

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ RFA(OS) No.69/2009 & CM No.11710-11/2009
SPENTEX INDUSTRIES LTD. ...Appellant through
Mr. Sudheer Pandey, Adv.

versus

DUNVANT S.A. & ANR. Respondent through
None

% Date of Hearing : August 24, 2009

Date of Decision : October 29, 2009

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE V.K. JAIN

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| 1. Whether reporters of local papers may be allowed to see the Judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the Judgment should be reported in the Digest? | Yes |

VIKRAMAJIT SEN, J.

CM No.11711/2009

1. For the reasons stated in the Application the delay of thirty days in refilling the Appeal is condoned.
2. Application stands disposed of.

RFA(OS) No.69/2009 & CM No.11710/2009

3. This Appeal assails the Order dated 29.5.2009 passed by the learned Single Judge holding the view that none of the reliefs prayed for in the plaint could be granted. Although it has not been specifically stated that the suit stands dismissed, this

is the understanding (rightly so) of the Plaintiff/Appellant as stated in paragraph 2 of the Memorandum of Appeal which is, *inter alia*, to the effect that the suit has been dismissed as not maintainable.

4. The Reliefs prayed for in the plaint are as follows:-

- (a) declare the purported contract/letter of intent dated 24th July, 2008 and 20.08.2008 as null and void;
- (b) Declare the purported Arbitration Clause (Arbitration Agreement) contained in the purported contract dated 24th July, 2008 and 20.08.2008 as non-existent and unenforceable;
- (c) Declare the arbitral award dated 09.04.2009 as null and void and unenforceable;
- (d) Pass a decree of permanent injunction against the enforcement of the Arbitral Award;
- (e) Pass a decree for damages of rupees twenty two lakhs only;
- (f) Pass a decree for recovery of Rupees five lakhs for the excess payments made towards the substandard good supplied;
- (g) Pass such other/further order as this Hon'ble Court deems fit and proper in the facts and circumstances of this case.

These supplications were made in the backdrop of arbitral proceedings conducted by the International Cotton Association Limited, which had also appointed the Chairman of the Arbitral

Tribunal, of which the appointees of the two adversaries before us were also members.

5. The Contract contains a clause mentioning that disputes would be settled by arbitration under the aegis of the International Cotton Association Limited. The Plaintiff/Appellant had itself preferred a claim of damages for defective quality of the first two consignments.

6. The first question to be addressed is whether there are material dissimilarities between Chapter-I and Chapter-II of the Arbitration and Conciliation Act, 1996 ('A&C Act' for short). The debate in this regard has been settled by ***Bhatia International -vs- Bulk Trading S.A.***, 2002 (4) SCC 105 which has, *inter alia*, held that Chapter-I, including Section 9 of the A&C Act, would be applicable even to international commercial arbitrations held outside India unless the parties had expressly or impliedly excluded all or any of its provisions, in which event laws agreed upon between the parties would take effect. ***Bhatia International*** specifically concludes that Part I is applicable even to foreign awards. Their Lordships enunciated the law, *inter alia*, in these words-

32. To conclude we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsory apply and

parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply.

33. Faced with this situation Mr. Sen submits that, in this case the parties had agreed that the arbitration be as per the rules of ICC. He submits that thus by necessary implication Section 9 would not apply. In our view in such cases the question would be whether Section 9 gets excluded by the ICC Rules of Arbitration. Article 23 of ICC Rules reads as follows:

"Conservatory and Interim Measures

1. Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate.

2. Before the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory

measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an Arbitral Tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the Arbitral Tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the Arbitral Tribunal thereof."

34. Thus Article 23 of the ICC rules permits parties to apply to a competent judicial authority for interim and conservatory measures. Therefore, in such cases an application can be made under Section 9 of the said Act.

35. Lastly it must be stated that the said Act does not appear to be a well drafted legislation. Therefore the High Courts of Orissa, Bombay, Madras, Delhi and Calcutta cannot be faulted for interpreting it in the manner indicated above. However, in our view a proper and conjoint reading of all the provisions indicates that Part I is to apply also to international commercial arbitrations which take place out of India, unless the parties by agreement, express or implied exclude it or any of its provisions. Such an interpretation does not lead to any conflict between any of the provisions of the said Act. On this interpretation there are no lacunae in the said Act. This interpretation also does not leave a party remediless. Thus such an interpretation has to be preferred to the one adopted by the High Courts of Orissa, Bombay, Madras, Delhi and Calcutta. It will

therefore have to be held that the contrary view taken by these High Courts is not good law.

7. In *Bharti Televentures Ltd. -vs- DSS Enterprises Private Ltd.*, 123(2005) DLT 532 I had ventured the view that this question had not been conclusively settled because the focus in ***Bhatia International*** was the power to issue injunctions even in respect of foreign arbitrations. The controversy stands interred by *Venture Global Engineering -vs- Satyam Computer Services Ltd.*, AIR 2008 SC 1061, paragraphs 17, 19 and 29 of which are reproduced below for facility of reference:-

17. On close scrutiny of the materials and the dictum laid down in three-Judge Bench decision in *Bhatia International* (supra), we agree with the contention of Mr. K.K.Venugopal and hold that paragraphs 32 and 35 of the *Bhatia International* (supra) make it clear that the provisions of Part I of the Act would apply to all arbitrations including international commercial arbitrations and to all proceedings relating thereto. We further hold that where such arbitration is held in India, the provisions of Part-I would compulsorily apply and parties are free to deviate to the extent permitted by the provisions of Part-I. It is also clear that even in the case of international commercial arbitrations held out of India provisions of Part-I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. We are also of the view that such an interpretation does not lead to any conflict between

any of the provisions of the Act and there is no lacuna as such. The matter, therefore, is concluded by the three-Judge Bench decision in *Bhatia International* (supra).

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19. The very fact that the judgment holds that it would be open to the parties to exclude the application of the provisions of Part I by express or implied agreement, would mean that otherwise the whole of Part I would apply. In any event, to apply Section 34 to foreign international awards would not be inconsistent with Section 48 of the Act, or any other provision of Part II as a situation may arise, where, even in respect of properties situate in India and where an award would be invalid if opposed to the public policy of India, merely because the judgment-debtor resides abroad, the award can be enforced against properties in India through personal compliance of the judgment-debtor and by holding out the threat of contempt as is being sought to be done in the present case. In such an event, the judgment-debtor cannot be deprived of his right under Section 34 to invoke the public policy of India, to set aside the award. As observed earlier, the public policy of India includes - (a) the fundamental policy of India; or (b) the interests of India; or (c) justice or morality; or (d) in addition, if it is patently illegal. This extended definition of public policy can be by-passed by taking the award to a foreign country for enforcement.

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29. In terms of the decision in *Bhatia International* (supra), we hold that Part I of the Act is applicable to

the Award in question even though it is a foreign Award.

8. The logical consequence is that if a party is desirous of challenging an Award, whether domestic or international, it should file objections/applications as contemplated by the A&C Act.

9. In the present case, instead of filing Objections under Section 34 of the A&C Act or showing cause in terms of Section 48 of the A&C Act, as to why the Award ought not be enforced in India the Appellant has filed the present suit instead.

10. The learned Single Judge has dealt in great detail various case laws. Very recently another Division Bench of this Court of which one of us (Vikramajit Sen, J) was a member has also dwelt on this issue in **FAO(OS) No. 21/2008** titled **Airport Authority of India -vs- Hindustan Steel Works Construction Ltd.** decided on 15.10.2009. It was concluded that the A&C Act provides adequate recourse for challenging an award, not merely on the merits but also on questions such as whether the Arbitral Tribunal was possessed of powers to adjudicate the disputes. The learned Single Judge has correctly found the decision in *K.V. Aerner Cementation India Ltd. -vs- Bajranglal Agarwal*, IV(2001) SLT 535 = 2001 (6) Supreme 265, *S.B.P. & Co. -vs- Patel Engineering Ltd.*, (2005) 8 SCC 618 as

well as *Shin-Etsu Chemical Ltd. -vs- Aksh Optfiber Ltd.*, AIR 2005 SC 3766 : (2005) 7 SCC 234 to be relevant. We are in entire agreement with the reasoning in the impugned Judgment.

11. It appears that the Respondent has, as yet, not sought the enforcement of the Award in India. If Objections were intended to be filed by the Appellant, it would have to conform to the laws applicable in England. It is a moot question whether Objections could have been filed under Section 34 of the A&C Act in India. It is altogether a matter of conjecture whether the Respondent would seek enforcement of the Award in India. However, if it were to do so, the provisions of Section 48 of the A&C Act would immediately come into force. So far as first sub-section of Section 48 is concerned, the Appellant would have to make a written request to the Court not to enforce the Award predicated on any of the five contingencies adumbrated therein. So far as the second sub-section of Section 48 is concerned, presumably the Court would have to be satisfied, *suo moto*, firstly that the subject matter of the dispute is not arbitrable under the laws of India and secondly that the enforcement of the Award would be contrary to the public policy of India. These observations are strictly obiter but are nevertheless articulated in order to show the futility of filing a suit by way of an oblique challenge to the Award. In this regard, we immediately recall

the celebrated decision in *Nazir Ahmad -vs- King Emperor*, AIR 1936 Privy Council 253. The Apex Court observed as follows:

“It is the basic principles of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. The origin of this rule traceable to the decision in *Taylor Vs. Taylor* which was followed by Lord Roche in *Nazir Ahmad Vs. Kind Emperor*.”

This view is consistently followed by the Supreme Court in the subsequent judgments in *Rao Shiv Bahadur Singh -vs- State of Vindhayanchal Pradesh*, AIR 1954 SC 322; *State of Uttar Pradesh -vs- Singhara Singh*, AIR 1964 SC 358 and *Gujarat Urja Vikas Nigam Ltd. -vs- Essar Power Ltd.*, (2008) 4 SCC 755.

12. The Appeal is without merit and is dismissed. Pending Application also stands dismissed. Trial Court records be returned to the Record Room.

(VIKRAMAJIT SEN)
JUDGE

October 29, 2009
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(V.K. JAIN)
JUDGE