

(1994) 12 DEL CK 0018

In the Delhi High Court

Case No : I.A. No. 10455 of 1944 in OMP 144 of 1994

Dortener Maschine Fabricks

APPELLANT

Vs

Sand Plast India Limited and others

RESPONDENT

Date of Decision : 20-12-1994

Acts Referred:

Citation : (1994) 12 DEL CK 0018

Hon'ble Judges : R.C. Lahoti, J

Bench : Single Bench

Advocate : Shri R.K.P. Shankar Das, M/s. P.N. Sewak, Mr. M.G. Ramchandran, D.D. Singh, Sameer Oberoi and Ms. Sita Khosla, for the Appellant; Mr. A.M. Singhvi, Senior Advocate, Mr. R.N. Karanjwala and Mr. Bhaskar Pardhan, for the Respondent

Judgement

Mr. R. C. Lahoti, J.—The petitioner a German-company has filed the main petition registered as OMP under Sections 31, 32 and 33 of the Arbitration Act, 1940, seeking a declaration of invalidity of the award dated 18th February, 1994, a declaration that the said award shall not be enforceable unless and until it was made a rule of the court in accordance with the provisions of the Arbitration Act, 1940, and a restraint order against the respondent-Indian Company from executing the award or giving effect to it before a court in Germany. The main petition is accompanied by an application u/s 41(b) of the Act seeking an ad interim injunction in identical terms.

2. The parties had entered into an agreement dated February 6, 1990 for the transfer of the technical know-how and licencing arrangement for MDP 600 Dorstener Presses. Disputes and differences having arisen between the parties, they were referred to Indo-German Chamber of Commerce for arbitration. The two Arbitrators, who were nominees of the two parties made an award on February 18, 1994 whereby the claims of the respondent has been allowed and counter-claim of the petitioner who have rejected. On March 1, 1994 the petitioner was served with a notice from the Arbitrators informing of the making

of the award. On April 11, 1994 the petitioner was served with a copy of the award.

3. The respondent has initiated proceedings for enforcement of the award in Germany. The grievance of the petitioner is that the award is invalid and in any case so long as it has not been made rule of the court under the Arbitration Act, 1940, it cannot be enforced.

4. The petition Along with application for interim relief have been filed on December 5, 1994.

5. The learned Counsel for the petitioner has placed implicit reliance on a decision of the Supreme Court in Oil and Natural Gas Commission Vs. Western Company of North America, , submitting that this court ought to issue the ad interim injunction prayed for by the petitioner failing which the petitioner is sure to suffer an irreparable injury. It has been held :

"While as per the contract, parties are governed by the Indian Arbitration Act and the Indian Courts have the exclusive jurisdiction to affirm or set aside the award under the said Act, the Western Company in seeking to violate the very arbitration clause on the basis of which the award has been obtained by seeking confirmation of the award in the New York Court under the American Law. It will amount to an improper use of the forum in American in violation of the stipulation to be governed by the Indian Law which by necessary implication means a stipulation to exclude the USA Court to seek an affirmation and to seek it only under the Indian Arbitration Act from an Indian Court. If the restraint order is not granted, serious prejudice would be occasioned and a party violating the very arbitration clause on the basis of which the award has come into existence will have secured an order enforcing the order from a foreign court in violation of that very clause. Till an award is transformed into a judgment and decree u/s 17 of the Arbitration Act, it is altogether lifeless from the point of view of its enforceability. Life is infused into the award in the sense of its becoming enforceable only after it is made a rule of the court upon the judgment and decree in terms of the award being passed. The American Court would have Therefore enforced an award which is a lifeless award in the country of its origin, and under the law of the country of its origin which law governs the award by choice and consent."

6. The learned counsel for the respondent has distinguished the decision of the Supreme Court in O.N.G.C. case (supra) by submitting that the law laid down by the Supreme Court has to be read in the light of the New York convention, that the award in ONGC case was a domestic award which is not the case in the case at hand. In addition it is submitted that the petitioner is guilty of delay and lapses which would disentitle the petitioner to the discretionary relief of interim injunction. It is also submitted that the ONGC case was an unusual case of not ordinary circumstances and the law laid down therein has to be read in the peculiar facts of the case discernible from the judgment of their Lordships. To my

mind there is substance in the contentions raised on behalf of the respondent.

7. ONGC case (supra) was a case where their Lordships had formed an opinion that there was a possibility of the award being set aside by an Indian Court. The Western Company was going ahead with the proceedings in the American Court which if permitted, would be oppressive to the ONGC and would amount to driving the Indian Company in a tight corner and placing it in an inextricable situation.

8. The case at hand is one where an Indian Company is seeking enforcement of award against a German Company in Germany. It is a reverse situation. The German Company has rushed to India and is seeking setting aside of the award and restraining an Indian Company from enforcing the award in Germany. The petitioner has not come out with a case of oppression or gross-injustice. The Indian Company finding the German Company = (the petitioner having no assets in India, has chosen to go to Germany for enforcing the award.

9. In ONGC" CASE (supra) itself their Lordships have held :

"The facts of this case are eminently suitable for granting a restraint order as prayed by ONGC. It is no doubt true that Supreme Court sparingly exercises the jurisdiction to restrain a party from proceeding further with an action in a foreign court. This is one of those rare cases where the court would be failing in its duty if it hesitates in granting the restraint order, for to oblige the ONGC to face the aforesaid proceedings in the American Court would be oppressive in the facts and circumstances of the case."

10. Several Principles of law laid down in a landmark decision of this Court in Gas Authority of India Ltd. Vs. Spie Capag, S.A. and others, , repel the primary contention raised on behalf of the petitioner. I may briefly notice some of the relevant principles laid-down therein. The prime object of the New York convention was to ensure the recommendation and enforcement of commercial arbitration agreement having international features and the resultant foreign awards arisen there from. The New York convention will apply to an arbitration agreement if it has foreign element or flavour involving international trade and commerce (which the case in hand does have), even though such an agreement does not lead to a foreign award. To quote :

"The New York Convention will apply to an arbitration agreement if it has a foreign element or flavour involving international trade and commerce even though such an agreement does not lead to a foreign award but the enforcement and recognition of the agreement will of course be subjected to the limitations already spelt out. Thus the agreement in question entered by Indian company with foreign company attracts Article II(3) of the New York Convention and cannot be termed as a domestic arbitration agreement inasmuch as the parties Constituting the foreign company and their business are located outside India."

11. The principles governing the grant of ad-interim injunction in such matters

are the same as in other civil matters. The plaintiff must show that it has a prima facie case, the balance of convenience lies in its favor and in the absence of injunction. It is likely to suffer an irreparable injury. In addition the court would also look at the conduct of the parties. Delay defeats equity and in appropriate cases disentitles the party from indulgence in the discretionary jurisdiction of the court. As already noticed the petitioner having been served with copy of the award passed by the Arbitrators on 11th April, 1994 nothing had prevented the petitioner from filing the present petition within a reasonable time thereafter. The petitioner was served with summons from LANDGERICHT ESSEN (High Court of ESSEN). The petitioner has also filed its reply in the said proceedings on November 15, 1994. The objection which the petitioner has raised here can also be raised before the court in Germany.

12. This court is not satisfied that the petitioner has a prima facie case and the balance of convenience lies in its favor. The court is also not satisfied that the petitioner would suffer any irreparable injury in the absence of injunction. On the contrary, the respondent is likely to suffer irreparable injury if the enforcement of award is stayed.

13. For all the foregoing reasons, is No. 10455/94 is rejected.

14. Petition rejected.