party consciously waives by an agreement, it cannot be said that such waiver affects any public policy of the country. Waiver of a right by a person who is entitled to get benefit by exercising such right, cannot affect the public in any manner; and ordinarily it can have no

manner of connection with the public policy of India. The expression "public policy" has been explained by the Supreme Court in Renusagar''s case and again in ONGC''s case. From the meaning of the phrase as explained by the Supreme Court in these cases. I do not find anything to hold that the waiver of the right flowing from the domestic award by the parties was against the public policy of India.

27. I find no merit also in the contention that enforcement of the award would be contrary to public policy of India, because the arbitrator directed payment in foreign currency. Learned counsel has contended that payment in terms of the award is bound to affect the foreign exchange reserve of the country. As held in Forasol''s case payment in such a case is to be made in Indian currency, after calculating the amount on the basis of conversion rate prevailing on the date of the decree. In this case, if this Court records its satisfaction that the foreign award is enforceable, it shall be deemed to be a decree.

28. For the abovementioned reasons I find that the contentions raised by the respondent have no merit. I am satisfied that the award is enforceable. It shall, therefore, be deemed to be a decree of this Court.

29. The respondent is hereby directed to make the payment to the petitioner within three weeks from date. The payment shall be made in Indian currency calculated on the basis of conversion rate prevailing today.

30. Henceforth this application shall be treated as an execution application. If the respondent fails to make the payment, then necessary orders will be passed for execution of the decree.

For further orders the application shall appear as "Chamber Application for Final Disposal" after three weeks.

Urgent xerox certified copy of this judgment and order, if applied for, may be supplied to the parties.

Award is enforceable and shall therefore be deemed to a decree of this Court.