$~38

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on:14.02.2017

\+ **EX.P.25/2014 & EX.APPL. (OS) 582/2014**

FALCON PROGRESS LTD. ..... Decree Holder

Versus

SARA INTERNATIONAL LTD. ..... Judgment Debtor

Advocates who appeared in this case:

For the Decree Holder : Ms Niyati Kohli and Ms Gunika Gupta.

For the Judgment Debtor : Mr Sandeep Sethi, Sr. Advocate with Ms Anuradha Mukherjee, Ms Jyoti Dastidar, Ms Shikha Tandon and Ms Shreya Som.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

EX.APPL.(OS) 582/2014

1. The above captioned petition has been filed by Falcon Progress Limited (hereafter 'FPL'), a company registered under the laws of Hong Kong, for enforcement of the foreign award dated 22.11.2012 as corrected by the award dated 21.12.2012 (hereafter 'the impugned award'). The impugned award was rendered by the sole arbitrator pursuant to arbitration proceedings conducted under the rules of Singapore International Arbitration Centre (SIAC) in respect of disputes between FPL and Sara International Ltd. (hereafter 'Sara'), the Judgment Debtor.

2. Sara has filed the present application under Section 48 of the

Arbitration and Conciliation Act, 1996 (hereafter 'the Act') *inter alia* praying that enforcement of the impugned award be declined.

3. In the present application, Sara has pleaded that the recognition and enforcement of the impugned award be declined on several grounds; but, Mr Sethi, learned senior counsel appearing for Sara has broadly canvassed only two reasons in support of the relief sought.

4. First of all, he submitted that there was no agreement between FPL and Sara and, therefore, the impugned award could not be enforced as a foreign award. He submitted that although the parties had exchanged a signed agreement - in electronic form - on 24.04.2009, the said agreement was not a concluded contract but was only an agreement to agree. Consequently, the same was not binding on the parties. He submitted that, therefore, the arbitration clause contained in the said agreement was also not binding on the parties. He earnestly contended that the signed copy of the agreement was forwarded on behalf of FPL on 24.04.2009 as an attachment to an e-mail but in the body of the e-mail, FPL had requested Sara to nominate a vessel and indicate the quantity so that the Letter of Credit (LC) quantity and amount could be determined. He submitted that the demand to nominate a vessel as a pre-condition for opening the LC was contrary to the terms of the agreement attached with the email and, therefore, the attached agreement could not be considered as a concluded contract. He also referred to Article 7 of the agreement in question and contended that one of the essential terms regarding the port of discharge had not been agreed to between the parties. Thus, the alleged agreement could only be considered to be an agreement to agree and not a concluded contract.

5. Secondly, Mr Sethi submitted that there was no evidence of any damages suffered by FPL and, therefore, the damages awarded in favour of FPL were unsustainable. He stated that FPL was a trader and had been awarded damages on the basis of difference between the market value of product and the contracted price of the product under the agreement. He submitted that although the measure of damages accepted by the Arbitral Tribunal was apposite and in accordance with Section 51 of the Sale of Goods Act, 1979 (United Kingdom), nonetheless FPL had to prove that it had incurred such damages. He submitted that since there was no evidence that FPL had procured the contracted quantity of the product from a third party at higher rates, it was not entitled to any damages. He submitted that in the given circumstances, the award of damages was contrary to the fundamental policy of India law.

6. The learned counsel for FPL countered the submissions made by Mr Sethi. He submitted that the Arbitral Tribunal had considered the question whether there existed a concluded contract and had rejected the submissions now urged before this court. He contended that the impugned award was binding and Sara could not be permitted to re-agitate the matter in these proceedings.

7. I have heard the learned counsel for the parties.

8. The contention advanced on behalf of FPL that the question as to the existence of a contract cannot be agitated in these proceedings as the same had been considered by the Arbitral Tribunal, is unmerited. The existence of an arbitration agreement is *sine qua non* to constitute a foreign award.

9. Section 44 of the Act defines a foreign award to mean an arbitral award rendered on differences between the parties arising out of legal relationships, considered as commercial under the law in force in India, in pursuance of an agreement in writing for arbitration to which the New York Convention applies. Thus, the question of existence of a foreign award does not arise if there is no agreement in writing between the parties. It is also necessary to understand that the Arbitral Tribunal has the jurisdiction to rule on the existence and validity of the agreement and, consequently to rule on its own jurisdiction, however, the said decision is not final and binding and is amenable to challenge. In case of arbitration to which Part I of the Act applies, the decision of the Arbitral Tribunal to assume jurisdiction is subject to challenge under Section 34 of the Act. In case of an award, which is sought to be enforced under Part II of the Act, the court has to be satisfied at the threshold that the award is a foreign award. Plainly, the Arbitral Tribunal's decision regarding existence of an agreement – which clothes the Arbitral Tribunal with the jurisdiction to decide the disputes – would not be immune to judicial review because if the party challenging the existence of the agreement is correct then the Arbitral Tribunal's decision on its own jurisdiction would be without jurisdiction. The Arbitral Tribunal owes its existence to the agreement between the parties. And, although the Arbitral Tribunal can rule on the same in the first instance, the same would be amenable to judicial review. There is no substance in the contention that if the Arbitral Tribunal has considered and decided that the agreement is in existence, this court should accept the same; because, if there is no agreement between the parties, the decision of the Arbitral Tribunal is of no value at all. The rule of Kompetenz – Kompetenz, which is now accepted in

the UNCITRAL model of law and also embodied in Section 16 of the Act, does not in any manner preclude or curtail challenge to the Arbitral Tribunal's jurisdiction, once the award is made. The rule only clothes the Arbitral Tribunal to decide the existence of the agreement and its jurisdiction in the first instance without the parties seeking recourse to courts.

10. It is also necessary to observe that the question whether the enforcement of a foreign award would be declined under Section 48 of the Act has to be considered only on the grounds as set out in Section 48 of the Act, notwithstanding the decision of the Arbitral Tribunal. If the grounds as indicated in Section 48 of the Act are established, the recognition and enforcement of the award is to be declined.

11. There is no presumption that the decision of the Arbitral Tribunal as to the existence of an agreement is valid and the court must be independently satisfied by sufficient evidence of such agreement. At the threshold, the party seeking enforcement of a foreign award has to produce the evidence as specified under Section 47(1) of the Act: (i) the original award or an authenticated copy of the award; (ii) the original agreement for arbitration or a duly certified copy thereof; and (iii) such evidence as may be required to prove that the award is a foreign award. It is only after the party applying for enforcement of a foreign award is able to satisfy the court as to the existence of an arbitration agreement - as defined under Article II(2) of the New York Convention - and that the award sought to be enforced is a foreign award, rendered pursuant to such agreement, the question of proceeding further to recognise and enforce the same would arise.

12. Having stated the above, the principal question to be considered is whether there was a concluded contract between the parties. The undisputed facts are that on 24.04.2009 at 03:33 p.m., Ms Daisy Liu of FPL sent an e-mail to Mr Gill of Sara attaching therewith a final version of the agreement for signing. The e-mail clearly stated: "*Attached please find the final version of the contract for signing. Please kindly send us the signed contract for counter-signing today with thanks*". In response to the said mail, Mr Gill of Sara sent an e-mail on 24.04.2009 at 6:23 p.m. attaching a signed copy of the agreement. Mr Gill clearly stated: "*Please find enclosed herewith signed contract. Kindly let us have the counter signed & stamped copy*". Admittedly, the signed agreement was attached with the said mail. Thereafter, Ms Daisy Liu sent another mail at 6:47 p.m. attaching a counter signed scanned copy of the agreement which was earlier signed and sent by Sara. The said mail, *inter alia*, reads as under:-

> "Attached please find the co-signed contract. We'll send you the LC format early next week. Please kindly nominate vessel asap so that we can determine the LC quantity and amount."

13. It is not disputed that the agreement attached with the mail of FPL was the same agreement which was subsequently signed on behalf of Sara and, thereafter, counter-signed on behalf of FPL. In the circumstances, the contention that the parties had only agreed to agree and there was no concluded contract between the parties is unsustainable. The Arbitral Tribunal had also considered the aforesaid contention and rejected the same.

14. Mr Sethi's contention that essential terms of the agreement were not finalised, is also without merit. In terms of the said agreement, Sara had

agreed to ship 20,000 - 27,000 WMT (+/- 10% at Seller's option) iron ore fines of the Indian origin of the given specifications. The parties had also agreed on the price of the product; the base price of the product was agreed upon as, "*USD 63.00 (United States Dollars Sixty Three Only) per dry metric ton CFR FO Main Port, China (discharge port at buyer's option) on the basis of sixty three point five percent (63.5% basis) Fe content*".

15. Mr Sethi had referred to Article 7 of the said agreement, in terms of which, parties had *inter alia* agreed as under:-

> "In case of discharge port as Yangtze River Port, NOR should be tendered when vessel arrives at the actual discharge port. NOR tendering at CJK is not acceptable."

He contended that in view of the above, the issue of port of discharge had remained inconclusive and this according to him, indicated that the agreement entered into between the parties was only an agreement to agree and therefore not a binding contract. This court finds the aforesaid contention to be bereft of any merit. On the contrary, Article 7 clearly records the agreement between the parties that Notice of Readiness (NOR) would be tendered when the vessel arrives at the actual port of discharge and NOR tendering at CJK was not acceptable.

16. A plain reading of the agreement indicates that all essential terms had been agreed to between the parties. The contention that since FPL had requested Sara to indicate the name of the vessel and the quantity for opening of the LC, the signed agreement attached with the mail could not be considered as a concluded contract, is unsustainable. FPL's request for nomination of the vessel and for informing the quantity of goods being

shipped is not inconsistent with the terms of the agreement. Although, it is correct that FPL had agreed to open LC in favour of Sara within a period of seven days from signing of the contract to cover the entire value of shipment; the same is consistent with FPL's request to Sara to intimate the quantities to be shipped as well as the nominated vessel.

17. Article II(2) of the New York Convention expressly provides "*The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams*". In the present case, it is not disputed that the agreement attached with the emails referred hereinabove contained an arbitration clause and, therefore, the contention that there is no arbitration agreement between the parties is also devoid of any merits.

18. The next issue to be considered is whether the impugned award falls foul of the fundamental policy of Indian law inasmuch as the Arbitral Tribunal had awarded damages in favour of FPL. The finding of the Arbitral Tribunal that Sara had breached the agreement cannot be assailed in these proceedings. The said finding is final and binding. In fairness, Mr Sethi had also not contested the said finding. The only issue advanced was that award of damages without sufficient proof of loss would fall foul of the fundamental policy of Indian law.

19. It is relevant to mention that the parties had agreed that the agreement would be governed by the laws of United Kingdom. In addition, both the parties had also agreed that damages were to be measured in terms of Section 51(3) of the Sale of Goods Act, 1979 (UK).

20. Section 51 of the Sale of Goods Act, 1979 (UK) reads as under:-

> "**51. Damages for non-delivery.**
>
> (1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.
>
> (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.
>
> (3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or (if no time was fixed) at the time of the refusal to deliver."

21. Both the parties were *ad idem* that in case of breach of agreement, the damages to be awarded were to be measured in terms of Section 51(3) of the Sale of Goods Act, 1979 (UK). The controversies raised by Sara included the determination of the market value and the relevant date in reference to which the market value was to be determined. However, it is not disputed that the parties had agreed on a list of market prices on various dates which were drawn from Umetal Figures. On the basis of the said list, the Arbitral Tribunal determined the market value of the ore by making due adjustments including on account of moisture content. It is relevant to note that computation of the difference between the market value and the contracted value is not in dispute. No contentions have been advanced in this court assailing the aforesaid calculation. The only contention advanced is that

since FPL had not procured the goods in question from another source at a higher value, no damages could be awarded to FPL. It was earnestly contended that FPL was a trader and, therefore, would have suffered actual loss only if it had further transacted the goods or had procured the goods at a higher price. The aforesaid contention is also unmerited. A trader is not required to show that it has procured the goods at a higher price in order to claim damages. It is sufficient for a trader to show that the market value of the goods promised to it had increased. It is well settled that the difference in the contracted value and the market value of the goods which the seller has failed to deliver represents the amount that the buyer must obtain to put itself in the position, it would have been if the agreement was duly performed by the seller. Thus, FPL is entitled to the difference between the market price and the contracted value of the goods as representing the damages actually suffered by FPL. The fact that the goods at the contracted value were not delivered to the trader would itself indicate that it had suffered a loss of drop in value.

22. In view of the above, the application is dismissed.

EX.P.25/2014

23. List on 13.04.2017.

VIBHU BAKHRU, J

FEBRUARY 14, 2017
RK