

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

**Judgment reserved on: 14.02.2011**

**% Judgment delivered on: 09.03.2011**

**+ O.M.P. No. 138/2011 & I.A. Nos. 2250-51/2011**

SMT. ANITA GARG ..... Petitioner  
Through: Mr. C.A. Sundaram & Mr. Dhruv  
Mehta, Sr. Advocates, with Mr. N.M.  
Sharma, Ms. Mithu Jain, Ms. Mallika  
Gehlot & Mr. Abhishek Sharma,  
Advocates.

versus

M/S. GLENCORE GRAIN ROTTERDAM B.V. & ANR ..... Respondents  
Through: Mr. Rajiv Nayar, Sr. Advocate, with  
Ms. Niti Dixit, Mr. Darpan Wadhwa,  
Mr. Vidur Bhatia, Advocates.

**CORAM:  
HON'BLE MR. JUSTICE VIPIN SANGHI**

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

**J U D G M E N T**

**VIPIN SANGHI, J.**

1. This petition has been preferred under Section 34 of the Arbitration and Conciliation Act, 1996 (the Act) to challenge the interim award dated 20.06.1997 and the final award dated 29.07.1997 passed by The Grain and Feed Trade Association (for short 'GAFTA') in disputes between respondent no.1 M/s Glencore Grain Rotterdam B.V

and M/s Shivnath Rai Harnarain (India) Company, a registered partnership firm (the firm) of which the petitioner was one of the partners at the relevant time.

2. The arbitral awards in question has been rendered in an international commercial arbitration. To maintain these objections, the petitioner places heavy reliance on the decision of the Supreme Court in ***Venture Global Engineering V. Satyam Computer Services Ltd. and Anr.***, (2008) 4 SCC 190 wherein the Supreme Court has held that objections under Section 34 of the Act (which falls in Part I) would lie in respect of an award made in an international commercial arbitration.

3. The admitted position is that the firm filed suit being CS(OS) 1103/1997 before the Delhi High Court to challenge the legality and validity of the 11 underlying contracts, in relation to which arbitration proceedings were initiated at the instance of respondent No. 1. The issue of jurisdiction of the arbitral tribunal was raised by the firm, before the tribunal, and the same was rejected by it by its interim award dated 20.06.1997. The aforesaid foreign awards were made against the firm wherein, inter alia, the petitioner and her husband Shri Prem Garg were partners. The firm participated in the arbitration proceedings upto the point when the issue of jurisdiction was decided against it. The firm was represented in the arbitration proceedings by its partner Shri Prem Garg. The issue of legality and validity of the

underlying contracts had been arbitrated by the arbitral tribunal and the finding returned thereon was against the firm.

4. After the final award was rendered, respondent No. 1 filed CS(OS) 541/1998 to enforce the foreign award. I have called for the records of the disposed of CS (OS) No.1103/1997 and CS (OS) No.541/1998. This suit was contested by the aforesaid firm acting through its authorized representative and power of attorney holder Shri Ram Lal Thakur & partner Shri Prem Garg. The suit filed by respondent no.1, and the defence raised therein were treated as proceedings under Sections 47 and 48 of the Act. The earlier suit filed by the partnership firm, i.e., CS(OS) 1103/1997 was also listed and taken up along with the suit filed by respondent no.1.

5. On 27.11.2008, the learned single Judge decreed the suit filed by respondent no.1, being CS(OS) 541/1998 and held that the foreign award was enforceable. The objections to the awards were dealt with in detail. On the same day, by another consequential order, the suit filed by the partnership firm Shivnath Rai Harnarain (India) was dismissed *"In view of the findings recorded in connected suit No. 541/1998"*.

6. The aforesaid firm filed two regular first appeals to assail the order dated 27.11.2008 in respect of the decisions rendered in CS(OS) 1103/1997 and CS(OS) 541/1998. They were numbered as RFA No. 17/2009 and RFA No. 20/2009. The Division Bench, however, vide

order dated 06.11.2009 held that the regular first appeals were not maintainable. The partnership firm then preferred SLP to assail the order dated 06.11.2009.

7. In the meantime, respondent no.1 had preferred execution proceedings, being Ex.Pet.No.72/2009 against the firm; Shri Prem Garg; the petitioner herein, Smt. Anita Garg; Shri Brij Mohan Gupta and Lal Mahal Ltd who had apparently taken over the business of the firm. To rope in, inter alia, the petitioner, reliance was placed on Order 21 Rule 50 CPC.

8. The Supreme Court granted interim stay against the execution of the foreign awards, subject to deposit of 50% of the principal amount under the foreign awards. The partnership firm, however, did not deposit any amount. Consequently, the stay of execution proceedings did not become operative.

9. On 19.04.2010, in the execution proceedings the Court directed that the assets of Shri Prem Garg and the petitioner Smt. Anita Garg, namely the shares held by them in Lal Mahal Ltd. be sold by public auction. Sh. Prem Garg and the petitioner Smt. Anita Garg, and the firm preferred EFA (OS) Nos. 15/2010 and 16/2010 to challenge the order dated 19.04.2010 passed by the executing court. On 11.06.2010, these appeals were dismissed by the Division Bench by a detailed order. It was, inter alia, held that the petitioner was a partner of the firm at the relevant time. The Court placed reliance on

***Gambhir Mal Pandiya (since deceased) v. J.K. Jute Mills Co. Ltd.***

***Kanpur & Anr.***, AIR 1963 SC 243. The Division Bench held in paragraph 15 as follows:-

*“We are of the view that the scope of enquiry under Rule 50 Order XXI of the CPC is limited to the fact as to whether the person against whom the execution is sought was a partner when the cause of action accrued against the firm and against the Decree Holder, but the person may **question the decree on the ground of collusion, fraud or the like but not have a fresh adjudication on the question of liability.** (emphasis supplied).”*

10. The order passed by the Division Bench in EFA (OS) 15/2010 and 16/2010 has attained finality. I may note that this order of the Division Bench, though referred to, has not been filed with this petition. The present objections have been filed after the dismissal of the said appeals, on or about 19.01.2011.

11. I have heard senior counsels for the parties on the aspect of maintainability of these objections. It is not disputed that a signed copy of the award was sent to the party to the arbitration proceedings, namely, the partnership firm M/s. Shivnath Rai Harnarain (India). The firm not only opposed the proceedings under Sections 47 of the Act by participating in CS(OS) 541/1998, but also raised its objections under Section 48 of the Act. It also pursued its own suit in CS(OS)1103/197 to challenge the legality and validity of the underlying contracts.

12. In the aforesaid suit being CS (OS) No.541/1998, issues were framed on 09.11.2000. Two of the issues framed by the Court were:

*"1. Whether the petitioner has complied with the provisions contained in Section 47(1)(a) to (c) of Act, 1996, for enforcement of the award dated 29.7.97?*

*2. If the issue No.1 is decided in affirmative, whether the respondent has furnished proof as required under Section 48 of the Act, 1996, showing that the enforcement of the said award is liable to be refused under Section 48?"*

The Court dealt with the objections raised by the firm under Section 48 of the Act. This is evident from the following extracts of the said judgment:

*"He, however, sought to resist the enforcement of the award by placing reliance on the provisions of Section 48(1)(a) and (b) as well as Section 48(2)(b) to which I shall presently refer."*

*... ..*

*"43. Adverting to Issue No.2, which deals with the question as to whether the defendant has furnished proof as required under Section 48 of the Act, showing that the enforcement of the award is liable to be refused under Section 48, Mr. Tiku, the learned counsel for the defendant has raised a three-fold contention:-*

*(i) There was no arbitration agreement between the parties and accordingly the arbitral tribunal had no jurisdiction to arbitrate upon the matter.*

*(ii) The defendant was not given proper notice of the arbitral proceedings and was unable to present its case.*

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

13. The findings returned by the Court on the issues are the following:

*"54. .... The necessary corollary is that it must be held that there was an arbitration agreement between the parties and the defendant*

*being fully aware of the same, cannot turn round at this stage to urge that it was not so.”*

*... ..*

*“56. It is clear from the above that the defendant's contention that the defendant was not able to present its case before the arbitral tribunal is wholly untenable. The plaintiff's submissions were received by the Arbitral Tribunal on 3rd July, 1996. The award was rendered a year later on 29th July, 1997. During this period, a long rope was given to the defendant to present its case. If the defendant after receipt of the interim award on 20th June, 1997 failed to contest the matter, the blame cannot be laid at the door of the arbitrators for no fault of theirs, more so as the Arbitral Tribunal on the insistence of the defendant agreed to consider the question of its jurisdiction in the first instance and to hear the submissions on the substantive issues in the event that they determined they had jurisdiction to do so.”*

14. The Court then considered the submission of the firm that the award was opposed to public policy of India for the reason that under the Indian law, a partner of a firm cannot bind the partnership firm for referring the disputes to arbitration and that there is no such implied authority with the partner of a firm. This submission was also rejected by the learned Judge in para 61, by placing reliance on the Supreme Court decision in ***Renusagar Power Co. Ltd. v. General Electric Co.***, AIR 1994 SC 860, wherein it is held that:

*“61.....the defence of public policy should be construed narrowly and that 'the expression 'public policy' covers the field not covered by the words 'and the law of India' which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required'. See paragraph 65 of the judgment in Renusagar (supra).*

62. *Apparently with a view to place matters beyond the pale of controversy, the legislature while enacting the Arbitration and Conciliation Act, 1996 deemed it expedient to add an Explanation in order to explain the scope and ambit of the expression 'contrary to the public policy of India'. Hence the declaration contained in the Explanation to Sub-section (2) of Section 48 of the Act 'for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption'. Thus, even assuming that the enforcement of the award would involve any contravention of the law of partnership in India, it cannot be said that the enforcement of the award would be contrary to the public policy of India. The scope and ambit of the expression 'public policy of India' must necessarily be construed narrowly to mean the fundamental policy of India and, as clarified by the Explanation to Section 48(2), conflict with the public policy must involve the element of fraud or corruption."*

15. As aforesaid, the said suit filed by respondent no.1 was decreed.

Consequently the objections raised by the partnership firm to the foreign award were rejected. The petitioner herein was a partner of the partnership firm M/s. Shivnath Rai Harnarain (India) on the relevant day. The first question that, therefore, arises is whether the present proceedings are barred by *res judicata*.

16. The partnership firm is only a compendium of its partners which remains liable even to the extent of their personal assets till the time all the creditors are satisfied. *A partner is the agent of the firm for the purpose of the business of the firm* (Section 18 of the Partnership Act). *The act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm.* The authority of a partner to bind the firm is called his "*implied authority*".

17. The arbitration proceedings were contested by the partnership firm M/s. Shivnath Rai Harnarain (India); CS(OS) 1103/1997 was filed in the name of the partnership firm, and; CS(OS) 548/1998 was contested in the name of the partnership firm M/s. Shivnath Rai Harnarain (India) by Shri Ram Lal Thakur, its authorized representative and power of attorney holder and Shri Prem Garg, partner. The acts of defending and prosecuting arbitration proceedings and litigation by a partner or authorized representative/power of attorney of the firm, would qualify as acts done by the partner/attorney in usual course of business, of the kind carried on by the firm. Consequently, by virtue of Section 19 of the Indian Partnership Act, the aforesaid acts of Shri Ram Lal Thakur and Shri Prem Garg, bind the firm. Pertinently, the conduct of Shri Prem Garg and Shri Ram Lal Thakur, in defending the arbitration proceedings; prosecuting CS(OS) No. 1103/1997, and; defending CS(OS) No. 548/1998 does not fall in any of the instances mentioned in clauses (a) to (h) of section 19(2) of the Partnership Act, which enlists the various acts to which the implied authority of a partner does not extend, in the absence of any usage or custom or trade to the contrary.

18. In ***Krishna Pillai Raghavan Pillai and Anr. V. Karthiayani Amma Sarasamma and Ors.***, AIR 1969 Kerala 26, the Division Bench of the Kerala High court, inter alia, held as follows:-

*“When a person is, either by operation of law, or by act of parties, duly authorised to represent another in a litigation, that other is, we should think, in truth a party to the litigation even if not co nomine (sic eo nomine) so. The case of a manager litigating on behalf of his joint family, which under their personal law he is competent to represent would, we think, satisfy the requirement of identity of parties in the body of Section 11 of the Code with regard to members of the family claiming as such in a subsequent litigation -- all the members of the joint family being represented by the manager are, in truth, parties to the suit. The case would, of course, fall within Explanation VI, but we do not think it really needs the aid of the explanation to satisfy the requirement of identity. ....”*

19. In my view, the same legal position would hold good where a partner of a partnership firm, or an attorney of a firm litigates on behalf of the firm and represents the firm. A decision rendered in such a proceeding would bind the firm and all its partners, unless there are any other reasons to exclude such binding force.

20. In ***Her Highness Maharani Mandalsa Devi Vs. M. Ramnarain (P) Ltd.***, (1965) 3 SCR 421, AIR 1965 SC 1718, the Supreme Court held:

*“The suit against the firm is really a suit against all the partners who were its partners at the time of the accrual of the cause of action, .....Order 30, R. 4 of a Code of Civil Procedure enables the creditor to institute the suit against the firm in the firm name without joining the legal representative of the deceased partner. ....The decree passed in such a suit will, therefore, bind the partnership and all the surviving partners, .....”*

21. When the partnership firm, acting through one of its partners, namely, Shri Prem Garg and its attorney Shri Ram Lal Thakur,

contested the arbitration proceedings; thereafter filed CS(OS) 1103/1997 and defended CS(OS) 541/1998, the rights, contentions and obligations of the petitioner as a partner of the said firm stood duly represented. The matter directly and substantially in issue in the earlier suit, i.e. CS(OS)No.541/1998, as demonstrated above, was the issue of enforceability of the foreign award. By now preferring their objections under Section 34, it is the same matter which is again sought to be put in issue. The earlier suit was a suit between respondent no.1 on the one hand, and the firm on the other hand. The partnership firm is merely a compendium of its partners. Therefore, the earlier suit was, in effect, a suit between the same parties as in the present petition. The mere impleadment of respondent no.2, i.e. GAFTA in these proceedings makes no difference. Respondent no.2 is not even a proper party, let alone necessary party to these proceedings.

22. Mr. Sundaram submitted that the suit filed by the firm, i.e. C.S. (OS) No.1103/1997 was not maintainable in view of section 5 of the Act. Consequently, the dismissal of the said suit is also of no relevance.

23. As aforesaid, the said suit was filed to question the legality and validity of underlying contracts. Section 5 of the Act is a mandate directed against the judicial authority, not to intervene in matters governed by Part I of the Act, except where so provided by the said

Part. Therefore, the factum of filing of the said suit by the firm, and its dismissal cannot be underplayed on the principle that there is no estoppel against a statute. The petitioner and the firm cannot blow hot and cold at the same time. In any event, even if that suit was not maintainable, the decree passed in C.S. (OS) No.541/1998 stares the petitioner in the face.

24. Mr. Sundaram then contended that C.S. (OS) No.1103/1997 was not dismissed on merits. I find no force in this submission as well. The said suit was dismissed as a consequence of the Court decreeing the suit filed by respondent no.1 and holding the foreign awards to be enforceable. The foreign awards upheld the contracts in question – the legality and validity whereof was challenged by the firm.

25. The fact that while filing the objections, Section 34 had not been invoked, and only Section 48 had been invoked by the partnership firm also does not make any difference to the maintainability of this petition. This is because, *“Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit”* (Explanation IV to Section 11 CPC). The fact that the decision of the Supreme Court in **Venture Global Engineering** (supra) was rendered after the filing of CS(OS) No.1103/1997, and the filing of the written statement in CS(OS) No.541/1998 is also of no relevance. This is because the Supreme Court merely declared the

pre-existing legal position and did not vest or create any fresh right on the petitioner or the partnership firm to prefer objections under Section 34 of the Act. The decision in **Venture Global Engineering** (supra) in any event, was rendered on 10.01.2008, i.e. prior to the disposal of CS(OS) No.541/1998 on 27.11.2008. However, no objections were preferred under Section 34 of the Act at any stage by the partnership firm, which could have been and ought to have been so preferred. In my view, the decisions rendered in CS(OS) 1103/1997 and CS(OS) 541/1998 operate as res judicata against the petitioner in these proceedings, and consequently, these proceedings are not maintainable.

26. There is also the aspect of bar of limitation which stares the petitioner in the fact. The awards in question are of 20.06.1997 and 29.07.1997. The petitioner submits that the petitioner has not been provided with a signed copy of the awards. Mr. Sundaram has placed reliance on **Bharat Sanchar Nigam Ltd V. Haryana Telecom Ltd** in FAO(OS) 290/201 decided by the Division Bench on 06.08.2010 to submit that since a signed copy of the arbitral award has not been delivered by the arbitral tribunal to the petitioner, the period for filing of objections has not even commenced. Mr. Sundaram submits that the petitioner sent a legal notice dated 29.09.2010 requesting GAFTA to supply an ink signed copy of the two awards. Respondent No.2 expressed its inability to provide a signed copy of the awards. However, it agreed to supply photocopy of the awards on payment of

fee and costs. It is further submitted that GAFTA provided the interim and the final awards under the cover of its letter dated 21.10.2010 on 24.10.2010. He submits that the period of limitation of three months, if computed from the date of receipt of the unsigned copies of the award, did not expire when this petition was filed, firstly on 19.01.2011.

27. Undisputedly, the signed copy of the award was served on the partnership firm M/s. Shivnath Rai Harnarain (India) of which the petitioner was a partner at the time of making of the two awards. Notice to the firm is notice to a partner and vice versa. See section 24 of the Partnership Act, and ***Ashutosh v. State of Rajasthan & Ors.***, (2005) 7 SCC 308, para 12. Objections to the two awards were then preferred in the name of the firm by Shri Prem Garg partner and Shri Ram Lal Thakur, authorized representative and duly appointed attorney of the firm. There was no obligation on GAFTA to independently serve signed copies of the two awards on the partners of the firm M/s. Shivnath Rai Harnarain (India). The petitioner was a partner of the said firm at the relevant time. Therefore, she ought to have been aware of the fact that the signed copy of the awards had been served on the firm and that the liability under the awards in question would fasten upon her personal assets as well. If she was so minded, she could have joined the firm as a party plaintiff while filing CS(OS) 1103/1997. She could have also applied to the arbitral tribunal, and to the Court to be added as party defendant/respondent in the arbitration proceedings and in CS(OS) 541/1998 filed by

respondent no.1 herein and contested those proceedings by setting up her own defence. She did not do so as she was satisfied with the actions being taken by Shri Prem Garg, the other partner of the firm and Shri Ram Lal Thakur, the attorney of the firm. Pertinently, she never alleged any fraud by Shri Prem Garg or Shri Ram Lal Thakur, in collusion with respondent no.1 in the conduct of the arbitration proceedings and the two suits. The Division Bench in its decision in EFA (OS) 15/2010 and 16/2010 did not permit, inter alia, the petitioner to raise the plea of fraud for the first time before it. Consequently, the plea that objections could not have been preferred by the petitioner earlier cannot be accepted. The objections are clearly barred by limitation and are liable to be dismissed on that ground alone.

28. Mr. Nayar, learned senior counsel for the respondent submits that the petitioner has deliberately suppressed from this Court, the order passed in EFA 15/2010 and EFA 16/2010 dated 11.06.2010 passed by the Division Bench, which has attained finality. He submits that the Division Bench in paragraph 15 has held *inter partes* against whom execution is sought by resort to Rule 50 of Order 21 CPC may question the decree on the ground of collusion, fraud or the like **but not have a fresh adjudication on the question of liability.** Mr. Nayar submits that the aforesaid observation of the Division Bench means that it is not open to the petitioner to challenge the award in question on merits under Section 34 or even under Section 48 of the Act to seek a fresh adjudication on the question of her liability. The

petitioner has suppressed the said order of the Division Bench, which has attained finality and binds the petitioner.

29. I agree with the aforesaid submission of Mr. Nayar. Though a reference of the said order of the division bench has been made in the petition, calculatedly the said order has not been filed on record. the observation made by the Division Bench in para 15 of its order clearly holds that the petitioner is not entitled to challenge the two awards on merits i.e. either under Section 34 or under Section 48 of the Act. In **Gambhir Mal Pandiya** (supra), the Supreme Court held as follows:

*“19. .... As we have pointed out O. 30 of the code permits suits to be brought against firms. The summons may be issued against the firm or against persons who are alleged to be partners individually. The suit, however, proceeds only against the firm. Any person who is summoned can appear, and prove that he is not a partner and never was; but if he raises that defence, he cannot defend the firm. Persons who admit that they are partners may defend the firm, take as many pleas as they like but not enter upon issues between themselves. When the decree is passed, it is against the firm. Such a decree is capable of being executed against the property of the partnership and also against two classes of persons individually. They are (1) persons who appeared in answered to summons served on them as partners and either admitted that they were partners or were found to be so, and (2) persons who were summoned as partners but stayed away. The decree can also be executed against persons who were not summoned in the suit as partners, but r. 50(2) of O. 21 gives them an opportunity of showing cause and the plaintiff must prove their liability. This enquiry does not entitle the person summoned to reopen the decree. He can only prove that he was not a partner, and in a proper case, that the decree is the result of collusion, fraud or the like. But, he cannot claim to have other matters tried, so to speak, between himself and his other partners. Once he admits that he is a partner and*

*has no special defence of collusion, fraud, etc. the Court must give leave forthwith."*

If the petitioner is precluded from re-opening the decree in the execution proceedings, she cannot do so in these proceedings as well.

30. It is clear to me that the petitioner, by suppressing the said vital document has sought to mislead this Court by seeking to challenge the two awards on merit so as to seek a fresh adjudication on the question of liability, even though in the petitioner's very own appeal, the Division Bench has ruled against the maintainability of any fresh adjudication on the question of liability.

31. In my view the present petition is nothing but a gross abuse of the process of the Court by the petitioner. It is clear to me that the firm M/s. Shivnath Rai Harnarain (India) and its partner, Smt. Anita Garg are hell bent on somehow stalling the execution proceedings and the present is an attempt to put a spoke in the wheel to somehow obstruct the execution proceedings. For the aforesaid reasons, I dismiss this petition with costs quantified at Rs. two lakhs.

**(VIPIN SANGHI)**  
**JUDGE**

**MARCH 09, 2011**  
as