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Delhi High Court

Case No: Ex. P. No. 275 of 2007

Naval Gent Maritime Limited	APPELLANT
Vs	
Shivnath Rai Harnarain (I) Ltd.	RESPONDENT

Date of Decision: Sept. 17, 2009

Acts Referred:

- Arbitration Act, 1940 - Section 17
- Arbitration and Conciliation Act, 1996 - Section 34, 44, 46, 47, 48
- Civil Procedure Code, 1908 (CPC) - Section 44A
- Registration Act, 1908 - Section 17(1), 17(2)

Citation: (2009) 174 DLT 391 : (2010) 7 RCR(Civil) 1623

Hon'ble Judges: S.N. Dhingra, J

Bench: Single Bench

Advocate: Anuradha Dutt Ekta Kapil Anish Kapur and Kuber Dewan, for the Appellant; Chetan Sharam Anshuj Dhingra and Anubhav Mehrota, for the Respondent

Judgement

Shiv Narayan Dhingra, J.
The Execution Petitioner/Decree Holder filed this petition/application for enforcement of foreign award dated 22.1.2001 under Part II Chapter I of the Arbitration & Conciliation Act, 1996. Along with the petition, the petitioner has filed a certified copy of the award, a certified true copy of the Charter Party Agreement containing arbitration clause and a certified copy of the notice issued to the respondent at the behest of Counsel for the Petitioner seeking remittance of the amount in terms of the award and an affidavit of the Solicitor of the petitioner to the fact that no appeal has been preferred against the award in the country of its making i.e. England and the limitation for filing appeal against the award expired on 19th February, 2001. The Judgment Debtor/respondent put appearance in the Court on 5th November, 2007 when the matter was taken up by the Court. The respondent sought time to file response to the Execution Petition of the petitioner

however, despite repeated opportunities no application u/s 48 of the Arbitration & Conciliation Act, 1996 was filed nor the response was filed to the Execution Petition. The matter was ultimately fixed for arguments on enforceability of the award. On 3rd July, 2009 none appeared for the Judgment Debtor, the Judgment Debtor was proceeded ex parte. Thereafter, Judgment Debtor on 7th July, 2009 was permitted to address arguments on the enforceability of the award.

2. The Counsel for the petitioner submitted that the petitioner had complied with all conditions as laid down u/s 47 of the Arbitration & Conciliation Act, 1996 to show that the award was enforceable in India. The petitioner filed duly authenticated copy of the original award as required by the law of this Court. The petitioner also placed on record duly certified copy of the arbitration agreement between the parties. The award was in English language so, no translation was required to be furnished and it was pleaded that the award should be held enforceable.

3. The learned Counsel for the Judgment Debtor on the other hand argued that the award was not an enforceable award on the following grounds:

1. The award had not yet become binding between the parties in view of Section 66 of Arbitration Act, 1996. An award made by Tribunal in England pursuant to an arbitration agreement could only be enforced by leave of Court in England. It was argued that unless leave of the Court in England was sought the award would not be a binding award. Reliance was placed also on Section 48(1)(e) of the Arbitration and Conciliation Act, 1996 (India) which reads as under:

48. Conditions for enforcement of foreign awards--

(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that --

x x x x x x x x

(e)The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

It is argued that the issue whether the foreign award, sought to be enforced in India u/s 48 has become "binding", has to be determined in accordance with the laws of the country where it was made. Therefore, an Indian Court u/s 48 may refuse to enforce a foreign award if it has not yet become binding. Reference was made to the commentaries of the Arbitration Act to press this point.

2. The second argument advanced by the learned Counsel for the Judgment Debtor is that the award was contrary to public policy of India and was not enforceable. He submitted that the learned Arbitrator had acknowledged in para 25 of the award that the

owners did not have a lien on the cargo at the material times but they threatened the respondent that unless the respondent did not agree to addendum 3 they would exercise a lien over the cargo and/or divert the vessel en route to the first discharge port and then delay entry to that port. This threat was a deliberate and calculated breach of contract. It was stated that this threat amounted to duress and the contract executed under duress was null and void. The learned Arbitrator though observed that there was duress exercised by the owners but still awarded amount in favour of the owner and did not consider addendum 3 as null and void therefore the award was contrary to public policy.

3. The third issue raised by the JD was that the award was not stamped as per the Indian Stamp Act, and therefore was not enforceable. To press this issued the JD relied on Gujrals Co. Vs. M.A. Morris, .

4. All the above contentions of the Judgment Debtor have been refuted by the Decree Holder/petitioner and it was submitted that the issues raised by the Judgment Debtor were not at all issues and the law on these issues was well settled.

5. Part II of the Arbitration & Conciliation Act, 1996 deals with enforcement of certain awards. Chapter I deals with the New York Convention Awards and Section 44 defines "foreign award" as under:

44. Definition ■ In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationship, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960-■

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette declare to be territories to which the said Convention applies.

6. It is apparent that "foreign award" within the meaning of this Chapter is an award of the Arbitrator which adjudicates the disputes of the nature as given in Section between the parties on the basis of a written agreement. When an award is given between the parties outside India in a country of New York Convention, the validity of award can be challenged in that country in accordance with law of that country. If the award is challenged in that country and is set aside, the award cannot be set out in India as a "foreign award". However, if it is not challenged in that country of origin and it is allowed to stand and becomes final in the country of its origin, the award can be set out in India as a "foreign award". Once it is set out in India as a "foreign award" its enforceability in India has to be ascertained as per Indian Law. Section 46 of Arbitration & Conciliation Act, 1996 provides that a foreign award would be enforceable and shall be treated as binding for all purposes between the parties, if it is enforceable in accordance with Chapter II.

Section 47 obliges a party applying for enforcement of a foreign award to produce before the Court following documents:

(a) The original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

(b) The original agreement for arbitration or a duly certified copy thereof; and

(c) Such evidence as may be necessary to prove that the award is a foreign award.

7. In case these three documents are produced in the Court and the Court is satisfied about the award being a foreign award accompanied with these documents as evidence, the award is to be held enforceable unless the Court refuses the enforcement of award in terms of Section 48 of the Arbitration & Conciliation Act, 1996. u/s 48 the Court can refuse to enforce a foreign award only at the request of party against whom the award made is invoked, only if that party furnishes to the Court proofs as envisaged under Clauses 48(1)(a) to (e). Enforcement of award can also be refused if the Court finds that the subject matter of the difference was incapable of settlement by arbitration under the law of India or the enforcement of award would be contrary to public policy. Section 48(3) reads as under:

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Clause (e) of sub-section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

8. Section 48(1)(e) read with Section 48(3) of the Arbitration & Conciliation Act, 1996 makes it clear that the competent authority in this case is the authority of the country of origin, where the award has been made and the party against whom the award has been made was in the process of taking steps before the Courts of that country in challenging the award. The competent authority is not the authority in India.

9. Had the JD taken steps to challenge the award in England and any proceedings were pending between the petitioner and the respondent/Judgment Debtor in England, it was reasonable for the Judgment Debtor to argue that the award has not yet become final and binding between the parties. But once Judgment Debtor had not challenged the award, the plea taken by the Judgment Debtor that the award has not become binding is baseless. Reliance of Judgment Debtor on the Rules of Supreme Court of England regarding enforcement of award does not carry weight. Section 66 of the Arbitration Act, 1996 of England is in respect of enforcement of award made in England by the Courts of England. JD"s contention that this Court u/s 48 should refuse the enforcement of award since it has not yet become binding in England does not stand the scrutiny of law. Section 66 of Arbitration Act of England is in the nature of Section 17 of Arbitration Act, 1940 (old Indian Arbitration Act) where the Court makes a domestic award as a Rule of Law. u/s 66,

the English Court has to hold if the award was enforceable and binding after ensuring that the award satisfies certain conditions. Section 66 of Arbitration Act of England has therefore no application in India for determining in India whether a foreign award (even if given in England) was binding or not. The Courts in India have to consider the enforceability of the foreign award in accordance with Part II of the Arbitration & Conciliation Act, 1996 and have not to see if the award satisfies Section 66 of English Arbitration Act, 1996.

10. Madras High Court in Compania Naviera "SODNOC" Vs. Bharat Refineries Ltd. and Mr. Christopher J.W. Moss, in a similar situation, rejected the applicability of Section 66 of the England Arbitration Act, while considering the enforcement of foreign award in India and observed that the leave u/s 66 of England Arbitration Act is to be obtained only when the award is to be enforced in England. I, therefore find no force in the plea of the petitioner that the award has not become binding so that it can be considered for enforceability in India.

11. The argument of the Judgment Debtor regarding the award being contrary to public policy is based on the observation of the Arbitrator in the award itself. The Arbitrator has elaborated as to what was the nature of duress and how this duress was of no consequence. It was pleaded before the Arbitrator that the Owners. conduct in threatening and alleging a lien over the cargo and threat to divert the vessel en route to the first discharge port, and then delaying the entry to that port, was a deliberate and calculated breach of contract and that the pressure consequently exerted upon them by the Owners was unjustified, unwarranted and illegal with the result that Addendum 3 had clearly been agreed by the Charterers under duress whose buyers were demanding prompt delivery of the cargo in West Africa. However, in view of the threat given, it had no option but to sign Addendum 3, Addendum 3 having been obtained under duress was not binding. On the other hand it was submitted by the owners that a contract procured under duress was voidable and was not void abinitio and every threat given by a person would not amount to economic duress and in case the Charterers had entered into the contract of addendum 3 under duress, the Charter would have revoked the contract soon thereafter. The owners also pleaded that they were not aware during the voyage that they had no lien on the cargo at material time. They understood it from their P&I Club that they had a lien and a huge demurrage at the load port had already accrued due to delay. For this reason they had acted under a bona fide belief about the existence of their right of lien and they had threatened to exercise the right of lien. It was also stated that they were under tremendous financial difficulties because of long duration that had been experienced at the load port and it was therefore necessary for them to act in order to compensate some cash flow to fund the voyage. It was stated that this was economic necessity and they had justly demanded to vary the terms of contract. The Counsel for the owner argued that all it had really done was to demand an advance of monies that were bound to fall due to them in any event in the future and thus the threat allegedly perceived by the Charterers was not as great as suggested.

12. The learned Arbitrator after considering the trade tactics and the evidence observed that the pressure exerted by the Owners upon the Charterers though illegitimate must be considered in context. The context was that one of the experienced owners and Charterers were in dispute as to the owners. right to collect or secure the payment of demurrage before the discharge of cargo after a lengthy stay at the load ports. Though the owners were not legally entitled to exercise a right of lien or to deviate in order to recover demurrage but it was suggested by the owners. to the charterers under a bona fide belief that they had such rights and they would exercise such a right. The learned Arbitrator accepted the plea of the owners of being under financial pressure at the time of giving threat of exercising lien and held that it was not unusual or uncommon for the owners to do this. He considered this as a typical of the brinkmanship adopted by experienced parties jostling for position in the course of their commercial activities and opined that the pressure was not so unusual, uncommon or extraordinary as to vitiate the charterers consent or satisfy the legal requirements of economic duress. He observed that even after this addendum 3 signing, the correspondence between the parties continued over a number of weeks and the owners on more than one occasion invited the charterers to provide their comments on the Owners. calculations and forward their calculations and this conduct of the respondent/Judgment Debtor was inconsistent with any suggestion of persistent coercion. He concluded that it was too late to argue that the contract was made under duress and it should not be enforced. The contract at the most was not voidable and the Charterers by their subsequent conduct affirmed the contract and lost any right to avoid the contract (Addendum 3).

13. I find no infirmity in the reasoning given by the learned Arbitrator regarding the issue of duress. The Arbitrator is the judge chosen by parties not only to decide issues of facts but also to decide issues of law. Duress is a mixed issue of law and facts. The Arbitrator has decided this issue after considering the evidence of both the parties and material on record. This Court cannot sit in appeal over the findings of the Arbitrator as to whether there was duress or not and what was the effect of duress and whether the contract has been evaded or not. I consider that decision of the Arbitrator on the issue of duress going against the Judgment Debtor cannot be considered an issue of public policy and the award cannot be held to be non-enforceable u/s 48(2) on the ground of public policy.

14. The third issue raised by the Judgment Debtor is about non stamping of the award. The Judgment Debtor has relied on Punjab & Haryana High Court Judgment however, after this judgment of Punjab & Haryana high Court, the Supreme Court in Harendra H. Mehta and Others Vs. Mukesh H. Mehta and Others, observed as under:

44. A decree or order of a court does not require registration under Clause (b) of Sub-section (1) of Section 17 of the Registration Act. This is the effect of Clause (vi) of Sub-section (2) of Section 17. Earlier under this Clause (vi) before its 1929 even an award did not require registration. However, after omission of the word "an any award" an award creating or declaring right or interest in immovable property of the value of Rs. 100 would require registration. But then that award would be an award under the Arbitration

Act, 1940 and certainly not a foreign award.

45. Let us examine this argument of Mr. Ganesh that a foreign award required registration from another angle. He said that the foreign award has already merged in the foreign judgment on the basis of which Mukesh has brought a suit in the Bombay High Court. A foreign judgment does not require registration as the process of suit having been decreed on that basis will have to be gone through. When a decree is passed by the court, it does not require registration in view of Clause (vi) of Sub-section (2) of Section 17 of the Registration Act. A decree or order of a court affecting the rights mentioned in Sections 17(1)(b) and 17(1)(c) would not require registration. It would, however, require registration where the decree or order on the basis of compromise affects the immovable property other than that which is the subject-matter of the suit or proceeding. Even a decree passed by the foreign court execution of which is sought u/s 44-A of the CPC would not require registration. That being the position, we are of the view that a foreign award under the provisions of the Foreign Awards Act does not require registration under the Registration Act. In any case, in the present case the award creates a right to obtain transfer and closing documents which as regards Indian properties and businesses are yet to be executed by D.M. Harish & Co., Chartered Accountants. Decision of this Court in Tehmi P. Sidhwa case as rightly pointed by Mr. Dholakia, learned Counsel appearing for the respondents would be fully applicable and the argument that the award required registration has to be rejected on this ground as well.

15. In view of above judgment the foreign award would not require registration and can be enforced as a decree. In any case the issue of Stamp Duty cannot stand in the way of deciding whether the award is enforceable or not. Supreme Court in M. Anasuya Devi and Another Vs. M. Manik Reddy and Others, had observed that at the time of deciding objections u/s 34 of the Arbitration & Conciliation Act, 1996, the Court cannot set aside the award for want of stamping and registration. I consider that the Court while deciding enforceability of foreign award under Sections 47 & 48 cannot hold the award non-enforceable on the ground of award being not registered or unstamped.

16. It is settled law that a foreign award can be enforced or executed in the same proceedings as was held by the Supreme Court in M/s. Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd., The present award was passed in England and it became binding between the parties since its validity was not assailed by the Judgment Debtor in England. The Judgment Debtor did not assail the award u/s 48 raising grounds as given in Section 48 of the Act, or produce any evidence in respect of any of the grounds available to the Judgment Debtor to resist the execution of the award. The issues argued by the Judgment Debtor were on the basis of intrinsic material available on record. I find no force in any of the issues raised by the Judgment Debtor. The present award is held executable. The bank guarantee issued by the Judgment Debtor in favour of the petitioner/Decree Holder and being renewed from time to time under the directions of the Court is allowed to be encashed by the Decree Holder. After getting the bank guarantee encashed, if any further amount remains to be paid by the Judgment Debtor, Decree

Holder would be at liberty to take steps for further execution.