EC No. 311 of 2013
With
EC No. 312 of 2013
IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
Original Side

Bunge London Limited
Vs.
R. Piyarellal Import and Export Limited

Appearance
Mr. Jishnu Saha…Sr. Adv., Mr. Sanjay Ginodia….Adv.,
Mr. Debnath Ghosh….Adv….for petitioners.

Mr. Jayanta Banerjee ...Adv., Mr. Koushik Chatterjee..Adv.
……for the judgment debtor.

Heard On:- 06th January, 2015
Judgement On: - 22nd January, 2015

I.P. MUKERJI, J.

EC No. 311 of 2013

In an execution application to enforce a foreign arbitral award dated 23rd February, 2013, in favour of the petitioner, the judgement debtor has taken various points to challenge this award under Part-II chapter-I of the Arbitration and Conciliation Act, 1996.

The award is of the Refined Sugar Association 154, Bishopsgate London made and published by its Chairman.

The alleged contract was entered into between the parties on 21st December, 2010. The petitioner was the seller and the judgement debtor, the buyer. The opening words of the contract document recited as follows:-

"***We confirm having sold to you under the following terms and conditions stipulated hereinafter".***

The contract was for sale of 12,500 MT of white sugar, described as "Thailand Refined Sugar". It was to be shipped in 250 lots of 50 MT each in polypropylene

bags each of 50 Kg. net. The load ports were to be Bangkok and two other ports in Thailand. The shipment was to be made between 10th March, 2010 and the 15th May 2010. The above quantity was to be shipped in a maximum of three full vessels and the balance in containers. It was a FOB Contract.

There was a technical stipulation with regard to fixation of the price, which has given rise to a part of the present dispute between the parties. According to the contract;

"Basis BEO for 250 lots (Basis 12,500 Metric Tons) of the March 2010 London No.5 white sugar contract plus a premium or US$ 15.00 (Fifteen) per metric ton to give a price in metric tons, basis FOB stowed Bangkon and/or Sriracha and/or Laemchabang and/or Kohsichang.

Each lot is equivalent to 50 metric tons. The buyer has to finally price the nearest lot quantity to match the final shipped quantity.

Pricing to be fixed 5 days before the terminal expires or 20 days before the vessel arrival at the load port".

The judgement debtor was to deposit US$ 1 lakh in the account of the petitioner within four working days of receiving the contract. They were also required to open a fully "workable and irrevocable letter of credit" in favour of the petitioner.

The contract contains an arbitration clause which is as follows:-

"***All disputes arising out of this contract are hereby submitted to the Refined Sugar Association for settlement in accordance with the Arbitration rules of the Refined Sugar Association."***

It would be governed by the laws of England.

It appears that the judgment debtor neither made the deposit 1 lakh US dollars nor opened the letter of credit in favour of the petitioner. The period for performance of the contract expired. The judgment debtor did not buy any sugar from the petitioner. An attempt was made to settle the dispute between the parties. It failed. On 29th June, 2010 the petitioner wrote to the judgment debtor alleging repudiation of the contract by them and accepting this repudiation. Therefore, we can safely say that on 29th June, 2010 the contract between the parties was terminated without any

performance. According to the petitioner the pricing of the contract was completed on 13 February 2010 resulting in an average price, including premium, of US$ 744.9832 per MT. According to the petitioner there was a fall in price and they suffered loss. The claim under the contract was calculated to be US$ 1,509,200.

By the said award the respondent was directed to pay to the petitioner.

a. ***US$ 1,646,311.56, comprising the principal sum of US$ 1,509,200.00, plus interest of US$ 137,111.56; and***

b. ***Compound interest on the said sums, which total US$ 1,646,311.56, at 90 day rests, at a rate of 8% per annum from and including the sate following the date of this Award until payment is made.***

The respondent was also directed to pay costs to the petitioner.

The award was passed by the Arbitral Tribunal in London. The judgment debtor did not prefer any application to challenge the award in an English Court, to which such application necessarily lay.

This award is a foreign award under the description of New York Convention Awards under Chapter I Part II of the Arbitration and Conciliation Act, 1996. Section 49 states that when the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of the court. Hence, the award can be enforced in execution as a decree. The petitioner has put the said award to execution by filing the above execution case in this court. It is also necessary to mention Section 46 of the Act which says that when a foreign award is enforceable under this chapter it shall be treated as binding for all purposes on the persons between whom it was made. The language of Section 48 of the Act is drafted in negative terms. It seems to suggest that ordinarily an award is enforceable and is presumed to be so. Its enforcement may be refused at the request of the party against whom it is made, if the party establishes the following:

" (a) The parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise under to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it 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 enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing, such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the Court finds that-

(a) The subject- matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) The enforcement of the award would be contrary to the public policy of India".

Mr. Jayanta Banerjee, learned Advocate for the respondent tried to establish one point with great condour. There was no formation of contract between the parties, because the price was not fixed. Hence, the contract was vague in its terms and void on the ground of uncertainty.

He also argued that since the price was not fixed the contract had no consideration and hence it was void. Therefore, the contract could be challenged on the ground of invalidity under Section 48 of the Act.

On 04th July, 2011 the judgment debtors had filed an application for oral hearing. The only other point urged on behalf of the judgment debtor was that the oral arguments had closed on 12th September, 2011. On 28th September, 2011 the tribunal ordered that for oral hearing costs of pounds 12,000 had to be paid by the judgment debtor. The application was withdrawn on 29th September, 2011 because the petitioner objected that the requisite fees or costs of pounds 12,000 had not been paid.

According to the judgment debtor the evidence of Barry Callingham by way of statement dated 09th September, 2011 was allowed to be filed on 04th November, 2011. The Judgment debtor did not have an opportunity to cross-examine Mr. Barry Callingham.

In this way the Arbitral Tribunal did not allow the judgment debtor to present their case under Section 48 (1) (b) of the Act. The Arbitral Tribunal had shown bias towards the judgment debtor.

Therefore the award was against the public policy of India.

The first question which was considered by the arbitral tribunal was whether the contract pricing mechanism was sufficiently certain so as to constitute a valid contract between the parties. This point has been dealt with by the tribunal in Paragraphs 104, 105,106, and 107 of the award. It held that the pricing clause was in quite standard terms. It was according to trade. It gave the buyer the option to fix the price of sugar. If that price level was reached the buyer would instruct the seller to sell the goods at that price. The contract price "would then be calculated by taking weighted average of the future purchase plus the physical premium".

According to the tribunal the international sugar market operated following this practice. The cut-off date for pricing "was five days before expiry of the terminal or twenty days before the arrival of the vessel at the load port". Having analysed the contract provisions, of the sugar market practice etc. the tribunal held that the pricing

mechanism was sufficiently certain to be enforceable, in paragraphs 108-112 of the award. The Arbitral Tribunal has come to the opinion that pricing had been carried out in accordance with the judgment debtor's instruction.

Furthermore, regarding pricing and placing of orders the Arbitral Tribunal has held in paragraph-111 of the award that it was a common practice in the trade to place orders over the telephone. This seems to have been done in this case also, by the judgment debtor, through the agency of NRG. If orders had not been placed or prices not authorised, the judgment debtors would have adversely reacted to confirmation provided by NRG to sale at a particular price. In paragraph-113 of the award the Arbitral Tribunal opined that after considering all the surrounding circumstances it was of the view that the contract price was settled at US$ 744.9832 per MT.

The Arbitral Tribunal held that the judgment debtor was in breach of the contract. The contract "pricing" was completed on 05th February, 2010. Alternatively, it was in breach of the condition from 25th April, 2010 being 20 days before the last date on which the vessel could arrive at the load port within the shipment period. (See paragraph-118 of award)

A foreign award can be challenged on the ground of invalidity under section 48(a) of the Arbitration and Conciliation Act, 1996. It was sought to be contended by Mr. Jayanta Banerjee, learned Advocate appearing for the judgment debtor that the question whether a contract had been entered into between the parties or whether the contract was void for lack of a definite consideration clause, could be included in this arena. The authorities seem to suggest otherwise. In the case of ***Oil and Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd*** reported in ***(2003) 5 SCC 705*** the Supreme Court was dealing with a ground available to set aside a domestic award. It was dealing with one of the grounds in Section 34 which enabled an award to be set aside for the reason that it was in conflict with the public policy of India. Now, this ground is also available under section 48. In the ***Saw Pipes case*** the Court gave a

meaning to what was to be understood by public policy of India. However, when it came to attacking a foreign award on this ground, the same Court in ***Shri Lal Mahal Limited Vs. Progetto Grano Spa*** reported in ***(2014) 2 SCC 433*** held that this ground was very restricted. It was only available when gross illegality was writ large on the face of award. The illegality had to be patent. That is also what I understand to be the intention of the legislature. In drafting the section the draftsman has said that an award can be set aside if the "agreement is not valid under the law to which the parties have subjected it or failing any indication thereon under the law of the country where the award was made". The expression "under the law…….where the award was made" was not required to be added because an award is adjudged according to the law which governs the award. This is the ordinary principle of private international law. No grafting of the principle into the statute was required. Now, if the statute would have simply said "invalidity", all the grounds of voidness or voidability or illegality of contract could have been urged at the time of setting aside of the award. But the legislature has qualified this by saying "under the law…….award was made". This in my opinion points towards illegality being one of the grounds and this is fortified by the above authorities. A foreign award cannot be thrown open to challenge on merit according to the Supreme Court in ***Renusagar Power Co. Ltd. Vs. General Electric Company and another*** *reported in* ***AIR 1994 SC 860.***

Now, let me consider the point of invalidity of the contract urged by the judgment debtor from another angle. If you look at the contract you will find that it starts with the phrase "we confirm having sold to you". This strongly suggests that the contract had been entered into. Fixation of the sugar price was a mechanism peculiar to the sugar trade and had to be done during performance of contract, according to the trade practice. Now, the judgment debtor had filed their written submissions before the Arbitral Tribunal. They had participated in the Arbitration. The arbitration clause in

the document dated 21st December, 2010 clearly shows that all disputes arising out of this contract were to be referred to Refined Sugar Association for settlement in accordance with the Arbitration Rules of the Association.

Let us assume that there was no concluded contract between the parties. Nonetheless disputes arising out of the document, being an alleged contract could also be referred to arbitration. There was no problem with this kind of a reference if parties agreed to it. If we consider the language of Section 7 of the Arbitration Act, 1996, it describes an arbitration agreement as an agreement by the parties to submit to arbitration disputes arising out of a defined relationship whether it was contractual or not. Even if the relationship between the parties was not contractual, it was certainly legal. The arbitration agreement cannot be denied. Participation of the judgment debtor before the Arbitral Tribunal clearly shows that it was their intention that the said dispute regarding confirmation of their contract had to be decided by the tribunal. This tribunal gave its specific ruling that there was a clear cut price fixation and that the judgment debtor was in breach of its obligations under the contract. The question of validity of the contract was also raised and gone into by the Arbitral Tribunal. The Supreme Court has said in very clear terms that if the intention of the parties is so expressed in clear words, the Arbitral Tribunal has the power to adjudge the validity of the alleged contract giving rise to arbitration. ***Renusagar Power Co. Ltd. Vs. General Electric Company and another*** *reported in* ***AIR 1985 SC 1156.***

As regards the test to determine whether an award is against the public policy, the test as prescribed in the ***Renusagar*** case ***AIR 1994 SC 960*** is to be followed. Enforcement of foreign award could only be refused if its enforcement would be contrary to 1. Fundamental policy of Indian law 2. The interest of India 3. The justice or morality. Section 48 does not permit the Court to have a “second look” at the award.

Tested against these standards, the award is far from being against the public policy of India.

Moreover, the judgment debtor did not take any action in the English Courts to set aside the award. When the arbitrator has come to a clear cut finding that the contract was duly executed between the parties and it was certain with regard to the price, the judgment debtor ought to have challenged that part of an award under the provisions for setting aside of the award. In the alternative the judgment debtor could have challenged the jurisdiction of the arbitrator alleging that the contract was void or it could have taken other legal steps to adjudge the agreement as void but certainly not now at the stage of execution. That the contract was void for absence or uncertainty of the price clause is not open to the petitioner.

I accept Mr. Saha's contention that the judgement debtor's application for oral hearing was not entertained by the tribunal because they did not deposit the requisite fees. The petitioner's statement of Mr. Barry Callingham was admitted because they paid the fees. The parties had agreed to be abided by the above rules, practice and procedures of the tribunal.

For those reasons, the objections taken to the enforcement of the award fail. I pass an order in terms of prayers (c) and (e) (i) and (ii) of the tabular statement. Mr. S.P. Ghose Barrister-at-law and Mr. Prashant Kumar Tripathi C/o Mr. O.P. Tripathi Advocate Bar Association Room No. 15 are appointed Joint Receivers at an initial remuneration of 2000 GMS and 900 GMS respectively to be paid by the petitioner.

The awarded amount inclusive of interest on the date of the award will first be quantified in rupees at the conversion rate prevailing on the date of the award. The attached fund in the judgment debtor bank account to the extent of the above amount and any further interest accrued there on will be remitted by the Joint Receivers to the petitioner in Sterling. For proper implementation of this order, the Joint Receivers may open a bank account in their joint names, to be operated jointly in any

nationalised bank. The attached funds from the bank account of the judgement debtor, to the extent necessary to satisfy the award will be transferred to this account of the Joint Receivers. The petitioner will take out another execution application to enforce the balance part of the award by sale of immovable property belonging to the judgment debtor etc.. The Joint Receivers will file a report in this court by 30th June, 2015.

This execution application is allowed to the above extent.

Considering all the circumstances, this order is stayed till 06th February, 2015 to enable the judgement debtor to prefer an appeal.

EC 312 of 2013

The facts and issues in this case are identical to the above application (EC 311 of 2013).

The alleged contract was entered into on 21st December, 2010.

The shipment period was between May 2010 and 15th July, 2010.

The quantity and quality of sugar was the same i.e 12500 mt of White Thailand Sugar.

The award was made and published on 23rd February, 2012.

The award against the judgement debtor was for:

"(a) US$ 644,382.02, comprising the principal sum of US$ 93,565.00, plus interest of US$ 50,817.02; and

(b) Compound interest on the said sums, which total US$ 644,382.02, at 90 day rests, at a rate of 8% per annum from and including the date following the date of this award until payment is made".

Costs were also awarded.

The objection taken by the judgement debtor are identical. The reasons advanced in the Award are identical to those in support of the award in EC 311 of 2013.

Hence I dispose of this application with the same reasons and in the same manner as the other execution application (EC 311 of 2013).

The ordering part of EC 311 of 2013 is deemed to be incorporated in this order, with the same Joint Receivers but without any additional remuneration. Order in terms of prayers (c), (e) (i) and (ii) of the tabular statement and all other directions as in the other matter.

Stay of this order till 06th February, 2015

Certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(I.P. MUKERJI, J.)