Brace Transport Corporation of Monrovia, Bermuda

Vs

Orient Middle East Lines Ltd., Saudia Arabia and others

Civil Appeals Nos. 5438-39 of 1993

(Kuldip Singh, S. P. Bharucha JJ)

12.10.1993

JUDGEMENT

BHARUCHA, J.

1. Leave granted.

2. Heard

3. These appeals raise an interesting question relating to the Foreign Awards (Recognition and Enforcement) Act 1981 (now referred to as the 'said Act'),

4. The appeals concern what was an ocean going vessel originally called Leda Maersk and thereafter Saudi Cloud. The appellant, M/s. Brace Transport Corporation of Monrovia a Corporation incorporated under the laws of Liberia was the owner of the said vessel. It agreed to sell the same in an amended Norwegian sale form dated 24th February, 1981 to the second respondent. M/s. Orri Navigation Lines, Saudi Arabia, Jeddah. or its nominee for the sum of (sic) 15,50,000. Clause 15 of the sale form provided that disputes arising thereunder would be referred to arbitration in England. The nominee of the second respondent who purchased the said vessel was the first respondent, Orient Middle East Lines Ltd., Saudi Arabia, Jeddah. Disputes having arisen they were referred to arbitration. The Arbitrators appointed by the parties made an award on 25th August, 1983, holding that:

> (a) the Claimants succeed in their claim for the balance of the purchase price in the sum of US $ 155000;
>
> (b) the claimants succeed in their claim for damaged for late acceptance of the ship by the Buyers in the sum of US $ 24,262,
>
> (c) the Claimants succeed in their claim for the cost diesel on board at delivery in the sum of US $ 3280;
>
> (d) the Claimants succeed in their claim for expenses paid on behalf of the Buyers in respect of Polish Officers in the sum of US $ 2,976.
>
> Pursuant thereto the appellant recovered a part of the amount awarded, leaving unpaid the amount of US $ 5678747 and interest and costs. The cost of the award was taxed and settled at US $ 1172 and the appellants costs in the reference at US $ 10,000.

5. On or about 15th December 1983, the appellant learnt that the said vessel was being sold to the third respondent an Indian Government company. The appellant gave notice to the third respondent of its aforementioned claim. However the said vessel was purchased by the third respondent and sold by the third respondent, in turn to the fourth respondent, a partnership firm having its office at Bhavnagar in the State of Gujarat for the purposes of being broken up at the port of Alang near Bhavnagar. We are informed that the said vessel is now beached at Alang.

6. On 6th January, 1984, the appellant filed a petition in the court of the Civil Judge, Senior Division, Bhavanagar. and

prayed for the following reliefs under the said Act:

(a) That the notice of this petition/ application be directed to be given to the respondents requiring them to show cause why the said (Exhibit O) should not be filed in this Hon'ble Court within the time specified by this Hon'ble Court;

(b) That this Hon'ble Court may be pleased to order that the said award (Exhibit (sic)) be filed in this Hon'ble Court;

(c) That judgment be pronounced and decree passed in terms of the award in favour of the petitioners ordering the respondents Nos. 1 and/or 2 to pay to the petitioners a sum of US dollars 56,789.47 equivalent to Indian Rs. 5,84,931.54 with interest at 15% per annum from the date of the award until payment/ realisation;

(d) For costs of the award in the sum of US dollars 1,172.00 equivalent to Indian Rs. 17,908,16 as taxed and settled by the learned arbitrators in terms of the said award;

(e) For the petitioners cost of reference to arbitration being US Dollars 10,000000 equivalent to Indian Rs. 152,800,00.

(f) For a permanent order and injunction of this Hon'ble Court restraining the respondents their servants from sailing or causing to sale the said vessel 'SAUDI CLOUD' at present lying in the port of Alang in. the district of Bhavagar, Gujarat and/ or receiving or (sic) withdrawing any amount out of the sale proceeds are lying with the respondents No. 3 and /or No. 4 unless and until the award, the costs of the award and the petitioners costs of reference in this Hon'ble Court and/or execute the necessary bank guarantee in favour of the petitioners.

(g) That pending the hearing and final disposal of this petition for an order an injunction of this Hon'ble Court restraining the respondent No. 1 and/or 2, their servant and/or agents from sailing or causing to sail the said vessel 'SAUDI CLOUD' at present lying in the port of Alang in the district of Bhavnagar, Gujarat and/or reciding or reparting/ withdrawing any amount of the said sale of the said vessel 'Saudi Cloud' which sale proceeds are lying with the respondents Nos.3 and/or 4 unless and until the respondents Nos. 1 and/or 2 pay to the petitioners the sum of Rs. 7,84,884.27 being the balance amount under the award the cost of the award and the cost of reference or deposit the said sum of Rs. 7,84,884.27 in this Hon'ble Court and/or execute the necessary Bank guarantee in favour of the petitioner.

(h) for an order and injunction of this Hon'ble Court restraining the respondents Nos. 2 and /or 4 their servants and/ or agent from paying and/or remitting and/or crediting any amount out of the sale proceeds of the vessel SAUDI CLOUD to respondents Nos. 1 and./or 2 unless and until the respondents Nos.1 and/or 2 pay to the petitioners a sum of Rs. 7,84,884.27 or deposit the said sum in this Hon'ble Court and or execute the necessary bank guarantee in favour of the petitioners;

(i) Pending the hearing and final disposal of this petitions for an order and injunction of this Hon'ble Court restraining remitting and/or crediting any amount out of the same proceeds of the said vessel SAUDI CLOUD to respondents Nos. 1 and/or 2 unless and until the respondents Nos. 1 and/or 2 pay to the petitioners a sum of Rs. 7,84,884.27 or deposit the said sum in this Hon'ble Court and / or execute the necessary bank guarantee in favour of the petitioners;

(j) For a mandatory order and injunction of this Hon'ble Court directing the respondents Nos. 3 and/ or 4 to deposit in this Hon'ble Court a sum of Rs. 7,84,884.27 which is the amount due and payable by the respondents Nos. 1 and/or 2 to the petitioners being the balance of the amount under the award the costs of the award and the petitioners costs of reference to arbitration.

(k) Pending the hearing and final disposal of this petition for an order and injunction of this Hon'ble Court directing the respondents Nos. 3 and/or 4 to deposit a sum of Rs. 7,84,884.27 in this Hon'ble Court which is the amount payable by the respondent No. 1 and/or 2 to the petitioners being the balance of the amount under the award the costs of the award and the petitioners costs of reference to

arbitration.

(l) Pending the hearing and final disposal of the petition for an order of attachment before judgment under order (sic) Rule 45 of the Civil Procedure Code, 1908 on the said vessel SAUDI CLOUD at present lying in the Port Alang in the district of Bhavnagar, Gujarat and/or on the money being the sale proceeds of the purported also of the vessel SAUDI CLOUD lying with respondents Nos. 3 and/ or 4.

(m) Pending the hearing and final disposal of this petition for an order and injunction of this Hon'ble Court restraining the respondents their servants and/or agents from the breaking up or dismantling or scrapping or causing a break up or dismantle or scrap the vessel SAUDI CLOUD at present lying at the port of Alang in the district of Bhavnagar in Gujarat unless and until the respondents pay to the petitioners a sum of Rs. 7,84,884.27, being the amount due and payable by respondents 1 and/or 2 to the petitioner viz. the balance amount under the record, the costs of the award as taxes and resettled by the lezard arbitrators and the petitioners cost of reference to arbitration.

(n) for ad interim reliefs in terms of payable s.l.k.j. and m

(o) for cost of this petition and

(p) for such other and further reliefs and as the nature and circumstances of the case may require.

The appellants also applied under the provisions of Order 38, Rule 5 and Order 39, Rules 1 and 2 and Section 151 of the Code of Civil Procedure for the attachment of the sale proceeds of the said vessel and for an injunction restraining the third and the fourth respondents from parting with the sale proceeds without first satisfying the claim of the appellant. On 6th January, 1984, the Bhavnagar court passed the following order. Heard the plaintiff's advocate Shri H. J. Bhatt, read his application affidavit in support thereof and other papers. Issue Notice to defendant No. 4 returnable on 21-1-1984 to show cause why they should not be required to furnish security in the sum of Rs. 8,00,000/- to secure the decree that may be passed in favour of the plaintiff. The defendants Nos. 3 and 4 are also restrained till 21-1-84 by an ex parte ad interim injunction from disposing breaking or removing the vessel name SAUDI CLOUD more particularly described in this application from port Alang. Yadi to Asstt. Collector of Custom, Alang Bhavnagar as prayed for Urgent process. Plaintiff to supply copies to the defendants as required by 0.39, R.3 of C. P. C.

Notices were served upon the respondents. The first and second respondents filed an affidavit and challenged the jurisdiction of the Bhavnagar Court. The 4th respondent also filed an affidavit. It was stated on behalf of the 4th respondent that the 4th respondent had made full payment of the purchase price to the third respondent and that the said vessel was in the 4th respondent's possession. The third respondent did not file any appearance before the Bhavnagar Court. On 3rd February, 1984, the Bhavnagar Court restrained the third respondent from paying to the first respondent an amount of US $ 62,000 equivalent to Rs. 6,40,000/ from within the price of the said vessel. It clarified that the balance price could be paid by the 3rd respondent to the first respondent. On 5th March, 1984 the Bhavnagar court, having heard arguments held that it had jurisdiction to entertain the appellant's application and it continued the operation of the order aforementioned.

7. As against the aforesaid order of the Bhavnagar court, revision petitions were preferred by the first respondent to the High Court of Gujarat. The revision petitions were allowed. The order of the Bhavnagar court holding that it had jurisdiction to entertain the appellant's petition was set aside and it was ordered to return the petition to the appellant for presentation to the proper Court. The injunction issued by the Bhavnagar court was vacated.

8. These appeals are directed against the judgment and order of the Gujarat High Court.

9. Notices were issued to the respondents upon the special leave petitions, but they have not appeared on 27th May, 1985, the 3rd and 4th respondents were restrained from making payment of the sum of Rs. 6,40,000 to the first and second respondents and that order continued to operate until 12th April, 1993 when this Court directed the 3rd and 4th

respondents to deposit the sum of Rupees 6,40,000/- in the Registry within 8 weeks. Pursuant to this order the 3rd respondent without protest, deposited the sum of Rs. 6,40,000 in the Registry on 7th June, 1993.

10. Since the respondents were not appearing, the Solicitor General was requested to assist the Court amicus curiae and the Supreme Court Legal Aid Committee to appoint a senior advocate for the same purpose. We are indebted to the Solicitor General and counsel for their assistance.

11. The said Act has been placed on the statute book to enable effect to be given to the Convention on the Recognition and Enforcement of Arbitral Awards, done at New York on the tenth day of June, 1958, to which India is a party and for purposes connected therewith. Section 2 of the said Act defines a foreign award to mean an award on differences between persons arising out of legal relationship, whether contractual or not considered as commercial under the law in force in India made on or after the 11th day of October, 1960 in pursuance of an agreement in writing for arbitration to which the. New York Convention applies and 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 New York Convention applies. Section 3 says that notwithstanding anything contained in the Arbitration Act, 1940 or in the Code of Civil Procedure, 1908, if any party to an agreement to which Article II of the New York Convention applies commences any legal proceedings in any court against any other party to the agreement in respect of any matter agreed to be referred to arbitration in such agreement any party to such legal proceedings may apply to the court to stay the proceedings and the court, unless satisfied that the agreement is null and void, inoperative or incapable of being performed or that there is not, in fact, any dispute between the parties with regard to the matter agreed to be referred shall make an order staying the proceedings. By reason of S. 4 a foreign award shall. subject to the provisions of the said Act, be enforceable in India as if it were an award made on a matter referred to arbitration in India. Any foreign award which would be enforceable under the said Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India. Sub-section (1) of Section 5 is the most relevant provision of the said Act for our purposes and it reads thus:

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.

Section 6 states that where the Court is satisfied that the foreign award is enforceable under the said Act, it shall order the award to be filed and shall proceed to pronounce judgment according to the award. Upon the judgment so pronounced a decree shall follow. Section 7 sets out the conditions for enforcement of a foreign award. It states that a foreign award may not be enforced under the said Act, if, inter alia, the award deals with questions not referred or contains decisions on matters beyond the scope of the agreement, provided that if the decisions on matters submitted to arbitration can be separated from those not submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced foreign award, it also states, may not be enforced if the Court is satisfied that the subject matter of the difference is not capable of settlement by arbitration under the law in India. Section 8 sets out what evidence the party applying for the enforcement of an award shall produce.

12. Reference may also be made, with advantage, to the relevant terms of the New York Convention. Clause 1 of Article 1 states that the New York Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards is sought, and arising out of differences between persons whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought. Article II requires each contracting State to recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect. of defined legal relationship whether contractual or not, concerning a subject matter capable of settlement by arbitration. The term agreement in writing includes an arbitral clause in a contract. The court of contracting State, when Seized of an action in a matter in respect of which the parties have made an agreement within the meaning of Article II shall upon the request of one of the parties refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. Article III requires each contracting State to recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the Article of the New York Convention. Article IV sets out the documents which the party applying for recognition

and enforcement must produce. Article V states that recognition and enforcement of the award may be refused at the request of the party against whom it is invoked only if that party furnishes to the competent authority from whom recognition and enforcement is sought proof that, inter alia, the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or it contains 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 recognised and enforced. Recognition and enforcement of arbitral awards may also be refused if it is found that the subject matter of the difference is not capable of settlement by arbitration under the law of that country.

13. Before we deal with the facts of the case before us, a statement of some broad principles is necessary, The New York Convention speaks of "recognition and enforcement" of an award. An award may be recognised, without being enforced; but if it is enforced, then it is necessarily recognised. Recognition alone may be asked for as a shield against re-agitation of issues with which the award deals. Where a court is asked to enforce an award, it must recognise not only the legal effect of the award but must use legal sanctions to ensure that it is carried out. In the Law and Practice of International Commercial Arbitration by Redfern and Hunter (1986 edition) it is said (at pages 337 and 338):

> A party seeking to enforce an award in an international commercial arbitration may have a choice of country in which to do so; as it is sometimes expressed, the party may be able to go forum shopping. This depends upon the location of the assets of the losing party. Since the purpose of enforcement proceedings is to try to ensure compliance with an award by the legal attachment or seizure of the defaulting party's assets. Legal proceedings of some kind are necessary to obtain title to the assets seized or their proceeds of sale. These legal proceedings must be taken in the State or States in which the property or other assets of the losing party are located.

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In other words, the place of arbitration will have been chosen as a neutral forum. It will be rare for the parties to have assets situated within this neutral country; and the award if it has to be enforced must generally be enforced in a country other than that in which it was made. This is why it is so important that international awards should be recognisable and enforceable internationally, and not merely in the country in which they are made; moreover, unlike the place of arbitration, the place of recognition and enforcement will not be chosen by or on behalf of the parties. It will depend upon the circumstances of each particular case.

So far as recognition of an international award is concerned, the successful party only needs to seek recognition if proceedings are brought against him in respect of a matter which has already been dealt with and made the subject of an award. The party who is sued will then wish to rely on the award by way of defence, or set off, or in some other way in the Court proceedings. For this purpose, he will ask the Court concerned to recognise the award as binding on the persons between whom it was made. It is impossible to know in what Court or in what country such proceedings are likely to be brought; and this fact emphasises once again how important it is that international awards should be truly international in their validity and effect.

Where it becomes necessary to enforce an international award, the position is different. The first step is to determine the country or countries in which enforcement is to be sought. In order to reach this decision, the party seeking enforcement needs to locate the State or States in which the losing party has (or is likely to have) assets available to meet the award.

14. Now, Section 5(l) of the said Act says that 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. Dr. Ghosh, learned counsel for the appellant submitted that the said vessel was within the jurisdiction of the Bhavnagar Court and the Bhavnagar Court had therefore, jurisdiction to take the award on file. The jurisdiction paragraph of the application to the Bhavnagar Court reads thus:

The petitioners submit that the respondent No. 1 and/or 2 have no assets whatsoever within the jurisdiction of this Hon'ble Court or elsewhere in India. The only assets which are available within the jurisdiction of this Hon'ble Court is the said vessel SAUDI CLOUD. The petitioners submit that the respondent No. 1 and /or 2 and/or 3 with intent to

delay, obstruct and defeat the execution of any decree that may be passed in this petition against them have sold the said vessel SAUDI CLOUD. The petitioners further submit that they have a maritime lien on the said vessel SAUDI CLOUD and the respondents No. 1 and/or 2 and/or submit that it is just necessary and in the interest of justice that this Hon'ble Court be pleased to order attachment before judgment of the vessel SAUDI CLOUD at present lying in port Alang in the district of Bhavnagar, Gujarat.

The said vessel having been sold to the 3rd and 4th respondents it is no more an asset of the 1st or 2nd respondents and the award cannot be executed there against, which is why the appellants claim in the application to have a maritime lien. But the Bhavnagar Court has, admittedly, no jurisdiction to enforce a maritime lien, assuming it to exist.

15. It was then submitted by Dr. Ghosh that the subject-matter of the award was money and the 1st and 2nd respondents had money in the jurisdiction of the Bhavnagar Court in the form of part of the purchase price of the said vessel payable to them by the 3rd and 4th respondents.

16. This being an award for money its subject-matter may be said to be money, just as the subject-matter of a money-decree may be said to be money.

17. The appellant's application to the Bhavnagar Court stated, as reproduced above, that the first and second respondents had no assets within the jurisdiction of the Bhavnagar Court or elsewhere in India. However, having regard to the object of the said Act, note may be taken of events that have transpired subsequently. The case of the 4th respondent before the Bhavnagar Court was that it had paid over the full purchase price of the said vessel to the 3rd respondent. Thereupon the Bhavnagar Court injuncted the 3rd respondent from paying the amount of Rs. 6,40,000/- to the 1st and 2nd respondents and permitted the 4th respondent to break the said vessel. When this Court called upon the 3rd and the 4th respondents to deposit the amount of Rs. 6,40,000/- in its Registry, it was as we find from the record, the 3rd respondent which made the deposit. The deposit was made without protest and the 3rd respondent has not appeared before this Court to contend that the amount of Rs. 6,40,000 / - was not due to the 1st and 2nd respondents as part of the purchase price of the said vessel. It can, therefore, be said that the 3rd respondent was holding monies, in the amount of Rs. 6,40,000 of the 1 st and 2nd respondents.

18. The 3rd respondent as the cause title shows, is a Government company that has its registered office at Calcutta and a regional office at Bombay. It is not known where the 3rd respondent held the said amount of Rs. 6,40,000/ -.

19. It is now for the appellant to ascertain where the monies were so held and, if they were held within the jurisdiction of the Bhavnagar Court, to apply for an amendment of the jurisdiction paragraph of its application to the Bhavnagar Court accordingly. The Bhavnagar Court would then, after notice to the parties, consider whether or not the amendment should be allowed. It would, ordinarily, having regard to the object of the said Act and the fact that these events have transpired after the application to it was filed, allow the amendment. Thereafter, it would determine Whether the averment in the amendment is correct. In the event that it came to the conclusion that the 1st and 2nd respondents had monies within its jurisdiction, it could be said to have jurisdiction to take the award on file under Section 5 of the said Act and it would proceed thereafter under the subsequent provisions of the said Act

20. The appeal, therefore, succeeds and is allowed to the aforesaid extent. The judgment and orders under appeal are set aside. In the event that the appellant applies to the Court of the Civil Judge. Senior Division, Bhavnagar, for an amendment of its petition within 16 weeks from today so as to aver that the 1st and 2nd respondents had monies within its jurisdiction, the Bhavnagar Court Shall consider after notice to the parties, the grant of such amendment. If it allows such amendment, it shall consider the correctness of the averment therein. If it comes to the conclusion that the 1st and 2nd respondents did have monies within its jurisdiction, the Bhavnagar Court shall take the award on file under the provisions of Section 5 of the said Act and shall proceed thereafter in accordance with its subsequent. provisions.

21. In the event that no application for amendment as aforementioned is made by the appellant to the Bhavnagar Court within 16 weeks from today the 3rd respondent shall be entitled to withdraw the amount of Rs. 6,40,000./-deposited by it in the Registry of this Court. In the event of such an application being made within the time aforementioned the amount of Rupees 6,40,000/- deposited by the 3rd respondent in the Registry of this Court shall stand transferred to the credit of the application of the appellant. in the Bhavnagar Court and its disposal shall be subject to the orders of

the Bhavnagar Court.

22. There shall be no order as to costs. Order accordingly.

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