

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

+ O.M.P. 149/2010 & I.A. Nos. 3944/2010 and 4343/2010

PEC LIMITED

..... Petitioner
Through: Mr. Ramji Srinivasan, Senior
Advocate with Mr. Jayant K.
Mehta, Mr. Ashwin Shankar and
Mr. Yogesh Tiwari, Advocates.

versus

THAI MAPARN TRADING
CO LIMITED & ANR

..... Respondents
Through: Mr. Jay Salva, Advocate with
Ms. Meenakshi Ogra, Mr. Suresh
Bisht, Ms. Aditi Mohan and
Mr. Rajpal Singh, Advocates, for
respondent No.1.

Mr. S.L. Gupta, Advocate and
Mr. Ram Gupta Advocate for
respondent No.2.

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Date of Decision : APRIL 27, 2010

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No. |
| 2. To be referred to the Reporter or not? | No. |
| 3. Whether the judgment should be reported in the Digest? | No. |

J U D G M E N T

MANMOHAN, J (ORAL)

1. This Court vide its order dated 16th March, 2010 was persuaded to pass an order restraining respondent No.2-Bank from retaining an amount not exceeding the awarded amount of US\$14,520,000/- plus

interest and costs as a garnishee on the belief that the impugned award had attained finality. It was not disclosed to this Court that an internal appeal under the Gafta Rules was maintainable and further that the respondent's Solicitor had intimated petitioner on 10th/11th March, 2010 that respondent intended to file an internal appeal under the Gafta Rules against the award.

2. Today, Mr. Ramji Srinivasan, learned senior counsel for petitioner has sought to contend that the petition had been filed on 11th March, 2010 and by that date the fax message of respondent's Solicitor indicating its intent to file an internal appeal had not been received.

3. He further submits that by virtue of Clause 26(c) of the Purchase Contract executed between the parties, petitioner has the right to obtain security in respect of its claim in any jurisdiction. Clause 26(c) of the agreement executed between the parties reads as under:

"26. ARBITRATION-

xxx xxx xxx

(c) Nothing contained under this Arbitration Clause shall prevent the parties from seeking to obtain security in respect of their claim or counterclaim via legal proceedings in any jurisdiction, provided such legal proceedings shall be limited to applying for and/or obtaining security for a claim of counterclaim, it being understood and agreed that the substantive merits of any dispute or claim shall be determined solely by arbitration in accordance with the GAFTA Arbitration Rules, No.125."

4. In this connection, he places reliance upon the judgment of the Supreme Court in ***Bhatia International vs. Bulk Trading S.A. and Anr.*** reported in ***(2002) 4 SCC 105*** as well as ***Intraco Ltd. Vs. Notis***

Shipping Corp. of Liberia (The Bhoja Trader) (1981) 2 Llyods Rep. 256.

5. Mr. Srinivasan lastly submits that by virtue of Section 48(3) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the “Act, 1996”), this Court has the power, even when the Award is subject to an internal appeal, to direct the respondent to furnish suitable security. Section 48(3) of Act, 1996 reads as under:

“48. Conditions for enforcement of foreign awards. –

XXX XXX XXX

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security. “

6. On the other hand, Mr. Jay Salva, learned counsel for respondent No.1 submits that proceeds of Letter of Credit can neither be attached nor can a garnishee be appointed. In this connection he places reliance on the judgment of Supreme Court in *Fargo Freight Ltd. vs. Commodities Exchange Corporation* reported in *AIR 2004 SC 4109* wherein it has been held as under:-

“25. Order 21, Rule 46, C.P.C., deals with garnishee proceedings. These apply when monies of the judgment debtor are in the hands of third parties. In cases of Letter of Credit the liability of the issuing bank is an entirely independent liability. It cannot be said that the monies belonging to the judgment-debtor. Thus, the claim, if any, can only be decided in independent proceedings which should have been adopted by the appellants.”

7. Mr. Salva further submits that no relief under Section 9 of the Act, 1996 can be granted to the petitioner as the award has already been published.

8. Mr. Salva lastly submits that as respondent No.1 is based in Thailand, petitioner should have filed a proceeding under Section 48 in Thailand and if such a proceeding is instituted there, petitioner would furnish a security to the satisfaction of the Thai Court in accordance with Section 48(3).

9. Having heard the parties, I am of the view that proceedings under Section 48 of the Act, 1996 for enforcement of foreign award can be filed in any territory where respondent's assets can be traced. Moreover, Clause 28(C) permits the petitioner to file appropriate proceedings to obtain security in any jurisdiction. Consequently, at this stage, it cannot be said that this Court has no territorial jurisdiction to entertain the present petition.

10. However, in my opinion, the petitioner should have disclosed during the course of the arguments on 15th and 16th March, 2010 that it had received intimation from the respondent's solicitor of its intention to file an internal appeal as provided in Gafta Rules. I may mention that in accordance with 10:1 of the Gafta Rules, a notice of intent to file an appeal had been complied with by the respondent vide its Solicitor's notice dated 10th March, 2010. Moreover, even if the petitioner had received the said notice dated 11th March, 2010 after filing of the present petition, petitioner should have brought this fact to the notice of

this court on 15th-16th March, 2010 when the matter had been heard. Undoubtedly, petitioner's lawyers have a good standing at the Bar and I suspect that non-disclosure was due to bureaucratic indifference in petitioner's organisation, but at the same time this does not absolve the petitioner of its legal duty to disclose all the facts.

11. Had I known that respondent No.1 had an opportunity to file an appeal and that respondent No.1 had decided to file such an appeal, I would not have passed an order directing the respondent-Bank to retain the amount lying with it as a garnishee. In fact, by virtue of the internal appeal mechanism, the proceedings under Section 48 for enforcement of the award are liable to be adjourned.

12. Moreover, due to applicability of Section 48(3) at this stage, the power under Section 9 of the Act, 1996, is not available at this stage. This has also been held by the Supreme Court in ***Bhatia International*** (supra) wherein it has been observed, "Section 9 does suggest that once an award is made, an application for interim measure can only be made if the award is a "domestic award" as defined in Section 2(7) of the said Act. Thus where the legislature wanted to restrict the applicability of Section 9 it has done so specifically."

13. Consequently, at this stage, I can only exercise power under Section 48(3) of the Act, 1996, which only confers discretion on me to direct the respondent to furnish a security while adjourning the present proceedings. Accordingly, keeping in view the Award dated 04th March, 2010, I direct the respondent No.1 to furnish security to the

satisfaction of the Registrar General of this Court for the awarded sum within a period of four weeks from today.

14. However, order dated 16th March, 2010 is hereby vacated and present proceedings are adjourned. Accordingly, the State Bank of India is at liberty to repatriate the amount retained by it under the Letter of Credit.

15. List the matter before Registrar General on 25th May, 2010 for furnishing security by respondent No.1.

16. At this stage, both the parties state that they would like to amicably resolve their disputes. Consequently, with consent of parties, Mr. Justice D.P. Wadhwa, a retired Supreme Court Judge, C-25, Panchsheel Enclave, New Delhi – 110 017, Mob. No. 9810720200 is appointed as the Mediator to resolve all disputes between the parties. Learned Mediator shall be entitled to fix his own fee schedule.

17. Let a senior representative each of both the parties be present before Justice Wadhwa on 7th May, 2010 at 4.30 p.m. However, if the said date and time is not convenient either to the Mediator or to any of the parties, the date and time of meeting be changed after giving prior written notice to all. Needless to say that this mediation offer is without prejudice to the rights and contentions of either of the parties.

MANMOHAN,J

APRIL 27, 2010

js/rn