

Delhi High Court

Delhi High Court

Ludwig Wunsche & Co. vs Raunaq International Ltd. And ... on 12 April, 1982

Equivalent citations: AIR 1983 Delhi 247, 22 (1982) DLT 53, 1983 (4) DRJ 8

Author: H Anand

Bench: H Anand

JUDGMENT

H.L. Anand, J.

(1) This application is a sequel to an order made on February 23, 1981 by the Registrar of this Court in Suit No. 113-A/81, and raises a question as to the procedure to be followed in proceedings for the enforcement of a foreign award under the provisions of the Arbitration (Protocol & Convention) Act, 1937 and of the Foreign Awards (Recognition and enforcement) Act, 1961, for short, the Acts of 1937 and 1961 respectively.

(2) Ludwig Wunsche and Company, a foreign company, applied under the Act of 1961 and/or the Act of 1937 to enforce a foreign award said to have been made on September 5, 1979 by three arbitrators, nominated by the Grain & Food Trade Association Ltd. pursuant to an arbitration clause said to have been incorporated in a contract, allegedly entered into between the company and Raunaq International Ltd, an Indian company, defendant no. 1. By its application) the foreign company prayed that "this Hon'ble Court may be pleased to direct that the said Award dated the 5th September, 1979 be filed in this Hon'ble Court, a decree be made in terms thereof". The original Award and a duly authenticated copy of it, were enclosed with the application as Annexures 'S' and 'Q.' respectively. On February 23, 1981, the Registrar of this Court directed that the application be registered as a suit and notice of it be issued to the opposite party for April 16, 1981. The order proceeded further thus:

"THE Arbitrator be directed to file the original award, award proceedings and documents on or before the said date."

(3) Before the said date, the foreign company filed the present application u/s. 151 read with Section 153 of the Code of Civil Procedure praying that the order made by the Registrar, of February 23, 1981, be clarified and/ or modified/amended by withdrawing the direction to the Arbitrators to file the original Award, award proceedings & documents as the Award had already been filed Along with the petition and the award proceedings and documents were not "statutory required". Notice of this application was issued to the Indian company on whose behalf the request was opposed. The Registrar heard the parties, noticed the rival contentions and has made a reference of the matter to the Court for appropriate orders. Meanwhile, on receipt of notice of the main proceedings, pursuant to the order of February 23, 1981, the Indian company has filed objections to the Award by I.A. 1852/81, inter alia, praying that for the reasons set out therein the Award "be set aside with costs against the plaintiff."

(4) The rival contentions, as indeed, the reference of the Registrar pose the question as to the correct and proper procedure to be followed where a foreign award is sought to be enforced in India and as to the manner in which an apparent conflict between the Indian Arbitration Act, 1940, for short, the Act of 1940 and the special statutes dealing with the enforcement of foreign awards is to be resolved.

(5) Dr. Sankar Ghosh, counsel for the foreign company contends that the original Award having been filed with the petition for its enforcement and the production of the arbitration proceedings being unnecessary for the purpose of enforcement of a foreign award in view of the provisions of the Arbitration (Protocol and Convention) Act, 1937 and/or the Foreign Awards (Recognition and Enforcement) Act, 1961, notice to the Arbitrators for the production of the Award, proceedings and the documents was unnecessary and so was the further notice to the Indian company, after the Award has been filed, as envisaged in Section 14(2) of the Indian Arbitration Act, 1940. He contends that the enforcement and recognition of a foreign award is to be

regulated by the Acts of 1937 or the Act of 1961, as the case may be and the provisions of the Act of 1940 or the procedure laid down therein in that behalf would have no application. Any such procedure, he contends, would have unnecessarily delay the course of the enforcement of a foreign award, which would be contrary to the letter and spirit of the articles of the protocol and the convention on which the Acts of 1961 and of 1937 are based. On the other hand, Mr. G.N. Aggarwal, who appears for the Indian Company, contends that the foreign award could be enforced in India only in accordance with the procedure prescribed in the Act of 1940 and that u/s. 14(2) of the Act, notice to the Arbitrators to Produce the Award, award proceedings and other documents was mandatory to be followed by a fresh notice to the parties of the filing of the Award by the Arbitrators and that the requisite period for filing objections would be computed in accordance with the service of the notice of the filing of the Award by the Arbitrators. He particularly points out that to hold to the contrary would amount to compelling the Indian company to file objections without having recourse to the arbitration proceedings. He, however, does not dispute that certain documents purporting to be the original Award and its authenticated copy have been filed Along with the petition, even though there is a formal prayer in the application that "the said Award dated 5th September, 1979 be filed in this Hon'ble Court." In this context he invites attention to the claim of the Indian company that the Indian company had no notice of the arbitration proceedings or of the foreign award that led to it. The Indian company apparently denies that there was any concluded contract and, therefore, challenges the existence of the arbitration clause said to have been incorporated in the contract.

(6) The Act of 1937 and that of 1961 are based on the protocol and the convention which are set out in the case of 1937 in the First and Second Schedules to the Act and in the case of the Act of 1961, in the Schedule thereto. The two Statutes, at indeed, the protocol and the convention are more or less in identical terms. The two Statutes, however, embody the procedure for the enforcement of a foreign award and lay down the rules for the enforceability of a foreign award which represent a departure from the rules and procedure laid down in the Act of 1940. Section 2 of the Act of 1961 defines the expression "foreign award". Section 3 provides for stay of proceedings in respect of matters to be referred to arbitration and subject to certain variations correspond to Section 36 of the Act of 1940. Section 4 of the Act of 1961 lays down the effect of a foreign award and provides that subject to the provisions of the Act, a foreign award shall be "enforceable in India as if it were an award made on a matter referred to arbitration in India", and lays down that a foreign award, which is enforceable "shall be treated as binding for all purposes on the persons as between whom it was made." Section 5 corresponds to Section 14 of the Act of 1940 and provides :

"5.(L)Any person interested in a foreign award may apply to any court having jurisdiction over the subject-matter of the award that the award be filed in court. (2) The application shall be in writing and shall be numbered as a suit between the applicant as plaintiff and the other parties as defendants. (3) The Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified why the award should not be filed."

Section 6 of the Act of 1961 which corresponds to Section 17 of the Act of 1940 is in the following terms : "6. (1) Where the court is satisfied that the foreign award is enforceable under this Act, the court shall order the award to be filed and shall proceed to pronounce judgment according to the award. (2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award." Section 7 lays down the conditions for enforcement of foreign awards and Section 8 lays down the conditions for a proper application for the enforcement of a foreign award and the evidence to be adduced before the Court for the purpose. It is obvious from the provisions of the Act of 1961 that these provisions represent a departure from the procedure laid down in the Act of 1940, in that, in the first instance, an application for enforcement of an award has to be accompanied by the original award or a duly authenticated copy of it, there is no provision for a notice to the arbitrator or of any direction to the arbitrator for the production of the award or the arbitration proceedings, the only notice envisaged is a notice to the respondent to show cause why the award be not filed, which does refer to the ministerial act of the filing of an award in Court taking the award on its record and the Court has to be satisfied that the award is enforceable before it directs that the award be filed in Court, and once such a

discretion is made, the Court proceeds to pronounce a judgment according to the award. The only opportunity under this procedure that the respondent has is to oppose the filing of the award on the ground that the conditions of Section 7 for the enforcement of foreign awards are not satisfied. It is also significant that in terms of this Statute, Indian Court is not empowered to set aside or to annul the award and the only enquiry before the Court is if the award is enforceable. If, however, the Court is satisfied that an application for the setting aside or suspension of the award has been made before a competent authority, the Court may, if it seems proper, adjourn the question of enforcement of the award on such terms as to suitable security as the Court may order. It further appears that Article 119 of the Limitation Act, which deals with the awards under the Act of 1940, have no application to foreign awards and the proceedings in relation to foreign awards would either be regulated by the residuary Article 137 or in accordance with the directions that may be made by the Court seized of the matter.

(7) To what extent, if any, are the provisions of Act of 1940 applicable to proceedings in India for the enforcement of a foreign award, either under the Act of 1937 or of the corresponding provisions of the Act of 1961? There has never been any doubt in the position either under the Act of 1940 or under any of the earlier enactments relating to arbitration in India that these enactments were inapplicable to foreign awards. It has also never been in doubt that prior to the Act of 1937, there was no statutory provision in India applicable to foreign awards and a party seeking to enforce a foreign award could only file a suit on the basis of it. Act of 1937 was enacted to give effect to the protocol in arbitration clauses and to the convention on the execution of foreign arbitral awards of the league of nations which are reproduced in the Schedule I and II to that Act and to which India was a signatory. The Act of 1961 repealed the Act of 1937 and was intended to give effect to the convention of the recognition and enforcement of foreign arbitral awards to which India was also a signatory. Both these statutes, while giving effect to the international conventions, made elaborate provisions for the enforcement of the foreign awards and laid down a procedure for stay of any suits with regard to matters covered by the arbitration agreement as also the reasons and the circumstances in which the Indian Court may decline to enforce a foreign award. These provisions run parallel to the provisions contained with regard to arbitration proceedings and awards under the Act of 1940 and are to an extent inconsistent with an constituted departure from corresponding provisions in the Act of 1940. Section 47 of the Act of 1940 makes the provisions of the Act inapplicable to foreign awards by virtue of the saving clause. This is how section 47 runs :

"47. Subject to the provisions of Section 46, and save in so far as is otherwise provided by any law for the time being in force the provisions of this Act shall apply to all arbitrations and to all proceedings there under: Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by and Court before which the suit is pending."

(8) It is quite obvious that the provisions of the Act of 1937 and latter that of 1961 constitute "any law for the time being in force" within the meaning of Section 47, in relation to certain categories of arbitration agreements, arbitrations, arbitration proceedings and arbitral awards. The Acts of 1937 and 1961 were, therefore, treated as laying down a complete Code to deal with foreign awards in India to the exclusion of the provisions of the Act of 1940. This exclusion is not only based on the express provision contained in Section 47 of the Act of 1940 but would also be implied because at least the Act of 1961 was a subsequent Statute and both the Acts of 1937 and the Act of 1961 are special Statutes dealing with certain categories of arbitral awards, while the Act of 1940 was a general provision with regard to the arbitration. It is well-known that the special statute prevails over the general. It is, however, a possible view to take of the exclusion u/s. 47 of the Act of 1940 that the provisions of the Act of 1937 and 1961 would prevail to the extent of inconsistency with the provisions of the Act of 1940 and that matters, for which there was no provision in the Acts of 1937 and of 1961, would be regulated by the general provisions contained in the Act of 1940. This could be inferred from the use of the words "Save in so far as is otherwise provided" in Section 47. In the case of *Mury Exportation v. D. Knaitan & Sons Ltd.*, 1956 Cal. 644, P.B. Mukherji, J. of the Calcutta High Court held that the Act of 1937, then in force, and the Act of 1940 were two statutes governing different kinds of arbitration and to

introduce Section of the Act to regulate arbitration under the other will be to create confusion and contradiction which was not intended by the legislature. This question arose with regard to the applicability of Section 35 of the Act of 1940 and the question if the said section was applicable in the case of a foreign award was answered in the negative. The foreign award had been challenged, inter alia, on the ground that the notice of the filing of the suit in India having been given to the foreign arbitrator, the further proceedings of arbitration, including the foreign awards were invalid by virtue of Section 35 of the Act of 1940. The learned Judge relied on an earlier decision of the Calcutta High Court in the case of *Shiva Jute v. Hindleyds Co. Ltd.*, 57 Cal. W.N. 575(577), in which the High Court expressed "grave doubts" as to whether Section 35 of the Indian Act, can have that result on an English Award." It must, however, be pointed out that eventually when the case of *Shiva Jute* (supra) came in appeal to the Supreme Court, it was assumed that Section 35 would apply and the decision turned on other aspect of the case. (Sec ).

(9) In the case of *M/s. Francesco Corsi v. M/s. G rakhram Gokalchand Air* 1960 Bombay 91, K, Desai, J. of the Bombay High Court held that Section 4(1) of the Act of 1937 did not provide that foreign award shall be deemed to be an award made under the Act of 1940 and that it was only enforceable in India subject to the provisions of the Act of 1937 as if it was award made on a matter referred to arbitration in India. It was pointed out that before a foreign award is "filed" under the Act of 1937, there are various requirements of law which have to be satisfied and that merely because of foreign award was enforceable in India as if it was an award made on a matter referred to arbitration in India, it did not make that award an award under the Act of 1940. It was further pointed out that the provisions with regard to the filing of the award under the Act of 1940 were totally different from those contained in the Act of 1937, and that an application for filing an award u/s. 5 of the Act of 1937 could not be treated as an application for filing an award u/s. 14 of the Act of 1940. It was further pointed out that the nature of the enquiry before the Court under the two statutes was entirely different and an application for filing an award under the 1937 Act could not be equated with an application for directions to file an award under the Act of 1940. It was accordingly held that Article 178 of the Limitation Act was, therefore, inapplicable to an application for filing an award u/s. 5 of the Act of 1937.. This decision appears to provide a complete answer to the question raised on behalf of the Indian company.

(10) In the case of *Societe De Traction et D'Electricite Societe Anonyms v. Kamani Engineering Co. Ltd.* Air 1964, S.G.553. Shah, J. speaking for the Court observed that by the use of words "Save in so far as otherwise provided by any law for the time being in force" in Section 47 of the Act of 1940, the legislature had clearly made the provision of the Act of 1937 applicable to consensual arbitration under the Act of 1940 when the conditions prescribed for the application of that Act were attracted even if the scheme of arbitration recognised there by is inconsistent with Sections 3 to 38 of the Act of 1940. It was further pointed out that Act of 1937 was enacted for giving effect to protocol on arbitration clauses set forth in the first Schedule and of the conventions on the execution of foreign arbitral awards set forth in the Second Schedule and for enabling the conventions to become operative in India.

(11) It would, however, be appropriate to point out that there appears to be a grey area in so far as the application of Section 35 of the Act of 1940 to foreign award is concerned and perhaps as also with regard to stay of proceedings in India u/s. 34 of the Act of 1940, even though arbitration proceedings may be pending abroad or a reference may have been made or may be imminent. In the case of *Michael Colodetz and others v. Serajuddin & Co.*, the question was as to

whether a suit filed in India by an Indian party should be stayed pending reference of the disputes between the parties to an international arbitration. In the Calcutta High Court, Section 34 of the Act of 1910 had been invoked to have the suit stayed. Ray, J., as he then was, declined the stay but he was overruled by a Division Bench of the Calcutta High Court. In appeal, the Supreme Court upheld the judgment of the Calcutta High Court. The corresponding provisions of the Acts of 1937 and of 1961 were neither invoked nor referred was the question if there was any conflict between the two statutes at any stage of the proceedings raised, either in the Calcutta High Court or in the Supreme Court but, Shah, J., who spoke for the Court observed that "We will assume for the purpose of this appeal that Section 34 of the Arbitration Act of 1940 invests a Court in

India with authority to stay a legal proceeding commenced by a party to an arbitration agreement against any other party there to in respect of any matter to be referred even when the agreement is to submit it to a foreign arbitration tribunal." It would be interesting to remember in this context that Section 3 of the Act of 1937, which corresponds to Section 34 of the Act of 1940, could have been invoked to stay the suit only if there was a "submission" to arbitration as distinct from a mere arbitration agreement. Section 3 of the Act of 1961 originally contained a similar provision. Stay of proceedings under the Act of 1940 is discretionary but Section 3 of the Acts of 1937 and 1961 employ the expression "shall" and on one reckoning makes it mandatory. The expression "submission" has since been construed to mean a reference and not a mere arbitration agreement. That is how the expression was construed by the Supreme Court in the case of *M/s V/O. Tractoro export, Moscow v. Tarapore & Co., Madras & another*, . While

dealing with the corresponding provision of Section 3 of the Act of 1961, Supreme Court noticed that in the earlier case of *Shiva Jute* (supra), that Court had assumed that Section 35 applied to proto- col arbitration. Grover, J., who spoke for himself and Shah, J" however, tobserved that although "it is a moot point whether Section 35 of the Arbi- ration Act, 1940 will be applicable to the present case, the principle embodied in that Section cannot be completely ignored while considering the question of injunction." Injunction was declined in that case by the Supreme Court on the ground that the "submission" meant a reference and a reference had until then not been made. Ramaswami, J. entered his dissent on the ground that "submission" should be and had been construed in England to mean an "arbitration Agreement". It is interesting to notice in this context that Section 3 of the Act of 1961 was amended by Act 47 of 1973 and the expression "agreement" was substituted for "submission" in that Section, to give effect to the relevant part of the protocol and to widen the scope of Section 3.

(12) While some doubt may still be possible, and expression to it has already been given by the highest Court, if the provisions of Sections 34 and 35 of the Act of 1910 would be applicable to foreign arbitration, there could be little doubt that the Act of 1940 would have no application to regulate proceedings in India for the enforcement of a foreign award to the extent there are specific provisions made in the Acts of 1937 or of 1961, which are inconsistent with the corresponding provisions of the Act of 1940. That is the position that obtains in relation to an application to file the foreign award and to seek its enforcement. I am not concerned at the present stage of the proceedings either with the question of stay of arbitration proceedings or the effect on the validity of the award of any notice to the arbitrators with regard to proceedings pending in this country. I am only concerned with the procedure to be followed when an application is made in India for the enforcement of a foreign award. The provisions of Sections 5, 6, 7 and 8 of the Act of 1961, as indeed, the scheme of the Act, represents a clear depar- ture from the corresponding procedure laid down in the Act of 1940. An application for the filing of the award and for its enforcement has to comply with the requirements of Section 5 of the Act of 1961 and be accompanied by the original award or an authenticated copy thereof. The only notice to which the respondent is entitled on such an application is a notice envisaged by Section 5 and that requires the respondent to show cause why the award should not be filed. Before the Court directs the award to be filed, it has to hold an inquiry if the award is enforceable having regard to the provisions of Section 7 of the Act and once it has so satisfied and directs that the award be filed, it has to proceed to judgment on the award in terms of Section 6. The order of the Court that that the award be filed has nothing to do with the ministerial act of filing the award or of any direction to the arbitrator in that behalf but is tantamount to its acceptance on the basis that it is an enforce- able award and all that remains to be done on such a finding is to make it a rule of the Court. The respondent is not entitled to any other notice in these proceedings nor are the provisions of Article 119, whether of (a) or (b), within the reach of such an award. The matter would be regulated either by the direction of the Court made in that behalf or by residuary Article 137 of the Limitation Act.

(13) The apprehension of the respondent was really based on a misconception of the true legal position. It must, however, be pointed out that even though there is no provision for a requisition to the arbitrators to file the award or the proceedings of arbitration or any other documents, there is nothing to prevent the respondent from obtaining from the Court appro- priate directions for the production of any record which is relevant to

the questions in controversy between the parties at any stage of the proceedings. There was, however, no warrant for any direction to the arbitrator to file the award, award proceedings and any documents. The question of a further notice to the respondent after the above direction has been carried out by the arbitrator would, therefore, not arise.

(14) In the result, I would modify the direction of the Registrar, rescind the order directing the arbitrators to file award, the award proceedings and documents, and direct, notice to be given to the respondent requiring it to show cause within 4 weeks why the award should not be filed. I.A. is disposed of in these terms. The costs in the application would be costs in the cause.