

IN THE HIGH COURT OF DELHI AT NEW DELHI

O.M.P. 484/2004 & I.A. No. 492/2011

Reserved on: November 14, 2011

Decision on: November 24, 2011

J.K. INDUSTRIES LTD. Petitioner

Through: Mr. Ramesh Singh with
Mr. A.T. Patra, Advocates.

Versus

D.S. STRATEGEM TRADE A.G. Respondent

Through: Mr. Ramji Srinivasan, Senior
Advocate with Mr. P.K. Jain,
Mr. Rajeev Kumar and
Mr. Rajesh Roshan, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

24.11.2011

Introduction

1. An Arbitral Award dated 15th May 1998 passed by the ICC International Court of Arbitration ('IICA') has in this petition under Section 34 of the Arbitration and Conciliation Act 1996 ('Act') been challenged by the Petitioner, J. K. Industries Limited. By the impugned Award the IICA has held that the Petitioner is liable to pay the Respondent D. S. Strategem Trade A. G. Switzerland, US\$ 1464873.63 and interest after 31st December 1997, including post-award rate of interest based on the LIBOR prevailing at the time of making the payment.

2. It may be noticed at the outset that on account of the failure of the Petitioner to pay its share of the Arbitrators' fees and costs, the copy of

the Award was not released to it for a long time after it was made. It is only after Petitioner made payment that by a letter dated 24th September 2004, the Secretariat of the IICA dispatched to the Petitioner a copy of the Award. Thereafter the present petition was filed on 14th December 2004. Initially by a decision dated 4th December 2007, the petition was dismissed by a learned Single Judge of this Court on the ground that “an application under Section 34 of the Act was not at all contemplated insofar as foreign award was concerned”. However, the said judgment was set aside in appeal by the Division Bench of this Court by an order dated 1st February 2008 in FAO (OS) No. 53 of 2008 relying on the judgment of the Supreme Court in *Venture Global Engineering v. Satyam Computer Services Ltd. AIR 2010 SC 3371*.

3. By an order dated 4th August 2009, this Court rejected an application, i.e., I.A. No. 11242 of 2008 filed by the Petitioner under Order XIV Rule 1 and Order XVIII read with Section 151 CPC for framing of issues and permission to lead evidence. The matter was then set down for final hearing. It may also be mentioned that in the meanwhile, the Respondent had already filed an Ex. P. No. 30 of 2005. However, the proceedings therein were suspended by an order dated 20th April 2005 of this Court awaiting the decision in the present O.M.P. No. 484 of 2004.

Background facts

4. The claim of the Respondent against the Petitioner before the IICA was based on an agreement dated 16th January 1991 in terms of which 500,000 Metric Tonnes (‘MT’) of Urea for fertilization were to be supplied by the Petitioner to the Respondent. The origin of the product was Romania and the destination was China. The selling price was in the range of USD 157 -159 per MT CIF FO China main port for the first three liftings and USD

127 per MT FOB Constantza Romania for the second three liftings. The loading of the first shipment had to be completed no later than 15th February 1991 and the seller, i.e., the Petitioner herein was to be responsible for the scheduling and arrival of vessels in time to comply with the final agreed upon delivery dates. The payment had to be done by prime bank letter of credit, irrevocable, transferable, payable at sight with partial deliveries and partial payment admitted and the quantity and total amount variations more or less 5% being acceptable.

5. Article 10 of the agreement contained the arbitration clause. Article 10.1 stated that the parties shall amicably settle any disagreement or dispute which may arise between them, failing which it shall be submitted to the IICA in Geneva (Switzerland). The Award was to be enforced by the competent Courts of law of Geneva.

6. The supplies could not take place as agreed between the parties and they entered into further negotiations at a meeting held in Ithaca, USA on 20th/21st February 1991. It was brought to the notice of the Respondent that the contract which had been originally signed for the Romanian product was outdated and needed to be amended because of the delays that had occurred since. It was mutually agreed that the first 150,000 MT would be contracted at the average rate of USD 161 per MT as follows:

- 50,000 MT against the first two LCs at USD 159/MT
- The next 50,000 MT against the second two LCs at USD 162/MT and,
- The third 50,000 MT against the third two LCs at USD 162/MT.

7. It was further agreed that if the Petitioner was in a position to fulfill its obligations on the first lifting by 7th March 1991 an additional bonus of USD 0.50 (fifty cents) would be given by the Respondent to the

Petitioner. The price on the contract for the balance 350,000 MT would be reviewed after the first contract was under way.

Prelude to the arbitration proceedings

8. By a legal notice dated 13th March 1991 the Respondent notified the Petitioner that it considered the Petitioner to be in breach of its obligations in respect of the first three shipments under the agreement. Consequently, the Respondent renounced delivery and instead claimed damages in compensation for the loss suffered including loss of profit. On 20th June 1991, the Respondent made a request for arbitration before the ICC Court of Arbitration ('ICOA') at Paris. On receipt of the above notice, the Petitioner filed a preliminary reply wherein it raised a preliminary objection that the proposal document dated 7th January 1991 was not a concluded contract; that there was no complete and acceptable LC issued by the bankers of the Respondent; that in terms of the said proposal document they had a fresh agreement dated 20th/21st February 1991. This was followed by a detailed reply to the Respondent's statement of claim on 5th December 1991.

9. On 17th February 1993 the IICA and the parties signed the terms of reference at Geneva. The Respondent also tendered its written submissions. In a letter dated 11th March 1993, the ICOA Secretariat notified the parties *inter alia* that the terms of reference would become operative only upon full satisfaction of the payment obligation in respect of advance on costs. By letters dated 29th April 1993 and 30th September 1993, the ICOA Secretariat notified the parties to effectuate payment of their respective shares of the remaining arbitration costs. On 2nd February 1994, the Secretariat of the ICOA notified the parties that the Claimant's (i.e. the Respondent's) share of the costs had been received. The

defendant's (i.e. the Petitioner's) request for the application of Clause 15 of Addendum II of the ICC Rules was rejected. By a letter dated 11th May 1994, the Secretariat notified the parties that the Respondent had substituted for the defaulting Petitioner in paying the Petitioner's share of the outstanding portion of the advance on costs. Following this, the terms of reference became operative.

10. The Petitioner filed a Civil Suit No. 1211 of 1994 in this Court against the Respondent for a declaration that the proposal document dated 7th January 1991 was not a concluded agreement and for a declaration that "there exists no valid arbitration clause for referring disputes between the parties to arbitration". An intimation about the filing of the suit was sent to the IICA by the Petitioner on 16th June 1994. The IICA on 1st July 1994 issued an order *inter alia* requiring the Petitioner to produce certain documents and notified the parties to submit a memorandum "concerning which substantive law should apply to the dispute and why" and outlined the future arbitration proceedings and submissions.

The arbitration proceedings before the IICA

11. The Petitioner informed the IICA that this Court had on 13th March 1995 stayed the further proceedings before the IICA after noticing that none appeared for the Respondent in those proceedings before this Court despite service of notice. In a letter dated 14th March 1995, the IICA Secretariat informed the parties that "the Arbitral Tribunal had decided to proceed with the hearing notwithstanding". At the hearing on 16th and 17th March 1995 in Geneva, the Respondent appeared but the Petitioner did not. On 3rd June 1995, the IICA addressed a letter to the Secretariat stating that the IICA deemed that neither the stay of the arbitration proceedings issued by this Court nor the Petitioner's allegations that it should have

been given a longer notice of the hearing constituted a valid excuse for the Petitioner's failure to appear at the hearing. Further the IICA stated that pursuant to Article 15.2 of the ICC Rules, the Petitioner was absent without a valid excuse and consequently the hearing was deemed to have been conducted in the presence of all parties.

12. The IICA on 3rd June 1995 wrote to the Petitioner about the hearing on 16th and 17th March 1995 and enclosed a copy of the transcript of the hearing. The IICA granted the Petitioner time till 15th July 1995 to comment on the enclosed materials as well as on the issue of the applicable substantive law. On 18th July 1995, the Petitioner submitted its memorandum on the said issue and maintained that Indian law was applicable in the arbitration. On 22nd August 1996, the IICA gave its Partial Award pursuant to Article 13(3) of the ICC Rules holding that "in the absence of any agreement of the parties on the applicable law, Swiss law was applicable to the merits of the dispute".

The final Award and the dissenting opinion on the Thirteenth Issue

13. After holding a further hearing on 13th May 1997, the final Award was submitted by the IICA to the ICOA on 15th May 1998. The IICA held that the Petitioner was liable to pay to the claimant the following amounts:

	<u>US\$</u>
"1) The difference between the market price and the contract price including insurance for the first shipment.	848750.00
2) Rate of interest from 15 th March 1991 till 31 st December 1997.	377624.00
3) The ICC costs including Arbitrator's fees	141500.00
4) The Claimant's Attorney fees	<u>96999.63</u>

To the sum of US\$ 1226374 (i.e. the sum of US\$ 848750 plus US\$ 377624), it has to be added any due interest after the 31st of December 1997 including the post award rate of interest, based on the LIBOR which is prevailing during the relevant time period, until payment is made.”

14. Mr. B. Sen, one of the learned Arbitrators, gave a dissenting opinion on the 13th issue i.e., ‘the determination of the market price’. While the majority had held that the market price C + F China port bulk at the time of delivery, i.e., 13th March 1991, excluding Sinochem’s commission was US\$ 180 C + F bulk China port, Mr. Sen was of the view that the comparison of the market price on the date of the breach had to be based on the prevailing price in Romania although it was also a controlled price. He further observed as under:

“For a comparison of the market price on the two dates (namely the date of the contract and the date of the breach) one cannot rely on prices prevailing in two different markets because on a given date for the same commodity and of same specifications prices do differ from one place to another depending on various factors including the factor of free or controlled economy. Further, the price shown in Fertecon Weekly Nitrogen merely shows the price paid by Sinochem in China for purchase of Fertilizers from traders but it provides no indication of the source of supply or the prevailing price at the place of supply at which the traders had made their purchases.”

Was there a concluded contract?

15. Mr. Ramesh Singh, learned counsel appearing for the Petitioner first submitted that there was no concluded contract between the parties and, therefore, there was as such no arbitration clause. This was one of the first

issues addressed by the IICA in the impugned Award. After discussing the documents and the detailed submissions of the parties, the IICA concluded that the document dated 7th January 1991 read with the addendum thereto constituted a concluded contract between the parties. It referred to the statement of Mr. Arora, General Manager (Legal & Excise) of the Petitioner who confirmed that Mr. Arvind Baliga was working with the Petitioner at the time of initiating the agreement dated 7th January 1991 till the time of its signing and stamping on 18th January 1991. He continued as such even thereafter. The IICA also held that the agreement dated 7th January 1991 could not be said to be *ab-initio* illegal and void although some of the contractual provisions attracted the prohibitions contained in Sections 9, 16 and 27 of the Foreign Exchange Regulation Act, 1973 ('FERA'). It was noted that some of the activities which came within the purview of those provisions could not be taken without the prior permission of the Central Government or the Reserve Bank of India ('RBI'). The IICA rightly noted that the said proceedings did not contain any absolute prohibition since those actions could be performed with the permission of the Central Government or the RBI. The IICA also observed that it was common in international trade that contracts contained provisions allowing changes in prices due to changes in freight rate or exchange rates.

16. Having perused the impugned Award, this Court is unable to find any legal infirmity in its conclusion regarding the existence of the valid agreement dated 7th January 1991 between the parties. Learned counsel for the Petitioner was unable to persuade the Court to hold otherwise.

Not resorting to amicable settlement prior to arbitration

17. It was next submitted by Mr. Ramesh Singh that in terms of Article 10

of the agreement, the parties had to first explore the possibility of an amicable settlement of the dispute and only thereafter resort to arbitration. Instead, the Respondent straightaway lodged a claim with the IICA and, therefore, the entire arbitration proceedings were vitiated. Mr. Singh further submitted that the meeting held on 20th/21st February 1991 was previous to the termination of the contract by the Respondent and could not therefore, be said to be a meeting for resolving the disputes as envisaged under Article 10.1 of the agreement. Referring to the decisions of the Supreme Court in *Asia Resorts Ltd. v. Usha Breco Ltd. (2001) 8 SCC 710* and *M/s M. K. Shah Engineers and Contractors v. State of Madhya Pradesh AIR 1999 SC 950*, it is submitted that where the agreement between the parties envisaged a certain sequence in the resolution of the dispute between the parties, a departure therefrom would render the arbitration contrary to the express agreement between the parties and, therefore, vulnerable to be set aside under Section 34 of the Act.

18. In reply, it was submitted by Mr. Ramji Srinivasan, learned Senior counsel appearing for the Respondent, that the decisions in *M/s M. K. Shah Engineers and Contractors* as well as *Asia Resorts Ltd.* were distinguishable on facts.

19. On this issue, the IICA held as under:

“The Arbitral Tribunal, after considering the merits of the arguments, of both parties and studying clause 10, decided that the Claimant did meet the requirement of clause 10.1 and he was right in submitting the dispute for arbitration to the ICC. Clause 10.1 does not require a specific means for the attempt to settle the dispute amicably. Nevertheless, the Claimant attempted this amicable settlement in meetings held in ITHACA on 20/21

February 1991. Moreover, the various times in which the Claimant agreed to extend the dates for shipments represent, in a sense, attempts to solve the disputes in an amicable way.”

20. In order to examine the above contentions, a reference may be made to Clause 10 of the agreement which reads as under:

“ARTICLE 10 – Disputes and Arbitration

10.1 The parties shall amicably settle any disagreement or dispute which may arise between them. In any case that the dispute cannot be settled amicably, then it shall be submitted to the International Chamber of Commerce in Geneva (Switzerland).

10.2 The parties have agreed to voluntarily execute the award of arbitration. In case of default, the award may be enforced through the competent courts of law of Geneva.

10.3 Neither party shall fail to comply in a timely way with the obligations on its part to be performed pursuant to this agreement even though a dispute may have arisen and proceed to arbitration. There shall be no abatement of the obligations of the respective parties pending the outcome of any arbitration.”

21. A perusal of the above clauses show that the parties were only to explore the possibility of an amicable settlement. It was not mandatory that had to hold a meeting for that purpose. This Court is inclined to concur with the opinion of the IICA that the meeting held on 20th/21st February 1997 was as a result of the failure of the Petitioner to make the supplies in terms of the agreement dated 7th January 1991. The subsequent correspondence between the parties does indicate that the attempts to resolve the dispute did not succeed. Further the decisions in *M/s M. K. Shah Engineers and Contractors* and *Asia Resorts Ltd.* are

distinguishable on facts.

22. Consequently, this Court rejects the plea of learned counsel for the Petitioner that the arbitration proceedings were vitiated because no attempt was made to amicably settle the disputes between the parties prior thereto.

The Governing Law

23. It was next submitted by Mr. Ramesh Singh that the IICA erred in concluding that the governing law was Swiss law and the Indian law. Referring to the decisions in *Sanshin Chemicals Industry v. Oriental Carbons & Chemicals Ltd.* (2001) 3 SCC 341, *Union of India v. M/s East Coast Boat Builders & Engineers Ltd.* AIR 1999 DELHI 44, *Jain Studios Limited v. Maitry Exports Pvt. Ltd.* 1 (2008) BC 640, he submitted that the key elements were the location of the Petitioner which was in India, the signing of the agreement by the Petitioner in India. It was from India that the Petitioner's communications emanated and it was here that communications were received by the Petitioner. Reference was made to the decision in *National Thermal Power Corporation v. The Singer Company & Ors.* AIR 1993 SC 998. It was additionally contended that if the applicable law was not Indian law then the agreement itself would be in violation of FERA.

24. Countering the above submissions, Mr. Ramji Srinivasan submitted that when both parties signed the terms of reference at Geneva, it was specifically agreed as under:

“The parties agree on applying the ICC Procedural Rules and on the application of the Laws of Switzerland where no provision is found in the ICC Rules.

In all cases, the Arbitrators shall take account of the provisions of the contract and the relevant trade usages.”

25. He supported the reasoning of the IICA in the Partial Award holding that the applicable law was the Swiss law.

26. As observed by the IICA in the Partial Award dated 22nd August 1996 neither in the agreement dated 7th January 1991 or in any other document, did the parties indicate what the applicable law would be. Article 13(3) of the ICC rules states that the parties would be free to determine the law to be applied by the Arbitrator. While signing on to the terms of reference the parties agreed to apply the ICC procedural rules and on the application of the laws of Switzerland where no provisions were found in the ICC rules. The IICA noted that Switzerland was the place of incorporation of the Respondent and further that the procedural rules of Switzerland were applicable to the arbitration. Various letters, faxes and other communications between the Petitioner and the Respondent were sent from and received in Switzerland. The agreement was signed by the Respondent in Switzerland. India was a place of incorporation of the Petitioner. The agreement was signed by the Petitioner in India. Romania was the place of the origin of the product and China was the place of delivery and USA was the defined place of the Respondent’s banker. An important meeting in relation to the agreement was held at Ithaca in New York. However, the IICA reasoned that although “all of the elements in favor of India are equally present, mutatis mutandis, in favor of Switzerland”, Switzerland had significant additional connections which were not present in India. Under Clause 10.1, the parties had chosen Switzerland as place for Arbitration and under Article 10.2 the parties had agreed that the Arbitral Award may be enforced through competent

Courts of Geneva, Switzerland. Further the bank was in Switzerland. Applying the closest connection test, the IICA held that Swiss law was the applicable substantive law.

27. This Court does not find any error in the above reasoning or conclusion of the IICA on the issue of the applicable substantive law. Indeed there are additional factors which tilt the balance in favour of the decision that the applicable substantive law should be the Swiss law. Consequently, the contention to the contrary by learned counsel for the Petitioner is rejected.

Is the Award opposed to the public policy of India?

28. It is then contended by Mr. Ramesh Singh that the impugned award was opposed to public policy principally because the arbitral tribunal proceeded with the matter in total disregard of the stay order passed by this Court. Relying on the judgments in *Tayabhai M. Bagasarwalla v. Hind Rubber Industries Pvt. Ltd.* (1997) 3 SCC 443; *Renusagar Power Co. Ltd. v. General Electric Co.* AIR 1994 SC 860; *Devinder Kumar Gupta, (Dr.) v. Realogy Corporation* 2011 (125) DRJ 129 (DB); *Kangaro Industries v. Jaininder Jain* 2007 (34) PTC 321 (Del); *Prakash Narain Sharma v. Burmah Shell Cooperative Housing Society Ltd.* (2002) 7 SCC 46 and *Venture Global Engineering v. Satyam Computer Services Ltd.* (2008) 4 SCC 190, it is submitted that ignoring the binding order of this court and proceeding to make an Award in defiance of the order of this Court was sufficient to render the Award violative of the public policy of India. It is further submitted that a party cannot be allowed to enjoy the fruits of the contempt committed by it. Referring to Section 47 of FERA, it is submitted that the Tribunal erred in observing that there was no absolute prohibition under Section 47 FERA as it was an

implied term that no action which required the permission of the Central Government or the RBI could be undertaken unless such permission was granted. Since there was an implied term that the contract was governed by Indian law, the action contemplated under the contract was violative of the Indian law and, therefore, of Indian public policy.

29. Replying to the above submissions, Mr. Ramji Srinivasan pointed out that the Petitioner had abandoned the suit filed in this Court by simply withdrawing it on 9th February 1997 without seeking any liberty to institute fresh proceedings for the said relief. Relying on the judgments in *Becharam Choudhuri v. Purna Chandra Chatterji AIR 1925 Cal 845* and *Parmanand (Dead) through L.Rs. v. Prescribed Authority (Munsif City), Meerut 2001 (3) AWC 2302* it was submitted that the public policy doctrine could not be invoked by a party who wanted to thwart the course of justice. He submitted that the facts of *Renusagar Power Company* were distinguishable. The other decisions cited also were on different facts and did not involve the withdrawal of a suit filed in the High Court unconditionally by a party to the Award. The payment under the contract could not be made without the permission of the RBI and that by itself was a sufficient safeguard.

30. The interpretation placed on Section 47 FERA by the IICA is a plausible view to take and cannot be said to be perverse or legally incorrect. The Petitioner withdrew the suit filed in this Court unconditionally. The order dated 7th February 1997 in Suit No. 1211 of 1994 simply states that the counsel for the plaintiff sought leave to withdraw the suit. Consequently the suit was dismissed as withdrawn. Since the arbitral proceedings continued even thereafter and the Petitioner participated in those proceedings, it cannot be heard to question the

continuation of those proceedings by the Tribunal and attack the resultant Award as being opposed to public policy. The objection raised by the Petitioner on this ground is misconceived. There is nothing in the Award which can be suggested as being opposed to the public policy of India. The decisions cited by learned counsel for the Petitioner are distinguishable on facts and do not assist him.

Costs and Fees

31. Mr. Ramesh Singh submitted that the costs, attorneys' fees and interest awarded by the IICA were excessive compared to the quantum of claim. Referring to certain passages from **Chitty on Contracts (28th Edition) Vol-2**, it is submitted that the IICA erred in holding the applicable market price would be that prevalent on the date of the possible purchase of the goods in question in China. It ought to have been determined with reference to the prevalent price at Romania, the origin of the product. Reliance is placed on the judgment in ***M. Lachia Setty & Sons Ltd. v. Coffee Board [1981] 1 SCR 884***. It was submitted that without any specific provision in the contract, the IICA could not have awarded penal interest. Reliance was placed on the decision in ***Central Bank of India v. Ravindra (2002) 1 SCC 367*** and ***(2004) 5 SCC 65***. Relying on the passages from **International Arbitration Law and Practice - 2nd Revised Edition by Mauro Rubino-Sammartano** and the decision in ***Union of India v. Raman Iron Foundry AIR 1974 SC 1265***, it was submitted that in the absence of any attempt at amicable settlement between the parties prior to the arbitration no costs ought to have been awarded in favour of the Respondent.

32. Mr. Ramji Srinivasan on the other hand submitted that there was difficulty in going by the Romanian price since it was a 'controlled' price.

The price of urea had risen worldwide and there was a difficulty in purchasing in bulk from Romania. On the question of FERA, reliance was placed on the judgment in *Dhanrajamal Gobindram v. Shamji Kalidas AIR 1961 SC 1285*. Further the contract value was only as a measure of assessing the costs and fees.

33. On all of the above aspects, the findings of the IICA cannot be said to be opposed to the public policy of India. The IICA appears to have gone by the accepted commercial practices in the matter of award of costs, attorney's fees and interest. These findings do not call for interference. As regards the appropriate market price, the mere fact that Mr. B. Sen, one of the members of the Tribunal gave a dissenting note cannot render the majority opinion illegal or perverse.

34. For all of the aforementioned reasons, this Court finds no valid grounds having been made out for interference with the impugned Award. The petition is dismissed with costs of Rs.25,000 which will be paid by the Petitioner to the Respondent in four weeks.

S. MURALIDHAR, J.

NOVEMBER 24, 2011

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