(2007) 11 DEL CK 0106

In the Delhi High Court

Case No : Execution Petition No. 160 of 2006 and EA No. 332 of 2007

Toepfer International Asia Pvt. Ltd. APPELLANT

Vs

Priyanka Overseas Pvt. Ltd. RESPONDENT

Date of Decision : 15-11-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 44, 48, 48(1), 48(2)
Contract Act, 1872 — Section 39, 63

Citation : (2007) 4 ARBLR 499

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : Indu Malhotra, Kunal Tandon and Gopal Shankar Narayanan, for the Appellant; G.L. Rawal and Kuljeet Rawal, for the Respondent

Judgement

Sanjay Kishan Kaul, J.

EA No. 332/2007

1. The subject matter of dispute between the parties are six contracts entered into between 22.09.2003 and 28.10.2003 whereby the judgment debtor had to supply to the decree holder of various quantities of Indian Toasted Soya Bean Extract in FAQ - Yellow Flakes. The contracts provided for prices between USD 200 to USD 256 per metric ton and the shipment period was from 15.11.2003 to 15.01.2004

2. The judgment debtor performed only part of the obligations and failed to deliver the balance quantity. In this behalf, the first relevant document is dated 15.03.2004, being a fax message of the judgment debtor stating that all the suppliers, with whom they had contracted, had defaulted in supplies and that they were seeking to sort out the problem and thus requested for extension of time. On the same fax message is an endorsement made on 18.03.2004 to the effect that all the suppliers had backed out on account of abnormal spurt in prices and that the judgment debtor would not be able to execute the order. The

judgment debtor further stated that they were trying to settle the issues with the suppliers and would accordingly settle the contract with the decree holder.

3. In response to the aforesaid letter, the decree holder addressed a letter dated 02.04.2004 acknowledging the inability of the judgment debtor to execute the contract as mentioned in the message dated 18.03.2004 and expressing their intent to treat the contract as cancelled with the liability to settle/pay damages to be agreed. The decree holder confirmed its acceptance to treat the contract as repudiated resulting in the damages as specified in the letter as under:

Contract No. Quantity Contract Price Market Price as Price Difference Claim Amount on 19-20/03/2004 TIA13011630 5000mt USD 212/-mt USD 330/- mt USD 118/mt x 5000 mt USD 590,000/- TIA13011530 2319mt USD 209/-mt USD 330/- mt USD 121/mt x 2319 mt USD 280,599/- TIA13009320 5000mt USD 202/-mt USD 330/- mt USD 128/mt x 5000 mt USD 6,40,000/- TIA13009150 4000mt USD 194/-mt USD 330/- mt USD 136/mt x 4000 mt USD 544,000/- TIA13012670 4000mt USD 256.50/-mt USD 330/- mt USD 73.50/mt x 4000 USD 294,000/- mt TIA13012010 2346mt USD 240/-mt USD 330/- mt USD 90/mt x 2346 mt USD 211,140/- TOTAL CLAIM AMOUNT DUE TO US : USD 2,559,739

4. The judgment debtor addressed a fax dated 27.05.2004 stating that out of the total contracted quantity of 28,040 metric tons, 5935.300 metric tons had been shipped, and thus, the balance quantity was 22,104.700 metric tons. The fax went on to state that from the discussions between the parties, the decree holder had agreed to settle the claim at USD 25 per metric ton being the agreed differential price amounting to a total of USD 552,600; out of which the judgment debtor confirmed that it was willing to pay USD 252,600 within 30 days of the settlement and balance USD 300,000 by the end of September, 2004 This proposal was accepted by the decree holder vide letter dated 28.05.2004 The payments were, however, not made and the judgment debtor vide letter dated 21.12.2004 sought further time to pay the amount by 10.01.2005. The payments were still not made and thus the decree holder on 19.01.2005 invoked the arbitration clause contained in the The Grain and Feed Trade Association (''GAFTA'' for short) Rules being clause No. 26 which is in the following terms: 26. Arbitration

a) Any dispute arising out of or under this contract shall be settled by arbitration in accordance with the GAFTA Arbitration Rules No. 125, in the edition current at the date of this contract, such Rules forming part of this contract and of which both parties hereto shall be deemed to be cognizant.

b) 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 until such dispute shall first has been heard and determined by the arbitrator(s) or a board of appeal, as the case may be, in accordance with the Arbitration Rules and it is expressly agreed and declared that the obtaining of an Award from the arbitrator(s) or a board of appeal, as the case may be, shall be a condition precedent to the right of either party hereto or of any persons claiming under either of them to bring any action or other legal proceedings against the other of them in respect of any such dispute.

5. In view of the letter dated 19.01.2005, the decree holder appointed its arbitrator and claimed the amount taking the default date as 05.04.2004 The claim thus made was for USD 2,763,724/-. The judgment debtor finally appointed the arbitrator vide letter dated 21.03.2005, which had been accepted by the decree holder on 28.04.2005. The GAFTA appointed the Chairman of the Tribunal on 30.05.2005. On 08.06.2005, the Schedule for proceedings before the Tribunal was laid down and the Tribunal granted 28 days'' time to the judgment debtor to submit its defense. On 30.06.2005, the judgment debtor sought further 90 days'' time to reply on the ground that there had been a fire in the office of the judgment debtor, but since the fire had occurred as far back as on 15.06.2004, the Tribunal found no merit for such extension but, in any case, granted a second opportunity to the judgment debtor of 21 days. A further opportunity was provided to the judgment debtor on 22.08.2005 of 7 days, but the judgment debtor failed to oblige. This resulted in a unanimous Award being passed by the Tribunal on 22.09.2005 for USD 2,763,724 with interest at the rate of 4.5 per cent and GAFTA fee of 105 pounds with interest at the rate of 5.5% apart from arbitration fees and expenses quantified at 4534 pounds.

6. The decree holder served a copy of the Award on the judgment debtor on 30.09.2005 with a debit note of USD 2,965,063.50. Even at that stage, the proposal for settlement was re-activated by the judgment debtor addressing a letter dated 23.12.2005 seeking to pay the amount of USD 552600 in certain Installments. The payments were still not made resulting in filing of the present execution petition.

7. The judgment debtor has filed the present objections and submissions of the learned Counsel for the parties have been heard.

8. In order to appreciate the scope and ambit of judicial scrutiny of these objections, a reference may be made to the Scheme of the Arbitration under the Arbitration and Conciliation Act, 1996 (''the said Act'' for short). Section 34 of the said Act falls in Chapter VII which deals with recourse against an arbitral Award. However foreign Awards have been dealt with in Part II under the heading ''Enforcement of Certain Foreign Awards'', Chapter I of which deals with ''New York Convention Awards''. Section 44 of the said Act defines a foreign Award and as per Clause (b) an Award made in a country/such territory where reciprocal provisions have been made is to be declared by a notification in the Official Gazette as a territory to which the said Convention applies. The said Section reads as under:

Section 44: Definition.

In this Chapter, unless the context otherwise requires, ``foreign Award''` means an arbitral Award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960?

(a) in pursuance to an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

9. It is, Therefore, not in dispute that the Award in question, emanating from the United Kingdom, a country where such Convention applies and has been duly notified, is thus a foreign Award.

10. The next question which thus arises is as to in what circumstances such an foreign Award is to be enforced and what is the nature of objections which can be gone into by this Court. For the said purpose, Sections 48 and 49 of the said Act are reproduced as under:

Section 48: Condition 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 contain 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), 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 affected 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.

Section 49: Enforcement of foreign Awards. Where the Court is satisfied that the foreign Award is enforceable under this Chapter, the Award shall be deemed to be a decree of that Court.

11. The submissions of the learned Counsel for the judgment debtor is that the Award is not liable to be enforced as a decree in view of the provisions of Section 48 as also Clause 48(2)(b) of the said Act.

12. The first plea which is sought to be advanced is that there was no arbitration agreement agreed upon under GAFTA Contract No. 119/125 as no mode of settlement was agreed by way of arbitration under the GAFTA Contract No. 119 at London. The correspondence between the parties is stated to be explained away as purely a bona fide mistake since the staff of the decree holder was working on various export contracts and it was not realized that the appointment of an arbitrator was not to be made for arbitration under GAFTA. The Explanation is also sought to be once again given about the fire in the office of the judgment debtor.

13. I find no force in the aforesaid plea which is an endeavor on the part of the judgment debtor to somehow wriggle out of the obligations arising under the Award. The Arbitral Tribunal has been constituted in terms of the agreement between the parties, the judgment debtor appointed his arbitrator and for the judgment debtor to now plead that there was no contract is clearly fallacious.

14. The sum and substance of the real challenge to the Award by the judgment debtor arises out of para 23 of the GAFTA Contract No. 119 which provides the obligations in case of default by a party. The said clause is as under:

23. Default - In default of fulfillment of contract by either party, the following provisions shall apply:

a) The party other than the defaulter shall, at their discretion have the right, after serving notice on the defaulter, to sell or purchase, as the case may be, against the defaulter, and such sale or purchase shall establish the default price.

b) If either party be dissatisfied with such default price or if the right at (a) above is not exercised and damages cannot be mutually agreed, then the assessment of damages shall be settled by arbitration.

c) The damages payable shall be based on, but not limited to, the difference between the contract price and either the default price established under (a) above or upon the actual or estimated value of the goods, on the date of default, established under (b) above.

d) In all cases the damages shall, in addition, include any proven additional expenses which would directly and naturally result in the ordinary course of events from the defaulter''s breach of contract, but shall in no case include loss of profit on any sub contracts made by the party defaulted against or others unless the arbitrator(s) or board of appeal, having regard to special circumstances shall in his/their sole and absolute discretion think fit.

e) Damages, if any, shall be computed on the quantity called for if any but, if no such quantity has been declared then on the mean contract quantity, and any option available to either party shall be deemed to have been exercised accordingly in favor of the mean contract quantity.

15. There is an agreement between the learned Counsel for the parties that the question of payment of damages has to be as per Clause 23 (c) of GAFTA Contract No. 119. Thus the only aspect to be considered is whether the Arbitral Tribunal has made the Award in terms of the parameters laid down in the contract between the parties, more specifically Clause 23 (c) GAFTA Contract No. 119.

16. A perusal of the Award shows that the Arbitral Tribunal has succinctly set forth the correspondence exchanged between the parties and has emphasized the fact that even where a respondent does not enter appearance, the Arbitral Tribunal should tread cautiously, act fairly and proportionately. It has thus been said that on the one hand it should not uncritically accept and adopt the claimants'' case as the basis for its Award while simultaneously at the other extreme the Tribunal should not assume the role of advocates on behalf of the non participating respondents, suggesting and exploring possible objections to the claim, unless these spring unprompted from the claimants'' claim, submissions and the supporting documents on which the claimants rely. One cannot but wholeheartedly agree insofar as this approach of the Tribunal is concerned. It also cannot be lost sight of that it is not the function of this Court to sit as a Court of Appeal over the findings of an Arbitral Tribunal or seek to arrive at conclusions different from the once arrived at by the Tribunal merely because the Court would have come to a different conclusion on appreciation of evidence. So long as the conclusion arrived at by the Arbitral Tribunal is a plausible conclusion, though possibly not the only conclusion, no interference is called for by the Court.

17. It has to be simultaneously emphasized that the undisputed legal position is

that the arbitrator is a creature of the contract between the parties and thus has to be guided and is bound by the terms and conditions of the contract. If the terms of the contract provide for a methodology to determine the damages arising from the breaches of the contract, it is not for the arbitrator to tread on a different path.

18. The Arbitral Tribunal has proceeded on the basis that the repudiation of the contract by the judgment debtor is as per the letter dated 02.04.2004 The claim was filed on the basis of prevalent prices as on 05.04.2004 Date of 02.04.2004 being a Friday, the Tribunal found that the rates given by the decree holder as on 05.04.2004 were justified.

19. The decree holder in support of its case had produced three documents. The first document is a certificate dated 18.01.2005 by M/s Rasex Traders. The document is not even signed and could have hardly been relied upon by the Arbitral Tribunal. However, there are two more documents - one being a certificate of Soya Links Export Intermediaries to the effect that as per the market information on 05.04.2004, the indicative prices were set out in the letter. Apart from this, the decree holder filed extracts of the Journal of The Solvent Extracts'' Association of India, which gave rates prevalent as on 05.04.2004 Insofar as these two documents are concerned, it is the submission of learned Counsel for the judgment debtor that these documents ought not to have been relied upon as the first document, being a certificate of Soya Links Export Intermediaries, only gave indicative prices while the second document being extracts of the Journal of The Solvent Extracts'' Association of India was not proved by producing any witness in that behalf.

20. In my considered view, the judgment debtor can hardly make any complaint in that behalf having chosen to deliberately stay away from the proceedings. It was for the judgment debtor to have appeared before the Arbitral Tribunal and established its case or offered rates different than the ones propounded by the decree holder. Thus, I find no merit or reason to alter the conclusion based on appreciation of evidence. The point, however, remains as to whether this date of 05.04.2004 taken by the Arbitral Tribunal was the correct date or at least a plausible date. The first communication of the judgment debtor is dated 18.03.2004 where the judgment debtor had clearly expressed its inability to perform the obligations. The first response of the decree holder is vide the letter dated 02.04.2004 accepting the same. The view taken by the Arbitral Tribunal could have been a plausible view if no specific provision had been made in the contract. However, in the present case there is a specific provision made in Clause 23 (c) referred to aforesaid where the relevant date is ''date of default''. It is thus not the date of repudiation but the date of default which was the relevant date. The date of default is 18.03.2004

21. Learned Counsel for the decree holder did seek to contend that as per the provisions of Indian Contract Act, 1872 (hereinafter referred as the Contract Act), it was open to the judgment debtor to have either changed the contract or

accepted the repudiation and thus it is only on the repudiation being accepted that the contract comes to an end. In this behalf, learned senior counsel has relied upon the provisions of Section 39 and Section 63 of the Contract Act which read as under:

39. When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promise may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

63. Every promise may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit

22. Section 39 of the Contract Act provides that on a refusal of a party to perform obligations, the promise may put an end to the contract unless there is acquiescence in its continuance. Section 63 provides for the promise to dispense with or extend time for such performance.

23. I have no doubt that the repudiation was accepted on 02.04.2004 but it is not the relevant date since the relevant date is the date of default and not the date of repudiation. It may once again be pointed out that in the own wisdom of the decree holder itself even in the letter dated 02.04.2004, the decree holder has rightly relied upon the rates prevalent as on 19/20.03.2004, which were prevalent immediately after the date of default of 18.03.2004

24. The settlement proposed and accepted was subject to its compliance by the judgment debtor failing which the provision had been made that the said settlement would have no effect. Admittedly the judgment debtor did not comply with the settlement and thus the settlement would have no effect with the result that the decree holder would be entitled to the claim for default on the part of the judgment debtor in terms of Clause 23 (c) of the Contract Act.

25. The provisions of Section 48 of the said Act provide for interference by the Court where decision in a matter is beyond the scope of the arbitration or the Award is contrary to the Public Policy of India. In Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., , the expression ''Public Policy of India'' has been given a wider connotation to include the power to set aside an Award if it is contrary to the fundamental policy of Indian law, interest of India, justice or morality, is patently illegal or is so unfair and unreasonable that it shocks the conscience of the Court. However, illegality of a trivial nature was held liable to be ignored. The Fundamental Policy of Indian Law is that Law of Land must be obeyed. The Law of Land is that an Arbitral Tribunal is bound by the terms of the contract of which it is a creation. The terms of the contract provide for damages in terms of Clause 23. Thus to the extent that the Arbitral Tribunal has proceeded to award damages on the basis of the date of repudiation and thus date of 05.04.2004 cannot be sustained as the relevant date is 18.03.2004

26. Learned Counsel for the judgment debtor thus seeks to contend that the claim of the decree holder has proceeded only on the basis of the cut off date of 05.04.2004 and thus the Award is unexecutable in toto. In this behalf, learned Counsel submits that unless the Court is satisfied that the Award as it is enforceable, the same cannot be enforced as a decree in terms of Section 49 of the said Act. Learned Counsel further states that thus the Award deals with matters not contemplated by the terms of the contract and contains decisions on matters beyond the scope of the submission. I am unable to accept the plea. The claim of the decree holder was based on the breach by the judgment debtor. The judgment debtor himself accepted the breach. The only question was the extent of damages. Same settlement also took place for the quantum of damages which was never honoured by the judgment debtor. The only relevant aspect to be considered is about the date of 18.03.2004 In the letter dated 02.04.2004, the decree holder itself set forth the rates prevalent as on 19-20.03.2004, which can be accepted. The reason is that the judgment never disputed these rates nor did it care to appear before the Arbitral Tribunal to put forth its case or set forth any contrary rates whether it be off 18.03.2004 or 05.04.2004

27. Learned Counsel for the judgment debtor also sought to contend that no procedure was set forth by the Tribunal for conduct of arbitral proceedings. The Arbitral Tribunal laid down the schedule, gave enough indulgence, if not over indulgence, to the judgment debtor to join the proceedings, but the judgment debtor stayed away. I fail to appreciate what further procedure had to be laid down when there was only one party before the Arbitral Tribunal.

28. I am thus of the considered view that the Award is enforceable to the extent of the claim for damages as set out in the letter dated 02.04.2004 taking the rates prevalent as on 19-20.03.2004 apart from interest and costs. To that extent, the plea of the judgment debtor has to be accepted.

29. Apart from the aforesaid, there is no other plea pressed by learned Counsel for the judgment debtor.

30. The decree holder is thus entitled to USD 2,559,739 instead of USD 2,763,724 while the other portion of the Award remains the same.

31. The application stands disposed of. Execution Petition No. 160/2006

(1) In order to satisfy the aforesaid decree, an attachment order is to be issued in respect of the assets disclosed by the judgment debtor as per the affidavit dated 10.07.2007.

(2) Since the affidavit is vague, I deem it appropriate to direct personal presence of Mr. Raj Kumar Jain, Director of the judgment debtor to record his statement on oath when he should come with all the material in respect of the assets of the judgment debtor.

(3) List on 21.01.2008 in the category of Short Matters.

