

(1996) 10 BOM CK 0044
In the Bombay High Court
Case No : Arbitration Petition No. 98 of 1994

Laxmichand Dayabhai (Export) Company	APPELLANT
Vs	
Prestige Foods Limited	RESPONDENT

Date of Decision : 07-10-1996

Acts Referred:

Arbitration Act, 1940 — Section 30, 33
Bombay High Court (Original Side) Rules, 1980 — Rule 80
Foreign Awards (Recognition and Enforcement) Act, 1961 — Section 5, 6, 7, 7(1)

Citation : (1997) 3 BomCR 90

Hon'ble Judges : S.M. Jhunjhunwala, J

Bench : Single Bench

Advocate : T.N. Subramanian and Hemant Mehta, instructed by Mehta and Co., D.R. Zaiwala and K.A. Setlawad, instructed by Mulla and Mulla and Craigie Blunt and Caroe, for the Appellant; S.U. Kamdar, T.N. Subramanian and Hemant Mehta, instructed by Mehta and Co., for the Respondent

Final Decision : Allowed

Judgement

S.M. Jhunjhunwala, J.—This petition has been filed under sections 5 and 6 of The Foreign Awards (Recognition & Enforcement) Act, 1961 (for short, "the Act) for an order to file the Award dated 29th January, 1992 in this Court and for pronouncement of judgement in terms thereof.

2. Three Contracts, all dated 12th September, 1990, were concluded at Bombay whereby the respondent agreed to sell to the petitioner 36 MT, 54 MT and 36 MT respectively of Indian HPS groundnut kernels bold 60/70 new crop (for short, "the said goods") at the price and on the terms and conditions contained therein. Except as to quantity, the said three Contracts were identical. The terms of Federation of Oils Seeds & Fats Association Limited (FOSFA) Contract No. 34 were made part of the said three Contracts. FOSFA Contract No. 34 amongst other terms and conditions incorporate terms Nos. 23 and 25 pertaining to domicile and arbitration, which read as under :

"23. DOMICILE : This contract shall be deemed to have been made in England and the construction, validity and performance thereof shall be governed in all respects by England law. Any dispute arising out of or in connection therewith shall be submitted to arbitration in accordance with the Rules of the Federation. The serving of proceedings upon any party by sending same to their last known address together with leaving a copy of such proceedings at the offices of the Federation shall be deemed good service, rule of law or equity to the contrary notwithstanding".

"25 ARBITRATION : Any dispute arising out of this contract, including any question of law arising in connection therewith, shall be referred to arbitration in London (or elsewhere if so agreed) in accordance with the Rules of Arbitration and Appeal of the Federation of Oils, Seeds and Fats Association Limited, in force at the date of this contract and of which both partners hereto shall be deemed to be cognizant.

3. Neither party hereto, nor any persons claiming under either of them, shall bring any action or other legal proceedings against the other of them in respect of any such dispute and such dispute shall first have been heard and determined by the arbitrators, umpire or Board of Appeal (as the case may be) in accordance with the Rules of Arbitration and Appeal of the Federation, and it is hereby expressly agreed and declared that the obtaining of an Award from the arbitrators, umpire or Board of Appeal (as the case may be) shall be a condition precedent to the right of either party hereto or of any person claiming under either of them to bring any action or other legal proceedings against the other of them in respect of any such dispute".

Since disputes arose, the petitioner by its telex dated 15th January, 1991 claimed arbitration as per arbitration agreement contained in each of the said contracts and appointed its arbitrator and called upon the respondent to nominate its arbitrator. The petitioner informed the respondent that if the respondent did not appoint its arbitrator, the petitioner might approach FOSFA to nominate arbitrator on behalf of the respondent. The respondent failed to appoint an arbitrator. The petitioner, in accordance with the FOSFA Rules, applied for an arbitrator to be appointed on behalf of the respondent. On 17th January, 1991, an arbitrator was appointed by FOSFA on behalf of the respondent. The parties filed their papers, documents and pleadings before the Arbitrators. On 29th January, 1992, the Arbitrators have made and published their Award and have held that the respondent was in default for having failed and neglected to ship the said goods. By the Award, the respondent is required to pay to the petitioner a sum of US \$ 25,200 plus interest thereon at the rate of 9 1/2% from 1-1-1991 till the date of the Award and the costs of the arbitration including the costs of appointment of the Arbitrators. By its letter dated 12th March, 1992, the petitioner forwarded to the respondent a copy of the Award and its debit note in the sum of US \$ 28,191/- and called upon the respondent to remit the said amount. The respondent failed and neglected to pay the said amount. By its

letter dated 1st February 1993. FOSFA informed the respondent that it had decided that the respondent be faulted for non-fulfillment of the Award unless the settlement was made within 28 days therefrom . The respondent failed and neglected to make payment under the Award which became final and binding under the Laws of United Kingdom by which it was governed..

4. Mr. Zaiwala, learned Counsel appearing for the petitioner, has submitted that the Award is a foreign Award within the meaning of section 2 of the Act and is enforceable under the Act in as much as it arises from a contract pertaining to matters regarded as commercial under the law in force in India and in pursuance of an agreement for arbitration to which the Convention on Recognition and Enforcement of Foreign Arbitral Awards apply, it having been made in United Kingdom, being a territory notified by the Government of India as a territory to which the said Convention applies. Mr. Zaiwala further submitted that the Award has become binding and since no steps were taken by the respondent to have it set aside or suspended by a competent authority of the Country in which, or under the law of which, that Award was made.

5. Mr. Kamdar, learned Counsel appearing for the respondent, submitted that even a final award cannot be enforced if the ground u/s 7 of the Act exists as the question of enforcement will arise only when the award becomes final. Mr. Kamdar also submitted that the Arbitrators made the Award by taking into consideration further submission made by the petitioner before them, a copy whereof was not furnished to the respondent. Mr. Kamdar further submitted that though the objection was taken before the concerned Authority which assured for consideration of the objections of the respondent, no further communication in this respect was made to the respondent and as such, the Award having been made in breach of the principles of natural justice is not final and hence not enforceable. In the submission of Mr. Kamdar, the Award is not enforceable as the respondent was otherwise unable to present its case before the Arbitrators since principles of natural justice were not followed. Mr. Kamdar further submitted that in view of the assurances given by the concerned Authority to consider the objections raised by the respondent, the Award has not become final and binding and as such, it can not be enforced. Mr. Kamdar also submitted that the right of appeal vested in the respondent was frustrated by the default of the petitioner since though the Award is dated 29th January, 1992, the copy thereof was received by the respondent on 17th March, 1992.

6. At the outset, it may be mentioned here that in exercise of the powers conferred under sub-section (b) of section 2 of the Act, the Government of India, being satisfied that the reciprocal provision is made, by a Notification No. SO 4320 dated 25th October, 1978 has declared United Kingdom to be a territory to which the Convention on Recognition and Enforcement of Foreign Arbitral Awards set forth in the Schedule to the Act applies. It may also be mentioned here that the Schemes of The Arbitration Act, 1940 and of the Act are quite different . Under sections 5 and 6 of the Act, any person interested in a foreign award has

to apply to the Court having jurisdiction that the award be filed in Court. A show cause notice has to be served on the other side. Thereafter if the Court is satisfied that the foreign award is enforceable, the Court shall have the award to be filed and shall proceed to pronounce judgement according to the award. On such judgment being pronounced, a decree shall follow. From the decree so passed no appeal lies unless the decree is in excess of and not in accordance with the award. Under the provisions of The Arbitration Act, 1940, which apply to the arbitrations within the Country, when the arbitrators have made their Award and signed it, they are required to give a notice in writing to the parties of the making and signing of the award. Thereafter, the arbitrators have to file the award in Court. After the award is so filed, the Court is to give notice to the parties of the filing of the award. At this stage, proceedings may be taken to set aside the award u/s 30 read with section 33. Where the Court sees no cause to remit the award or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired or such an application having been made, after refusing it, proceed to pronounce judgment according to the award. Upon judgment so pronounced, a decree shall follow and no appeal lies from such decree except on the ground that it is in excess of or not otherwise in accordance with the award. Unlike section 5 of the Foreign Award Act, separate proceedings are contemplated u/s 30 read with section 33 of the Arbitration Act, 1940 for setting aside the award. Section 6 of the Act contemplates a single proceedings in which the Court should be asked to decide whether the foreign award is enforceable and order that the award be filed, proceed to pronounce judgment on the award upon which a decree shall follow. An award becomes binding under the Act when no possibility exists for an appeal from the award either to a Court or to an Arbitral Tribunal. As held by the Supreme Court in the case of Renusagar Power Co. Ltd. Vs. General Electric Co., , in the proceedings for enforcement of an foreign award under the Act, the scope of enquiry before the Court in which an award is sought to be enforced is limited to the grounds mentioned in section 7 of the Act and does not enable a party to the said proceedings to impeach the award on merits. The parties were given opportunity to remain present before the Arbitral Tribunal. The principles of natural justice have been followed by the Arbitral Tribunal and after taking into consideration the claims and pleadings placed for consideration, the Award was made and since no appeal therefrom was filed and no steps as contemplated u/s 7 of the Act were taken to have it set aside, the Award has become binding. The Award is not barred u/s 7(1) (a) (ii) of the Act on the ground that the respondent was allegedly unable to present its case before the Arbitral Tribunal.

7. Though Rule 80 of the Rules of this Court as applicable on its Original Side contemplates that the award to become enforceable must be a final award, section 7 of the Act uses the terminology of the award to become "binding. Since the Act requires an award to become "binding" before it can be enforced and in the facts and circumstances of the case more particularly in view of the fact that the principles of natural justice have been followed and no appeal from the

Award having been filed and no steps as contemplated u/s 7 of the Act have been taken to have it set aside, the Award has become binding and as such, enforceable.

Accordingly the petition is made absolute in terms of prayers (a), (c), (d) (i), (d) (ii) fixing the rate of interest at 8% per annum, (d) (iii), (e) (i), (e) (ii) fixing the rate of interest at 8% per annum, (e) (iii) and (f) of the petition.