

(2009) 06 BOM CK 0110

In the Bombay High Court

Case No : Arbitration Petition No. 68 of 2000 in Arbitration Award No. of 1999

Hugo Neu Corporation

APPELLANT

Vs

Lloyds Steel Industries Ltd.

RESPONDENT

Date of Decision : 12-06-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 47, 47(1), 48, 48(2)
Bombay High Court (Original Side) Rules, 1980 — Rule 803C
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22

Citation : (2009) 6 BomCR 374

Hon'ble Judges : Dharmadhikari S.C., J

Bench : Single Bench

Advocate : Pradeep Rajgopal and M. Manoharan, instructed by Rekha Rajgopal, for the Appellant; Vatsal Shall and M. Wamorkar, instructed by Maravoor and Wamorkar and Co., for the Respondent

Judgement

Dharmadhikari S.C., J.—This is a petition u/s 47 of the Arbitration and Conciliation Act, 1996 seeking Enforcement of an Award dated 10th October, 1999, made in United States of America. In this petition. On 17th March, 2009 I had passed the following order:

The matter was posted for passing orders. However, at the request of both sides, I heard the respective Counsel on the satisfaction by the petitioner, of the ingredients of Section 47(1) of the Arbitration and Conciliation Act, 1996. Both sides have relied upon the further affidavits and made oral submissions. However, with a view to present a complete picture, both sides have requested that they may be permitted to file written submission. At their request, two weeks time is granted to file written submissions.

2. After the written submissions are filed, the date will be given for pronouncement of judgment. Judgment reserved.

2. In compliance with the above, respondent had filed written submissions on 30th March, 2009. However, the office has reported that no written submissions

are filed by the petitioner. Since the time to file them has long expired, no question arises of permitting the petitioner to file the written a submissions. It is on this basis that I am delivering the judgment.

3. The petitioner is a corporation incorporated in United States of America having its Liason Office in India. Respondent is a company incorporated under the provisions of Indian Companies Act 1956 having its registered office at the address mentioned in the cause title.

4. It is stated that a contract for sale was entered into between the petitioner and respondents on 18th September, 1998. The terms and conditions and the nature of goods traded are set out in the contract, a copy of which is annexed as an Annexure to the Award, which is sought to be enforced by this petition. The Award is at Exh. "A" to the petition.

5. Reliance is placed upon Clause 13 of the Contract of Sale and, thereafter, the nature of the dispute between the parties has been set out. The petitioner states that in pursuance of the disputes, they had to make a claim and that was referred to arbitration in New York. Reliance is placed upon clauses in the contract which stipulate that any dispute arising between the parties would be amicably settled by American Arbitration Association in New York.

6. The matter was taken up with the Association, with due intimation to the respondent. It appointed one Mr. Robert Pincus as arbitrator on 19th March, 1999. The said arbitrator made an Award on 10th October, 1999. In paras 16 to 19 of the petition, this is what is stated:

16. The petitioner states that the Award dated 10-10-1999 passed by the learned Arbitrator Mr. Robert Pinacus had been appointed in pursuance of submissionary arbitration which is valid under the Laws of the State of New York, U.S.A.

17. The petitioner states that the subject-matter of the Award is capable of settlement by arbitration under the Laws of India.

18. The petitioner states that the Award dated 10th October, 1999 has been made by the International Arbitration Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties as per Clause 13 of the Contract of Sale and in conformity with the law governing the arbitration procedure.

19. The petitioner states that the Award has become final in the Country of America in which it has been made, in the sense that it will not be considered as such if it is open to opposition or appeal or if it is provided that any proceedings for the purpose of contesting the validity of the award are pending.

7. It is in these circumstances that the present petition is filed requesting that the Award be made the Rule of this Court so also a decree in terms of the same be passed.

8. The petition has been filed in the year 2000 but was kept pending in this Court

till date as it was mentioned that although this is a foreign award, the hearing of this petition cannot be taken up as the respondent company being an Indian company and declared as sick Industrial Company by B.I.F.R. under Sick Industrial Companies (Special Provisions) Act, 1985, during the pendency of the proceedings in that behalf, this Court cannot enforce the foreign award.

9. A request was made on behalf of the petitioner that the matter is erroneously adjourned sine die and the order passed by this Court to that effect be recalled. I heard both sides on this aspect and delivered a detailed order on 18th December, 2008, recalling the earlier direction of adjourning the petition sine die. That is how after 8 years of its date of admission, the proceedings were revived by me. Thereafter, the matter was placed for arguments.

10. On 21st January, 2009, I heard both sides and particularly, Mr. Rajgopal appearing for the petitioner on the preliminary objection as to whether the arbitration petition as filed satisfies the requirements of Section 47(1) of the Arbitration and Conciliation Act, 1996 read with Rule 803(C)(c) of Bombay High Court (O.S) Rules. Mr. Rajgopal sought time to place before this Court the entire material. The petitioner urged that the communication from the American Arbitration Association and affirmed by one Mr. Richard Zimmerman affirming that Annexure A dated 28th October, 1999 is a contract dated 17th September, 1998 containing Arbitration Agreement and further the Award Exh. B to the petition is rendered by the arbitrator shows compliance with the Statutory provisions and the O.S. Rules. Mr. Rajgopal took time to satisfy me with regard to compliance with Section 47(1) of the Arbitration & Conciliation Act and at his request, the matter was adjourned from time to time and an affidavit has been filed dated 26th February, 2009 by the petitioner. The said affidavit reads as under:

1. I say that I am aware of the facts and circumstances of the case. I say that Richard A. Zimmerman represented the petitioners in the arbitration against the respondents. The case was heard by the sole arbitrator Robert Pincus under the Americal Arbitration Association. Robert Pincus was chosen from the Roster of the American Arbitration Association under the Rules of that organisation to act as sole arbitrator.

2. The arbitration proceeding resulted in an Award signed and dated 10th October, 1999 by Robert Pincus in favour of the petitioners which is annexed and marked as Exh. A. The True copy of the original award duly attested by Richard Zimmerman is filed in this Hon''ble Court. The Award is affirmed by him in the capacity of Notary Public appointed u/s 130 read with 135 of the Executive Laws of Consolidated Laws of the State of New York. I say that Mr. Richard Zimmerman has affirmed on oath an Affidavit dated 17.2.2009 enclosing the contract dated 18.9.1998 and Award dated 10.10.1999 to be presented in this Hon''ble Court. The same is marked as Exh. B.

3. I say that the condition laid down in Section 47 of the Arbitration and

Conciliation Act, 1996 is complied by the petitioner with at the time of filing of the petition.

11. The Award is annexed thereto which is signed by Robert Pincus, the arbitrator and he has given his affirmation below the same. Further, Mr. Richard Zimmermen has filed an affidavit stating that he has maintained a true copy of the original award in his possession. He was having his office at ONE -World Trade Centre, WTC, New York on 52nd floor. There was an attack on the said centre on September, 11, 2001 which destroyed the entire structure and building. The original Award and other documents in the office of Mr. Zimmerman were destroyed in the said attack.

12. It is on this basis that it is contended that there is due compliance with the procedural provisions.

13. Mr. Rajgopal vehemently contended before me that technicality should be obstruct the petitioners in obtaining a decree in terms of the Award. The respondent is a party to the proceedings, inasmuch as, the arbitrator has recorded that there was a claim and counter claim. After referring to both, he has made the Award. It has been very clearly pointed out that the case was placed before the sole arbitrator and he made the award.

14. However, the respondent has filed a reply to this affidavit and Mr. Shah appearing for them has urged that the petitioner ought to have filed original award along with the petition at the time of filing of the petition i.e. in the year 2000. There is no provision in law enabling filing of the original award subsequently or that the requirement to produce a duly authenticated copy of the Award can be satisfied subsequently. In other words, his submission is that at the time of filing of the petition it was open for the petitioner to produce a copy of the Award duly authenticated in the manner required by law of the Country in which the Award was made but even such duly authenticated copy was not filed along with the petition. There is nothing in law which permits the petitioner to file it or produce the same at this stage. Since the petition was not accompanied by the original Award or a duly authenticated copy thereof as contemplated by the Act and the Rules, then, this petition cannot be entertained and must be dismissed.

15. Alternatively, he submits that a copy of the Award alleged to be produced is not authenticated. It is certified by Mr. Zimmerman, who is an Advocate appearing on behalf of petitioners. He submits that there are settled procedures and the Rules prevalent at the relevant time in U.S.A. for commercial arbitration were entitled as "Commercial Arbitration Rules and Mediation". Reliance is placed upon Rule 47 and other provisions of these Rules and it is contended that unless and until the Award is made a Decree of the Competent Court in the country where it was made, filing a copy of the Award and seeking a relief that a decree may be made in terms thereof is not permissible. Mr. Shah has invited my attention to the affidavit filed by the respondents on 12th March, 2009.

16. For properly appreciating the rival contentions reference is necessary Section 47 insofar as it is relevant reads as under:

47(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the Court:

- (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.

17. A bare perusal of the provision would demonstrate that the party applying for enforcement of a foreign award is required to produce before the Court, original award or a copy thereof, duly authenticated in the manner required by law of the Country in which it was made, the original Agreement for Arbitration or a duly certified copy thereof and such evidence as may be necessary to prove that the award is a foreign award.

18. Before me it is undisputed that the respondent carries on business within the territorial jurisdiction of this Court and, therefore, assuming that there was a foreign award sought to be enforced against it, this Court is the Competent Court where the application u/s 47 can be made. To this extent, there is no dispute between both sides.

19. However, the argument is that the requirement of Section 47(1), insofar as production of original award or duly authenticated copy thereof so also the original agreement for arbitration or duly certified copy thereof and necessary evidence to prove that the award is a foreign award, is not complied with. Bombay High Court O.S. Rules contain Chapter XXXXIII-A which is inserted on 26th December, 1996. These are Rules relating to Arbitration and Conciliation Act, 1996. Rule 803-C provides for contents of petition and insofar as relevant for our purpose, reads thus:

803-C(c): Every petition u/s 47 of the Act shall be accompanied by the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made; the original agreement for arbitration or a duly certified copy thereof; and such documentary evidence as may be necessary to prove that the award is a foreign award. If the award or agreement to be produced is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or a consular agent of the Country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

20. When this petition was filed in 2000, an affidavit in reply was filed in which surprisingly no plea was raised, save and except, vague urging that the petitioners have failed to comply with the conditions laid down u/s 47 of the Act.

Thus, the point of maintainability of the petition was not raised specifically. The argument was that the award is not enforceable. However, when I subsequently noticed that the petition is filed by the petitioner without stating anything with regard to the Award being filed in original or a true copy of the aforesaid award duly authenticated in the manner provided for authentication of such documents in U.S.A. is filed, the issue of maintainability was raised by me during the course of arguments.

21. I called upon Mr. Rajgopal to satisfy me with regard to compliance with Section 47 and Rule 803-C of the Bombay High Court (O.S) Rules. Earlier Mr. Rajgopal invited my attention to the affidavits in reply filed on 3rd April, 2000, 31st July, 2000 and petitioner's rejoinder dated 3rd August, 2000 thereto. He also invited my attention to the supplemental affidavit filed on 25th January, 2002 by the respondent. He contended that at no stage has this issue been raised. In any event, according to the petitioner, filing of the affidavit dated 26th February, 2009 shows due compliance with law.

22. The petitioner has filed an Affidavit affirmed on 26th February, 2009 annexing therewith the Award of the arbitrator along with an affidavit of Mr. Richard Zimmerman. The affidavit of Mr. Richard Zimmerman insofar as relevant for our purpose reads thus:

7. I received an original Award of the sole arbitrator's decision from the American Arbitration Association on or about October 15, 1999. I myself made a True copy of that original Award. I compared the copy that I had made to the original and attested in my capacity as a Notary Public for the State of New York that the copy was an exact copy of the original Award. It is common practice for Notaries within the State of New York to compare copies of documents to originals thereof and to attest to the fact that the copy is a True Copy.

8. I state that copies of the Contract and Award respectively have been affirmed by me as a Notary Public appointed u/s 130 read with Section 135 of the Executive Laws of the Consolidated Laws of the State of New York, entitled Appointment of Notaries.

9. I maintained the original Award of which I had made a True Copy in my possession at my offices. At the time, my offices were at One World Trade Centre, New York, NY, on the 52nd floor. The original Award of which I made a True copy in 1999 was destroyed in the attack on the World Trade Centre on September 11, 2001.

23. Thus, Mr. Zimmerman states that the copy of the Award dated 10th October, 1999 is duly authenticated in the manner required by the law of U.S.A. being the Country in which the Award was made. Hence, the requirement of filing of the original Award or a Duly Authenticated copy as per U.S. law stands complied with.

24. The only question then remains for consideration is whether the party viz., the petitioner applying for enforcement of a foreign award has at the time of the

application produced before the Court the documents stipulated by Section 47(1) (a) to (c). Mr. Shah would contend that these have to be produced when the petition is filed and there is no provision enabling their production at this stage. In other words, this petition is admitted and is now placed before the Court for hearing and final disposal. At this stage, the petitioner cannot produce the affirmation of Mr. Zimmerman or other document to prove that the Award is duly authenticated in the manner required by the law of U.S.A.

25. There is no dispute that the Award is a foreign Award. To that extent the evidence has also been produced. There is no dispute that there was an agreement for arbitration. However, it is now contended that the petitioner has failed to produce the original agreement for arbitration or a duly certified copy thereof. In my view, the respondent cannot be permitted to urge that there was no agreement for arbitration at this belated stage. In this behalf, if the affidavits filed prior to the admission of petition are perused, it is clear that the stand of the respondent was that they were not afforded enough opportunity by the arbitrator to present their defence. The argument was that the arbitrator has not followed the procedure and Rules of American Arbitration Association. (See paras 2 and 3 of the Affidavit filed on 31st July. 2000).

26. Prior thereto a reply was filed on 3rd April, 2000 wherein reliance was placed upon a suit being Suit No. 821 of 1999 filed by the respondent in this Court.

27. These contentions were dealt with by the petitioners by filing rejoinder affidavit and stating therein in clearest terms that all procedural provisions have been followed by the arbitrator. Reliance was placed upon a notice addressed by the Association to the parties and request of the Association to select the arbitrator from the panel. Thereafter, reliance is placed on a letter dated 12th March, 1999 which was addressed by the Association to the respondent: and an order dated 8th April, 1999. It is on this basis that it is contended that the arbitration proceeded in accordance with U.S. law. Subsequently, the respondent gave up this stand and raised altogether different objections stating that by virtue of Section 22 of SICA the present petition cannot proceed.

28. Even in the affidavit filed by the respondent on 12th January, 2009, it is not the case of respondents that there was no arbitration agreement. To this affidavit filed by the respondents, they have annexed a copy of the plaint in Suit No. 1821 of 1999. Therein also, the argument is that the contract has come to an end by act of parties and, therefore, invocation of the arbitration clause thereunder, after discharge of the contract is neither lawful nor reasonable. However, despite the declaration claimed so also the injunction sought till date, the respondent could not produce any order which stay the arbitral proceedings. In these circumstances, it will not be possible to accept the contention of the respondents that there is no arbitration agreement. Thus, Section 47(1)(b) and (c) is complied with.

29. The only point that now remains is whether the petitioner has produced a

copy of the Award duly authenticated in the manner required by the law of U.S.A. In that behalf also, the argument is that such production is not permissible at this stage, viz., after admission of the petition. The petition should be accompanied by the Award or a duly authenticated copy thereof. Reliance is placed upon Rule 803-C of the Bombay High Court O.S. Rules. Reading Section 47(1) so also Rule 803-C(c) together to my mind, all that is required is that the party applying for enforcement of foreign award shall at the time of the application produce before the Court, the original Award or copy thereof. Admittedly, the petitioner has produced a copy of the Award duly authenticated under the law prevailing in U.S.A. The affidavit of Mr. Zimmerman is proof of authentication of the copy of the Award in the manner required by the law of U.S.A. Since, the procedural provision contemplates accompaniment of a copy of the Award duly authenticated in the manner required by law of the Country and since a doubt was expressed by me in that behalf, the petitioner has filed the affidavit affirmed on 26th February, 2009 to satisfy the Court that the copy of the Award accompanying the arbitration petition is duly authenticated in the manner required by the law of the Country in which it was made. Respondent does not dispute the manner in which the authentication has been done. Respondent does not dispute that Mr. Zimmerman is a Notary Public. However, now the respondent raises another objection and it is that the copy of the Award itself is produced at the stage of hearing of this petition. It is not filed at the time of filing of this petition nor does it accompany the petition.

30. Having satisfied myself, from a perusal of the record, that a duly authenticated copy of the Award is already filed and what was lacking is proof of the manner in which it was authenticated but even that aspect having now been clarified by the affidavit referred to above, the objection must be overruled. Any larger issue need not be considered.

31. Therefore, whether a duly authenticated copy of the Award can be produced at the stage of hearing or whether it should accompany the application/petition for enforcement of a foreign award when the same is filed is an aspect or issue which is kept open for being considered in appropriate proceedings. In the peculiar facts of this case, I am satisfied that copy of the Award was already filed. It was accompanying the petition. The proof that it is authenticated in the manner required by law of U.S.A. is also produced. I do not see any substance in the technical objection raised by the respondent.

32. Thus, there is no substance in the pleas that the Arbitral Award is not enforceable for the reasons mentioned in paras 3 to 5 of the written submissions and on the grounds set out in the affidavit dated 12th March, 2009. These objections and pleas raised in that behalf are rejected for the reasons set out above. The Award is not assailed on merits today. No material is produced, save and except, reproduction of the Arbitration Rules, as contemplated by Section 48 of the Act.

33. The Issue of applicability of Section 22 of the SICA is something which can be urged by the respondents even at a later stage. Presently, the request of the

petitioner is to take the foreign award on file of this Court and pass a decree in terms thereof. That is an aspect covered by Section 47(1). If the application for enforcement of the foreign award is held to be maintainable, then, the only relief that is being granted today is that this Court can enforce the Award dated 10th October, 1999 made by Mr. Richard Pincus in Case No. 50-T-153- 00026-99 as a foreign award and treat it accordingly. I am not taking away the opportunity of respondents to prove that the Award is not enforceable or executable. They will have to prove this fact is apparent from a reading of Sections 47 and 48 of the Act. In this behalf, Section 48 is clear. Its relevant part is reproduced below:

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:

(a) the parties to the agreement referred to in Section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

PROVIDED THAT, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(d) the composition of the Arbitral Authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(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.

(2) Enforcement of an arbitral award may also be refused if the Court finds that:

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(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 effected by fraud or corruption.

(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.

34. A perusal thereof would demonstrate that the only objection raised and considered today is on the maintainability of the arbitration petition. It is held that the Award is Enforceable. Subject to the right of respondent to resort to Section 48(2) and production of proof as contemplated thereunder and without prejudice to their pleas and contentions in that behalf, it is held that the petition is maintainable and the Award can be enforced as a foreign award in the manner provided in law. However, there will be no order as to costs.

35. Needless to state that if respondents raise the pleas based on Section 48(2) it would be open or the petitioner to rebut the same. Further, needless to add that if no such proof is produced, the respondent can enforce the Award in the manner provided in law.