
(1999) 04 BOM CK 0030
In the Bombay High Court
Case No : Arbitration Petition No. 350 of 1998

Toepfer International Asia Pvt. Ltd.	Vs	APPELLANT
Thapar Ispat Limited		RESPONDENT

Date of Decision : 22-04-1999

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 47, 49, 82
Contract Act, 1872 — Section 10
Grain and Feed Trade Association (Singapore) Rules — Rule 2.2, 4, 82

Citation : AIR 1999 Bom 417 : (1999) 4 BomCR 415 : (1999) 2 BOMLR 890 : (2000) 2 MhLj 331

Hon'ble Judges : B.N. Srikrishna, J

Bench : Single Bench

Advocate : N.C. Thakkar and Jariwala, instructed by Thakore Jariwala and Associate, for the Appellant; S.C. Dharmadhikari and Ajay Khandkar, for the Respondent

Judgement

B.N. Srikrishna, J.—This is a petition u/s 47 of the Arbitration and Conciliation Act, 1996 (hereinafter called "the Act") applying for enforcement of the Award dated 30th September, 1997.

The silent facts necessary to dispose of this petition are as under:-

The petitioner is a company incorporated under the laws of Singapore, which carries on business of imports and exports of, infer alia. Indian commodities and in particular, import of Indian Toasted Soyabean Extractions. The respondent is a company registered under the Companies Act in the State of Punjab carrying on business of dealing with several Indian commodities. The petitioner and the respondent had an earlier business transaction during the course of which one M/s. Harish & Co. of Bombay had been appointed as the broker of the respondent to carry out the business deal for sale of certain commodities. The document at Exh. A to the affidavit of Dilip K. Sheth in rejoinder filed on 12th March, 1999 brings out the fact that in the previous business transaction M/s. Harish & Co.

had acted as broker for the respondent/company. The said M/s. Harish & Co. are regularly carrying on business of broker for selling edible and non-edible oils, oilseeds, oilcakes, bran, cattle feed and poultry feed ingredients.

2. It is the case of the petitioner that M/s. Harish & Co. acting as broker of the respondent approached the petitioner and offered to sell, supply and deliver goods as per the requirement of the petitioner. Negotiations took place with regard to terms of a contract for supply of 1000 Metric Tons of Indian Toasted Soyabean Extraction FAQ yellow Flakes of certain specification. The shipment of the goods was to be effected by December, 1995 and the agreed price was US \$ 192 per metric tone of 1000 kilos net in Bulk FAS (FOB) Bodi Bunder, Gujrat. The payment under the contract had to be made by opening an irrevocable letter of Credit for 100% contract value in favour of the seller. By a note dated September 5, 1995 under the signature of M/s. Harish & Co., the basic terms of the contract were confirmed and it was further provided therein that the other terms would be "As per contract No. TIA 2856-151155 dated 5-9-1995 of M/s. Alfred C. Toepfer (India) Export Pvt. Ltd., Bombay". A formal document of contract appears to have been drawn up and signed by the authorised representative of the petitioner and by one of the Directors of the respondent/company.

3. Pursuant to the terms of the contract, the petitioner opened a letter credit on 23-11-1995 with their Bank Society General, Singapore Branch, who in turn instructed their Bombay branch with regard to opening of the irrevocable letter of credit for a sum of US \$ 192,000.00. Under the terms of contract, the respondent was to load the goods on the ship to be nominated by the petitioner. The petitioner by its communication issued by their Surveyor dated 6-12-1995 nominated M.V. Feng Guang as the carrying vessel. This was confirmed by another telex of the Surveyor of 14-12-1995. The respondent failed to load the cargo as required, even after another telex dated 28-12-1995. The surveyor placed on record that till 19.00 hours on that date that no cargo had been offered by the respondent for pre-shipment against the vessel M.V. Feng Guang. By a note dated January 2, 1996 the shipment date was altered from December, 1995 to January, 1996 and the note was countersigned on behalf of the respondent by its broker M/s. Harish & Co. There was failure to load the cargo even after the shipment date was thus altered. This is evidenced by the surveyor's letter dated 15-1-1996. The shipment date was once again amended to February, 1996 by addendum to the contract dated February, 1996 signed on behalf of the respondent by its broker M/s. Harish & Co. Even after this amended shipment date, the respondent failed to load the cargo on the vessel. By a telex dated February 12, 1996, the petitioner placed on record that the respondent had failed to tender cargo on the nominated vessel in accordance with contract and declared the respondent to be in default and reserved its rights to claim all costs and consequences including demurrage, dead freight and price difference. By a telex dated 27th March, 1996, the petitioner claimed a sum of US \$ 40000/- calculated at the rate of US \$ 40/- price per mt., thence prevailing on the date and called upon the respondent to remit the same to its account at Chase

Manhattan Bank, New York.

4. The respondent failed to respond to any of the communications, despite several communications received from the petitioner. The petitioner exercised its right of moving its claim in Arbitration and by its telex dated 14-6-1996 nominated one A.G. Scott as its nominee in accordance with "The Grain and Feed Trade Association" Arbitration Rules (Form No. 125), which were part of the contract by virtue of the arbitration clause contained in the contract. The matter apparently was taken up with the broker M/s. Harish & Co. by the petitioner. M/s. Harish & Co, by their letter dated 25th July, 1996, referred to the contract in question and advised the respondent that it had defaulted on the contract. They also drew the respondent's attention to the fact that one H.P. Thakkar of M/s. Harish & Company along with one Padmanabhan of M/s. Alfrad C. Toepfer, Bombay, the petitioner's broker in Bombay, had visited the respondent's office at Ludhiana on 18th June, 1996 to discuss the matter with a view to arrive at an amicable solution. The letter also placed on record as to how one Anil Thaper with whom a previous appointment had been fixed for discussing the issue was unavailable for 4-5 days and how the subsequent promise of Anil Thaper to visit the Bombay office of M/s. Alfrad C. Toepfer on subsequent two occasions to sort out the issue earlier was not fulfilled. The broker by the said letter tried to impress the respondent that the dispute should be resolved at the earliest or it would damage the respondent's reputation. If buyer decided to act otherwise.

5. On 25th June, 1996 The Grain and Feed Trade Association (hereinafter referred to as "GAFTA") informed the respondent that the petitioner as Buyer had requested GAFTA to appoint an Arbitrator on behalf of the seller respondent, as the respondent had failed to appoint its own Arbitrator. This is permissible under the GAFTA Arbitrator Rules Form No. 125. On 16th July, 1996, GAFTA appointed one C. Nottage as the Arbitrator on behalf of the respondent seller. On 3rd September, 1996 GAFTA appointed one G. Perry as the third Arbitrator and Chairman of the Arbitral Tribunal. By a letter dated 3rd September, 1996, the respondent was called upon to provide its submissions and documents within 28 days. On 11th October, 1996, the Chairman of the Arbitral Tribunal informed the respondent via telex sent by GAFTA to deliver its submission as required within due date and directed the respondent to deliver the submission to GAFTA on or before 21 October, 1996. The respondent failed to deliver its submission or take any part in the arbitration proceedings. On 9th December, 1996 the Chairman of the Arbitral Tribunal issued a peremptory order requiring the respondent to submit its papers within 21 days, upon failure of which the Tribunal would proceed to determine the issue on the basis of the documents and papers placed before it by the claimant. Despite this peremptory order, the respondent failed to place its documents and submissions before the Arbitral Tribunal for consideration. In the result, the Arbitration proceedings were held ex parte and, after considering the material tendered and the submissions made by the petitioner, Arbitration No. 1193 resulted in the Award dated 30-9-1997. Arbitrators by their award held that the respondent had failed to supply the

contracted goods as agreed and that hence was liable for damages calculated at the difference between the default price on the date of selling (25-6-1996) of US \$ 232 per metric tone and the contractual price of US \$ 192 per metric tone. Thus, by the said award the respondent was held liable to pay to the petitioner a sum of US\$ 40 per metric tone, making a total amount of US \$ 40,000 and further directed to interest at the rate 7% per annum from 25-1-1996 to the date of the award.

6. The petition, has been opposed by the respondent by an affidavit in reply of one Raghbir Singh Bhullar dated 9-1-1999. The respondent contends that the petition deserves to be dismissed and that it be declared that the Foreign Award is not enforceable for the following reasons:

(i) That there was no contract at all between the petitioner and the respondent with regard to supply of any goods. Hence, there could not have been an arbitration agreement and, consequently all purported proceedings in arbitration must be held to be void and of no consequence. Hence, the award is also void and unenforceable:

(ii) Without prejudice it is contended that if at all there was a contract for supply of goods, then, it was entered into at Ludhiana in the State of Punjab and, therefore, this Court has no jurisdiction to entertain the petition:

(iii) That the award in question was rendered despite the fact that the claim in arbitration had been made beyond the period of limitation prescribed under the Arbitration Rules and, therefore, enforcing such an award would amount to acting contrary to the public policy in this country.

7. The first contention that there was no contract at all appears to me to be more a contention born of desperation than rooted in facts. In the affidavit in reply, the respondent took up the extreme contention of there being no contractual relationship whatsoever between the petitioner and itself and went to the extent of denying that M/s. Harish & Co. were acting as its broker. The petitioner has by its affidavit-in-rejoinder dated 12th March, 1999 placed a number of documents on record, which were obtained from the office of GAFTA on an application made by the advocate of the petitioner M/s. Jariwala & Co. I have already referred to one document at Exh. A of this affidavit-in-rejoinder. This has been placed on record to show that M/s. Harish & Co. acted as brokers with regard to particular type of commodities dealt with and that on earlier occasion they had acted as brokers between the petitioner and the respondent, when goods worth Rs. 8,78,40,650/- had been purchased and sold. Exh. "B" to this affidavit in rejoinder is a letter dated September 15, 1995 addressed by the respondent to M/s. Harish and Co., in which the respondent acknowledged the receipt of contract No. TIA 2856/151155 dated September 5, 1995 for 1000 MT Soyabean Extraction. The respondent also said that "it was returning two sets of the contract for onward submission to Toepfer and further action at your end". M/s. Harish & Co. was also requested to kindly arrange to send the L/C at the earliest. Despite taking time

to deal with the facts averred in the affidavit in rejoinder, no further affidavit was placed by the respondent. In the circumstances, there is no reason for not accepting the averments made in the affidavit-in-rejoinder, which appear to be well supported by several documents annexed thereto, some of which were obtained from the custody of GAFTA, which has no axe to grind in the matter. There is neither denial of the letter dated 15-5-1995 from the respondent to M/s. Harish and Co., nor is there any explanation for this letter. Reading of this letter leaves me in no doubt that the contract No. TIA 2856/151155 had been arrived at between the parties and that, after having executed it the respondent had supplied two sets of the documents to M/s. Harish & Co., for onward submission to the petitioner and for "further action". Which could only mean execution thereof by the petitioner.

8. Exhibit "C" to the affidavit-in-rejoinder is a letter of the petitioner to the GAFTA indicating the defence taken by the respondent in its affidavit-in-reply and requesting GAFTA to supply several documents from its end. The documents supplied by the GAFTA have been placed on record at Exhibit "C" collectively. A perusal of Exhibit "C" collectively, clearly bears out that on 16th July, 1996, the Director General of GAFTA addressed a letter to the respondent informing it that the petitioner had filed an application for arbitration of its claim in a dispute which had arisen between the petitioner and the respondent touching the contract dated 1-2-1996 being contract No. TIA 2858/151155 in respect of supply of 1000 MT Indian Toasted Soyabean Extraction FAQ Yellow Flakes. It was also pointed out therein that since the respondent had failed to appoint its Arbitrator within 9 consecutive days of the receipt of the Claimant's notice of the appointment of A.G. Scott as the claimant's arbitrator, C. Nottage had been appointed as the respondent Arbitrator under the Rules. The respondent by the said notice was called upon to appear in person or by representative or to state its case in writing, which had to be done in accordance with Rule 4 of the GAFTA Arbitration Rules Form 125. Placed on record is a xerox copy of the receipt issued by the postal department of the Royal Mail Department in U.K., which evidences that such a letter was addressed to the respondent at the address which is shown in the petition.

9. Another letter dated 3rd September, 1996 is addressed by the Arbitration Department of GAFTA to the petitioner with copy to the respondent and the Arbitrators. This letter appears to have been sent by fax and the transmission report indicates that the fax was received by the respondent. This letter acknowledges receipt of the submissions and documents from the petitioner and draws attention to the Rule 4 of the Arbitration Rules Form 125. There is also a letter dated 3rd September, 1996 addressed jointly to the petitioner and the respondent informing them of the appointment of G.M. Perry as the third arbitrator and chairman of the Arbitral Tribunal. The letter also gives the time schedule for parties to act. That the petitioner has acted on this is indubitable. It is therefore, impossible to accept that somehow the respondent never received this letter. On record is also another notice dated 3rd September, 1996 from

GAFTA addressed to both the parties, giving them further time schedule for producing the submissions/documents. This letter appears to have been received by fax by the respondent. A letter dated 3rd September, 1996 addressed to the petitioner with copy to the respondent and the third Arbitrator, acknowledges the receipt of the submissions and documents and draws attention to Rule 4 of the Arbitration Rules Form 125, and calls upon the parties to send all documents in triplicate. There is also a letter dated 11th October, 1996 addressed by GAFTA to the respondent conveying the directions of the Chairman of the Tribunal that since the respondent failed to deliver submissions as required in earlier letter of GAFTA, the respondent was directed that it should be done by 21st October, 1996, upon failure to do which the Tribunal would issue a peremptory order. This letter is sent by registered mail and the xerox copy of the receipt of the Royal Mail Department evidences that it has been sent to the respondent. A fax message was sent on 11th October, 1996 by GAFTA to the petitioner as well as the respondent conveying the same message. The activity report indicates that it has been received by the respondent.

10. There is another fax message dated 11th October, 1996 from GAFTA addressed to the respondent with copy to the petitioner, the two Arbitrators and the Chairman of the Arbitral Tribunal. In this letter also it was conveyed that if the respondent failed to file its submission by 21st October, 1996, the Tribunal would issue a peremptory order. On 9th December, 1996, GAFTA addressed a letter to the respondent conveying peremptory order made by the Arbitral Tribunal. The said letter also was sent by fax to the respondent, as evidenced by the Fax transmission form and activity report, which indicates that the fax message was received by the respondent. On 6th June, 1997, GAFTA addressed a letter to the petitioner with copies to respondent, the two Arbitrators and the Chairman of the Arbitral Tribunal, acknowledging receipt of fax dated 2nd June, 1997. On 18th September, 1997 GAFTA informed the petitioner that the award of Arbitration was available upon receipt of the fees and expenses amounting to \$ 2,740.00 and called upon the petitioner to forward the said fees. This letter was sent by registered post as evidenced by posting receipt of Royal Mail, U.K. On 30th September, 1997 GAFTA addressed a letter to the petitioner acknowledging full settlement of fees, including a copy of the Arbitration Award dated 30th September, 1997 and conveying that copies thereof had been sent to the respondent, the members of the Tribunal and the Chairman of the Tribunal. A Courier Waybill placed on record evidenced that the award was forwarded to the petitioner and the respondent by GAFTA.

11. A perusal of the aforesaid materials place me no doubt that the Arbitral Tribunal conducted proceedings in accordance with the procedure of GAFTA Rules, principles of natural justice and the laws applicable in the Country. I have also no doubt that the respondent was given due notice of the arbitration proceedings, but the respondent failed to appear before the Arbitral Tribunal and put forth its case. In these circumstances, I am of the view that no fault can be found with the Arbitral Tribunal making its award ex parte as against the

respondents.

12. Considering the material produced before the Court, it is difficult to accept the contention of the respondent that there was no contract at all between the petitioner and the respondent with regard to supply of the goods in question. In fact, the affidavit of Harish P. Thakkar and Shri Padmanabhan Iyer dated 16th March, 1999 takes the matter beyond the pale of controversy. The said Harish P. Thakkar is the proprietor of M/s. Harish Brokers and he asserts that his firm has been acting as a broker for Thapar Oils and Fats Ltd., an associate Company of the respondent and Thapar Exports Ltd., as well as for the respondent and had effected a number of transactions for the said Thapar Groups of Companies. He also states that he has handed over a set of photo copies of bills, letters and other documents exchanged between himself and the said Thapar Companies to the petitioner. The affidavit of Harish also brings out that sometime in or around September, 1995 his firm was appointed as Brokers for the respondent for sale of Indian Toasted Soyabean Extraction through one Anil Thapar, a director of the respondent Company, who represented to him that the respondent would be in position to supply the contracted quantity of the said goods. Thereafter, there were negotiations with the petitioner through one Padmanabhan Iyer, working with M/s. Alfred C. Toepfer India Exports Ltd., who were acting as Brokers of the petitioner. The negotiations were held at Bombay and the terms of the contract were finalised on 5th September, 1995 at Bombay between the two Brokers acting on behalf of their respective Principals. Harish Thakkar also asserts that under instructions from the respondent, his firm has issued a letter of confirmation at Bombay to the petitioner Brokers setting out the terms of the contract under which the respondent agreed to supply 1000 Metric Tons of Indian Toasted Soyabean Extraction F.A.Q.-Yellow Flakes at the rate of U.S. \$192/- per Metric Ton during December, 1995. According to Harish Thakkar, subsequently a formal contract document was prepared by M/s Alfred C. Toepfer (India) Export Ltd. (brokers of the petitioner) and the said contract's number was TIA 2856-151155. This formal document was forwarded by Harish Thakkar to the respondent and the same was returned by the respondent under cover of letter dated 15th September, 1995 duly signed "for further action". In fact, a copy of the said letter is enclosed at Exh. A to the affidavit of Harish Thakkar. This letter, in terms says." We are returning herewith two sets of contract for onward submission to Toepfer and further action at your end. You are requested to kindly arrange to send us the L/C at the earliest." At Exh-A-1 is a letter dated September, 22, 1995 by Harish & Co. addressed "to the petitioner at the address of its brokers in Bombay forwarding a contract No. TIA 2856-151155 dated September, 5, 1995 in duplicate duly signed by sellers M/s Thapar Ispat Ltd. Ludhiana.

13. The same affidavit also incorporates the assertions of Padmanabhan Iyer, the employee of the petitioner" brokers" M/s Alfred C. Toepfer India Ltd. who confirms the facts placed on record by Shri Harish P. Thakkar. In the face of this affidavit, which has not been controverted at all, I have no hesitation in holding

that there was a contract between the parties for supply of the goods already described.

14. I, therefore, hold that there was a contract between the parties and the contract was in fact the document TIA 2856-151155 reproduced at Exh-A to the petition. The last term in the contract styled as "Other Terms" reads:

"All other terms and conditions as per GAFTA contract Nos. 100 & 119/125 currently in force. Both the buyer and seller hereby acknowledges familiarity with the test of the said GAFTA Contracts and agree to be bound by its terms and conditions. ARBITRATION IN LONDON....."

The meaning of this Clause is quite obvious, at any rate to a person who was dealing with the goods in question or with GAFTA. This clearly means that the contract was subject to an arbitration clause in accordance with the rules of GAFTA. Thus, the first contention of Shri Dharmadhikari that there was no contract between the parties, much less, an arbitration agreement, has no substance and must be rejected.

15. The second contention also has no substance in my view. In the first place, the material placed on record evidences that all terms of the contract were negotiated and finalised in Bombay on 5th September 1995. It was, thereafter, that the formal contract document was engrossed and sent Ludhiana for the signature of the respondent. The respondent's Director signed the contract document and forwarded it to the respondent's broker at Bombay, for onward transmission to the petitioner for taking necessary action. The Affidavit of Harish Thakkar clearly shows that this document was thereafter handed over to the authorised representative of the petitioner. It is the case of the petitioner in paragraph 3 of the petition that the contract was actually executed by and on behalf of the petitioner at Bombay. There is no material on record to refute this assertion. In fact, there could not have any material for it is a fact known only to the petitioner and its authorised representative. The issue can be looked at in two ways. If the contract is said to have been concluded when the terms were prepared, then obviously that took place in Bombay. If the Contract is said to have been finalised only after both parties had signed, then it is clear that only one of the parties signed at Ludhiana and the other signed it in Bombay only after it was received in Bombay. Looking at it, either way, I am satisfied that the Contract was entered into in Bombay and that this Court has jurisdiction to entertain the petition. The second contention of Mr. Dharmadhikari must be rejected.

16. As to the third contention with regard to limitation, I am of the view that, at best, this may touch the merits of the claim. It was open to the respondent to appear before the Arbitral Tribunal and raise the contention that the Arbitral tribunal could not have entertained the claim because it was beyond the limitation prescribed under the GAFTA Rules. Arbitration Rules From No. 125 have been issued by GAFTA. Rules 2.2 would apply to the claim of the nature

entertained by the Arbitral Tribunal. In respect of such claim the claim has to be lodged not later than the 90th consecutive day after the dispute has arisen. Rule 2.4 says "No award by the tribunal shall be questioned or set aside on appeal or otherwise on the ground that the claim was not made within the time limits stipulated in this Rule if the respondent to the claim did not raise the matter in its submissions so as to enable the tribunal to consider whether or not to exercise the discretion vested in it by Rule 2.2."

17. Rule 2.2, therefore, is a complete answer to the contention of Shri Dharmadhikari. The objection was purely a matter touching the merits of the claim and even under the rules thus, if the objecting party fails to raise an objection, then no fault can be found with the Award. I am, therefore, of the view that there is no substance in the third contention also which must be rejected.

18. Hence, I find that all objections raised to the validity of the Award have no force. I am satisfied that the award is perfectly in accordance with the provisions of GAFTA Rules and is fit one to be enforced as a Foreign Award under Chapter II of the Arbitration and Conciliation Act, 1996.

19. By prayer (a) in the petition, it is prayed that this Court be pleased to enforce the award dated 30th September, 1997 Exh. O to the petition. In my view, such a prayer cannot be granted under the provisions of the Act 1996. In my opinion, section 49 of the Act merely empowers the Court to declare that the Foreign Award is enforceable under the provisions of Chapter II of the Act. The moment such a declaration is granted, an award shall be deemed to be a decree of the Court. Once its deemed to be a decree of the Court, it is open to the parties to seek its execution in accordance with the provisions of the Civil Procedure Code.

20. Mr. Thakkar, then sought relief in terms of prayer (c) in the petition, which is for payment of interest at the rate of 21% p.a. on the principal sum of US\$. 40,000 from the date of award i.e. 30th September 1997 till payment and realisation of the same sum. The award by itself directs payment of interest at 17% per annum on the principal sum of us 40,000 from 25-1-1996 to the date of the award. In Court's view, this prayer cannot be granted. Under the 1996 Act, it is no longer open to the Court to make such an order for interest. It appears to me that there is a serious lacuna in the Act, in so far as an Arbitration Award is concerned, if it does not award interest beyond the date of award and for any delay caused thereafter, the party who succeeds in the claim would be put to great loss. It would put premium or dishonest objection to the Award and delay in its execution, without risk of incurring interest charges. This lacuna can be cured either by legislature or by framing of appropriate rules by the High Court in exercise of its powers u/s 82 of the Act. Admittedly, there are no rules on the subject made by the High Court still. In these circumstances, I am of the view that the matter should be placed before the learned Chief Justice for consideration as to whether appropriate rules can be made under Rule 82 to get over this

difficulty with regard to lack of the power of the Court to grant interest beyond the date of the Award. With these observations, I refuse relief in terms of prayer Clause (c)

20A. Hence, the following order.

ORDER

The Foreign Award of the Arbitral tribunal dated 30th September, 1997 at Exh. O to the petition is hereby declared to be enforceable under Chapter 11 of the Arbitration and Conciliation Act, 1996. Rules accordingly made absolute. The respondent to pay Rs. 20,000/- as costs of this petition.

21. Rule made absolute.