

(2011) 11 DEL CK 0158
In the Delhi High Court
Case No : Ex. P. No. 29 of 2010

Olympia Spinning and Weaving Mills Limited	APPELLANT
Vs	
Emmsons International Limited	RESPONDENT

Date of Decision : 30-11-2011

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 2, 34, 44, 47(1)(b), 48
Contract Act, 1872 — Section 39
Foreign Awards (Recognition and Enforcement) Act, 1961 — Section 7
International Cotton Association Rules — Rule 220, 225, 226
Sales of Goods Act, 1930 — Section 60

Citation : (2011) 185 DLT 590

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Rajiv Nayar, with Mr. Darpan Wadhwa, Mrs. Namrata K. Sharma and Ms. Tina and Mr. P.P. Kumar, for the Appellant; Sanjeev Puri with Mr. Ruchin Midha, Ms. S.S. Khemka and Mr. Arjun Syal, for the Respondent

Judgement

S. Muralidhar, J.—The present petition has been filed by the Decree Holder ("DH") Olympia Spinning & Weaving Mills Limited having its office at Karachi in Pakistan u/s 48 of the Arbitration & Conciliation Act, 1996 ("Act") against the Judgment Debtor (JD) Emmsons International Ltd. seeking execution of the Foreign Award dated 16th February 2009 (hereafter the First Tier Award) as affirmed on 30th October 2009 by the Appeal Award of the Technical Appeal Committee (TAC) of the International Cotton Association ("ICA") at Liverpool, United Kingdom.

2. The DH is a public limited company incorporated under the laws of Pakistan, carrying on the business of spinning. The Judgment Debtor ("JD") is a private limited company, incorporated under the Indian Companies Act, 1956 engaged in the business of trading of agricultural commodities including trading in raw cotton.

3. It is stated that the DH entered into six contracts with the JD on 1st November

and 16th November 2007 for purchase of a shipment of total 3600 metric tons (600 tons against each contract) of Indian raw cotton Shankar-6 (crop season 2007-08) length 29 mm, MIC 4.0 to 4.7, Strength 29 GPT from the JD through Mr. Muhammed Hashim of M/s. Commodities Trading Company ("CTC") at Karachi in Pakistan. The subject contracts were made specifically subject to the Bye-laws and Rules of the ICA. It was further agreed under Clause 13 of the contracts that all disputes relating to the subject contracts "would be resolved through arbitration in accordance with the ICA Bye-laws".

4. The disputes between the DH and the JD were referred to the ICA on 10th March 2008. The JD submitted its reply on 15th July 2008. The JD and the DH participated in the arbitral proceedings before a Three-member Arbitral Tribunal ("Foreign Arbitral Tribunal") formed in accordance with the ICA Bye-laws. The Foreign Arbitral Tribunal delivered its First Tier Award on 16th February 2009. The operative portion of the Foreign Arbitral Tribunal was as under:

(i) As regards the Contract No. EMS/AM/008/07-08, the DH shall pay to the JD the sum of US\$ 138.30 being interest due in accordance with the provisions of Rule 220, on the amount of US\$ 8,741.25 from 20th February 2008 to 7th May 2008 at the rate of 7.5% per annum. The JD's claim for "Wrong Crop Year" at 2.00 cents per/lb in relation to 800 bales was not allowed. As regards the Contract No. EMS/AM/009/07-08, the DH shall pay to the JD the sum of US\$ 83.74 being interest, due on the amount of US\$ 8,146.01 from 9th April 2008 to 10th May 2008 and on US\$ 5,961.07 from 14th April 2008 to 10th May 2008 @ 7.5% per annum. In relation to 91 bales the JD's claim for "wrong crop year" was not allowed.

(ii) As regards Contract No. EMS/AM/010/07-08, EMS/AM/014/07-08, EMS/AM/015/07-08, EMS/AM/016/ 07-08, the JD shall invoice back to the DH 600 metric tons or the equivalent of 1,322,760 lbs net being the entire contract quantity at the unit price of 79.00 US cents per lb net. The Tribunal further directed that the DH shall in consequence of the foregoing direction, pay to the JD the sum of US\$ 134,260.14 being the difference between the contract value of the said 600 metric tonnes, or the equivalent of 1,322,760 lbs net, and the market value on 1st March 2008. The DH shall pay the DH the sum of US\$ 9,710.87 being interest on the sum of US\$ 134,260.14 at the rate of 7.5% per annum from 1st March 2008 to 16th February 2009, the date of this our award. The JD had failed to effectively substantiate their claim for the costs incurred in establishing the letters of credit and therefore, their claim was not allowed. As regards the Contract No. EMS/AM/016/ 07-08, the Tribunal further directed that the DH shall pay to the JD interest on the sum of US\$ 576,106.08 being the cumulative total of the amounts referred to in directions (1), (3), (6), (7), (10), (11), (13), (14), (17) and (18) herein at the rate of 3.5% per annum over the New York Prime Interest Rate or as appropriate, the calculated average thereof, prevailing from 13th February 2009 until the date of payment of that sum to the JD.

5. The First Tier Award further ruled that the JD would be responsible for all costs of the arbitration and directed as under:

The total costs of the award are set at 8,985 pounds sterling to be initially borne and paid by the parties as detailed below from the deposits received. At the date of writing this award, the JD and the DH had paid 3,000 pounds sterling. The DH shall bear and pay 2,195 pounds sterling due under the provisions of bylaw 359, together with Vat of 105 pounds sterling. The JD shall bear and pay 3,000 pounds sterling but shall recover this amount from the DH. There was a shortfall in the deposits received against the actual costs amounting to 2,895 pounds sterling and a request had gone to both the parties seeking this payment. In the event that the JD provide the additional amount they shall recover the amount of 2,985 pounds sterling from the DH. If this amount was provided by the JD they shall bear this amount as they were responsible for all of the costs of arbitration.

6. On 13th April 2009 the JD preferred an appeal against the First Tier Award to the TAC appointed in accordance with the ICA Bye-laws. The DH also requested TAC to examine such of its claims that had been turned down by the Foreign Arbitral Tribunal. The TAC on 30th October 2009 delivered the Appeal Award in which it directed as under:

(i) As regards the weight losses against Contract Nos. EMS/AM/08/07-08 and EMS/AM/09/07-08, the parties should address the outstanding payment as clearly directed under the first tier award.

(ii) As regards Contract No. EMS/AM/009/07-08, the JD shall pay the DH the sum of US\$ 3131.88 being 1 US cent lb allowance on 891 bales or 313188 lbs nett shipped weight for 2006/2007 shipped against the contracted crop year 2007/2008. The JD shall pay the DH the sum of US\$ 364.24 being interest on US\$ 3131.88 at the rate of 7.5 from 12th April 2008 to 30th October 2009, the date of this award.

(iii) As regards Contract No. EMS/AM/010/07-08, EMS/AM/014/07-08, EMS/AM/015/07-08, EMS/AM/ 016/07-08 the JD shall invoice back to the DH 600 metric tons or the equivalent of 1,322,760 lbs net being the entire contract quantity at the unit price of 79.00 US cents per lb net. The Tribunal further directed that the DH shall in consequence of the foregoing direction, pay to the JD the sum of US\$ 134,260.14 being the difference between the contract value of the said 600 metric tonnes, or the equivalent of 1,322,760 lbs net, and the market value on 1st March 2008. The DH shall pay the DH the sum of US\$ 16,773.32 being interest on the sum of US\$ 134,260.14 at the rate of 7.5% per annum from 1st March 2008 to 30th October 2009, the date of this our award. The JD claimed for the costs incurred in establishing the letters of credit was not allowed. As regards the Contract No. EMS/AM/016/07-08, the Tribunal further directed that the DH shall pay to the JD interest on the sum of US\$ 607,629.96 being the cumulative total of the amounts referred to indirections (1), (2), (4), (5), (8), (9), (11), (12), (15) and (16) herein at the rate of 3.5% per annum

over the New York Prime Interest Rate or as appropriate, the calculated average thereof, prevailing from 20th November 2009 until the date of payment of that sum to the JD.

7. As regards the costs, the TAC directed as under:

17. (a) The JD shall bear and pay 8,995 pounds sterling being the total amount of costs awarded in the first tier arbitration award dated 16th February 2009.

(b) The JD shall bear and pay 10,937.17 pounds sterling being the costs of the Technical Appeal Award.

8. The DH states that at the time of proceedings before the Foreign Arbitral Tribunal, the DH had paid the amounts of 3000 pounds sterling and 2,985 pounds sterling towards costs of arbitration. The Foreign Arbitral Tribunal had in the First Tier Award directed the amounts to be recovered by the DH from the JD. According to the DH costs of 5,985 pounds sterling were due from the JD.

9. It is stated by the DH that although it was open to the JD to have challenged the Appeal Award under the Arbitration Act of the United Kingdom within 28 days of becoming aware of it, no such challenge was raised by the JD. It is, accordingly, contended that the impugned Award has become final and binding on the parties and since it was an "International Commercial Arbitration" as defined u/s 2 (f) of the Act, the foreign arbitral award, i.e. The First Tier Award as affirmed by the Appeal Award, was in terms of Section 44 of the Act enforceable in India under Part II of Chapter 1 of the Act.

10. At the hearing on of this petition on 16th February 2010 a statement was made on behalf of the JD that he would not dispose of or create any third party interests in the following properties listed at Annexure B to the petition:

(i) House No. S-473, Second floor, Greater Kailash-I, New Delhi ? 110 48;

(ii) Flat No. 102, First floor, South Delhi House, 12,

Zamurdpur, Community Center, Kailash Colony, New Delhi; and

(iii) Office Flat Southern Half Portion, 12, Zamurdpur, Community Center, Kailash Colony, New Delhi.

11. By an order dated 15th July 2011 this Court negatived the objection of the JD that the provisions of Section 47(1) (b) of the Act had not been complied with by the Petitioner inasmuch as the original of the agreement for arbitration or a duly certified copy thereof had not been filed along with execution petition.

12. This Court has heard the submissions of Mr. Sanjeev Puri, learned Senior counsel appearing for the JD and Mr. Darpan Wadhwa, learned counsel for the DH.

13. Before dealing with the submissions on merits it is necessary to recapitulate the law on the scope of the present proceedings for enforcement of a foreign

award u/s 48 of the Act. In *Renusagar Power Co. Ltd. Vs. General Electric Co.*, , where the challenge was to a foreign award, it was held that the scope of enquiry was limited to the grounds mentioned in Section 7 of the Foreign Awards Act 1961. It did not enable the parties to the said proceedings to impeach the award on merits. In *M/s. Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd.*, there was a detailed discussion on the scope of Section 48 of the Act. It was explained that "every final arbitral award has to be enforced as if it is a decree of the court". The object of the 1996 Act was to minimise the supervisory role of the court.

14. Considering that in the present case the only substantial ground of challenge is that the foreign award is contrary to the public policy of India, the meaning to be given to those words occurring in Section 48 of the Act defines the scope of the proceedings. In *Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.*, , while construing the expression "public policy of India" occurring in Section 34 of the Act, a distinction was drawn between those very words occurring in Section 48. It was explained that when the challenge is to a domestic award u/s 34 of the Act the phrase "public policy of India" was required to be given a wider meaning. In *Jindal Exports v. Furest Day Lawson* (OMP 29 of 2003 delivered on 11th December 2009), this Court held that a narrow meaning had to be given to the words "public policy of India" occurring in u/s 48. This was reiterated in *Penn Racquet Sports v. Mayor International Ltd.* (decision dated 11th January 2011 in Ex. P. 386/08). The ground of "patent illegality" is not available when a challenge is raised to the validity of a foreign award. Another facet is that the substantive law governing the agreements was not Indian law. Having unsuccessfully exhausted the remedy of an appeal against the First Tier Award before the TAC, the JD could possibly have challenged it further under the Arbitration Act of UK, which it did not. In the circumstances, the JD cannot be permitted to assail the foreign award on merits in proceedings u/s 48 of the Act.

15. In support of his plea that the impugned foreign award could be challenged even in proceedings u/s 48 of the Act as being opposed to the public policy of India, learned Senior counsel for the JD relied on the decision of the Supreme Court in *Venture Global Engineering Vs. Satyam Computer Services Ltd. and Another*, . The facts of the said decision were however different. That case did not deal with the challenge to the validity of the award at the stage of enforcement u/s 48. In fact the enforcement proceedings there were initiated in the court at Michigan, U.S.A by the decree holder. It was held by the Supreme Court that even if the judgment debtor participated in the enforcement proceedings in the court in Michigan, it would not be precluded from challenging the award in the court in India u/s 34 of the Act. Here the JD has for reasons best known to it not challenged the impugned foreign award under Sections 67 and 68 of the Arbitration Act of U.K. The JD has chosen to challenge the validity of the impugned foreign award only at the stage of its enforcement in the proceedings u/s 48 of the Act. Consequently the decision in *Venture Global Engineering* is not of assistance to the JD in its plea that the scope of challenge to the validity of the foreign award u/s 48 of the Act on the ground of it being

opposed to the public policy of India is as wide as the scope of the challenge proceedings u/s 34 of the Act.

16. One of the points urged by the JD is that Rules 225 and 226 of the ICA Bye-laws are inequitable and against the accepted principle that it is the defaulting party who has to be pay damages to the non-defaulting party. It is submitted that in the instant case even an innocent seller who has not committed any breach, may be compelled to compensate the defaulting buyer for the difference in the contract price and the market price. In order to examine this submission a reference may be made to Rules 225 to 226 of the ICA Bye-laws which read as under:-

Rule 225

(i) If for any reason a contract or part of contract has not been, or will not be, performed (whether due to a breach of the contract by either party or due to any reason whatsoever) it will not be cancelled.

(ii) The contract or part of a contract shall in all instances be closed by being invoiced back to the seller in accordance with our rules in force at the date of the contract.

Rule 226

Where a contract or part of a contract is to be closed by being invoiced back to the seller the following provisions will apply:

(i) If the parties cannot agree upon the price at which the contract is to be invoiced back then the price will be determined by arbitration, and if necessary, appeal.

(ii) The date of closure will be the date when both parties knew or should have known that the contract would not be performed. In determining that date the arbitrators or appeal committee will take into account:

- a. The terms of the contract;
- b. The conduct of the parties;
- c. Any written notice of closure; and
- d. Any other matter which the arbitrators or Appeal committee consider to be relevant.

(i) In determining the invoicing back price, the arbitrators or technical appeal committee shall have regard to the following:

- a. The date of closure of the contract as determined in (ii) above;
- b. The terms of the contract; and
- c. The available market price of the cotton which is the subject of the contract, or

such like quality, on the date of closure.

(ii) The settlement payable on an invoicing back will be limited to the difference (if any) between the contract price and the available market price at the date of closure.

(iii) Any settlement payable on an invoicing back of a contract in accordance with Rules 225 and 226 will be calculated and shall be paid regardless of whether the party receiving or making the payment is considered to be responsible for the non-performance and/or breach of the contract.

17. The First Tier Award has considered the applicability of the above rules. It is concluded that there was a failure on the part of the Seller, i.e. the JD, to satisfy its contractual responsibility and therefore the Buyer, i.e. the DH, was entitled to have the contract "closed out" by being invoiced back in accordance with the bye-laws. It explained that the idea of Rule 226 was to place parties "in so far as it is possible, in the same financial position as that which they would have occupied had the contracts been performed, bearing in mind any variation to the terms of such contracts as may have been brought about by either written amendments or by the conduct of the parties and/or their accredited agents. This principle is universally recognised in the cotton trade."

18. This Court is also unable to agree with the contention of the learned counsel for the JD that Rules 225 to 226 are opposed to the public policy of India. The parties agreed that the substantive law in the present case would be the laws of England. The parties have agreed to abide by the Rules of the ICA. Rules 225 and 226 encapsulate a principle that is universally recognized in cotton trade. It is not possible in the circumstances to hold that such universally recognised principles of cotton trade, which many Indian entities who are members of the ICA have agreed to abide by, is opposed to the public policy of India.

19. It was submitted on behalf of the JD that the impugned foreign award was against the substantive laws of India inasmuch as the contracts which stood rescinded on 16th January 2008 could not be acted upon in terms of the provisions of Section 60 of the Sale of Goods Act, 1930 and Section 39 of the Indian Contract Act, 1872. Further no reasons were given by the TAC for concluding that CTC "acted as the agent of the Sellers" based on its understanding "the custom of the trade?". It was further submitted that the TAC wrongly rejected the contention of the JD that the actions of the DH were vitiated by fraud. According to the JD, there were defects in the Letters of Credit (LCs) opened by the DH and the documents relied upon by the DH were fabricated by CTC which had acted in conspiracy with the DH in order to mislead the Foreign Arbitral Tribunal. The JD alleged that the criminal purpose of the deliberate misrepresentation was to defer the date of "closing out" into March at a time when the market was rising sharply, thereby generating to the buyers" benefit a large increase in the resulting price differential. Lastly, it was submitted that damages, if at all payable by the JD could not have exceeded the delivery period

of the goods and could only be awarded till the date the contracts were alive. Reliance was placed on the decision in Nathulal Vs. Phoolchand, .

20. All of the above submissions assail the factual findings rendered concurrently by the Foreign Arbitral Tribunal in the First Tier Award and the TAC in its Appeal Award. As already observed at the present stage of enforcement u/s 48 of the Act it is not possible for the court to entertain a plea which would involve the re-appreciation of the evidence led in the arbitral proceedings. The Foreign Arbitral Tribunal has found on an analysis of the correspondence exchanged between the parties that the "shipments were extended from time to time and shipments were allowed to be made up to 29th February 2008." The JD has been found to be in breach of the contracts. The TAC observed that no supporting evidence was provided by the JD to substantiate the allegations of fraud. It was noticed that there was a request to extend the validity of the 1200 MT of LCs in relation to contract Nos. 10 and 15 which originally provided for reduced shipments by 31st January 2008. Referring to the correspondence between the parties, the TAC concluded:

From our careful investigation of the evidence placed before us and the actions of the parties in their exchanges relating to the contracts and letter of credit extensions, and the physical action of the Buyers in their extending the letters of credit to meet the validity requests of the Sellers, we find the date of breach of contracts to be 1 March, 2008, which upholds the findings at the first tier award.

21. On an examination of the impugned foreign arbitral award in the light of the documents forming part of the arbitral record this Court is unable to discern any illegality therein that warrants interference u/s 48 of the Act. The objections of the JD to the First Tier Award dated 16th February 2009 as affirmed by the Appeal Award dated 30th October 2009 of the TAC are hereby rejected.

22. The JD is given twelve weeks" time to satisfy the impugned foreign arbitral award failing which the present enforcement proceedings will be taken to its logical conclusion inter alia by bringing to sale the properties mentioned at Sl. Nos. (i) to (iii) of Annexure "B" to the petition.

23. For compliance with the above direction, the petition be listed on 13th March 2012. Till such time the JD will not dispose of, or part with possession or create any third party interests in respect of the properties mentioned in Sl Nos. (i) to (iii) of Annexure B to the petition.