
Northern Sales Co. Ltd. Vs Reliable Extraction Industries Pvt. Ltd.

Arbitration Petition No. 77 of 1983

Court: Bombay High Court

Date of Decision: Nov. 19, 1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) " Section 13, 14#Foreign Awards (Recognition and Enforcement) Act, 1961 " Section 5, 6

Citation: AIR 1985 Bom 332 : (1985) ILR (Bom) 1945

Hon'ble Judges: Pendse, J

Bench: Single Bench

Advocate: A.N. Mody, Anup Shah and M. Sen, for the Appellant; D.H. Mehra and N.M. Pandya, for the Respondent

Judgement

1. By this petition filed u/s 5(1) of the Foreign Awards (Recognition and Enforcement) Act, 1961, the petitioner is requesting that the award dated

July 10, 1980 be filed in Court and the judgment to pronounced in accordance with the award. The fact giving rise to the filing of the petition are

not in dispute and are required to be briefly stated to appreciate the relief's sought by the petitioner.

2. The petitioner is a Company incorporated under the laws of Manotoba, Canada, and carries on business as exporters of oilseeds; while the

respondent is a company incorporated in India and carries on business as importer of oilseeds. By contract dated June 23, 1978 the petitioner

agreed to sell to the respondent 1000 Metric tons of No. 1 Canadian Rapeseed 5 percent more or less at Sellers" option. The price was United

States Dollars 285 per metric ton, in bulk, cost, insurance and freight, Bombay Free Out. The contract stipulated that the discharge rate at

Bombay would be minimum of 750 metric tons per weather working day, and for a demurrage rate of Us \$ 40000 per day and for despatch at

half the rate. There were certain special conditions annexed to the contract and Item 10 provided that the terms and conditions not in contradiction

to the other clauses of the agreement would be in accordance with GAFTA Contract No. 31. The Grain and Feed Trade Association Limited is an

association in the United Kingdom and publishes standard printed contract forms for sale and purchase of various commodities which are freely

available even to non-members of the GAFTA. GAFTA Contract Form No. 31 contains an arbitration clause and, inter alia, provides that any

dispute arising out of or under the contract shall be settled by arbitration in accordance with the Arbitration Rules No. 125 of the Grain and Feed

Trade Association Limited. In accordance with the contract, the petitioner shipped 950 metric tons rapeseed in bulk per M.V. MICHALIS for the

respondent along with rapeseed on account of their importers at Bombay under a charter party. The vessel reached Bombay on December 11,

1978 and the respondent, as well as the other importers failed to discharge the rapeseed at the contracted rate and the total demurrage of US \$ 2,

63,166. 68 was determined to be payable by the respondent as its proportionate share for the quantity of 950 metric tons. The petitioner

submitted a debit note dated March 29, 1979 to the respondent, but failed to receive any amount. Large correspondence transpired between the

parties, but the respondent did not pay the amount due.

3. As a dispute arose with regard to the amount payable by the respondent in respect of demurrage claim, the petitioner resorted to GAFTA

Arbitration in accordance with the terms of the contract. The petitioner appointed its own arbitrator, but the respondent failed and neglected to do

so, and thereupon in accordance with the GAFTA Rules, an arbitrator was appointed on behalf of the respondent. The arbitrators gave their

award No. B 6408 dated July 10, 1980 in London and by the said award the respondent was directed to pay to the petitioner a sum of US \$ 19,

028.40 with interest at 13 per cent per annum from March 29, 1979 till the date of the award. The award also directed payment of costs and

expenses. The respondent declined to pay the amount due under the award and thereupon the petitioner has filed the present proceedings claiming

Rs. 2,46,940.85 as equivalent amount in India Rupees which is due under the award from the respondent.

4. In answer to the petition, Shri Bihari V. Yagnik, Secretary of the respondent, has filed return sworn on August 30, 1984 and though several

contentions are raised in the affidavit, Shir Mehta, learned counsel appearing on behalf of the respondent, has restricted his submissions at the

hearing only to one contentions. It is claimed that in pursuance of the award passed under the GAFTA Rules, the petitioner approached the English

Court for a judgment in terms of the award and accordingly the English Court passed the judgment on June 10, 1981 and therefore the award

merged in the judgment and it is not open for the petitioner to seek relief sought in the present petition. Shri Mody, learned counsel appearing on

behalf of the petitioner, disputed that the judgement was secured from the English Court and submitted that the order passed by the English Court

was merely an enforcement order and not a judgment. The learned counsel also urged that even assuming that the English Court has passed

judgment in terms of the award, still it cannot be claimed in this Court that the award has merged in the judgment and therefore the present

proceedings are not maintainable.

5. In view of these rival contentions two points require determination and those are ;

(1) Whether the petitioner obtained a judgment from the English Court on the award passed by the arbitrators ; and

(2) Whether as a result of the judgment the award stands merged in the judgment?

6. Shri Mody submitted that the order dated June 10, 1981 passed by the Master In Chambers of the Queen's Bench Division, and the certified

copy of which was produced on record, is merely an enforcement order and not a judgment. The order is passed upon reading the affidavit of

Linda Ann Wilson and reads as under ;

IT IS ORDERED that the plaintiffs be at liberty to enforce the Award of Mr. G.C. Meace Mr. A.G. Noble and Mr. A.P. Beaton dated the 10th

of July 1980 in the same manner as a Judgment or Order to the same effect pursuant to Section 26 of the Arbitration, Act 1950.

IT IS FURTHER ORDERED that the abovenamed defendants Reliable Extraction Industries Pvt. Limited be at liberty to apply to set aside this

Order within 37 days after service upon them of this Order in India pursuant to Rule 10(6) of Order 73 R.S.O. and the Award shall not be

enforced until after the expiration of that period or any extension of that period granted by the Court or if any application be made to set aside the

Order until such application has been disposed of".

A Perusal of the order makes it clear that it is passed in exercise of powers u/s 26 of the Arbitration Act, 1950. Section 26(1) of the English Act

reads as under :

26(1). An award on an arbitration agreement may, be leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment

or order to the same effect, and where leave is so given, judgment may be entered in terms of the award".

Shri Mody submits and in my judgment with considerable merit, that Section 26 prescribes two modes for enforcement of the award. The award

can be enforced in the same manner as the judgment by obtaining leave of the Court, while a separate leave can be obtained and the judgment can

be secured in terms of the award. In the first category though award is not made a judgment of the Court, still leave is granted to enforce it as if it is

a judgment. In other words, what is prescribed is only a mode of enforcement. In the second category, the judgment is entered in terms of the

award and thereafter the judgment can be enforced. On page 369 of "Russell on Arbitration, Twentieth Edition" the background with which the

provisions of Section 26 of the 1950 Act came to be enacted has been set out and it is pointed out that the consequence is that when the

machinery of Section 26 is invoked fully (and it is possible that a party can invoke only the enforcement provisions without invoking the provisions

for entry of judgment) the applicant has a fully mature judgment in his hands and can no longer sue on the award which will then have necessarily

merged in the judgment *stricto sensu* which will have necessarily been obtained. The form of the order, when the judgment is obtained, would be

that the ""defendant do pay to the plaintiff the amount found due under the award"" in cases where a judgment is passed in terms of the award. It is

obvious that the enforcement order dated June 10, 1981 produced by the respondent , does not set out the amount found due under the award.

Indeed, the order recites that in case the respondent failed to apply for setting aside the order within the stipulated period, then the award can be

enforced. The wording of the order leaves no manner of doubt that it was merely an enforcement order and not a judgment in terms of the award.

The leave was granted by the Master In Chamber merely for enforcement of the award in the same manner as the judgment and cannot be

considered as a judgment in terms of the award. It is, therefore, clear that the submission of Shri Mehta that the enforcement order dated June 10,

1981 is a judgment in terms of the award and therefore the award stands merged in the judgement is incorrect.

7. Even assuming that the claim of the respondent that the order dated June 10, 1981 is a judgment is accepted, still it is not possible to hold that

the award stands merged in the judgment and therefore it is not open for the petitioner to institute the present proceedings. Turning again the Russel

on Arbitration on page 367, the following principles are set out :

Merger of an award judgment : In English law any cause of action, whether a right of action under a contract or in respect of a tort or in respect of

any other cause of action, is merged in and effected by an English civil judgment pronounced thereon"".

This proposition is only another way of stating the well-known rule as to *res judicata* and is of course an illustration of that rule of public policy

which holds that *interest reipublicae at sit finis litium*. Indeed if the proposition were not a sound one there could never be an end to any litigation.

The proposition is indeed so elementary that it is impossible to find high and direct judicial authority for it. It is so ingrained in English law that the

only judicial pronouncements thereon are in cases where a possible exception to the rule is being discussed. For example questions sometimes

arise as to whether and if so to what extent, strangers are bound by a judgment; or whether a judgment creditor need be content with the rate of

interest applicable to a judgment debt when the deed creating the debt stipulated for a higher rate of interest until payment was actually effected.

In Particular English law makes this exception to the generality of the rule, that a foreign judgment is not accorded the power of merging and

effacing the cause of action on which it was given. This is an insular quirk probably peculiar to English law, and is so anomalous that even the most

learned writers sometimes forget it.

But the doctrine of merger of a cause of action in an English judgment has never been doubted and it follows that after judgment, it is no longer

open for a claimant in any jurisdiction governed by English law to sue upon the award. Though indeed, a successful action was brought on an

award after a judgment had been obtained to enforce it in England in the case of *Oppenheim and Co. v. Mahomed Haneef* (1922) 1 AC 482. The

Privy Council felt it necessary to explain that in order to prevent misconception it appeared desirable to add that it was not pleaded or contended

at any stage of the proceedings that the award had merged in the English judgement. Quite plainly it had, and if the parties had raised the point the

Privy Council would have been obliged to so hold. As the parties had not raised the point the Privy Council had to add their rider by way of self

exculpation".

The passage unmistakably establishes that a foreign judgment is not accorded the power of merging and effacing the cause of action on which it

was given under the English law. Therefore, even assuming that the order passed by the Master in Chambers is a judgment, still it being a foreign

judgment, as far as this Court is concerned, it will not have the effect of effacing the cause of action, that is the award secured by the petitioners in

their favour. The same principle is stated on pages 1129 to 1135 of Dicey & Morris in "The Conflict of Laws" 10th Edition.

8. Shri Mody invited my attention to a decision of the Division Bench of this Court *East India Trading Co. Vs. Badat and Co.*, Bombay where an

identical question arose for consideration. A suit was filed on the Original Side of this Court by the plaintiffs, a Company incorporated in the State

of New York, based on an award given by domestic tribunal in New York and on which award a decree was obtained from the Supreme Court

of State of New York. The suit was resisted on two grounds : (1) that the Bombay High Court had no jurisdiction to entertain the suit as no part of

cause of action has arisen in Bombay ; and (2) that as a foreign judgment was passed on the award the only suit that could be filed was the suit on

the foreign judgment and not on the award. The second contention was advanced on the basis that the award no longer survives after a judgment in

terms of the award was passed by the Supreme Court of New York. The learned single Judge dismissed the suit, but in appeal, the Division Bench

reversed the decree by holding that the Bombay High Court had jurisdiction to entertain the suit and the submission that the award merged in the

foreign judgment and therefore claim based on the award was not maintainable was without any substance. The learned Chief Justice Mr. Chagla,

speaking for the Bench observed. :

It was then sought to be argued by Mr. Thakore that it is not competent to the plaintiffs to file this suit on the award, because the award has

become merged in the foreign judgment, and Mr. Thakore urged before us that once a foreign judgment is passed on the award, the only suit that

can be filed is the suit on the foreign judgement and not on the award. Now, it is clear and well established law that it is open to a party who has

obtained a foreign judgement to sue in the alternative on the original cause of action which resulted in his obtaining the foreign judgment. Mr.

Thakore does not dispute that principle of law, but he says that whatever may be the law with regard to a foreign judgment obtained on a contract

or in any other cause of action, that principle does not apply when a party obtains an adjudication from a domestic tribunal and then goes to a

competent Court and obtains a decree or a judgment on the award. Apart from authorities, it is difficult to understand how the two positions can

be distinguished on principle. If it is open to a party suing on a foreign judgment to rely in the alternative on the original cause of action, we should

have thought that it would be equally competent to a party who has obtained a foreign judgment on the award to rely on the original cause of action

which in this case happens to be the award. Therefore, the award is as much a cause of action qua the foreign judgment as a contract or any other

right which the party has litigated and which has resulted in a foreign judgment. Instead of going to Court on the contracts which were entered into

between the parties and obtaining a decree, the parties here first went to the domestic tribunal, obtained the award, and then proceeded to

complete the award and make it enforceable by obtaining a judgment. Therefore, in this case, the cause of action was constituted by the award and

the judgment was obtained because the plaintiffs had the award in their favour. Therefore it would seem to us that on principle there is no reason

why the plaintiffs should be debarred from relying on the award as the original cause of action which resulted in the foreign judgment being

obtained.

Against the decree passed by the Division Bench, the defendants carried an appeal before the Supreme Court, and the judgment of the Supreme

Court is *Badat and Co. Vs. East India Trading Co.*, Majority judgment of (Justice Raghubar Dayal and Justice Mudholkar) set aside the decree

passed by the Division Bench on the ground that (1) the Bombay High Court had no jurisdiction to entertain the suit as no cause of action arose

within its jurisdiction; and (2) the alternative claim based on the award must fail as the award has not become final and was not enforceable. The

minority judgment was delivered by Mr. Justice Subba Rao accepting the conclusions recorded by the Division Bench of this Court. It is interesting

to note that the majority judgment did not set aside the conclusions of the Division Bench that the award does not merge in the foreign judgment

and can be made a cause of action for enforcement in the Bombay Court. The Supreme Court set aside the judgment of this Court by holding that

the award had not become enforceable and therefore the cause of action based on such award was not maintainable. In paragraphs 36 and 37 of

the judgment, of Mr. Justice Mudholkar, who spoke for the majority, the principle set out by the Division Bench of this Court was not reversed

and though the controversy was set out, it was observed that it is not necessary to decide the point. Mr. Justice Subba Rao, who delivered the

minority judgment, specifically considered the question whether the award merged in the judgment of the Supreme Court of New York in

paragraph 6 of the judgment, and came to the conclusion that the award cannot merge in the judgment. Mr. Justice Subba Rao observed after

recording the principles set out in Halsbury's Laws of England and in Smith's Leading Cases that as the contract does not merge in the foreign

judgment, by parity of reasoning, the award on which a foreign judgment is made cannot also merge in the judgment. Shri Mody submits, and in my

judgement very correctly, that the dictum laid down by Chief Justice Chagla in the Division Bench judgment of this Court has not been set aside or

disapproved by the Supreme Court, but indeed accepted as correct by the minority judgment, the majority judgement not considering the question.

In my judgment, the view taken by the Division Bench, with respect, is the only possible view and it must be held that even assuming that the order

dated June 10, 1981 passed by the Master In Chambers is a judgment in terms of the award, still such judgment would not have the effect of

effacing or merger of the award and it is open for the petitioner to institute the present proceedings in this Court on the basis of the award. The

view taken by the Division Bench of this Court is approved and followed in Gopal Singh Hira Singh, Merchants Vs. Punjab National Bank and

Another, O.P. Verma Vs. Lala Gehrilal and Another, Setabganj Sugar Mills Ltd. Vs. Benozir Ahmed and Another, Setabganj Sugar Mills Ltd. V.

Benozir Ahmed. In my judgment, the objection raised on behalf of the respondent to the maintainability of the proceedings is without any merit and

must be turned down. That being the only objection, the petitioner is entitled to the relief.

9. Accordingly, petition succeeds and the award dated July 10, 1980 or an authenticated copy thereof is ordered to be filed in this Court and the

judgment is pronounced in accordance with the award. The respondent is directed to pay to the petitioner an amount of Rs. 2,46,940.85 as set out

in Exhibit "I" to the petition. The respondent is also liable to pay interest at the rate of 11 per cent per annum on the principal amount granted under

the award that is equivalent of India Rupees 2,12,255.78 from the date of the award till realisation. The respondents to pay costs of the petitioner.

10. Petition allowed.