

(2018) 11 DEL CK 0014

Delhi High Court

Case No: EX.P. 271 Of 2014

Drager Medical Gmbh

APPELLANT

Vs

M/S ION BIO MED-I

RESPONDENT

Care Pvt Ltd

Date of Decision: Nov. 1, 2018

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 9, 34, 34(3), 36, 45, 48
- Companies Act, 1956 - Section 433(e)
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 - Article 1

Hon'ble Judges: Prathiba M. Singh, J

Bench: Single Bench

Advocate: Arvind Nayar, Shweta Bharti, J. K. Chaudhary, Swetshikha, Upasana Katyani, Chandra Shekaran, Samrat Nigam, Sandeep Mittal, Vinod Kathpalia, Abhimanyu Walia, Shaurya Kuthiay]

Final Decision: Disposed Off

Judgement

Prathiba M. Singh, J.

E.A. 139/2015

1. The present execution petition has been filed under Section 36 of the Arbitration and Conciliation Act, 1996 (Ã¢â¬Åthe ActÃ¢â¬Å) seeking execution of

ICCÃ¢â¬Ås International Court of Arbitration award dated 29th June, 2012.

2. Drager Medical GmbH, the Decree Holder is a company engaged in the business of manufacture, supply and sale of various medical equipment,

anesthesia equipment etc, which are highly specialised equipment used by the medical profession in treatment of patients. M/s Ion Bio Med-I-Care

Pvt. Ltd. (earlier known as Usha Drager Pvt. Ltd.), the Judgment Debtor, is a company, which was incorporated as a joint venture pursuant to a

Joint Venture agreement dated 9th May, 1987 between Dragerwerk AG and M/s Usha Services Pvt Ltd, both of which had equal equity participation

in the Judgment Debtor. The Judgment Debtor was appointed as the exclusive distributor in India of medical equipment manufactured by the Decree

Holder. A Distributor Agreement to this effect dated 22nd February, 1999 was duly entered into between the parties. Supplies were made by

the Decree Holder to the Judgment Debtor from time to time. However, the payments made by the Judgment Debtor company were irregular and

according to the decree holder there were several outstanding payments.

3. Disputes arose between the parties leading to the termination of the Exclusive Distributor Agreement on 18th June, 2003. Several outstanding

payments were not made by the Judgment Debtor. The Decree Holder then invoked arbitration by a letter dated 18th November, 2004 sent to the

International Court of Arbitration requesting for initiation of arbitration proceedings. The Arbitral Tribunal passed award dated 29th June, 2012 in

favour of the Decree Holder. Subsequent to the award, the Decree Holder filed a Section 9 petition seeking an injunction in respect of the assets of

the Judgment Debtor. Thereafter, an execution petition was also filed, seeking enforcement of the arbitral award, however, the same was withdrawn.

A petition for winding up was also filed under Section 433 (e) of the Companies Act, 1956. The same is stated to be pending before this Court.

4. On behalf of the Decree Holder Mr. Arvind Nayar, Ld. Senior Counsel, submits that under Section 36 of the Act, once the time for making an

application to set aside the award expires, the award is enforceable as if it was a decree of the Court. In the present case, as per the Decree Holder,

the time for challenging the award, i.e. three months, has expired, hence the present execution petition has been filed seeking the following reliefs.

“a) Pass an order for execution of the award dated 29.06.2012 in favour of the Decree Holder and against the Judgment Debtor directing the

Judgment Debtor to pay the Decree Holder a sum of EUR 4'994'873.81 = INR 40,58,33,570.19 (Conversion taken to be 1 EUR=INR 81.25) along

with interest @18% from 09.10.2012 till the realisation of decretal amount.

b) Issue warrants of attachment attaching the movable and immovable properties of the Judgment Debtor and the same may be sold towards

satisfaction of the Decretal Amount as mentioned hereinabove.

c) Issue warrants of arrest against the Directors and all the persons in charge in day to day affairs of the Company for detention to civil prison in

terms of Order XXI Rule 30 in the event of non payment of the Decretal Amount.

d) Pass any other/further order/s or direction that this Hon'ble Court may deem fit and proper in the interest of justice.”

5. Notice was issued in the execution petition on 12th August, 2014. The Judgment Debtor filed objections under Section 48 of the Act, alleging that

the award was a foreign award, and was not enforceable. In the said application, the Judgement Debtor has set out reasons as to why the award

ought not to be enforced and as to why the Execution petition is also not maintainable. On 4th September, 2018, when the matter was heard by this

Court, the counsel for the Decree Holder raised an objection that the application under Section 48 of the Act is not maintainable, as the award in the

present case is a domestic award and hence the Judgment Debtor ought to have challenged the said award under Section 34. The Judgment Debtor

having not challenged the award under Section 34 of the Act, cannot maintain objections against the award under Section 48 of the Act. A distinction

is sought to be drawn between foreign awards and international awards. According to learned Senior Counsel, Part-I of the Act would be applicable in

respect of international awards, if the arbitration takes place within India. Thus, the objections ought to have been filed by the Judgment Debtor under

Section 34 of the Act. He relies on the judgment of the Supreme Court in Bharat Aluminium Company v Kaiser Aluminium Technical Services Ltd.

(2012) 9 SCC 552 (hereinafter, BALCO).

6. On the other hand, learned counsel for the Judgment Debtor submits that the award is not an international award to which Part I is applicable and it

is, in fact, a foreign award as per the Decree Holder's admission. In the earlier round of litigation between the parties, the Decree Holder itself

invoked Part II of the Act and reference to arbitration was made under Section 45 of the Act. This round of litigation had travelled right till the

Supreme Court and the parties were referred to arbitration under Section 45. This being the position, it cannot now be argued by the Decree Holder

that Part-I of the Act applies to the present facts. The award, being the outcome of the reference under Section 45, the Decree Holder cannot argue

that the award has to be challenged under Section 34.

7. The arbitration agreement in the present case reads as under:

“26. Applicable Law

This Agreement shall be governed, construed and interpreted in accordance with the German laws. However, the cogent prescriptions concerning

(German) domestic commercial agents shall not apply. The United Nations Convention on Contracts for the International Sale of Goods shall

not apply.

27. Arbitration

All disputes arising in connection with this present Agreement shall be exclusively and finally settled under the Rules of Conciliation and Arbitration of

the International Chamber of Commerce by three Arbitrators appointed in accordance with the said Rules.

The award shall be in writing and shall contain the reasons for the decision.

The language of the arbitration proceeding shall be English.

The arbitration proceeding shall be held in New Delhi, India.

8. It is clear from a reading of the above clauses that the contract was to be governed by the Rules of Conciliation and Arbitration of the ICC. The

venue of the proceedings was New Delhi. The agreement was governed by German Law i.e. German Law was the substantive law of the contract

(page

43 of pleadings). However, during the course of arbitral proceedings, parties agreed that Indian law shall be the applicable law i.e., the substantive law

of the contract (Paras 131 and 132 of the Award). There is no dispute to this position.

9. In the background of this clause, it is clear that as per section 2(2), whenever the place of arbitration is in India, Part-I of the Act applies. This is

also the ratio of the Supreme Court in *Bhatia International v Bulk Trading SA* (2002) 4 SCC 105 (hereinafter, *“Bhatia International”*). The

relevant paras of the judgment are extracted herein below:

“23. That the Legislature did not intend to exclude the applicability of Part I to arbitrations, which take place outside India, is further clear from

certain other provisions of the said Act. Sub-section (7) of Section 2 reads as follows:

(7) An arbitral award made under this Part shall be considered as a domestic award.

As is set out hereinabove the said Act applies to (a) arbitrations held in India between Indians (b) international commercial arbitrations. As set out

hereinabove international commercial arbitrations may take place in India or outside India. Outside India an international commercial arbitration may

be held in a convention country or in a non-convention country. The said Act however only classifies awards as “domestic awards” or “foreign

awards”. Mr. Sen admits that provisions of Part II makes it clear that “foreign awards” are only those where the arbitration takes place in a

convention country. Awards in arbitration proceedings which take place in a non-convention country are not considered to be “foreign awards” under

the said Act. They would thus not be covered by Part II. An award passed in an arbitration which takes place in India would be a “domestic award”.

There would thus be no need to define an award as a “domestic award” unless the intention was to cover awards which would otherwise not be

covered by this definition. Strictly speaking an award passed in an arbitration which takes place in a non-convention country would not be a "domestic

award". Thus the necessity is to define a "domestic award" as including all awards made under Part I. The definition indicates that an award made in

an international commercial arbitration held in a non-convention country is also considered to be a "domestic award".

32. To conclude we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is

held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of

Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or

implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is

contrary to or excluded by that law or rules will not apply.

10. Learned Senior counsel for the Decree Holder has rightly relied upon the judgment in BALCO (supra) to bring out the distinction between an

international award and foreign award. The relevant extract of the judgment is set out hereinbelow:

"88. In our opinion, the aforesaid provision does not, in any manner, relax the territorial principle adopted by Arbitration Act, 1996. It certainly does

not introduce the concept of a delocalized arbitration into the Arbitration Act, 1996. It must be remembered that Part I of the Arbitration Act, 1996

applies not only to purely domestic arbitrations, i.e., where none of the parties are in any way "foreign" but also to "international commercial

arbitrations" covered within Section 2(1)(f) held in India. The term "domestic award" can be used in two senses: one to distinguish it from

"international award", and the other to distinguish it from a "foreign award". It must also be remembered that "foreign award" may well

be a domestic award in the country in which it is rendered. As the whole of the Arbitration Act, 1996 is designed to give different treatments to the

awards made in India and those made outside India, the distinction is necessarily to be made between the terms “domestic awards” and

“foreign awards”. The Scheme of the Arbitration Act, 1996 provides that Part I shall apply to both “international arbitrations” which take

place in India as well as “domestic arbitrations” which would normally take place in India. This is clear from a number of provisions contained in

the Arbitration Act, 1996 viz. the Preamble of the said Act; proviso and the explanation to Section 1(2); Sections 2(1)(f); 11(9), 11(12); 28(1)(a) and

28(1)(b). All the aforesaid provisions, which incorporate the term

“international”, deal with pre-award situation. The term “international

award” does not occur in Part I at all. Therefore, it would appear that the term

“domestic award” means an award made in India whether in a

purely domestic context, i.e., domestically rendered award in a domestic arbitration or in the international context, i.e., domestically rendered award in

an international arbitration. Both the types of awards are liable to be challenged under Section 34 and are enforceable under Section 36 of the

Arbitration Act, 1996. Therefore, it seems clear that the object of Section 2(7) is to distinguish the domestic award covered under Part I of the

Arbitration Act, 1996 from the “foreign award” covered under Part II of the aforesaid Act; and not to distinguish the “domestic award” from

an “international award” rendered in India. In other words, the provision highlights, if anything, a clear distinction between Part I and Part II as

being applicable in completely different fields and with no overlapping provisions.

11. The above paragraph clearly distinguishes between an “international award” and a “foreign award”. In case of any international

commercial arbitration held outside India, an award arising from the same would be a foreign award, if the seat of the arbitration is not in India.

However, an award passed in an international commercial arbitration held within India, would be construed as a domestic award for the purposes of

the Act. This is clear, not only from the para from BALCO (supra) set out above, but also Article 1 of the Convention on the Recognition and

Enforcement of Foreign Arbitral Awards, 1958, also known as the New York Convention. The said Article reads as under:

“Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the

recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply

to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term “arbitral awards” shall include not only awards made by arbitrators appointed for each case but also those made by permanent

arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity

declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may

also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as

commercial under the national law of the State making such declaration.

12. A perusal of the above provisions shows that if an award is made in a state other than the state where it is sought to be recognised, only such an

award becomes a “foreign award,” to which the New York Convention would be applicable. The provision also makes it clear that the

Convention would not apply to those awards which are considered as domestic awards in the State where their recognition is sought.

13. In India, both Bhatia International (supra) and BALCO (supra) are clear to the effect that where an international commercial arbitration is held

within India, Part-I of the Act would apply. This is also clear from a plainreading of the Act. There is no conflict as to this principle irrespective of

whether Bhatia International (supra) applies or BALCO (supra) is applied. Both these judgments are unanimous to the effect that if the arbitration

takes place in India, the award is a domestic award, even if the substantive law of the contract is foreign law.

14. In the present case, the substantive law of the contract is Indian law. The contract stipulates that the arbitral proceedings shall be held in New

Delhi, India. Thus, the award under challenge in the present case is a domestic award, for all intent and purposes. However, the matter does not end

here. The clause does not specify as to what is the seat of the arbitration agreement. Thus, it needs to be presumed that New Delhi is the agreed seat

of the arbitration.

15. The only remaining issue, as has been urged by the Judgment Debtor is that in a suit filed by it seeking various reliefs against the Decree Holder,

an application seeking reference to arbitration in the present case was filed by the Decree Holder under Section 45 of the Act. The Judgment Debtor

relies upon the said application filed by the Decree Holder, at the time when the reference to arbitration was sought to be made i.e. I.A. No.

8159/2005 in CS OS 1217/2005. In the said application, the Decree Holder had sought reference to arbitration by a tribunal, which was to be appointed

by the ICA of the ICC. Para 3 of the I.A. 8159/2005, clearly records the fact that the Tribunal was fully constituted by the ICC with three Arbitrators,

comprising the following:

1) Mr. Jean Marc Joerin

2) Mr. Justice M. J. Rao (Retd.)

3) Mr. Justice U P Singh (Retd.)

The prayer in the said application was based on the arbitration clause in the Distribution Agreement, and the relief sought was as under.

“(a) Stay the present Suit bearing no.1217 of 2005 titled as M/s. Usha Drager Pvt. Limited and Ors. vs. Dragerwerk AG Ors.;

(b) refer the Plaintiff No.1 to arbitration as agreed in the Distributor Agreement dated 22.02.1999 and without prejudice to the ongoing arbitration

proceedings already commenced and the terms of reference already approved by the International Court of Arbitration of the International Chamber

of Commerce under the Arbitral Tribunal comprising of Mr. Jean Mare Joerin, Chairman, Hon'ble Justice M J Rao (retd.) and Hon'ble

Justice U P Singh (retd.) as co-arbitrators as per Clause 27 of the Distributor Agreement dated 22.02.1999;

(c) Costs;

16. The above application came to be decided by a learned Single Judge of this Court. Vide order dated 17th January, 2006, while referring to Sections

44 and 45 of the Act, and relying on the judgment of the Supreme Court in Shin-Etsu Chemical Co. Ltd. v M/s Aksh Optifibre Ltd. and Anr. (2005) 7

SCC 234, referred the parties to arbitration under Section 45 of the Act. This judgment was rendered after the judgment of the Supreme Court in

Bhatia International (supra). It appears, in the said judgment, the arguments were focussed on the question of whether some of the disputes raised

were arbitrable and whether there was a valid arbitration agreement. It further appears that it was not brought to the notice of the Court that the

arbitral proceedings were to be held in India and hence in the absence of any contrary intention between the parties, Part I would apply. In any event,

at the time the said judgment was passed, the arbitral tribunal was in the process of being constituted. Thus, the learned Single Judge had, after

adjudicating the arbitrability of the disputes, observed as under:

“15. Accordingly, this application is allowed and the parties are referred to arbitration. The disputes sought to be raised in the present suit are,

therefore, to be settled by the Arbitral Tribunal. This application and the suit stand disposed of.

Dasti.

17. Vide judgment dated 17th January, 2006, the learned Single Judge simply declared that the dispute ought to be settled by the arbitral tribunal and,

the parties were referred to the arbitration. The invocation of the arbitration had already taken place by then. This order was confirmed by the

Division Bench and was also not interfered with by the Supreme Court.

18. The submission of the Judgment Debtor is that the Decree Holder itself having invoked Section 45 at that stage, had thus admitted that the

proceedings under challenge would be governed by Part-II and not Part-I. What would be the effect of such an admission, is the question. Can

parties, by their conduct, agree to treat a domestic award as a foreign award or vice versa? Would the Court be bound by the conduct of the parties in

such a situation, is the question? The answer would be a categorical

“No”. The question whether an award is a domestic award or a foreign

award has to be decided as per the provisions of the Act and settled judicial precedents.

19. The clear legal position, on the date when the reference was made, was governed by the decision in Bhatia International (supra). Since the

arbitration was held in India, Part-I applied, and hence the award is a domestic award.

The answer to this legal issue has to be decided not on the

basis of a misunderstanding by any party but the stipulations contained in the arbitration clause. It is, thus, held that the award in the present case is a

domestic award and the Judgment Debtor ought to have challenged the same under Section 34 of the Act.

20. The next question is as to what would be the consequence of the Judgment Debtor not raising a challenge to the award under Section 34 within

the prescribed limitation period. Under Section 34(3) of the Act, a period of 3 months plus a further period of 30 days (if the Court is satisfied that the

applicant was prevented by a sufficient cause from applying within the stipulated period of 3 months), is provided for raising a challenge to the arbitral

award. Admittedly, the award was passed on 29th June, 2012. The Judgment Debtor had notice of the said award and in fact, the Decree Holder had

filed an application under Section 9 of the Act seeking interim reliefs, being OMP 777/2012. In the said OMP the Judgment Debtor had accepted

notice, as is evident from order dated 27th August, 2012. The Judgment Debtor was directed to file an affidavit giving details of its movable and

immovable assets, bank statements etc, which it did on 16th October, 2012. The Decree Holder had filed an execution petition, which it withdrew.

However, no notice of the said execution petition been issued to the Judgment Debtor.

21. Thus, even as of August, 2012, the Judgment Debtor had notice of the award. However, it chose not to take any steps to challenge the same. This

conduct of the Judgment Debtor is sought to be justified by arguing that the Judgment Debtor presumed the award to be a foreign award, of which

enforcement was to be sought by the Decree Holder, by filing an application under Section 48 of the Act. This was clearly a mistake by the Judgment

Debtor. However, it was based on the Decree Holder's conduct of having filed an application under Section 45 and invoking Section 45 of the Act

at the time of seeking reference. It is the settled position that an act of Court cannot cause harm to any party. Further, the Decree Holder cannot be

allowed to take advantage of its own wrong. The maxim *actus curiae neminem gravabit* would be of application here.

22. Should the Judgment Debtor, under such circumstances, be shown any leniency in respect of the challenge to the award, as the award has not yet

been tested on the available grounds of challenge, either under Section 34 or Section 48 or should the award be enforced straightaway? This is the

question that has to be answered, i.e., as to whether such a mistake in law can be condoned by the Court.

23. In *Roger Shashoua & Others v. Mukesh Sharma & Others* (2017) 14 SCC 722, the Supreme Court has clearly held that even if a party has

wrongly approached the Court in India and accepted the applicability of Part-I of the Act, the same would not confer jurisdiction on Indian Courts.

¶64. The other ground of attack is that the Appellants had themselves approached the courts in India and, therefore, by their own conduct

applicability of Part I has been accepted by the Appellants and the right to raise the issue of jurisdiction has been waived. ¶

66. In Kanwar Singh Saini (supra), this Court has laid down that conferment of jurisdiction is a legislative function and it can neither be conferred with

the consent of the parties nor by a superior court, and if the court passes an order/or a decree having no jurisdiction over the matter, it would amount

to a nullity as the matter goes to the root of the cause. For the said purpose the two-Judge Bench has placed reliance upon United Commercial Bank

Ltd. (supra), State of Gujarat v. Rajesh Kumar Chimanlal Barot Kesar Singh v. Sadhu, Kondiba Dagadu Kadam v. Savitribai Sopan Gujar and

Collector of Central Excise, Kanpur v. Flock (India) Pvt. Ltd.

67. In Zuari Cement Ltd. (supra), the Court ruled that though the petitioner and the Corporation therein have subjected themselves to the ESI Court,

the same could not confer jurisdiction upon the ESI Court to determine the question of exemption from the operation of the Act, for by consent, the

parties cannot agree to vest jurisdiction in a court to try the dispute which the court does not possess.

68. In view of the aforesaid, there cannot be any trace of doubt that any filing of an application by the appellant in the courts in India can clothe such

courts with jurisdiction unless the law vests the same in them.Ã¢â¬â€

24. The situation in the present case is the reverse, i.e., the Decree holder had admittedly invoked Section 45, under the assumption that the award

rendered would be a foreign award. However, the same is clearly a domestic award, as per Bhatia International (supra), as the proceedings were held

in India and there was no implied or express exclusion of Part-I. Applying the ratio of Roger Shashoua (supra), such conduct of a party cannot, by

itself, convert the award into a foreign award.

25. In the application under Section 48 filed by the Judgment Debtor, various objections have been raised as to why the award ought not to be

enforced in India. The manner in which the application is drafted, is under the presumption that the award is a foreign award. The Judgment Debtor

clearly had no opportunity to raise the challenge to the award in any forum, under this confusion as to whether the award in this case is a domestic

award or a foreign award. It would be, in any event, contrary to public policy not to permit challenge to the award. The narration of events set out

above and the position in law, leaves no doubt in the Court's mind that the Judgment Debtor deserves one opportunity to state its case challenging

the award. Considering that the Court, which referred the matter to the arbitration, as also the Decree Holder, proceeded under the assumption that

the award in this case would be governed by Part-II, there can be no doubt that both parties proceeded under the presumption that Part-II would

apply. Thus, there was a bona fide dispute on this issue.

26. The Judgment Debtor has raised various grounds in the application under Section 48. Since the award has been held above to be a domestic

award, the said application is not maintainable.

27. The mechanisms for enforcement, and for challenging foreign awards and domestic awards are very different. If the award is a foreign award,

the enforcement of the same is sought in India by the person relying upon the award and seeking reliefs, under Section 48 read with Section 49. On

the other hand, in the case of a domestic award, the enforcement of the same is as a decree if there is no challenge within the prescribed period. A

person who wishes to challenge a domestic award, has to approach the Court under Section 34. In the case of a foreign award, the person who seeks

to challenge the same in India, can do so, when the same is sought to be enforced in India. Thus, the Judgment Debtor, under the presumption that

since the reference was made under Section 45, the award was in fact a foreign award, waited for the Decree Holder to seek enforcement of the

award. However, what the Decree Holder did in the present case was to treat the award as a domestic award and straightway filed the execution

petition after the limitation period under Section 34 elapsed.

28. Thus, though prior to the passing of the award, both the parties proceeded under the presumption that the proceedings are governed by Part-II, in

the execution petition, the Decree Holder has taken a stand that it is a domestic award. Since there was an impossibility for the Judgment Debtor to

challenge the award, if it was a foreign award, and since it has been held today by this Court, that the award is a domestic award, the limitation to

challenge the award, would begin from now.

29. In conclusion it is held:

i. That there is no implied or express exclusion of Part I of the Act;

ii. That the award dated 29th June 2012 passed by the International Court of Arbitration of the ICC, is a "domestic award", as the proceedings

were held in Delhi and the law governing the arbitration agreement was not specifically mentioned. The seat of arbitration would thus be Delhi.

iii. That the Decree Holder itself had earlier taken the stand that the disputes are governed by Part II of the Act and the reference had taken place

under Section 45 of the Act "thus the understanding or belief of the Judgement Debtor that the same is a "foreign award" was a bonafide

error of law;

iv. The Judgement Debtor having not had an opportunity to challenge the award under Section 34 of the Act, as it was under the bonafide belief that

the same is a "foreign award", deserves to be given an opportunity to avail of its legal remedies, upon this court declaring the award to be

a "domestic award";

30. Accordingly, declaring the award in the present case to be a domestic award, the application under Section 48, i.e. E.A. No.139/ 2015 is disposed

of in the above terms. The Judgment Debtor is permitted to avail its remedies, in accordance with law.

EX.P. 271/2014

31.. List the execution petition for further proceedings on 4th Feb 2019.