

Calcutta High Court

Canadian Commercial Corporation vs Coal India Limited on 21 September, 2016

IN THE HIGH COURT AT CALCUTTA ORDINARY ORIGINAL CIVIL JURISDICTION ORIGINAL
SIDE GA 3547 of 2013 With EC 281 of 2013 CANADIAN COMMERCIAL CORPORATION

-Versus-

COAL INDIA LIMITED

For the Award-holder: Mr Tilok Bose, Sr Adv.,
 Mr Anubhav Sinha, Adv.,
 Mr Shailendra Jain, Adv.,
 Mr T. De, Adv.

For the Award-debtor: Mr Anirban Roy, Adv.,
 Mr Soumabho Ghose, Adv.,
 Mr Pradyot Das, Adv.

Hearing concluded on: September 15, 2016.

BEFORE

SANJIB BANERJEE, Judge

Date: September 21, 2016.

SANJIB BANERJEE, J. : -

This should bring to an end an unsavoury episode that has done no credit to the public sector company involved herein or to the judiciary in this country. This may also be regarded as the epilogue to the judgment of March 20, 2012 by which the award-debtor's petition for challenging a foreign arbitral award under Section 34 of the Arbitration and Conciliation Act, 1996 was rejected on the ground of maintainability.

2. The parties entered into an agreement in 1989 for the foreign company to set up a coal-extracting facility for the Indian company in the Rajmahal area in the State of Jharkhand. The dispute-resolution mechanism envisaged under the agreement was of arbitration; and, the arbitration was to take place under the rules of the International Chamber of Commerce (ICC) with the place of arbitration in Geneva, Switzerland. Disputes arose between the parties as to whether the Indian company was entitled to more money by way of penalty than the foreign company was to get bonus. The Indian company sought a reference. The parties nominated their representatives on the arbitral tribunal and the presiding arbitrator was filled in by the ICC. The arbitral tribunal held its meetings in the United Kingdom but recognised that the seat of the arbitration was Switzerland. The

rival claims were dismissed by the arbitral tribunal and the foreign company was awarded substantial costs. The present execution is for enforcing the foreign award for costs. The award is dated March 1, 2002. The present proceedings were initiated in July, 2013, about a year after the Indian company's challenge to the arbitral award failed before the arbitration bench in this court on March 20, 2012. The judgment of March 20, 2012 was affirmed in appeal on January 15, 2013. A special leave petition against the appellate order was dismissed by the Supreme Court.

3. Section 49 of the Arbitration and Conciliation Act, 1996 mandates that where the court is satisfied that a foreign award is enforceable under Chapter I of Part II of the Act, the award shall be deemed to be a decree of that court. Part II of 1996 Act deals with the enforcement of certain foreign awards and Chapter I thereunder pertains to New York Convention awards. Section 46 of the Act recognises that a foreign award made under the New York Convention, when found to be enforceable under Chapter II, shall be treated as binding for all purposes on the persons as between whom it was made. Section 47 of the Act lays down the conditions that are required to be complied with for the enforcement of a New York Convention arbitral award. No objection has been raised by the award-debtor on any of the grounds under Section 47 of the Act. In any event, the original award has been appended to the application. A duly certified copy of the original agreement for arbitration has also been furnished therewith.

4. Under Section 48 of the said Act, the enforcement of a New York Convention foreign award may be refused only upon the party resisting its enforcement establishing any of the grounds enumerated therein. The wording of the provision places the burden squarely on the party seeking to resist the enforcement of a New York Convention foreign award to establish that it ought not to be enforced. In a sense, Sections 48 and 49 of the said Act are the key provisions in the matter of the enforceability of New York Convention arbitral awards in this country. The enforcement under a two- tier process can be telescoped into a solitary application where the matter of actual enforcement of the award may be taken up only upon any challenge to its enforceability being repelled.

5. Of the few grounds available to an award-debtor to resist the enforcement of a New York Convention award in this country, the award-debtor herein has urged the second ground under Section 48(2) of the Act. For the present purpose it would suffice to only notice Section 48(2) of the Act, including the explanations thereto:

"48. Condition for enforcement of foreign awards. -

(1) ...

(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 1: For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, -

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2: For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute."

6. The award-debtor claims that the enforcement of the award of March 1, 2002 would be contrary to the public policy of India since costs were awarded thereunder against the award-debtor though the claim of the award-debtor was rejected on the ground of limitation and the counter-claim of the Canadian company was also found to be barred by lapse of time.

7. The award records that the arbitration proceedings were begun on April 10, 2000. At a preliminary hearing in March, 2001, the tribunal was requested by the Canadian company to determine the issue of limitation first. The tribunal declined to do so on the following grounds recorded at paragraph 22 of the award:

"22. ... First, it was by no means certain that the plea of a time bar would be upheld; secondly, it was not a pure question of law and there would need to be witnesses; thirdly, to some extent the same witnesses would be needed in any further hearing on the merits; fourthly, in any event there would be likely to be attending officers of the parties both at a preliminary hearing on time bar and on any subsequent hearing on other matters; and lastly, the parties, their lawyers and at least two of the arbitrators would have to travel considerable distances at great cost in order to attend the hearing or hearings. None were resident in Switzerland, nor (as it happens and except for the Chairman) in the United Kingdom."

8. The tribunal ruled that the risk of having to incur the expenses "twice outweighed the risk that additional cost might be incurred unnecessarily by having a hearing of all issues at one time." Thus, the parties were directed by the tribunal to convene for the entirety of the reference to be decided at a stretch. However, the plea of time bar asserted by the Canadian company succeeded, though implicit in such objection was the acknowledgement that the Canadian company's counter-claim would stand rejected by the same yardstick. After dismissing the claim and the counter-claim, the arbitral tribunal went on to discuss the costs. A substantial part

- nearly a sixth - of the 30-page award covers the discussion and the decision of the tribunal on costs. It was a commercial dispute that was carried before the tribunal and the tribunal dealt with

such aspect of the matter with the seriousness that it deserved. The hearing in course of the reference covered 10 days. The arbitral tribunal held that about a quarter of the time ought to have been spent on the issue of limitation or, at any rate, if the excessive evidence on the issue of limitation were disregarded, such aspect ought to have covered a quarter of the hearing time.

9. The parties furnished their bills of costs with the Indian company claiming in excess of US \$ 250,000 and the Canadian company claiming in excess of Can \$ 1.74 million. The tribunal removed the external expenses not controlled by the parties and converted the Indian company's claim to Canadian dollars, which was the currency recognised in the agreement, and reckoned the Indian company's claim on costs to be slightly over Can \$ 189,000 and the Canadian company's claim to be about Can \$ 1.462 million. The tribunal held that the Canadian company had expended an exorbitant amount in engaging two firms of lawyers from among the most prestigious in the world. The finding in such regard was that though some specialist treatment on private international law was necessary, but it was essentially an engineering dispute requiring a long and detailed, but not very complex, inquiry. The tribunal found that in a number of respects the Canadian company's case was over-elaborated and the attendance of its two senior executives was greater than required. The Canadian company was directed to be reimbursed the sum of US \$ 162,000 on account of the fees paid by it to the ICC and cost of court reporting after disallowing the luxury costs of disks and courier at Can \$ 9,186. The costs expended by the Canadian company on the Indian expert on the issue of limitation was determined to be US \$ 22,000. Since limitation took up a quarter of the time, the tribunal considered the amount billed by the two firms acting for the Canadian company. That amount came to nearly US \$ 200,000, but the tribunal found it appropriate to allow US \$ 150,000 on such count. The costs awarded on account of the fees paid by the Canadian company to the ICC, on account of the expert witness and for contesting the reference added upto Can \$ 522,943. To this the cost of court reporting of Can \$ 9,186 was added and the award provided for interest on such amounts from October 1, 2001 at the rate of 4.5 per cent per annum. The date of October 1, 2001 was chosen since by then almost the entirety of the costs had been incurred.

10. Though the award-debtor has raised the bogey of the award of costs being contrary to the public policy of India, it is not clear as to how the award- debtor seeks to assail the enforceability of the award on such ground. The award dwells on the basis of the costs. Every head of claim on costs received the attention of the tribunal and, if at all, the tribunal was charitable to the Indian company almost to the point of being condescending. The award-debtor has not been able to cite any law or the judicial recognition of any policy under which the rejection of a claim and a counter-claim in a reference must result in the parties being left to bear their own costs without any adjudication thereon. Indeed, since the other substantive issues were not required to be discussed upon the claim and, consequently, the counter-claim, being dismissed on the ground of limitation, the parties were left to bear their own costs on the time spent on the hearing on issues other than the question of limitation. Again, the over- elaborate case made out by the Canadian company was appropriately scaled down by reckoning a quarter of the time to have been spent on the issue of limitation, thereby reducing the Indian company's liability on costs to some extent.

11. In assessing whether a foreign arbitral award is contrary to the public policy of India, the ground cannot be used as an excuse to review the order on merits. The ground is of very limited scope and

the award must be crying out as being patently unfair for it to be regarded as contrary to the public policy of India.

12. Though the award-debtor has referred to a judgment reported at (2015) 3 SCC 49 (Associate Builders v. Delhi Development Authority) on such aspect, that case involved an issue under Section 34 in Part I of the Act of 1996. The award-holder has referred, more appropriately, to a judgment reported at (2014) 2 SCC 433 (Shri Lal Mahal Limited v. Progetto Grano Spa). Paragraph 47 of the judgment is instructive:

"47. While considering the enforceability of foreign awards, the court does not exercise appellate jurisdiction over the foreign award nor does it enquire as to whether, while rendering foreign award, some error has been committed. Under Section 48(2)(b) the enforcement of a foreign award can be refused only if such enforcement is found to be contrary to: (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The objections raised by the appellant do not fall in any of these categories and, therefore, the foreign awards cannot be held to be contrary to public policy of India as contemplated under Section 48(2)(b)."

13. The award on costs in this case is not against the fundamental policy of Indian law. Nothing in the award militates against any law in force in India or any judicial pronouncement. The award on costs does not appear to be perverse nor has it been based on the ipse dixit of the tribunal without reference to the surrounding circumstances. There does not appear to be any impediment to the award of March 1, 2002 being enforced.

14. The only question that remains is as to the date of conversion, if at all, of the amount covered by the award. As noticed above, the agreement referred to the monetary figures in the Canadian currency and, as such, the arbitral tribunal made the award on costs in the same currency.

15. Both parties have referred to the parent judgment reported at (1984) Supp SCC 263 (Forasol v. Oil and Natural Gas Commission) on the appropriate date of conversion into the currency of the realm. The award-holder suggests that the date of applying for execution should be taken to be the appropriate date for conversion, if conversion were necessary at all. The award-debtor claims that the appropriate date for conversion would be when the foreign award is adjudged to be enforceable within the meaning of Section 49 of the Act of 1996.

16. In Forasol, a French company entered into an agreement with ONGC and the currency of payment to the French company under the contract was the French franc. In arbitration, an award was passed in the foreign currency and the Delhi High Court passed a decree in terms of the award simpliciter, without fixing a date for conversion of the foreign currency to rupees. The question that fell for consideration before the Supreme Court in connection with the execution levied by the French company was the relevant date to be selected by the court for converting the foreign currency into Indian currency for an appropriate order of payment to be made. At paragraph 70 of the report in Forasol the Supreme Court laid down the practice which ought to be followed in suits in which a

sum of money expressed in a foreign currency can legitimately be claimed by the plaintiff and decreed by the court. That is the law as has been declared under Article 141 of the Constitution. At paragraph 71 of the report the Supreme Court dealt with the claims in arbitration. However, at paragraph 73 of the report the Supreme Court held that the Single Bench of Delhi High Court had correctly taken the date of the decree as the date of conversion, but found the direction to be flawed in it not being made subject to the permission of the appropriate authority under the Foreign Exchange Regulation Act, 1973 that then held the field.

17. In this case, the parties were directed to obtain information from the Reserve Bank of India as to the rates of conversion of the Canadian dollar to Indian rupees on the date of the award, on the date when the award- holder applied for the enforcement of the award and on the date when the direction to obtain the information was issued. The information furnished by the Reserve Bank, which the parties have not questioned, is that on the date of the award on March 1, 2002 Can \$ 1 was equivalent to Rs.30.6315; on July 10, 2013, when the present application was filed, Can \$ 1 was equivalent to Rs.57.4665; and, on August 29, 2016 Can \$ 1 was equivalent to Rs.51.6459.

18. The prayer in the present application is for payment of Rs.4,39,87,736/-

calculated upto April 30, 2013 without any break-up being furnished in the tabular statement as to the principal amount due in Indian currency under the award and the interest thereon.

19. Forasol instructs that a claimant or a decree-holder has a choice of seeking the payment in Indian currency or in foreign currency if the agreement between the parties provided for the payment thereunder in the foreign currency. The rule will hold good for arbitral awards, including foreign arbitral awards. Forasol also recognises that the payment in foreign currency would be subject to the law in this country in such regard and the volition of the defendant or judgment-debtor to make the payment in foreign currency, whether or not the permission therefor was obtained.

20. The regime under FERA stands much diluted under the Foreign Exchange Management Act, 1999 that now governs the field. It is unlikely that if permission is sought by either party for remittance of the award debt in the foreign currency, there would be any major difficulty in the approval being accorded. At least, the parties have not indicated any statutory or procedural impediment to permission being sought or obtained for the remittance of the award debt by the Indian company to the Canadian company in the foreign currency that was recognised under the agreement between them.

21. Ordinarily, as experience shows, it is the Indian currency which has fallen in value over the years against the major foreign currencies; as a result whereof, an Indian debtor would invariably suggest an earlier date of conversion and the foreign creditor would demand the conversion at the latest point of time. The tables are somewhat turned in this case with the Canadian dollar now commanding a much lower rate in Indian rupees than it did when this application was lodged on July 10, 2013. The Indian company contends that since the payment under the agreement between

the parties was to be in Canadian dollars, to the extent the award has been found to be enforceable, the Indian company should be permitted to remit the amount in the currency recognised under the agreement between the parties, subject to the appropriate permission in such regard being sought and obtained by the Indian company. The Canadian company does not appear to be averse to accepting the payment under the award in the currency recognised in the agreement between the parties, but insists that if the money due to it is not paid in Canadian dollars, then the amount due to it in Indian rupees on the date of the present execution being levied should be directed to be made over to it together with interest on the principal in terms of the award till the date of realisation.

22. It must be noticed at this stage that when the present execution was taken up on August 29, 2013, the following direction was issued for the Indian company to deposit 50 per cent of the Indian equivalent of Can \$ 532,129 in a separate bank account to the credit of the present proceedings:

"Accordingly, the judgment debtor is directed to keep apart 50% of 532129 Canadian Dollars equivalent to INR as on date, in a separate Bank account in its name earmarked to E.C. No. 281 of 2013 within two weeks from the date of receipt of this order. Let intimation of the said sum kept apart be informed to the decree holder by the judgment debtor. In default, the judgment debtor will be required to keep apart the entire costs awarded."

23. There is no dispute that the money remains deposited in terms of the relevant order and, possibly, substantial interest has accrued in the account over the last three years or so.

24. In aid of its argument that the date of conversion, if at all, must be reckoned to be the date when the foreign award is held to be enforceable in this country, the Indian company has referred to a judgment reported at (2001) 6 SCC 356 (Fuerst Day Lawson Limited v. Jindal Exports Limited). The Indian company places to paragraph 31 of the report which envisages the filing of a solitary application for enforcing a foreign arbitral award before a court, whereupon the aspect of enforceability would have to be assessed first and, if the foreign award is found to be enforceable, the steps for enforcement should follow. The award-debtor suggests that if the obligation of the award-debtor to pay under the arbitral award is upheld and the award-debtor is found liable to pay in the currency of the realm, the conversion should be at the rate applicable immediately after the foreign award is found or declared to be enforceable.

25. The dictum in Forasol is binding on this court. The Supreme Court upheld the rate of conversion in that case being applied as at the date the award was made a decree of the court. The rider that the Supreme Court incorporated to the decision on conversion was that the remittance would be subject to the applicable law and permission from any statutory authority under such law.

26. If the present matter is considered from the foreign company's point of view, it ought to be paid the amount awarded by the award together with the interest in the currency recognised by the agreement between the parties and the currency expressed in the award. The foreign company cannot take advantage of the fortuitous fluctuation of the conversion rates to claim the money due to it under the award in Indian currency as at the date of the lodging of the application for enforcement

of the award and, thereafter, obtain permission to convert the money into the Canadian currency for remittance to its offices in Canada. The compensation for the delayed receipt of the amount covered by the award is by way of the interest therefor provided under the award. The foreign company cannot legitimately insist on taking advantage of the higher value that the Canadian dollar commanded at the time the application for enforcement was instituted to make a profit on the rate of exchange that the award did not envisage. Indeed, the foreign company may have insisted on the conversion, if at all, being made applicable as on the date of the award being found enforceable, if the Canadian dollar had appreciated against the Indian rupee in the interregnum.

27. Accordingly, the parties are directed to seek and obtain permission from the appropriate authorities for remittance in Canadian dollars of the principal amount awarded on costs in the arbitral award of March 1, 2002 together with the interest thereon reckoned till the day preceding the remittance such that the remittance is completed within ten weeks from date. In the event, however, that such permission is declined or Coal India does not wish to make the payment in foreign currency, the amount due on account of the principal as at today's rate of conversion would be payable within the same time by Coal India to the Canadian company together with interest at the rate provided for in the award on the Indian equivalent of the principal amount as it would stand upon Can \$ 532,129 (the sum of Can \$ 522,943 and Can \$ 9,186) being converted into Indian rupees as on date.

28. The amount deposited pursuant to the order dated August 29, 2013 in Indian rupees will not be touched by Coal India till the remittance in terms of the order is made to the Canadian company upon due permission being obtained therefor or the Indian equivalent of the dues under the award as provided for hereinabove is tendered to the appropriate authorised person of the Canadian company. Upon the payment in either form being completed, the award will stand satisfied and Coal India will be entitled to use the money lying deposited in terms of the order dated August 29, 2013 after defraying the costs for the present enforcement as provided for hereinafter.

29. The Canadian company will be entitled to the costs of the present proceedings for enforcement of the foreign award assessed at Can \$ 10,000 since the agreement between the parties provided for payment in such foreign currency. The remittance on such account will also be subject to permission from the appropriate authorities. In the alternative, Coal India may pay the Indian equivalent of such amount at the rate prevailing today. If the costs in either form are not tendered within ten weeks from date, such costs will carry interest at the rate of 4.5 per cent per annum simple from today till realisation.

30. GA 3547 of 2013 and EC 281 of 2013 stand disposed of for all practical purposes, save to record the satisfaction of the arbitral award upon the payment being made in terms of this order. Let the matter now appear on December 14, 2016 for the parties to confirm whether the payment due under the award and in terms of this order has been paid and received.

31. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(Sanjib Banerjee, J.)