courtkutchehry.com

Company: Sol Infotech Pvt. Ltd.
Website: www.courtkutchehry.com
Printed For:
Date: 05/11/2025

(2010) 09 CAL CK 0090

Calcutta High Court

Case No: E.C. No. 115 of 2008

Kokusai Shipping Agency Ltd.	APPELLANT
Vs	
Korp Resources Private Ltd.	RESPONDENT

Date of Decision: Sept. 3, 2010

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 34, 44, 48, 48(1), 48(2)

Hon'ble Judges: Patherya, J

Bench: Single Bench

Advocate: Tilak Bose and Sudhakar Prasad, for the Appellant;Moloy Ghosh and Suman Dutt, for the Respondent

Judgement

Patherya, J.
This is an application for execution of the foreign award dated 17th August, 2007.

2. Petitioner''s case

The case of the petitioner is that in execution of the foreign award dated 17th August, 2007 orders are sought in terms of Column 10 of the Tabular Statement as no step has been taken by the judgment-debtor for setting aside the award. Therefore, the award has become enforceable and entitles the decree-holder to release of sums.

3. Counsel for the decree-holder submits that the award is against Korp Resources who is a party to the arbitration proceeding. The invoices raised on Korp Gems was before the Arbitral Tribunal and the same was considered and thereafter liability imposed. Section 48 of the 1996 Act is similar to Section 44 of the 1996 Act. The merits cannot be challenged at the time of enforcement of the award and to challenge the merits an application for setting aside the award of 2005 ought to have been made before the appropriate forum.

4. The charter party agreement was between the decree-holder (owner of the vessel) and Korp Resources (hirer of such vessel). The defence taken by the judgment-debtor has been set out in the award and considered. Clauses 5 and 6 of the award have dealt with the points on merits and have rejected the points raised. Korp Resource is the charterer and only for convenience invoice was raised in the name of Korp Gems and Korp Resources. An award has been passed against Korp Resources and therefore, there has been no violation of any of the provisions of any Indian Act. Section 48(1)(b) permits a party to challenge the award in the place where it is made. At the time of enforcement the objection can only be restricted to point of law. Reliance is placed on Renusagar Power Co. Ltd. Vs. General Electric Co., for the proposition that in foreign award "public policy" must be given a narrow meaning. The arbitration agreement was between the decree-holder and judgment-debtor. The award is also passed against Resources and it is only after considering the points raised by the judgment-debtor a finding has been reached by rejecting the contention of the judgment-debtor.

5. Sections 44 and 48 of the 1996 Act must be read in the light of Article 5 of the New York convention and will have a restricted narrow meaning.

6. Counsel for the judgment-debtor submits that a money award was passed against Korp Resources and Korp Gems. u/s 48(2) of the 1996 Act the Court is empowered to refuse enforcement of the arbitral award if such enforcement is contrary to the public policy of India. In the instant case, the agreement is between the decree-holder and Korp Resources. The invoice on the basis of which the award has been passed is dated 7th December, 2005 and is raised on Korp Gems. As there is no separate agreement with Korp Gems, the arbitration agreement, therefore, is not binding on it. Korp Gems and Korp Resources are two separate legal entities and in view of no agreement with Korp Gems no award could have been passed against it nor can the same be enforced against it. Section 7 of the Arbitration Act postulates the circumstances in which the arbitration agreement comes to exist. "Public policy" has by virtue of judicial pronouncement been expanded and under the law the award cannot be enforced.

7. The scope of public policy must be considered and whether the benefit of the same can be extended to the judgment-debtors. Reliance is placed o M/s. Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd., for the proposition that all points can be agitated at the stage of enforcement. Reliance is placed on Sudhir Kumar Saha and Others Vs. J.N. Chemicals Private Ltd. and Others, for the proposition that although the Directors may be common of two companies each is a separate legal entity and cannot be considered as one and therefore, comes within the scope of public policy. Reliance is also placed on Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., .

8. Renusagar Power Co. Ltd. Vs. General Electric Co., was dealing with the Foreign Awards (Recognition and Information) Act 1961 and is not to apply to the facts of the case and though the merits have not been challenged the legality of the award can be challenged. The narrow or wide meaning given to public policy is irrelevant as Section

48(2)(b) of the 1996 Act deals with public policy of India and in view of the decision in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., the same can be challenged. The invoice in the name of Korp Gems forms the basis of the award. There are two separate agreements between the decree-holder, Korp Gems and Korp Resources. The agreement of Korp Gems does not contain an arbitration clause and assuming that an arbitration clause did exist there has been no adjudication thereon. Therefore, the award is unforceable and no order be passed.

9. In reply counsel for the petitioner submits that there is no dispute with the principle laid down in M/s. Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd., and there is no doubt that the only objection is with regard to the invoice raised on Korp Gems. The decision reported in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., dealt with "public policy" vis-a-vis domestic Tribunal and therefore, is distinguishable on facts. Therefore, the objection raised be rejected and order be passed as sought.

10. Having considered the submission of the parties the award dated 17th August, 2007 is against the judgment-debtor Korp Resources. For the purposes of convenience two separate invoices were raised. It is not disputed that Korp Resources hired the vessel and therefore, it is the liability of Resources to make payment. The internal arrangement between Resources and Gems cannot deprive the decree-holder of its dues. An arbitration agreement existed between Resources and the decree-holder is seeking to enforce its claim. As no proceeding has been filed for setting aside the award u/s 48 of the 1996 Act, therefore, the division of liability cannot be questioned in this proceeding as the judgment-debtor has accepted booking of the goods by Resources.

11. The only objection raised is that the award is opposed to the public policy of India. "Public policy" of India came in for consideration for the first time in Renusagar Power Co. Ltd. Vs. General Electric Co., to include the following:

(i) fundamental policy of Indian Law;

(ii) the interests of India;

(iii) justice or morality.

and was given a wider meaning in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., to include anything which is "patently illegal".

12. "Patently illegal" would be something so unfair or unreasonable to shock the Court''s conscience. Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., was dealing with a case u/s 34 of the 1996 Act and therefore, did not have the opportunity to deal with the explanation to Section 48(2)(b) of the 1996 Act while Renusagar Power Co. Ltd. Vs. General Electric Co., which has been extended was dealing with the issue of enforcement of foreign award.

13. In the instant case the judgment-debtor has not challenged the Award u/s 48 of the 1996 Act in the English Court but is seeking to challenge it at the execution stage only on the ground of public policy and the only meaning which can come to the aid of the judgment-debtor is "patently illegal".

14. For the application of the said meaning either some clause of the agreement must be shown which is so unfair or unreasonable that it shocks the conscience of the Court or the finding is so unreasonable that no Court would support it.

15. The invoice raised on Korp Gems was issued with the consent of the receiver of the goods, namely, the judgment-debtor Resources who was willing to receive the cargo under two different Bills of lading. Such willingness must be with the consent of the Board of Directors of Korp Gems and the reason for such arrangement has also been set out in the e-mail of 9th September, 2005 and mentioned in the Award.

16. The Contract Note is between the judgment-debtor and the decree-holder and as delivery was taken at Paradip and Haldia, therefore, the said arrangement. The plea of two separate contracts cannot be taken at the time of enforcement of decree.

17. No fraud or corruption can be alleged to the decree-holder as per the explanation to Section 48(2)(b) of the 1996 Act which is set out herein below:

Section 48(1) ....

(a) ....

(b) ....

(c) ....

(d) ....

(2) ....

(a) ....

(b) the enforcement of the award would be contrary to the public policy of India.

Explanation.- Without prejudice to the generality of Clause (b) of this section, it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

(3) ....

18. The issue sought to be raised in the execution application was raised before the arbitrator and rejected. Therefore, the finding of the arbitrator ought to have been

challenged on merits by filing an application for setting aside the award. Not having done so this issue cannot be decided at the execution stage and the power of the executing Court to go behind a decree is limited and restricted to only cases of nullity. No question of fact or law can be raised at the execution stage.

19. For the said reasons so also as no fraud or corruption is envisaged or the Award is not so unreasonable to shock the conscience of the Court, the objections of the judgment-debtor cannot be sustained and are rejected.

20. This, therefore, entitles the decree-holder to an order in terms of prayers (a), (c) (d) and (h) of Column 10 of the Tabular Statement. For such purpose Mr. Deepnath Roy Choudhury, Advocate, Bar Library Club, 1st Floor, is appointed Receiver at an initial remuneration of 300 Gms. to take possession of the assets mentioned in prayer (a) of Column 10 of the Tabular Statement. The Receiver will submit his report on the next day of hearing. Matter to appear in the list 4 weeks hence.